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Of Winks and Nods - Webster's Uncertain Effect on Current and Future Abortion Legislation

Randall D. Eggert

Andrew J. Klinghammer

Jeanne Morrison

"Of Winks and Nods" - Webster's Uncertain Effect on Current and Future Abortion Legislation

Webster v. Reproductive Health Services[1]

INTRODUCTION

Perhaps no other decision by the Supreme Court in its last term received as much attention as the long-awaited ruling in *Webster v. Reproductive Health Services*. *Webster* concerned the constitutionality of various provisions regulating abortion in Missouri. The Supreme Court upheld the validity of each of the statutory provisions it addressed. Nevertheless, each was dealt with in a manner that did not disturb any major aspect of abortion law as it has developed since *Roe v. Wade*.[2] The *Webster* decision does reflect the possibility of a change in the near future concerning the standard to be used in evaluating the validity of state abortion regulations.[3] The opinion also reflects the widely differing views of the justices concerning the *Roe* framework, which measures the competing interests regarding abortion throughout a pregnancy.[4] The effect the decision may have on the manner in which state legislatures will be allowed to regulate abortion in the future is unclear.

Justice Blackmun's dissent described his view of the effect: "The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly."[5] The plurality probably would not agree with Justice Blackmun's "winks and nods" analogy. It acknowledged, however, that its holding does allow state legislatures to adopt abortion regulations which would have been prohibited under previous abortion law.[6] A majority of the Court, therefore, agreed that some movement has occurred to alter the nature of the power to

1. 109 S. Ct. 3040 (1989).
2. 410 U.S. 113 (1973).
3. *See infra* notes 157-71 and accompanying text for a discussion of this issue.
4. *See infra* notes 94-137 and accompanying text for a discussion of this issue.
5. 109 S. Ct. at 3067 (Blackmun, J., dissenting).
6. *Id.* at 3058.

previous abortion law.[6] A majority of the Court, therefore, agreed that some movement has occurred to alter the nature of the power to regulate abortion as it has been defined in previous post-*Roe* cases.

This Comment will analyze the implications and effects of the Court's holding in *Webster* and evaluate current and future state abortion regulation in light of the decision. Part I traces the legal history of *Webster* and the statutory provisions that were the subject of the case. Part II analyzes the Supreme Court's decision in *Webster* and outlines the potentially changing standard by which future abortion regulations will be evaluated. Part III discusses current state abortion regulations concerning the four areas involved in *Webster* and addresses the possible future effect of *Webster* in these areas.[7]

I. LEGAL HISTORY

A. Missouri's Battles with the Supreme Court Over Roe v. Wade

Webster does not represent the first time Missouri law has been called into question by *Roe v. Wade.* Missouri has consistently challenged the parameters of the Supreme Court's recognition of the right to an abortion. Three times previous to *Webster,* Missouri Attorneys General sought to preserve abortion regulations considered inconsistent with *Roe.* For the most part, they were unsuccessful.[8] In

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6. *Id.* at 3058.

7. Both Justices Scalia and Blackmun note that *Webster* increases even further the impact of abortion as a political issue. They suggest that the decision invites state legislatures to regulate abortion while the Court retains power under *Roe* to determine the constitutionality of these new regulations. With its focus on current and possible future state legislation, this Note recognizes that conclusion.

8. The first of these attempts involved statutes criminalizing the performance of abortions except when the mother's life was in danger. In Danforth v. Rodgers, 414 U.S. 1035 (1973), the Supreme Court declared these statutes to be unconstitutional. In response to this decision, Missouri legislators in June, 1974, imposed regulations on abortions during every phase of pregnancy. 109 S. Ct. at 3047 n.1. These regulations were challenged in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). In this case, the Supreme Court found unconstitutional provisions requiring spousal consent and in the case of minors, parental consent, for an abortion. *See id.* at 67-75.

In 1979, Missouri legislators tried again to restrict abortion practices by enacting legislation which 1) required abortions after the twelfth week of pregnancy to be performed in hospitals; 2) required a pathology report for each abortion performed; 3) required the presence of two physicians when abortions were performed after viability; and 4) required minors to secure parental

the fourth attempt, as noted above, Missouri Attorney General William Webster found a more sympathetic audience.

B. *Missouri Abortion Act of 1986*

In February of 1986, seven members of the Missouri General Assembly introduced into the Missouri House of Representatives House Bill No. 1596 (Act) known as "An Act . . . relating to unborn children and abortion . . . [and] to the use of public funds."[9] The Act passed both the House and Senate in April of 1986 by substantial majorities and in June 1986 Governor John Ashcroft signed it into law.[10] By its own provision, the Act was to become effective in August of 1986.[11]

Of the twenty sections contained in the original Act, seven faced challenges in the United States District Court.[12] Although all seven were struck down by the district court and—on appeal—the Eighth

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requirement. *Id.* at 481. However, the Court held that the other provisions under scrutiny were constitutional. *Id.* at 494. The Court reasoned that the requirements in *Ashcroft* "provided a judicial alternative" by allowing the young woman to anonymously seek consent for an abortion from the juvenile court. *Id.* at 492.

In comparison to Missouri, Pennsylvania has been before the Supreme Court to defend statutory sections alleged to be contrary to *Roe* on three occasions: Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Colautti v. Franklin, 439 U.S. 379 (1979); Beal v. Doe, 432 U.S. 438 (1977).

9. H.R. 1596, 83rd Gen. Ass., 2nd Sess. (1986).

10. The Bill first passed the Missouri House of Representatives on April 3, 1986 by a vote of 124 to 27. JOURNAL OF THE HOUSE OF THE STATE OF MISSOURI, SECOND REGULAR SESSION JANUARY 8, 1986 TO MAY 15, 1986 AND VETO SESSION SEPTEMBER 3, 1986 TO SEPTEMBER 9, 1986, at 882-83 (1986) [hereinafter HOUSE JOURNAL]. The Senate passed an amended version of House Bill 1596 on April 16, 1986 by a vote of 23 to 5. JOURNAL OF THE SENATE OF THE STATE OF MISSOURI, SECOND REGULAR SESSION JANUARY 8, 1986 TO MAY 15, 1986 AND VETO SESSION SEPTEMBER 3, 1986 TO SEPTEMBER 9, 1986, at 1161-62 (1986). The House approved the amended Senate version on April 23 by a vote of 119 to 36. HOUSE JOURNAL, *supra*, at 1477-78. Governor Ashcroft signed the bill into law on June 26, 1986. *Id.* at 2229. The lopsided majorities that approved the bill indicated the deep, bipartisan support abortion restrictions have traditionally received from the Missouri General Assembly.

11. Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 411 (W.D. Mo. 1987) [hereinafter *Reproductive Health Servs. I*].

12. *See id.* at 430.

Circuit, only four of the provisions were appealed to the Supreme Court.[13] These four included the following: 1) a "preamble" which declared that the life of each human being begins at conception;[14] 2) a prohibition on the use of public facilities for abortions and the participation by public employees in performing abortions;[15] 3) a prohibition on the use of public funding for abortion counseling;[16] and 4) a requirement that physicians conduct viability tests prior to performing abortions.[17]

The "preamble" provided that "[t]he life of each human being begins at conception" and "[u]nborn children have protectable interests in life, health, and well-being."[18] It also stated that all state laws are to be interpreted to provide unborn children with the same rights available to other persons, subject to the federal constitution, decisions of the Supreme Court, and contrary state provisions.[19]

The restrictions concerning public funds, facilities, and employees who perform abortions or counsel women to have abortions were contained in three separate Missouri statutes.[20] All three statutes also contained provisions not appealed to the Supreme Court despite lower court findings that the provisions were unconstitutionally vague. These include restrictions on the use of public funds to perform abortions[21]

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13. The three provisions invalidated by the lower courts but not appealed to the Supreme Court included: 1) a requirement that all abortions performed at or after the sixteenth week of pregnancy be performed in a hospital; 2) a prohibition on the use of public employees and facilities for abortion counseling; and 3) a requirement that each physician obtain a woman's "informed consent" prior to the performance of an abortion. 109 S. Ct. at 3049. This latter provision required both the physician and the woman to sign a form indicating that the woman was informed as to the following: 1) whether or not she was pregnant; 2) the "particular risks" associated with the abortion technique to be used; and 3) alternatives to abortion. MO. REV. STAT. § 188.039 (1986).

14. MO. REV. STAT. § 1.205 (1986).

15. *Id.* §§ 188.210, 188.215.

16. *Id.* § 188.205.

17. *Id.* § 188.029.

18. *Id.* § 1.205.1.

19. *Id.* § 1.205.2.

20. *Id.* §§ 188.205, 188.210, 188.215.

21. *Id.* § 188.205. The district court and court of appeals both found section 188.205 void for vagueness based on its use of the terms "encouraging" and "counseling." *See, e.g., Reproductive Health Servs. I,* 662 F. Supp. at 426. Missouri appealed this finding to the Supreme Court. The focus of the public funding provision was limited to those persons responsible for expending public funds according to the Missouri Attorney General. This interpretation rendered moot the question before the Court concerning the constitutionality of section 188.205. 109 S. Ct. at 3053.

and restrictions on the use of public employees and public facilities to counsel women concerning abortion.[22]

For purposes of the Act, the Missouri General Assembly defined a "public employee" as "any person employed by this state or any agency or political subdivision thereof."[23] A "public facility" was defined as "any public institution, public facility, public equipment or any physical asset owned, leased or controlled by [the] state, or any agency or political subdivision thereof."[24] The Act defined a "public fund" as "any fund[] received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers."[25]

The provision requiring viability testing by a physician applied only when the physician had reason to believe the woman was at or beyond the twentieth week of pregnancy.[26]

Reproductive Health Services of St. Louis and Planned Parenthood of Kansas City, two non-profit corporations that assisted in the performance of abortions, filed a class action suit challenging the Act in the United States District Court for the Western District of Missouri.[27] After filing the action in July, 1986, the class representatives sought a temporary injunction to restrain enforcement of the challenged sections of the Act.[28] The district court granted the request.[29] In December, 1986, the district court heard a full trial on the merits.[30]

The district court interpreted the preamble as an attempt by the state to make an end run around the Supreme Court's admonition in *City of Akron v. Akron Center for Reproductive Health, Inc.*[31] that a "State may not adopt one theory of when life begins to justify its

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22. MO. REV. STAT. §§ 188.210, 188.215 (1986). The district court and court of appeals also found both of these statutes void for vagueness. *See, e.g.*, Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1077-79 (8th Cir. 1988) [hereinafter *Reproductive Health Serv. II*]. The Missouri Attorney General did not appeal the Eighth Circuit's ruling on these provisions. 109 S. Ct at 3049.

23. MO. REV. STAT. § 188.200(1) (1986).

24. *Id.* § 188.200(2).

25. *Id.* § 188.200(3).

26. *Id.* § 188.029.

27. *Reproductive Health Servs. I*, 662 F. Supp. at 410. The two non-profit corporations were joined in the class action by three physicians, one nurse, and one social worker. All were "public employees" at "public facilities" in Missouri. 109 S. Ct. at 3048.

28. *Id.*

29. *Id.*

30. *Id.*

31. 462 U.S. 416 (1983).

regulation of abortion."[32] On appeal, the Eighth Circuit agreed and noted that the preamble was part of a bill almost exclusively devoted to abortion. From this the court of appeals drew the inference that "the state intended its abortion regulations to be understood against the backdrop of its theory of life."[33] The appellate court also rejected the state's reasoning that because the preamble is subject to Supreme Court decisions, it is not directed at abortion and is, therefore, constitutional. As the court explained, such a declaration cannot "validate state laws that are in fact incompatible with the constitution."[34]

The Eighth Circuit reiterated the district court's reasoning as it related to the provision requiring viability tests by physicians. The court stated that "the Supreme Court has squarely addressed this point and declared that 'neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor.'"[35] Since the determination of viability is to be made as a "matter of medical skill and judgment" the court concluded that the provision represented "an impermissible legislative intrusion."[36]

The Eighth Circuit also agreed with the district court that the statutory provisions prohibiting the use of public funds, facilities, or employees to "encourage and counsel" a woman to have an abortion were void for vagueness and a violation of the right to privacy. Concerning the vagueness contention, the state argued that the two words "encourage" and "counsel" encompassed and named only "affirmative advocacy." The court rejected this interpretation noting that the word "counsel" is "fraught with ambiguity; its range is incapable of objective measurement."[37]

On the question of right to privacy, the court found "that the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion."[38] The court of appeals relied upon its decision in *Nyberg v. City of Virginia*[39] to address the issue of public facilities. It found that this ban created an undue burden on the free exercise of the right to choose abortion.

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32. *See, e.g., Reproductive Health Servs. I,* 662 F. Supp. at 413.

33. *Reproductive Health Serv. II,* 851 F.2d at 1076.

34. *Id.* at 1077.

35. *Id.* at 1074 (quoting Colautti v. Franklin, 439 U.S. 379, 388-89 (1979)).

36. *Reproductive Health Serv. II,* 851 F.2d at 1074 (quoting *Reproductive Health Servs. I,* 662 F. Supp. at 423).

37. *Reproductive Health Serv. II,* 851 F.2d at 1078.

38. *Id.* at 1079.

39. 667 F.2d 754 (8th Cir. 1982), *appeal dismissed, cert. denied,* 462 U.S. 1125 (1983).

This burden is even more nettlesome, noted the court, when "it bars women seeking to obtain and pay for abortions access to public facilities when the evidence demonstrates that *no* public funds are expended by allowing the abortion."[40] Concerning the restrictions covering public employees, the court of appeals reasoned that this provision of the statute placed "obstacles in the path of the woman's exercise of her freedom of choice."[41] It further reasoned that these obstacles would be unable to stand absent a compelling state interest. Since the State was unable to provide such an interest, the court ruled that the statute violated the due process clause as interpreted in *Roe*.[42]

II. ANALYSIS OF THE U.S. SUPREME COURT'S DECISION IN *WEBSTER*

The Supreme Court's ruling in *Webster* reversed the decisions of the district court and the court of appeals on the four portions of the Missouri abortion statute that were before the court. In doing so, five opinions were filed by the Court. The plurality opinion, written by Justice Rehnquist and joined by Justices White and Kennedy, upheld both the preamble and the ban on use of public facilities and employees as not being facially unconstitutional. The plurality found the viability testing provision of the Missouri statute constitutional, but also found that the provision conflicted with the trimester framework of *Roe v. Wade*. They used this conflict as a basis to modify *Roe* by abandoning the trimester framework, but the remaining holdings of *Roe* were left intact. The counseling provision in section 188.205 was found moot by a unanimous decision of the Court.

Justice O'Connor concurred with the results reached by the plurality on the four portions of the statute before the Court. She disagreed with the plurality, however, that *Webster* afforded an

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40. *Reproductive Health Serv. II*, 851 F.2d at 1082.

41. *Id.* at 1083 (quoting Harris v. McRae, 448 U.S. 297, 318 (1980)).

