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"TIME ENOUGH": *WEBSTER V. REPRODUCTIVE HEALTH SERVICES* AND THE PRUDENT PACE OF JUSTICE

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Justice is not to be taken by storm. She is to be wooed by slow advances.

— Benjamin N. Cardozo[1]

I. INTRODUCTION

In 1986 the Missouri General Assembly repealed ten sections of the Missouri Annotated Statutes regulating abortion and adopted

1. B. CARDOZO, THE GROWTH OF THE LAW 133 (1924).

twenty new provisions regulating abortion.[2] One month before the new law became effective, a class action was filed in federal district court seeking declaratory and injunctive relief against enforcement of seven of the new provisions regulating abortion.[3] The district court ruled that six of the challenged provisions were wholly unconstitutional and that the seventh provision was partially unconstitutional.[4] The Eighth Circuit affirmed the judgment of the district court in all respects except one.[5] The United States Supreme Court reversed the circuit court in *Webster v. Reproductive Health Services*.[6]

After sixteen years and as many major abortions cases,[7] the Supreme Court in *Webster* altered its analysis of state laws regulating abortion. The Court upheld all of the challenged provisions of the Missouri abortion law that were properly before the Court and indicated that state legislatures may enact more substantial abortion regulations than prior abortion cases had suggested.[8]

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2. Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 411 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 851 F.2d 1071 (8th Cir. 1988), *rev'd*, 109 S. Ct. 3040 (1989); MISSOURI SENATE COMM. SUBSTITUTE FOR H.R. 1596, 83d Gen. Assembly, 2d Reg. Sess. (1986) [hereinafter H.R. 1596].

3. *Webster*, 662 F. Supp. at 410-11.

4. *Id.* at 430. The court enjoined enforcement of these provisions. *Id.*

5. *Webster*, 851 F.2d at 1073. The court of appeals reversed the district court's holding that the state's restriction on using public funds to perform or assist nontherapeutic abortions was unconstitutional. *Id.* at 1084; *see infra* text accompanying note 81. The state did not appeal the district court's determination that MO. ANN. STAT. § 188.039 (Vernon 1989), which requires doctors to personally advise abortion-seeking patients as to whether the patients are pregnant, was unconstitutional. *See Webster*, 662 F. Supp. at 413-15.

6. 109 S. Ct. 3040 (1989). The state did not appeal to the Supreme Court the lower courts' determination that MO. ANN. STAT. § 188.025 (Vernon 1989), requiring all abortions on fetuses of at least 16 weeks gestational age to be performed in a hospital, was unconstitutional. *See Webster*, 851 F.2d at 1073-74; *Webster*, 662 F. Supp. at 416-17.

7. The prior major abortion cases have been the following: Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). The Court also has heard many less significant and collateral cases involving the abortion controversy since 1973. *See, e.g.*, Frisby v. Schultz, 108 S. Ct. 2495 (1988); Hartigan v. Zbaraz, 484 U.S. 171 (1987) (per curiam); Diamond v. Charles, 476 U.S. 54 (1986); Guste v. Jackson, 429 U.S. 399 (1977); Connecticut v. Menillo, 423 U.S. 9 (1975); Bigelow v. Virginia, 421 U.S. 809 (1975); *see also* United States v. Vuitch, 402 U.S. 62, 72-73 (1971) (upholding District of Columbia abortion statute against vagueness challenge, but declining to consider privacy arguments).

8. *Webster*, 109 S. Ct. at 3058. The most expansive abortion decisions include the following: *Thornburgh*, 476 U.S. at 747 (invalidating statute requiring printed state material regarding

The Court's judgment in *Webster* is not surprising. The trend toward moderating the abortion privacy doctrine enunciated in *Roe v. Wade*[9] and its progeny has been apparent in the Court's voting trend in abortion cases[10] and in the increasing alarm at expansive applications of that doctrine expressed by the growing number of dissenters.[11]

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risks and alternatives to abortion to be provided, requiring reports, requiring a standard-of-care for abortions of viable fetuses, and requiring a second doctor to be available when a doctor performs an abortion on a viable fetus); *City of Akron*, 462 U.S. 416 (invalidating statute requiring abortions after the first trimester be performed in a hospital, requiring minors under age 15 seeking abortion to obtain parental consent, requiring disclosure of the facts of fetal development and alternatives to abortion, imposing a 24-hour waiting period, and requiring disposition of fetal remains in a humane and sanitary manner); *Bellotti*, 443 U.S. 622 (invalidating Massachusetts law requiring minors seeking abortion to attempt to obtain parental consent and requiring parental notification to be before a judicial bypass hearing); *Colautti*, 439 U.S. 379 (invalidating standard-of-care requirement applicable to postviability abortions); *Danforth*, 428 U.S. 52 (invalidating statute requiring spousal consent, requiring parental consent, and prohibiting saline amniocentesis abortions); *Doe*, 410 U.S. 179 (invalidating statute requiring abortions be performed in hospitals, be approved by abortion committees, and be given two-doctor confirmation); *Roe*, 410 U.S. 113 (invalidating Texas criminal abortion law, holding that abortion abortion is a fundamental right, rejecting state interest in protecting fetal life before viability, and adopting "trimester framework" analysis).

9. 410 U.S. 113 (1973).

10. *Roe* was decided in 1973 by a 7-2 vote. *Id.* at 115. In 1976 the vote in *Danforth* was 6-3. *Danforth*, 428 U.S. at 52. *Thornburgh* was decided in 1986 by a 5-4 vote. *Thornburgh*, 476 U.S. at 747. In 1987 the Court was split evenly, 4-4, in *Hartigan*. *Hartigan*, 484 U.S. at 171.

The impact of new appointments is obvious. President Reagan's three appointees to the Supreme Court, Justices O'Connor, Scalia and Kennedy, all voted with the majority in *Webster*. *See Webster*, 109 S. Ct. at 3040. But the political factor easily can be overstated. Although Justice Stevens was appointed by a conservative Republican President, Ford, since 1985 he has voted consistently for expanding the abortion privacy doctrine. *Id.* (Stevens, J., concurring in part, dissenting in part); *Thornburgh*, 476 U.S. at 772 (Stevens, J., concurring); *City of Akron*, 462 U.S. at 416. He also dissented in *Harris*, 448 U.S. at 349 (Stevens, J., dissenting) (also serving as a dissent in *Williams*, 484 U.S. at 358).

Only five Justices have voted consistently in the abortion cases. Justices Blackmun (appointed by strict constructionist, President Nixon), Brennan, and Marshall have voted consistently to invalidate abortion restrictions and regulations. Justices Rehnquist and White (the latter appointed by Democrat President Kennedy) have voted consistently to uphold restrictions. Justice Stevens has voted to uphold some abortion restrictions. *See H.L.*, 450 U.S. at 420 (Stevens, J., concurring in the judgment); *Bellotti*, 443 U.S. at 652 (Stevens, J., concurring in the judgment); *Danforth*, 428 U.S. at 101 (Stevens, J., concurring in part, dissenting in part). Justice O'Connor has voted consistently to uphold abortion regulations since she has joined the Court, but on narrower grounds than Justice White. *See Webster*, 109 S. Ct. at 3058 (O'Connor, J., concurring in part, concurring in the judgment); *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting) *Webster* was the first abortion case in which Justices Scalia and Kennedy cast recorded votes. *See Webster*, 109 S. Ct. at 3040; *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment).

11. Within the Court signs of a significant, growing concern arose about excessive applications of the abortion privacy doctrine. For example, Justice Powell broke with Justice Blackmun and

Webster presented an ideal opportunity for modifying the abortion privacy doctrine because the challenged provisions of the Missouri law involved only collateral regulations of, not direct prohibitions of, abortion. Moreover, *Webster* was widely expected to have major significance regarding the future of the abortion privacy doctrine.[12]

The *Webster* decision, however, did not revolutionize constitutional doctrine. The Court's judgment and holding were narrow. The Court upheld the challenged abortion regulations, but did not overturn or even modify the most controversial elements of *Roe* or its progeny.[13] The prevailing plurality proposed to eliminate two substantial elements of the *Roe* doctrine,[14] but the judgment of the Court stopped short of doing so.[15]

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voted to limit the expansion of the abortion privacy doctrine in all five of the funding cases prior to *Webster*. *See Williams*, 448 U.S. at 358; *Harris*, 448 U.S. at 297; *Poelker*, 432 U.S. at 519; *Maher*, 432 U.S. at 464; *Beal*, 432 U.S. at 438. Further, Justice Powell wrote the opinion for the Court in the *Maher* and *Beal* cases. Justice Stewart filed separate concurring opinions in *Roe*, 410 U.S. at 167 (Stewart, J., concurring), and *Danforth*, 428 U.S. at 89 (Stewart, J., concurring), and broke with Justice Blackmun in the last three major abortion cases he heard, writing the opinion for the Court in *H.L.*, 450 U.S. at 413; *Williams*, 448 U.S. at 360; and *Harris*, 448 U.S. at 300. In *Thornburgh* Chief Justice Burger, who had voted with the majority in *Roe*, 410 U.S. at 115, strongly dissented against what he viewed as an unjustified and excessive extension of the principles of *Roe*, and called for re-examination of the *Roe* decision. *Thornburgh*, 476 U.S. at 782 (Burger, C.J., dissenting). Justice O'Connor's incisive dissenting opinions in *City of Akron*, 462 U.S. at 452 (O'Connor, J., dissenting), and *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting), also enhanced the credibility and seriousness of the criticisms of *Roe*.

12. General awareness that the Court in *Webster* might alter the abortion privacy doctrine was evident when substantially more amicus briefs were filed in *Webster* than had ever been filed in a Supreme Court case. A record 76 amicus briefs were filed. Docket Sheet at 1-5, *Webster*, 109 S. Ct. 3040 (1989) (No. 88-605-AFX); telephone interview with Kathy Arberg, Assistant Public Information Officer, United States Supreme Court (June 14, 1989) (the previous record was 58 amicus briefs filed in the 1978 affirmative action case, University of Cal. Regents v. Bakke, 438 U.S. 265, 268-70 (1978)). In *Webster* 46 amicus briefs supporting the appellant, Missouri, were filed by organizations and individuals ranging from the federal government (Solicitor General) to the Alabama Lawyers for Unborn Children, Inc. Thirty amicus briefs were filed in support of the appellees, Planned Parenthood and Reproductive Health Services, by "[m]ore than 300 organizations, including virtually every major medical and health association in the country" and 896 American law professors. The Alan Guttmacher Institute, Washington Memo, Apr. 19, 1989, at 1 [hereinafter Washington Memo, Apr. 19, 1989]; *see also* Webster v. Reproductive Health Services: *Taking Sides*, NAT'L L.J., May 1, 1989, at 28-29; The Alan Guttmacher Institute, Washington Memo, Mar. 7, 1989, at 1. Likewise, the unprecedented media coverage of the case manifested a general expectation that some significant change in constitutional law was possible.

13. *See infra* notes 152-93 and accompanying text.

14. *Id.*

15. *See infra* note 153 and accompanying text.

Yet, the *Webster* decision represents a major development in Supreme Court analysis of abortion cases from four perspectives. First, *Webster* signified an important shift in the direction of the evolving abortion privacy doctrine. The Court made several noteworthy adjustments to the doctrine.[16] More importantly, the Court initiated a search for a less radical formulation of the abortion privacy doctrine and suggested a willingness to consider some of the profound issues neglected in *Roe*.[17] Second, *Webster* revived concern about matters of constitutional structure, system, and legitimacy. It reaffirmed the modern value of federalism and the continuing importance of legislative self-government.[18] Third, *Webster* demonstrated that constitutional consensus is the critical test of constitutional legitimacy.[19] The *Webster* decision effectively reopened legitimate societal and political dialogue regarding abortion policy, dialogue indispensable to the evolution of constitutional consensus and facilitative of more tolerance and truth than *Roe v. Wade* has produced.[20]

But, perhaps the most significant facet of *Webster* is how the Court approached the opportunity to change constitutional doctrine. The Court adopted a conservative approach to changing the abortion privacy doctrine, an area of law characterized by sudden and dramatic developments. *Webster* reveals a new vision of the process of constitutional adjudication; a preference for the gradual development of constitutional doctrine; and a prudent, case-oriented method of analysis in lieu of an abrupt and sweeping jurisprudential approach.[21]

II. *WEBSTER*'S IMPACT ON THE ABORTION PRIVACY DOCTRINE

Because of the significance of other dimensions of the *Webster* decision, the details of the Missouri abortion regulations and the lower courts analysis of them will soon be forgotten. Nevertheless, those regulations and the lower courts' rationales for invalidating them illustrate why the Supreme Court in *Webster* addressed more basic issues and why the Court adopted a new approach in analyzing them.

A. *Legislative Declaration That Life Begins at Conception*

The preamble to the Missouri Act, section 1.205, provides, "1. The general assembly of this state finds that: (1) The life of each human

16. *See infra* notes 149-51 and accompanying text.
17. *See infra* notes 205-55 and accompanying text.
18. *See infra* notes 256-300 and accompanying text.
19. *See infra* notes 301-25 and accompanying text.
20. *See infra* notes 326-57 and accompanying text.
21. *See infra* notes 358-94 and accompanying text.

being begins at conception; (2) Unborn children have protectable interests in life, health and well-being . . . ."[22] Before conducting the trial, the district court granted the plaintiffs' motion *in limine* to bar the state from introducing any evidence supporting this legislative finding.[23] Then, not surprisingly, the district court held this legislative declaration unconstitutional, reasoning that *Roe v. Wade*[24] and *City of Akron v. Akron Center for Reproductive Health*[25] mandated that a state "may not adopt one theory of when life begins to justify [its] abortion regulation[s]."[26] The district court refused to consider proffered evidence about the veracity of the legislative declaration, finding it would be "inappropriate . . . to conduct an inquiry into such a

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22. MO. ANN. STAT. § 1.205.1(1)-(2) (Vernon 1989). The next paragraph of this section grants rights to fetuses:

> 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, . . . subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court . . . .

Id. at § 1.205.2; *cf.* ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd Supp. 1989) ("[T]he unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life."); LA. REV. STAT. ANN. § 40:1299.35.0 (West Supp. 1989) ("[T]he unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life."); MONT. CODE ANN. § 50-20-102 (1989) ("The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged . . . . [W]e reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.").

23. *Webster*, 662 F. Supp. at 413. *See generally* Pine, *Speculation and Reality: The Role of Facts and Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 697-720 (1988) (arguing that lower courts should be free to rely on new facts and to arrive at rights-protective constitutional results that vary with existing precedent, especially in the context of abortion).

24. 410 U.S. 113 (1973).

25. 462 U.S. 416 (1983).

