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# WEBSTER, PRIVACY, AND RU486

## I. INTRODUCTION

Law is a living enterprise. For over a decade and a half, the Supreme Court has protected a woman's right to an abortion from overreaching state power.<sup>1</sup> Now, the Court's recent decision in *Webster v. Reproductive Health Services*<sup>2</sup> has expanded state protection of potential human life and maternal health.<sup>3</sup> Advances in abortion technology — making abortions easier and more accessible — will potentially spur state legislatures to amend abortion legislation as necessary to ensure the protection of maternal health and potential human life. Into this enterprise now comes the new drug RU486<sup>4</sup> — the latest discovery in abortion technology. RU486, a pill that stimulates miscarriage, is at the center of the latest conflict between a woman's right to

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1. In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court determined that the right to privacy encompasses a woman's decision whether or not to terminate her pregnancy by means of an abortion.

2. 109 S.Ct. 3040 (1989).

3. Though *Webster* only notes the existence of a compelling state interest in potential human life throughout pregnancy, the same reasoning is also used to find a compelling state interest in maternal health throughout pregnancy. See *City of Akron v. Akron Center For Reproductive Health*, 462 U.S. 416, 460-61 (1983) (O'Connor, J., dissenting):

The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies State regulation to ensure that first trimester abortions are performed as safely as possible . . . . [Accordingly,] the State possesses compelling interests in the protection of potential human life and in maternal health throughout pregnancy . . . .

The author notes that the Court, in the same term in which it expanded state protection of fetal life in *Webster*, allowed the states to execute minors, *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989), and the mentally retarded, *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989).

4. RU486 or mifepristone was created in 1982 by French researcher Dr. Etienne Baulieu. Herman, *Women's Health: In France, A New Method of Abortion*, Wash. Post, Sept. 27, 1988, at 13 (Health), col. 1. RU486, usually given as a pill, induces a miscarriage in early pregnancy causing the fetus to be expelled. Couzinet, *Termination of Early Pregnancy by the Progesterone Antagonist RU486 (Mifepristone)*, 315 NEW ENG. J. MED. 1565, 1568 (1986). RU486 is currently available in France where it is dispensed only at designated family planning centers. The procedure requires two visits to the family planning center, first for ingestion of RU486 and then, some days later, for an injection of prostaglandin to induce uterine contractions. Herman, *The Politics of the Abortion Pill*, Wash. Post, Oct. 3, 1989, at 12 (Health), col. 4. Dr. Baulieu received the 1989 Albert Lasker Award for Clinical Research for his scientific achievements including his work on RU486. *French Researcher Wins Top U.S. Medical Award, Angering Abortion Foes*, Wash. Post, Sept. 28, 1989, at A12, col. 1.

an abortion established within the strict trimester guidelines of *Roe v. Wade*<sup>5</sup> and the statutory protection of health, safety, and welfare by the individual states.<sup>6</sup>

This Comment will examine the *Webster* decision and its possible effects on the state regulation of abortions. To this end, RU486 is discussed — its terminology, testing history, and potential benefits and consequences. This Comment will conclude by discussing RU486 in the context of post *Webster* abortion law, and will propose a model statute to demonstrate the expanded possibilities of constitutional state abortion regulation.

## II. WEBSTER V. REPRODUCTIVE HEALTH SERVICES

In *Webster*, the Supreme Court, in a plurality opinion, upheld a Missouri statute that restricts a woman's right to an abortion.<sup>7</sup> The provisions of the statute include: (1) a preamble that sets forth legislative "findings" that life begins at conception and that unborn children have protected life interests,<sup>8</sup> (2) a prohibition on the use of public facilities or public employees to per-

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5. *Roe*, 410 U.S. at 159-64. States may regulate abortions after the first trimester ends provided the regulations are reasonably related to maternal health. *Id.* at 164. After the second trimester ends, the state may regulate abortions to the point of prohibition to protect viable fetal life. *Id.* This is because the state's interest in maternal health and viable fetal life "grow(s) in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id.* at 162-63.

During the first trimester, the mortality rate for childbirth may be greater than or equal to that of abortion, therefore the state has no compelling interest and thus no authority to regulate abortions. *Id.* at 163. During the second trimester, the state's interest in maternal health is now compelling because the mortality rate for abortion becomes greater than for childbirth. *Id.* at 163. During the third trimester, the fetus is presumed viable and the state may regulate abortions, even to the point of prohibition, because the state has a compelling interest in protecting potential human life. *Id.* An exception is made to allow third trimester abortions to "preserve the life or health of the mother." *Id.* at 163-64.

6. Through its police powers, the state may protect the "public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

7. MO. REV. STAT. §§ 1.205, 188.205, 188.210, 188.029 (1989).

8. *Id.* at § 1.205 Life begins at conception — unborn child, defined — failure to provide prenatal care, no cause of action for:

1. The general assembly of this state finds that:
  - (1) The life of each human being begins at conception;
  - (2) Unborn children have protected interests in life, health, and well-being;
  - (3) The natural parents of unborn children have protected interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
3. As used in this section, the term "unborn children" and "unborn child" shall

form abortions that are not necessary to save the mother's life,<sup>9</sup> and (3) a requirement that physicians perform viability tests for any fetus believed to be at least twenty weeks old.<sup>10</sup> The *Webster* decision, however, is significant beyond the "findings" and regulations themselves. *Webster* demonstrates the plurality's deference to state legislation which goes to the procedural core of the abortion debate. This deference facilitates a transfer from the federal to the state forum of such questions as: when does life begin, when is the state's interest in fetal life paramount, and what state actions are constitutional protections of potential human life?<sup>11</sup> In this regard, *Webster* is

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include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

9. *Id.* at § 188.205. Use of public funds prohibited, when:

It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

§ 188.210. Public employees, activities prohibited, when:

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.

10. § 188.029. Physician, determination of viability, duties:

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 ordinary 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.

11. The *Webster* Court's desire to remove abortion regulation from the courts and return it to the state legislatures is based, in part, on its view that the medical knowledge necessary to make informed abortion regulation decisions is beyond the capabilities of the courts. "[L]egislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts." *City of Akron v. Akron Center For Reproductive Health, Inc.*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting).

Medically, the questions arising from the abortion debate can be overwhelmingly intricate. For example, the question of when life begins. Does life begin at the penetration of the ovum by a sperm? Does life begin at the cell division of a fertilized ovum to form a blastocyst? Does life begin at the invasion of the endometrium by the blastocyst? Even assuming that life does begin at one of these stages, present scientific technology can not accurately detect the exact moment that one of these events has occurred. J. PRITCHARD, P. MACDONALD, & N. GANT, *WILLIAMS OBSTETRICS* 467-68 (17th ed. 1985) [hereinafter *WILLIAMS OBSTETRICS*]. The in-

essentially an invitation to the states to amend their existing abortion laws.<sup>12</sup>

By deferring to state abortion legislation, *Webster* eased the state's burden in defending the constitutionality of its abortion legislation, placing the greater burden on the individual challenging the statute's constitutionality. In *Thornburgh v. American College of Obstetrics and Gynecologists*,<sup>13</sup> the majority applied a strict scrutiny standard of review and invalidated all six provisions of a Pennsylvania statute regulating abortion.<sup>14</sup> The burden was placed upon the state to prove that its regulations protected its interest in maternal health. The state did not prove that the regulations advanced any legitimate state interest and the statute was declared unconstitutional.<sup>15</sup>

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tricacies of the questions involved in abortion regulation may require the time and resources available to state legislatures.