42. *Id.* at 1083. The district court concluded that the restrictions on public funds and assistance by public employees was a violation of the eighth amendment since such provisions effectively denied women inmates access to "medically necessary" abortions. *Reproductive Health Servs. I*, 662 F. Supp. at 428-29. The court of appeals disagreed with this contention. *Reproductive Health Serv. II*, 851 F.2d at 1084. It found that the word "assisting" in the statute, which makes it unlawful to expend public money, did not prevent "state employees from arranging for abortion procedures for inmates or from transporting and escorting inmates to abortion facilities." *Id.* Because the Supreme Court has "made clear that neither the due process clause nor the equal protection clause requires public funding for abortions," the court of appeals found the first sentence of section 188.205 to be constitutional. *Id.*

opportunity to reconsider the *Roe* framework and she found that the viability testing provision could be upheld as consistent with the framework. Justice Scalia also concurred with the results reached by the plurality on the four issues before the Court. He wrote separately to express his belief that *Roe* should have been fully addressed and reversed. Two dissenting opinions, one written by Justice Stevens and the other by Justice Blackmun with whom Justices Brennan and Marshall joined, found the remaining three provisions of the Missouri statute unconstitutional.

Each of the opinions gave separate treatment to the four provisions of the Missouri statute and for the purposes of this analysis each of the provisions will be treated separately.

A. The Four Provisions of the Missouri Act

1. The Preamble

The plurality criticized the meaning the court of appeals attributed to the statement in *City of Akron v. Akron Center for Reproductive Health, Inc.*[43] that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[44] The plurality found this statement to mean only that an abortion regulation otherwise invalid under *Roe v. Wade* cannot be justified because it embodies the State's theory of when life begins.[45] They asserted that this meaning has no application to the preamble since the language of the preamble does not expressly regulate abortion. The plurality reasoned that the preamble may be read as the State simply exercising its authority to make the kind of value judgment favoring childbirth over abortion found permissible under the Court's decision in *Maher v. Roe*[46]

Because they viewed the preamble as a permissible "value judgment" of the State, the plurality found passing on the constitutionality of the preamble unnecessary. The plurality delayed this determination until the Missouri courts decide the extent to which the preamble will be used to interpret state statutes and regulations or to restrict

43. 462 U.S. 416 (1983)

44. *Id.* at 444.

45. 109 S. Ct. at 3050.

46. *Id.* The right of a state to express such a "value judgment" was enunciated in Maher v. Roe, 432 U.S. 464 (1977), which found that "*Roe* did not declare an unqualified 'constitutional right to abortion.' . . . It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 473-74.

abortions in a specific way.[47] They reasoned that passing on the constitutionality is unnecessary at this time as they do not have the power "to decide . . . abstract propositions or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."[48]

In his dissent, Justice Stevens found the preamble unconstitutional as interfering with both contraceptive choices and the Establishment Clause of the first amendment. Justice Stevens addressed this first claim by pointing out that the Missouri abortion statute defines conception as "the fertilization of the ovum of a female with the sperm of a male."[49] According to Justice Stevens, this implies regulation of post-fertilization forms of contraception such as the IUD and "morning after pill" which prevent pregnancy by preventing a fertilized egg from implanting on the wall of the uterus.[50] Justice Stevens found this implication unconstitutional under the right of privacy in contraceptive

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47. 109 S. Ct. at 3050. Several efforts have been made in Missouri to apply the preamble to existing law in numerous contexts. The first involved calculating a person's age from the time of conception, thus adding nine months to age as it is traditionally measured. Columbia Daily Tribune, July 25, 1989, at 10, col. 2. The Director of the Missouri Department of Revenue concluded that the word "age" in state law means the time since birth. *Id.* Therefore, the moment of conception does not give rise to tax deductions in Missouri nor does one become eligible for a driver's license at 15 years and 3 months. *Id.* The attorney of an imprisoned woman used the preamble to bring suit against the state on behalf of her fetus. Columbia Daily Tribune, Aug. 3, 1989, at 1, col. 1. She alleged that the constitutional rights of the fetus were violated because it was being imprisoned without having been charged with a crime, allowed an attorney, or convicted or sentenced. *Id.* A St. Louis County Judge, citing the preamble, accepted a necessity defense and acquitted 21 people accused of trespassing during sit-ins at an abortion clinic. Columbia Daily Tribune, Aug. 17, 1989, at 1, col. 2. A Boone County Judge held that the preamble does not add nine months to a person's age and so does not provide a defense to the charge of possession of alcohol by a minor. Columbia Daily Tribune, Aug. 19, 1989, at 1, col. 1. Further clarification of the impact of the preamble will be provided when the Attorney General responds to the request of a member of the Missouri General Assembly for an opinion of its affect on a wide range of state laws. Columbia Daily Tribune, Sept. 2, 1989, at 1, col. 3.

48. 109 S. Ct. at 3050 (quoting Tyler v. Judges of Court of Registration, 179 U.S. 405 (1900)).

49. MO. REV. STAT. § 188.015(3) (1986).

50. 109 S. Ct. at 3080-81. Justice Stevens also points out that the definition of conception under the Missouri statute conflicts with that of standard medical texts which define conception as the implantation of the ovum in the uterus. This occurs about six days after fertilization. *See, e.g.*, D. MISHELL & V. DAVAJAN, INFERTILITY, CONTRACEPTION & REPRODUCTIVE ENDOCRINOLOGY 109-110 (2d ed. 1986).

choices[51] enunciated in *Griswold v. Connecticut*[52] and other cases involving freedom of personal choice in the area of marriage and family life.[53] He conceded that religious beliefs in the sanctity of human life from the moment of conception provide a *theological* basis for making a distinction between contraceptives which act immediately before fertilization and those which act immediately after such time. He found, however, that the absence of any identifiable *secular* basis for this distinction renders the preamble invalid.[54]

Justice Stevens also used his conclusion that the preamble serves no identifiable secular purpose in asserting that the preamble violates the Establishment Clause of the first amendment. He viewed the "findings" of the preamble as endorsing the theological position that preserving the life of the fetus during the first forty or eighty days of pregnancy involves the same secular interest which exists after viability or after the fetus has become a "person" for purposes of protection under the Constitution.[55] Justice Stevens asserted that, during the period immediately before and after fertilization, the Constitution allows a woman to use contraceptives to prevent the fertilized ovum from developing.[56] He placed, as a matter of law, the burden on Missouri to identify secular rights which distinguish the first days of pregnancy from the period immediately before and after fertilization in order to sustain the position endorsed by the preamble.[57] Justice Stevens concluded that no valid secular purpose exists which justifies making such a distinction; therefore the preamble's endorsement of a theological position is unconstitutional under the Establishment Clause.

In asserting that no such secular interest exists, Justice Stevens withdrew a number of areas from consideration as secular interests of the State. No interest exists in protecting the newly fertilized egg from

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51. 109 S. Ct. at 3082. In her concurring opinion, Justice O'Connor agrees with Justice Stevens that *Griswold* and its progeny may protect the use of post-fertilization contraceptive devices. *Id.* at 3059. However, she points out that the appellees did not seek to enjoin such potential violations of *Griswold*, and there is no indication that the preamble will be applied in this way. Under such circumstances, she finds that the plurality is correct in finding an unconstitutional application too hypothetical to invalidate the preamble on this basis. *Id.* at 3059.

52. 381 U.S. 479 (1965).

53. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 394 (1923); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner V. Oklahoma, 316 U.S. 535, 541 (1942).

54. 109 S. Ct. at 3082.

55. *Id.* at 3083.

56. *Id.* at 3083-84.

57. *Id.* at 3084.

physical harm, he argued, because the capacity for suffering has not yet developed.[58] According to Justice Stevens, the potential societal interests in increasing population or the balancing of fiscal costs and benefits are nonexistent because currently such considerations come down on the side of permitting abortions.[59] Although the State was admitted to have a valid interest in protecting a woman from an incorrect abortion decision, the interest was not deemed to justify the findings of the preamble. Additionally, Justice Stevens was unpersuaded by the State's argument that the preamble is merely an amendment to its tort, property, and criminal laws. He supported this conclusion by contending that none of these areas of Missouri law were based or supported by a definition of when life begins. He also pointed out that such an argument is inconsistent with the prohibition, under the Missouri Constitution, against statutes which pertain to more than one subject matter.[60]

Justice Stevens bolstered his conclusion that the preamble violates the first amendment by pointing to the deeply held religious convictions of many of the participants involved in the abortion debate. These beliefs cannot find their way into abortion regulation, he asserted, because under the Establishment Clause, "[t]he Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate."[61]

In his dissenting opinion, Justice Blackmun agreed with Justice Stevens that the preamble unconstitutionally burdens the use of post-fertilization contraceptives such as the IUD and "morning after" pill. Additionally, he asserted the preamble may be invalidated because of its statement that the rights of the unborn are "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court."[62] Justice Blackmun found that this creates an interest in fetal life defined only by the limits of the Supreme Court's holdings in the abortion area. He stated that such an interest of indeterminable limits has the danger of "the unconstitutional effect of chilling the exercise of a woman's right to terminate a

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58. *Id.*

59. *Id.*

60. *Id.* Article 3, section 23 of the Missouri Constitution provides:

> No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.

MO. CONST., art. III, § 23.

61. 109 S. Ct. at 3085.

62. MO. REV. STAT. § 1.205 (1986).

pregnancy and of burdening the freedom of health professionals to provide abortion services."[63]

2. Use of Public Employees or Facilities

The plurality, joined by Justices O'Connor and Scalia, upheld the prohibition in the Missouri statute on the use of public employees or facilities as consistent with the Supreme Court's earlier public funding decisions in *Maher v. Roe*,[64] *Poelker v. Doe*,[65] and *Harris v. McRae*.[66] The plurality also felt the ban reflects the general proposition that an affirmative right to governmental assistance is not protected by the due process clause even when the aid is needed to secure due process interests, which themselves cannot be deprived by the government.[67]

Maher was an early case involving public funding of abortions. The court in *Maher* upheld a Connecticut welfare regulation providing Medicaid benefits for childbirth expenses but not for nontherapeutic abortions. The Court approved cutting off Medicaid benefits for abortions even though it "may make it difficult-and in some cases, perhaps, impossible-for some women to have abortions" without public funding.[68] In *Poelker*, a companion case to *Maher*, the Supreme Court upheld the constitutionality of a directive issued by the mayor of St. Louis prohibiting the performance of nontherapeutic abortions in city funded hospitals. The Court reached this decision even though city hospitals provided financed medical services for childbirth. *Harris v. McRae* involved a failed constitutional challenge to the Hyde Amendment, a law which severely restricted the use of federal funds to reimburse the cost of nontherapeutic abortions under Medicaid.

The plurality rejected the court of appeals' reasoning that these cases could be distinguished because the Missouri statute "does more than demonstrate a political choice in favor or childbirth; it clearly narrows and in some cases forecloses the availability of abortion to women."[69] The plurality found that, similar to *McRae*, the statute is valid because it is not a "government obstacle" to obtaining an abortion and does not leave a pregnant woman with any fewer choices than if the State chose not to operate any public hospitals.[70] The plurality

63. 109 S. Ct. at 3068 n.1.
64. 432 U.S. 464 (1977).
65. 432 U.S. 519 (1977).
66. 448 U.S. 297 (1980).
67. 109 S. Ct. at 3051; *see* DeShaney v. Winnebago County Dept. of Social Servs., 109 S. Ct. 998, 1003 (1989).
68. *Maher*, 432 U.S. at 474.
69. *Reproductive Health Serv. II*, 851 F.2d at 1081.
70. 109 S. Ct. at 3052; *see McRae*, 448 U.S. at 315-17.

admitted that the statute restricts a woman's ability to obtain an abortion to the extent she chooses to use a physician affiliated with a pubic hospital. They characterized this restriction, however, as being considerably less burdensome and easier to remedy than the case in *Maher*. Additionally, the plurality upheld the statute on the basis of the statement in *Maher* that a state may implement a value judgment favoring childbirth by refusing to fund abortions. They found that this allows the state to implement that same value judgment by the way in which it allocates other public resources such as hospitals and medical staff.[71]

The Eighth Circuit distinguished the Missouri statute from *Maher* and its progeny on the basis that public facilities in Missouri recoup the expenses of providing abortions with payments from the patients. To the appellate court this indicated the Missouri statute created a governmental obstacle to the right to receive an abortion rather than merely expressing a preference for childbirth.[72] The plurality disagreed with this analysis and found no obstacle is created since, "[n]othing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions."[73] The opinion also questioned how the Missouri statute burdens a woman's abortion decision at all if the State recoups all of its expenses in performing abortions when no state subsidy is available.[74]

The plurality concluded that *Maher*, *Poelker*, and *McRae* support its view that a state may prohibit its resources from being used in abortions even when the state recoups all of its expenses. They point out that the ban upheld in *Poelker* applied to all women regardless of their ability to pay. The plurality also pointed to the Court's emphasis in *Poelker* that the decision to prohibit abortions in city hospitals was "subject to public debate and approval or disapproval at the polls" and that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done."[75] The plurality seemed to indicate that the

71. 109 S. Ct. at 3052.

72. *Reproductive Health Serv. II*, 851 F.2d at 1083.

73. 109 S. Ct. at 3052.

74. *Id.* The plurality opinion does indicate, however, this conclusion might change if a state had socialized medicine in which all of the hospitals and physicians in the state were publicly funded or if the State attempted to bar physicians who performed abortions in private institutions from using public facilities for any purpose. *Id.* at 3052 n.8

75. *Poelker*, 432 U.S. at 521.

decision to devote public resources of any kind to the performance of abortions is a political issue.

In her concurring opinion, Justice O'Connor agreed with the plurality's holding but she found that the broad definition given to "public facilities" in the statute may permit some unconstitutional applications of the ban. She implied that *Maher, Poelker,* and *McRae* do not have unlimited application to the Missouri statute. She found that these decisions "stand for the proposition that *some quite straightforward applications* of the Missouri ban on the use of public facilities for performing abortions would be constitutional."[76] The appellees suggested that attempting to impose the ban on abortions on private hospitals that are connected to public water and sewage lines is one potential misapplication of the definition of a public facility.[77] Justice O'Connor viewed these potential unconstitutional applications insufficient to invalidate the statute, however, because the appellees brought only a facial challenge to the statute. A facial challenge may be defeated if any set of circumstances exist under which the statute would be valid.[78]

Like Justice O'Connor, Justice Blackmun's dissent found the statute's definition of a "public facility" troublesome. He did not, however, hesitate to declare the statute invalid on this basis. He found that through a definition of "public facility," which prohibits abortions in institutions that in all pertinent respects are private, Missouri has gone beyond just withdrawing from the business of abortion. He asserted the statute is an affirmative step, in violation of *Roe's* command, toward restricting abortions by private physicians in private hospitals.[79] Justice Blackmun distinguished the "sweeping scope" of the provision as going far beyond the rights of a state established in

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76. 109 S. Ct. at 3059 (emphasis added). The type of application of the broad definition of a "public facility" which Justice O'Connor may find unconstitutional is suggested in the appellees' brief. It states therein that this definition could include private hospitals which are linked to public water and sewage lines or which lease state land or equipment. Brief for Appellees at 49-50, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) [hereinafter Brief for Appellees].