26. *Webster*, 662 F. Supp. at 413 (citing *City of Akron*, 462 U.S. at 416; *Roe*, 410 U.S. at 162). *Roe* struck down a Texas criminal abortion law prohibiting all abortions except those necessary to preserve the life of the mother. *Roe*, 410 U.S. at 164-65. In *City of Akron*, the Court declared unconstitutional an ordinance requiring doctors to inform their patients that "the unborn child is a human life from the moment of conception." *City of Akron*, 462 U.S. at 444. The district court also cited Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *see Webster*, 662 F. Supp. at 413, in which the Court invalidated a Pennsylvania statute requiring that women seeking abortion be provided with printed materials, including a statement that "[t]he Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion." *Thornburgh*, 476 U.S. at 761. In Justice Blackmun's words, the statute was "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762 (Blackmun, J., majority opinion).

difficult and philosophical question" as whether human life begins at conception.[27] Thus, the legislative "findings" about the beginning and legal status of human life *in utero*, in sections 1.205.1(1) and (2), were "invalid as a matter of law."[28]

The court of appeals affirmed the district court's ruling.[29] The appellate court agreed that the state's argument that life begins at conception was legally irrelevant.[30] Additionally, the court of appeals emphasized that the statutory provisions stating when life begins were not neutral because they were contained in a bill regulating abortions.[31]

The Supreme Court reversed.[32] The Court addressed two attacks on the Missouri legislative preamble. The first, relied on by both courts below, was that the *Roe* and *City of Akron* dicta prevented the Missouri state legislators from expressing a statutory viewpoint that life begins at conception.[33] Chief Justice Rehnquist, writing for the majority,[34] noted that the lower courts had "misconceived . . . the *City of Akron* dictum," which meant only that abortion restrictions otherwise invalid under *Roe* were not justified by "the State's [belief about] when life begins."[35] Moreover, the Court had emphasized previously that *Roe* "'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.'"[36] The Missouri legislative declaration that life begins at conception could be read "simply to express that sort of value judgment."[37]

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27. *Webster*, 662 F. Supp. at 413.

28. *Id.*

29. *Webster*, 851 F.2d at 1076. Judge Arnold of the appellate panel, dissenting in part, found no facial constitutional infirmity in the legislative finding that life begins at conception and would have upheld it except as it applied to restrict abortion. *Id.* at 1085 (Arnold, J., concurring in part, dissenting in part).

30. *Id.* at 1076 n.7 (majority opinion).

31. *Id.* at 1076-77. It would have substantive impact because it could affect the interpretation of statutes in many areas including torts and property. *Id.* at 1076. The legislative caveat that the declaration was subject to decisions of the Supreme Court interpreting the Constitution did not save the provision because the bill directly violated Supreme Court decisions holding that states may not declare when life begins in the abortion context. *Id.* at 1076-77.

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

33. *Id.* at 3049-50.

34. The majority included Chief Justice Rehnquist and Justices White, O'Connor, Kennedy, and Scalia. *See id.* at 3046. Justices O'Connor and Scalia wrote separate opinions. *See id.* at 3058 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment).

35. *Id.* at 3050 (majority opinion).

36. *Id.* at 3050 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

37. *Id.*

The Court also rejected the appellees' argument that the preamble could have restrictive effects upon *in vitro* fertilization and contraception.[38] The Court noted that state courts had not yet applied the state statute to these areas and stated that there would be "time enough" for courts to consider this argument should the state courts apply the preamble to restrict such activities.[39] Thus, the appellees' claim of potentially extreme applications of the preamble interfering with contraceptives and artificial conception was nonjusticiable.[40]

Three other opinions addressed the constitutionality of the preamble. In concurrence Justice O'Connor noted that the "intimations of unconstitutionality [were] simply too hypothetical" to be considered.[41] However, she warned that the state could violate the *Griswold v. Connecticut*[42] doctrine by applying the preamble to interfere with postfertilization contraception or artificial conception technology.[43]

In dissent Justice Blackmun argued that the preamble was unconstitutional for several reasons.[44] First, it was not "abortion-neutral" because the Missouri legislature intended the preamble to provide "the backdrop" for its abortion regulations.[45] Second, it placed an impermissible "burden of uncertain scope" on the abortion decision[46] and thereby burdened the use of contraceptive devices that operate after fertilization.[47]

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38. *Id.* at 3050 (citing the appellees' brief).

39. *Id.*; *see id.* at 3061 (O'Connor, J., concurring in part, concurring in the judgment).

40. *Id.* at 3050 (majority opinion).

41. *Id.* at 3059 (O'Connor, J., concurring in part, concurring in the judgment).

42. 381 U.S. 479 (1965).

43. *Webster*, 109 S. Ct. at 3059 (O'Connor, J., concurring in part, concurring in the judgment) (citing *Griswold*, 381 U.S. at 479). Justice O'Connor warned that "[i]t may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny." *Id.* (O'Connor, J., concurring in part, concurring in the judgment). She then noted that "nothing in the record or the opinions below indicates that the preamble will affect a woman's decision to practice contraception." *Id.* (O'Connor, J., concurring in part, concurring in the judgment).

44. *Id.* at 3067 (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun could not bring himself to admit that the Court was beginning to jettison pieces of the abortion doctrine he created. Rather, it was "the plurality (with whom Justice O'Connor on this point joins)" that was doing so. *Id.* at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part).

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

46. *Id.* (Blackmun, J., concurring in part, dissenting in part). The exception in the preamble for decisions by the Supreme Court was impermissibly vague because it was "dependent on the uncertain and disputed limits of our holdings, [which] will have the unconstitutional effect of chilling the exercise of a woman's right to terminate a pregnancy." *Id.* (Blackmun, J., concurring in part, dissenting in part).

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

Justice Stevens, in a separate dissent, focused on two perceived flaws in the Missouri declaration that life begins at conception.[48] First, he pointed out that the Missouri statute declared that conception occurred at fertilization, contrary to recent medical opinions that conception occurs at the time of implantation.[49] He argued that, if the preamble interfered with the use of postfertilization contraceptives, the preamble would be unconstitutional under *Griswold v. Connecticut*.[50] Legislative action which interfered with late contraception or early abortion before the "seed has acquired the powers of sensation and movement"[51] would be unconstitutional because "a State has no greater secular interest in protecting the potential life of an embryo that is still 'seed' than in protecting the potential life of a sperm or an unfertilized ovum."[52]

Second, Justice Stevens argued that the preamble violated the establishment clause because only a theological distinction exists between contraceptives that operate before fertilization and contraceptives that operate in the first few weeks after fertilization.[53] Pointing

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48. *Id.* at 3079 (Stevens, J., concurring in part, dissenting in part). Justice Stevens also asserted that the Missouri preamble violated the Constitution insofar as *Roe* and its progeny prohibit the state from adopting "a theory of life that overrides a pregnant woman's rights." *Id.* at 3083 n.12 (Stevens, J., concurring in part, dissenting in part).

49. *Id.* at 3080 (Stevens, J., concurring in part, dissenting in part). Justice Stevens did not indicate whether, for this reason alone, he would strike down the Missouri preamble. *Id.* at 3079 (Stevens, J., concurring in part, dissenting in part). However, this factor adds an ironic touch to the *Webster* dissents because Justice Blackmun argued in his opinion that criticisms of the abortion cases that chastised the Court for acting too much like a national medical board were unfounded. *Id.* at 3074-75 (Blackmun, J., concurring in part, dissenting in part).

50. *Id.* at 3081 (Stevens, J., concurring in part, dissenting in part) (citing *Griswold*, 381 U.S. at 485-86).

51. *Id.* at 3085 (Stevens, J., concurring in part, dissenting in part). The fact that "the vast majority of abortions are actually performed" during the first several weeks of pregnancy was of profound concern to him. *Id.* (Stevens, J., concurring in part, dissenting in part).

52. *Id.* (Stevens, J., concurring in part, dissenting in part). Justice Stevens suggested that abortion during the "first several weeks" of pregnancy, possibly the first 40-80 days, was constitutionally protected. *Id.* at 3083-84 (Stevens, J., concurring in part, dissenting in part). By tracing this period for unrestricted abortion to St. Thomas Aquinas, *id.* at 3083 (Stevens, J., concurring in part, dissenting in part), he apparently would invoke the historical branch of substantive due process forming a zone of privacy to protect against legislation reflecting the moral significance of modern knowledge about the beginning of prenatal life.

53. *Id.* at 3082-83 (Stevens, J., concurring in part, dissenting in part). The Court directly repudiated the establishment clause argument in Harris v. McRae, 448 U.S. 297, 319-20 (1980). To describe respect for the wonder of human creation as merely theological grossly understates the significance of the event. Moreover, obvious medical and biological differences exist between an unfertilized sperm or ovum and a fertilized zygote: fertilization has occurred. The process of division, the multiplication of cells, and the complexity of the organism are also differences;

specifically at St. Thomas Aquinas and the "leaders of the Roman Catholic Church," Justice Stevens argued that Missouri's preamble served no secular purpose and was an "unequivocal endorsement of a religious tenet of some . . . Christian faiths."[54] The Court could sustain the preamble only if the preamble furthered some legitimate secular purpose, such as military or economic interests. From the economic perspective, Justice Stevens opined that abortion made imminently more sense than childbearing.[55] Justice Stevens maintained that the national debate over abortion "reflects the deeply held religious convictions" of many citizens, thus the Missouri legislature could not take a position in the debate signaling "its endorsement of a particular religious tradition."[56]

The *Webster* decision upholding the Missouri legislative preamble's declaration that life begins at conception was unremarkable. Previous court dicta prohibiting a state from adopting a theory of when life begins had specific reference to a direct, substantial abortion restriction.[57] The Missouri legislative finding that life begins at conception was distinguishable from the Akron requirements that doctors espouse that position in their private consultations with their patients.[58] In *Thornburgh v. American College of Obstetricians & Gynecologists*,[59] *City of Akron*, and *Roe*, the direct state intrusion into the doctor-pa-

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in vitro fertilization and embryo transfer, these are critical differences. In terms of genetic development, genetic engineering, potential for twins, and identification of genetic defects, significant differences also exist. Of course, the order *in limine* may have prevented the introduction of evidence of "secular purposes" to support these arguments.

54. *Webster*, 109 S. Ct. at 3082-83 (Stevens, J., concurring in part, dissenting in part).

55. *Id.* at 3083-84 (Stevens, J., concurring in part, dissenting in part). This observation is seriously debatable. The aborted fetus will never repay to the state the cost of his or her abortion. For publicly funded abortions, other taxpayers will have to recoup the cost. The public costs of childbirth (and in some cases the subsequent childrearing costs born by the welfare system) are undoubtedly greater than the costs of abortion. However, the child who was not aborted will perhaps pay back the state in funds and services, including tax payments and military service.

56. *Id.* at 3085 (Stevens, J., concurring in part, dissenting in part); *see infra* note 337 and accompanying text. Justice Stevens's opinion did not make clear whether he found the Missouri preamble unconstitutional because it was too religious or not religious enough. He chastised the Missouri legislature for taking a position in the abortion debate that reflected a "theological position" on when life begins. However, he also seemed to criticize the legislature for not recognizing the historic (Catholic) position comparing an unfertilized sperm or ovum to an embryo during the first 40 days of gestation. *See Webster*, 109 S. Ct. at 3084 (Stevens, J., concurring in part, dissenting in part).

57. *See City of Akron*, 462 U.S. at 444.

58. *See id.* at 423-24.

59. 476 U.S. 747 (1986).

tient relationship created the constitutional defect. The Missouri legislative finding, on the other hand, involved no intrusion into the physician-patient relationship, but was pure political speech.

The true significance of the *Webster* Court's upholding the legislative declaration that life begins at conception lies in the rejection of an extreme interpretation of *Roe* that would prohibit the official expression of community views that contradict the *Roe* orthodoxy.[60] A growing number of judges and commentators had adopted this rigidly doctrinaire reading of the abortion cases.[61] In this context, the Court's rejection of this interpretation of *Roe* is indeed a significant point. *Webster* cut off a branch of the *Roe* abortion privacy doctrine that was ominously inconsistent with the concept of free and robust debate that lies at the heart of the first amendment protection of political speech.[62]

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60. Professor Michael Perry noted, "The Court's reasoning in *Roe* necessarily entails the proposition that *no* governmental action can be predicated on the view that in the previability period abortion is per se morally objectionable." Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1115-16 (1980) (citations omitted).

61. *See, e.g.*, Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985); Charles v. Carey, 579 F. Supp. 464 (N.D. Ill. 1983) (holding several sections of an Illinois statute restricting abortions unconstitutionally vague), *aff'd in part, rev'd in part sub nom.* Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub nom.* Diamond v. Charles, 476 U.S. 54 (1986); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980); Siemieniec v. Lutheran Gen. Hosp., 117 Ill. 2d 230, 512 N.E.2d 691 (1987) (denying cause of action for wrongful birth to hemophiliac who, but for negligent medical advice of the defendants, would have been aborted). *But cf.* Women's Servs. v. Thorne, 636 F.2d 206 (8th Cir. 1980) (holding a Nebraska statute requiring preabortion warning of possible mental and medical risks along with a 48-hour waiting period did not violate the establishment and free exercise clauses of the first amendment). *See generally* Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. LEGIS. 97, 120 n.92, 142 n.197 (1985). Surprisingly, 7 of the 13 federal judges and Justices who heard the *Webster* case accepted this position also (i.e., the district court, two circuit judges, and four dissenting Supreme Court Justices).

62. It would have been remarkable for the Court that held dial-a-porn was protected expression, *see* Sable Communications v. FCC, 109 S. Ct. 2829 (1989), and upheld flag burning as constitutionally protected political speech, *see* Texas v. Johnson, 109 S. Ct. 2533 (1989), not to uphold a legislative preamble declaring that life begins at conception as a protected form of political speech as well. Ironically, three of the Justices who had upheld flag-burning in *Johnson* voted in *Webster* to hold that the Constitution forbids elected legislators from expressing their belief that life begins at conception in a legislative preamble. Justice Blackmun and Justice Marshall joined in Justice Brennan's statement in *Johnson* that "[i]f there is a bedrock principle underlying the First Amendment it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 2544. If the *Webster* dissenters and the lower courts had prevailed, the Court would have judicially revised the first amendment to omit expressions of fact or opinion contradicting the properiety of abortion from the protection of the free speech clause. *See infra* note 334 and accompanying text.

B. *Prohibition Against Using Public Resources, Facilities, and Employees to Perform or Assist Nontherapeutic Abortions*

Section 188.205 of the Missouri Annotated Statutes prohibits expending public funds "for the purpose of performing or assisting an abortion, not necessary to save the life of the mother."[63] Section 188.215 applies the same restrictions on the use of any public facilities,[64] and section 188.210 applies the same restrictions to public employees "acting within the scope" of their public employment.[65] Many other states have adopted similar restrictions on the use of public resources to facilitate abortion.[66]

The district court invalidated all three restrictions prohibiting the use of public resources to perform or assist abortions.[67] According to the district court, the state's restriction on the use of public funds or employees to perform or assist nontherapeutic abortions could have been interpreted to prohibit the use of public money or employees to transport women prisoners who desired and were willing to finance abortions to abortion facilities.[68] This possible failure to provide appropriately for what the court considered a "serious medical need" violated the eighth amendment prohibition against cruel and unusual punishment.[69]

The district court also held unconstitutional the restriction on the use of public facilities for performing or assisting nontherapeutic abor-

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63. MO. ANN. STAT. § 188.205 (Vernon 1989).

64. *Id.* § 188.215.

65. *Id.* § 188.210.