12. In the recent decision of *Davis v. Davis*, No. E-14496 (Tenn. App. Sept. 21, 1988) (LEXIS, 641), Judge Young cited *Webster* in his decision to examine state law in deciding the fate of seven frozen embryos. In *Davis*, Judge Young declared that life begins at conception and thus seven frozen embryos at the center of a separation dispute are human beings and not property. *Id.* at 30. Judge Young noted that:

the recent *Webster* case leaves open the door for a state to establish its compelling interest in protecting even potential human life by legislation declaring its public policy . . . . [T]he *Webster* Court opined that it saw no reason why the state's interest in protecting potential human life should come into existence only at the point of viability.

*Id.* at 31. Judge Young then examined Tennessee law to determine its public policy concluding the "the age-old common law doctrine of *parens patriae* controls these children, in vitro, as it has always supervised and controlled children . . . in domestic relations cases. *Id.* at 34. Because Ms. Davis planned to implant some or all of these embryos, Judge Young awarded custody to Ms. Davis. It "seems the best interest of these children for Mrs. Davis to be permitted the opportunity to bring these children to term through implantation." *Id.* at 37.

13. 476 U.S. 747 (1986).

14. Abortion Control Act, 18 PA. CONS. STAT. §§ 3201-3220 (1983). The Pennsylvania statute required, first, that the woman seeking an abortion be given materials stating that agencies will assist her in carrying her child to term and a description of the physiological characteristics of an unborn child. The statute also required the woman to be advised of the medical risks of abortion and childbirth. *Id.* at §§ 3205, 3208. Second, the physician was required to record information about the physician performing the abortion and the woman receiving the abortion which was to be available for public inspection. *Id.* at § 3214(a),(h). Third, the physician was required to make and record a non-viability determination for all second and third-trimester abortions. *Id.* at § 3211(a). Fourth, after viability, the physician was required to use the abortion procedure most likely to preserve the life of the child unless the procedure would significantly increase the risk to the mother's health. *Id.* at § 3210(b). Fifth, for abortions after viability, a second physician must be present to take all reasonable steps to preserve the life and health of the child. *Id.* at § 3210(c). All six of these provisions were declared unconstitutional. *Thornburgh v. Am. College of Obstetrics & Gynecologists*, 476 U.S. 747, 762-71 (1986).

15. *Thornburgh*, 476 U.S. at 762-71. The Court found the required informed consent information to be at times unnecessary and thus at a minimum overinclusive, and at times facially unconstitutional. *Id.* at 762-64. The Court disregarded Pennsylvania's reasoning that the information was necessary for informed consent, finding the information "to be nothing more than an outright attempt to wedge the Commonwealth's message discouraging abortion

In contrast, the *Webster* Court upheld a state created presumption of viability at twenty weeks — four weeks into the second trimester — which the physician must rebut before performing an abortion.<sup>16</sup> Using the less stringent rational basis standard of review, this regulation was upheld.<sup>17</sup> The Court reasoned that the state has a compelling interest in potential human life, and the state's desire to prevent the mistaken abortion of a viable fetus is a rational reason for viability testing beginning at twenty weeks.<sup>18</sup> Under the rational basis standard of review a state's reasoning is rebuttable. However, after *Webster*, an individual challenging the constitutionality of state abortion legislation has the difficult task of demonstrating that there is no rational way the legislation can further the compelling state interest of protecting maternal health or potential human life.<sup>19</sup>

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into [the doctor-patient relationship]." *Id.* at 762. With respect to the reporting requirements, the Court found the scope of the information and the public access to "believe any assertions by the Commonwealth that it is advancing any legitimate interest" and declared the provision unconstitutional. *Id.* at 765-66. Examining the degree of care for the post-viability abortions provision, the Court did not wait for state court interpretation of the ambiguous phrase "significantly greater medical risk," but agreed with the court of appeals that the term required the mother to bear more than a minimally increased health risk and was thus unconstitutional. *Id.* at 769. Finally, in examining the second physician requirement, the Court, again, interpreted the provision prior to state court interpretation and found it unconstitutional because it did not provide an exception for emergency maternal health situations. *Id.* at 770-71. Scrutinizing Pennsylvania's intentions, the Court concluded that "the Pennsylvania legislature knows how to provide a medical-emergency exception when it chooses to do so . . . [and therefore its] failure to provide [one] . . . was intentional." *Id.* at 771.

16. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989).

17. Chief Justice Rehnquist allows this regulation because it "permissibly furthers" the State interest in potential human life. *Id.* at 3057. This constitutional test is less than the strict scrutiny of *Thornburgh* because it allows the regulation to be overinclusive. Specifically, the regulation is valid though the required viability tests are likely to be performed on some second trimester abortions. *Id.*

Justice O'Connor allows the testing requirement because it "does not impose an undue burden on a woman's abortion decision." *Id.* at 3063. See *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (prior to a state statute creating an "undue burden," judicial scrutiny "should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of" maternal health and potential human life.)

18. *Webster*, 109 S.Ct. at 3055. Chief Justice Rehnquist notes that the district court found that a 20 week fetus is not viable and only at 23 1/2 to 24 weeks is there a reasonable possibility of viability. But, the district court found that there may be a four week error in estimating gestational age. Therefore, to protect every viable fetus against an abortion due to miscalculated gestational age, testing should begin at 20 weeks. *Id.*

Interestingly, in many states, a birth certificate is prepared for any pregnancy at 20 weeks or older. WILLIAMS OBSTETRICS, *supra* note 11, at 467.

19. See TRIBE, AMERICAN CONSTITUTIONAL LAW 1446-50 (2d ed. 1988). Examining the effect of the rational basis standard of review on the Equal Protection Clause, Tribe notes that "underinclusive" and "overinclusive" legislation is permissible "[b]ecause the problems of government are practical ones and may justify, if they do not require rough accommodations, a demand for mathematical nicety is implausible: instead, the Constitution invalidates only that

The plurality also went to great lengths to avoid considering the constitutionality of the preamble, stating that "[t]he preamble can be read simply to express [a] sort of value judgment"<sup>20</sup> and not as a limit on abortion. It is within the province of the state courts first to decide if the preamble impermissibly limits a woman's abortion right.<sup>21</sup>

The *Webster* plurality has, in theory, allowed the states to enact more extensive restrictions on a woman's right to abortion. Yet, the statute at issue in *Webster* only chips away at the edges of *Roe*. Abortion still may be prohibited only after viability, with viability moved back four weeks into the second trimester.<sup>22</sup> Despite the four week violation of the strict trimester framework of *Roe*, the plurality chose to distinguish and narrow *Roe* rather than overturn it.<sup>23</sup> Therefore, the question arises as to whether state legislation that results in severe restrictions of first and early second-trimester abortions — abortions that could be performed with RU486 on an outpatient basis — will be constitutional. An examination of both the plurality's view of the right to privacy and *Roe*'s trimester framework will prove instructive.