77. Brief for Appellees, *supra* note 76, at 49-50.

78. 109 S. Ct. at 3060.

79. *Id.* at 3068 n.1. Justice Blackmun uses Truman Medical Center in Kansas City, Missouri as an example of this type of application of the statute. In 1985, 97% of all Missouri abortions at sixteen weeks or later were performed at Truman Medical Center. Justice Blackmun points out that the hospital is located on ground leased from a political subdivision of the state. Therefore, he claims that the statute may be applied to prohibit abortions at this facility even though the hospital is staffed primarily by private doctors and administered by a private corporation. *Id.*

Maher, Poelker, and *Harris* to offer incentives in favor of childbirth and disassociate state-owned institutions and personnel from abortion services. Contrary to the plurality opinion, Justice Blackmun felt the statute leaves a woman with fewer choices—and in some cases no choice—than she would have if the State chose not to operate any public hospitals at all. He stated that by the manner in which public facility has been defined, "Missouri has brought to bear the full force of its economic power and control over essential facilities to discourage its citizens from exercising their constitutional rights."[80]

3. The Counseling Provision

Although all three of the counseling provisions of the Act were struck down by the lower courts, Missouri only brought section 188.205, which deals with funding, to the Supreme Court.[81] The State asserted in its brief to the court that this provision is directed solely at the persons responsible for expending public funds and does not apply to public or private physicians or health care providers.[82] The appellees' brief stated that they are not adversely affected under such an interpretation; therefore, a controversy no longer exists concerning this provision.[83] The plurality opinion, speaking for the unanimous Court on this issue, found that this rendered the controversy over section 188.205 moot. It directed the court of appeals to vacate the judgment of the district court with instructions to dismiss the relevant part of the complaint.[84]

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80. *Id.*

81. The appeal of the other two provisions of the statute would have undoubtedly brought complex first amendment issues before the Court as well as the question of whether the provisions unconstitutionally restricted abortion.

82. Brief for Appellants at 43, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) [hereinafter Brief for Appellants].

83. Brief for Appellees, *supra* note 76, at 31-32.

84. 109 S. Ct. at 3054. The plurality ends its discussion on this issue with a quote from Deakins v. Monaghan, 484 U.S. 193, 200 (1988), which states, "Because this [dispute] was rendered moot in part by [appellees] willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated." 109 S. Ct. at 3054. Both Justice O'Connor and Justice Blackmun, however, note the interpretation of section 188.205 given by the State in its brief is not binding upon the Missouri Supreme Court and the provision might be relitigated should that court adopt a different interpretation. *Id.* at 3061, 3069 n.1.

4. Viability Testing

The viability testing provision in section 188.029 of the Missouri statute elicited the most commentary from the Justices and provided the plurality with an opportunity to challenge the *Roe* trimester framework. The testing provision consists of two sentences which provide:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.[85]

a. Interpretation of Section 188.029

The debate over the interpretation of the viability testing provision centered on the interplay between the provision's two sentences. The court of appeals interpreted the second sentence of the statute as requiring that after twenty weeks the physician must perform tests to determine gestational age, fetal weight, and lung maturity regardless of the costs, health risks, and usefulness of performing those tests in a particular situation.[86]

Although the usual practice of the Court is to defer to the lower court's construction of a state statute, the plurality rejected the court of appeal's interpretation as "plain error."[87] The plurality found that the court of appeals erred by not reading the second sentence in the context of the provision as a whole. The opinion stated that the lower court's interpretation violated both canons of Missouri statutory interpretation, and the general principle that statutes should be interpreted to avoid constitutional difficulties.[88] Under the lower court's interpretation, the second sentence of section 188.029 requires the physician to perform the indicated tests regardless of whether, in the physician's medical

85. MO. REV. STAT. § 188.029 (1986).
86. *Reproductive Health Serv. II*, 851 F.2d at 1074.
87. 109 S. Ct. at 3054.
88. *Id.* at 3054-55.

judgment, the tests would be helpful in determining viability or would pose significant risks to the mother and the fetus. The first sentence, however, requires the physician to exercise reasonable professional skill and judgment. The apparent conflict between these two sentences led the plurality to conclude that the lower court misinterpreted the statute. Additionally, the plurality found that such an interpretation is incongruous with the use of the word "necessary" in the statute and the statute's expressed purpose of determining viability.[89] Under the plurality's interpretation of the statute, then, the viability testing provision does not require the physician in all cases to perform tests to determine gestational age, weight, and lung maturity of the unborn child. The plurality interpreted the testing provision to require a physician to perform tests only when the tests will be useful in making subsidiary findings about viability.[90]

Justice Stevens' dissent stated that the Court's practice of accepting the interpretation of the lower court even when a different interpretation is justified forecloses adoption of the plurality's interpretation.[91] He also asserted that the interpretation adopted by the court of appeals is the "plain meaning" of the statute which cannot be ignored even if the plurality's interpretation avoids constitutional difficulties.[92] He

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89. *Id.* at 3055.

90. *Id.* at 3054-55. Justice O'Connor's concurring opinion agrees with the plurality's interpretation of section 188.029. She adds, however, that in addition to only requiring tests useful in making subsidiary findings as to viability, the statute requires only tests which would be prudent to perform in the particular medical situation before the physician. *Id.* at 3061.

As a practical matter, the provision may have little effect on the performance of viability tests by physicians. The parties in *Webster* agree that prior to thirty weeks of pregnancy, the only possible finding relevant to determining viability is that of gestational age. They also agree that the standard medical procedure for ascertaining gestational age is ultrasonography, a process using sound waves to create a visual image. Sophisticated ultrasound equipment is needed to make the three-dimensional measurements required to estimate fetal weight. The only known test to determine fetal lung maturity is amniocentesis. This involves the insertion of a hollow needle into the uterus to extract amniotic fluid which is then analyzed for the presence of certain chemicals. This test yields no useful information about viability before thirty weeks of pregnancy. Brief for Appellees, *supra* note 76, at 26-27; Brief for Appellants, *supra* note 82, at 32.

91. 109 S. Ct. at 3079-80.

92. *Id.* at 3080. Justice Blackmun and the other dissenters agree with Justice Stevens' interpretation that the second sentence of section 188.029 requires the physician to perform tests to determine gestational age, weight, and lung maturity regardless of whether these tests are necessary to make a viability determination, add to the cost of the abortion, or pose substantial medical risks to the woman and the fetus. Under such a construction, both

supported his conclusion by adding that the word "shall" is used twice in the second sentence of the statute without any qualifying language. He also pointed out that under the plurality's interpretation the second sentence adds nothing to the first sentence's requirement that a physician use his best skill and judgment. Contrary to the plurality's opinion, Justice Stevens asserted that it is not incongruous to assume the Missouri Legislature was trying to protect nonviable fetuses by making an abortion more expensive. He claimed the preamble and the statute as a whole indicate that the purpose of the Missouri abortion statute is "to protect the potential life of the fetus, rather than to safeguard maternal health."[93]

b. *Conflict With the Roe Framework*

After setting out its interpretation of section 188.029, the plurality maintained that the statute conflicts with the Court's decisions in *Colautti v. Franklin*[94] and *City of Akron*. The plurality did not find the testing provision unconstitutional because of this conflict. Rather, it used the conflict as a basis for abandoning the trimester framework established in *Roe v. Wade*. The *Roe* framework sought to balance the interests of a state in safeguarding maternal health and protecting potential human life[95] against a woman's constitutional privacy rights which were found to encompass the decision concerning whether to terminate her pregnancy.[96] The framework places no restrictions on

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dissents find that the statute is unconstitutional regardless of the *Roe* framework. They find that even under the rational basis test the statute's requirement of tests which have no medical justification impose additional health risks upon the woman and the fetus. Therefore, they conclude that such tests bear no rational relation to the State's interest in the protection of fetal life. *Id.* at 3070. Justice Blackmun also agrees with the finding of the court of appeals that section 188.029 conflicts with the decision in Colautti v. Franklin, 439 U.S. 379, 388-89 (1979), that a state may not proclaim one of the elements entering into the determination of viability. 109 S. Ct. at 3070 n.4.

93. *Id.* at 3080 (quoting *Reproductive Health Servs. I*, 662 F. Supp. at 420).

94. 439 U.S. 379 (1979).

95. "[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right, therefore, cannot be said to be absolute." *Roe*, 410 U.S. at 154.

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

abortions performed in the first trimester of pregnancy.[97] The state's interest in *maternal health* becomes compelling at the second trimester of pregnancy. At this point, the state may regulate abortion to the extent the regulation reasonably relates to the preservation and protection of maternal health.[98] The framework sets viability as the point at which the state's interest in *potential human life* becomes compelling. With a compelling interest, the state may "regulate, and even proscribe, abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[99]

Two findings of the plurality provide the basis for the conflict between the viability testing provision of the Missouri statute and the Court's decisions in *Colautti* and *City of Akron*. First, the plurality stated that the testing statute is concerned not with maternal health, but with promoting the State's interest in potential human life.[100] Second, the statute is said to create a presumption that a viable fetus exists at twenty weeks. The presumption must be rebutted with tests before an abortion may be performed.[101]

In *Colautti*, the Court emphasized the importance of the viability determination in the *Roe* framework and the role of the physician in making this determination. The Court stated, "[t]he determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."[102] The plurality asserted that Missouri's viability testing provision conflicts with this holding because it inflicts state regulation upon the medical determination of viability. Further, added the plurality, both the district court and court of appeals struck down the testing provision on this basis.[103] The provision in *City of Akron* that is relevant to this issue required second trimester abortions to be performed in hospitals. The Court struck down the regulation because it burdened access to obtaining an abortion by doubling the cost.[104] Because the testing provision of the Missouri Act, in some cases, increases the cost of second trimester

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terminate her pregnancy." *Id.* at 153.

97. *Id.* at 163.

98. *Id.*

99. *Id.* at 165.

100. 109 S. Ct. at 3055.

101. *Id.*

102. *Colautti*, 439 U.S. at 396 (quoting Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 53, 64 (1976)).

103. 109 S. Ct. at 3056.

104. *City of Akron*, 462 U.S. at 434-35.

abortions, the plurality felt it conflicts with the holding in *City of Akron.*[105]

The plurality believed the inconsistency between the Missouri statute and the holdings in *Colautti* and *City of Akron* indicates the inadequacy of the trimester framework and has resulted in the complication of abortion law. The opinion stated that "the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed."[106]

Justice Blackmun's dissent emphasized that the plurality adopted an incorrect interpretation of section 188.029. He suggested, however, that even under the plurality's interpretation, the statute does not conflict with the decisions in either *Colautti*[107] or *City of Akron.*[108] More significantly, Justice Blackmun emphasized that, even though some second trimester abortions in which the fetus is not viable will be affected, the plurality's interpretation does not conflict with *Roe.* He stated, "Nothing in *Roe,* or any of its progeny, holds that a State may not effectuate its compelling interest in the potential life of a viable fetus by seeking to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age."[109] The additional costs added to second trimester abortions by the testing provision were justified as being " merely *incidental* to, and a *necessary accommodation* of, the State's unquestioned right to prohibit nontherapeutic abortions after the point of viability."[110] Thus, Justice

105. 109 S. Ct. at 3056.

106. *Id.*

107. Justice Blackmun reads the plurality's interpretation of section 188.029 as only instructing a physician to use tests to make the findings listed in the statute when such tests are medically feasible and appropriate. As such, he finds the provision does not conflict with *Colautti* since the determination of viability is still within the medical judgment of the physician. *Id.* at 3071 n.6.

108. Justice Blackmun concludes the application and justification of the viability testing provision sufficiently separates it from the regulation in *City of Akron* for it to be upheld under the holding in that case. He finds the testing provision of section 188.029, which would apply only to *some* second trimester abortions, is significantly different from the hospitalization regulation in *City of Akron* since that provision purported to regulate *all* second trimester abortions. Justice Blackmun also emphasizes the holding statement in *City of Akron* that the State may not impose "a heavy, and *unnecessary,* burden on women's access to a relatively inexpensive, and otherwise accessible, and safe abortion procedure." *Id.* Justice Blackmun believes, unlike the regulation involved in *City of Akron,* the testing provision is *necessary* to effectuate the State's interest in potential human life of viable fetuses. *Id.*

109. *Id.* at 3071.

110. *Id.* (emphasis added).

Blackmun acknowledged that, under some circumstances, the State's interest in potential human life may justify burdening second trimester abortions.

Justice O'Connor concurred with the plurality in upholding the testing provision. Like Justice Blackmun and other dissenters, however, she believed that the plurality's interpretation of the statute does not conflict with *Colautti* or *City of Akron* and provides no basis for reexamining the *Roe* trimester framework.[111] While agreeing with the plurality that the purpose of the Missouri testing statute is to protect potential human life, she felt that this purpose does not place the statute in conflict with the *Roe* trimester framework. Similar to Justice Blackmun's discussion of the statute's validity under the *Roe* framework, Justice O'Connor based her finding of validity on the absence, in prior abortion decisions by the Court, of any holding that a State may not promote its interest in potential human life when viability is possible.[112] She looked to *Thornburgh v. American College of Obstetricians & Gynecologists*[113] as supporting the power of a state to promote this interest. In *Thornburgh*, the Court struck down a Pennsylvania statute requiring the presence of a second physician during an abortion performed after viability. Justice O'Connor suggested that the statute was struck down only because of the absence of any exception for emergency situations and not because any difference exists between promotion of the State's interest when viability is possible and when it is certain.[114] The *Thornburgh* majority made no statement that the State's interest may differ in these two situations. Justice O'Connor viewed this as an indication that all nine members of the Court agreed

111. Justice O'Connor finds that the first sentence of the testing provision arguably conflicts with the decisions in *Planned Parenthood v. Danforth* and with *Colautti*. The presumption of viability at twenty weeks may be seen as restricting the judgment of a physician by requiring that the presumption be overcome before an abortion may be performed. Justice O'Connor points out, however, that she believes such an argument would be unsuccessful and, in any event, the question is not before the Court because the appellees did not appeal the district court's ruling that the first sentence is constitutional. 109 S. Ct. at 3061.

112. Justice Scalia's concurring opinion criticizes the concept of a State's "interest in potential life when viability is possible." *Id.* at 3066 n.4. He points out that by definition viability only involves the possibility that the fetus is capable of life outside the womb. He therefore concludes that the concept alluded to by Justice O'Connor is a "possibility of a possibility of survivability outside the womb." *Id.*

113. 476 U.S. 747 (1986).

