

April 1990

Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium

Mark E. Chopko

Follow this and additional works at: <http://scholarship.law.campbell.edu/clr>

 Part of the [Constitutional Law Commons](#), [Health Law and Policy Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Mark E. Chopko, *Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium*, 12 CAMPBELL L. REV. 181 (1990).

This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

WEBSTER V. REPRODUCTIVE HEALTH SERVICES: A PATH TO CONSTITUTIONAL EQUILIBRIUM

MARK E. CHOPKO*

I.	INTRODUCTION	181
II.	THE STATE OF THE LAW	182
III.	THE <i>WEBSTER</i> CASE	191
	A. <i>Statute and Litigation Background</i>	191
	B. <i>The Webster Decision</i>	194
	1. <i>Statutory Finding</i>	195
	2. <i>Funding Restrictions</i>	196
	3. <i>Viability Testing</i>	197
	4. <i>Separate Concurrences</i>	199
	5. <i>Dissenting Opinions</i>	200
IV.	THE RELATIONSHIP OF WEBSTER TO THE FUTURE OF <i>ROE</i> <i>v. WADE</i>	202
	A. <i>Substantive Doctrine</i>	203
	B. <i>Policy Considerations</i>	211
V.	DOES <i>ROE v. WADE</i> HAVE A FUTURE?	214
	A. <i>The Nature of Constitutional Change</i>	214
	B. <i>Future Considerations</i>	216
VI.	CONCLUSION	219

I. INTRODUCTION

January 22, 1973, is commemorated by millions who march, pray, fast, or debate in testimony against a Supreme Court decision. On this date the Supreme Court of the United States swept away the abortion laws of every state in the United States and made abortion not only legal, but also a matter of fundamental constitutional principle.¹ On July 3, 1989, the Supreme Court de-

* The author is General Counsel of the National Conference of Catholic Bishops and the United States Catholic Conference. He gratefully acknowledges the assistance of Helen M. Alvare in the preparation of this article.

1. *Roe v. Wade*, 410 U.S. 113 (1973)(holding that a decision whether to ter-

cided a second case, *Webster v. Reproductive Health Services*,² and for the first time in sixteen years, upheld a regulatory restriction aimed at abortion, and suggested the Court had gone too far. Whether other millions will come to mark July 3 as the end of *Roe v. Wade* in the same way that millions remember its beginnings will depend on whether this case is a mere minor perturbation in a path of abortion on demand, or actually turned the Court in a new constitutional direction. The answers will start to appear in the next series of cases, four appeals consolidated into the three cases in which the Court will hear argument this coming Term.³

This Article is intended as part of a symposium and a debate on substantive due process and the decision in *Webster v. Reproductive Health Services*.⁴ This writer, although here a commentator on the law, does have an opinion on the ultimate question: *Roe v. Wade* was wrongly decided. As an advocate, this writer addresses the Supreme Court of the United States in briefs *amicus curiae* for his clients, suggesting error in the initial decision and the means to correct it. In this particular presentation, this writer examines the state of the abortion jurisprudence after *Roe v. Wade* that led to *Webster*, a review of and commentary on *Webster*, the substantive and political aspects of that decision, and the ways in which constitutional equilibrium might be restored. Although *Roe v. Wade* was a serious substantive and policy error, this writer believes that the Court is not likely to admit that it made a mistake of constitutional proportions. Over time, however, the Court will compress the decisional freedom that it allowed in *Roe v. Wade* by expanding the role of the states, and choosing different language to describe the abortion decision and the nature of its "constitutional" basis. Each of these points is illustrated and foreshadowed to a certain extent by the Supreme Court's decision in *Webster*.

II. THE STATE OF THE LAW

In 1973, the Supreme Court opened the door to legalized abor-

minate or continue a pregnancy was protected under the Constitution).

2. *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989), *aff'g in part*, 851 F.2d 1071 (8th Cir. 1988).

3. *Turnock v. Ragsdale*, *juris. postponed*, 109 S. Ct. 3239 (U.S. July 3, 1989) (No. 88-790); *Ohio v. Akron Center for Reproductive Health*, *juris. noted*, 109 S. Ct. 3239 (U.S. July 3, 1989) (No. 88-805); *Hodgson v. Minnesota*, *cert. granted*, 109 S. Ct. 3240 (U.S. July 3, 1989) (No. 88-1125 consolidated with No. 88-1309).

4. 109 S. Ct. 3040 (1989).

tion, virtually on demand.⁵ By its language, however, *Roe v. Wade* guaranteed only a limited right, a right of a woman to choose whether or not to terminate or continue a pregnancy without undue interference by the state.⁶ In the precise text, the Supreme Court held that “a state criminal abortion statute . . . that excepts . . . only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.”⁷ The constitutional underpinning of the Court’s holding is that there exists a “right of privacy . . . , broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁸ Although it located the right in a constitutional amendment, the Court nevertheless concluded “this right is not unqualified and must be considered against important state interests in regulation.”⁹

In *Roe*, the Supreme Court identified three distinct interests that could create legitimate grounds for “due interference” in a woman’s abortion decision by the state: an interest in maternal health, an interest in viable preborn life, and an interest in setting and maintaining medical standards.¹⁰ The Court demarcated the pregnancy into trimesters, and related the “interests” to various trimesters. In the first trimester, no state interest was recognized as compelling.¹¹ At the beginning of the second trimester, the

5. Except for funding restrictions (*Harris v. McRae*, 448 U.S. 297 (1980)) and limited parental involvement (*H.L. v. Matheson*, 450 U.S. 398 (1981)), the Supreme Court has generally resisted state legislative attempts at substantive regulation. For example, the Court allows for “informed consent” in principle but has refused to permit legislatures to determine when consent is truly informed. Compare *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 67 and n.8 (1976) with *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 444-46 (1983).

6. See description in *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) (restricting state funds for nontherapeutic abortions).

7. *Roe v. Wade*, 410 U.S. 113, 164 (1973). Scholarly treatises and articles analyze *Roe* in a way that cannot be duplicated here. J. NOONAN, *A PRIVATE CHOICE* (1979); Bopp and Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181 (1989) [hereinafter, Bopp & Coleson].

8. *Roe*, 410 U.S. at 153. Because of this holding, reversal of *Roe v. Wade*, notwithstanding popular opinion, means deconstitutionalizing abortion. Simply returning the issue to state regulation does not reverse *Roe*.

9. *Id.* at 154.

10. *Id.* at 154, 163-64.

11. *Id.* at 163. The danger of this statement was soon apparent as unlicensed

Court stated that the state might have a compelling interest in protecting maternal health.¹² At the beginning of the third trimester, the interest in preborn life became compelling because it was understood that at that point the unborn child became capable of living outside the womb. It is now recognized that this line-drawing was entirely arbitrary on the part of the Court. Papers found in the archival works of Justice Douglas include exchanges of correspondence which demonstrate that this was an exercise of raw judicial power based on the Court's own assessment of what was fair.¹³

Perhaps the same perception of "what was fair" undergirds the entire decision. There is no attempt in the decision to examine rigorously the roots of the privacy doctrine, nor any analytical precision in how the privacy doctrine extended to this particular exercise of a choice.¹⁴ Rather, it is apparent the Court was exercising its choices based entirely on its view that somehow it was protecting the woman, perhaps an unwed or poor woman, against the natural consequences of her actions:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to

individuals began to perform abortions. A state was then allowed some minimal medical regulation. *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975)(*per curiam*).

12. The Court offered as examples licensing of personnel (qualifications, etc.) and facilities. *Roe*, 410 U.S. at 163.

13. *Washington Post*, Jan. 22, 1989, Outlook Section at 1.

14. The Court traces a number of privacy decisions in a line from *Union Pacific Ry. v. Botsford*, 141 U.S. 250 (1891) (which excepted abortion) to *Eisenstadt v. Baird*, 405 U.S. 438 (1972). It notes each one with an appropriate phrase, and proceeds to locate a "right of privacy" in abortion, almost with a shrug, in the Fourteenth Amendment or the Ninth Amendment. *Roe*, 410 U.S. at 153-54. The Court does not seek to place its analysis even within a *Palko v. Connecticut* analysis (discussed *infra* in Part 4) to determine if a right is fundamental. One need only contrast the treatment in *Roe* with *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986) or *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2340-45 (1989), in which the Court exhibited rigor in analysis and caution in its extension of constitutional protection, to see the analytical difference.

care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹⁵

These "detriments" are the precise underpinnings for the announced holding that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁶ Chief Justice Burger concurred in the result in *Roe v. Wade*. He did so because he did not view the Court's holdings as having "sweeping consequences".¹⁷ In his view, "the Court today rejects any claim that the Constitution requires abortions on demand."¹⁸ Of equal or greater importance is the concurring opinion of Justice Douglas. Justice Douglas examined the nature of the privacy doctrine, which he conceded was not found in

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

16. *Id.* When the Court thus speculated on the potential problems caused by denying women the discretion to abort their unborn children, however, it necessarily did so without any knowledge of how abortion might or might not alleviate the enumerated problems. It is now apparent that constitutional abortion did not solve the problems its supporters promised it would, but it has created new disturbing ones. Each is a matter of record and far beyond this discussion to explain in detail.

It is precisely the prevalence of abortion with its attendant principle of unlimited autonomy, that has led to a social ethic and atmosphere which virtually compels a woman to favor abortion if having a child might cause her, the father, or her family some present inconvenience. As one feminist author has observed, unlimited autonomy is deceptive and even burdensome:

In gaining the choice to control the quality of our children, we may rapidly lose the choice *not* to control the quality, the choice of simply accepting them as they are. The new reproductive technology is offered to us in terms of expanding choices. But it is always true that while new technology opens up some choices, it closes down others. B. Rothman, *The Tentative Pregnancy* 11 (1986) (emphasis added).

Recent statistics reveal how this abortion ethic discourages choosing to give birth. In 1988, the Alan Guttmacher Institute reported that the overwhelming majority of women abort for discretionary, social reasons unrelated to health problems. Approximately 76% of the women interviewed cited worries about how a baby could interfere with work, school or other responsibilities; 50% said they did not want single parenthood or had relationship problems; 31% said they were not ready for the responsibility; and 13% said the fetus had a possible health problem. Of the 7% citing their own health problems, only half said a doctor told them their condition might be made worse by remaining pregnant. Torres & Forrest, "Why Do Women Have Abortions?" 20 *Family Planning Perspective* 169, 170 (1988).