### III. PRIVACY AND ABORTION LAW

The present Court takes a more literal approach toward the Constitution, viewing its role as a corrector of legislative excess and not a creator of individual rights. Through legislative activity, the states themselves create or protect the rights not expressly contained within the Constitution, not the courts. To read beyond the text of the Constitution is to allow the Court to remove the people's authority to govern themselves, a form of tyranny.<sup>24</sup>

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governmental choice which is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id.* at 1446 (citations omitted).

20. *Webster*, 109 S.Ct. at 3050.

21. *Id.* By abstaining, the majority may add additional expense, delay, and inconvenience to individual plaintiffs whose appeals will likely reach the Court anyway.

22. The *Roe* Court chose "viability" as the point where the state may regulate and even proscribe abortions with only an exception for maternal health. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). The *Roe* Court determined that viability occurs at 24 weeks, the beginning of the third-trimester. *Id.* at 160. Similarly, MO. REV. STAT. § 188.030 (1986) chose "viability" as the point where it may proscribe abortion with only a maternal health exception. But the required viability determination at 20 weeks of § 188.029 "creates what is essentially a presumption of viability at 20 weeks." *Webster*, 109 S.Ct. at 3055. Thus, viability remains the point where the state may proscribe abortion with only a maternal health exception, except the Missouri legislature has determined that viability begins four weeks earlier than the Supreme Court did in *Roe*.

23. Only Justice Scalia called for *Roe* to be overturned. *See infra* note 35.

24. *See Thornburgh v. Am. College of Obstetrics & Gynecologists*, 476 U.S. 747, 768-87 (1986) (White, J., dissenting).

In my view, [the rejection of *Roe v. Wade*] would be highly desirable from the stand-

At the heart of the abortion debate is the tension between state police powers<sup>25</sup> and the unwritten right to privacy.<sup>26</sup> Judging from the Court's decision in *Bowers v. Hardwick*,<sup>27</sup> the Court implies that past privacy rights decisions have merely reflected the personal values of the Justices which have been imposed upon the states without Constitutional root.<sup>28</sup> Therefore, to ensure that privacy rights do not arise from judicial whim, privacy issues should be scrutinized, and the question asked whether "the federal Constitution confers a right to engage in this activity?"<sup>29</sup> In doing so, the Court

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point of the Constitution. Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never — not in 1787, 1791, 1868, or at any time since — done any such thing. I would return the issue to the people by overruling *Roe v. Wade*.

*Id.* at 796-97.

Chief Justice Rehnquist, writing for the *Webster* plurality echoes the sentiments of Justice White when he states:

The goal of the 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. We think we have done that today.

*Webster*, 109 S.Ct. at 3058.

The *Webster* majority's views on judicial restraint and state's rights are not limited to abortion. See, e.g., *DeShaney v. Winnebago County Dep't of Social Services*, 109 S.Ct. 998 (1989). In *DeShaney*, the Court ruled that a governmental agency was not liable for injuries inflicted upon a minor by his father despite repeated notifications of these injuries to the agency and an agency investigation noting probable child abuse. More importantly for this Comment, the dicta of the majority (Rehnquist, C.J., delivered the opinion of the Court, in which White, Stevens, O'Connor, Scalia, and recently appointed Kennedy, JJ., joined) outlined its view of the doctrine of state's rights and the role of the judiciary.

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

*Id.* at 1007.

25. See *supra* note 6.

26. *Griswald v. Connecticut*, 381 U.S. 479, 484 (1965) states that a right to privacy exists within the "penumbras" of the first, third, fourth, fifth, and ninth amendments.

27. 478 U.S. 186 (1986). In *Bowers*, the Court upheld a Georgia statute criminalizing sodomy against the challenge that the statute violates an active homosexual's right to privacy.

28. *Id.* at 191.

29. The Supreme Court formulated the issue of the case as "whether the Federal Constitution confers a right upon homosexuals to engage in sodomy." *Id.* at 190.



limits its ability to employ present knowledge in interpreting Constitutional rights. In *Bowers*, the Court looked to specific liberties that are “deeply rooted in the Nation’s history and tradition” or “implicit in the concept of ordered liberty.”<sup>30</sup> Rights, like homosexual rights at issue in *Bowers*, which are not enumerated in the Constitution, historically accepted as fundamental, or basic to the workings of society, must be statutorily conferred on citizens today.<sup>31</sup>

Applying this reasoning to abortion,<sup>32</sup> the majority has been extremely critical of the “unwritten”<sup>33</sup> trimester guidelines of *Roe*. As members of the minorities of *Akron* and *Thornburgh*, Justices O’Connor and White criticized the unworkability of *Roe*’s rigid trimester framework, with Justice White calling for *Roe* to be overturned.<sup>34</sup> However, when the minority be-

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30. *Id.* at 192. After examining sodomy statutes, the majority of which were passed in the 18th and 19th centuries, *Id.* at 192 n.5, 193 n.6, and ancient Roman and Judaeo-Christian moral standards, *Id.* at 196-97 (Burger, C.J., concurring), the majority determined that homosexual sodomy has never been accepted as a fundamental right and therefore not within the contemplation of the Due Process Clause. *Id.* at 194.

31. The dissent of Justice Blackmun, Justice Brennan, Justice Marshall, and Justice Stevens disagrees arguing that this is not a case about a fundamental right to homosexual sodomy as it is a case about the right of an individual to make certain decisions beyond the reach of government. *Id.* at 199 (Blackmun, J., dissenting). The Supreme Court has long recognized “that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.” *Id.* at 203. An individual’s privacy interest encompasses those decisions that “form a central part of an individual’s life.” *Id.* at 204. Sexual intimacy “is a sensitive, key relationship of human existence, central to the development of the human personality.” *Id.* at 205. In this diverse Nation, decisions about sexual intimacy which do not harm others should be protected from government intrusion regardless of whether the decisions conform to the views of the majority of the citizenry. *Id.* at 205, 210-12. Homosexual sodomy between two consenting adults should not be criminalized because of the views of this majority or the dictates of history, but protected from governmental interference. There are many “right” ways to conduct intimate associations, all of which should be constitutional because sexuality is central to an individual’s self-identity and thus can only be made by the individual without limitations imposed by government. *Id.* at 205-06.