114. 109 S. Ct. at 3063.

that a state may regulate abortion to protect its interest in potential life when viability is possible but not certain.[115]

Justice O'Connor found no conflict existing between the testing provision and the statement in *Colautti* that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability . . . as the determinant of when the State has a compelling interest . . . . Viability is the critical point."[116] The plurality's interpretation only requires a physician to make subsidiary findings as to viability and Justice O'Connor felt this makes it clear that section 188.029 does not violate *Colautti's* rule that viability is the "critical point."[117]

Likewise, Justice O'Connor found no conflict with the holding in *City of Akron* that a state may not impose a "heavy and unnecessary, burden" on a woman's abortion rights. She reached this conclusion by applying the standard for evaluating regulation of pre-viability abortions she expressed in her dissent in *City of Akron.* In that case, she suggested that "a regulation imposed on a lawful abortion is not unconstitutional unless it *unduly burdens* the right to seek an abortion."[118] Similar to the analysis of Justice Blackmun, Justice O'Connor found that the testing procedure, contrary to the statute involved in *City of Akron,* does not violate the unduly burdensome standard because it will only marginally, if at all, increase the cost of an abortion.[119] Justice O'Connor pointed out that unlike the statute in *City of Akron* which applied to all second trimester abortions, section 188.029 applies only when viability is possible. Additionally, she found that her interpretation of the *Thornburgh* decision makes the State's interest in determination of viability compelling whereas the hospitalization requirement in *City of Akron* involved no such compelling interest.[120]

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115. *Id.*

116. *Id.* (quoting *Colautti,* 439 U.S. at 388-89).

117. *Id.*; Justice Scalia disagrees with this analysis. He finds the principle expressed in *Colautti* and *Danforth* that viability must be a matter for the determination of the physician is violated by section 188.029. He believes section 189.029 requires in some instances that the physician perform tests that he or she would not otherwise have performed to determine whether a fetus is viable. *Id.* at 3066 n.* (Scalia, J., concurring).

118. *City of Akron,* 462 U.S. at 453 (O'Connor, J., dissenting) (emphasis added).

119. 109 S. Ct. at 3063.

120. *Id.* Justice Scalia's concurring opinion criticizes the "undue burden" standard used by Justice O'Connor as lacking any basis for determining why the burden involved here is "due" but the burden in *City of Akron* is "undue." He finds that because the financial burden imposed by the Missouri statute is much less than the one involved in *City of Akron,* that case can not be used as a basis for evaluating the Missouri regulation.

c. Rejection of the Roe Framework

After noting a conflict between the viability testing provision and the *Roe* trimester framework, the plurality described the framework as a construction of the constitution which has proven "unsound in principle and unworkable in practice."[121] The Court acknowledged the importance of *stare decisis* but stated that its importance is reduced in constitutional cases where change can be effectuated only through the Court and constitutional amendments.

The plurality condemned the framework on two principle grounds. First, they stated that the framework is inconsistent with the Constitution which is cast in general terms and speaks in general principles. Secondly, they found no reason why a state's interest in protection of human life should not be as compelling before viability as it is after viability.[122]

The plurality advanced its finding of inconsistency with the Constitution's general terms and principles by noting that the trimester and viability elements essential to the framework are not found in the Constitution. They asserted that the indeterminate bounds of inquiry involved in the framework have resulted in a "web of legal rules which have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."[123] The plurality also cited to a comment from Justice White's dissent in *Planned Parenthood v. Danforth.*[124] In *Danforth,* Justice White alleged that the intricacies of the framework have made the Court the country's "*ex officio* medical board with the power to approve or disapprove medical and operative practices and standards throughout the United States."[125]

> To avoid the question of *Roe v. Wade's* validity, with the attendant costs that this will have for the Court and the principles of self-governance, on the basis of a standard that offers 'no guide but the Court's own discretion'. . . merely adds to the irrationality of what we do today.

Id. at 3066 n.* (quoting Baldwin v. Missouri, 281 U.S. 586, 595 (1930)).

121. *Id.* at 3056 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)). Justice O'Connor disagrees with the plurality that addressing the *Roe* framework is required in this case. She does indicate, however, her continuing belief that the trimester framework of *Roe* is "problematic." *Id.* at 3063. In *City of Akron,* Justice O'Connor described the framework as "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context." *City of Akron,* 462 U.S. at 454.

122. 109 S. Ct. at 3056-57.

123. *Id.* at 3057.

124. 428 U.S. 52 (1976).

125. *Id.* at 99.

The plurality's second basis for rejecting the *Roe* framework rested on their view that there is no reason why a state's interest in potential human life is not present before viability. The plurality rejected the *Roe* framework because it does not recognize such an interest of the state and sets viability as a rigid line before which the state cannot establish regulations to protect its interest in potential human life.[126]

Justice Blackmun's dissent answered the plurality's first argument by pointing out that many constitutional doctrines are not found in the specific language of the Constitution. He used the first amendment's "actual malice" standard as an example of such a doctrine. These doctrines, he explained, are not rights protected by the Constitution. Rather, they are methods by which the scope of constitutional rights are measured or by which constitutional rights of individuals are balanced against those of the government.[127] Justice Blackmun stated that the *Roe* framework operates to define and limit the rights underlying abortion to accommodate, but not destroy, the interests of the state. This accommodation of individual rights and state interests, he explained, lies at the heart of constitutional adjudication.[128] He provided a similar answer to the plurality's assertion that the framework has resulted in abortion law resembling a code of regulations. Justice Blackmun pointed to the fine distinctions contained in a number of areas such as the fourth amendment freedom from unreasonable searches and seizures. He stated further that the Court has no more been established as an "*ex officio* medical board" by virtue of its abortion decisions than it has become a national school board due to its decisions involving religion in the public schools or become the bureau of prisons through its decisions concerning prison regulations.[129] Justice Blackmun felt the intricacy of abortion law has developed not because the court has overstepped its judicial role, rather, because it has acted conscientiously to do careful justice to the fundamental rights involved.[130]

Justice Blackmun strongly criticized the plurality for not providing greater explanation for their assertion that a state has a compelling interest in potential life throughout pregnancy. He characterized the lack of explanation as "it-is-so-because-we-say-so jurisprudence."[131] Justice Blackmun answered the plurality's assertion that a state has a compelling interest throughout pregnancy by citing the opinion of Justice Stevens in *Thornburgh*. Therein, Stevens wrote, "The develop-

126. 109 S. Ct. at 3057.
127. *Id.* at 3072-73.
128. *Id.* at 3073.
129. *Id.* at 3074.
130. *Id.* at 3075.
131. *Id.*

ment of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality."[132]

Justice Blackmun reaffirmed his belief in the effectiveness and fairness of the trimester framework and, in particular, the use of the viability line. He contended that prior to the point of viability the fetus cannot survive without the woman, therefore, it cannot be seen as having rights separate from or superior to those of the woman.[133] He pointed out that the viability line marks the place in time where the fetus loses its dependence on the uterine environment. Therefore, he concluded it is only at this point that the state's interest in the protection of potential human life becomes compelling.[134]

Justice Blackmun also faulted the plurality's analysis for not addressing what he felt was the true issue underlying this case: whether the constitutional general right to privacy recognized in decisions such as *Griswold* and *Roe* extends to abortion. Justice Blackmun stated that the issues surrounding these privacy rights are "questions of unsurpassed significance in this Court's interpretation of the Constitution."[135] It was his belief that the plurality should have decided this case on those grounds.

The plurality answered this criticism by distinguishing *Griswold* from the *Roe* decision on the basis that *Griswold,* unlike *Roe,* contains no framework full of rules and regulations to be followed in interpreting the nature of the right involved.[136] They also justified their hesitancy to address this issue by stating that the problems in applying *Roe* show that it is wise to avoid unnecessarily distinguishing between "a 'fundamental right' to abortion, as the Court described it in *Akron,* . . . a 'limited fundamental constitutional right' which Justice Blackmun's dissent [in *Webster*] treat[ed] *Roe* as having established, . . . or a liberty interest protected by the Due Process Clause, which [the plurality] believe[d] it to be."[137]

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132. *Thornburgh,* 476 U.S. at 778-79.

133. 109 S. Ct. at 3075.

134. *Id.*

135. *Id.* at 3072.

136. *Id.* at 3057-58.

137. *Id.* at 3058 (citations omitted). Justice Rehnquist similarly defined the right involved in abortion as a "liberty interest" in his dissenting opinion in *Roe v. Wade,* and stated that laws in the abortion area were subject only to the rational basis test. He stated:

> If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld

d. The "Permissibly Furthers" Standard

After finding the *Roe* trimester framework no longer applicable, the plurality replaced it with its own "permissibly furthers" standard. The plurality upheld the constitutionality of the viability testing provision because it "permissibly furthers the State's interest in protecting potential human life."[138] Although it discarded the framework of *Roe*, the plurality stated that it modified and narrowed only the holding in *Roe* and did not overrule that decision. They found the Missouri statute, which uses viability as the point at which to assert its interest, too factually dissimilar from the statute in *Roe*, which prohibited all nontherapeutic abortions, to fully reconsider the *Roe* decision.[139]

Justice Blackmun disputed the basis for this distinction and concluded that the "permissibly furthers" standard is in effect equivalent to the rational basis test, the most lenient level of review for evaluating abortion regulations. He found that adoption of such a standard would overrule *Roe* for all practical purposes.[140] He felt the plurality's standard violates every principle established in *Roe* and ignores the protection in that decision of what he called every woman's "limited fundamental constitutional right to decide whether to terminate a pregnancy."[141] Justice Blackmun concluded it is the plurality's view that the interest of the state becomes compelling at conception. He claimed that this position allows for every regulation restricting abortion to be upheld as a "permissible" furtherance of the State's interest in potential human life. Therefore, he determined that the plurality's assertion that *Roe* lies undisturbed by its decision because of factual differences between the Missouri statute and the one involved in *Roe* is a distinction without a difference. He felt that under the plurality's analysis the statute involved in *Roe* could be upheld as "permissibly furthering" the interest of the state.[142]

The dissent felt the adoption of the "permissibly furthers" test reveals the ultimate objective of the plurality: the return of abortion

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> in our earlier decisions on the basis of that liberty. . . . But that liberty is not guaranteed absolutely against deprivation, only against deprivations without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective.

Roe v. Wade, 410 U.S. 113, 175 (1973) (Rehnquist, J., dissenting).

138. 109 S. Ct. at 3057.

139. *Id.* at 3058.

140. *Id.* at 3076 (Blackmun, J., dissenting).

141. *Id.*

142. *Id.* at 3077.

law to its pre-*Roe* state. The dissent's analysis led it to suggest that through the "permissibly furthers" standard the plurality implicitly invited state legislatures to enact more restrictive abortion regulations and to seek to assert the state's interest at the point of conception.[143] The dissent believed that this invitation was made with the hope that new test cases would arise so the Court could overrule *Roe v. Wade* totally and return the ability to place the severe limitations on abortions to the states.[144]

In answering this accusation, the plurality admitted that its opinion renders some regulation of abortion permissible that would be found unconstitutional under the logic of previous abortion decisions.[145] The plurality found that the new participation of legislatures in this area which is allowed by its holding is consistent with the goal of constitutional adjudication. It said that such a procedure "hold[s] true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not."[146] The assumption of the dissent that state legislatures will use the plurality's holding to return to severe restrictions on abortions was attacked by the plurality because it "not only misread[] [its] views but [the dissent did] scant justice to those who serve in such bodies and the people who elect them."[147] This statement suggests that the dissent was incorrect in its finding that the ultimate purpose of the plurality's holding was to initiate a process that will return abortion law to its pre-*Roe* state.

Justice Blackmun's dissent also directed criticism at the lack of discussion by the plurality concerning the effect of its holding. Justice Blackmun defined the right of reproductive choice as "vital to the full participation of women in the economic and political walks of American life."[148] He criticized the plurality for not providing a greater explanation of why it "cast[] into darkness" the beliefs of women who have structured their lives around the right to reproductive choice. Additionally, the plurality was criticized for not addressing the disastrous results which are likely to occur when women ignore the law and seek out back-alley abortionists or attempt to perform abortions upon themselves. Justice Blackmun called the lack of consideration given to both of these areas "callous" and found the plurality's silence on these issues destructive to the Court as an institution.[149]

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143. *Id.* at 3067.
144. *Id.*
145. *Id.* at 3058 (plurality opinion).
146. *Id.* at 3058.
147. *Id.* at 3058.
148. *Id.* at 3077 (Blackmun, J., dissenting).
149. *Id.* at 3078.

Justice Blackmun also stated that special justification is needed to depart from *stare decisis*, which he stated applied with unique force in this case because of the nature of the rights involved. He found this special justification lacking in the plurality's opinion because of the plurality's silence about the impact of their decision on women who have come to believe that they possess certain abortion rights.[150] Justice Blackmun believed that the lack of explanation by the plurality and its unjustified departure from *stare decisis* invited deserved criticism of the Court. Such criticism was based on "cowardice and illegitimacy" in dealing with what he called "the most politically divisive domestic legal issue of our time."[151]

Justice Scalia wrote a separate concurring opinion which, while agreeing with the results reached on the specific issues before the court, criticized the plurality for not going further and explicitly overruling *Roe v. Wade*. The effect of the Missouri statute cannot, in Justice Scalia's view, be decided on statutory or procedural grounds in order to avoid deciding the constitutionality of the statute. He found this inquiry not limited, as Justice O'Connor suggested, by the rule that constitutional questions should be avoided when possible. Rather, he found guidance from the principle that a rule of constitutional law would not be formulated which is broader than is necessary to decide the case in question.[152]

Justice Scalia found that this principle applied to the Court's examination of the viability testing statute. He then stated that valid and compelling reasons existed which brought the case within the exception allowing departure from the principle for good cause.[153] Foremost among the reasons Justice Scalia asserted in support of this departure is his belief that the questions in this area are mainly political and not judicial. He felt that maintaining the Court's involvement in this area will distort the public's view of the role of the Court. The public will then subject the members of the Court to the types of public pressures from which the judiciary properly should be insulated and which are best reserved for political institutions.[154]

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150. *Id.*

151. *Id.* at 3079.

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

153. *Id.* at 3065. The origins of this exception are traced by Justice Scalia as far back as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Justice Scalia points out that the exception permitting a broader holding than necessary has been permitted even in cases where the identical result could be reached by applying the rule displaced by the broader holding. *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986); Illinois v. Gates, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983).

154. 109 S. Ct. at 3064-65 (Scalia, J., concurring).

Justice Scalia contended that the nature of the abortion issue also justified departure from the "no broader than necessary" principle. He pointed out that, unlike most cases in which the party injured by the Court's failure to adopt a broader holding can challenge the holding himself, the harm which many feel is done by allowing unrestricted abortions does not lend itself to this solution.[155]

The Court's hesitancy to overrule *Roe* in this case led Justice Scalia to question how anything more than minor problematic aspects of *Roe* can ever be reconsidered unless the Court is faced with a statute which directly violates its principles. "It thus appears that the mansion of constitutionalized abortion-law, constructed overnight in *Roe v. Wade*, must be disassembled door-jamb by door-jamb, and never entirely brought down, no matter how wrong it may be."[156]

B. The Changing Standard

While obviously disagreeing on the treatment of the specific issues, both the plurality and dissenting opinions agreed that the Court's decision invites state legislatures to pass more restrictive abortion regulations.[157] Arguably, this invitation did not come because of any dramatic effect *Webster* had on the specific regulation areas involved in the case. The Court upheld the Preamble by finding it to be a "value judgment" allowable under current abortion law. It left open the possibility of finding the Preamble unconstitutional if it is applied to restrict abortion rights.[158] The Court left the abortion counseling area untouched by finding the dispute in that area moot.[159] Much discussion surrounded the viability testing provisions, but five Justices found that the provisions could be upheld on noncontroversial grounds consistent with the *Roe* trimester framework and prior abortion cases.[160] The decision did extend the holding of *Maher* that a state is not required to fund abortions by applying that principal to uphold the ban on use of public facilities. As Justice O'Connor pointed out, however, one reason the provision was upheld was that only a facial challenge to the statute was involved. Some potential applications of the statute may be unconstitutional.[161] The invitation to state legislatures seems to come, then, not from changes in the specific areas

155. *Id.* at 3066.
156. *Id.* at 3067.
157. *Id.* at 3058 (plurality opinion); *id.* at 3067 (Blackmun, J., dissenting).
158. *Id.* at 3050.
159. *Id.* at 3053-54.
160. *Id.* at 3060-64 (O'Connor, J., concurring); *id.* at 3071 (Blackmun, J., dissenting); *id.* at 3079 (Stevens, J., concurring in part and dissenting in part).
161. *Id.* at 3059-60.

dealt with in the case, but from the indications of a shift in how the Court will evaluate future abortion regulations.

