CONSTITUTIONAL LAW—States Have Greater Latitude to Regulate and Restrict Abortions—*Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

In 1986 Missouri enacted legislation ("Act") placing certain restrictions on abortions.[1] The preamble to the Act contained "findings" by the legislature that human life begins at conception,[2] and that "[u]nborn children have protectable interests in life, health, and well-being."[3] The Missouri statute also required "that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution" and United States Supreme Court precedents.[4] Additionally, if a physician has reason to believe a woman is twenty or more weeks pregnant, the Act requires the physician to ascertain the viability of the fetus by conducting "such medical examinations and tests as are necessary to make a finding of gestational age, weight, and lung maturity of the unborn child."[5]

Another section of the Act contained an "informed consent" provision requiring physicians to advise pregnant women of various facts before performing an abortion.[6] The Act also required post-sixteen-week abortions to be performed in hospitals only.[7] Other portions of the Act prohibited public funds,[8] employees,[9] or facilities[10] from being used either to perform or to counsel women to have abortions not necessary to save the mother's life.

Several publicly-employed health professionals and two nonprofit corporations brought a class action suit in federal district court challenging the constitutionality of the Act.[11] The district court certified the case as a class action and based its jurisdiction on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3).[12] The District Court for the Western District of Missouri found these provisions of the Missouri statute to be unconstitutional.[13]

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1. Webster v. Reproductive Health Servs., 492 U.S. 490, 500 (1989).
2. Mo. Rev. Stat. § 1.205.1(1) (1989).
3. *Id.* § 1.205.1(2).
4. *Id.* § 1.205.2.
5. *Id.* § 188.029.
6. *Id.* § 188.039.
7. *Id.* § 188.025.
8. *Id.* § 188.205.
9. *Id.* § 188.210.
10. *Id.* § 188.215.
11. Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 410-11 (W.D. Mo. 1987).
12. *Id.*
13. *See id.* The preamble was struck down as a matter of law. *Id.* at 413. The sections that banned public employees, facilities, and funds from being used to counsel women to have abortions or to perform abortions were struck down on the basis of vagueness as well as other grounds. *Id.* at 426. The court held that the informed consent provision was overbroad and that

On appeal, the Eighth Circuit agreed with the district court that the viability provision constituted an "impermissible legislative intrusion" into the realm of medical skill and judgment regarding finding of viability.[14] The court of appeals also found the preamble was an "impermissible state adoption of a theory of when life begins to justify its abortion regulations."[15] The court of appeals agreed the prohibition on using public funds, facilities, or employees to counsel women to have an abortion were unconstitutionally vague and violative of the right to privacy.[16] The Eighth Circuit considered the ban on public facilities and employees from being used to perform abortions to be unduly burdensome, violating the due process clause.[17] Distinguishing other cases that upheld statutes prohibiting public funding of abortions,[18] the court found the state had no compelling interest to such a ban when the patient could pay and the state could recover its costs.[19] The Eighth Circuit, however, reversed the district court regarding the ban on public funding of abortions, finding the ban to be constitutional.[20]

On appeal, the following parts of the statute were considered by the Supreme Court: (1) The preamble; (2) the prohibition against using public facilities or employees to perform abortions; (3) the prohibition against using public funds for abortion counseling; and (4) the viability testing requirements.[21] The Supreme Court *held*, reversed.[22] None of the four challenged provisions of the Act violated the constitution.[23] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

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it violated a woman's right to privacy. *Id.* at 414, 416. The court found the post-sixteen-week hospitalization section was not reasonably related to the state's interest in maternal health. *Id.* at 420. The first part of the viability testing provision was upheld, but the latter part of the provision was struck down as an impermissible legislative intrusion into the medical arena. *Id.* at 423.

14. Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1074-75 (8th Cir. 1988) (quoting Reproductive Health Servs. v. Webster, 662 F. Supp. at 423).

15. *Id.* at 1076.

16. *Id.* at 1077.

17. *Id.* at 1080-83. This affirmed the district court ruling but for a different reason. The district court had found that these prohibitions violated the eighth amendment. *Id.* at 1081, 1083.

18. *Id.* at 1081; *see, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977).

19. Reproductive Health Servs. v. Webster, 841 F.2d at 1083.

20. *Id.* at 1084.

21. Webster v. Reproductive Health Servs., 492 U.S. at 501 (1989).

22. *Id.* at 522.

23. *Id.* The decision consisted of five separate opinions. Chief Justice Rehnquist along with Justices White and Kennedy agreed in one opinion. Both Justices O'Connor and Scalia had separate concurring opinions. Justices Blackmun and Stevens each wrote a dissenting opinion.