32. See *Thornburgh v. Am. College of Obstetrics & Gynecology*, 476 U.S. 747, 790-91 (1986) (White, J., dissenting). Unwritten fundamental rights within the Due Process Clause are those which are either “in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.” *Id.* at 791. Examining abortion, Justice White concluded that the *Roe* decision itself (probably *Roe*’s invalidation of numerous state criminal abortion statutes. *Roe*, 410 U.S. at 139-40 nn.34-37) and the continuing and deep division over abortion today demonstrate that there is no “deeply rooted” abortion right in the “Nation’s history and tradition.” Thus, the abortion right is not an unwritten fundamental right within the Due Process Clause. *Thornburgh*, 476 U.S. at 791 (White, J., dissenting).

33. The author notes that the trimester guidelines are written in *Roe*, but they are not found in the literal text of the Constitution.

34. In her *Akron* dissent, Justice O’Connor criticized the majority for its denial of any state interest prior to the compelling point. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 459 (1983). A state’s interest in maternal health and fetal life are compel-

came the *Webster* plurality, only Justice Scalia called for *Roe* to be overturned.<sup>35</sup> The remainder of the plurality resolved the conflicts in *Webster* by narrowing and distinguishing *Roe*.<sup>36</sup> In fact, the plurality of Chief Justice Rehnquist, Justice White and Justice Kennedy acknowledged that abortion is "a liberty interest protected by the Due Process Clause."<sup>37</sup> In the end, without overruling *Roe*, the plurality replaced *Roe*'s strict scrutiny test with the combined rational basis analysis of Chief Justice Rehnquist and Justice O'Connor — restrictions on early abortions are constitutional if they "permissibly further the State's interest in protecting potential human life" without imposing "an undue burden on a woman's abortion decision."<sup>38</sup>

Constitutional state abortion legislation will now turn on the Court's interpretation of the terms "compelling state interest" and "undue burden."<sup>39</sup>

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ling throughout pregnancy because fetal life, for example, is no less potential during the early weeks of pregnancy than it is from viability onwards. *Id.* at 460-61. In *Thornburgh*, Justice White declares that "[t]he State's interest is in the fetus as an entity in itself . . . [a]ccordingly, the State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). Thus, *Roe*'s trimester framework is medically flawed (and not ground in Constitutional root) and should be overturned. *Id.* at 796.

35. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3065-66 (1989). Justice Scalia gives three reasons to overturn *Roe*. First, to restrict *Webster* so narrowly preserves the present abortion law "chaos." *Id.* Second, this narrow decision maintains a public misperception that the Court decides political issues. *Id.* Third, given the arguable evil of abortion, if states have the constitutional power to prohibit abortion, the Court should tell them so. *Id.*

36. Chief Justice Rehnquist, joined by Justice White and Justice Kennedy, distinguished *Roe* by noting that the statute at issue in *Webster* prohibited abortions only after viability while the statute at issue in *Roe* criminalized all abortions. *Id.* at 3058. Justice O'Connor found no conflicts with *Roe*. Once § 188.029 was properly interpreted as requiring viability tests only when they are safe and necessary within the doctor's discretion, it does not conflict with *Roe*. Since the statute's constitutionality does not turn on *Roe*'s constitutionality, there is no reason to re-examine *Roe*. *Id.* at 3060.

37. *Id.*

38. *Id.* at 3063.

39. The Supreme Court granted review in three more cases involving abortion and permissible state regulation. The Court will review the conflicting court of appeals decisions in *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3851 (U.S. Jan. 21, 1989) (No. 92-212), and *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3852 (U.S. Jun. 27, 1989) (No. 88-1125). In *Slaby*, an Ohio statute (amended substitute House Bill No. 319 to have been enacted under OHIO REV. CODE ANN. §§ 2152.85 and 2919.12) (Anderson Supp. 1985) required either advance 24-hour notice to parents or the satisfaction of a juvenile court bypass option before an unemancipated minor could receive an abortion. The judicial bypass option under this Ohio statute is a complex procedure where the minor must prove to the court by clear and convincing evidence that she is sufficiently mature to make the abortion decision without notification to her parents or that parental notification would be contrary to her best interest. The Sixth Circuit held this to be an unconstitutional burden on the minor's right to an abortion. *Slaby*, 854 F.2d at 873 (case in which the court ruled for summary dismissal of *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986)). The State did not meet its burden of proof that this procedure helped ensure a well informed medical decision. *Rosen*, 633 F. Supp.

If "compelling state interest" is interpreted in its usual constitutional sense, it will probably outweigh a woman's "liberty interest" or even "fundamental right" to an abortion.<sup>40</sup> Then, a state could constitutionally enact severe restrictions on early abortion to protect its compelling interest in potential human life which exists throughout pregnancy. If, however, "compelling state interest" is interpreted in its definitional sense, the state interest may demand great weight in the balance between a woman's privacy rights and a state's right to protect its unborn citizens, but it should not prevail absolutely.<sup>41</sup>

"Undue burden" is also left undefined.<sup>42</sup> The life of the mother has historically outweighed the potential life of the fetus, but the question remains

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at 1135. Further, regulation limited the grounds upon which a court could find notification necessary. *Id.* at 1135-37. This, combined with the somewhat restrictive clear and convincing standard, risked an improper deprivation of a minor's right to an abortion. *Id.*

However, a similar statute was upheld in *Hodgson v. Minnesota*. The Eighth Circuit held that a two parent notification scheme with a judicial bypass option, which requires the minor to prove either maturity or that an abortion without parental notification is in her best interest, was constitutional. MINN. STAT. ANN. §§ 144.343(2)-(7) (West 1987). Reviewing the statute as a whole, the Court noted the potential consequences of an abortion and found valid state interests in ensuring a wise decision. *Hodgson*, 853 F.2d at 1465. Further, the parental notification provision promoted the traditional state interest in the family as well as providing an opportunity for the parents to supply necessary medical information. *Id.* at 1463-65. Because these interests are compelling, the statute did not violate a minor's abortion right. *Id.* at 1465.

Finally, in *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3851 (U.S. Jun. 27, 1989) (No. 88-790), the Supreme Court will review, among other issues, whether Illinois can constitutionally license and regulate outpatient surgical facilities in which pregnancy terminations are performed to the same extent that it licenses and regulates outpatient surgical facilities in which pregnancy terminations are not performed. *Id.*

40. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 696 (3d ed. 1986) [hereinafter CONSTITUTIONAL LAW] ("where the [state] legislation restricts the exercise of fundamental constitutional rights it will only be upheld if it is necessary to promote a compelling state interest"). In the reverse, if a compelling state interest exists, it will be upheld though it restricts the exercise of a fundamental constitutional right. In the abortion arena, the saving of an unborn life is a compelling state interest which should be upheld although it restricts a woman's right to privacy.