Roe v. Wade established the abortion decision as a fundamental right.[162] Therefore, the Court in its pre-*Webster* decisions applied the strict judicial scrutiny and compelling state interest test in evaluating abortion regulations. Under this test, a state's interest in protection of maternal health is not "compelling" until the second trimester of pregnancy. Abortion regulations are evaluated as either reasonably related to this compelling interest or as an unconstitutional burden on abortion.[163]

The dissenters in pre-*Webster* cases, however, disagreed with the use of strict scrutiny and proposed two alternative tests. One test, advanced by Justices White and Rehnquist, asserted that the rights involved in abortion were not "fundamental," therefore, only a "rational relationship" need exist between an abortion regulation and the state interest involved.[164] Justice White indicated in his *Thornburgh* dissent that this test would achieve the desirable result of allowing outright prohibition of abortion by the states.[165] Justice O'Connor expressed the second alternative, the "undue burden" standard, in her dissent in *City of Akron*.[166] Under this standard, strict scrutiny is not applied in every case. The Court is to first determine whether the state law bears a rational relationship to a compelling state interest, then, it should apply strict scrutiny only if the statute has "unduly burdened" the abortion decision.[167]

Part of the significance of the *Webster* decision seems to be that five Justices indicated they are no longer willing to apply the strict scrutiny test in every case. These five Justices all agreed that the standard should be something less than strict scrutiny but they disagreed on the exact formulation of the standard. The three Justices of the plurality pointed to the "permissibly furthers" test; Justice Scalia seemingly would apply no test or at the very most a "rational basis" test; and Justice O'Connor reaffirmed her "undue burden" standard. The limits of the "permissibly furthers" standard used by the plurality are difficult to determine. The plurality did not expand on this standard and only stated that the Missouri viability testing provision is valid because it "permissibly furthers the State's interest in protecting potential human

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162. *Roe*, 410 U.S. at 153-54.

163. *Id.* at 163-64.

164. *Thornburgh*, 476 U.S. at 788-97 (White, J., dissenting); *see, e.g., Roe*, 410 U.S. at 173-77 (Rehnquist, J., dissenting).

165. *Thornburgh*, 476 U.S. at 796 (White, J., dissenting).

166. *City of Akron*, 462 U.S. at 452-75 (O'Connor, J., dissenting).

167. *Id.* at 462-66.

life."[168] The plurality answered the dissent's charge that the "permissibly furthers" test will send abortion law back to the "dark ages" by saying the dissent has "misread" its views.[169] This may imply that the plurality has adopted a standard somewhat more restrictive than the rational basis test supported by Justices White and Rehnquist in their earlier dissents.

The dissenters in *Webster* may have hinted that they also will change the way they examine abortion regulations. Although they reaffirmed *Roe* and the framework it adopted, they characterized the right for the first time as a "*limited* fundamental constitutional right to decide whether to terminate a pregnancy."[170] Like the plurality, the dissent did not discuss this characterization, making it difficult to determine what effect, if any, the dissent gave to defining the right as "limited." A possible indication of change is contained in Justice Blackmun's assertion that the viability testing provision as interpreted by the plurality does not violate *Roe*. He felt that the testing would have the effect of increasing costs of some second trimester abortions. He claimed, however, that the extra costs involved are "merely incidental to, and a necessary accommodation of, the State's unquestioned right to prohibit nontherapeutic abortions after the point of viability."[171] This is the first time state intrusion into second trimester abortions for the purpose of furthering the interest in potential human life has been upheld by the Supreme Court.

Justice O'Connor's "undue burden" standard lies between the opposing views of the dissent and the plurality. Assuming the plurality's adoption of a "permissibly furthers" standard and the dissent labeling abortion rights "limited fundamental constitutional rights" represent changes in the way they will evaluate abortion regulation in the future, movement toward the middle to Justice O'Connor's view has occurred. This movement indicates that examination of future abortion regulation, while not falling to the leniency of the "rational basis standard," will be conducted under a standard less restrictive than the strict scrutiny applied in the past.

168. 109 S. Ct. at 3057.
169. *Id.* at 3058.
170. *Id.* at 3076 (Blackmun, J., dissenting) (emphasis added).
171. *Id.* at 3071.

III. THE APPROACH OF OTHER STATES REGARDING ISSUES ADDRESSED IN WEBSTER

A. The Determination of When Life Begins

In *Roe*, the Court acknowledged the strongly held, opposing views on the abortion controversy,[172] much of which grows out of divergence in thinking on the question of when life begins. The Court considered itself in no better position to answer that question than all the others who had tried or declined to do so.[173] It indicated that if a state believed itself to be in a position to answer the question of when life begins, it could do so, provided that the state did not use this determination to override the woman's right to privacy—namely, to have an abortion.[174]

Eight states[175] have statutes expressing views similar, at least in part, to those in Missouri's Preamble. All are contained within broad abortion control acts and all indicate an intention to protect the unborn.[176]

Only two states, Illinois and Louisiana, specifically address when life begins. Their very similar statutes find that "the unborn child is a human being from the time of conception" and declare that the unborn child is "a legal person for the purposes of . . . the right to life from conception under the laws and Constitution of this State."[177] When challenged, the Illinois statute was upheld by the Seventh Circuit Court of Appeals. The court found the statute lawful because of language contained in it which stated the legislative intent to regulate abortion only when such was in conformance with the decisions of the Supreme

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172. *Roe*, 410 U.S. at 116.

173. *Id.* at 159.

174. *Id.* at 162.

175. CONN. GEN. STAT. ANN. § 53-31a (West 1985); ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd Supp. 1989); KY. REV. STAT. ANN. § 311.710 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. § 40:1299.35.0 (West Supp. 1989); MONT. CODE ANN. § 50-20-102 (1989); NEB. REV. STAT. § 28-325(1) (1985); N.D. CENT. CODE § 14-02.1-01 (1981); 18 PA. STAT. ANN. § 3202(a) (Purdon 1983).

176. The Missouri Preamble is located in a different section of the revised statutes than the provisions specifically regulating abortion. However, the preamble was included in the comprehensive bill enacted by the General Assembly "to repeal sections [of Missouri's revised statutes] relating to unborn children and abortion, and to enact . . . new sections relating to the same subject." H.R. 1596, 83rd Gen. Ass., 2nd Sess., 1986 Mo. Laws 689.

177. ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd Supp. 1989); LA. REV. STAT. ANN. § 40:1299.35.0 (West Supp. 1989).

Court.[178] The statute also indicated explicitly that it was not in any way to restrict a woman's right to privacy, including the right to an abortion.[179]

One other state, Connecticut, indicates the moment of conception is the point at which the State's interest in protecting and preserving human life begins.[180] In *Abele v. Marke*,[181] however, this provision was held to be an unconstitutional abridgement of a woman's right to an abortion. The court reasoned that while the State may regulate the manner in which abortions are performed, it may not prohibit them. The statute in question, the intent of which is to protect and preserve life from the moment of conception, arguably acts as such a prohibition.

The *Webster* decision did not change, but rather clarified the *Roe* holding that States wishing to adopt a view of when life begins may do so only if that view is not used to justify the regulation of abortion. This clarification likely will have little impact. The issue of whether an abortion regulation is an impermissible definition of when life begins seldom has been the subject of litigation. To be consistent with the principle laid down in *Roe* and reaffirmed in *Webster*, a statute would need to expressly indicate that it is to be applied in a manner consistent with all decisions of the Supreme Court and the United States Constitution.[182] *Webster* did not change the results reached in the cases involving the Illinois and Connecticut statutes.[183]

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178. Charles v. Carey, 627 F.2d 772, 779 (7th Cir. 1980), *on remand*, 579 F. Supp. 377 (N.D. Ill. 1983).

179. *Id.* at 778-79, 779 n.8.

180. CONN. GEN. STAT. ANN. § 53-31a (West 1985).

181. Abele v. Marke, 351 F. Supp. 224, 227 (D. Conn.), *stay granted*, 409 U.S. 908, *motion to vacate denied*, 409 U.S. 1021 (1972), *stay vacated*, 410 U.S. 964, *vacated and remanded*, 410 U.S. 951, *reh'g denied*, 411 U.S. 940, *on remand*, 369 F. Supp. 807 (D. Conn. 1973).

182. Section 1.205.2 of the Missouri statute provides:

> 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.

MO. REV. STAT. § 1.205.2 (1986). Section 188.010 indicates: "It is the intention of the general assembly of the state of Missouri . . . to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." MO. REV. STAT. § 188.010 (1986).

183. However, one may argue that the Connecticut statute is simply an expression by that state which favors childbirth over abortion, and that it is therefore constitutional. This rationale was used to uphold the Missouri

Statutes such as those in Illinois and Louisiana which declare that a fetus is a legal person appear to be contrary to the decision in *Roe* and its analysis of the meaning of "person" as used in the United States Constitution. Viewing the fetus as a person places states and courts in the position of having to choose between the interests of two persons. When abortion is at issue, this might involve having to choose between the lives of two persons.

The Court has not decided the constitutionality of statutory grants of other rights to fetuses. Nevertheless, rights such as tort recovery for prenatal injuries, prenatal inheritance, and other devolution of property have been accepted by several courts.[184] Similar fetal rights which

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Preamble. *See supra* notes 43-46 and accompanying text. In order to reach this result applying *Webster*, it would be necessary to establish that the Connecticut statute does not expressly regulate a woman's right to an abortion.

184. In Witty v. American Gen. Capital Distrib., 697 S.W.2d 636 (Tex. Ct. App. 1985), a Texas appellate court allowed recovery to the mother of a deceased unborn child, in her parental capacity, for the wrongful death of a four month old fetus. For a discussion of the history of judicial response to actions for prenatal injury resulting in death, see Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639 (1980); Note, *A Wrongful Death Action Can Be Maintained for Prenatal Injuries Causing the Stillbirth of a Fetus: Witty v. American General Capital Distributors*, 17 TEX. TECH. L. REV. 983 (1986). Departing from precedent, the Supreme Judicial Court of Massachusetts prospectively held in Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984), that a viable fetus constituted a person under the Massachusetts vehicular homicide statute. *Id.* at 801, 467 N.E.2d at 1326. *See* Note, *Criminal Law-Viable Fetus is Person for Purposes of Massachusetts Vehicular Homicide-Commonwealth v. Cass Statute*, 19 SUFFOLK U.L. REV. 145 (1985).

A majority of courts which have ruled on the issue recognize a right to recover for injuries inflicted before birth. While some courts do not allow recovery for harm inflicted before the fetus is viable, recent trends suggest most eventually will allow prenatal tort actions for harm negligently inflicted any time between conception and birth. Note, *Negligent Infliction of Prenatal Death: New York's Uncompensated Injury after Tebbutt v. Virostek*, 19 CONN. L. REV. 365, 377 (1987).

A United States District Court in Connecticut held that recent and well-established trends in state courts have "expanded the legal rights of the viable fetus in a wide variety of contexts." Douglas v. Town of Hartford, 542 F. Supp. 1267, 1270 (D. Conn. 1982). In that case, a child was allowed to assert a claim for injuries received as a result of alleged police brutality against his mother while she was pregnant. *Id.* The court held that a viable fetus is a person within the meaning of title 42, section 1983 of the United States Code. *Douglas*, 542 F. Supp. at 1270.

In People v. Monson, No. M-508197 (Cal. 1986), criminal charges were filed against a woman for failing to follow the instructions of her physician and thus, allegedly contributing to the death of her unborn child. This case reflects an emerging trend by courts and legislatures to recognize that a fetus has rights

required perfection by live birth were recognized by *Roe*.[185]

B. Limitations on the Use of Public Resources

A popular way legislatures have attempted to restrict the availability of abortion has been through restrictions of funding for abortion services. The Supreme Court has upheld the ability of a state's legislature to act in this capacity within the framework of *Maher*, *Poelker*, and *Harris*.

Missouri statutes sections 188.205 to 188.215 reflect the attempts of one state to remove itself from the business of assisting abortions. Other states have adopted statutes concerning public funds and facilities that are similar to the Missouri provisions upheld by the Court in *Webster*. Of course, the question that must be asked is what effect, if any, *Webster* will have upon these various statutes, many of which have been declared unconstitutional by court decisions preceding *Webster*.

For purposes of this discussion, state statutes that limit or restrict abortion funding can be classified into three general areas. First, there are states that prohibit the use of public facilities to some degree to obtain abortions.[186] Second, states might restrict to some degree the use of public funds to pay for abortions.[187] A third group of states

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separate from those of its mother. Comment, *A New Crime, Fetal Neglect: State Intervention to Protect the Unborn—Protection at What Cost?*, 24 CAL. W.L. REV. 161 (1987-88); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994 (1988).

185. *Roe*, 410 U.S. at 731.

186. ARIZ. REV. STAT. ANN. §§ 15-1630, 48-2212 (1984); GA. CODE ANN. § 32-881 (Harrison Supp. 1988); KY. REV. STAT. ANN. § 311.800 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. § 40:1299.34.5 (West Supp. 1989); MO. REV. STAT. § 188.215 (1986); N.D. CENT. CODE § 14-02.3-0.4 (1981); 18 PA. CONS. STAT. ANN. § 3215 (Purdon 1983 & Supp. 1989); S.D. CODIFIED LAWS ANN. § 34-23A-15 (repealed 1982).

187. The Allen Guttmacher Institute in Washington D.C. has compiled a list of thirty-seven states that restrict to some degree the use of state funds to pay for abortions. These states include: Alabama, Arkansas, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming. *The Allen Guttmacher Institute, An Analysis of State Laws Enacted Since 1973 That Have Provisions Similar to Those Challenged In the Webster Case* (June, 1989). The authors of this Note discovered sixteen states that have codified these restrictions. These include the following: ARIZ. REV. STAT. ANN. § 35-196.02

attempt to place policy restrictions upon insurance coverage that pays for abortion services.[188] *Webster* only dealt with the issues of public facilities and counseling. An overview of the entire statutory scheme regarding the use of public funds for abortion services may assist in determining the impact of *Webster* on existing and future statutory law.