## I. The Plurality Opinion

### A. *The Preamble*

When ruling on the preamble to the Missouri statute, the Eighth Circuit quoted *City of Akron v. Akron Center for Reproductive Health*,[24] stating " 'a State may not adopt one theory of when life begins to justify its regulation of abortions.' "[25] From this perspective, the Eighth Circuit struck down the preamble, rejecting Missouri's claim that the preamble was "abortion neutral."[26]

Chief Justice Rehnquist, however, writing for the plurality, interpreted the preamble differently in light of *Akron*. Rehnquist stated *Akron* only prevented justifying abortion regulations that were "otherwise invalid under *Roe v. Wade*[27] on the ground that [the regulations] embodied the State's view about when life begins."[28] In Rehnquist's opinion, the preamble did not "by its terms regulate abortion."[29] He supported this viewpoint by quoting from *Maher v. Roe*:[30] "*Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.' "[31]

Rehnquist also noted a constitutional question concerning a statute does not arise until a state court construes it in a concrete set of facts.[32] In this case, no Missouri court had construed the preamble.[33] Therefore, the plurality found no need to address its constitutionality.[34]

### B. *The Prohibition Against Public Employees or Facilities from Being Used to Perform Abortions*

The plurality next addressed whether a state could prohibit public facilities and employees from performing nontherapeutic abortions.[35] Rehnquist stated that under the due process clauses one does not have an " 'affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.' "[36] The essence of the plurality's reasoning

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24. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

25. Reproductive Health Servs. v. Webster, 851 F.2d at 1075 (quoting City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. at 444 (other citation omitted)).

26. *Id.* at 1076.

27. Roe v. Wade, 410 U.S. 113 (1973).

28. Webster v. Reproductive Health Servs., 492 U.S. 506 (1989).

29. *Id.*

30. Maher v. Roe, 432 U.S. 464 (1977).

31. Webster v. Reproductive Health Servs., 492 U.S. at 506 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

32. *Id.* (quoting Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 460 (1945)).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 507 (quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S.

for this part of the Act was based on the Court's previous rulings in *Maher v. Roe*,[37] *Poelker v. Doe*,[38] and *Harris v. McRae*.[39]

In *Maher*, indigent women challenged the constitutionality of a Connecticut Welfare Department regulation prohibiting Medicaid benefits from being used for nontherapeutic abortions.[40] The Supreme Court found that such a regulation is not unconstitutional unless it "unduly burdens" a woman's right to seek an abortion.[41] Moreover, the Court in *Maher* noted indigent women are not a suspect class under the equal protection clause.[42] Thus, the State was not required to show a compelling interest to justify the regulation.[43]

Consequently, the Supreme Court assessed the regulation in *Maher* under the deferential rational-basis standard.[44] In assessing the plight of indigent women, the Court noted " 'the Constitution does not provide judicial remedies for every social and economic ill.' "[45] Finding the regulation rationally related to a legitimate state purpose,[46] the Court determined it was improper to weigh the regulation's "wisdom or social desirability."[47] Thus, *Maher* showed that withholding state funds from subsidizing nontherapeutic abortions was constitutional under *Roe*.

Similarly, in *Poelker* an indigent woman challenged the constitutional-

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189, 196 (1989)).

37. Maher v. Roe, 432 U.S. 464 (1977).

38. Poelker v. Doe, 432 U.S. 519 (1977).

39. Harris v. McRae, 448 U.S. 297 (1980).

40. Maher v. Roe, 432 U.S. at 466-67. A federal district court had found the regulation violated the equal protection clause by excluding nontherapeutic abortions from welfare coverage that subsidized other expenses related to pregnancy and childbirth. *Id.* at 468.

41. *Id.* at 473.

42. *Id.* at 470-71.

43. *Id.* at 477. "We think it abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education." *Id.*

44. *Id.* at 478.

45. *Id.* at 479 (quoting Lindsey v. Normet, 405 U.S. 56, 75 (1972)).

46. *Id.* at 478-79. "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' . . . an interest honored over the centuries . . . . Nor can there be any question that the Connecticut regulation rationally furthers that interest . . . . The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth." *Id.* (citation and footnote omitted).

47. *Id.* at 479-80. The Court in *Maher* considered the matter to be a policy matter better handled by the legislature, not the Court.

> Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

*Id.* (quoting Missouri, K. & T.R. Co. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.)) (footnote omitted).

ity of an abortion policy in St. Louis, Missouri.[48] The mayor of St. Louis had forbidden its city-owned hospitals from performing abortions, except when there was a threat of serious injury or death to the mother.[49] Applying the same reasoning as in *Maher*, the Court found the matter to be a policy choice not violating the Constitution.[50] *Poelker* showed, therefore, that a state could deny public facilities, as well as public funds, from being used for abortions.

In *Harris* the Supreme Court considered the Hyde Amendment, which restricted the use of federal funds from funding abortions under Medicaid.[51] Finding the provisions of the Hyde Amendment similar to the regulation considered in *Maher*, the Court in *Harris* stated that it "place[d] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."[52] The Court further stated that the right to choose to have an abortion does not also provide "constitutional entitlement" to public funding for an abortion.[53] Thus, federal subsidization of abortion was held to be "a question for Congress to answer."[54] Consequently, the Hyde Amendment was found to be "rationally related to the legitimate governmental objective of protecting potential life."[55]

In the plurality's perspective, the portion of the Act prohibiting public employees or facilities from being used to perform abortions presented the same type of abortion restrictions as those contested in *Maher*, *Poelker*, and

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48. Poelker v. Doe, 432 U.S. 519, 519 (1977).