41. Justice O'Connor's dissent in *Akron* suggests that she may be using "compelling" in its non-constitutional sense. Concluding a section outlining her reasons for recognizing state interest in potential fetal life prior to viability, Justice O'Connor states that "[the *Roe*] framework is clearly an unworkable means of balancing the fundamental [abortion] right and the compelling state interest." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting). Nowhere in the preceding passage does Justice O'Connor state or suggest that the compelling state interest is absolute. Further, the balancing of state and maternal interests is necessary to protect maternal health. Without at least a minimal balancing of interests, the state could ban abortions even when the pregnancy would directly threaten the woman's life.

42. In *Akron*, Justice O'Connor states only general descriptions of what an "undue burden" entails, namely, "absolute obstacle," "coercive restraint," "official interference," or "state action drastically limiting the availability and safety [of abortion]." *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting) (citations omitted).

open as to when the mother's burden is less than life itself.<sup>43</sup> Furthermore, the life potential of a fetus varies throughout pregnancy depending on the fetus' weight and gestational age — a possible factor to be weighed in determining the relative "burden" imposed on a woman by a state restriction on early abortion.<sup>44</sup>

Presented with a state statute restricting early abortion, the *Webster* plurality, in applying a rational basis analysis, could balance the state's compelling interest and the woman's burden in favor of the woman and declare the statute unconstitutional. However, the plurality's deference to state legislation would likely allow a well-written state statute to interpret the ambiguities of "compelling state interest" and "undue burden" in favor of the state. Into this fray comes RU486, the new abortion pill, which does not require professional assistance to induce an abortion, but may present medical consequences. Use of the drug will undoubtedly precipitate state regulation and court challenges.

#### IV. RU486

RU486 is an antiprogestosterone.<sup>45</sup> Progesterone is the hormone that prepares the uterus for implantation and retention of the fertilized egg.<sup>46</sup> Although not completely certain, researchers believe that RU486 blocks

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43. See CONSTITUTIONAL LAW, *supra* note 40, at 697 ("It should be noted that all of the [abortion] opinions have assumed that an exception would be made to [post-viability prohibitions] to secure the mother's life or prevent serious injury to her health"). *But see* Thornburgh v. Am. College of Obstetrics & Gynecologists, 476 U.S. 744, 808-10 (1986) (White, J., dissenting):

[I]f, as the Court has held, the State has a compelling interest in the preservation of the life of a viable fetus, I find the majority's unwillingness to tolerate the imposition of *any* non-negligible risk of injury to a pregnant woman in order to protect the life of her viable fetus in the course of an abortion baffling.

*Id.* at 809.

44. The spontaneous abortion rate in early pregnancy is approximately 60% while the overall rate throughout pregnancy is approximately 10%. WILLIAMS OBSTETRICS, *supra* note 11, at 467-68. The mortality rate of infants even with intensive care is virtually 100% for infants weighing less than 600g (approximately 23 weeks) decreasing to about 40% for infants between 900 and 999g. Equally telling, among the survivors, severe handicaps was 100% in the 600 to 699g weight group, 26% for the 700 to 799g group, 29% for the 800 to 899g group, and 3% for the 900 to 999g group. *Id.* at 748-50.

45. Roger & Baird, *Induction of Therapeutic Abortion in Early Pregnancy with Mifepristone in Combination with Prostaglandin Pessary*, LANCET, Dec. 19, 1987, at 1415 [hereinafter LANCET].

46. Cameron & Baird, *Early Pregnancy Termination: A Comparison Between Vacuum Aspiration and Medical Abortion Using Prostaglandin or the Anti-progestogen RU486*, 95 BRIT. J. OBST. & GYN. 271-72 (1988) [hereinafter BRIT. J.].

progesterone thus causing the lining of the uterus to break down and bleed.<sup>47</sup> The uterus then secretes prostaglandin, a hormone which induces muscle contractions expelling the embryo or fetus.<sup>48</sup> The uterus needs to be deprived of progesterone for only a few hours to initiate this process. Taken as a pill, RU486 ideally simulates a miscarriage which occurs in approximately a week.<sup>49</sup> Studies of RU486 are compelling both for their conclusions and for their exclusions. This comment will summarize and compare three recent studies.<sup>50</sup>

Dr. Baulieu and four associates studied the effects of RU486 on 100 women with early, unwanted pregnancies.<sup>51</sup> The women were between the ages of 19 and 42, with normal pregnancies of 5 1/2 to 6 weeks and sound medical histories.<sup>52</sup> The women were divided into three test groups and given various doses of RU486 over a four day period. Follow-up visits were scheduled for days 4, 6, 9, and 13 after RU486 ingestion with a tentative appointment for vacuum aspiration<sup>53</sup> set for day thirteen in case of failed abortion. Overall, RU486 induced eighty-five complete abortions,<sup>54</sup> and fifteen incomplete abortions.<sup>55</sup> The reason for these fifteen incomplete abortions is unknown.<sup>56</sup>

The most dangerous side effect of RU486 was prolonged, heavy bleeding (18%), but women also experienced slight nausea (24%), fatigue (22%), and

47. Couzinet, *Termination of Early Pregnancy by the Progesterone Antagonist RU486 (Mifepristone)*, 315 NEW ENG. J. MED. 1565, 1568 (1986) [hereinafter NEW ENG. J.].

48. BRIT. J., *supra* note 46, at 271.

49. Herman, Wash. Post, Sept. 27, 1988, at 13 (Health), col. 1.

50. These three studies were selected because the author believes that they accurately reflect the current medical knowledge available on RU486. For another recent study and citations to several previous studies see Grimes, *Early Abortion With a Single Dose of the Antiprogesterin RU-486*, 158 AM. J. OBST. GYN. 1307 (1988). The results of this study support the conclusions reached in the three studies outlined in this Comment.

51. NEW ENG. J., *supra* note 47, at 1565-70.

52. "We recruited 120 healthy women within ten days of the expected onset of the missed menses from among persons applying for a legal abortion. The women were 19 to 40 years old and had a history of regular menses (28 +/- 4 days). Women with any symptoms of an abnormal pregnancy or pelvic inflammatory disease; a history of use of glucocorticoids in the previous three months; or a history of liver, gastrointestinal or renal disease were excluded from the study." NEW ENG. J., *supra* note 47, at 1565.

53. Vacuum aspiration is an abortion procedure in which a tube is inserted into the uterus which vacuums away the lining of the uterus and with it the fetus. WILLIAMS OBSTETRICS, *supra* note 11, at 479-81.

54. A complete abortion is one where the fetus is dead and expelled from the body. NEW ENG. J., *supra* note 47, at 1566.