17. *Roe*, 410 U.S. at 208 (Burger, C.J., concurring).

18. *Id.* Although the statement about the Constitution is undoubtedly true, the Court moved quickly to gut the Chief Justice's statement.

the Bill of Rights but which he asserted the Court's "decisions have recognized . . . as one of the fundamental values those amendments were designed to protect."¹⁹ He distinguished between different types of "private" interests, and corresponding levels of constitutional protection. Those he termed "autonomous," of which he would permit no exception, were those involving only the "development and expression of one's intellect, interests, tastes, and personality."²⁰ The other aspects of privacy, including choices regarding marriage and the procreation of children, the freedom to care for one's health and person, etc. admitted of exceptions in favor of certain state interests. These interests included the protection of the public health and safety and the protection of patients from the unscrupulous.²¹

From the small beginnings of *Roe v. Wade* grew a rather convoluted and detailed, but essentially "legislative" body of judge-made law. In *Roe v. Wade* the Court reserved a number of issues including the rights of spouses, parents, and fathers.²² Three years after *Roe* in *Planned Parenthood of Central Missouri v. Danforth*, the Court indicated that with very few exceptions, those persons had no rights in the "medical decision" made between the woman and her physician.²³ During this period of time the Court continued to explain that the state had certain interests and indeed upheld the bare requirement that there should be informed consent.²⁴ But still the Court declined to uphold any substantive regulation bearing on the abortion decision. If anything, the Court was mov-

19. *Id.* at 209 n.2 (Douglas, J., concurring).

20. *Id.* at 211.

21. *Id.* at 215-16.

22. *Id.* at 165 n.67.

23. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976.) In 1976, when the issue was presented, for example, the Court concluded that a child had at least some protected privacy interest that precluded an absolute decision on her behalf by her parents, backed by the authority of the law. Although the Court discussed the rights of minors to seek and obtain abortions without regard to the views of their parents, the Court's holding does not use language that reflects the adolescent in her precise status, namely, an unemancipated minor whose most fundamental relationship is not with her physician but with her parents. Instead, it created a conflict between a "patient" (the adolescent) and a "third party" (her parents) and resolved the supposed struggle in favor of the "decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reasons for withholding [parental] consent." *Id.* (emphasis added).

24. *Id.* at 67 and n.8; see *supra* note 5.

ing swiftly, in the other direction, away from permitting regulation. Through a series of cases in the late 1970's, notably *Bellotti v. Baird*²⁵ and *Colautti v. Franklin*,²⁶ the Court diminished the reach of the state's protection and outlined the details of particular kinds of regulations that might be upheld. During this period of time the Court only examined two of the three interests presented in *Roe*, maternal health and viable preborn life. The Court made no independent assessment of the interest in setting and maintaining adequate medical standards and practices. The other two rapidly diminished.

By 1983, a state's medical regulatory interest had disappeared altogether from the case law as an independent reason. It was lumped together with the protection of maternal health, finally, in *Akron v. Akron Center for Reproductive Health*.²⁷ In that case, decided along with two others,²⁸ the Court rejected vehemently the first attacks on *Roe v. Wade* delivered by now a new member of the Court. Justice O'Connor, in that case, dissented rather vigorously from the holding and indicated her willingness both to reconsider *Roe v. Wade* in an appropriate case and to expand the interest of the state's regulation beyond the narrow and artificial confines established in *Roe*.²⁹ It had long been noted, and became more evident in the 1983 decisions, that the Supreme Court was rapidly distinguishing abortion from other aspects of personal privacy and giving it greater protection. The normal principles of judicial review simply did not apply.³⁰

One example illustrates the point. Although the Supreme Court has called the abortion decision "in all its aspects. . . a medical decision,"³¹ it has abandoned any attempt to refine the states' interest in maintaining adequate medical standards. Similarly, although it has also recognized that the abortion decision differs fundamentally from other medical decisions because "no other proce-

25. 443 U.S. 622 (1979).

26. 439 U.S. 379 (1979).

27. 462 U.S. 416, 428-29 (1983).

28. *Planned Parenthood Ass'n. v. Ashcroft*, 462 U.S. 476 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

29. *Akron*, 462 U.S. at 452-53, 461 (O'Connor, J., dissenting).

30. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting); *Bopp & Coleson*, *supra* note 7 at 224-34, 349-50.

31. *Roe v. Wade*, 410 U.S. 113, 166 (1973).

dure involves the purposeful termination of potential life,"³² it has steadfastly refused to apply normative principles of judicial review to state legislation regulating this medical decision.³³ Instead, it has protected the abortion decision to a greater extent than other medical decisions even though the same kind of physician-patient relationship was arguably implicated.³⁴ By 1986, a now 5-member majority of the Supreme Court, in *Thornburgh v. American College of Obstetricians and Gynecologists*,³⁵ had seemingly calcified the doctrinal core of *Roe v. Wade* in frustration over the legislative efforts of states to regulate abortion. In its Abortion Control Act,³⁶ the Commonwealth of Pennsylvania directed that those who would provide abortion services must facilitate informed consent for patients seeking abortion,³⁷ adopt a series of medical practices to enhance survival rates for unborn children in late-term abortions,³⁸

32. *Harris v. McRae*, 448 U.S. 297, 325 (1980). See *Roe v. Wade*, 410 U.S. at 159.

33. Regulation of the medical profession generally justifies reasonable supervision of the physician-patient relationship throughout pregnancy to assure that professional standards remain consistently high. See, e.g., *Connecticut v. Menillo*, 423 U.S. 9 (1975) (upholding physician licensing requirements); *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 67 (upholding bare informed consent requirement).

34. Notwithstanding the absence of direction from the Court on the issue of medical regulation and medical interests, there has been steady pressure on medical professionals to conform their medical practice to the prevailing law of the land concerning liberalized abortion. From the early 1970's, courts were asked to expose medical facilities to lawsuits for failure to perform sterilizations or abortions or offer related services. E.g., *Taylor v. St. Vincent Hosp.*, 369 F. Supp. 948, 950 (D. Mont. 1973) (reversing prior decision); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974). Most efforts were rejected, and in 1973, Congress responded by amending Title X of the Public Health Services Act, enacting a "Conscience Clause" which provides that no person or facility should be discriminated against for either performing or assisting or refusing to perform or assist abortions. 42 U.S.C. § 300a-7 (1982). Institutional conscience clauses have been the subject of particular scrutiny. *Pilpel & Patton, Abortion, Conscience, and the Constitution*, 6 COLUM. HUM. RTS. L. REV. 279 (1974). The battles still continue and have shifted to accreditation of obstetrical units and grant or denial of staff privileges for abortion practitioners. Consistent with this pressure, there has been expansion of the rights of women to demand abortions generally in society and, notwithstanding the language in *Roe v. Wade* describing state interests, a diminution of the ability of the states to regulate.

35. 476 U.S. 747 (1986).

36. 1982 Pa. Laws, Act No. 138, 18 PA. CONS. STAT. § 3201, *et seq.*

37. 18 PA. CONS. STAT. §§ 3205, 3208.

38. *Id.* § 3210(b),(c); §3211(a).

provide adequate reports and public records,³⁹ and similar measures. In this case, a bare majority exhibited exasperation at this latest in a series of state attempts to regulate different aspects of the abortion decision. For its part, the majority completed a further expansion of *Roe v. Wade*, and, at the same time, drove off the Chief Justice in dissent. Three of the four dissenters called for reconsideration of *Roe v. Wade*. Perhaps because the Solicitor General urged reversal of *Roe v. Wade*,⁴⁰ or perhaps because the new Reagan appointee was making her presence felt, the majority opinion is fascinating social, if not legal, reading.

The majority began by noting that, since *Roe v. Wade*, "States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice."⁴¹ The majority viewed state regulation *not* under the rubric of state protection of maternal health or the vindication of a state interest in life, but rather a legislative stick by which "to intimidate women into continuing pregnancies."⁴² *Seriatim* the Court then rejected each of the Pennsylvania abortion statutes. It found that each of these mechanisms struck an impermissible balance in favor of the continuation of pregnancy and against the exercise of the constitutionally protected choice of abortion. The depth of the division on the Court is indicated in a passage that might someday be observed to be the "highwater mark" of expansive abortion decision making. The Court majority indicated that it was somehow protecting a "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government."⁴³ And, for the first time, the majority indicated how far it had come from the *Roe v. Wade* decision in 1973, by describing abortion as a decision that was in a class with those that were "personal and intimate" and "basic to individual dignity and *autonomy*."⁴⁴ A majority had now lifted abortion from among those rights which were by their nature limited and balanced against other rights, interests, and concerns,

39. *Id.* § 3214.

40. The Solicitor General's highly publicized brief was given scant attention by the Court, which denied his request for divided argument. *Thornburg v. Am. College of Obstetricians and Gynecologists*, 473 U.S. 931, 932 (1985).

41. *Thornburgh*, 476 U.S. at 759.

42. *Id.*

43. *Id.* at 772.

44. *Id.* (emphasis added). Contrast this language with the discussion in Justice Douglas' concurring opinion in *Roe*. 410 U.S. at 210-12 *supra* note 20.

into the class of decisions, such as the choice of formation of one's personality and taste, which were absolute and not only beyond regulation but seemingly beyond question. The degree of hostility in the majority opinion was mirrored in the three dissenting opinions. Chief Justice Burger and Justice White, in their dissents, criticized bitterly the direction of the caselaw since *Roe v. Wade*. For example, both offered opinions that states were being denied their power, however limited, to regulate the medical transaction involved in abortion, *and* that this same power is exercised routinely in other areas of medical practice.⁴⁵ Both recognized that states are perhaps misled to believe they can play any meaningful regulatory role under current law. A significant development in *Thornburgh* was that, for the first time, there was a sense in some opinions that perhaps the majority did not mean what it said in *Roe*. Chief Justice Burger, for example, stated that, "We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice."⁴⁶ Of particular interest was his further statement: "Undoubtedly, the Pennsylvania Legislature added the [post-viability] requirement on the mistaken assumption that the Court *meant what it said in Roe* concerning the "compelling interest" of the

45. States routinely have legislated in the area of physician-patient relations in nonabortion matters. For example, New York requires that information be provided (a) to pregnant women about the potential adverse impact of medication to be used during pregnancy and in delivery (N.Y. Public Health Law § 2503 (McKinney 1984)), (b) to the public and health care providers on the availability of breast milk for infant nutrition (*Id.* § 2505), and (c) to parents about metabolic disorders in their newborns (*Id.* § 2500-a). Florida has enacted legislation designed to guard against too frequent use of electroconvulsive (shock) therapy by adding new consent requirements (Fla. Stat. Ann. (Professions Law), § 458.325 (West 1984)). Several states have enacted laws requiring that victims of breast cancer give adequately informed consent to a course of treatment before it is begun. Some simply require evidence of written consent but others require that physicians provide oral or written summaries of the various alternatives prior to assent to any particular procedure. Va. Code §54-325.2-2 (1984 Supp.); Ga. Code Ann. § 43-34-21(g) (1984). These are but a few examples of measures that affect directly the physician-patient relationship at its most elemental level by shaping the content of their dialogue.

46. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 783-84 (1986) (Burger, C.J., dissenting). These words are in sharp contrast to his concurring opinion in *Roe* 410 U.S. at 208, text accompanying notes 17-18, *supra*.

states in potential life after viability."⁴⁷ Justice O'Connor was equally pointed:

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. . . . Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however long-standing or deeply felt, prevent it from even-handedly applying uncontroversial legal doctrines to cases that come before it. . . .⁴⁸

One major consequence of *Thornburgh* is that it further constricted the ability of the legislatures to make and enforce public policy in this area. As Justice O'Connor intimated in her dissenting opinion, after *Thornburgh*, no regulation was thought to be safe from the overreaching hands of the federal judiciary.⁴⁹

III. THE *Webster* CASE.

A. *Statute and Litigation Background*

In 1986, the Missouri Legislature passed a statute which contained a number of provisions for the regulation of medical practices related to abortion. Among these provisions were broad restrictions on the expenditure of state funds, the availability of state facilities, and the participation or assistance of state employees in the performance, encouragement, or counseling of abortions.⁵⁰ Further, the state attempted to protect viable unborn chil-

47. *Thornburgh*, 476 U.S. at 784 (emphasis added).

48. *Id.* at 814 (O'Connor, J., dissenting).

49. *Id.* A thorough discussion of the *Thornburgh* case and its impact on litigation strategy and tactics is found in *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts*, Part IV, at 245 (D. Horan, E. Grant, P. Cunningham eds., 1987).

50. MO. ANN. STAT. §§ 188.205, .210, .215 (Vernon 1983 & 1989 Supp.)

§ 188.205: Use of public funds prohibited

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

dren and directed physicians to perform certain tests to ascertain the gestational age of the child.⁵¹ The statute also contained a broad hospitalization requirement for later abortions and provisions on informed consent.⁵² Finally, the statute contained a legislative finding which would not be binding on any matter related to abortion (until the Supreme Court changed or overruled *Roe*), but could now be effective in establishing public policy in other areas, that "the life of each human being begins at conception."⁵³

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 person 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.

§ 188.215. Use of public facilities prohibited

It shall be unlawful for any public facility to be used 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.

51. *Id.* § 188.029:

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.

52. *Id.* §§ 188.025 (hospitalization) & .039 (informed consent). The informed consent provision was not raised on any appeal. The hospitalization provision was likewise invalidated but not appealed beyond the Circuit Court.

53. *Id.* § 1.205:

1. The general assembly of this state finds that:
(1) The life of each human being begins at conception;
(2) Unborn children have protectable interests in life, health, and well-being; . . .

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.

A challenge to the statute was filed almost immediately in the United States District Court for the Western District of Missouri. In 1987, Chief Judge Scott O. Wright of the district court declared many portions of the Act unconstitutional and enjoined their enforcement.⁵⁴ The state appealed to the United States Court of Appeals for the Eighth Circuit. On July 13, 1988, with one exception, the court of appeals confirmed the district court's earlier opinion.⁵⁵ The court broadly invalidated the hospitalization requirement, the tests prescribed in the statute to determine viability, the legislative finding that human life begins at conception, and a significant part of the restrictions on the use of funds, employees, and facilities.⁵⁶ One judge dissented from the decision involving the legislative finding that human life begins at conception. In that judge's opinion, the statutory finding had no restrictive effect on abortion and, therefore, was constitutional. He found that the majority's broader view of the statute emasculated the state's ability to legislate in nonabortion areas involving protection of the unborn, for example, in tort law, criminal law, and related statutes.⁵⁷

In October, 1988, the state applied for Supreme Court review. In its Jurisdictional Statement for the Supreme Court, the state listed seven questions, the first six of which dealt with the substance of the Missouri statute. The seventh question asked "whether the *Roe v. Wade*. . . trimester approach for selecting the test for which state regulation of abortion services is reviewed should be reconsidered and discarded in favor of a rational basis test."⁵⁸ Later in the Jurisdictional Statement, Missouri made clear that the issue presented was an alternative basis for review. In other words, "If Missouri's carefully drafted statutory provisions are unconstitutional under *Roe v. Wade* and its progeny as the court below maintains, [Missouri] submit[s] that *Roe v. Wade*

54. *Reproductive Health Servs. v. Webster*, 662 F. Supp. 407 (W.D.Mo. 1987); see Note, 26 J. FAM.L. 835 (1987-88).

55. 851 F.2d 1071 (8th Cir. 1988).

56. The Court of Appeals did uphold the restriction in the statute limiting the expenditure of public funds for performance of abortion but rejected the other spending limitations. *Id.* at 1083-84.

57. *Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1085 (1988) (Arnold, J., dissenting). His view accords with other cases which have upheld similar language that is not applied substantively in abortion regulation. Compare e.g., *Margaret S. v. Treen*, 597 F.Supp. 636, 661 (E.D. La. 1985), with *Doe v. Israel*, 482 F.2d 156, 159 (1st Cir. 1973).

58. *Webster v. Reproductive Health Servs.*, Jurisdictional Statement (filed U.S. October 10, 1988)(No. 88-605).

should itself be reconsidered."⁵⁹ For the first time in a number of years, the Supreme Court was confronted with a case presenting, however indirectly, the continued utility of a core doctrine in *Roe v. Wade*.⁶⁰

B. *The Webster Decision*

The *Webster* decision is a subtle and complex mixture of statutory provisions made necessary both by the nature of the Court's jurisprudence as described above⁶¹ and also by the nature of the statute itself. For example, the funding statutes consist of three provisions: a ban on the expenditure of state funds, a ban on the use of state facilities, and a ban on the use of state employees for the performance of abortions.⁶² The lower courts reviewed the statutes as embodying separate subsections: both a prohibition on the expenditure of funds as well as a potentially more substantive directive governing the use of employees, facilities, and space.⁶³ However, by the time the case arrived before the Supreme Court, the narrow and precise issues outlined by the statute and the surgical nature of its proposed cut into the fabric of *Roe v. Wade* was apparent. Of the twenty possible provisions and portions of provisions that could have been on judicial review in the statute, only five were placed on the Supreme Court's docket.⁶⁴

A 5-4 majority upheld those provisions it found still legitimately at issue.⁶⁵ The most significant aspect of the case for politi-

59. Jurisdictional Statement at 11.

60. It must be remembered that overturning *Roe v. Wade* requires the deconstitutionalization of abortion. Abandoning a trimester analysis or expanding the role of states does not necessarily overrule *Roe*.

61. Set forth in Section (1).

62. See *supra*, note 50.

63. *Reproductive Health Serv. v. Webster*, 851 F.2d 1071, 1077-84 (8th Cir. 1988).

64. MO. ANN. STAT. §§ 1.205, 188.029, 188.205, 188.210, 188.215 (Vernon 1986).

65. The *Webster* case attracted the largest number of *amicus curiae* briefs in any docket to date. Most sensed that this case would allow the Court to overrule the constitutional case of *Roe v. Wade* and so attacked it directly on privacy (United States Catholic Conference), Tenth Amendment (Certain State Legislators), personhood of the unborn (11 briefs, including the Attorney General of Louisiana), separation of powers (13 briefs including a portion of the United States of America's), and other grounds. Others delineated the numerous historical and jurisprudential errors (e.g., Association for Public Justice). On the other side, many urged no retreat from *Roe v. Wade* for either social (Assoc. of Repro-

cal observers of the Court was that *only* four Justices demanded reconsideration of *Roe v. Wade*, if not in that case, then soon, beginning with the abandonment of the trimester mode of analysis. Justice Kennedy, whom some observers thought supplied the critical fifth vote to overturn *Roe*, turned out to be the fourth vote in this case. The fifth vote remains with Justice O'Connor who concurred in the decision and on the critical viability testing provision declined to follow the plurality's lead and rule that *Roe v. Wade* be narrowed. Each portion of the statute will be examined briefly in turn for the disposition of the Court.

1. Statutory Finding

The Missouri legislature found, for purposes of its public policy, that "the life of each human being begins at conception."⁶⁶ Finding that this prelude to the Missouri code adopted a theory of when life began, contrary to the Court's decision in *Roe v. Wade*, the lower courts invalidated it but not without dissent.⁶⁷ The Supreme Court reversed. Speaking for a majority on this point, Chief Justice Rehnquist announced that the question whether the preamble embodied a theory of life that infringed a constitutional right was not yet appropriate for federal court adjudication.⁶⁸ Missouri had claimed the statute only represented a statement of legislative purpose and policy. It would be an aid in the construction of other statutes⁶⁹ but was not intended to have any substantive effect with respect to abortion unless and until the Supreme Court altered the body of law it launched with *Roe v. Wade*.⁷⁰ The Supreme Court held that this announcement of legislative policy would be presumptively valid unless and until it had been applied in an unconstitutional manner. Plainly a state has the authority to announce its public policy as it might affect various areas of the law.⁷¹ The plurality exercised considerable restraint in resisting the pleas of many to uphold the legislative finding expressly as an ex-

ductive Health Professionals, 281 American Historians, American Psychological Assoc.) or jurisprudential reasons (AMA, A Group of American Law Professors, American Jewish Congress, *et al.*).

66. *See supra* note 53.

67. *Webster*, 851 F.2d at 1075-76; *but see Webster*, 851 F.2d at 1085.

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

69. *Id.* at 3049, 3050 n.5. *See Webster*, 851 F.2d at 1085 (Arnold, J., dissenting).