49. *Id.* at 520.

50. *Id.* at 521. The court in Poelker stated:

> [W]e note that [the Mayor] is an elected official responsible to the people of St. Louis. His policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls. We merely hold for the reasons stated in *Maher*, that the Constitution does not forbid a State or city, pursuant to the democratic processes, from expressing a preference for normal childbirth as St. Louis has done.

*Id.*

51. Harris v. McRae, 448 U.S. 297, 302-03 (1980). A federal district court had found the Hyde Amendment violated the due process clause of the fifth amendment as well as the free exercise clause of the first amendment. *Id.* at 305-06.

52. *Id.* at 315.

53. *Id.* at 316. The Court in Harris distinguished a protected freedom from an entitlement to having the public fund that freedom:

> But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

*Id.* at 317.

54. *Id.* at 318.

55. *Id.* at 325.

*Harris*. Therefore, this portion of the statute did not conflict with previous court decisions regarding abortions. Rehnquist quoted *Maher* as support that the Act posed no constitutional difficulties:

> The [state] regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. . . . The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state] regulation.[56]

Therefore, the plurality did not consider the ban on using public facilities or employees to be a state-created barrier to nontherapeutic abortion. Rather, it viewed the restriction in the same light as a ban on public funding of abortions.

Similarly, *Poelker* showed that a city can refuse to use public facilities for nontherapeutic abortions without running afoul of the Constitution.[57] Rehnquist also noted the majority in *Harris* found that withholding public funds from nontherapeutic abortions " 'was rationally related to the legitimate governmental goal of encouraging childbirth.' "[58]

Comparing the Missouri statute to the regulation challenged in *Maher*, the plurality found the Missouri statute "considerably less burdensome" than the regulation upheld in *Maher*.[59] Both *Maher* and *Harris* revolved around indigent women's access to public funding for abortion. In contrast, the Missouri statute forbade public facilities and employees from performing nontherapeutic abortions, whether the woman could pay or not. Those who could pay were still free to obtain abortions elsewhere. "Missouri's refusal to allow public employees to perform abortions in public hospitals [left] a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all."[60]

When the Eighth Circuit considered this part of the statute, it noted the State could recoup its costs for abortions when the patients were able to pay for them.[61] Because the statute forbade using public employees and facilities to perform nontherapeutic abortions, even for women who could pay, the court of appeals reasoned the Act created an obstacle for those who could afford abortions.[62] However, the plurality rejected this reasoning.[63]

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56. Webster v. Reproductive Health Servs., 492 U.S. at 508 (1989) (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

57. *Id.* (citing Poelker v. Doe, 432 U.S. 519, 521 (1977)).

58. *Id.* at 508-09 (citing Harris v. McRae, 448 U.S. 297, 325 (1980)).

59. *Id.* at 509.

60. *Id.*

61. Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1083 (8th Cir. 1988).

62. *Id.*

63. Webster v. Reproductive Health Servs., 492 U.S. at 510.

Quoting from *Maher*, Rehnquist stated:

> "Constitutional concerns are greatest," we said in *Maher*, . . . "when the State attempts to impose its will by the force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions.[64]

Therefore, the plurality reasoned that withholding access to public facilities and employees from those who desired abortions created no obstacle for women who could afford them.[65] Rehnquist stated the provision did not burden a woman's reproductive choice.[66] Accordingly, the plurality found "*Maher*, *Poelkner*, and [*Harris*] all support the view that the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so."[67]

### C. *Prohibitions Regarding Counseling a Woman to Have an Abortion*

Three sections of the Act prohibited use of public funds and employees to counsel a woman to have an abortion that was not medically necessary.[68] The Eighth Circuit struck down all three sections as unconstitutionally vague and as unacceptably infringing on a woman's right to an abortion.[69] Missouri elected to appeal the Eighth Circuit's decision regarding only the section prohibiting public funding for abortion counseling.[70]

On appeal, the State qualified its interpretation of this section. Missouri claimed the section was directed solely at fiscal officers responsible for allocating public funds, not at the primary conduct of physicians or health care providers.[71] Those challenging the statute found no problem with the State's interpretation.[72] Therefore, this issue was rendered moot and proved to be the only common ground of agreement for all nine justices.[73]

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64. *Id.* (quoting Maher v. Roe, 432 U.S. at 476) (citation omitted).
65. *Id.* at 509.
66. *Id.* If all the hospitals were publicly funded under socialized medicine, or if doctors who performed abortions in private facilities were barred from using public facilities for any purpose, a different analysis might apply. *Id.* n.8.
67. *Id.* at 511.
68. Mo. Rev. Stat. §§ 188.205, .210, .215 (1986).
69. Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1079 (1988).
70. Webster v. Reproductive Health Servs., 492 U.S. at 512.
71. *Id.*
72. *Id.*
73. *Id.*