66. *See, e.g.*, COLO. CONST. art. V, § 50 (funding facilities and employees restrictions); ARIZ. REV. STAT. ANN. § 15.1630 (1981) (facilities restriction); *id.* § 35-196.02 (Supp. 1988) (funding restriction); COLO. REV. STAT. §§ 26-4-105.5, 26-15-104.5 (Supp. 1988) (funding restrictions); ILL. ANN. STAT. ch. 23, paras. 5-5, 6-1, 7-1 (Smith-Hurd 1988) (funding restriction); IND. CODE ANN. § 16-10-3-3 (Burns 1983) (funding restriction); KY. REV. STAT. ANN. § 311.715 (Baldwin 1989) (funding restriction); LA. REV. STAT. ANN. § 40:1299.34.5 (West Supp. 1989) (funding restriction); MINN. STAT. ANN. § 261.28 (West Supp. 1989) (funding restriction); *id.* § 256B.40 (West 1982 & Supp. 1989) (funding restriction); *id.* § 393.07 subd. 11 (West Supp. 1989) (funding restriction); N.J. STAT. ANN. § 30:4D-6.1 (West 1981) (funding and facilities restrictions); OHIO REV. CODE ANN. § 5101.55(C) (Anderson 1989) (funding restriction); 18 PA. CONS. STAT. ANN. § 3215 (Purdon 1983 & Supp. 1989) (funding restriction); *id.* tit. 62, § 453 (Purdon Supp. 1989) (funding restriction); S.D. CODIFIED LAWS ANN. § 28-6-4.5 (1984) (funding restriction); UTAH CODE ANN. § 26-18-4 (Repl. vol. 1989) (funding restriction); WIS. STAT. ANN. § 59.07 (136) (West 1988) (funding restriction); *id.* § 66.04(1)(m) (West Supp. 1989) (funding restriction); WYO. STAT. § 35-6-117 (1988) (funding restriction). *See generally infra* note 107.

67. *Webster*, 662 F. Supp. at 407.

68. *Id.* at 428-29.

69. *Id.* The district court's opinion did not note that Missouri's own construction of these provisions would allow for the prisoner transportation that the district court deemed mandatory. *Id.* at 407.

tions.[70] The district judge distinguished the Supreme Court's decision in *Poelker v. Doe*,[71] which upheld a St. Louis policy prohibiting the performance of nontherapeutic abortions in a public hospital,[72] as a cost avoidance case.[73] The plaintiffs in *Webster* had presented evidence that some patients were willing to pay for nontherapeutic abortion services in a public facility; thus, no loss or expenditure of public funds would occur.[74] Additionally, the Eighth Circuit in *Nyberg v. City of Virginia*[75] had emphasized the "fundamental difference" between restrictions on the expenditure of public funds alone and restrictions which had the secondary effect of restricting access to public facilities where safe abortions could be performed.[76] In *Nyberg* the appellate court held that the city could not prohibit a municipal hospital's staff physicians from performing nontherapeutic abortions.[77] Although the public facility involved in *Nyberg* was the only hospital in the community,[78] the district court in *Webster* opined that "the gravamen of the holding was that there was no direct public expenditure."[79]

The court of appeals reversed the district court's finding that the Missouri prohibition on the use of public funds was unconstitutional.[80] The appellate court accepted the Missouri Attorney General's interpretation of "assist" to mean direct participation in the abortion procedure and not to bar expenditure of public funds to escort or transport prisoners to doctors' offices for privately-funded abortions.[81] The appellees did not appeal this ruling to the Supreme Court.

However, the court of appeals unanimously affirmed the district court's judgment invalidating the restriction on using public facilities or employees for nontherapeutic abortions.[82] *Nyberg*, rather than *Poelker*, controlled because banning access to public facilities for pri-

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70. *Id.* at 428.

71. 432 U.S. 519 (1976).

72. *Id.* at 521-22.

73. *Webster*, 662 F. Supp. at 428 (citing *Poelker*, 432 U.S. at 520).

74. *Id.* at 428 n.55.

75. 667 F.2d 754 (8th Cir. 1982), *appeal denied, cert. denied*, 462 U.S. 1125 (1983); *see also* Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974).

76. *Nyberg*, 667 F.2d at 758.

77. *Id.* at 758-59.

78. *See id.* at 756.

79. *Webster*, 662 F. Supp. at 428.

80. *Webster*, 851 F.2d at 1084.

81. *Id.* The appellate court emphasized, however, that it was not rejecting the eighth amendment analysis of the lower court; rather, it was accepting an interpretation of the statute that made it unnecessary to reach the issue. *Id.* n.17.

82. *Id.* at 1082-85.

vately paid abortions presented "a totally different issue" than the issue raised in *Poelker*.[83] Missouri's restricting the use of public facilities "clearly narrow[ed] and in some cases foreclose[d] the availability of abortion to women" by increasing the cost and delay of abortion.[84] For essentially the same reasons, the circuit court also held that the restriction on the use of public employees to perform or assist abortions was unconstitutional.[85] Since the state "recouped" all its costs for its employees' services, it had no legitimate basis for denying the use of public servants to assist abortions.[86]

The Supreme Court reversed the lower courts and upheld the Missouri restrictions on the use of public facilities and employees to "perform or assist" elective abortions.[87] The Court noted that "'the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure'" fundamental liberties.[88] The Court cited three of its earlier cases that upheld restrictions on the use of public resources to provide access to abortions.[89] Quoting one of them, the Court reasoned that "'[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.'"[90] *Poelker* was indistinguishable from the present case.[91] Having earlier upheld public re-

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83. *Id.* at 1081.

84. *Id.* It could also "prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals." *Id.*

85. *Id.* at 1083. The Court stated, "Just as a statutory prohibition on access to public facilities for privately-paid abortions constitutes such a government-created obstacle, so too does Missouri's ban on public employees performing or assisting abortions." *Id.*

86. *Id.*

87. *Webster*, 109 S. Ct. at 3050-53.

88. *Id.* at 3051 (quoting Deshaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1003 (1989)).

89. *Id.* at 3051-53 (citing Harris v. McRae, 448 U.S. 297, 325 (1980) (withholding of federal funds for certain medically necessary abortions upheld because it was rationally related to the legitimate governmental purpose of promoting childbirth); Poelker v. Doe, 432 U.S. 519, 521 (1977) (St. Louis policy to publicly finance childbearing hospital services without providing such services for nontherapeutic abortions upheld); Maher v. Roe, 432 U.S. 464, 474 (1977) (Connecticut welfare regulation, under which Medicaid payments were distributed to cover childbearing expenses but not nontherapeutic abortions, upheld)).

90. *Webster*, 109 S. Ct. at 3051 (quoting *Maher*, 432 U.S. at 474).

91. The Court noted the similarity of the facts in *Webster* and *Poelker*:

> The suit in *Poelker* was brought by the plaintiff "on her own behalf and on behalf of the entire class of pregnant women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis for the termination of pregnancies."

Id. at 3053 n.9 (quoting Doe v. Poelker, 497 F.2d 1063, 1065 (8th Cir. 1974), *rev'd*, 432 U.S. 519 (1977)).

fusal to fund abortions, the Court noted that "it strain[ed] logic [for the Court] to reach a contrary result for the use of public facilities and employees."[92] The fact that all of the state's costs would be "recouped when the patient pays" for an abortion in a public facility or for using public employees also did not require the state to allow its facilities or employees to be used for abortion.[93] Moreover, the decision whether or not to use public resources to facilitate abortions was "'subject to public debate and approval or disapproval at the polls,' and 'the Constitution did not forbid a State or city, pursuant to democratic processes,'" from choosing to restrict the use of its public resources for the purpose of abortion.[94]

Justice O'Connor concurred in this portion of the Court's opinion and emphasized that upholding the Missouri restrictions on the use of public facilities and employees to perform or assist abortion simply "follow[ed] directly" from the previous decisions upholding state and federal restrictions prohibiting the funding of nontherapeutic abortions.[95] She reiterated that "conceivable applications of the ban on the use of public facilities . . . would be unconstitutional."[96] However, the fact that some extreme, hypothetical circumstance could be conceived in which application of the statute might be unconstitutional was no basis for invalidating the statute on its face "since [the Court had] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[97]

In dissent Justice Blackmun argued that these resource allocation restrictions were unconstitutional.[98] He noted that "strong dissents"

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92. *Id.* at 3052. Furthermore, just as "the [s]tate may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' surely it [could] do so through the allocation of other public resources, such as hospitals and medical staff." *Id.* (quoting *Maher*, 432 U.S. at 474).

93. *Id.* at 3052-53. The Court stated, "[N]othing in the Constitution requires states to enter or remain in the business of performing abortions." *Id.* at 3052. The Court noted that if the state had a monopoly on all of the hospitals and physicians, or if the state barred doctors that performed abortions in private facilities from using public facilities for nonabortion purposes, the state might have gone too far. *Id.* at 3052 n.8. However, "[t]he State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so." *Id.* at 3052.

94. *Id.* at 3053 (quoting *Poelker*, 432 U.S. at 521); *see infra* text accompanying notes 304-12.

95. *Webster*, 109 S. Ct. at 3059 (O'Connor, J., concurring in part, concurring in the judgment).

96. *Id.* For example, if private hospitals were subject to the ban on the use of public resources simply because they used public water and sewage lines, or leased state-owned equipment or land, a more difficult constitutional question could be presented. *Id.*

97. *Id.* at 3059-60 (O'Connor, J., concurring in part, concurring in the judgment) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

98. Justice Stevens separately adopted Justice Blackmun's analysis of this issue. *Id.* at 3079 (Stevens, J., concurring in part, dissenting in part).

existed in the funding cases.[99] He further argued that the Court could distinguish the funding cases because the Missouri restrictions on the use of public facilities and employees could effectively "assure that abortions are not performed by *private* physicians in *private* institutions."[100] Justice Blackmun disagreed with the definition of "public facility" that included institutions, equipment, and physical assets "owned, leased, or controlled" by the state.[101] He warned that "by defining as 'public' every health-care institution with some connection to the State, no matter how attenuated," the Court was allowing Missouri to coerce women into bearing unwanted children.[102] The public facility restriction would "leave the pregnant woman with far fewer choices, or for those too sick to too poor to travel, perhaps no choices at all."[103] Thus, the Missouri restriction on the use of public facilities and employees was an "aggressive and shameful infringement on the right of women to obtain abortions."[104]

Given the clarity of the constitutional principles laid down in the five previous abortion funding cases and the factual and legal similarity of the issues in *Poelker*,[105] the *Webster* Court's decision upholding

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99. *Id.* at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part). Of course, the same could be said about many other cases, including Roe v. Wade, 410 U.S. 113 (1973), in which Justice Blackmun wrote the opinion for the majority. *Compare id.* at 116 (Blackmun, J., majority opinion) *with id.* at 171 (Rehnquist, J., dissenting) and *id.* at 222 (White, J., dissenting). What Justice Blackmun apparently meant was that the decisions of the Court in those funding cases were wrong and should be overturned. However, he could not say so explicitly, because later he had to argue very strongly that the doctrine of stare decisis has particularly important application to abortion cases. *Webster*, 109 S. Ct. at 3078-79 (Blackmun, J., concurring in part, dissenting in part).

100. *Id.* at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part) (emphasis in original). Justice Blackmun apparently forgot that the restriction of public funding upheld in the five prior abortion-funding cases meant, for indigent women, precisely "that abortions [would] not [be] performed by *private* physicians in *private* institutions." Indeed, the impact of the restrictions on the use of public facilities and employees on abortions "performed by *private* physicians in *private* institutions" is significantly less than the impact of restrictions on public funding, since public funds are much more easily transportable to private abortion providers than are public facilities or public employees.

101. *Id.* (Blackmun, J., concurring in part, dissenting in part). The statutory language does not clearly indicate whether "public facility" includes assets that the state leases for its own use or whether it includes facilities located on land leased by private enterprises from the state. Justice Blackmun gave the abortion regulation the latter, more inclusive interpretation. *See infra* text accompanying notes 102-04.

102. *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part). His reasoning ignored the caveats of the majority's and Justice O'Connor's opinions.

103. *Id.* at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part).

104. *Id.* at 3068-69 n.1 (Blackmun, J., concurring in part, dissenting in part).

105. *See supra* note 91.

Missouri's public resource restriction was hardly novel.[106] However, the applications of the abortion privacy doctrine accepted by the lower courts and urged by the dissenters in the Supreme Court magnify the significance of this holding. Lower courts have invalidated restrictions on the use of public resources to facilitate abortion even though the Supreme Court has declared such restrictions constitutional.[107] Commentators also have called for the rejection or defiance of the abortion-funding decisions.[108] The lower court decisions in *Webster* can be read as a direct challenge to the Supreme Court abortion-funding decisions. Thus, the *Webster* decision unequivocally reaffirmed the principle of state freedom not to provide public resources to facilitate abortions established in *Maher v. Roe*[109] and *Poelker*.

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106. The warning conveyed by the majority, *see Webster*, 109 S. Ct. at 3058 n.8 (majority opinion); *supra* note 93, and reiterated by Justice O'Connor, *see Webster*, 109 S. Ct. at 3059 (O'Connor, J., concurring in part, concurring in the judgment); *supra* note 97, about the limits on the power of the state to restrict the use of monopolistic public facilities, or to punish public employees for private, legal conduct, is more noteworthy. The next critical point of abortion litigation over public resource restrictions may focus on quasi-monopolistic impact: when the only facilities in which abortions may be performed in a state or a substantial geographic region or subdivision of a state are public facilities to which the ban applies.

Two arguments the lower courts had relied upon for invalidating the public resource restrictions were not repeated, relied upon, or endorsed even by the dissenters at the Supreme Court level. The dissenters in the Supreme Court failed to resurrect the "prison case" scenario — the hypothetical argument, which was repudiated by the circuit court, *see Webster*, 851 F.2d at 1083-84, that the Missouri statute could be interpreted to prohibit the use of public funds or employees to transport and escort female prisoners for privately paid abortions. Likewise, Justice Blackmun in dissent partly eschewed the "petty burdens" argument of small increased costs, transportation expenses, and minor delays, featured prominently in the lower court decisions. *See Webster*, 109 S. Ct. at 3071 (Blackmun, J., concurring in part, dissenting in part); *Webster*, 851 F.2d at 1084.

107. *See, e.g.*, Nyberg v. City of Virginia, 667 F.2d 754 (8th Cir. 1981) (city could not prohibit staff physicians from performing abortions for paying patients at the only hospital in the community); Valley Family Planning v. North Dakota, 661 F.2d 99 (8th Cir. 1981) (statute prohibiting abortion referrals conflicted with mandate of Title X of the Public Health Service Act). *But cf.* D.R. v. Mitchell, 645 F.2d 852 (10th Cir. 1981) (statute providing that state would give medical expenditures for abortion only if the life of the mother was in danger upheld against equal protection and due process challenges); Women's Health Servs. v. Maher, 514 F. Supp. 265 (D. Conn. 1981) (Connecticut regulation providing public funds for abortion only when the woman's life would otherwise be endangered did not create an equal protection or due process violation); Roe v. Arizona Bd. of Regents, 113 Ariz. 178, 549 P.2d 150 (1976) (statute prohibiting certain kinds of abortions at a teaching hospital was constitutional because it was a teaching facility and abortions were available elsewhere).

108. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 1340-62 (2d ed. 1988); Perry, *supra* note 60; Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

109. 432 U.S. 464 (1977) (upholding Connecticut welfare regulation under which Medicaid payments were distributed to cover childbearing expenses but not nontherapeutic abortions).

C. *Prohibition Against Using Public Funds to Encourage or Counsel Abortion*

Section 188.205 of the Missouri Annotated Statutes prohibits the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life."[110] Section 188.210 likewise restricts public employees, and section 188.215 similarly restricts the use of public facilities.[111] The district court held that the restriction on "encouraging or counseling" nontherapeutic abortions in all three sections was unconstitutionally vague, relying, *inter alia*, on the Supreme Court's upholding the right to disseminate commercial information regarding abortion.[112] Moreover, rejecting a narrow construction of the statute supported by the Missouri Attorney General,[113] the district court reasoned that the provisions interfered with the constitutionally protected discretion of physicians to advise their patients about abortion and erected a "significant barrier to a woman's right to consult with her physician and exercise her freedom of choice."[114] By allowing counseling for only therapeutic abortions, the provisions violated the Supreme Court rule prohibiting "a state [from imposing] 'an increased risk to the life *or health* of the woman.'"[115]

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110. MO. ANN. STAT. § 188.205 (Vernon 1989).