55. An incomplete abortion is one where the fetus is dead but not expelled from the body. *Id.*

56. *Id.* There are no differences in age, date of pregnancy, or previous history of pregnancy in those who aborted and those who did not. In addition, the failure rate was also the same at all three dosage levels. *Id.* at 1568-69.

painful contractions (20%).<sup>57</sup> None of the side-effects proved to be serious and RU486 was generally well tolerated.<sup>58</sup> This study concluded that RU486 is safe and effective but only in "very early pregnancy" and "only under close medical supervision."<sup>59</sup>

A similar study was later conducted by Dr. Mary M. Rogers and Dr. David T. Baird.<sup>60</sup> This study differed from Dr. Baulieu's study in that along with RU486, a gemeprost vaginal pessary<sup>61</sup> was given to enhance expulsion. The test group was similar: one hundred women between the ages of 17 and 40 who had normal pregnancies of less than eight weeks and sound medical histories.<sup>62</sup> Various doses of RU486 were given in one day with a gemeprost vaginal pessary given two days later. Follow-up examinations were scheduled for weeks 1, 2, and 4 after RU486 ingestion. RU486 produced ninety-five complete abortions and five incomplete abortions.<sup>63</sup> The five incomplete abortions required either curettage<sup>64</sup> or the removal by other methods of the "products of conception" at times ranging from 2 1/2 to 7 1/2 weeks after ingestion of RU486.<sup>65</sup> No serious complications were reported during treatment, but nausea occurred in over half of the patients, ten percent had diarrhea or a high degree of pain, and bleeding ranged from 4 to 43 days with a median of twelve days.<sup>66</sup> Drs. Rogers and Baird concluded that the "occur-

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57. *Id.* at 1566-67. *But see* Ulmann, *The Antiprogestins: A Recent Advance in Fertility Regulation*, 27 J. STEROID BIOCHEM. 1009, 1011 (1987). "Mild abdominal pain, nausea/vomiting or tiredness have sometimes been reported when using RU486 . . . but careful analysis of available data suggests that these symptoms are related more to pregnancy interruption than to RU486 itself." *Id.*

58. *Id.* at 1569. One should compare the side effects of RU486 with the dangers of surgical abortion which include the risks of anesthesia, surgical complications, infertility, and psychological after effects. *Id.*

59. *Id.* In this study, "close medical supervision" included having a professional staff member always available for emergencies, the use of vacuum aspiration for failed abortions, and a follow-up visit a month after a complete abortion. *Id.* at 1566.

60. LANCET, *supra* note 45, at 1415-18.

61. A gemeprost vaginal pessary is a vaginal suppository used to aid expulsion of the fetus. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1689 (1967).

62. "Women with evidence of multiple pregnancy or spontaneous abortion were excluded from the study as were those with a history of serious medical disorder and those aged below 17." LANCET, *supra* note 45, at 1415.

63. *Id.* The addition of a small dose of prostaglandin to treatment with RU486 increased the frequency of abortion from 85% as demonstrated in NEW ENG. J., *supra* note 47, and 60% as demonstrated in BRIT. J., *supra* note 46, to 95% as demonstrated in the present study.

64. Curettage is the removal of the fetus by a scraping away of the uterine lining. WILLIAMS OBSTETRICS, *supra* note 11, at 479.

65. LANCET, *supra* note 45, at 1415-16.

66. *Id.* at 1416-17. Only nine patients required intramuscular pain killers, but over half were administered some pain killing drugs. Further, the blood-loss experienced was similar to that of a heavy period. *Id.* at 1417. As stated in note 57, *supra*, it is difficult to assess where complications due to pregnancy termination end and complications due to RU486 begin.

rence of incomplete abortion after medical termination of pregnancy . . . makes careful follow-up a necessity."<sup>67</sup>

Lastly, Dr. Baird teamed with Dr. I.T. Cameron to compare the widely used vacuum aspiration method with the use of RU486 alone and RU486 with a gemeprost vaginal pessary.<sup>68</sup> As in the two previous studies, the women were in early pregnancy, healthy, and between the ages of 17 and 41.<sup>69</sup> RU486 was administered to the patients over four days with one group receiving the gemeprost on day three after RU486 ingestion.<sup>70</sup> Follow-up examinations were scheduled after weeks 1 and 2 with more examinations every two weeks until the next menstruation.<sup>71</sup> Complete abortions occurred in ninety-six percent of those using vacuum aspiration, in ninety-five percent of those given RU486 and gemeprost, and in only sixty percent of those given RU486 alone.<sup>72</sup> The women who ingested RU486 remained hospitalized throughout the treatment.<sup>73</sup>

While the majority of the women studied had no serious complications, one woman had an emergency uterine evacuation due to heavy bleeding after RU486 alone failed to produce a complete abortion, and one woman had to be removed from the study due to RU486 produced side effects.<sup>74</sup> Noting that this method of abortion must be acceptable to both the woman seeking the abortion and the health care provider to be effective,<sup>75</sup> Drs. Baird and Cameron concluded that RU486 with or without a gemeprost vaginal pessary "must be administered under close medical supervision" to detect

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67. *Id.* at 1417-18. Interestingly, despite the admonition that careful follow-up is a "necessity," the authors state that RU486 and prostaglandin abortions should "have particular application in the countries where skilled medical and surgical experience are in short supply." *Id.* at 1418.

68. BRIT. J., *supra* note 46, at 271-76. The study also included abortions by using a vaginal pessary of a prostaglandin analogue alone, but I have not included these results since they do not involve RU486 or its comparison to the common procedure of vacuum aspiration.

69. "Patients with evidence of abnormal pregnancy or spontaneous abortion were excluded from the study, as were women with medical complications such as cardiovascular or pulmonary disease, allergy, or epilepsy." *Id.* at 272.

70. *Id.*

71. *Id.* at 272-73.

72. *Id.* at 273-74.

73. *Id.* at 272. In contrast, the women who aborted by vacuum aspiration were treated on an outpatient basis. *Id.*

74. *Id.* at 274. The specific side effects were not named.

75. *Id.* at 274-75. Comparing the risks of abortion by vacuum aspiration to those of medical treatment involving RU486, it should be noted that in this study vacuum aspiration was completed in one visit to the doctor on an outpatient basis while RU486 abortions occurred over a four day period of hospitalization. *Id.* at 272. Presently, French family planning centers administer RU486 on an outpatient basis. Herman, *The Politics of the Abortion Pill*, Wash. Post, Oct. 3, 1989, at 12 (Health), col. 4.

"treatment failures," to diagnose "ectopic pregnancy,"<sup>76</sup> and "also to assess their [RU486 and gemeprost] effects in delaying subsequent ovulation, which may offer a major restraint to the use of these medical agents on a regular basis for fertility control."<sup>77</sup>

All three of these studies noted the potential benefits of RU486 as a safe and effective abortion procedure when used correctly. Psychologically, many believe RU486 makes for a less stressful abortion decision because women will be able to obtain it from their physician and use it at home.<sup>78</sup> Physically, RU486 is usually experienced like "an abundant painless menstrual period"<sup>79</sup> that "avoids the risks of perforation and scarring" to the uterus<sup>80</sup> as well as the risks of surgical and anaesthetical complications associated with mechanical abortions.<sup>81</sup> RU486 is also less expensive than mechanical abortions.<sup>82</sup>

Despite its potential benefits, RU486 has many potentially serious side effects. Nearly every woman who has taken RU486 experienced prolonged menstrual-like bleeding lasting anywhere from a few days to a few weeks.<sup>83</sup>

76. An ectopic pregnancy is one occurring elsewhere than in the cavity of the uterus. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 721 (1967).