1. The Use of Public Facilities for Abortion Services

While not numerous, the Missouri law restricting abortion in public facilities is not without its counterpart in other states. These restrictions can be broken down into two general groups. Kentucky,[189] North Dakota,[190] and Pennsylvania[191] have enacted statutes that, like Missouri's statute, prohibit abortions in publicly owned hospitals or health care facilities. Arizona[192] and Georgia[193] prohibit the use of educational facilities, state built clinics, and public schools in performing or assisting in the performance of abortions.

a. Publicly Owned Hospitals and Health Care Facilities

In 1980 the Kentucky legislature amended Kentucky Revised Statute section 311.800 to prohibit "publicly owned hospital[s] or other publicly owned health care facilit[ies]" from performing or permitting the performance of abortions "except to save the life of the pregnant woman."[194] Similar to Missouri's statute, Kentucky provided for injunctive action for "any resident of the county in which" there is a

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(1990); COLO. REV. STAT. §§ 26-4-105.5, 26-15-104.5 (1989); IDAHO CODE § 56-209c (Supp. 1989); IND. CODE ANN. § 16-10-3:3 (Burns 1983); KY. REV. STAT. ANN. § 311.715 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. § 40-1299.34.5 (West Supp. 1989); MO. REV. STAT. § 188.205 (1986); N.J. STAT. ANN. § 30:4D-6.1 (West 1981); N.D. CENT. CODE § 14-02.3-01 (1981); OHIO REV. CODE ANN. § 5101.55 (Anderson 1989); 18, 62 PA. CONS. STAT. ANN. § 3215, § 453 (Purdon 1983 & Supp. 1989); S.D. CODIFIED LAWS ANN. § 28-6-4.5 (1984); UTAH CODE ANN. §§ 26-18-4, 26-18-10, 76-7-322, 76-7-323 (1989 & Supp. 1989); VA. CODE ANN. §§ 32.1-92.1, to -92.2 (1950); WIS. STAT. ANN. §§ 20.927, 59.07(136), 66.04(1)(m) (West 1986, 1988 & Supp. 1989); WYO. STAT. § 35-6-117 (1977).

188. IDAHO CODE §§ 41-2142, 41-2210A, 41-3439 (Supp. 1989); 18 PA. CONS. STAT. ANN. § 3215(e) (Purdon 1983); R.I. GEN. LAWS §§ 27-18-28, 36-12-2.1 (1989 & 1984).

189. KY. REV. STAT. ANN. § 311.800 (Michie/Bobbs-Merrill 1983).

190. N.D. CENT. CODE § 14-02.3-04 (1981).

191. 18 PA. CONS. STAT. ANN. § 3215 (Purdon 1983).

192. ARIZ. REV. STAT. ANN. § 15-1630 (1984).

193. GA. CODE ANN. § 32-881 (Harrison Supp. 1989).

194. Act effective April 4, 1980, ch. 225, § 1, 1980 Ky. Acts 684-85.

publicly owned hospital or health care facility that is violating the ban.[195]

While narrower in its scope of restriction, North Dakota aims for the same goal as Missouri and Kentucky. The North Dakota statute prohibits the performance of "an abortion in a hospital owned, maintained, or operated within the state" unless "necessary to prevent" the woman's death.[196]

Like Missouri, Pennsylvania to some degree has a broader statute in its degree of exclusion. The Pennsylvania statute provides that "[n]o hospital, clinic or other health facility owned or operated" by the state, a county, or other government body except the United States is allowed to "[p]rovide, induce, perform or permit its facilities to be used" to obtain abortions except when the mother's life is endangered by the pregnancy. Unlike the Kentucky, Missouri, and North Dakota laws, Pennsylvania's statute provides an exemption in the event the pregnancy results from rape or incest.[197]

In comparison, the statutes of all four states are directed at the prevention of abortion procedures in public hospitals and public facilities. The scope of this prevention is varied, however. Missouri's statute is directed at any "public facility."[198] Kentucky's statutes are directed at "publicly-owned hospitals" or publicly owned health care facilities.[199] Pennsylvania's statute provides the same degree of exclusion.[200] Only North Dakota's statute prohibits abortions solely at "publicly owned hospitals."[201] The statutes also vary as to the degree of punishment. The laws in Kentucky, North Dakota, and Pennsylvania all make a violation of their statute a misdemeanor offense.[202] Missouri's statute has no provision for punishment. During oral arguments at the Supreme Court in *Webster*, however, Missouri's attorney general indicated his belief that violation of Missouri's statute would *not* be a misdemeanor.[203] The Missouri and Kentucky statutes both provide private causes of action while North

195. KY. REV. STAT. ANN. § 311.800(2) (Michie/Bobbs-Merrill 1983).

196. N.D. CENT. CODE § 14-02.3-04 (1981).

197. 18 PA. CONS. STAT. ANN. § 3215(c)(2) (Purdon 1983).

198. MO. REV. STAT. § 188.215 (1986).

199. KY. REV. STAT. ANN. § 311.800(1), (2) (Michie/Bobbs-Merrill 1983).

200. 18 PA. CONS. STAT. ANN. § 3215(a) (Purdon 1983).

201. N.D. CENT. CODE § 14-02.3-04 (1981).

202. *See* KY. REV. STAT. ANN. § 311.990(19) (Michie/Bobbs-Merrill 1983); N.D. CENT. CODE § 14-02.3-05 (1981); 18 PA. CONS. STAT. ANN. § 3215(n) (Purdon 1983).

203. N. Y. Times, April 27, 1989, at B12, col. 2.

Dakota and Pennsylvania do not.[204] Only Missouri's statute has been challenged on facial constitutionality.

b. *Educational Facilities, State-built Clinics, and Public Schools*

Both Arizona[205] and Georgia[206] have restricted the ability to perform abortions in educational facilities but to different degrees. Arizona's law focuses upon the use of state universities and college facilities in performing abortions. Georgia has similar restrictions that focus upon public schools.

Arizona's statute prohibits the performance of abortions "at any facility under the jurisdiction of the Arizona Board of Regents" unless the abortion is necessary to save the mother's life.[207] In effect, the law prohibits abortions at Arizona public educational facilities with that one exception. In *Roe v. Arizona Board of Regents*,[208] a nineteen year old unmarried female in the second trimester of pregnancy sought to have the Arizona prohibition declared unconstitutional. The Arizona Supreme Court rejected this challenge: "Even as plaintiff does not have an absolute right to an abortion on demand, she also does not have a right to select any public facility she chooses for an abortion."[209] The court reasoned that if there are alternative and adequate public facilities available to her, the woman's right of choice has been protected. Therefore, she cannot complain that she would rather have the abortion performed at a different facility.[210]

Georgia's statute provides that "[n]o facility operated on public school property or operated by a public school district and no employee of any such facility acting within the scope of such employee's employment shall provide [the] . . . (2) [p]erformance of abortions."[211] Passed in 1988, the statute has yet to face a serious constitutional challenge in the courts.

Both Arizona and Georgia's statutes are more limited in the scope of their restriction than Kentucky, Missouri, North Dakota and Pennsylvania. In all regards, however, the Arizona statute probably has the same effect as the statutes of the more restrictive states since most

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204. *See* KY. REV. STAT. ANN. § 311.800(2) (Michie/Bobbs-Merrill 1983); MO. REV. STAT. § 188.220 (1986).

205. ARIZ. REV. STAT. ANN. § 15-1630 (1984).

206. GA. CODE ANN. § 32-881 (Harrison Supp. 1989).

207. ARIZ. REV. STAT. ANN. § 15-1630 (1984).

208. 173 Ariz. 178, 549 P.2d 150 (1976).

209. *Id.* at 180, 549 P.2d at 152.

210. *Id.*

211. GA. CODE ANN. § 32-881 (Harrison Supp. 1989).

public hospitals are affiliated with public universities.[212] As *Roe v. Arizona Board of Regents* pointed out, the constitutionality of Arizona's statute is hinged upon the availability of "alternative adequate public facilities" to perform the abortion.[213]

2. The Public Funding of Abortions

Of the sixteen states that have codified abortion funding restrictions, nine prohibit the use of public funds by statute except when the life of the mother is endangered.[214] Four states statutorily prohibit abortion funding except in cases of life endangerment, rape, or incest.[215] Two states restrict the use of Medicaid to fund abortions,[216] while another prohibits funds for abortion except in cases of life endangerment, rape, incest or severe fetal deformity.[217] One state, Colorado, prohibits public funding of abortion in its constitution.[218]

The right of states to restrict public funds for the performance of abortion is hinged upon the *Maher-Poelker-Harris* framework.[219] The decision in *Webster* does not alter this framework; instead it builds upon it by holding that certain bans upon the use of public employees and facilities in performing abortions are valid.

3. Medical Insurance Coverage of Abortion

Some states, in addition to restricting state funding of abortions, also limit the ability of state employees to have elective abortions provided for under state insurance coverage. For example, Rhode Island

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212. It is worth noting that the hospital involved in *Webster* Truman Medical Center, was associated with the University of Missouri School of Medicine. *Reproductive Health Servs. I*, 662 F. Supp. at 411.

213. S.D. CODIFIED LAWS ANN. § 34-23A-15 (repealed 1982).

214. ARIZ. REV. STAT. ANN. § 35-196.02 (1990); COLO. REV. STAT. §§ 26-4-105.5, 26-15-104.5 (1989); IND. CODE ANN. § 16-10-3.3 (Burns 1989);.KY. REV. STAT. ANN. § 311.715 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. § 40:1299.34.5 (West Supp. 1989); MO. REV. STAT. § 188.205 (1986); N.D. CENT. CODE § 14-02.3-01 (1981); OHIO REV. CODE ANN. § 5101.55 (Anderson 1989); S.D. CODIFIED LAWS ANN. § 28-6-4.5 (1986).

215. IDAHO CODE § 56-209c (Supp. 1989); 18, 62 PA. CONS. STAT. ANN. § 3215, § 453 (Purdon 1983 & Supp. 1989); WIS. STAT. ANN. §§ 20-927, 59.07(136), 66.04(1)(m) (West 1986 & 1989); WYO. STAT. § 35-6-117 (1988).

216. N.J. STAT. ANN. § 30:4D-6.1 (West 1981); UTAH CODE ANN. § 26-18-4 (1989).

217. VA. CODE ANN. §§ 32.1-92.1, 92.2 (1985).

218. COLO. CONST. art. V, § 50.

219. *See supra* notes 64-80 and accompanying text.

excludes "in any health insurance contracts, plans or policies covering employees [of the state] any provision which shall provide coverage for induced abortions (except where the life of the mother would be endangered if the fetus were carried to term, or where the pregnancy resulted from rape or incest)."[220]

Pennsylvania and Idaho have adopted statutes which require certain insurance policies to expressly exclude coverage of abortion services not necessary to save the woman's life or in cases of rape or incest.[221] Under these statutes, a woman could still acquire insurance to cover the expenses of an elective abortion. Yet, she could only do so by paying a higher premium. This type of provision was upheld in *Thornburgh*.[222]

4. Limitations on the Use of Public Resources: Post-*Webster*

The decision in *Webster* provides a logical extension of previous decisions by the Supreme Court concerning the use of public financing for abortion services. *Maher, Poelker,* and *Harris* were concerned primarily with restrictions limited to the area of public funding. On the other hand, the provisions upheld in *Webster* dealt specifically with restrictions on the use of public employees and facilities to assist in the performance of abortions. Even prior to *Webster* one might logically conclude that if public funding for the performance of abortions is prohibited, such funds could not be used to pay out the salaries of public employees who perform abortions. One might also logically assume under the *Maher-Poelker-Harris* framework that buildings supported or built by public funds could not be used to facilitate the performance of abortions. Thus, what might have been implied before is now expressly permitted as a result of *Webster*.

The plurality opinion contended that under *Maher, Poelker,* and *Harris* the restriction of public facilities and staff to perform abortions "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."[223] According to the plurality, a state's refusal to provide these services "leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all."[224]

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220. R.I. GEN. LAWS §§ 27-18-28, 36-12-2.1 (1989).

221. IDAHO CODE §§ 41-2142, 41-2210A, 41-3439 (Supp. 1989); 18 PA. CONS. STAT. ANN. § 3215(e) (Purdon 1983).

222. *Thornburgh*, 552 F. Supp. at 809.

223. 109 S. Ct. at 3052.

224. *Id.*

Justice O'Connor agreed with the plurality on this point, but expressed in her opinion some of the concerns highlighted by the appellees. O'Connor pointed out that section 188.200(2) defines public facility as "any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof."[225] She contended that under certain situations the ban on the use of such facilities would be unconstitutional.[226] O'Connor observed that possible constitutional violations could exist if the state attempts to enforce a ban similar to Missouri's "against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land."[227]

Justice O'Connor appeared to stand in the middle of a sharply divided court on this issue. Therefore, the extent of her analysis is likely to determine the parameters within which a state legislature may act to prohibit the use of public facilities for abortion services.

After *Webster* it seems clear that a state may restrict public resources of any kind from use in assisting abortions. As in *Webster*, this naturally includes public facilities. The definition given to "public facilities" by a statute may determine the extent of a state's prohibition under such a provision. Justice O'Connor's opinion is an important signpost for the interpretation of present and future statutes that deal with public facilities. These statutes may pass scrutiny under the test of facial constitutionality. Contrary to the issue addressed in *Webster*, however, they may be overreaching in the scope of their restrictions, thus inviting a different analysis by the court.

The states of Kentucky, North Dakota, and Pennsylvania, which have adopted statutes similar to Missouri's, limit the scope of abortion restrictions in such a way that each most likely would be upheld.[228] The opinion in *Webster* also seems to uphold the validity of the

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225. *Id.* at 3059 (O'Connor, J., concurring).

226. *Id.*

227. *Id.*

228. Kentucky's statute is specifically limited to publicly owned hospitals and health care facilities. KY. REV. STAT. ANN. § 311.800 (Michie/Bobbs-Merrill 1983). North Dakota's statute is limited to government hospitals. N.D. CENT. CODE § 14-02.3-04 (1981). Pennsylvania's statute deals with any "hospital, clinic or other health care facility owned or operated by the commonwealth, a country, a city or other governmental entity (except the government of the United States, another state or a foreign nation)." 18 PA. CONS. STAT. ANN. § 3215 (Purdon 1983). At the time of this writing the Pennsylvania House of Representatives had adopted a new set of abortion restrictions which reaffirmed the state's commitment to the prohibition of public hospitals from performing abortions, except to save the woman's life or in cases of rape or incest. St. Louis Post-Dispatch, Oct. 25, 1989, at 1, 11.

contention in *Arizona Board of Regents* that the Arizona statute restricting abortions from being performed in educational facilities funded by the state is constitutional.[229] Such a statute appears to be permissible so long as it is not overreaching in an attempt to contort its application to non-public facilities.[230]

By building upon the *Maher-Poelker-Harris* framework, the Court in *Webster* placed itself alongside the view that "[n]othing in the Constitution requires States to enter or remain in the business of performing abortions" or that "private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions."[231]

C. *The Use of Public Funds and Employees to Counsel or Encourage Women to Have Abortions*

Unlike the public facility restriction, the restrictions on counseling to encourage abortion has faced stiffer opposition and frequently has been found unconstitutional prior to *Webster*. The major challenge to this type of state statute has been possible first amendment violations. As the attorney for Reproductive Health Services stated in his argument to the Supreme Court in *Webster*, "It touches upon the free speech aspects of both the physician and the patient and, secondly, it clearly touches upon the . . . fundamental right . . . of abortion."[232]

Two states whose prohibitions against counseling women on abortion have never been challenged are Georgia and Louisiana. Georgia has the less inclusive statute. It mandates that no employee in Georgia's public school system shall provide "[r]eferrals for abortion."[233] Under the Georgia statute, it appears that a public school

229. *Webster*'s plurality holds that "[n]othing in the Constitution requires states to enter or remain in the business of performing abortions." 109 S. Ct. at 3052. Justice O'Connor seems to hold this belief as well. *Id.* at 3059. Thus, it appears that the concern expressed by the Arizona Supreme Court in Roe v. Arizona Board of Regents that the constitutionality of Arizona's statute is hinged upon the availability of "alternative adequate public facilities" to perform the abortion finds no merit in the *Webster* court. *Roe v. Arizona Board of Regents*, 113 Ariz. at 180, 549 P.2d at 152. Justice O'Connor is concerned about *public* intrusions into the rights of *private* facilities to perform abortions, not with the curtailment of abortion by public facilities in general. 109 S. Ct. at 3059.