111. *Id.* §§ 188.210, .215.

112. *Webster*, 662 F. Supp. at 425 (citing Bigelow v. Virginia, 421 U.S. 809 (1975)). However, the district court's reliance on *Bigelow* to justify the application of a strict scrutiny standard of vagueness was misplaced. *Bigelow* involved general restrictions on all abortion advertising, private or public, *Bigelow*, 421 U.S. at 812-13, whereas the Missouri statutes involved restrictions only on publicly funded advocacy activities. *See* MO. ANN. STAT. §§ 188.205, .210, .215 (Vernon 1989).

113. The district court rejected the Missouri Attorney General's interpretation that § 188.205 applied only to "state and local officials responsible for expending public funds" because the language "certainly [was] broad enough" to include "anyone who (was] paid from" public funds. *Webster*, 662 F. Supp. at 425. The Missouri Attorney General had argued that the statute was intended to forbid only "affirmative advocacy" of nontherapeutic abortions, but the district court rejected this interpretation because the statutory language "encouraging or counseling" elicited such "vastly different interpretations of the scope of the forbidden activity" that it was obviously unconstitutional, just like the loyalty oaths invalidated in the 1960s. *Id.* at 426. This logic is classic bootstrap.

114. *Webster*, 662 F. Supp. at 427. The court reasoned that it would violate medical ethics for a physician to fail to advise or counsel a health-preserving abortion. Moreover, no legitimate state interest existed for prohibiting counseling or encouraging because patients who paid for their own abortions at public facilities would fully reimburse the state's costs for the physicians' time to give that advice. *Id.* at 427-28, 428 n.55.

115. *Id.* at 427 (quoting *Thornburgh*, 476 U.S. at 770) (emphasis added in *Webster*).

The court of appeals unanimously affirmed the district court's holding.[116] Rejecting the state's narrowing construction, the court held that the restriction on counseling or encouraging nontherapeutic abortions interfered with constitutionally protected rights of free speech and free choice regarding abortion.[117] A Ninth Circuit decision upholding a similar Arizona ban on state support for "counseling" abortions was distinguished because the Arizona statute in that case was more precise than and significantly different from Missouri's statute.[118] Alternatively, the appellate court found the restriction on state employees' counseling or encouraging nontherapeutic abortions an unconstitutional state-erected obstacle to patients' access to medical judgment.[119]

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116. *Webster*, 851 F.2d at 1077-80; *id.* at 1085 (Arnold, C.J., concurring in part, dissenting in part).

117. *Id.* at 1077-80 (majority opinion). The court rejected the state's construction of its own statute because the scope of the prohibition "appeared literally to be much broader than the interpretation offered by the state," and the state's interpretation was inconsistent with principles of statutory construction laid down by the Supreme Court in Colautti v. Franklin, 439 U.S. 379 (1979). *Webster*, 851 F.2d at 1077-78 (citing *Colautti*, 439 U.S. 379). The court of appeals thus read *Colautti* as establishing a curious rule of statutory construction that a court should not interpret an abortion statute to render one part inoperative if another interpretation was possible to render the entire statute unconstitutional. *Id.* at 1078. However, the court noted that the word "counsel" was "fraught with ambiguity" and already had had the "pernicious effect" of causing publicly employed healthcare personnel to be advised to make no comment relative to abortion unless the abortion would be necessary to save the life of the mother. *Id.* at 1078 n.11.

118. *Id.* at 1078-79 (citing Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983)). The circuit court's effort to distinguish *Planned Parenthood*, 718 F.2d 938, because the Arizona Attorney General previously had interpreted Arizona's statute narrowly is disingenuous because the circuit court refused to accept the narrowing interpretation offered by the Missouri Attorney General. *See id.* at 1078. The court's argument that the language in the Arizona statute was "sufficiently different" to justify a different outcome in the case was particularly unpersuasive because the court failed to identify what the differences were and why they were so significant in constitutional analysis as to cause the court to reach the opposite conclusion.

119. *Id.* at 1079-80. The court noted that the restriction could cause a state-employed doctor to violate his professional duty to convey all the information he thinks his clients need. *Id.* at 1079 n.12. If imposed on all doctors, such a requirement would clearly be unconstitutional; the fact that the state imposed the requirement solely on public employees or contractors did not save it. The court stated, "The state's limitation on doctor-patient discussions reflects a state' choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice." *Id.* at 1080. This statement was ironic in light of the lower court's decision that the state could not protect the woman's right to be informed whether or not she was pregnant. *Webster*, 662 F. Supp. at 413-16! Finally, the court of appeals noted that the funding cases were "completely inapt" because the effect of the statute was to erect an obstacle in the path of women seeking uncensored medical advice. *Webster*, 851 F.2d at 1080. Judge Arnold separately opined that these provisions violated the first amendment by restricting speech on the basis of content. *Id.* at 1085 (Arnold, J., concurring in part, dissenting in part).

Notably, both the district court and the circuit court rejected the plaintiffs' claim that this funding restriction unconstitutionally infringed upon academic freedom in violation of the first

The state chose to appeal only that portion of the circuit court's judgment that invalidated the restriction on the use of public funds to counsel or encourage abortion. The Supreme Court unanimously accepted the state's saving construction of the appealed provision and vacated the judgment with instructions to dismiss that portion of the complaint.[120] Chief Justice Rehnquist first addressed the question of statutory interpretation and accepted the state's argument that section 188.205 was "simply an instruction to the State's fiscal officers not to allocate funds for abortion counseling." Since the appellees had asserted that they were not adversely affected by that construction of the statute, a case or controversy no longer existed on the issue, and the Court unanimously agreed that the challenge to this provision was moot.[121] In her concurring opinion Justice O'Connor added a caveat that construing section 188.205 to "prohibit publicly employed health professionals from giving specific medical advice to pregnant women" would revive the controversy.[122]

D. *Viability Testing*

Section 188.029 of the Missouri Annotated Statutes requires a doctor who "has reason to believe" that the fetus is of at least twenty weeks gestational age to determine whether the fetus is viable before performing an abortion.[123] The statute further provides that "[i]n making this determination of viability, the physician shall perform . . .

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amendment by forbidding instruction on certain subjects. *See id.* at 1084 n.18 (majority opinion); *Webster*, 662 F. Supp. at 429-30. The circuit court held that none of the plaintiffs had standing to raise the issue. *Webster*, 851 F.2d at 1084 n.18. Although none of the plaintiffs was a medical student, three plaintiffs were physicians "associated with the University of Missouri Schools of Medicine," *Webster*, 662 F. Supp. at 411. The circuit court never explained why the physicians would lack standing to raise the issue.

120. *Webster*, 109 S. Ct. 3053-54; *id.* at 3060 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment); *id.* at 3069 n.1 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3079 (Stevens, J., concurring in part, dissenting in part).

121. *Id.* at 3053 (majority opinion).

122. *Id.* at 3060 (O'Connor, J., concurring in part, concurring in the judgment). Justice Blackmun made a similar observation. *Id.* at 3069 n.1 (Blackmun, J., concurring in part, dissenting in part). Since Justice O'Connor cast the swing vote on all other issues, it may have been prudent for the State of Missouri not to have appealed the invalidation of MO. ANN. STAT. § 188.210 (Vernon 1989), which prohibits public employees from counseling or encouraging women regarding nontherapeutic abortions.

123. MO. ANN. STAT. § 188.029 (Vernon Supp. 1989). While the 20-weeks gestation point is before viability, the four-week error-range makes the viability determination reguirement appropriate at that point. *Webster*, 662 F. Supp. at 423.

such medical examinations as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child."[124] The district court held that the first sentence of this provision was constitutional because the provision obligated the doctor only to make a determination of viability and did not interfere with his discretion in the method of determination.[125] However, rejecting the Missouri Attorney General's narrowing construction, the court invalidated the second part of the requirement which specified age, weight, and lung maturity viability tests.[126] Reading the statute as requiring all three tests in all cases, the district court held that the statute violated the Supreme Court's declaration in *Colautti v. Franklin*[127] prohibiting the "'legislature [and] the courts [from] proclaim[ing] one of the elements entering into the ascertainment of viability . . . [to] be . . . weeks of gestation[,] fetal weight[,] or any other single factor.'"[128]

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124. MO. ANN. STAT. § 188.029 (Vernon Supp. 1989). Many states have similar statutes. *See* ARIZ. REV. STAT. ANN. §§ 36-2301, -2301.01 (1986); ARK. STAT. ANN. § 20-16-706 (1987); FLA. STAT. § 390.001(5) (1989); IDAHO CODE § 18-608(3) (Repl. vol. 1987); ILL. ANN. STAT. ch. 38, para. 81-26 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 35-1-58.5-7 (Burns 1985); IOWA CODE ANN. § 707.10 (West 1979); KY. REV. STAT. ANN. § 311.780 (Baldwin 1989); LA. REV. STAT. ANN. § 14:87.5 (West 1986); *id.* § 40:1299.35.4 (West Supp. 1989); MINN. STAT. ANN. § 145.415, .412(3) (West 1989); MONT. CODE ANN. §§ 50-20-108, -109(1)(c) (1989); NEB. REV. STAT. § 28-330 (1985); N.Y. PUB. HEALTH LAW § 4161 (McKinney 1985); N.D. CENT. CODE § 14-02.1-04 (Repl. vol. 1981); OKLA. STAT. ANN. tit. 63, §§ 1-732, -734 (West 1984); 18 PA. CONS. STAT. ANN. §§ 3210-3211 (Purdon 1983 & Supp. 1989); UTAH CODE ANN. §§ 76-7-307, -308 (Repl. vol. 1978); WIS. STAT. ANN. § 940.15 (West Supp. 1989); WYO. STAT. § 35-6-104 (1988).

125. *Webster*, 662 F. Supp. at 421. The district judge also rejected the plaintiffs' contention that, because the statute did not provide an explicit exception for situations in which the health of the mother is endangered, the statute was unconstitutional. *Id.* at 423. Emphasizing the court's duty to "seek to ascertain and give effect to the legislative intent if possible," the district court accepted the state's argument that the statute should be read in harmony with a previously enacted section providing that a postviability abortion is not prohibited when necessary to preserve the life or health of a woman. *Id.* The court's unexplained rejection of the Attorney General's interpretation of the testing provision was ironic because here, two paragraphs later, the court emphasized its duty to ascertain and give effect to legislative intent. *Id.*

126. *Id.* The plaintiff's expert witness had testified that fetal weight tests cost $125-250 and were unreliable. Lung maturity tests or amniocentesis could add another $200-250 to the cost of abortion, could not be performed usefully until at least 28-30 weeks of gestation, and imposed additional health risks for both the pregnant woman and the fetus. *Id.* at 422. However, uncontradicted testimony confirmed that ultrasound measurements were the only tests that provided sufficient information to determine viability at 30 weeks gestational age or before. *Id.* The Missouri Attorney General argued that the statute required only such examinations to be performed as were necessary and effective to make the required viability finding (i.e., ultrasound only, unless the fetus was substantially older), but the district judge rejected that interpretation without explanation. *Id.* at 423.

127. 439 U.S. 379 (1979).

128. *Webster*, 662 F. Supp. at 423 (quoting *Colautti*, 439 U.S. at 388).

The court of appeals tersely affirmed, stating that "the Supreme Court [had] squarely addressed this point" and that the Missouri legislature had "precisely" violated *Colautti* by requiring doctors to determine gestational age, weight, and lung maturity.[129] The appellate court emphasized that without any exceptions or qualifications "the statute plainly declares that[,] in determining viability, doctors *must* perform tests to find gestational age, fetal weight and lung maturity."[130]

1. Interpreting the Viability Statute

Despite the apparent violation of *Colautti*, the Supreme Court reversed the lower courts and upheld the viability testing requirement. The Court first concluded that the lower courts had erred in rejecting the Missouri Attorney General's statutory interpretation that the specified tests need be performed only when necessary to determine viability.[131] Chief Justice Rehnquist, writing for a plurality, noted that the lower courts had failed to consider the second sentence of section 188.029 in the context of the whole law, its object, and its policy and had violated the rule of construction that mandates that courts should, when possible, interpret statutes to avoid constitutional problems.[132] The second sentence could make sense only if it were read to require useful tests; otherwise, the first sentence emphasizing the doctors' discretion and professional judgment would be rendered meaningless.[133] Additionally, the lower courts violated Missouri's own canons of statutory construction concerning legislative intent and reasonable, harmonious construction.[134]

Justice O'Connor concurred, agreeing that the lower courts committed plain error in rejecting the state's reasonable interpretation of its own statute. The lower courts also erred in adopting the "contradictory nonsense" construction of the second sentence. The second sentence did not require viability testing in situations when such testing would

129. *Webster*, 851 F.2d at 1074-75.

130. *Id.* at 1075 n.5.

131. *Id* at 3054 (plurality opinion, consisting of Rehnquist, C.J. and White and Kennedy JJ.) [hereinafter (Rehnquist, C.J., plurality opinion)]; *id.* at 3060 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 3066 n.* (Scalia, J., concurring in part, concurring in the judgment) (Scalia failed to specifically state the "plain error" position, but he clearly accepted the state's interpretation of its own statute); *see infra* note 135.

132. *Id.* at 3054 (Rehnquist, C.J., plurality opinion).

133. *Id.* at 3054-55 (Rehnquist, C.J., plurality opinion).

134. *Id.* (Rehnquist, C.J., plurality opinion).

be careless and imprudent "in the particular medical situation before the physician."[135]

The four dissenters argued that the Supreme Court was obliged to defer to the lower courts' interpretations of state law.[136] Both Justice Blackmun's and Justice Stevens's dissenting opinions emphasized that the plain language of the second sentence, standing alone, required viability testing at all times, even when unreasonable, ineffective, and costly, and the lower courts had interpreted the statute accordingly.[137]

2. Conflicting With Constitutional Doctrine

After accepting the state's statutory construction, the *Webster* Court faced the question of whether the Missouri viability testing provision, so construed, violated the abortion privacy doctrine established by *Roe* and its progeny. A majority concluded that it did not.[138] Justice O'Connor (the only justice to vote with the prevailing side on all of the issues) read the abortion precedents narrowly and emphasized that the *Colautti* dictum did not forbid states from requiring appropriate viability testing. In her view, the lower courts' fatal mistake was their erroneous interpretations of the breadth of the Missouri testing

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135. *Id.* at 3060 (O'Connor, J., concurring in part, concurring in the judgment). Justice O'Connor apparently wanted to underscore the need for deference to the reasonable judgment of the attending physician.

Justice Scalia, also writing separately, accepted Missouri's interpretation of its statute without explanation. *Id.* at 3066 n.* (Scalia, J., concurring in part, dissenting in part) ("it will *sometimes* require a physician to perform tests that he would not otherwise have performed") (emphasis added). While Justice Scalia declined to join part II-D of the plurality opinion, he criticized only the restraint of the constitutional analysis, not the statutory construction. *Id.* at 3066-67 (Scalia, J., concurring in part, concurring in the judgment).

136. *Id.* at 3069 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3079-80 (Stevens, J., concurring in part, dissenting in part).