77. A 1987 article in the *Journal of Steroid Biochemistry*, *supra* note 56, at 1011, states that data obtained from more than 1000 women suggests that a limited number of properly administered treatments of RU486 will not impair future fertility, though it may cause a slight delay in ovulation in some women. However, researchers are unsure what permanent effects RU486 will have on a woman's menstrual cycle if it is regularly used as a once-a-month birth control pill. Franklin, *Drugs: Brave New Pill*, HIPPOCRATES 24 (May, 1987) [hereinafter *Brave New Pill*].

78. *French Abortion Pill 90% Effective*, MEDICAL WORLD NEWS, Oct. 12, 1987, at 82 [hereinafter MEDICAL WORLD NEWS]. However, "RU486 is not a do-it-yourself substitute for vacuum aspiration." *Id.* A doctor-patient relationship is necessary to prevent administration to patients whose medical conditions or histories put them at an unacceptable risk of complication, *see, e.g., supra* note 52, which may not be known to the lay patient; to assist in emergency situations associated with RU486 and pregnancy termination in general, *see, e.g., supra* note 59; and to ensure that the pregnancy is terminated and the fetal remains expelled, *see* MEDICAL WORLD NEWS, at 82.

79. NEW ENG. J., *supra* note 47, at 1566.

80. MEDICAL WORLD NEWS, *supra* note 78, at 82.

81. NEW ENG. J., *supra* note 47, at 1569. Despite the potential complications of mechanical abortions, the complete abortion success rate is nearly 100%. BRIT. J., *supra* note 46, at 273 (100% success rate with 28 women receiving vacuum aspiration abortions with no blood transfusions or overnight observation required); Grimes, *Early Abortion with a Single Dose of the Antiprogesterin RU486*, 158 AM. J. OBST. GYN. 1307, 1310 (1988) (the success rate of suction curettage is 99%).

82. MEDICAL WORLD NEWS, *supra* note 78. This may afford additional access to abortion for the impoverished which would not otherwise be available due to allowable prohibitions of state aid for abortion after *Webster*.

83. *Brave New Pill*, *supra* note 77, at 22-23. *See* LANCET, *supra* note 45, at 1416, Table III (average duration of bleeding was 12 days with the range from 4 to 43); BRIT. J., *supra* note 46, at 274 (average duration of bleeding was 11 days with the range from 5 to 34 days for patients



This bleeding occurred whether the fetus was expelled completely or whether unexpelled tissue remained in the uterus.<sup>84</sup> Further, this unexpelled tissue could lead to serious infections.<sup>85</sup> Only a doctor's examination will ensure that all of the fetal tissue has been expelled and the abortion complete.<sup>86</sup> An incomplete abortion could be fatal.<sup>87</sup>

RU486 is potentially hazardous when not used within strict, doctor supervised guidelines<sup>88</sup> because RU486 is not completely understood.<sup>89</sup> Women with less than ideal pregnancies or medical histories, as well as very young women, were excluded from these studies, implying potential complications for these groups.<sup>90</sup> Scientists are also unsure of the efficacy of RU486 after 8 weeks of pregnancy.<sup>91</sup> If RU486 is taken on a monthly basis as an emergency contraceptive backup, its currently tested dosage could seriously disrupt the regularity of the woman's menstrual cycle.<sup>92</sup> Moreover, a woman who chooses to use the drug should be certain that she wants an abortion because if the abortion is incomplete, RU486 could have damaged the fetus.<sup>93</sup>

#### V. RU486, ABORTION LAW, AND A MODEL STATUTE

Given the regulatory deference afforded the states following *Webster*, the issue is whether the states will be able to constitutionally regulate RU486 and restrict a woman's right to abortion by expanding state protection of

treated with RU486 alone or RU486 and a gemeprost pessary); *NEW ENG. J.*, *supra* note 47, at 1566 (average duration of bleeding was 11.6 days with the range from 5 to 17 days).

84. *Brave New Pill*, *supra* note 77, at 24.

85. *Id.*

86. *Id.* See also *MEDICAL WORLD NEWS*, *supra* note 78, at 82.

87. *Brave New Pill*, *supra* note 77, at 24.

88. *Id.*

89. "The mechanism by which RU486 interrupts pregnancy is not clear . . . [and] [t]he reason why an abortion did not occur in these patients [with incomplete abortions] is unknown." *NEW ENG. J.*, *supra* note 47, at 1568.

90. *BRIT. J.*, *supra* note 46, at 272; *LANCET*, *supra* note 45, at 1415-16; *NEW ENG. J.*, *supra* note 47, at 1565. Further, medical studies of the nature conducted with RU486 are often conducted exclusive of minorities and persons with alternate lifestyles, i.e., drug abusers, bisexuals, etc. Therefore, the effects of variations in dietary, drug, and sexual habits of the public at large are not fully known. See, e.g., Rogers, *Federal Spending on AIDS - How Much is Enough?*, 320 *NEW ENG. J. MED.* 1623 (1988) (effect of excluding minorities and persons with alternate lifestyles from AIDS trials).

91. *Success With Abortion Drug Reported*, *Wash. Post*, Dec. 18, 1986, at A19, col. 1. Further, "[t]he average hemorrhage complication rate is 2.3% and usually is associated with pregnancies of more than seven weeks." *MEDICAL WORLD NEWS*, *supra* note 78, at 82.

92. *Brave New Pill*, *supra* note 77, at 24.

93. *Id.* Aside from potential state regulation, the fear of product liability litigation and pro-life boycotts may deter drug companies from marketing RU486 in the United States. See *MEDICAL WORLD NEWS*, *supra* note 78, at 82.

maternal health and potential human life. The possibility exists.<sup>94</sup>

Current medical knowledge states that, first, RU486 should be used only within the first 8 weeks of pregnancy; second, by women with normal pregnancies and medical histories; and third, only under medical supervision. With these precautions, RU486 abortions are generally safe and effective. Outside of these precautions, however, the use of RU486 can be hazardous to the mother and the fetus. Furthermore, because RU486 is self-administered and does not require medical assistance or supervision people may have a tendency to misuse or abuse the drug.

With the *Webster* Court's deference to state "findings" and its belief in compelling state interests in potential human life and maternal health throughout pregnancy,<sup>95</sup> a statute able to be interpreted as one which "permissibly furthers" state interests in maternal health and potential human life is likely to be upheld. Even an abortion restriction that extends into the first trimester might be upheld.<sup>96</sup> The Court was openly hostile to *Roe*, though it did not overrule it. Therefore, given the dicta of *Webster*, the Court may continue to limit *Roe* or possibly even overturn it to uphold a well-written statutory protection of maternal health and potential human life.