70. The plain language of the preamble so provided. *See supra* note 53.

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

ercise of state legislative authority in the abortion area.

An interesting facet of this part of the majority opinion was the manner in which the plurality treated seemingly conflicting language in *Akron*. The majority called that language *dictum* and indicated that it should not have been construed so broadly in the context of that decision.⁷² Perhaps, to a certain extent, this is a linguistic tool used by the plurality to signal both its willingness to go further *and* its restraint. As a matter of substantive law, however, there was no basis on which to make an accurate prediction, since the Court declined to rule affirmatively on this portion of the Missouri statute. By declaring that such statutes are presumptively valid, in effect, the Court frees legislatures to explore other ways in which a state's public policy can be expressed in statutory language that might bear on ultimate abortion decisions at some point in the future. By declining to rule affirmatively, the Court leaves for another day whether legislatures are bound by some constitutional limits in the exercise of legislative discretion.

2. Funding Restrictions

The Court next turned to the restrictions on the use of public funds, employees, and facilities. In reviewing three of the six restrictions on Missouri public resources, the majority found little in dispute. Lumping two provisions of the Missouri law together governing restrictions on whether public employees or public facilities may perform or assist in abortions, the Court apparently had little trouble finding these were valid under a straight-forward extension of *Harris v. McRae*.⁷³ The Court indicated that one has many affirmative rights but no correlative right to have the government fund their exercise.⁷⁴ Thus, the Court found that if one had chosen either a doctor who is a public employee or a public hospital for abortion services, and if one were now precluded from exercising that choice through operation of the Missouri statute, it was nothing more than a natural consequence of the choice. The majority stated:

Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hos-

72. *Id.* (stating the Court of Appeals "misconceived the meaning of the *Akron dictum* . . .").

73. *Webster*, 109 S. Ct. at 3051-53.

74. *Id.*

pitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital.⁷⁵

The Court distinguished the situations in which all of the health care in a particular area was operated by the State. The Court believed that this would present an entirely different question. Similarly, the Court expressed some disapproval with the idea that staff privileges could now be denied doctors who perform private abortions.⁷⁶ Neither situation was presented in this case.

With respect to the restrictions on the use of public money for counseling or encouraging abortions, the Attorney General of Missouri avoided a potential problem in his appeal and then in his approach to oral argument. On appeal, Missouri raised the question only as a ban on use of public money. In argument, the Attorney General of Missouri indicated that the statute *only* acted as a restriction on the state financial officers who would not reimburse expenses for counseling or encouraging abortions.⁷⁷ It was not, according to the Attorney General, a restriction on the rights or obligations of employees—public or private—to encourage or counsel abortions.⁷⁸ In this set of circumstances, the plaintiffs withdrew their challenge to that portion of the statute. Thus, the challenge to these provisions of the statute was moot and the Court ordered that count of the complaint dismissed with prejudice.⁷⁹ One can only speculate whether the rendering of this section of the statute moot and the subsequent dismissal with prejudice will have any preclusive effect on either the state's efforts to extend this portion of the statute in the future or the plaintiffs' ability to revisit a challenge in such circumstances.

3. Viability Testing

With respect to viability testing, the majority that had held up through previous aspects of the statute now splintered. On this point, the majority was divided and felt the sting of a sharp dissent. As indicated above, the viability testing statute applied at twenty weeks and required physicians, according to their judg-

75. *Id.* at 3052.

76. *Id.* at 3052 n.8.

77. *See Webster*, 109 S. Ct. at 3053.

78. *Id.* Transcript of Oral Argument, at 4.

79. *Id.* On this point, the Court was unanimous. *Id.* at 3069 n.1 (Blackmun, J., concurring/dissenting in part).

ment,⁸⁰ to determine whether and to what extent an unborn child would be viable, thus triggering additional precautions and restrictions. Writing for three Justices, Justices White and Kennedy and himself, the Chief Justice upheld the viability testing statute on both a factual and a legal basis. As a factual matter, the Chief Justice noted a medical finding in the record that, although viability was thought to exist around twenty-four weeks, there was a four-week uncertainty in such a determination.⁸¹ Thus, in order to give complete protection to Missouri's interest in the life of the unborn child, the statute required the testing to begin at twenty weeks. On that basis, the statute could have been upheld, as indeed Justice O'Connor intimated in her concurring opinion.⁸²

However, the plurality at this point invited conflict with and reconsideration of the trimester approach in *Roe v. Wade*, as indeed had been urged by the Missouri Attorney General as an alternative basis. Although the plurality indicated the statute allowed for complete physician discretion, it suggested that the statute was arguably invalid under *Colautti* and *Akron*.⁸³ The plurality found the nub of the dispute not so much a statutory as a jurisprudential problem, with the expansion of *Roe v. Wade* seriatim through *Colautti* and *Akron* "making constitutional law in this area a virtual Procrustean bed."⁸⁴ The plurality pointedly condemned *Roe v. Wade*:

The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.⁸⁵

Thus, the plurality expressly narrowed the trimester approach outlined in *Roe v. Wade* as expanded in *Colautti* and *Akron* by suggesting the abandonment of the trimester approach. In the view of

80. The Attorney General of Missouri argued that the statute preserved physician judgment as to the tests necessary and as to the standard of care, an argument accepted by the majority. Transcript of Oral Argument, at 14-18.

81. *Id.* at 3055.

82. *Id.* at 3060 (O'Connor, J., concurring).

83. *Id.* at 3056.

84. *Id.*

85. *Id.* at 3056-57 (footnote omitted).

the plurality, one could not allow the State an interest in unborn life and then deny it by restricting the State's reasonably designed means to achieve it. In the view of the plurality, the State should be allowed to protect potential life throughout pregnancy.⁸⁶

4. *Separate Concurrences*

If *Webster* were the only basis for predicting whether Justice O'Connor agreed with the above proposition, the answer would be debatable. She had previously expressed the view that a state's interest in pregnancy should not be artificially confined by some concept of "trimesters" which is not found in the Constitution.⁸⁷ Nonetheless, when the question was actually placed before her in *Webster*, she declined to rule, finding that there would be no need to make such a ruling in this case. She found the viability testing approach to be valid under the factual and medical distinction offered by the plurality in part of its own opinion.⁸⁸ Although she still was of the opinion that the trimester framework remained "problematic,"⁸⁹ she believed there would be time to review it in an appropriate case and "to do so carefully."⁹⁰ What she meant by this passage remains to be seen. Apparently, however, concern about whether it represented a retreat from her prior views attracted the attention of Justice Scalia who was anything but charitable to Justice O'Connor in his concurring opinion. He agreed with the dissent that the plurality effectively overruled *Roe* and indicated that he would do so "explicitly."⁹¹ With respect to Justice O'Connor, he noted that although the Court's policy is not to formulate constitutional rules broader than required by the precise facts of the case, there were good cause exceptions that were espe-

86. *Id.* at 3057. The plurality distinguished the Missouri statute from the Texas criminal abortion statute invalidated in *Roe v. Wade* and expressly declined to revisit the holding in *Roe* that the Texas statute conflicted with the Due Process Clause. *Id.* at 3058. See note 6, *supra*, and accompanying text.

87. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986), 476 U.S. at 828 (O'Connor, J., dissenting); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

88. *Webster*, 109 S.Ct. at 3060 (O'Connor, J., concurring). The precision with which Justice O'Connor viewed the issue presented should not have been startling. In *Thornburgh*, she attacked the majority as much for its procedural errors as for substance. *Thornburgh*, 476 U.S. at 815-26.

89. *Id.* at 3063.

90. *Id.* at 3061.

91. *Id.* at 3064 (Scalia, J., concurring).

cially applicable to this case, where *Roe* itself established a structure that was broader than required by the facts.⁹² “[W]hat is not at all arguable, it seems to me, is that we should decide now and not insist that we be run into a corner before we grudgingly yield up our judgment.”⁹³

5. *Dissenting Opinions*

Justice Blackmun, joined by Justices Brennan and Marshall, dissented from the Court’s determination.⁹⁴ Justice Blackmun stated initially that the plurality was signaling an end to *Roe v. Wade*, but called its methods “deceptive.”⁹⁵ By pushing legislatures to provoke test cases rather than make changes itself in *Roe*, he accused the majority of “foment[ing] disregard for the law and for our standing decisions.”⁹⁶ On the critical point whether there was a legal controversy between the Missouri viability testing statute and *Roe*’s trimester framework, for example, he called the conflict “contrived.”⁹⁷ In his view, that statute would not even pass a rational basis test because it would apply “regardless of whether the tests subject the pregnant woman or the fetus to additional health risks or add substantially to the cost of an abortion.”⁹⁸ Justice Blackmun condemned the plurality for, in his view, twisting the meaning of the statute in order to create a conflict with *Roe*. “Far from avoiding constitutional difficulty, the plurality attempts to engineer a dramatic retrenchment in our jurisprudence by exaggerating the conflict between its untenable construction of [the viability testing statute] and the *Roe* trimester framework.”⁹⁹

He was particularly stung by criticism of the constitutional doctrine in the opinion that he authored in 1973. He pointed out that many critical elements of constitutional law, not just abortion doctrine, appear nowhere in the Constitution. In his view, fashioning accommodations between individual rights and governmental interests, establishing benchmarks with which to evaluate compet-

92. *Id.* at 3065.

93. *Id.* at 3066.

94. The concurrence that the withdrawn challenge to one funding restriction was moot is insubstantial in the context of the dissent. It is relegated to the end of a long elaborate footnote. See *id.* at 3069 n.1.

95. *Id.* at 3067 (Blackmun, J., concurring/dissenting in part).

96. *Id.* “Standing” apparently means “not yet overruled.”

97. *Id.* at 3069.

98. *Id.* at 3070.

99. *Id.*

ing claims, goes to the heart of constitutional adjudication. In his view, the trimester approach is such an accommodation.¹⁰⁰ In so many words, he accuses the plurality of being dishonest as to what it intends and what it decided in this case. For now, however, he indicates that the abortion right is safe and that abortion remains the law of the land. Nonetheless, as he has in some of his public remarks over the last several years, he sounds the clarion call.¹⁰¹

In a separate decision which is either clever or anti-religious,¹⁰² Justice Stevens assaulted the viability testing statute and the preamble as an establishment of religion. He indicated that the abortion/question is one on which many religious adherents divide.¹⁰³ In his view the preamble adopted tenets of "some but by no means all Christian faiths" and thus "serves no identifiable secular purpose."¹⁰⁴ In this, Justice Stevens proves too much.¹⁰⁵ No law is safe

100. *Id.* at 3072-73.