137. *Id.* at 3069-70 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3080 (Stevens, J., concurring in part, dissenting in part). None of the dissenters, however, argued that the lower court construction correctly incorporated the Missouri legislature's intent. Indeed, Justice Stevens acknowledged that the state's construction of its own statute was "the most plausible nonliteral construction." *Id.* at 3079 (Stevens, J., concurring in part, dissenting in part).

138. *Webster*, 109 S. Ct. at 3057-58. However, had the Court accepted the lower courts' interpretation of the viability testing provision, the question remains whether the Court also would have accepted the lower courts' conclusion that the provision was unconstitutional. The four dissenters, who agreed with the lower courts' construction of the statute, stated that the provision would have been unconstitutional, not only under *Roe*, but also because it would "not pass constitutional muster under even a rational-basis standard." *Id.* at 3070 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3080 (Stevens, J., concurring in part, dissenting in part). The majority, however, declined to speculate upon this question.

requirement.[139] Reading *Thornburgh*, *Colautti*, and *City of Akron* narrowly, Justice O'Connor saw no conflict between the proper narrow interpretation of section 188.029 and the proper narrow application of the prior decisions of the Supreme Court regarding viability regulation.[140]

Justice Blackmun's plurality agreed that the state's interpretation of the viability testing statute posed "little or no conflict with *Roe*."[141] Adopting a significantly different position from the one he took in *Thornburgh* and *Colautti*,[142] Justice Blackmun agreed that "[n]othing in *Roe*, or any of its progeny, holds that a state may not effectuate

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139. *Id.* at 3062 (O'Connor, J., concurring in part, concurring in the judgment). Actually, the district court based its holding that the viability testing statute was unconstitutional upon the dictum of *Colautti*. *Webster*, 662 F. Supp. at 423 (citing *Colautti*, 439 U.S. at 388). The district court stressed "that the final sentence of Section 188.029 [was] an impermissible legislative intrusion upon a matter of medical skill and judgment . . . . [T]he State may not dictate that a physician make a 'finding' [of] gestational age in order to determine viability." *Id.* After presenting this analysis, the trial court added as a postscript that it "also reject[ed] defendants' interpretation that only those tests which [were] 'necessary' to do so must be performed" because "[t]he State may not dictate either the tests *or* the findings which enter into a decision whether or not a fetus is viable." *Id.*

The circuit court cited with approval the district court's determination that constitutionally "'[t]he State may not dictate either the tests *or* the findings which enter into a decision whether or not a fetus is viable.'" *Webster*, 851 F.2d at 1074 (quoting *Webster*, 662 F. Supp. at 423) (emphasis in district court's opinion). By requiring specific findings or tests relating to the viability determination, the circuit court was convinced that the Missouri statute was unconstitutional. *Id.* at 1074-75. Under that analysis the statute would be unconstitutional even if the court accepted the state's construction. In a footnote the circuit court affirmed the district court's rejection of the state's interpretation of its own statute. *Id.* at 1075 n.5. Thus, under the view of the abortion privacy doctrine adopted by both the lower courts in *Webster*, the Missouri viability testing requirement was unconstitutional whether interpreted broadly or narrowly.

140. *Webster*, 109 S. Ct. at 3060-63 (O'Connor, J., concurring in part, concurring in the judgment). This narrowing reading of past abortion cases by Justice O'Connor was consistent with her approach to the *Roe* and *City of Akron* dicta about a state adopting a theory of when life begins. *See supra* notes 33 & 41 and accompanying text. The Rehnquist plurality's broad reading of the viability cases, albeit honest, seems inconsistent with their narrow reading of the *Roe* and *City of Akron* dicta about state adoption of a theory of life. *See supra* note 35 and accompanying text. The four dissenters' narrow reading of the viability precedents was inconsistent with their very broad reading of the *Roe* and *City of Akron* dicta about a state adoption of theory of life. *See supra* notes 44-47 and accompanying text.

141. *Id.* at 3070 (Blackmun, J., concurring in part, dissenting in part).

142. *Compare Thornburgh*, 476 U.S. at 766 (Blackmun, J., majority opinion) (recognizing that recordkeeping and reporting provisions that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible) *with* Colautti v. Franklin, 439 U.S. 379, 388, 392 (1979) (Blackmun, J., majority opinion) (recognizing that viability may be a legitimate concern in drafting abortion statutes).

its compelling interest in the potential life of a viable fetus by seeking to insure that no viable fetus is mistakenly aborted."[143] Thus, the state's interpretation of the statute "could be upheld effortlessly under current doctrine."[144] Therefore, Justice O'Connor and the four principal dissenters constituted a majority holding that the viability testing provisions were not unconstitutional under the abortion precedents.

The Rehnquist plurality disagreed. They found the Missouri statute, even construed narrowly, to conflict with the Court's prior abortion viability decisions. Chief Justice Rehnquist observed that *Roe* and its progeny had emphasized the state's inability to restrict previability abortion.[145] That rule constituted the third prong of *Roe*'s "trimester framework."[146] He noted further that, if section 188.029 "regulates the method for determining viability, it . . . superimpose[s] state regulation on the medical determination of whether a particular fetus is viable" in violation of *Colautti*.[147] Moreover, he argued, if Missouri's viability tests increased the costs of "second-trimester abortions," the testing requirement conflicted with the *Akron* holding that regulations substantially increasing the cost of second-trimester abortions were unconstitutional.[148]

The *Webster* Court's decision regarding viability testing indicates a significant shift in the abortion privacy doctrine. First, the Court unanimously repudiated the lower courts' broad reading of the abortion precedents. Five Justices held that both lower courts had given those decisions unnecessarily expansive application and noted that the Missouri statute, as construed by the state, presented an easy case that

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143. *Id.* at 3070-71 (Blackmun, J., concurring in part, dissenting in part). Likewise, the minimal additional costs of such tests "would be merely incidental to, and a necessary accommodation of, the State's unquestioned right to prohibit nontherapeutic abortions after the point of viability." *Id.* at 3071 (Blackmun, J., concurring in part, dissenting in part).

144. *Id.* (Blackmun, J., concurring in part, dissenting in part). Justice Stevens separately agreed that the viability testing requirement, if construed as the state urged, "is constitutional and entirely consistent with our precedents." *Id.* at 3079 (Stevens, J., concurring in part, dissenting in part).

145. *Id.* at 3055 n.14 (Rehnquist, C.J., plurality opinion).

146. *See id.* at 3056 n.14 (Rehnquist, C.J., plurality opinion) (citing *Roe*, 410 U.S. at 163).

147. *Id.* at 3056 (Rehnquist, C.J., plurality opinion) (citing *Colautti*, 439 U.S. 379).

148. *Id.* (Rehnquist, C.J., plurality opinion) (citing *City of Akron*, 462 U.S. at 434-35).

Writing separately, Justice Scalia noted that it was "an arguable question" whether the Missouri viability testing provision violated *Roe* and its progeny. *Id.* at 3066 (Scalia, J., concurring in part, concurring in the judgment). However, he concluded that the statute conflicted with the *Roe* doctrine for the same reasons set forth by Chief Justice Rehnquist, and he sharply criticized Justice O'Connor's analysis of the question. *Id.* at 3066 n.* (Scalia, J., concurring in part, concurring in the judgment).

could be "upheld effortlessly"[149] under the proper, narrow reading of the precedents. The other four Justices argued that the lower courts had not misread the unnecessarily broad language in the precedents and proposed to restrictively modify the precedents. But, the Court unanimously agreed on the propriety of a narrow reading of the abortion cases dealing with viability. Inasmuch as the Court thrice previously had invalidated legislative efforts to restrict postviability abortions,[150] and only once had upheld postviability regulation,[151] the *Webster* Court's shift to a narrow reading of the precedents invalidating postviability restrictions represents a notable alteration in the understanding of the abortion privacy doctrine.

3. Modifying the *Roe* Trimester Framework

The last question the Court addressed in *Webster* was the big issue: "Should the *Roe v. Wade* . . . trimester approach . . . be reconsidered . . . in favor of a rational basis test?"[152] Although eight members of the Court were willing to address the issue, they split four-to-four, and that stalemate effected no modification of *Roe*.[153] Thus, while *Webster* hardly constitutes a ringing endorsement of the *Roe* abortion privacy doctrine (unless the ring is a death knell), the hard core of that doctrine "[f]or today, at least, . . . stand[s] undisturbed."[154] Almost.

While the Court appropriately may reconsider the validity of a doctrine announced in a prior case even when reconsideration is un-

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149. *Id.* at 3071 (Blackmun, J., concurring in part, dissenting in part) ("the testing provision, as construed by the plurality[,] is consistent with the *Roe* framework and could be upheld effortlessly under the current doctrine").

150. *See Thornburgh*, 476 U.S. at 768-71; *Colautti*, 439 U.S. 379; Planned Parenthood v. Danforth, 428 U.S. 52, 388-89 (1976). Many lower courts have invalidated post-viability regulations based on broad interpretations of the Supreme Court viability cases. *See, e.g.*, Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), *appeal dismised sub nom.* Diamond v. Charles, 476 U.S. 54 (1986); Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976); Planned Parenthood v. Carey, 686 F. Supp. 1089, 1131 (E.D. Pa. 1988); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980).

151. Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983).

152. Brief for Appellants, at ii, *Webster*, 109 S. Ct. 3040 (1989) (No. 88-605).

153. Four Justices clearly answered in the affirmative, *see infra* notes 160-65 and accompanying text, three clearly answered in the negative, *see infra* notes 169-92 and accompanying text, and one voted in the negative but hinted how the Court might salvage or recast *Roe*. *See infra* note 193.

154. *Id.* at 3079 (Blackmun, J., concurring in part, dissenting in part). Actually, the *Webster* decision mortally wounded *Roe*'s trimester framework but no official report of its demise has been made. *See infra* text accompanying notes 205-09.

necessary to the disposition of the case at bar,[155] a "venerable principle of [the] Court's adjudicatory processes" demands the Court refrain from doing so.[156] Invoking this principle, Justice O'Connor declined to address the big issue. She found "no necessity to accept the state's invitation to re-examine the constitutional validity of *Roe v. Wade*."[157] She reminded her brethren that "'[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'"[158] She cautioned against hastily accepting the task of reconsidering the *Roe* doctrine. Future cases would arise and the Court would have "time enough to reexamine *Roe* . . . . carefully."[159]

Chief Justice Rehnquist, writing for a plurality, would have abandoned the "rigid trimester analysis" of *Roe*.[160] He noted that the *Roe* trimester framework resembled "a code of regulations rather than a body of constitutional doctrine," placing the Court in the position of acting "as the country's '*ex officio* medical board.'"[161] Such rigid detail was inconsistent with the "notion of a Constitution cast in general

155. *Cf.* Erie R.R. v. Tompkins, 304 U.S. 64, 82 (1938) (Butler, J., dissenting) (no constitutional question was argued in the lower courts or at the Supreme Court level); *id.* at 90-92 (Reed, J., concurring in part) (proper to overturn Swift v. Tyson, 41 U.S. 1 (1842), but improper to reach constitutional issue).

156. Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U.S. 33, 39 (1885)).

157. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring in part, concurring in the judgment).

158. *Id.* at 3061 (O'Connor, J., concurring in part, concurring in the judgment) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

159. *Id.* (O'Connor, J., concurring in part, concurring in the judgment). Justice O'Connor reiterated her previous criticisms of *Roe* and its progeny, noting that she "continue[d] to consider [*Roe*'s trimester framework] problematic." *Id.* at 3063 (O'Connor, J., concurring in part, concurring in judgment). She criticized the way the *City of Akron* Court "distorted and misapplied its own standard for evaluating state regulation of abortion" and alluded to an "undue burden" standard of judicial review of abortion regulations. *See id.* (O'Connor, J., concurring in part, concurring in judgment). In a dissenting opinion in an earlier abortion case, Justice O'Connor suggested that this standard of review would be preferable to *Roe*'s trimester framework. *See City of Akron*, 462 U.S. at 453 (O'Connor, J., dissenting); *see also Webster*, 109 S. Ct. at 3062 (O'Connor, J., concurring in part, concurring in the judgment) (noting the "degree of state regulation" as a significant factor).

160. *Webster*, 109 S. Ct. at 3056 (Rehnquist, C.J., plurality opinion). The principle of stare decisis does not preclude the Court from reconsidering prior constitutional interpretations that have proven "'unsound in principle and unworkable in practice.'" *Id.* (Rehnquist, C.J., plurality opinion) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

161. *Webster*, 109 S. Ct. at 3056-57 (Rehnquist, C.J., plurality opinion).

terms."[162] He perceived no reason "why the state's interest in protecting potential human life should come into existence only at the point of viability" and not before.[163] While acknowledging that a pregnant woman desiring an abortion could assert a due process interest, Chief Justice Rehnquist argued that the state legislatures had the responsibility to deal with "'the most politically devisive domestic legal issue of our time.'"[164] Thus, without overturning *Roe*, the Rehnquist plurality "would [have] modif[ied] and narrow[ed] *Roe* and succeeding cases."[165]

Justice Scalia wrote separately to express his desire not just to effectively overrule *Roe*, as the Rehnquist plurality opinion would have done, but to "do it more explicitly."[166] He would not have "needlessly . . . prolong[ed the] Court's self-awarded sovereignty over a field where it has little proper business."[167] He pointedly rebutted Justice O'Connor's argument that the Court had no business addressing the big issue in this case and chastized the plurality for their unduly cautious approach towards correcting the serious folly of *Roe*.[168]

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162. *Id.* at 3056 (Rehnquist, C.J., plurality opinion). Chief Justice Rehnquist distinguished Griswold v. Connecticut, 381 U.S. 479 (1965), from *Roe* because in *Griswold* the Court "did not purport to adopt a whole framework, complete with detailed rules and distinctions" or to resolve "once and for all by reference only to the calendar . . . the competing claims and constitutional interests at stake." *Webster*, 109 S. Ct. at 3057-58 (Rehnquist, C.J., plurality opinion) (citing *Griswold*, 381 U.S. 479).

163. *Id.* at 3057 (Rehnquist, C.J., plurality opinion).

164. *Id.* at 3058 (Rehnquist, C.J., plurality opinion) (quoting *id.* at 3079 (Blackmun, J., concurring in part, dissenting in part)).

165. *Id.* (Rehnquist, C.J., plurality opinion).

166. *Id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment).

167. *Id.* (Scalia, J., concurring in part, concurring in the judgment).

168. *Id.* at 3064-66 (Scalia, J., concurring in part, concurring in the judgment). For Justice Scalia the only issue in the case was whether the Missouri statute was constitutional. That issue required the Court to ascertain the test for constitutionality, *Roe* or something else. *Id.* (Scalia, J., concurring in part, concurring in the judgment). While by straining the Court could have upheld the statute under the *Roe* constitutional standard, good reasons existed for the Court to reconsider the abortion privacy doctrine. Moreover, Justice O'Connor herself had reconsidered other constitutional doctrines in other cases. *Id.* at 3064-65 (Scalia, J., concurring in part, concurring in the judgment) (citing Richmond v. J.A. Croson Co., 109 S. Ct. 706, 727-29 (1989) (outlining criteria for race-based remedies); Perry v. Leeke, 109 S. Ct. 594, 599-600 (1989) (sixth amendment violation to deprive defendant right to confer with counsel during trial); Daniels v. Williams, 474 U.S. 327 (1986) (overruling prior holding that a "deprivation" of liberty or property could occur through negligent governmental acts)).