230. 109 S. Ct. at 3059-60.

231. *Id.* at 3052.

232. N. Y. Times Nat'l, Apr. 27, 1989, at 6, col 3.

233. GA. CODE ANN. § 32-881(a)(3) (1988).

employee may advise a student on the feasibility of an abortion but may not refer that student to an abortion facility to obtain the abortion.[234]

The Louisiana statute is more restrictive. It prohibits all employees of the state or any person receiving "governmental assistance" for work to "require or recommend that any woman have an abortion."[235] The Louisiana statute specifically exempts from its coverage physicians who are "acting to save or preserve the life of the pregnant woman."[236] Neither the Louisiana nor Georgia statute has been tested in regard to the first amendment's right to free speech.

Other states adopting similar statutes have been subject to suit over the free speech issue. Arizona's statute restricting abortion counseling was struck down in *Planned Parenthood v. Arizona.*[237] In *Planned Parenthood,* a footnote to a state appropriations bill "prohibited state money from being given to agencies or entities which offer abortions, abortion procedures, 'counseling for abortion procedures,' or 'abortion referrals.'"[238] The district court held that this language of the appropriations bill "necessarily means that the plaintiffs would be prohibited from exercising their First Amendment right to disseminate abortion information."[239] Also, the court found the footnote sufficiently vague under the due process clause of the fourteenth amendment. The court, in finding the footnote void for vagueness, concluded that because of the "footnote's ambiguity the plaintiffs will be forced to guess whether they are in violation of the law."[240] The court pointed out that the footnote did not address whether "counseling" refers "to the act of advocating abortion as an alternative to pregnancy and childbirth, or [if] it merely refer[s] to voluntarily offering advice on abortion."[241] To be consistent with the bill, the court questioned whether an agency must refrain from ever mentioning abortion as an alternative when a pregnant woman seeks advice on the alternatives to pregnancy.[242]

This decision was overturned by the Ninth Circuit Court of Appeals in 1983.[243] Concerning the first amendment claim, the court of appeals determined "the state of Arizona may not unreasonably interfere with the right of Planned Parenthood to engage in abortion or

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234. *Id.*

235. LA. REV. STAT. ANN. § 40:1299.34 (West Supp. 1989).

236. *Id.*

237. 537 F. Supp. 90 (D. Ariz. 1982), *rev'd,* 718 F.2d 938 (9th Cir. 1983), *appeal after remand,* 789 F.2d 1348 (9th Cir. 1986).

238. *Id.* at 91.

239. *Id.* at 92.

240. *Id.*

241. *Id.* at 1348.

242. *Id.*

243. *See* Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983).

abortion-related speech activities, but the State need not support, monetarily or otherwise, those activities."[244] Regarding the vagueness claim, the court reasoned:

> we find that 'counseling for abortion procedures' is a more narrowly drawn term. The term 'abortion procedure' is commonly used to refer to the actual operation performed by medical personnel in carrying out the abortion. Thus, the reasonable person would understand the statute to refuse funding for counseling activities closely tied to the actual abortion operation, such as preparing a woman who has already decided to have an abortion for the medical treatment she is about to undergo.[245]

The court remanded the case, however, "to give the state the opportunity to prove that withdrawing all state funds from Planned Parenthood was the only way to ensure that Planned Parenthood would not use state funds to support its abortion-related activities."[246] On remand, the State did not adequately show that the withdrawal of state funds was the only way to prevent Planned Parenthood from using state money for abortion counseling.[247] Because of alternative methods, such as monitoring the use of funds by Planned Parenthood, the district court again ruled the statute unconstitutional.[248] This decision was upheld by both the Ninth Circuit Court of Appeals and the Supreme Court.[249]

A North Dakota statute dealing with the prohibition of state money for "any person, public or private agency which performs, refers, or encourages abortion" also was declared unconstitutional in *Valley Family Planning v. North Dakota*.[250] The district court invalidated the North Dakota statute declaring, "The denial of funds to Valley Family Planning solely because of its abortion referral activities is an attempt by the State of North Dakota to produce a result it could not command directly."[251] The court found the statute violated the free expression rights of the first amendment and also determined that it was unconstitutionally vague under the fourteenth amendment.[252]

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244. *Id.* at 944.
245. *Id.* at 948-49 (citation omitted).
246. *Id.* at 946.
247. Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986).
248. *Id.* at 1348.
249. *See id.* at 1351, *aff'd. mem.*, 479 U.S. 925 (1986).
250. 489 F. Supp. 238 (D.N.C. 1980), *aff'd*, 661 F.2d 99 (8th Cir. 1981).
251. *Id.* at 243.
252. *Id.*

Missouri's statutes are similar to Louisiana's in that they prohibit public employees from assisting in abortions. They also resemble the invalidated North Dakota statute which restricted state funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." The Ninth Circuit Court of Appeals in *Planned Parenthood I and II,* reached its conclusion concerning Arizona's restriction on state funding for abortion counseling in a different manner than the Eighth Circuit Court of Appeals' approach in *Valley Family Planning.* Nevertheless, in the end, both decisions reached the same result—that the attempted statutes were unconstitutional.

In *Webster,* Missouri argued that the scope of section 188.205 should be construed narrowly. The State claimed that the section was "not directed at the conduct of any physician or health care provider, private or public;" instead it was "directed solely at those persons responsible for expending public funds."[253] In oral argument, Missouri Attorney General Webster insisted that section 188.205 "does not go to the speech [of encouraging abortion] but rather is directed at the entities responsible for expending public funds."[254] Faced with this interpretation, the appellees conceded in their brief that the statute would not adversely affect them.[255] The Court accepted this concession and unanimously agreed that this limited focus of section 188.205 rendered the controversy moot.[256]

This decision limits the impact *Webster* will have, if any, upon counseling statutes similar to Missouri's. Since *Webster* did not address the counseling issue substantively, it appears that prior arguments raised in the Arizona cases and *Valley Family Planning* remain valid. Therefore, Arizona and North Dakota, which both had similar provisions struck down, can find no justification in *Webster* to revive those statutes.[257]

In addition, the first amendment's right to free speech may still protect the right of health care professionals to counsel women on abortion, even if a counseling provision which prohibits such an action exists. Therefore, if the statutes in Louisiana or Georgia are to be interpreted in such a manner as to interfere with these first amendment rights, they are most likely unconstitutional.

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253. 109 S. Ct. at 3053.

254. N. Y. Times Nat'l, Apr. 27, 1989, at 1, col 1.

255. 109 S. Ct. at 3053.

256. *Id.*

257. It appears that *Webster* at least on this point cannot be considered to go beyond the effect which it has on Missouri law specifically. *See id.* at 3053-54.

The only concrete position on which *Webster* stands concerning this issue is that state legislatures probably can limit funding for the counseling of abortion consistent with the Constitution so long as the focus of that limitation is upon the revenue officers of the state and not doctors.[258] States would be hard pressed to find in *Webster* justification to place restrictive burdens upon state-employed doctors to forbid counseling a woman about her option of abortion.[259]

D. The Role of Viability Testing and the Physician

In all abortion decisions, the Court has indicated that a state's interest in protecting potential life becomes greater than a woman's right to personal privacy, including the right to an abortion, at the point the fetus becomes viable. Viability has been held to be a flexible point which must be assessed by a physician on a case-by-case basis.

Fourteen states have statutory provisions defining a specific number of weeks into a pregnancy when interest in protection of the prenatal life becomes greater than interest in the woman's right to privacy.[260] These statutes differ in several respects.

Eight states[261] appear to accept the invitation issued in *Roe* to proscribe abortion after the fetus is viable.[262] Their definition of when

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258. *Id.* at 3053.

259. *Id.*

260. ARK. STAT. ANN. § 20-16-703 (1987); DEL. CODE ANN. tit. 24, § 1790 (1988); FLA. STAT. ANN. §§ 390.001(2), 310.011(6) (West 1986); IDAHO CODE § 18-604(5) (1987); MD. HEALTH-GEN. CODE ANN. § 20-208(b)(1) (1987); MASS. GEN. L. ch. 112, § 12M (1983); MINN. STAT. ANN. § 145.411 subd. 2 (West 1989); NEV. REV. STAT. § 442.250 (1987); N.Y. PENAL LAW § 125.05(3) (McKinney 1987); N.C. GEN. STAT. § 14-45.1(b) (1986); OKLA. STAT. ANN. tit. 63, § 1-732(B) (West 1984); 18 PA. CONS. STAT. ANN. § 3211(a) (Purdon 1983); S.C. CODE ANN. § 44-41-10(L) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 34-23A-5 (1986).

261. DEL. CODE ANN. tit. 24, § 1790 (1988); FLA. STAT. ANN. § 390.001(2) (West 1986); MD. HEALTH-GEN. CODE ANN. § 20-208(b)(1) (1987); MASS. GEN. L. ch. 112, § 12M (1983); NEV. REV. STAT. § 442.250 (1987); N.Y. PENAL LAW § 125.05(3) (McKinney 1987); N.C. GEN. STAT. § 14-45.1(b) (1986); S.D. CODIFIED LAWS ANN. § 34-23A-S (1986).

262. Seven of the eight statutes recognize the requirement in *Roe* that any prohibition on post-viability abortion provide for an exception when necessary to protect or preserve the life or health of the pregnant woman. A physician is required to make the determination that an exception is necessary in five of these states. Delaware and Maryland require that authorization for such an abortion be granted by a hospital review authority appointed by the hospital. DEL. CODE ANN. tit. 24, § 1790(a) (1988); MD. HEALTH-GEN. CODE ANN. § 20-208(b)(2) (1987). However, according to the Maryland Attorney General this provision is unconstitutional. *See* 62 Op. Att'y. Gen. 3 (1977). Except when a

viability occurs is made implicitly by simply defining a specific number of weeks into the pregnancy after which abortion is prohibited. Delaware and North Carolina place the restriction at twenty weeks; Maryland at twenty-six; the others at twenty-four.

The remaining states have express presumptions about viability. Statutes in Arkansas, Idaho, and South Carolina contain presumptions that a fetus is not viable "prior to the end of the twenty-fifth week," "before the commencement of the twenty-fifth week," and "no sooner than the twenty-fourth week" respectively.[263] These statutes proscribe abortion after that point except under certain situations. Idaho provides an exception only to protect the life of the woman. In addition to an exception to protect the life or health of the mother, Arkansas allows post-viability abortions if the pregnancy results from rape or incest perpetrated on a minor.[264] The Idaho presumption is irrebuttable in all civil or criminal proceedings. Violation of the Arkansas or South Carolina statutes subjects the violator to criminal sanctions.

The South Carolina statute was held unconstitutional in *Floyd v. Anders*.[265] The district court ruled that the question of viability is one of fact. Thus, it determined that legislatures may not fix a particular date for viability; rather, they must allow the determination to be made on the basis of each individual fetus.[266]

The Minnesota statute indicates that, "[d]uring the second half of its gestation period a fetus shall be considered potentially 'viable.'"[267] It proscribes abortion after that point unless the attending physician certifies in writing that the abortion is necessary to preserve the life or

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physician certifies in writing that emergency procedures are necessary, Florida requires that two physicians certify to the fact that a post-viability abortion is necessary to save the life or preserve the health of the woman. FLA. STAT. ANN. § 390.001(2)(a), (b) (West 1986).

The Delaware provisions also require that two physicians certify that circumstances warranting such an abortion exist. DEL. CODE ANN. tit. 24, § 1790(b)(2) (1988). The New York statute makes an exception to the prohibition on post-viability abortions only for the preservation of life of the pregnant woman. N.Y. PENAL LAW § 125.05(3)(b) (McKinney 1987). The Massachusetts statute does not clearly indicate how it is to be determined that an abortion is "necessary" after the twenty-fourth week of pregnancy. MASS. GEN. L. ch. 112, § 12L (1983). Florida, Massachusetts, and New York provide criminal sanctions for violating their statutes.

263. ARK. STAT. ANN. § 20-16-703 (1987); IDAHO CODE § 18-604(5) (1987); S.C. CODE ANN. § 44-41-10(L) (Law. Co-op. 1985).

264. ARK. STAT. ANN. § 20-16-705(c) (1987).

265. 440 F. Supp. 535 (D.S.C. 1977), *vacated and remanded*, 440 U.S. 445 (1979).

266. *Id.* at 539.

267. MINN. STAT. ANN. § 145.411 subd. 2 (West 1989).

health of the pregnant woman. Violation of the statute is a felony. In *Hodgson v. Lawson,*[268] this provision was held constitutionally impermissible because it established a presumption that viability occurs at the end of the twentieth week of gestation.

The Oklahoma statute presumes the "unborn child to be viable if more than twenty-four (24) weeks have elapsed from the probable beginning of the last menstrual period of the pregnant woman."[269] A physician may rebut this presumption through the exercise of his medical judgment. He must certify in writing the criteria upon which he determined the fetus was not viable before he can perform any abortion. If he determines the fetus is viable, he may perform an abortion only if necessary to prevent the pregnant woman's death or impairment of health. Violation of this statute is defined as a homicide.[270]

The Pennsylvania statute[271] is most like that of the Missouri statute upheld in *Webster.* It requires that a physician determine whether a fetus is viable when the woman seeking an abortion is beyond nineteen weeks of pregnancy. The physician's good faith judgment, rather than any specific test, is adequate for making this determination. This statute was held unconstitutional in *Thornburgh* because of its reporting requirements. The Court believed that such requirements were designed for the purpose of identifying the woman rather than advancing any legitimate interest.[272] The constitutionality of the viability determination requirement was not at issue.

Only eight states[273] other than Missouri explicitly require any determination that the fetus is or is not viable before an abortion may be performed. All defer to the attending physician to exercise his judgment[274] to establish viability. None requires or even suggests that the physician conduct tests to make this determination. The Oklahoma statute indicates the physician may determine the gestational age of the

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268. 542 F.2d 1350 (8th Cir. 1976).