101. *Id.* at 3078. See e.g., *Blackmun Sees Switch on Abortion*, USA Today, Sept. 14, 1988, at A1.

102. For his assault on religious values allegedly serving as a basis for the Missouri statute, Justice Stevens might be accused of being anti-Catholic, as indeed he has been criticized. NCCB Committee on ProLife Activities "Statement on Webster Decision," *The Catholic Standard and Times*, p. 3 (Aug. 17, 1989) (Philadelphia Archdiocesan Newspaper). This writer believes the opinion is clever, and serves as a basis to argue that, because the issue is fraught with religious controversy, there should be no governmental involvement.

103. *Webster*, 109 S.Ct. at 3082. (Stevens, J., concurring/dissenting). He, too, concurs that the challenge to one funding restriction is moot and joins Justice Blackmun as to the others.

104. *Id.* He asserts that even those denominations in which there is traditional opposition, for example, the Roman Catholic Church, have wavered over time. For this view, he cites the brief of the Catholics for Free Choice (109 S.Ct. at 3081 n.11) but not briefs of the other Catholic organizations, including the Bishops' who are authorized to speak in the name of the Church in the United States on such matters. In his analysis, he relies on a Congressional Research Service paper which had been officially discredited by the Bishops' Conference as his basis for Catholic moral teaching. The factual conclusions he cites are erroneous. J. CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* (1977). His legal conclusion is inconsistent with that reached in, e.g., *Akron v. Akron Center*, 479 F.Supp. 1172, 1189-95 (N.D. Ohio 1979), *aff'd*, 651 F.2d 1198, 1201 n.1 (6th Cir. 1981).

105. His suggestion that the statute is invalid under the Establishment Clause because it has no identifiable secular purpose, but is an adoption of Catholic theological principles forces a distinction under which most social legislation and civil rights legislation would be invalid. Religious groups address a myriad of issues in our nation's life: from nuclear weapons to feeding the hungry to housing the homeless to Third World debt to the situation in South Africa. Religious organizations often lend their support to various means of social legislation to the

from this analysis if it affects the life and well-being of citizens on ultimate issues. Yet numerous choices are made by legislatures.¹⁰⁶ Thus, Justice Stevens continues a battle which he began in *Thornburgh* by assuming that the only basis on which one could support an abortion regulation statute would be theological.¹⁰⁷

IV. THE RELATIONSHIP OF *WEBSTER* TO THE FUTURE OF *ROE V. WADE*

Under existing jurisprudence, it was debatable whether the formulation of the case presented by Missouri would invite direct reconsideration of *Roe v. Wade*. In her dissenting opinion in *Thornburgh*, for example, Justice O'Connor stated that she would not join the dissenting opinions of those Justices demanding reconsideration of *Roe* simply because "Pennsylvania has not asked the Court to reconsider or overrule *Roe v. Wade*. . . ."¹⁰⁸ In *Webster*, Missouri presented only narrow issues and asked for reconsideration only as an alternative.¹⁰⁹ In those circumstances, those who demand an end to liberal abortion and, at the same time, an expanded role for the states may be disappointed that the Court did not go further. *Webster*, however, indicates that two important shifts may be forthcoming—a return to an earlier, more balanced

extent that they might coincide with the views of the organization. The word "coincidence" is important in this regard, for it announces that religious organizations and government sometimes agree. But unless the government intends affirmatively to aid religion, there is no Establishment Clause problem under our theory of government; See *McGowan v. Maryland*, 366 U.S. 420 (1961).

106. *Harris v. McRae*, 488 U.S. 297 (1980) is one such example. Choices to fund or restrict funding for abortions to promote childbirth are ultimate issues for some. The Court, however, believes legislatures can and should make such choices. No one requires, as Justice Stevens acknowledges, that such choices be bereft of religious motivation to withstand secular constitutional scrutiny. *Webster*, 109 S.Ct. at 3082.

107. In *Thornburgh*, Justices Stevens and White exchange pointed comments about the basis for their respective views on abortion. Compare *Thornburgh*, 476 U.S. at 778-79 with 795-96 n.4.

108. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

109. One line of argument suggests that the Court must reconsider its essential holding in *Roe* to enter into *any* new balancing of interests. Under federal procedural statutes, a federal court has authority to rule in these cases because a federal question is presented or a state law restricts some federal right. 28 U.S.C. §§ 1331, 1343; 42 U.S.C. § 1983. In every case jurisdiction over this subject matter is always at issue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 547 (1986). Occasionally courts act on those objections to the exercise of subject matter jurisdiction.

view of “personal privacy” and a corresponding reemphasis on the role of the legislature. Each will be examined in turn.

A. *Substantive Doctrine*

One of the more enduring and intractable debates throughout the constitutional history of the United States has been how best to protect individual personal liberties against the arbitrary exercise of governmental power. Certainly for the last century or more in constitutional adjudication, deeply personal actions, interests, and choices, some not particularly threatening to public order, have been subjects of state regulation. The Court has struggled to demarcate those personal actions deserving of constitutional protection, on the one hand, from the interest of the government, the competing interests of other persons, and the common good on the other. Some interests have had to be subrogated to other values, or the common good, in order for our basic institutions to thrive or even survive. Others have been protected under a body of case law developed on a theme of personal liberty and privacy. It has been a continuing search for fundamental constitutional values.

Historically, it was always understood that liberty to engage in certain personal actions was not license. In *Jacobson v. Massachusetts*,¹¹⁰ Justice Harlan explained:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.¹¹¹

Although the ability to make certain choices was often given constitutional foundation, such as in the Due Process Clause of the fourteenth amendment, the Court has always required that some balance be struck between legitimate competing interests rationally related to the choice.¹¹² In the early cases the Court struggled

110. 197 U.S. 11 (1905).

111. *Id.* at 26.

112. See *e.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). In *Allgeyer*, the Court found that a basic right to engage in business contracts was certainly an element of personal liberty that deserved to be protected. But for purposes of this

without a script, but still decided that protection of basic constitutional values must be the dominant adjudicative principle.¹¹³

The early debate on what became the privacy doctrine in this century occurred during the process of incorporation of "federal" rights to the states through the fourteenth amendment. In a seminal decision, *Palko v. Connecticut*,¹¹⁴ the Court articulated the standard necessary to sort those rights "incorporated" from those "unincorporated." The "incorporated" rights were not necessarily enumerated in the Constitution but were those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."¹¹⁵ Only those liberties "found to be implicit in the concept of ordered liberty" were incorporated.¹¹⁶ In his famous dissent in *Poe v. Ullman*,¹¹⁷ Justice Harlan recited that the search for these fundamental constitutional values was intended to be a "rational process" that must reflect the "traditions of the country, not judges."¹¹⁸ Thus, he found that personal liberty was somewhat of a "continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . ." ¹¹⁹ In that language, endorsed in *Moore v. City of East Cleveland*,¹²⁰ Justice Harlan acknowledged that protection of

discussion, it should be noted that the Court did "not intend to hold that in no such case can the State exercise its police power." *Id.* at 590. Indeed the Court found that this fundamental right "may be regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes . . ." *Id.* at 591.

113. Throughout its cases the Court has engaged in an effort to apply faithfully those values. Justice Harlan in *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) cites approvingly Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) for the idea that the spirit of the Constitution "is to be collected chiefly from its words."

114. 302 U.S. 319 (1937)

115. *Id.* at 326. The *Palko* Court employed "freedom of thought" as its primary example: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* at 327. In his concurring opinion in *Roe v. Wade*, Justice Douglas states that such internal matters as thought or belief are integral to one's autonomy and not subject to *any* infringement by the State. 410 U.S. at 211. *See supra.*, note 20. Other interests, like an interest in one's life, health, or well-being, are subject to appropriate regulation. *Id.* at 211-14.

116. *Palko*, 302 U.S. at 325.

117. 367 U.S. 497 (1961).

118. *Id.* at 542.

119. *Id.* at 543.

120. 431 U.S. 494 (1977) (plurality).

personal liberty often required a balance of different interests.¹²¹ By preserving liberty against only “substantial arbitrary” and “purposeless” restrictions, the Court invited consideration of countervailing interests.

When an individual exercises a private choice, which is personal as to him or her and does not affect the interests of others, the equation is only the individual versus the state. In many instances, individuals have made such choices, opposed to those of the state, whether they were over religious preferences,¹²² the education of children,¹²³ the person to marry,¹²⁴ or similar interests. It makes sense that the state should have a strict standard of proof to engage in restriction of such choices where there are no third-party interests at stake. This is especially true when the exercise of individual choice falls within the context of a protected relationship like a marriage or family.¹²⁵ Yet even in these relationships the state has regulatory authority, severely circumscribed, but sufficient to insure that individual choices be worked out in a balance respectful of all members of the protected relationship.¹²⁶

When one considers abortion decisions, however, the calculation is never simply one of individual interests competing with interests of the state. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself.¹²⁷ The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection.¹²⁸

In perhaps its most candid observation about the nature of the

121. *Id.* at 501-02.

122. *West Virginia State Bd. v. Barnette*, 319 U.S. 624 (1943).

123. *Meyer v. Nebraska*, 262 U.S. 390 (1932); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

124. *Loving v. Virginia*, 388 U.S. 1 (1967).

125. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

126. *Prince*, 321 U.S. at 166-67.