Justice Scalia listed four "valid reasons" reasons for "go[ing] beyond the most stingy possible holding" in *Webster*. *Id.* at 3065 (Scalia, J., concurring in part, concurring in the judgment). First, *Roe* had created "a chaos that [was] evident to anyone who can read and count." *Id.* (Scalia, J., concurring in part, concurring in the judgment). Second, the basic issue was political and *Roe* had distorted "the public perception of the role of this Court." *Id.* at 3064-65 (Scalia, J., concurring in part, concurring in the judgment). Third, under *Roe*, states could not vindicate

Justice Blackmun, author of the *Roe* opinion, wrote a lengthy dissenting opinion in *Webster*, reaffirming *Roe*, in which two other justices joined.[169] He chastised the plurality for "needlessly reaching out to address constitutional questions that [were] not actually presented" by its "aggressive misreading" of the Missouri statute and by its "needlessly wooden" reading of *Roe* and its progeny.[170] The plurality had manipulated the case "in the hope of precipitating a constitutional crisis," so that it could, by "[b]ald assertion masquerad[ing] as reasoning," prevail without bothering to persuade.[171] He taunted Chief Justice Rehnquist for failing to "even mention, much less join, the true jurisprudential debate" regarding the existence and scope of the unwritten constitutional right to privacy.[172]

Justice Blackmun described the "trimester framework" as "*Roe*'s analytic core,"[173] which was designed to effectuate the fundamental constitutional right to privacy and which "safeguard[ed] the right of women to exercise some control over their own role in procreation."[174]

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their interests by legislation. *Id.* at 3066 (Scalia, J., concurring in part, concurring in the judgment). Finally, by avoiding the question, the Court faced "a mansion of constitutionalized abortion-law, constructed overnight in *Roe*, [which had to] be disassembled door-jamb by door-jamb, and never entirely brought down, no matter how wrong it may be." *Id.* at 3067 (Scalia, J., concurring in part, concurring in the judgment).

169. *Id.* at 3067 (Blackmun, J., concurring in part, dissenting in part). Because "*Roe* would not survive the plurality's analysis," he feared the decisions the future might bring. *Id.* (Blackmun, J., concurring in part, dissenting in part). Blackmun's opinion in *Roe* drew the support of six other Justices. Sixteen years later, in *Webster*, only two others would sign his opinion. *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part, dissenting in part). Justice Stevens dissented separately without joining the Blackmun opinion. *Id.* at 3084 (Stevens, J., dissenting); *see infra* note 193.

170. *Webster*, 109 S. Ct. at 3069 (Blackmun, J., concurring in part, dissenting in part).

171. *Id.* at 3070, 3072 (Blackmun, J., concurring in part, dissenting in part).

172. *Id.* (Blackmun, J., concurring in part, dissenting in part). Blackmun's opinion was inconsistent because he condemned the plurality for failing to stretch to address this constitutional question while at the same time he condemned the plurality for reaching out to address the constitutional question concerning the trimester framework.

173. *Id.* at 3071 (Blackmun, J., concurring in part, dissenting in part).

174. *Id.* at 3073 (Blackmun, J., concurring in part, dissenting in part) ("[F]ew decisions are 'more basic to individual dignity and autonomy' . . . [than] the uniquely personal, intimate, and self-defining decision whether to end a pregnancy.") (quoting *Thornburgh*, 476 U.S. at 772).

Justice Blackmun engaged here in making the same type of "[b]ald, assertion[s]" without explanation for which he earlier had condemned the plurality. *Id.* at 3071 (Blackmun, J., concurring in part, dissenting in part). For example, why is the practice of abortion per se "'basic to individual dignity and autonomy'"? *Id.* at 3073 (Blackmun, J., concurring in part, dissenting in part) (quoting *Thornburgh*, 476 U.S. at 772). Justice Blackmun described abortion as "the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy." *Id.* (Blackmun, J., concurring in part, dissenting in part) (citing *Thornburgh*, 476 U.S. at 772).

The trimester framework demanded "accommodations between individual rights and the legitimate interests of government"; the trimester doctrine was "necessary to the wise and just exercise of [the] Court's paramount authority to define the scope of constitutional rights."[175] Justice Blackmun noted that "vast areas of . . . constitutional jurisprudence" were equally as complex as the *Roe* trimester framework[176] and that "'critical elements' of countless constitutional doctrines nowhere appear[ed] in the Constitution's text."[177]

After defending the trimester framework, Justice Blackmun identified "viability" as the critical transition point in the abortion privacy doctrine when the state's interest becomes sufficiently compelling to justify general abortion prohibitions.[178] Justice Blackmun identified six reasons why viability should remain the critical cutoff point in the abortion privacy doctrine. First, keeping viability as the cutoff point

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He also might have noted that abortion is a pretty significant "other defining decision" as well, because "the other" is "defined" out of existence. Ironically, Justice Blackmun invoked the "general principle, [or] the '"moral fact that a person belongs to himself and not others nor to society as a whole"'" *Id.* (Blackmun, J., concurring in part, dissenting in part) (quoting *Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J. concurring) (quoting Fried, *Correspondence*, 6 PHIL. & PUBL. AFF. 288-89 (1977))). The irony is that the central point of the abortion controversy is that, under the *Roe* abortion privacy doctrine, an actual, existing being, a person-in-the-making, does not belong to himself or herself, but belongs to and is totally at the mercy of another.

175. *Id.* (Blackmun, J., concurring in part, dissenting in part). He asserted that, ironically, the plurality accepted Griswold v. Connecticut, 381 U.S. 479 (1965), which did not protect any state interests, and condemned *Roe*, which at least sought to accommodate state interests at some point. *Webster*, 109 S. Ct. at 3072 n.7 (Blackmun, J., concurring in part, dissenting in part).

176. *Id.* at 3073-74 (Blackmun, J., concurring in part, dissenting in part) (noting "release time" programs for religious instruction, helicopter fly overs, and interference with attorney-client contact).

177. *Id.* at 3072 (Blackmun, J., concurring in part, dissenting in part).

178. *Id.* at 3074 (Blackmun, J., concurring in part, dissenting in part). Professor John Hart Ely's criticism of the Court's viability approach in *Roe* went right to the heart of the problem: "The Court's defense [of why viability is the critical point] seems to mistake a definition for a syllogism." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973).

Justice Blackmun also criticized Chief Justice Rehnquist for not explaining his assertion that the state's interest in potential life is compelling throughout pregnancy, not merely after viability. *Webster*, 109 S. Ct. at 3074 (Blackmun, J., concurring in part, dissenting in part). Perhaps, Chief Justice Rehnquist was merely mimicking Justice Blackmun's approach in *Roe*. The better explanation may be that Chief Justice Rehnquist was not selecting a new cutoff point, but was recognizing the existence of an interest which the Court previously had noted existed throughout pregnancy. *Roe*, 410 U.S. at 162-63; *see also* H.L. v. Matheson, 450 U.S. 398, 413 (1981) (distinguishing parental consent abortion law from other medical procedures on grounds the state has a unique interest in "full term pregnancies"); Maher v. Roe, 432 U.S. 464, 478 (1977) (state has "legitimate interest in encouraging normal childbirth"); Beal v. Doe, 432 U.S. 438, 446 (1977) (state has important interest in promoting childbirth).

would balance a pregnant woman's interests with the state's interest in potential human life.[179] Second, viability "mark[ed] that threshold moment prior to which a fetus cannot survive separate from a woman."[180] Third, until the fetus can survive separately, it could not "reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman."[181] Fourth, viability was "an easily applicable standard for regulating abortion."[182] Fifth, the viability cutoff point provided a pregnant woman "ample time to exercise her fundamental right . . . to terminate her pregnancy."[183] Finally, viability was a wise cutoff point because "'an "anatomic threshold" for fetal viability [occurs at] about 23-24 weeks gestation' . . . [and thus] will remain[ ] no different from what it was at the time *Roe* was decided."[184] Thus, "logic and science compelled" that viability constitute the critical transition point.[185]

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179. *Webster*, 109 S. Ct. at 3075 (Blackmun, J., concurring in part, dissenting in part). The same claim could be made with respect to any other point in the process of prenatal development, from conception to birth. This reasoning does not explain, however, why viability, as opposed to some other point in prenatal life, should be the critical point for constitutional analysis.

180. *Id.* (Blackmun, J., concurring in part, dissenting in part). The Court offered this justification in *Roe*, and thus it is subject to the same criticism. *See supra* note 178 and accompanying text.

181. *Id.* (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun did not explain the reasoning behind this conclusion. For example, why should total biological independence be deemed an indispensable prerequisite for legal protection? For purposes of wrongful death claims, wrongful life claims, homicide and feticide statutes, and trusts and wills claims, many states regard the fetus as the subject of rights and interests distinct from, and equal or in some cases paramount to, those of the pregnant woman, even before the fetus is viable. *See generally* Wardle, *Rethinking* Roe v. Wade, 1985 B.Y.U. L. REV. 231, 252-54 ("prenatal life of the fetus is recognized and respected in other areas of the law"). Many infants, medical patients, and elderly are as completely, and much more inconveniently and expensively, dependent as fetuses. Are laws protecting their lives also unconstitutional?

182. *Webster*, 109 S. Ct. at 3075 (Blackmun, J., concurring in part, dissenting in part). Of course, the same could be said of many other points in prenatal development. If the lower courts in *Webster* are to be believed, viability is perhaps not such an easy standard to apply.

183. *Id.* at 3075 (Blackmun, J., concurring in part, dissenting in part). This argument begged the question as a justification for subordinating the preservation of fetal life to feminist convenience. Justice Blackmun did not explain why the Court must give priority to a woman's desire to terminate her pregnancy for any reason.

184. *Id.* at 3075, 3076 n.9 (Blackmun, J., concurring in part, dissenting in part) (quoting Brief for American Medical Association, et al., as amici curiae, at 7). Justice Blackmun therefore rejected Justice O'Connor's criticism that *Roe* is "on a collision course with itself." *Id.* at 3076 n.9 (Blackmun, J., concurring in part, dissenting in part) (quoting *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting opinion)). Justice Blackmun was both forgetful and mistaken on this point. *See infra* text accompanying notes 241-44.

185. *Webster*, 109 S. Ct. at 3076 (Blackmun, J., concurring in part, dissenting in part).

Justice Blackmun next attacked Justice Rehnquist's standard of review as "nothing more than a dressed-up version of rational-basis review."[186] He saw three significant problems with Justice Rehnquist's standard. First, it would overrule *Roe*.[187] Second, the standard was too vague.[188] Third, it "completely disregard[ed] the irreducible minimum of *Roe*" because it extended no extraordinary protection to the "limited fundamental constitutional right to decide whether to terminate a pregnancy."[189] According to Justice Blackmun, the Bill of Rights placed some subjects beyond the reach of the democratic process, beyond the vicissitudes of political controversy, and beyond the reach of majorities; a woman's decision whether or not to have an abortion fell "within that limited sphere."[190] Finally, the author

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

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

188. *Id.* (Blackmun, J., concurring in part, dissenting in part). This criticism, however, contradicted his earlier charge that Chief Justice Rehnquist's standard of review was "nothing more than" the well-established "rational-basis review." *See supra* text accompanying note 186.

189. *Id.* (Blackmun, J., concurring in part, dissenting in part). The plurality's gratuititous indication that *Roe* survived their decision was mere pretense, he argued. He pointed out that Chief Justice Rehnquist's opinion contained an "implicit invitation to every State to enact more and more restrictive abortion laws," all of which would have to be upheld under "the plurality's non-scrutiny." *Id.* at 3077 (Blackmun, J., concurring in part, dissenting in part). However, recognition of a "compelling state interest" in protecting incipient life *in utero* would not, as Justice Blackmun suggested, *id.* at 3076-77 (Blackmun, J., concurring in part, dissenting in part), automatically mean that any or all abortion regulations or restrictions, including the nineteenth-century Texas criminal abortion prohibitions, *see Roe*, 410 U.S. 113, would be constitutional. To pass "strict scrutiny," legislation that unduly burdens or infringes upon a fundamental right not only must serve a compelling state interest, but also must be "narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (citing Griswold v. Connecticut, 479 U.S. 485 (1965)); *see also* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (statute interfering with the right to marry cannot be upheld unless it furthers important state interests and is tailored to effectuate only those interests); Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (regulations infringing on procreation decisions only may be justified by compelling state interests, and the statute must be drawn narrowly to further only those interests); *cf.* Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (although family privacy is not beyond regulation, the goals must be legitimate and the nexus important). Thus, some types of regulation may sweep more broadly than necessary to protect carefully defined compelling state interests.

190. *Id.* at 3077 n.11 (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun's invoking of the Bill of Rights was inapt because neither the text nor the history of the Bill of Rights mentions the right to privacy or the right to abort. *See infra* text accompanying note 273. Nor did Justice Blackmun explain why, in a nation founded on the belief that governments "deriv[e] their just Powers from the [c]onsent of the [g]overned," The Declaration of Independence para. 2 (U.S. 1776), the nondemocratic branch of the government is responsible for creating such rights. The issue is not whether the Court is the "guarantor" of unwritten constitutional rights, but whether the Court is the legitimate source and creator of them.

of *Roe* vigorously invoked the doctrine of stare decisis and accused the plurality of "discard[ing] a landmark case of the last generation."[191] Overturning *Roe*[192] would send hundreds of thousands of women into the hands of back-alley abortionists, "all in the name of enforced morality or religious dictates or lack of compassion," and allow the state "to conscript a woman's body."[193]

E. Webster's *Immediate Doctrinal Impact*

Justice Blackmun's declaration that *Webster* did not make "a single, even incremental change in the law of abortion"[194] is inaccurate. *Webster* substantially cut back the doctrines of *Thornburgh* and *City of Akron*. First, the *Webster* Court rejected the *Thornburgh* method of interpreting state statutes dealing with abortion.[195] Thrice, the *Webster* Court accepted the state's interpretation of its own statute, which the lower courts had rejected.[196] Thus, the Court repudiated *Thornburgh*'s

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191. *Webster*, 109 S. Ct. at 3077 (Blackmun, J., concurring in part, dissenting in part).

192. Justice Blackmun pointed out that it would be the first time the Court overturned a decision that secured a fundamental personal liberty. *Id.* at 3078 (Blackmun, J., concurring in part, dissenting in part) (This conveniently ignored the Court's last repudiated experiment was substantive due process.). It would upset "millions of women . . . [who] have ordered their lives around the right to reproductive choice." *Id.* at 3077 (Blackmun, J., concurring in part, dissenting in part). According to Justice Blackmun, abortion had "become vital to the full participation of women in the economic and political walks of American life." *Id.* (Blackmun, J., concurring in part, dissenting in part).

193. *Id.* at 3077-78 (Blackmun, J., concurring in part, dissenting in part). Justice Stevens did not endorse Justice Blackmun's analysis of whether to overturn *Roe*. Justice Stevens agreed that "no need [existed] to modify even slightly" *Roe* in order to uphold § 188.029. *Id.* at 3079 (Stevens, J., concurring in part, dissenting in part). Nevertheless, he took the opportunity to question why any regulation of abortion in early pregnancy was unconstitutional. He emphasized that, for at least some period in early pregnancy, the state may not restrain the decision to practice birth control. *Id.* at 3081 (Stevens, J., concurring in part, dissenting in part). Without endorsing the trimester framework, Justice Stevens suggested that "Missouri [had] the burden of identifying the secular interests that differentiate *the first 40 days of pregnancy* from the period immediately before or after fertilization when, as *Griswold* and related cases established, the Constitution allow[ed] the use of contraceptive procedures to prevent potential life from developing into full personhood." *Id.* at 3084 (Stevens, J., concurring in part, dissenting in part) (emphasis added). His opinion thus may be read as proposing an alternative to the trimester framework analysis of the *Roe* abortion privacy doctrine.