### D. *The Viability Testing Requirements After Twenty Weeks Gestation*

Section 188.029 of the Act was composed of two sentences.[74] Notably, these two sentences produced the sharpest disagreements and the most bitter exchanges among the justices. Furthermore, the interpretation of this section by the plurality and Justice O'Connor manifests a significant shift in how the Court will view abortion regulations in the future. Section 188.029 states:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.[75]

Those challenging the statute focused on the second sentence, contending the section mandated testing even if the tests were unreliable or contrary to accepted medical practice, thus imposing a health risk for both the woman and the fetus.[76] In contrast, the State focused on the first sentence, maintaining the section called for testing only in conformity with standards of ordinary medical skill and prudence.[77] The Eighth Circuit agreed with the former interpretation.[78]

The Supreme Court usually defers to a lower court's interpretation of a state statute. In this case, however, the plurality found the court of appeals had "fallen into plain error."[79] Rehnquist began by stating statutory construction must be guided by the entire law and the policy behind it, not merely one sentence or portion of it.[80] He also reaffirmed the principle that the courts will interpret a statute in order to " 'avoid constitutional difficulties.' "[81]

Laying this foundation, Rehnquist stated the second sentence made sense only if interpreted as requiring testing when "useful to making subsid-

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74. Mo. Rev. Stat. § 188.029 (1986).

75. *Id.* The district court found the first sentence of this section to be constitutional. Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 420-22 (W.D. Mo. 1987).

76. Webster v. Reproductive Health Servs., 492 U.S. at 513.

77. *Id.*

78. Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1075 n.5 (1988).

79. Webster v. Reproductive Health Servs., 492 U.S. at 514.

80. *Id.*

81. *Id.* (quoting Frisby v. Schultz, 487 U.S. 474, 483 (1988)).

iary findings as to viability."[82]

> If we construe this provision to require a physician to perform those tests needed to make the three specified findings *in all circumstances*, including when the physician's reasonable professional judgment indicates that the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus, the second sentence of § 188.029 would conflict with the first sentence's *requirement* that a physician apply his reasonable professional skill and judgment. It would also be incongruous to read this provision, especially the word "necessary," . . . to require the performance of tests irrelevant to the expressed statutory purpose of determining viability.[83]

Thus, in the plurality's view, the Act required testing only when consistent with reasonable medical judgment.[84] This interpretation apparently gives physicians discretion concerning what tests are appropriate in each case and when to use them. Therefore, viability tests are required by the Act only when "useful to making subsidiary findings as to viability."[85]

Rehnquist stated this section created a presumption of viability at twenty weeks, which must be rebutted by appropriate testing.[86] At this juncture, he discussed how the requirement might conflict with *Roe*. Rehnquist noted the Court in *Roe* recognized "that the State has 'important and legitimate' interests in protecting maternal health and in the potentiality of human life."[87] *Roe* also found a state's interest in potential life becomes compelling at viability.[88] Additionally, Rehnquist noted the testing requirement might conflict with other abortion-related cases that struck down statutes regulating a physician's discretion in determining viability or raising the cost of second-trimester abortions.[89] Nevertheless, the plurality found the testing requirement "further[ed] the State's interest in promoting potential human life" and, therefore, was constitutional.[90]

In the plurality's opinion, the apparent conflict with various precedents was not due to any infirmity in the Missouri statute, but rather resulted from the "rigid trimester analysis" established in *Roe*.[91] Stating that the tri-

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82. *Id.* at 514.
83. *Id.* at 514-15 (emphasis in original) (footnote omitted).
84. *Id.* at 516 (citing Roe v. Wade, 410 U.S. 113, 165 (1973)).
85. *Id.* at 514.
86. *Id.* at 515.
87. *Id.* at 516 (quoting Roe v. Wade, 410 U.S. at 162 (1973)).
88. *Id.* (quoting Roe v. Wade, 410 U.S. at 165).
89. *Id.*; *see* Colautti v. Franklin, 439 U.S. 379 (1979) (statute regulating standard of care when performing an abortion on a possibly viable fetus was void for vagueness); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (determining viability of a fetus is a matter for the judgment of the physician); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (increased cost from requiring all second-trimester abortions be performed in hospitals was an impermissible burden).
90. Webster v. Reproductive Health Servs., 492 U.S. at 519-20.
91. *Id.* at 517.

mester framework made constitutional law concerning abortion a "virtual Procrustean bed,"[92] the plurality abandoned it as " 'unsound in principle and unworkable in practice.' "[93] To justify this step, Rehnquist pointed to several abortion-related decisions that appeared to be either inconsistent or that drew unnecessarily fine lines concerning abortion regulation.[94] "[T]he result [of the trimester framework] has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."[95] Thus, the trimester framework in *Roe* no longer governs state regulation of abortion in the United States.