127. S. JORDAN, *DECISION MAKING FOR INCOMPETENT PERSONS* 19 (1985).

128. J. NOONAN, *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES*, 90-95, 190 (1979).

“right” being established in *Roe v. Wade*, the majority there specifically recognized that the decision-making process it sought to protect was, in its basic character, different from the character of the decisions protected in the line of cases from *Meyer* to *Griswold*.¹²⁹ However, even while stating that a woman could not be “isolated in her privacy,” the Court nonetheless framed the discussion in language that would enable subsequent majorities to link *Roe v. Wade* to the same line of cases which it admittedly distinguished in that original opinion.¹³⁰ By describing abortion as a confrontation only between a state and a woman, the Court precluded full and fair consideration of the true nature and other impacts of the decision.¹³¹ Rather than carefully balance the way in which the various and equally fundamental interests in life, procreation, marriage, family, or indeed the common good, might be affected by the abortion decision, the majority has treated these admittedly different interests as somehow subrogated to a state’s interest, which it has already arbitrarily diminished beyond recognition.¹³²

Over the last sixteen years, a majority of this Court has characterized itself as protecting a “promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.”¹³³ In actuality it separated privacy doctrine from its roots. Although it claimed to the contrary, the Court *has* isolated the pregnant woman in her privacy from all other interests. In a critical self-evaluation, it must be remembered that the privacy doctrine was intended to protect only certain kinds of choices, those “implicit in the concept of ordered liberty.”¹³⁴ Its fidelity was to be measured by the “tradition of the country, not judges.”¹³⁵ Limitations on choice were to be invalid only when they were “purposeless” or “substantial[ly] arbitrary.”¹³⁶ As majorities in abortion cases continued to erect a series of “substantial arbitrary impositions and purposeless restraints” on virtually every competing in-

129. Cases cited notes 123-25, *supra*. *Roe v. Wade*, 410 U.S. at 159.

130. *See e.g.*, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

131. S. JORDAN, *supra* note 127, at 20.

132. J. NOONAN, *supra* note 128, at 90-95.

133. *Thornburgh*, 476 U.S. at 772 (citing without discussion the string of decisions noted above, *supra* notes 123-25).

134. *Palko v. Connecticut*, 302 U.S. at 325.

135. *Poe v. Ullman*, 367 U.S. at 542.

136. *Id.*

terest, the Court turned legitimate privacy doctrine on its head.¹³⁷ In stretching the privacy doctrine until it was broad enough to cover abortion, the Court introduced a flaw into its jurisprudence that has become a threat to the very constitutional values and legitimate societal interests the doctrine was meant to protect.

By contrast, the Court's treatment of privacy interests asserted with respect to homosexual sodomy and paternity of biological versus marriage "fathers" was completely different and more rigorous treatment. In *Bowers v. Hardwick*,¹³⁸ the Court explained that a right to homosexual sodomy was not "deeply rooted in this Nation's history and tradition;" indeed, it had been criminalized from Colonial times onward.¹³⁹ The other aspect of the test, originating in *Palko*, as discussed above, was whether the asserted right was "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed."¹⁴⁰ Under this test the asserted "right" could not survive.¹⁴¹ In the 1988 Term, in *Michael H. v. Gerald D.*,¹⁴² the Court used the same kind of analysis to examine and reject the asserted constitutional rights of a natural father. In that case, a natural father argued his rights should be given legal precedence, and constitutional protection, over the husband of the mother. Using the same two-prong test, the Court found that, since the beginning of the Republic, the law presumed that the marriage partner was the father of any child born during the marriage. The assertion of this kind of right was not "implicit in the concept of ordered liberty" such that the Colonists and the framers of the Constitution would have found it to be fundamental.¹⁴³ Although the problem in *Michael H.* might

137. For example, it is widely recognized that parents have a general right to protect their children from potential adverse consequences of medical decisions. *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (analyzing and rejecting *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). Yet, in the abortion area, parents do not have the ability to exercise the same fundamental freedom. Thus Justice O'Connor has observed that, in the area of abortion, different rules come into play and nothing is safe from "ad hoc nullification" at the hands of a majority. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 814 (O'Connor, J., dissenting). Even traditional principles of informed consent have been abrogated in the abortion context. *See id.* at 798-804 (White, J., dissenting).

138. 478 U.S. 186 (1986).

139. *Id.* at 192-93, citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

140. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

141. *Bowers* 478 U.S. 186, 193-95 (1986).

142. 109 S. Ct. 2333 (1989).

143. *Id.* at 2340-45.

have been more definitional,¹⁴⁴ the Court said some important things about *Roe v. Wade*. A plurality at this point¹⁴⁵ explained that *Roe* had strained to find some historical basis for the assertion of an abortion right. And for the first time, those Justices indicated that the Court in *Roe* had somehow reached for the result it wanted and linked fragments of historical fact and fancy in order to support that result.¹⁴⁶ *Roe v. Wade*, of course, stems from a different line of cases. In this line of cases are *Griswold v. Connecticut*¹⁴⁷ and *Eisenstadt v. Baird*,¹⁴⁸ both involving access to contraceptives without government restriction. Neither of those cases examine the asserted privacy interest from the traditional constitutional framework presented in the 1930's. Without a rigorous analysis of the *Palko* formula, *Griswold* located the privacy right in "penumbras" of the Bill of Rights "emanating" from a number of specific bases in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.¹⁴⁹ This decision-making matrix, however located, still bore a basic relationship to the interests which the Court had protected in earlier privacy cases. In those cases, as explained above, the privacy interest asserted was not only personal but relational. The choices that individuals made were protected not only as individual choices, but in an appropriate context, and one to which all other interests were thought to be in conformance.¹⁵⁰ Thus, however the commentators have dealt with these cases,¹⁵¹ they at least bear some conceptual, if not factual and le-

144. *Id.* at 2350 (Brennan, J., dissenting). Justice Brennan insists that by narrowing the right asserted, the majority dictated the prescribed answer.

145. Justices O'Connor and Kennedy declined to join an elaborate footnote in which Justice Scalia rebutted Justice Brennan's dissent, and distinguished *Griswold* and *Eisenstadt*.

146. 109 S. Ct. at 2344 n.6. See Eds. "Roe v. Wade: No Justification in History, Law, or Logic," in *Abortion and the Constitution*, D. Horan & T. Balch, *supra* note 49.

147. 381 U.S. 479 (1965).

148. 405 U.S. 438 (1972).

149. *Griswold*, 381 U.S. at 484. *Eisenstadt* was an Equal Protection challenge to a state criminal law and the Court did not reach the privacy issue. *But see Eisenstadt*, 405 U.S. at 447 n.7, and 453 (arguing *Griswold* as an alternative rationale).

150. *Griswold*, 381 U.S. at 482, 486.

151. The Court in *Eisenstadt* described marriage as a relationship of two separate individuals and thus the privacy right as residing in the individual and not in the relationship. *Eisenstadt*, 405 U.S. at 453. While this is undoubtedly true, it does not go far enough to a recognition of the balance of rights implicit in *Griswold's* formulation. *Griswold*, 381 U.S. at 482, 486. Moreover, in that the

gal, relationship to the earlier line of privacy cases.

Although *Roe v. Wade* is said to stem from this line of cases, it is different not only in the types of interests involved but also in the treatment given those interests by the Court. For example, in *Pierce v. Society of Sisters*,¹⁵² the Court upheld parental choice of an educational institution for their children. Nonetheless, such choice could not be said to be absolute given the existence of state regulation over such matters as teacher training and qualification, curriculum accreditation, textbook certification, and various other matters directly affecting the range of educational content.¹⁵³ More significantly, in *Loving v. Virginia*,¹⁵⁴ the Court affirmed the fundamental nature of the choice of a marriage partner. Nonetheless, this right, which is closest to the kind of decisional matrix presented in the abortion cases, is subject to substantial regulation, even as to the choice of the partner.¹⁵⁵ The abortion right is not subject to any of these restrictions. It is absolute and unqualified and, after *Thornburgh*, was thought to be autonomous. It is also, on this basis, a threat to privacy itself, as interpreted by Professor Shannon Jordan:

Privacy reduced to its extreme is isolation, one of the conditions conducive to the success of totalitarian movements. It is the intention of free states to recognize and protect an area of privacy for the citizen but not to reduce that privacy to isolation. Recognizing the sociality of man as natural, states must recognize also that the affirmation of those rights the exercise of which is essential to the fundamental integrity of the person can only be accomplished in community. Alone the individual is naked and powerless, and the privacy he possesses becomes empty for lack of content, for a person cannot give content and meaning to these protected rights except in the shares living of affirmed values.¹⁵⁶

holding of *Eisenstadt* is on Equal Protection grounds, the discussion of privacy is dicta. Some suggest that the passage in *Eisenstadt* about protecting individual choices "whether to bear or beget a child," relied on in *Roe*, was written in anticipation of the 1973 abortion decision, already argued once and awaiting re-argument. J. NOONAN, A PRIVATE CHOICE, *supra* note 128, at 21.

152. 268 U.S. 510 (1925).

153. *Id.* at 534. Such regulation precludes certain choices where the educational welfare of children would suffer.

154. 388 U.S. 1, 12 (1967).

155. For example, restrictions exist as to the sex of the partner, blood relationship, age, and competence to name but a few. See Bopp & Coleson, *supra* note 7, at 231-32.

156. S. JORDAN, DECISION MAKING, *supra* note 127, at 132-33.

Webster suggested that this conclusion was changing. The increasingly rigid approach of those led by Justice Blackmun continues to become more strident in its language and more stringent in the protection it would offer to the abortion choice. In *Webster*, Justice Blackmun now in dissent explains:

Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous. It is also profoundly destructive of this Court as an institution. To overturn a constitutional decision is a rare and grave undertaking. To overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history.¹⁵⁷

By contrast, Chief Justice Rehnquist opens the door to, but does not resolve, whether abortion should continue to be treated as a fundamental constitutional right with all the trappings and protections attendant to that status. In the plurality opinion concerning the viability testing statute, he suggests that abortion is a species of protected liberty.¹⁵⁸ He does not give any further analysis of this liberty interest or explain how various state interests could interact with it.¹⁵⁹ In the next series of abortion cases, there is a renewed chance for the Court to balance privacy interests. In the parental notice cases, for example, the Court must balance abortion against fundamental interests of parents and family members in the abortion choices of another family member.¹⁶⁰ In the Illinois abortion regulation case,¹⁶¹ the Court must deal with the asserted, and normally compelling interest of the state in the protection of women and the unborn against unregulated medical practitioners.¹⁶² Sig-

157. *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3078 (1989) (Blackmun, J., dissenting). He suggests, however, that at a minimum, *Roe* protects a limited constitutional right, implicitly recognizing the extension in later cases. *Id.* at 3076.

158. *Id.* at 3058.

159. *Id.* See *infra* notes 178-80.