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

195. *See id.* at 3057 (Rehnquist, C.J., plurality opinion).

196. An unanimous Court accepted the state's interpretation of its statute restricting the use of funds to encourage or counsel abortion. *Id.* at 3053-54 (majority opinion); *id.* at 3058 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment); *id.* at 3069 n.1 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3079 (Stevens, J., concurring in part, dissenting in part). Five Justices accepted the state's construction of its preamble declaration. *Id.* at 3050 (Rehnquist, C.J., plurality); *id.*

"unprecedented cannon of construction" under which a "'permissible reading of a statute [restricting abortion] is to be avoided at all costs.'"[197] The *Webster* Court's message was unmistakable: plausible constructions of state statutes offered by the state, which render constitutional decisions unnecessary or which render the statute sustainable under constitutional doctrine, are preferred and must be accepted by the federal courts. This standard of construction is a marked departure from previous cases. Second, the *Webster* Court eschewed the *City of Akron* and *Thornburgh* Courts' expansive reading (what Justice O'Connor called distorting and misapplying)[198] of the abortion precedents.[199] Third, the *Webster* Court subverted the doctrinal result of *Thornburgh*, *i.e.*, invalidating postviability regulations, by upholding *pre*viability regulations to protect the viable fetus.[200] Fourth, the *Webster* Court curtailed the *City of Akron* and *Roe* dicta, which courts had interpreted to forbid official expressions of belief about the beginnings of life.[201]

Finally, *Webster* repudiated the "bad intent" principle applied in *Thornburgh* and *City of Akron*.[202] The dissenting Justices in *Webster* would consider the "bad" intent of legislatures as an element of con-

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at 3058-59 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment). Likewise, five Justices upheld the state's interpretation of its viability provision. *Id.* at 3054-55 (Rehnquist, C.J., plurality opinion); *id.* at 3066 (O'Connor, J., concurring in part, concurring in the judgment); *id.* at 3066 n.* (Scalia, J., concurring in part, concurring in the judgment). As Justice O'Connor noted, the Court "accepted the State's every interpretation of its abortion statute and . . . upheld, under . . . existing precedents, every provision of that statute which [was] propererly before [the Court]." *Webster*, 109 S. Ct. at 3061 (O'Connor, J., concurring in part, concurring in the judgment).

197. *Id.* (O'Connor, J., concurring in part, dissenting in part) (quoting *Thornburgh*, 476 U.S. at 812 (White, J., dissenting)); *see also* Colautti v. Franklin, 439 U.S. 379, 407 (1979) (White, J., dissenting) (noting the Court's incredible construction of the Pennsylvania statutes); Planned Parenthood v. Danforth, 428 U.S. 52, 99-100 (1976) (White, J., dissenting) (majority interpretation of statute was reading it "through a microscope," effectively "attributing to the Missouri Legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge").

198. *Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring in part, concurring in the judgment).

199. *See Thornburgh*, 476 U.S. at 772 (under *Roe*, states are not free to persuade women to continue pregnancy); *City of Akron*, 462 U.S. at 416 (under *Roe*, ordinance regulating second trimester abortions amd requiring parental consent for very young invalid).

200. *See supra* notes 123-51 and accompanying text.

201. *See supra* notes 22-62 and accompanying text.

202. *See Thornburgh*, 476 U.S. at 771; *City of Akron*, 462 U.S. at 443-45. The circuit court used the bad intent principle to find unconstitutional the declaration that life begins at conception, *Webster*, 851 F.2d at 1075-76, the restriction on state resources to counsel or encourage abortion, *id.* at 1080, and the prohibition on public employees performing or assisting abortions. *Id.* at 1083.

stitutional analysis.[203] The majority declined to accept that approach, indicating that the intent to restrict or regulate abortion to the full extent permitted under the Constitution was not a "bad" intent. The likelihood that otherwise valid state legislation is intended to deter or will deter some women from choosing abortion is no longer an acceptable reason for courts to strike down abortion legislation.[204]

F. Webster's *Significance for Future Modifications of the Abortion Privacy Doctrine*

The *Webster* holdings modified and moderated the *Roe* abortion privacy doctrine without fundamentally changing it. However, the *Webster* decision is far more important for the doctrinal changes it signified than for the changes it immediately achieved. *Webster* signified the potential for change regarding the trimester approach, privacy principles, the "right to life," and the standard of review for deciding the constitutionality of statutes regulating abortions.

1. Replacing the Trimester Doctrine

In *Webster* most of the Supreme Court Justices favored replacing the *Roe* abortion privacy doctrine.[205] Justice Scalia would have overruled *Roe* explicitly.[206] Chief Justice Rehnquist, Justice White, and Justice Kennedy would have abandoned the "trimester framework" and would have recognized a compelling state interest in protecting potential human life throughout pregnancy.[207] Justice O'Connor emphasized the problematic nature of *Roe*'s trimester framework and stated that she would have examined previability regulation under a standard different from the strict-scrutiny standard used in *Roe* and its progeny.[208] Even Justice Stevens declined to join Justice Blackmun's reaffirmation of *Roe* and wrote a separate dissenting opinion suggesting an alternative to the *Roe* rule that viability is the point at which the state has an interest in protecting prenatal life.[209] These opinions

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203. *See Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3080, 3084-85 (Stevens, J., concurring in part, dissenting in part).

204. *Cf. Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (state has compelling interest in protecting human life "'throughout pregnancy'") (quoting *City of Akron*, 462 U.S. at 415 (O'Connor, J., dissenting)).

205. *See Webster*, 109 S. Ct. at 3066 (Scalia, J., concurring in part, concurring in the judgment).

206. *Id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment).

207. *Id.* at 3056-57 (Rehnquist, C.J., plurality opinion).

208. *Id.* at 3063 (O'Connor, J., concurring in part, concurring in the judgment).

209. *Id.* at 3084, 3085 (Stevens, J., concurring in part, dissenting in part); *see supra* note 193.

suggest that in time the Court will forego the trimester framework and adopt a more flexible approach requiring less judicial supervision and providing more legislative responsibility.

2. Rethinking Privacy Principles

Webster reveals the Court's search for a less radical formulation of constitutional privacy.[210] The privacy rationale underlying the abortion privacy doctrine has proven to be particularly inadequate. The abortion privacy doctrine itself overreaches and is not well tailored to the principle of privacy.[211]

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210. While seven members of the Court supported the notion that a woman's decision to obtain an abortion is a constitutionally protected liberty during at least some part of pregnancy, *see id.* at 3055 n.14 (Rehnquist, C.J., plurality opinion); *id.* at 3072-73 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3081 (Stevens, J., concurring in part, dissenting in part) (Justices O'Connor and Scalia did not express their views on this point), only four Justices invoked the broad privacy rationale. *Id.* at 3072-73 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3081-82 (Stevens, J., concurring in part, dissenting in part).

211. In his dissenting opinion in *Webster*, Justice Blackmun attempted to restate a theoretical justification for the *Roe* doctrine. Once again, his principal argument was framed in terms of autonomy. The following excerpts illustrate his views: "few decisions are 'more basic to individual dignity and autonomy,'" *Webster*, 109 S. Ct. at 3073 (Blackmun, J., concurring in part, dissenting in part) (quoting *Thornburgh*, 476 U.S. at 722); within "that 'certain private sphere of individual liberty,'" *id.* (Blackmun, J., concurring in part, dissenting in part) (quoting *Thornburgh*, 476 U.S. at 722); "uniquely personal, intimate, and self-defining decision," *id.* (Blackmun, J., concurring in part, dissenting in part); "the '"moral fact that a person belongs to himself and not others nor to society as a whole,"'" *id.* (Blackmun, J., concurring in part, dissenting in part) (quoting *Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J., concurring) (quoting Fried, *supra* note 174, at 288-89)); "the right of women to exercise some control over their own role in procreation," *id.* at 3077; "that limited sphere of individual autonomy," *id.* at 3077 n.11 (Blackmun, J., concurring in part, dissenting in part); "the right to exercise some control over her unique ability to bear children." *Id.* at 3077 (Blackmun, J., concurring in part, dissenting in part.

He made two other arguments in support of the *Roe* doctrine: (1) *equal rights* — abortion choice is "vital to the full participation of women in the economic and political walks of American life," *id.* (Blackmun, J., concurring in part, dissenting in part); the plurality "casts into darkness the hopes and visions of every woman in this country," *id.* (Blackmun, J., concurring in part, dissenting in part); "millions of women, and their families, have ordered their lives around the right to reproductive choice," *id.* (Blackmun, J., concurring in part, dissenting in part); abortion choice is "basic to individual dignity," *id.* at 3073 (Blackmun, J., concurring in part, dissenting in part); and (2) *realistic necessity* — abortion protects women from "the physical labor and specific and direct medical and psychological harms that may accompany carrying a fetus to term," *id.* at 3077 (Blackmun, J., concurring in part, dissenting in part); "hundreds of thousands of women, in desperation, would defy the law and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists," *id.* (Blackmun, J., concurring in part, dissenting in part); "many women, especially poor and minority women, would die or suffer debilitating physical trauma." *Id.* (Blackmun, J., concurring in part, dissenting in part).

Autonomy, choice, and privacy truly are major dimensions of the abortion issue. Fear of the exercise of governmental power to curtail independence always has concerned the American people.[212] Pregnancy is a matter of profound female and familial significance because of the great, life-altering responsibility that comes with parenthood. Restricting abortion, however, is hardly tantamount to "conscript[ing] a woman's body and to forc[ing] upon her a 'distressful life and future.'"[213] Pregnancy results from a previously made choice,[214] besides providing an opportunity for further choice. Less severe methods of alleviating, even altogether avoiding, the "distress" of parenthood exist. One can agree that the Constitution protects "the right of women to exercise *some* control over their own role in procreation"[215] without accepting the premise that previability abortion is an absolutely "private choice" for a pregnant woman to make, irrespective of her circumstances and irrespective of any other interests of her spouse, her partner, her family, the fetus, or society.[216] Could not a legal realist say that the abortion privacy doctrine, despite its female-liberation rhetoric, actually exploits pregnant women by imposing on them alone (not men, not couples, not families, not society) the burden of eliminating the problem of unwanted pregnancies?

The use of the concept of "privacy" in the abortion context conceals the conflict between important values regarding abortion. The concept

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212. *See, e.g.*, D. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 17-19 (1988); Beschle, *Autonomous Decision Making and Social Choice: Examining the "Right to Die,"* KY. L.J. 319, 346 (1988-89).

213. *Webster*, 109 S. Ct. at 3077 (Blackmun, J., concurring in part, dissenting in part) (quoting *Roe*, 410 U.S. at 153).

214. Pregnancy resulting from rape is the obvious, and only, exception to this observation, and the ensuing autonomy analysis would not apply in the case of rape.

215. *Webster*, 109 S. Ct. at 3073 (Blackmun, J., concurring in part, dissenting in part) (emphasis added); *see also id.* at 3077 (Blackmun, J., concurring in part, dissenting in part).

216. Professor Mary Ann Glendon emphasized this point by demonstrating that American abortion law, compared to the abortion law in other western nations, is "in a class by itself" at the extreme libertarian end of the spectrum. M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 24 (1987). "If we were to broaden our field of comparison to include the seven Warsaw Pact nations, we still would not find any country [in Europe] where there is so little restriction on abortion in principle as there is in the United States." *Id.* at 23-24. "Today, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially, culturally and economically, and where concern about population expansion overrides *both* women's liberty and fetal life." *Id.* at 24 (emphasis in original). She cited *Roe* as a prime example of the excess of individualism, whereby Americans expressed themselves in language of isolation. *Id.* at 22-24, 42-45, 52-55, 112-16. "When applied to the family, the right [of privacy] to be let alone often turns out in practice to be the right to leave others alone [i.e., to abandon responsibility to dependent-others]." *Id.* at 57; *see also id.* at 2, 14 tab. 1, 20, 22.

of "privacy" helps the courts and society pretend that by prohibiting state restrictions of abortion they are making no decision at all but simply are deferring to individual autonomy. Thus, the notion of privacy masks decisions as nondecisions.[217]

The Constitution undoubtedly protects some historically essential relationships, choices, and decisions even though they are not described specifically anywhere in the text or the text of the amendments.[218] Recognition of some "unwritten" fundamental rights is historically justifiable[219] and essential to maintain and effectuate fundamental values which, in the eighteenth and nineteenth centuries, were considered extralegal prerequisites for constitutional government. Because of our expanded conception of legal rights, the Court must transform some of those eighteenth-century extralegal principles into twentieth-century constitutional rights to preserve the complete scheme of powers and liberties established in the Constitution.[220]

The obvious problem with unwritten constitutional rights is determining what they are. Because the "right to privacy" means all things

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217. J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 153-62 (1979) [hereinafter J. NOONAN, A PRIVATE CHOICE]. "The mask in law is a social construct willingly used by a lawyer or a judge to permit him to suppress a human being without guilt . . . . His mind attends to the fiction and is untroubled by what the fiction may hide." *Id.* at 154; *see also* J. NOONAN, PERSONS AND MASKS IN THE LAW 17-28 (1976) (the term "person" comes from the Latin *persona*, which was a type of mask or disguise worn by an actor); *cf.* J. GRAY, THE NATURE AND SOURCES OF THE LAW 27, 38-39 (1921) ("Persons" are whomever the legal system chooses to endow with legal rights and duties; whether the unborn are persons "is a matter which each legal system must settle for itself."). *See generally* Beschle, *supra* note 212, at 322. It may be no coincidence that the Critical Legal Studies movement has sprouted since the creation of the abortion privacy doctrine in *Roe*. *See generally* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 1 (1987) (first annual Conference on Critical Legal Studies convened in 1977); Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984) (viortually all of the material listed was published after 1975).

218. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979) (parental rights); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Meyer v. Nebraska, 262 U.S. 390 (1923) (foreign language in school).

219. *See, e.g.*, U.S. CONST. amend. IX; THE FEDERALIST NO. 84 (A. Hamilton); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 536-43 (1969); Levy, *Bill of Rights*, in ESSAYS ON THE MAKING OF THE CONSTITUTION 258-306 (2d ed. 1987).

220. *See generally* J. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, THE AUTHORITY OF RIGHTS 3-9 (1986). "Eighteenth-century constitutional rights, however, were not twentieth-century constitutional rights." *Id.* at 4. For example, Montesquieu distinguished "manners" and "customs" from "laws" and noted that manners and customs were inappropriate subjects for legal regulation. II C. MONTESQUIEU, DE SECONDAT THE SPIRIT OF LAW 23:14. Montesquieu was the most frequently quoted nonbiblical writer during the period of 1760-1805, particularly during the decade of 1780 when the Constitution was drafted and ratified. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189-97 (1984).

to all people, it invites judicial overreaching. *Roe* is a prime example. The *Webster* plurality's open discussion of the *Roe* doctrine's flaws foretells a future redefinition of the abortion privacy doctrine.[221]

3. Recognizing the Right to Life

Webster laid the groundwork for future consideration of the scope of constitutional protection of the "right to life," including its prenatal penumbras.[222] Five members of the Court have concluded that a compelling state interest exists for protecting unborn life throughout pregnancy.[223] Although the significance of the "right to life" for the founders

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221. *Webster*, 109 S. Ct. at 3056-57 (Rehnquist, C.J., plurality opinion). This idea was the thrust of Chief Justice Rehnquist's opinion regarding viability. *Id.* (Rehnquist, C.J., plurality opinion). It also served as the predicate for Justice Scalia's opinion. *Id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment); *see also id.* at 3084-85 (Stevens, J., concurring in part, dissenting in part).