Rehnquist also offered significant dicta spelling further erosion or outright reversal of *Roe v. Wade*. Referring to dissenting opinions by Justices White and O'Connor in *Thornburgh v. American College of Obstetricians & Gynecologists*,[96] the plurality indicated it saw no reason why a state's interest in protecting potential human life was not compelling throughout pregnancy and not merely after viability.[97] In contrast, the decision in *Roe* held a state's interest was compelling only after viability.[98] Thus, the plurality indicated a willingness to give the states greater latitude to regulate abortions, even before viability.

Because the Missouri statute chose viability as the point for safeguarding unborn children, however, the plurality declined to address whether *Roe* itself should be overruled.[99] Rehnquist also refused to discuss whether the "unenumerated" right to privacy recognized in *Griswold v. Connecticut*[100] included abortion or was included in the Constitution.[101] Rehnquist distinguished *Griswold* from *Roe*, noting *Griswold* "did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply."[102]

Clearly the plurality viewed regulating abortion as a matter for the democratic process, not for court adjudication. It recognized its decision would invite more regulation of abortion by the states.[103]

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92. *Id.*

93. *Id.* at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

94. *Id.* at 518 n.15; *see also* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 783-86 (1986) (Burger, C.J., dissenting) (an informed consent provision would have been upheld for any other medical procedure besides abortion).

95. Webster v. Reproductive Health Servs., 492 U.S. at 518 (footnote omitted).

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

97. Webster v. Reproductive Health Servs., 492 U.S. at 519.

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

99. Webster v. Reproductive Health Servs., 492 U.S. at 521.

100. Griswold v. Connecticut, 381 U.S. 479 (1965).

101. Webster v. Reproductive Health Servs., 492 U.S. at 520.

102. *Id.*

103. *Id.* at 521.

> [T]he goal of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not.[104]

Rehnquist briefly referred to Justice Blackmun's charge that this holding would invite oppressive legislation that offered no protection for women.[105] He noted that more than half of the voters who elect legislatures are women, and that the dissent did "scant justice to those who serve in such bodies and the people who elect them."[106]

## II. O'Connor's Concurrence

Justice O'Connor agreed with the plurality's interpretation of much of the Missouri statute. O'Connor expressly agreed the Eighth Circuit committed "plain error" by interpreting the viability-testing section as requiring tests in all circumstances.[107] She did not agree, however, that the requirements for viability testing conflicted with any previous decisions, including *Roe*.[108]

O'Connor noted no one disputed the district court's ruling that the first sentence of section 188.029 was constitutional.[109] Accordingly, O'Connor stated there was no dispute among the parties over the " 'presumption of viability at 20 weeks.' "[110] In her view, this presumption, if anything, would conflict with previous abortion-related decisions.[111] She agreed with the plurality that the second sentence of section 188.029 only delineates the means by which the presumption may be overcome "if those means are useful in doing so and can be prudently employed."[112] According to O'Connor, interpreting the statute in this manner did not conflict with the court's previous decisions.[113] "No decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible. Quite the contrary."[114]

Justice O'Connor disagreed with the plurality that the increased cost that viability testing requirement might impose on some abortions made the

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104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 525 (O'Connor, J., concurring).
108. *Id.* (O'Connor, J., concurring).
109. *Id.* at 527 (O'Connor, J., concurring).
110. *Id.* at 526 (O'Connor, J., concurring).
111. *Id.* (O'Connor, J., concurring).
112. *Id.* at 527 (O'Connor, J., concurring).
113. *Id.* (O'Connor, J., concurring).
114. *Id.* at 528 (O'Connor, J., concurring).

requirement suspect under *Akron*.[115] In *Akron* the ordinance requiring all second-trimester abortions to be performed in hospitals more than doubled the cost of such abortions.[116] In this case, however, the viability-testing requirements would "only marginally, if at all increase the cost of an abortion."[117] In O'Connor's view, the Missouri statute did not "impose an undue burden" on a woman's right to an abortion in light of *Akron*.[118] Therefore, because O'Connor saw no conflict with *Akron*, she saw no basis to reevaluate *Roe*.[119]

## III. Scalia's Concurrence

Justice Scalia concurred in the judgment of the Court but dissented in the way it was reached.[120] Scalia agreed with the plurality's interpretation of the preamble and the prohibition of public employees and facilities from being used for abortion.[121] He also agreed with Justice Blackmun that the plurality's opinion effectively would overrule *Roe*.[122] However, he would have done so explicitly.[123] Scalia stated that the answers to most of the abortion issues were political rather than juridical.[124] According to Scalia, the plurality's approach did "great damage [to] the Court, mak[ing] it the object of the sort of organized public pressure that political institutions in a democracy ought to receive."[125]