160. See *supra* note 3. See *supra* note 137, discussing *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (analyzing and rejecting *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

161. See *supra* note 3.

162. In 1978, independent investigators uncovered twelve previously unreported maternal deaths and other gross abuses in Chicago-area abortion clinics. Zekman & Warrick, *The Abortion Profiteers*, Chicago Sun-Times, Dec. 3, 1978 (special reprint). In response, Edward F. King, Deputy Director of the Chicago Health Society, explained to the press: "The Courts very effectively knocked the

nificantly, as a matter of substantive law, *Webster* indicates that change is foreseeable in the Court's treatment of assertions of constitutional right and the balance to be given other interests.

Given the chance, the Court should rationally evaluate the abortion decision within its true decisional matrix.¹⁶³ The Court originally offered a number of rationales, legal, medical and social, for calling abortion a privacy interest worthy of constitutional protection.¹⁶⁴ Although these rationales when first offered in 1973 were debatable, on further consideration and through actual experience they have been largely unrealized. If the Court seriously seeks support for abortion decisions in the historical line of privacy cases, it must reflect accurately that one person's "liberty" is not a "license" to control even one's own body where another's interest could suffer or the common good be diminished.¹⁶⁵ And it must reexamine the rationales first proffered for bringing abortion under the Constitution.

B. Policy Considerations

Although it indicated good jurisprudential reasons to depart from *stare decisis* because *Roe* had become "unsound in principle and unworkable in practice,"¹⁶⁶ the plurality found that this was not an appropriate case to overrule *Roe v. Wade* because the statutes themselves were distinguishable.¹⁶⁷ Nonetheless, the plurality offered the judgment that the Court's abortion jurisprudence has

Department of Health out of the picture. We're not even entitled to cross the threshold of these clinics." Brodt & McCabe, *Abortion Investigation Set*, Chicago Tribune, Nov. 13, 1978. See, e.g., *Friendship Medical Center v. Chicago Bd. of Health*, 505 F.2d 1141, (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). Concluded one of the investigative reporters on the case, Pamela Zekman: "In 1973 the Supreme Court legalized abortion. As it turns out, what they legalized in some clinics in Chicago is a highly profitable and very dangerous back-room abortion." Zekman, *Risky Abortions: Chicago Clinics Are Exposed*, Time, Nov. 27, 1978, at 52.

163. In this regard one should note Justice O'Connor's efforts to rectify the standard by which these various concerns are reviewed. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting). A rational balancing of legitimate interests throughout pregnancy is precisely the kind of calculus originally intended in privacy doctrine. *Id.* at 828.

164. The parade of horrors is quoted at note 15, *supra*. Compare *Webster*, 109 S.Ct. at 3077 (Blackmun, J., dissenting).

165. *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905).

166. 109 S. Ct. at 3056.

167. *Id.* at 3058.

indeed become "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."¹⁶⁸ It willingly recognized that the decision in *Webster* would encourage more legislative activity on the part of the states. However, the plurality noted that 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."¹⁶⁹ In our theory of government the usual arbiter of the public's health and welfare, especially in resolving matters of intense public controversy, is the state legislature.¹⁷⁰

The constitutional authority to resolve public debates over which actions shall be undertaken in the public interest is entrusted primarily to the legislative branch.¹⁷¹ A legislature's role in matters affecting important health and safety interests is paramount, especially when it resolves matters of intense public controversy.¹⁷² It is not the province of a court to frustrate the legislative will because the law "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree."¹⁷³ Rather, it is incum-

168. *Id.* at 3057.

169. *Id.* at 3058.

170. *Id.*

171. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819).

172. See *Webster v. Reproductive Health Servs.*, 109 S. Ct. at 3058; *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794-96 (1986) (White, J., dissenting).

In the juvenile death penalty cases, this point has been amply illustrated. In *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988), a plurality decided there were numerous state statutes expressing the view that minors did not have the experience, education, or maturity to evaluate the consequences of their conduct, citing, among other cases, *Bellotti v. Baird*, 433 U.S. 622, 654 (1979) (O'Connor, J., concurring). This rule of law was strengthened, not vitiated, by reconsideration of the juvenile death penalty cases in the last Term. *Stanford v. Kentucky* stands for the proposition that the jury system is best suited to determine individual responsibility *in the absence of some considered legislative judgment* evaluating the entire class of juveniles. 109 S.Ct. 2969, 2975-76 (1989). Thus the views expressed last Term reinforced the principle that legislative judgments on matters within their competence should ordinarily be upheld. Unfortunately, that has not always been the case when abortion statutes are involved. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

173. *Otis v. Parker*, 187 U.S. 606, 608 (1903); See *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 141 (1921).

bent upon those attacking a statute to show that there is a "clear incompatibility" with the Constitution.¹⁷⁴ Although courts are and should be vigilant in the protection of fundamental rights (such as religious freedom), the means by which the courts act are essentially procedural, allocating burdens of proof and setting standards of certitude. Courts do not displace the legislative process entirely, especially where there is more than one claim to a fundamental interest.¹⁷⁵

Because the Court's intricate jurisprudence on abortion has departed from these normative principles, it continues to frustrate even a carefully exercised and balanced legislative will. As the plurality recognized and perhaps a majority believes, the problem lies in the nature of the jurisprudence rather than in particular statutes that come before the Court. The law has become more cumbersome to administer, and more difficult to predict with certainty by the States.¹⁷⁶ The answer for the Court lies in a thorough reconsideration of the line of cases that begins with *Roe v. Wade*. Such a reconsideration was demanded by the dissenters in *Thornburgh* and *Akron* and finally broached by a plurality in *Webster*. While there may be merit in the suggestion that such reconsideration should allow "time enough . . . to do so carefully,"¹⁷⁷ the problem grows more urgent with each case. For the Court the time has come to decide whether to continue to write rules or to allow legislatures to legislate.¹⁷⁸ *Webster* opens the door. As one observer noted: "*Webster* . . . returns part of the responsibility for achieving wise and humane abortion laws back to the American people."¹⁷⁹

174. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, at 530-31 (1871).

175. In abortion decisions, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others. *See supra*, note 124, and accompanying text.

176. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

177. *Webster*, 109 S. Ct. at 3061 (O'Connor, J., concurring).

178. *Akron*, 462 U.S. at 456, (O'Connor, J., dissenting).

179. Kelly, *Winning Webster v. Reproductive Health Services: The Crisis of the Pro-Life Movement*, AMERICA, Aug. 19, 1989, at 79. Less than two weeks after the *Webster* decision, it was reported that legislative action was possible in as many as thirty states. *Abortion Battles Surface in Legislatures Across the Country; More to Come*, Los Angeles Daily Journal, July 17, 1989, at 10 (reporting state-by-state survey). Specific legislation is proposed in Florida and Pennsylvania, for example *Anti-Abortion Legislation Proposed for Pennsylvania*, Washington Post, Oct. 4, 1989, at A2; *Martinez Calls Session on Abortion*, Miami Herald,

V. DOES *ROE V. WADE* HAVE A FUTURE?A. *The Nature of Constitutional Change*

Webster illustrates the axiom that constitutional law changes but slowly. For the foreseeable future, the law will likely protect the notion that an abortion decision implicates a fundamental liberty interest even if, at the same time, the Court begins to restrict it. The Supreme Court does not identify many constitutional "rights," and does not call too many of them "fundamental." Even the new majority has implied some continued leeway for an abortion decision under the law. Chief Justice Rehnquist describes it as a "liberty interest protected by the Due Process Clause."¹⁸⁰ Justice White, who dissented in *Roe* and rather angrily in *Thornburgh*, has said that he has no argument with the "indisputable" proposition that the "abortion decision is a species of liberty."¹⁸¹ Justice O'Connor has implied similar views and is difficult to predict.¹⁸² Neither Justice Scalia nor Justice Kennedy has expressly indicated his views. One might assume convergence between Justice White and Justice Kennedy given their agreement in the *Webster* plurality. Justice Scalia at least says the proposition that a state may prohibit abortion is "arguable."¹⁸³ There is simply no agreement that abortion should be deconstitutionalized.

Developments in constitutional jurisprudence suggest the Court will not admit "error" but could permit "reinterpretation" or "rebalancing" of the competing interests.¹⁸⁴ The Court may do

July 26, 1989, at A1.

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

181. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986).

182. *Id.* at 828; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459, 461, 463-65 (1983) (O'Connor, J., dissenting) ("The privacy right involved in the abortion context 'cannot be said to be absolute.'" *citing Roe*).

183. *Webster*, 109 S.Ct. at 3066 (Scalia, J., concurring).

184. Certainly the Court reverses itself frequently on constitutional principles. M. Pfeifer, "Abandoning Error: Self Correction by the Supreme Court," in *Abortion and the Constitution*, Horan, Grant, Cunningham (eds.), *supra* note 49. Even that work does not identify any fundamental civil liberty issue on which reversal has occurred. Arguably the deconstitutionalization of the "right to contract" as an element of substantive due process to allow legislatures to enact labor protections is analogous. *Lochner v. New York*, 198 U.S. 45 (1905) was "good law" for about thirty years until it was so limited in *West Coast Hotel v. Parish*, 300 U.S. 379 (1937). The latter case, however, only overruled a comparatively "recent" (1923) decision and not *Lochner* expressly.

so in an effort to express better the values of the community. As Judge Kenneth Ripple has explained:

[C]onstitutional doctrine unfolds incrementally. The court, despite its unique role in American society, relies heavily on the common-law tradition and is populated by common-law lawyers. It rarely takes a single giant step and establishes a new doctrine or definitively rejects an old one. On rare occasions when it does radically depart from established precedent, it usually articulates its holding as an outgrowth of older, de-emphasized strains in the court's jurisprudence.¹⁸⁵

It must be remembered that *Plessy v. Ferguson*,¹⁸⁶ upholding racial segregation, was "good law" for 63 years until it was abandoned in *Brown v. Board of Education*.¹⁸⁷

Nonetheless, eventually, *Roe v. Wade* will be weakened significantly along two lines that this writer labels direct attack and indirect attack. "Direct" means are efforts to strengthen the three interests identified in *Roe* and referred to throughout the sixteen-year course of litigation as "compelling": medical standards, maternal health and viable life. Over time, if *Roe* is to be abandoned on its central holding, these interests would become more important, thus compressing the degree to which a woman may exercise the decisional freedom staked out in *Roe*. The Court would not admit its error but recast the balance. In this climate, *Thornburgh* could be overruled as judicial excess. Even if *Roe* is not expressly overruled, the practical effect of this course is that the state would have more authority to legislate regulation throughout the course of pregnancy. Even if the Court continues to protect a "liberty" interest in abortion, it would no longer protect that interest as absolute. The favorable decision upholding the Missouri statute in *Webster* will undoubtedly and appropriately encourage more legislative efforts addressing this balance.