Any legislation on this subject should contain certain basic elements. First, the statute should list relevant "findings" on RU486. Because the state's purpose is to protect maternal health and potential human life through restriction of the use of RU486, the medical risks of RU486 should be mentioned, including the potential risk of fetal damage caused by the improper use of RU486, especially after the eighth week of pregnancy. Secondly, based on the aforementioned legislative "findings," the statute should prohibit the use of RU486 after the eighth week of pregnancy. A provision

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94. See, e.g., *Louisiana Lawyers Move to Revive Invalidated Law Banning Abortion*, N.Y. Times, Oct. 7, 1989, § 1, at 9, col. 1; *Anti-abortion Legislation Proposed in Pennsylvania*, Wash. Post, Oct. 4, 1989, at A2 col. 1.

However, political responsibility after *Webster* may cause state legislatures to relax or at least retain present abortion statutes rather than pass more restrictive legislation. See, e.g., *In Florida, Abortion Activists Take the Stage; state senate panel quickly defeats governor's proposed restrictions*, Wash. Post, Oct. 11, 1989, at A1, col. 3; *Abortion's Changing Politics Keys House Turnaround: 206-216 rejection of restrictions on D.C. funding is first setback for abortion foes since 1980*, 47 Cong. Q. 2020 (Aug. 5, 1989); *Limits on Abortion Seem Less Likely*, N.Y. Times, Sept. 29, 1989, at A1, col. 1. Further, state constitutions may prevent state legislatures from passing more restrictive abortion statutes. See, e.g., *Florida Court Rules Against Abortion Curbs*, N.Y. Times, Oct. 6, 1989, at A15, col. 1 (Florida Supreme Court invalidates abortion statute mandating parental consent as a violation of the Florida Constitution).

95. See *supra* note 3.

96. *Roe* holds that there are no compelling state interests greater than the mother's right to an abortion during the first trimester. *Roe v. Wade*, 410 U.S. 113, 159-63 (1973). But *Webster* recognizes a compelling state interest in protecting human life throughout pregnancy. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989).

could be added requiring the doctor, in his or her professional discretion, to perform the tests necessary to determine if the pregnancy is eight weeks or older, and to record his or her findings and determination in the mother's medical record. Thirdly, to further protect maternal health and potential human life, RU486 should be required to be administered at a medical facility under the supervision of a doctor or nurse. Finally, the statute should contain a disclaimer provision stating that this statute is not intended to restrict the performance of abortions necessary to preserve the mother's life or health, or the use of RU486 in non-abortion medical treatments.<sup>97</sup>

Combining the above suggestions, a model statute regulating RU486 may be written as follows:

#### I. Findings on RU486

1. The general assembly of this state finds that:
  - (1) RU486, when administered to terminate a pregnancy, poses significant dangers to maternal health when ingested:
    - (A) after the eighth week of pregnancy; or
    - (B) by a woman with any medical complications or history of medical complications, including but not limited to ectopic or multiple pregnancy; liver, gastro-intestinal, renal, cardiovascular, or pulmonary disease; allergy; or epilepsy; or
    - (C) by a woman less than seventeen years of age; or
    - (D) continuously at intervals of one month or less.
  2. RU486, when used to terminate a pregnancy, poses a significant danger of disability to the fetus when ingested after the eighth week of pregnancy.

#### II. Physician, determination of gestational age, duties

Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of more than eight weeks gestational age, the physician shall first determine if the unborn child is more than eight week gestational age by using the degree of care, skill, and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination the physician shall perform or cause to be performed such examinations and tests as are necessary to make a finding of gestational age, and shall

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97. Studies indicate that RU486 can be used to treat Cushing's syndrome, Nieman, *Successful Treatment of Cushing's Syndrome with the Glucocorticoid Antagonist RU486*, 61 *J. CLIN. ENDOCRINOL. METAB.* 536 (1985), and tumor cells including breast cancer, Bakker, Setyonehan, Portengen, De Jong, Foekens, & Klijn, *Endocrine and Antitumor Effects of Combined Treatment with an Antiprogestin and Antestrogen or Luteinizing Hormone-Releasing Hormone Agonist in Female Rats Mammary Tumors*, 125 *ENDOCRINOLOGY* 1593 (1989).

enter such findings and determination of gestational age in the medical record of the mother.

### III. RU486 prohibition, medical administration

1. No abortion using RU486 shall be performed after the eighth week of pregnancy.
2. RU486, when administered to terminate a pregnancy within the first eight weeks of pregnancy, shall be administered only by a licensed doctor or nurse of this state, and only in a licensed clinic or hospital.

### IV. Protection of maternal life, health

Nothing in this statute shall be interpreted as a restriction on abortion necessary to preserve the life or health of the mother or the use of RU486 in non-abortion medical treatments.

## VI. CONCLUSION

The model state statute above is possible only because the Supreme Court's minority became a majority. With the appointments of Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, the balance in the Court shifted from individual conduct to state regulation, from judicial supervision of state statutes to judicial restraint. There has also been a shift toward the principle of federal non-interference in state legislative pronouncements. Surely when a state exercises its legislative will in a matter concerning the health and safety of its citizens, the Constitution is not likely to constrain state legislation unless that constitutional principle is clear and to the point. *Roe* is suspect because it relies upon privacy and lacks explicitness. Thus, inviting attack by the *Webster* Court, *Roe*'s weaknesses are further exacerbated because it affects health and safety, which are state concerns.

It can be argued that *Webster*'s greatest impact is on minorities and the poor, because it limits access to abortion. Reductions in state aid and state legislated prohibitions on abortion will inject out-of-state travel, money constraints, and politics into a woman's abortion decision. What will amount to inconvenience for middle class Americans will be an obstacle to any abortion for the impoverished. Abortion, the struggle between the rights of mother and the unborn, encompasses the struggle between the wealthy and the underprivileged.

RU486 goes to the heart of the abortion debate: the balance between state legislative action and a woman's right to privacy. Potentially a cheaper and easier abortion procedure when used correctly, RU486 could make abortions available for all women. But RU486 must be used carefully — within the first eight weeks of pregnancy under medical supervision — to protect ma-

ternal health. This could still be left to a physician's discretion if maternal health was the only reason to regulate RU486. But the state has the obligation to protect potential human life as well, whether that protection is against the mother, doctor, or anyone.

*Webster* provides little guidance on how to equitably balance the individual and state rights involved in abortion. Instead, the *Webster* plurality has removed the abortion balance from the courts and returned it to the state legislatures. Direct accountability of state legislatures to their citizens, the hallmark of the democratic political process, will now direct the struggle between mother and fetus, both privileged and impoverished.

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