Scalia acknowledged the Court generally should not reach constitutional questions that are not brought before it.[126] However, he also noted the Court has frequently departed from this principle "when good reason exists."[127] In Scalia's opinion, there were "not only valid but compelling" reasons for speaking more broadly.[128] First, he believed retaining control of the matter "continuously distorts the public perception of the role of [the] Court" as a political institution.[129] Second, Scalia stated that normally when the Court refuses to rule more broadly than necessary, those affected will still be able

115. *Id.* at 529-30 (O'Connor, J., concurring).
116. *Id.* at 530 (O'Connor, J., concurring).
117. *Id.* at 531 (O'Connor, J., concurring).
118. *Id.* (O'Connor, J., concurring).
119. *Id.* (O'Connor, J., concurring).
120. *See id.* at 532 (Scalia, J., concurring).
121. *Id.* (Scalia, J., concurring).
122. *Id.* (Scalia, J., concurring).
123. *Id.* (Scalia, J., concurring).
124. *Id.* (Scalia, J., concurring).
125. *Id.* (Scalia, J., concurring).
126. *Id.* (Scalia, J., concurring).
127. *Id.* at 533 (Scalia, J., concurring). Justice Scalia noted Justice O'Connor had authored two opinions during the term that went beyond what was technically needed to decide the cases in City of Richmond v. J.A. Crosan Co., 488 U.S. 469 (1989), and Perry v. Leeke, 488 U.S. 272 (1989). *Id.*
128. *Id.* at 534 (Scalia, J., concurring).
129. *Id.* at 535 (Scalia, J., concurring).

to make another challenge.[130] "Not so," he stated, "with respect to the harm that many States believed, pre-*Roe*, and many may continue to believe, is caused by largely unrestricted abortion."[131]

Rather than directly address the conflict between the Missouri statute and *Roe*, the plurality and Justice O'Connor avoided the issue. Scalia stated the result of this approach was to throw "settled law into confusion," preserving a chaos in the state of the law of abortion.[132] In his view, failing to reconsider *Roe* meant its holding must be disassembled in piecemeal fashion, never entirely reversing it "no matter how wrong it may be."[133] Thus, viewing the courses the Court could have taken, Scalia considered the one chosen to be the "least responsible."[134]

## IV. Blackmun's Dissent

Justice Blackmun's dissent was as biting in its criticism as it was bitter in its tone. Blackmun stated the plurality opinion encouraged disregard for the law and accused it of going about their business in "deceptive fashion."[135] "The simple truth is that *Roe* would not survive the plurality's analysis . . . ."[136]

Blackmun's dissent was directed toward the plurality's interpretation of the Act's testing requirements and how the plurality discarded *Roe*'s trimester framework. His commentary regarding the other portions of the statute was confined to an extensive footnote.[137]

In Blackmun's view, the plurality's interpretation of the Act's viability testing requirement suggested "a radical reversal of the law of abortion."[138] He described the plurality's and O'Connor's interpretation of this requirement as "irreconcilable with the plain language of the statute."[139] Quoting

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130. *Id.* (Scalia, J., concurring).
131. *Id.* (Scalia, J., concurring).
132. *Id.* (Scalia, J., concurring).
133. *Id.* at 537 (Scalia, J., concurring).
134. *Id.* (Scalia, J., concurring).
135. *Id.* at 538 (Blackmun, J., concurring in part and dissenting in part).
136. *Id.* (Blackmun, J., concurring in part and dissenting in part).
137. *Id.* at 539 n.1 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun stated the preamble was anything but "abortion-neutral." *Id.* (Blackmun, J., concurring in part and dissenting in part). He viewed the Missouri statute as expanding the scope of abortion regulations. *Id.* (Blackmun, J., concurring in part and dissenting in part). He also viewed the preamble as unconstitutionally burdening the use of various contraceptives. *Id.* (Blackmun, J., concurring in part and dissenting in part). Blackmun also maintained that the Missouri statute's definition of "public facility" was far broader in scope than the state regulations challenged in *Maher*, *Poelker*, and *Harris*. *Id.* (Blackmun, J., concurring in part and dissenting in part).
138. *Id.* at 541 (Blackmun, J., concurring in part and dissenting in part).
139. *Id.* at 542 (Blackmun, J., concurring in part and dissenting in part). Blackmun focused on the second sentence of section 188.029, interpreting it as requiring certain tests in all circumstances.