The other means by which the Court could reshape *Roe* is "indirect." There are a number of important indirect interests. These interests are identified not in *Roe*, but in subsequent cases, and

185. K. Ripple, *Constitutional Litigation*, 122-23 (1984). See Pfeifer, *supra* note 184 at 13.

186. 163 U.S. 537 (1896).

187. 347 U.S. 483 (1954). The careful and painstakingly slow litigation strategy used to reach *Brown* is thoroughly discussed in Ripple, *supra* note 185 at 122 *et seq.*

include parents' rights, spouses' rights, fathers' rights, etc.¹⁸⁸ In a subsequent case, the Court could recognize a new, significant (and perhaps even fundamental) competing interest. In parental consent/notice cases, for example, the interest of parents in the life and health of their daughter is precisely that kind of interest.¹⁸⁹ If, for example, in a case providing for parental consultation, the Court approved counseling of dependent minors, the next logical step would be to attempt to extend the reasoning to *all* minors. And, if those barriers break down, would a young woman's need for counseling differ so significantly from that of other women?

The *Webster* case raised both direct and indirect interests. The viability and legislative finding issues went directly to the issues raised in *Roe v. Wade*. Although both provisions were confirmed without revision of the essential body of law established in *Roe v. Wade*, by simply upholding the discretion of the legislature to adopt these measures, at least four Justices recognized the gross imbalance that *Roe v. Wade* imposed upon state legislative efforts to set public policy. The funding issues themselves are "indirect," that is, outside of the kind of balance which the Supreme Court struck in *Roe*. They presented the issue of whether a legislature should be required to spend public money or physical resources in allowing or assisting abortions. The favorable decision on these provisions indirectly restrains abortion, and more firmly establishes legislative policy encouraging childbirth over abortion.

B. *Future Considerations*

In the last analysis, whether the Court decides to reconsider *Roe v. Wade* is essentially a matter of the Court's own judgment

188. For example, *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (en banc), approved a parental notification statute similar to one disapproved in *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988). Both are pending argument in the Supreme Court in December 1989. *supra*, note 3. Similarly, father's rights were at issue in *Conn v. Conn*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 109 S. Ct. 391 (1988). The Court denied review of every such case presented in the 1988 Term.

189. See *supra* note 188. The Court had such an opportunity in *Hartigan v. Zbaraz*, *aff'd by equally divided vote*, 108 S. Ct. 479 (1987), an Illinois case concerning a mandatory waiting period to facilitate consultation between dependent minors and their parents. The vacancy created by the resignation of Justice Powell resulted in a deadlocked Court and the vote affirmed a 2-1 decision in the lower court that the statute was unconstitutional. *Zabaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985). Justice Powell was replaced by Justice Anthony Kennedy.

about the existence of the abortion right in the Constitution and the development of the jurisprudence of the last sixteen years. Over the last sixteen years, the Supreme Court has undergone a shift in composition. Several of the Justices who constituted the original majority in *Roe v. Wade* have retired. In the last eight years, President Reagan had the opportunity to add three Justices and replace the Chief Justice. At this time, there is great speculation in pro-life and pro-abortion circles that the Court is indeed poised to reconsider *Roe v. Wade* and will do so in an appropriate case.¹⁹⁰ For several reasons, it may decline to make such a ruling in the coming series of cases, most notably because no state has asked for such action.¹⁹¹ On the other hand, there are good reasons why the Court might have already decided that a pending case may be an appropriate vehicle on which to begin a reconsideration of *Roe v. Wade*. There are three reasons why the Court must eventually reevaluate *Roe v. Wade*. Each is rooted in a recognition that *Roe v. Wade* radically departed from constitutional and social doctrine.

First, there is substantial scholarly criticism of *Roe v. Wade*. There are over two hundred articles on *Roe v. Wade*. Many of them, including many written by judges and scholars supportive of abortion, are intensely critical of the body of law launched in *Roe*. Those scholars note the limited utility of the opinion (inextricably

190. Justice Blackmun certainly is of that view. See *supra* note 1. Indeed, pro-abortion groups have purposely moved from professional speculation to public outcry, claiming that *Webster* is the waterloo of *Roe v. Wade*. Witness their expensive full-page coathanger advertisements and other appeals for contributions. E.g., Washington Post Weekly, Jan. 30, 1989, at 2. Supporters of legal abortion have also begun to suggest alternative legal theories to buttress this "right". Compare Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 AM. J. L. & MED. 69, 90, 94, 98 (1988), with Bopp, *Will There Be a Constitutional Right to Abortion After Reconsideration of Roe v. Wade?*, 15 UTAH J. CONTEMP. L. 131 (1989).

191. In the parental notice cases in the coming Term, no state has yet expressly sought reconsideration of *Roe v. Wade*; But see Ohio Jurisdictional Statement at 16-17. There is sentiment on the Court for avoiding such reconsideration unless the issue is actually presented and a proper party demands it. Compare *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (conflict but no demand) with *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (demand but no conflict). In these cases, however, the scope and role of proper legislative activity is raised legitimately and should be resolved. See *id.* at 3058 (plurality). So too, the legislative balance given to competing interests, each of which this Court has called "fundamental" at one time or another, gives a legitimate basis on which to reconsider *Roe v. Wade*.

linked to then current but ambiguous medical terminology), the "legislative" nature of the judicial act, the arbitrary nature of the lines drawn, etc. As one pro-abortion (but anti-*Roe*) commentator noted, "what is frightening about *Roe* is that this super protected right is not inferrable from the language of the Constitution, the framers' general thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."¹⁹² The Court is not insensitive to that kind of criticism.¹⁹³

Second, judicial criticism mounts. In a court of appeals decision in *Margaret S. v. Edwards*,¹⁹⁴ although a three judge panel voted to invalidate particular aspects of a Louisiana law, two of those judges took the remarkable step of implicitly criticizing *Roe v. Wade* in a majority opinion. They summarized much of the scholarly and legal criticism mounting against *Roe v. Wade*: "It is no secret that the Supreme Court's abortion jurisprudence has been subjected to exceptionally severe and sustained criticism."¹⁹⁵ Rather than provide their own views, the judges engaged in implicit criticism and disdained the absence of definitive guidance from the Supreme Court. As they explained, "While we are unquestionably bound to obey the Supreme Court, we are not obliged to give expansive readings to a jurisprudence that the whole judicial world knows is swirling in uncertainty."¹⁹⁶ It is indeed rare for lower court judges to comment on Supreme Court decisions in such a fashion. Because the Court itself is bitterly divided, lower court judges may be less likely to invalidate entire statutes and more likely to contribute their own opinions to the reconsideration of *Roe*. In the aftermath of *Webster*, more affirmation of state statutes would be expected.

Finally, there will continue to be public and legislative pres-

192. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935 (1973)(footnote omitted). See also, Mangel, *supra* note 190, at 88-94; Wardle, *Rethinking Roe v. Wade*, B.Y.U. L. REV. 231, 237, n.38 (1985) (for references to articles and commentary). Articles are also summarized in Bopp & Coleson, *supra* note 7, 185-92.

193. *Webster*, 109 S. Ct. at 3066 (Scalia, J., concurring).

194. 794 F.2d 994 (5th Cir. 1986).

195. *Id.*

196. *Id.* at 996, n.3. Lower courts reading *dicta* in the cases believe they have divined both the mind of the Court favoring particular kinds of statutes as well as the specifics of the "legislative" relief the Court would provide if the case were presented. *E.g.*, Glick v. McKay, 616 F. Supp. 322, 324-25 (D.C. Nev. 1985).

sure on the Court. Sixteen years of silent anger at *Roe v. Wade* erupted in the briefs filed in *Webster*. Women who have had abortions explained how they were exploited by abortion providers. Doctors explained developing neonatal technology and expanding medical knowledge about pre-born life. Lawyers and legal scholars explained how unwieldy the law has become over time — so confused that, as a jurisprudential matter, legislatures are deprived of clear judicial guidance. They expressed increasing concern over how the faulty jurisprudence in *Roe* is adversely affecting other areas of law. Although the Court in *Thornburgh* seemed to reject any reasonable legislative options directed at *Roe* itself, there were four votes on the Court in defense of Pennsylvania's statute. On *Webster*, there were five. Efforts to regulate this abortion "right" will continue but on a more careful and detailed basis.¹⁹⁷

Each of these three rationales, however, has roots in a common theme: *Roe v. Wade* and the cases that follow from it are fundamentally at odds with the notions of fairness found in American law and expressed specifically in the Fourteenth Amendment Due Process Clause. Americans have come to understand that whatever their individual rights, and whatever their own notions of fairness, these rights must be balanced against the rights, concerns, and interests of all others. Most Americans have also come to understand that the person in the womb, although not entitled to legal protection under the Court's abortion jurisprudence, is nonetheless a human being. Thus Americans are increasingly uneasy about the idea that abortion should exist on demand for any reason or none at all, and that they have little say over the matter.¹⁹⁸ Ultimately, the law finds its legitimacy in the reflection of the public's will. If the public is unwilling to comply or the Court has misread the demands of the public's will and misconceived the constitutional bases of its own rules, the law changes.

VI. CONCLUSION

One of the legal and political tragedies of the first sixteen years of abortion jurisprudence was that the Court had increas-

197. The importance of the legislative record is made plain in the seminal work *Abortion and the Constitution*, *supra* note 49, Part IV.

198. *E.g.*, Kelly, *supra* note 179. Most Americans favor substantial limits on and regulation of abortion. The Future of Abortion, *Newsweek*, July 17, 1989, at 20; *Most in US favor ban on majority of abortions*, *Boston Globe*, March 31, 1989, at A1.

ingly deprived the people of their judgment expressed in laws passed through their elected legislators and who stand for approval through the political process. *Roe v. Wade* upset the political and legal equilibrium that was starting to occur in the United States over abortion by invalidating the abortion laws of every state and, its own protests notwithstanding, constitutionalizing abortion on demand. The new promise of the *Webster* case is a restoration of that equilibrium through which people might give full effect to their judgments about this controversial subject in the collective experience we know as the United States.