269. OKLA. STAT. ANN. tit. 63, § 1-732(B) (West 1984).

270. *Id.* § 1-732(F).

271. 18 PA. CONS. STAT. ANN. § 3211(a) (Purdon 1983).

272. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 769 (1986).

273. IND. CODE § 35-1-58.5-3[10-109] (1984); IOWA CODE § 702.20 (1989); LA. REV. STAT. ANN. § 40:1299.35.4(A) (West Supp. 1989); NEB. REV. STAT. § 28-329 (1985); NEV. REV. STAT. § 442.250(2) (1987); OKLA. STAT. ANN. tit. 63, § 1-732(B) (West 1984); 18 PA. CONS. STAT. ANN. § 3211(a) (Purdon 1989); WIS. STAT. ANN. § 940.15(2) (West Supp. 1989).

274. In these statutes, the word "judgment" frequently is modified by adjectives such as "responsible medical," "good faith," "best medical," "sound medical" and "reasonable medical."

fetus by relying on information provided by the pregnant woman or by conducting an examination of her.[275] A subjective standard of certainty is defined for the physician in Nebraska and Nevada.[276] The only objective requirements deal with reporting. Pennsylvania requires that the physician report the basis for his determination.[277] Indiana requires that the physician certify the determination of viability in any required written reports. Oklahoma requires certification in writing as to the precise medical criteria upon which a determination of nonviability is based.[278]

The Supreme Court has not assessed the constitutionality of a statute which defines when viability occurs in terms of a specific number of weeks of gestation. By applying the holding in *Colautti*,[279] however, such a statute probably would be unconstitutional. The law before *Webster* did not allow the prohibition of abortions prior to viability. This has not been changed by the decision in *Webster*. As previously discussed, viability is a flexible point determinable by a physician. Thus, a definition or presumption of viability used as a point beyond which abortion is proscribed and based only on gestational age or weeks of pregnancy, is probably an unconstitutional interference with the physician's case-by-case exercise of professional judgment. This same result would be reached regardless of whether the definition is expressed or implied. Applying this to existing law, the statutes of twelve of the fourteen states[280] which define viability in these terms, would be unconstitutional.

Because Missouri's rebuttable presumption was not at issue before the Supreme Court, it is uncertain whether it and Pennsylvania's similar statute would be held constitutional. They appear to be consistent with previous Court decisions. Each relies on the physician's medical judgment to determine the viability of the fetus. Rather than defining viability in terms of gestation, both statutes simply call the physician's attention to the need to assess viability beginning at a specific number of weeks of gestation. Justice O'Connor suggests that such a requirement is not an impermissible restriction on the judgment of the attending physician.[281]

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275. OKLA. STAT. ANN. tit. 63, § 1-732(B) (West 1984).

276. NEB. REV. STAT. § 28-329 (1985) ("the unborn child clearly appears to have reached viability"); NEV. REV. STAT. § 442.250(2) (1987) ("there is a reasonable likelihood of the sustained survival of the fetus").

277. 18 PA. CONS. STAT. ANN. § 3211(a) (Purdon 1989).

278. OKLA. STAT. ANN. tit. 63, § 1-732(B) (1984).

279. *See supra* notes 102-03 and accompanying text.

280. *See* statutes cited *supra* note 260.

281. 109 S. Ct. at 3061.

The Oklahoma statute presumes the existence of viability at a specific number of weeks of gestation. This presumption is rebuttable by the physician who is asked to perform the abortion. Therefore, the Oklahoma statute provides the required flexibility by continuing to allow the determination of viability to be made on a case-by-case basis by a physician. For this reason, it would probably survive constitutional challenge.

State legislatures which desire to invoke additional restrictions on abortion are likely to emulate the viability testing provisions of the Missouri Act. It is not unreasonable to assume that some legislatures may even attempt to enact stricter requirements in this area than those contained in the Missouri provision. As Justice Blackmum pointed out in *Webster*, a viability testing requirement may be viewed as a means by which a state seeks to protect its compelling interest to ensure that no viable fetus is aborted mistakenly.[282] In 1986, there were 1,987 live births of *less than* 20 weeks of gestation in the United States.[283] Therefore, legislatures may attempt to require viability testing at an even earlier stage than is provided for under the Missouri standard.

No state other than Missouri requires the physician to inform his or her medical judgment with findings derived from tests necessary to determine one or more measures of viability. Because the Supreme Court indicated this is permissible, it provides another area for future legislative effort. Assuming that a state considers it important to have viability of the fetus determined, a statute acknowledging the Court's holding that this determination is a subjective process made by a physician exercising medical judgment would be consistent with *Webster* and all previous holdings. To be certain that a statute is consistent with *Webster*, it would need to suggest to the physician that he choose appropriate medical technology to make one or more of a variety of

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282. 109 S. Ct. at 3070-71.

283. *U.S. Dept. of Health and Human Services, Vital Statistics of the U.S. 1986*, 1 NATALITY 257 (1988). This represented .05% of all live birth in that year. *Id.*

In addition to the foregoing, Justice O'Connor points out, "In 1973, viability before 28 weeks was considered unusual . . . . However, recent studies have demonstrated increasingly earlier fetal viability. It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future." City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 457 (1983) (O'Connor, J., dissenting) (citations omitted). *But see* Rhoden, *Late Abortion and Technological Advances in Fetal Viability*, 17 FAM. PLAN. PERSP., July-Aug. 1985, at 160. ("[T]he actual situation is that over the past decade, the threshold of viability has shifted backwards by several weeks. It may shift further, or it may not. While there are isolated reports of infants surviving who are born at 23 weeks' gestation, many experts doubt that the current threshold will be superseded . . . .").

findings in determining the presence of viability. A statute would be flawed if it relied on only one finding, if it required that a specific test be made, or if it required a test which was contraindicated by prevailing medical standards. Nevertheless, viability testing requirements other than those specifically discussed in *Webster* and greater state regulation of medical practice relative to abortion may be permissible now. The Court clearly indicated that regulation in the second trimester may be done to protect potential life as well as to protect the health of the pregnant woman.[284]

Despite this likely effect, which will give states more freedom to invoke stricter abortion regulations, it is not clear what standard will be used to assess the constitutionality of any new regulation. The plurality was satisfied that Missouri's testing requirement permissibly furthers the State's interest in protecting potential life.[285] Justice O'Connor appeared to advance that any regulation not impose an undue burden on the woman's abortion decision. She suggested that a medically imprudent regulation would be an undue burden.[286]

CONCLUSION

The decision in *Webster* addressed the constitutionality of four provisions of a comprehensive act regulating abortion in Missouri. A majority of the Court upheld these provisions. Three opinions were written by these five justices, however, and they showed significant differences in the rationale used to reach this result.

The Court held that the "Preamble" to Missouri's statute, which declares that the life of each human being begins at conception, is a permissible expression of a value judgment which does not directly regulate abortion. Therefore, the Court did not rule on the constitutionality of the preamble because the state courts had not yet determined whether the provision would be applied to regulate the performance of abortions.[287] In addition to the Preamble, the Court upheld separate provisions of the Missouri Act prohibiting the use of public employees and public facilities for performing or assisting an abortion not necessary to save the life of the mother.[288] The controversy concerning a restriction on the use of public funds for encouraging or counseling a

284. 109 S. Ct. at 3057.

285. *See id.*

286. *Id.* at 3063 (O'Connor, J., dissenting). *See supra* notes 162-71 and accompanying text for a discussion of the different standards advocated by members of the Court for use in determining the validity of state abortion regulations.

287. 109 S. Ct. at 3050; *see supra* notes 43-63 and accompanying text.

288. 109 S. Ct. at 3050-53; *see supra* notes 64-80 and accompanying text.

woman to have an abortion not necessary to save her life was held to be moot.[289] Finally, the Court upheld the requirement that a physician determine the viability of a fetus by informing his or her professional judgment with tests useful in making findings relative to fetal age, weight, and lung maturity.[290]

The most significant part of the *Webster* decision was not the holdings on the specific statutory provisions. Rather, one area of significance concerns the views expressed in regard to the *Roe* framework, which has undergirded practically every post-*Roe* decision dealing with abortion. Another significant area of *Webster* is the apparently changing standard used to evaluate the conflicting interests present when an abortion is considered.

Four of the justices appear ready to overturn the *Roe* framework, viewing it as rigid, unsound, and unworkable, resembling regulation more than constitutional doctrine. Justice O'Connor joined with the dissenters in saying that the Missouri statute provided no need to re-examine the *Roe* framework. While continuing to view viability as the point at which the interest in protecting potential life dominates a woman's right to privacy, including the right to an abortion, Justices O'Connor, Blackmum, Brennan, and Marshall are willing to allow some second trimester regulation to protect potential life. This is a departure from a strict adherence to the *Roe* framework, which allowed second trimester regulation only to protect the woman's health. This opening from *Webster* provides a likely avenue for further regulation of abortions.

A second avenue for additional abortion regulation was provided by the position of five justices who indicated that in the future they will use a standard other than strict scrutiny and compelling interest to assess the constitutionality of statutes regulating abortion. While these justices do not appear to agree on the exact standard that should be applied, it is clear that each supports the adoption of a less strict standard than the one used in pre-*Webster* cases. Some clarification of the extent of these changes may be provided later this year when the Supreme Court decides *Hodgson v. Minnesota*[291] and *Akron Center for Reproductive Health v. Ohio*.[292] Each concerns the constitutionality of statutory provisions requiring that notice be provided to the parents of a minor before she receives an abortion.

All members of the Supreme Court agree that the decision in *Webster* may encourage other states to change their abortion laws. It should come as no surprise then that shortly after the *Webster* decision

289. 109 S. Ct. at 3053-54; *see supra* notes 81-84 and accompanying text.
290. 109 S. Ct. at 3054-58; *see supra* notes 85-93 and accompanying text.
291. 853 F.2d 1452 (8th Cir. 1988).
292. 854 F.2d 852 (6th Cir. 1988).

numerous proposals were made by individual members of the various state legislatures in an attempt to place further restrictions on abortion. In November of 1989, Pennsylvania, which already had some of the most restrictive abortion regulations in the nation prior to *Webster*, became the first state to officially make such changes.[293]

The new Pennsylvania law, however, did not enact restrictions that corresponded with the four issues confronted in *Webster*. Instead, the Pennsylvania General Assembly focused on the following areas: a ban on abortions after the twenty-fourth week of pregnancy,[294] requirements that the doctor performing the abortion determine the gestational age of the "unborn child,"[295] a requirement to insure "spousal notice,"[296] a requirement for the "informed consent" of the woman submitting to the abortion,[297] and the prohibition of abortions based solely on the sex of the "child."[298]

The new Pennsylvania law does provide for an exception to the ban on abortions performed after the twenty-fourth week of pregnancy. The ban does not apply in situations where "the abortion is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman."[299] In the case of both exceptions the abortion must be performed in a hospital and an attending physician must be present in case of a live birth of the aborted "child."[300]

The new Pennsylvania law also requires the physician to determine the gestational age of the "unborn child."[301] Unlike the Missouri statute, however, there is no discussion in the Pennsylvania law of a point at which viability is presumed to exist.[302] In passing the new law, the Pennsylvania General Assembly also repealed a previous statute which made post-viability abortions a third-degree felony.[303] Since there is no presumption of viability and no penalty for post-viability abortions, it is unclear how the state plans to regulate pre-

293. 1990 Pa. Legis. Serv. §§ 18-3203 to 3220 (Purdon).

294. *Id.* § 3211(a).

295. *Id.* § 3210. The statute defines "unborn child" as "an individual organism of the species Homo sapiens from fertilization until live birth." *Id.* § 3203.

296. *Id.* § 3209.

297. *Id.* § 3205.

298. *Id.* § 3204.

299. *Id.* § 3211(b)(1).

300. *Id.* § 3211(c)(3)(5).

301. *Id.* § 3210.

302. *See* MO. REV. STAT. § 188.029 (1986).

303. 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon Supp. 1989) (repealed).

viability abortions beyond the gestational determination and spousal notice requirements.

The spousal notice requirement in the new Pennsylvania law is not as restrictive as it appears at first glance. This provision requires the woman undergoing the abortion to sign an unnotorized statement that "she has notified her spouse that she is about to undergo an abortion."[304] The law claims that "any false statement made [by the woman] is punishable by law" but the penalties run to the *performing doctor*. The statute provides for the possible suspension of the performing doctor's license and civil liability of the *doctor* to the unnotified spouse.[305] It also provides for exceptions to the spousal notice requirement when 1) the woman's spouse is not the father of the "child," 2) the spouse after diligent effort, could not be found, 3) the pregnancy results from spousal rape, 4) the woman has reason to believe that she may receive bodily injury if she informs her spouse and 5) in cases of medical emergency.[306]

The Pennsylvania law expands the scope of informed notice requirements. Before the passage of the new statutes, the law required the doctor to "orally [inform] the woman of the nature of the proposed procedure or treatment, and of those risks" involved in the abortion.[307] The new law requires the performing or referring physician to provide the following information to the woman at least twenty-four hours prior to the abortion: 1) the proposed procedure and the risks involved, 2) the probable gestational age of the "child," and 3) the medical risks involved with carrying the "child" to term.[308]

Although the Pennsylvania General Assembly took up the suggestion of the *Webster* court to legislate upon the abortion question, the thrust of the new law was far afield from the provisions discussed in *Webster*. In passing such a law, the Pennsylvania Legislature may seek to expand the scope of abortion regulations with a favorable appeal of the new law to the Supreme Court.

The governor of Missouri and several Missouri legislators are seeking to place additional restrictions on a woman's access to an abortion. A new bill proposed in January 1990 in the Missouri House of Representatives seeks to restrict abortions caused by unwanted pregnancies, and the use of abortion as a form of birth control, to select the sex of an offspring, to prevent multiple births, to prevent the loss of

304. 1990 Pa. Legis. Serv. § 18-3209(a) (Purdon).
305. *Id.* § 3209(e).
306. *Id.* § 3209(b).
307. 18 PA. CONS. STAT. ANN. § 3205(a) (Purdon 1983) (repealed).
308. 1990 Pa. Legis. Serv. § 18-3205(a)(1).

an educational or job opportunity, and to avoid the expense of child birth or child rearing.[309]

Governor John Ashcroft of Missouri also plans to propose to the Missouri General Assembly laws that ban abortions for sex selection, racial discrimination, and birth control.[310] According to the governor, these measures would eliminate the right of a woman to a second abortion and cut the number of abortions performed in Missouri by half.[311] Legislative leaders, however, have indicated they may refuse to take up abortion related issues until after the 1990 elections.[312]

The Supreme Court's ruling in *Webster* invoked only minor change in existing abortion law. Its greater effect will be determined as state legislatures and courts respond to the invitation it issued.

RANDALL D. EGGERT
ANDREW J. KLINGHAMMER
JEANNE MORRISON

309. St. Louis Post-Dispatch, Jan. 17, 1990, at 4A, col. 1.
310. St. Louis Post-Dispatch, Jan. 20, 1990, at 1A, col. 1.
311. *Id.*
312. *Id.*