*Frisby v. Schultz*,[140] Blackmun asserted that the Court should defer to the " 'district courts and courts of appeals [who] are better schooled in and more able to interpret the laws of their respective states.' "[141]

Because he believed the Act required testing even when it was medically imprudent to do so, Blackmun argued the plurality "had no cause to reconsider the *Roe* framework."[142] "Irrespective of the *Roe* framework," the Act could not survive rational-basis scrutiny, as it had no rational relation to the state's interest in protecting fetal life.[143]

Even if he were to accept the plurality's interpretation of the statute, Blackmun saw no conflict with *Roe*. "No one contests that under the *Roe* framework the State, in order to promote its interest in potential human life, may regulate and even proscribe nontherapeutic abortions once the fetus becomes viable."[144] Thus, he maintained the plurality "brush[ed] past an obvious basis for upholding [section] 188.029 in search of a pretext for scuttling the trimester framework."[145]

Blackmun then proceeded to defend the trimester framework, arguing it was analogous to other "judge-made methods" for measuring and balancing constitutional rights.[146] Accordingly, he defended the absence of the trimester framework in the Constitution, just as other judge-made rules of constitutional interpretation are not expressly found there.[147]

Blackmun also defended the *Roe* framework against the plurality's contention that it was more like a "web of legal rules . . . resembling a code of regulations rather than a body of constitutional doctrine."[148] He viewed the drawing of narrow distinctions in various abortion-related cases as the Court properly doing its job when applying broad constitutional principles to highly fact-specific situations.[149]

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140. Frisby v. Schultz, 487 U.S. 474 (1988).

141. Webster v. Reproductive Health Servs., 492 U.S. at 542 (Blackmun, J., concurring in part and dissenting in part) (quoting Frisby v. Schultz, 487 U.S. at 482 (other citation omitted)).

142. *Id.* at 543 (Blackmun, J., concurring in part and dissenting in part).

143. *Id.* at 543-44 (Blackmun, J., concurring in part and dissenting in part). Blackmun viewed the plurality's reading of the statute as a "tortured effort to avoid the plain import of" the statute. *Id.* (Blackmun, J., concurring in part and dissenting in part).

144. *Id.* at 544 (Blackmun, J., concurring in part and dissenting in part) (citing Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

145. *Id.* at 546 (Blackmun, J., concurring in part and dissenting in part).

146. *Id.* at 548 (Blackmun, J., concurring in part and dissenting in part). Blackmun compared the trimester framework to the "actual malice" standard for libel, to the standard for defining obscene speech, and to the rational-basis, intermediate and strict-scrutiny standards of equal protection analysis. *Id.* (Blackmun, J., concurring in part and dissenting in part).

147. *Id.* at 548-49 (Blackmun, J., concurring in part and dissenting in part).

148. *Id.* at 549 (Blackmun, J., concurring in part and dissenting in part) (quoting the plurality opinion at 578).

149. *Id.* at 550 (Blackmun, J., concurring in part and dissenting in part). Blackmun referenced other cases concerning the first, fourth, and sixth amendments, identifying what he asserted to be fine lines drawn concerning various rights under those provisions. *Id.* at 550

Blackmun further asserted the plurality presented no rationale to justify why a state's interest in protecting potential life should be compelling throughout pregnancy.[150] Referencing Stevens's opinion in *Thornburgh*,[151] Blackmun maintained that viability marks the threshold when the state's interest becomes compelling.[152]

Seeing the plurality as applying rational-basis review to what he considered a "limited fundamental constitutional right,"[153] Blackmun claimed it gave "no meaningful recognition" to the rights of women.[154] He clearly viewed the plurality opinion as inviting more restrictive abortion laws.[155]

Because Blackmun wrote the majority opinion in *Roe*, a vigorous dissent was to be expected. The thrust of his dissent was directed not only at the plurality's decision but also at how the plurality reached its decision. Blackmun criticized both what the plurality addressed as well as what it failed to address. Stating that the plurality actually would not uphold *Roe*,[156] he criticized it for failing to straightforwardly justify their willingness to depart from precedent.[157] Therefore, Blackmun considered the plurality's approach to be both cowardly and illegitimate.[158]

## V. Stevens's Dissent

Justice Stevens believed the plurality strained to reach its interpretation of section 188.029.[159] Stevens argued the preamble supported a plain interpretation that the statute required testing regardless of its usefulness or medical prudence.[160] Accordingly, he believed the Missouri legislature was trying to make abortions more costly to protect potential human life.[161] As such, he considered the Act to be manifestly unconstitutional under rational-basis standards, irrespective of *Roe*.[162] Likewise, Stevens argued the

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(Blackmun, J., concurring in part and dissenting in part).

150. *Id.* at 552 (Blackmun, J., concurring in part and dissenting in part).

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

152. Webster v. Reproductive Health Servs., 492 U.S. at 552-53 (Blackmun, J., concurring in part and dissenting in part) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. at 778-79 (Stevens, J., concurring)). Blackmun also discounted the likelihood that the point of viability would progress much earlier in pregnancy. *Id.* at 554 n.9 (Blackmun, J., concurring in part and dissenting in part).

153. *Id.* at 555 (Blackmun, J., concurring in part and dissenting in part).

154. *Id.* (Blackmun, J., concurring in part and dissenting in part).

155. *Id.* at 556 (Blackmun, J., concurring in part and dissenting in part).

156. *Id.* at 538 (Blackmun, J., concurring in part and dissenting in part) ("The simple truth is that *Roe* would not survive the plurality's analysis.").

157. *Id.* at 558-59 (Blackmun, J., concurring in part and dissenting in part).

158. *Id.* at 559-60 (Blackmun, J., concurring in part and dissenting in part).

159. *Id.* at 560-61 (Stevens, J., concurring in part and dissenting in part).

160. *Id.* at 562 (Stevens, J., concurring in part and dissenting in part).

161. *Id.* (Stevens, J., concurring in part and dissenting in part).

162. *Id.* at 562-63 (Stevens, J., concurring in part and dissenting in part) (citing William-

Act interfered with contraceptive choices through its definition of "conception."[163] Therefore, he considered it invalid in light of *Griswold v. Connecticut*,[164] and violative of the due process clause.[165]

In Stevens's view, the preamble to the Missouri statute endorsed a particular theological tenet.[166] He maintained, however, that legislation must have a separate, secular basis to be valid.[167] Although he acknowledged there were theological reasons to believe life begins at conception, Stevens saw no secular reason to adopt that theory.[168] Moreover, he saw a secular basis for recognizing a compelling state interest to protect the unborn only after viability.[169] Therefore, in Stevens's view, the Missouri statute also violated the establishment clause.[170]

## VI. Conclusion

The *Webster* decision did not reconsider whether a fetus is a "person" protected under the fourteenth amendment.[171] Nor did the decision clarify whether the decision in *Roe* properly extended the right of privacy recognized in *Griswold* to abortion decisions. These two issues are the heartbeat of *Roe*. *Roe*'s heart continues to beat, but the prognosis on its condition is uncertain. Regardless of whether the Court expressly reconsiders these issues in the near future, however, *Webster* reflects a shift in the Court's review of abortion restrictions. Even though there was no clear majority view on much of the Missouri statute, several elements in *Webster* indicate abortion statutes will be reviewed under rational-basis review.

First, the plurality opinion likened the Act to regulations considered in *Maher* and *Harris*. Rehnquist referred to these cases, noting they were upheld under rational-basis review.[172] Certainly, the Court exhibited a deferential posture toward the state legislature when interpreting the statute. It is noteworthy that although Justice O'Connor did not agree with reconsidering

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son v. Lee Optical Co., 348 U.S. 483 (1955)).

163. *Id.* at 563-64 (Stevens, J., concurring in part and dissenting in part). The statute defined "conception" as "the fertilization of the ovum of a female by a sperm of a male." Mo. Rev. Stat. § 188.015 (1986).

164. Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy found in the penumbra of the Bill of Rights extends to contraceptive choices).

165. Webster v. Reproductive Health Servs., 492 U.S. at 564-65 (Stevens, J., concurring in part and dissenting in part).

166. *Id.* at 566 (Stevens, J., concurring in part and dissenting in part). Stevens noted several *amici curiae* justified the position of life beginning at conception from deep and sincerely held religious beliefs. *Id.* at 3082 n.9 (Stevens, J., concurring in part and dissenting in part).

167. *Id.* (Stevens, J., concurring in part and dissenting in part).

168. *Id.* (Stevens, J., concurring in part and dissenting in part).

169. *Id.* at 569 (Stevens, J., concurring in part and dissenting in part).

170. *Id.* at 566, 571 (Stevens, J., concurring in part and dissenting in part).

171. *See* Roe v. Wade, 410 U.S. 113, 158-59 (1973).

172. *See supra* notes 37-67 and accompanying text.

*Roe*'s trimester framework, she did essentially agree with the plurality in its deferential interpretations of the statute. This fact in itself reveals the trend in the Court, regardless of whether it addresses the constitutional issue in the near future.

The plurality views abortion as a liberty interest.[173] Under a substantive due process analysis, infringements on liberty interests are generally reviewed under the rational-basis standard.[174] Thus, under *Ferguson v. Skrupa*[175] and *Williamson v. Lee Optical*,[176] abortion regulations would be scrutinized with great deference to legislative judgment.

Plainly, *Webster* invites the states to impose greater restrictions on abortion. In view of the deep-seated disagreements over the issues, it is a matter better handled by the legislatures. In this respect, *Webster* is a step in the right direction. However, Justices Scalia and Blackmun are correct in stating the Court should have directly addressed *Roe*. Failing to do so "throw[s] settled law into confusion"[177] with unsure headings to guide one out of the fray. No matter what decision the Court was going to hand down, a storm of criticism was inevitable. However, it is better to face the storm decisively rather than in a piecemeal fashion.

*Curtis Roggow*

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173. Webster v. Reproductive Health Servs., 492 U.S. at 520.

174. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting) (only "fundamental" rights call for strict scrutiny of legislation infringing on them).

175. Ferguson v. Skrupa, 372 U.S. 726 (1963).

176. Williamson v. Lee Optical, 348 U.S. 483 (1955).

177. *See* Webster v. Reproductive Health Servs., 492 U.S. at 535 (Scalia, J., concurring); *see also supra* note 132 and accompanying text.