222. U.S. CONST. amend. XIV, § 1.

223. *See Webster*, 109 S. Ct. at 3057; *Thornburgh*, 462 U.S. at 460 (O'Connor, J., dissenting); *see also* Record at 34-37, *Webster*, 109 S. Ct. 3040 (No. 88-605).

Considering the lengthy dissenting opinion he wrote addressing the "great jurisprudential issues" and attempting to justify *Roe*, Justice Blackmun's failure to address the issue of why the constitutionally protected "right to life" does not extend to life before viability was a serious omission. *See Webster*, 109 S. Ct. at 3057 (Blackmun, J., concurring in part, dissenting in part). In *Roe* Justice Blackmun brushed aside this question with an unconvincing technical argument, *Roe*, 410 U.S. at 157 (only "persons" enjoy the right to life and fetuses are not persons), and a disingenuous demand for certainty. *Id.* at 159 (Court is incapable of answering the question "[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus"). However, the technical argument mixed cause and conclusion: if the Court had extended right to life protection to unborn human beings, then they would, constitutionally be "persons." The demand for certainty was simply transparent. The *Roe* Court's recognition of constitutional protection in the privacy "penumbras," *id.* at 152-53, rendered the Court's grudging, technical analysis of the protection afforded by the "right to life" clause of the fourteenth amendment inconsistent. The Court never before has insisted on operating in "a stratosphere of icy certainty." Hughes, *Address of the Chief Justice Honorable Charles Evans Hughes*, 13 A.L.I. PROC. 61, 64 (1936). As Hughes noted,

> How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought, in theology, philosophy and science, we find differences of view on the part of the most distinguished experts, — theologians, philosophers and scientists. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.

Id.

Professor Bickel observed, as well, that "[e]ven when the law pretends to be a science, it is not, after all, mathematics." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 97 (1970); *see also* Ginsberg v. New York, 390 U.S. 629, 641-43 (1968); Glover, *Matters of Life and Death*, N.Y. REV. BOOKS, May 30, 1985, at 19, 20, col. 4.

of the Constitution is undeniable,[224] modern constitutional theory has not elaborated the full significance of the "right to life." Three dimensions of this right merit consideration. First, the balance between individual freedom and governmental power struck in the Constitution did not guarantee merely that those who were alive then would be able to enjoy life, liberty, and property; the Constitution protects the interests of future generations as well.[225] The Constitution is not bound exclusively to the here and now.[226] Even "our life points beyond itself — to our offspring, to our community, to our species."[227] Thus, one dimension of the "right to life" may guarantee that the exercise of liberty and the pursuit of happiness by one individual will not deprive another (even unborn) individual-in-being of the "life" prerequisite to the enjoyment of constitutionally protected opportunities.

Second, the "right" to life stands as a bulwark against the "wrong" of unjustified killing. The Anglo-American legal tradition never has deemed the destruction of human life, in whatever stage or condition,

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In contrast, the prevailing plurality (four Justices) specifically asked the question of whether the constitutionally protected right to life merits consideration before viability. *See supra* text accompanying note 163. Justice Stevens suggested that sentience (similar to the common law notion of "quickening") is the critical point at which the interest in protecting the right to life may be effective. *See supra* notes 38-52 and accompanying text. Apparently, Justice Stevens's test for the scope of the right to life is the ability to suffer. One wonders what that portends for the right to persons who are asleep or comatose. *See* Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988), *cert. granted sub nom.* Cruzan v. Director, Mo. Dep't of Health, 109 S. Ct. 3240 (1989). On the other hand, the premise underlying viability is apparently dependence. *Webster*, 109 S. Ct. at 3075 (Blackmun, J., concurring in part, dissenting in part) ("as it loses its dependence on the uterine environment").

224. *See, e.g.*, U.S. CONST. amend. V; The Declaration of Independence para. 2 (U.S. 1776); J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 5-8; J. REID, *supra* note 220, at 19-20.

225. U.S. CONST. preamble ("and secure the blessings of liberty to ourselves and our posterity"); J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 288 (1984 ed.) (first published as 2-3 THE PAPERS OF JAMES MADISON (1840)) ("We are providing for our posterity, for our children & our grand children . . . ."); *id.* at 376 ("We should consider that we are providing a Constitution for future generations and not merely for the peculiar circumstances of the moment."); *id.* at 551 ("As we are laying the foundation for a great empire, we ought to take a permanent view of the subject and not look at the present moment only."); *see also* C. ROSSITER, SEEDTIME OF THE REPUBLIC 395-96 (1953).

226. As Edmund Burke, a contemporary and admirer of the American Founders, stated, "[Society] is a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born." E. BURKE, *Reflections on the Revolution in France*, in BURKE SELECT WORKS 1, 114 (E. Payne ed. 1881).

227. D. CALLAGHAN, SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY 48 (1987).

a purely private matter.[228] The worst chapters of human history teach an unmistakable lesson about the terribly corrosive effect of killing on individuals and societies that accept killing as a solution to social problems.[229] Killing, especially the killing of human beings, has a brutalizing effect on the killer and society.[230] The "right to life" guarantee may be an intended bulwark against this social degradation.

Third, the moral expectations of a society verify and vindicate its claim to liberty. The *Roe* doctrine, including the ethic of unrestricted abortion-for-convenience that it has spawned, fundamental conflict with

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228. Terminating the life of any creature, or more bluntly, killing, is an act of greatest concern to society and to the law. Whether it be livestock raised to be slaughtered and eaten, wild game to be hunted in sport, ice-locked whales, stray dogs, or even dangerous and destructive insects, the state exercises significant control over the killing of most creatures. Four common reasons counsel the exercise of great caution in permitting the killing of any living creature. First, killing is a dangerous act. Sometimes in the process of killing the targeted creature, other creatures are placed in jeopardy, are unintentionally injured, or are even killed. Second, killing is an irremediable act. If the killer makes a mistake, no way exists to restore the lost life. Third, the principle of respect for all life is a widespread, if latent, cultural value. From this perspective, killing is the last alternative. For food provision, crop protection, medical experimentation, and wildlife management, the largest part of modern society believes that no practical alternative to killing creatures exists. Still, laws requiring humane treatment in the killing of animals underscore the persistence of some strain of this principle. Fourth, principles of nonviolence, mercy, and compassion discourage needless killing. Killing is a violent act, and dying connotes pain and often produces fear in sentient creatures.

When the creature whose death is contemplated is a human being, states traditionally have adopted even stricter regulations because the state's interests are more compelling. The state's interest in restricting the killing of human beings — protecting what Jefferson believed to be their *first* "inalienable" right — has been a matter of special priority in American legal doctrine and political theory for more than two hundred years. *See* The Declaration of Independence para. 2 (U.S. 1776). When killing concerns a human creature, the four common reasons for state concern apply with increased significance, and several additional reasons exist for this particular concern. First, respect for the equal worth of human beings is a fundamental principle of democracy. American political theory rejects the notion that the law generally can determine whose lives are not worth living. *See* Sherlock, *Liberalism, Public Policy and the Life Not Worth Living: Abraham Lincoln on Beneficent Euthanasia*, 26 AM. J. JURIS. 47 (1981); *see also* R. SHERLOCK, PRESERVING LIFE: PUBLIC POLICY AND THE LIFE NOT WORTH LIVING 15-74 (1987). Second, ubiquitous religious values based on love or fear of the Creator of all life and His unequivocal injunction, "Thou shalt not kill," provide moral constraint. *Exodus* 20:13. Finally, the fear of human nature and of the brutalizing, decivilizing effects of killing, reinforced by long, lamentable chapters of history, counsel great care and constraint.

229. "'Death, once invited in, leaves his muddy bootprints everywhere.'" J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 177 (quoting J. UPDIKE, COUPLES 380 (1968)).

230. *See* Glover, *supra* note 223, at 23. As Justice Brennan once noted, "[I]f the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values." Furman v. Georgia, 408 U.S. 238, 303 (1972) (Brennan., J., concurring).

the moral expectations necessary for the preservation of liberty and the perpetuation of constitutional government, as sharply and significantly as did the practice of slavery.[231] Perhaps, the "right to life" clauses of the fifth and fourteenth amendments require preservation of a vision of the worth of life encompassing some degree of real protection for even previable human developing life.

4. Moderating the Standard of Review

The *Webster* decision suggested a more moderate standard of review for laws regulating abortion.[232] With respect to Missouri's restriction on the use of public resources to further abortion, the Court applied a rational-relation standard of review.[233] The plurality also applied a less-than-strict-scrutiny standard of review to the viability regulations.[234] Justice O'Connor indicated in concurrence that the degree of scrutiny that the Court should apply must be proportionate to the degree of state intrusion upon a protected activity.[235] She rejected applying the first amendment "overbreadth" doctrine to abortion cases[236] and alluded to an "undue burden" standard of analysis, which she had suggested and explained in earlier dissenting opinions.[237] Justice Blackmun argued in dissent that strict scrutiny should be the minimum standard of review for all laws concerning abortion.[238] Thus,

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231. If Lincoln rhetorically could wonder whether "every drop of slave's blood drawn with the lash had to be repaid with another drawn with the sword," A. LINCOLN, *Second Inaugural Address*, in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 332, 332-33 (R. Basler ed. 1953) [hereinafter COLLECTED WORKS], modern Americans should wonder what the consequences of *Roe* and nearly two decades of unrestricted abortions will be for American society.

232. *See Webster*, 109 S. Ct. at 3042-43. The Court distinguished collateral regulations, which do not directly prohibit private abortion, and prohibitions of private access to abortion, which directly restrain the abortion choice. *See id.*

233. *Id.* at 3051-52. The Court applied the same standard of review in the abortion funding cases. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 324 (1980); Maher v. Roe, 432 U.S. 464, 470 (1977).

234. *Webster*, 109 S. Ct. at 3055-57 (Rehnquist, C.J., plurality opinion).

235. *See id.* at 3062-63 (O'Connor, J., concurring in part, concurring in the judgment).

236. *Id.* at 3060 (O'Connor, J., concurring in part, concurring in the judgment).

237. *Id.* at 3063 (O'Connor, J., concurring in part, concurring in the judgment). *See generally Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) ("judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes . . . , with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision"); *City of Akron*, 462 U.S. at 461-68 (O'Connor, J., dissenting). Justice Scalia criticized this approach as being just as subjective and costly for the principle of self-governance as the Court's flawed standard in *Roe*. *Webster*, 109 S. Ct. at 3066 n.* (Scalia, J., concurring in part).

238. *Webster*, 109 S. Ct. at 3075-76 (Blackmun, J., concurring in part, dissenting in part).

while the *Webster* Court did not classify the precise contours of the standard of review it would apply in future cases, a majority of the Court indicated it would not continue to apply the strict-scrutiny standard of *Roe* to all abortion restrictions.[239]

Modifying the standard of review of abortion regulation is appropriate for three reasons. First, the *Roe* strict-scrutiny standard has evolved into "a *per se* rule under which any regulation touching on abortion must be invalidated if it poses 'an unacceptable danger of deterring the exercise of [the right to privacy].'"[240] Yet, well-established constitutional principles provide that regulations having harmless, collateral, or insubstantial impacts upon other fundamental liberties do not trigger application of the strict-scrutiny standard of review.[241] Significant intrusions upon fundamental rights are necessary before the Court will apply strict scrutiny.[242] In fact, even the Court's early

239. *See id.* (Blackmun, J., concurring in part, dissenting in part).

240. *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting) (quoting *id.* at 767-68 (majority opinion)).

241. *See* Whalen v. Roe, 429 U.S. 589, 597 (1977) ("State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part.").

242. In *Roe* the Court declared that "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" *Roe*, 410 U.S. at 155 (citing Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)). However, in all three of the cases relied on by the Court, the degree of intrusion that triggered the strict-scrutiny standard was substantial. In *Kramer* the Court reviewed legislation which *denied* citizens the right to vote. *Kramer*, 395 U.S. at 626-27. In *Shapiro* the Court reviewed classifications which *penalized* the exercise of the fundamental right to travel. *Shapiro*, 394 U.S. at 634. In *Sherbert* the Court emphasized that the *denial* of benefits to persons who practiced certain religious beliefs effectively *penalized* them for exercising their first amendment rights. *See Sherbert*, 374 U.S. at 406. I am indebted to Professor Richard Wilkins for this insight.

Since *Roe* the Court has continued to require a significant intrusion upon fundamental rights before applying strict scrutiny. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (Court reasoned that a "critical examination" is appropriate "when a statutory classification *significantly interferes* with the exercise of [the] fundamental right" to marry.) The *Zablocki* Court found that rigorous judicial scrutiny is appropriate when legislation *"interfere[s] directly and substantially* with the right to marry" and citizens "suffer a *serious intrusion* into their freedom of choice in an area in which [the Court has] held such freedom to be fundamental." *Id.* at 397 (Powell, J., concurring in the judgment) (emphasis added). Further, "the Court has yet to hold that all regulation touching upon marriage implicates a 'fundamental right' triggering the most exacting scrutiny." *Id.* at 403 (Stevens, J., concurring in judgment). In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Court found that state laws "may 'significantly interfere with decisions to enter into the marital relationship.' . . . That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences." *Id.* at 499 (Powell, J., plurality opinion). "[T]he usual judicial deference" is unwarranted when the government "undertakes such intrusive regulation [of a fundamental protected right]."). *Id.*

abortion decisions indicated that legislation regulating abortion was not subject automatically to strict-scrutiny review. Only abortion regulations that unduly burdened the decision to abort triggered the application of the strict-scrutiny standard.[243]

Second, the Supreme Court in *Roe* emphasized that the right to abortion privacy "cannot be said to be absolute."[244] Yet, as the *Webster* lower court decisions demonstrated, applying strict-scrutiny review to regulations only collaterally impacting upon the abortion decision inflates the scope of the unwritten right to privacy to near-absolute dimensions.[245] Nothing in the nature of abortion or the history of its practice in America justifies such a favored status for abortion.[246]

Finally, the strict-scrutiny standard applied in *Roe* and its progeny fails to pay deference to the structure of our democracy.[247] As Justice Powell stated, "A test so severe that legislation can rarely meet it should be imposed by the courts with deliberate restraint in view of the respect that properly should be accorded legislative judgments."[248] Repeated confrontations between the life-tenured judiciary and the elected representatives of the people erodes the confidence of the people in their judiciary.[249]

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243. Harris v. McRae, 448 U.S. 297, 314 (1980) (unequal subsidizing of abortion and other medical services not unduly burdensome); Bellotti v. Baird, 443 U.S. 622, 640 (1979) (right to seek abortion unduly burdened); Maher v. Roe, 432 U.S. 464, 473-74 (1977) ("right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); Beal v. Doe, 432 U.S. 438, 446 (1977) (state's refusal to subsidize nontherapeutic abortions not unduly burdensome); Planned Parenthood v. Danforth, 428 U.S. 52, 66 (1976) (interference was unduly burdensome); *Roe*, 410 U.S. at 156 ("statute's infringement upon Roe's rights"); *see also* Doe v. Bolton, 410 U.S. 179, 192 (1973) (regulation unduly restricted the physician's rights and the woman's right of privacy).

244. *Roe*, 410 U.S. at 154; *see also Maher*, 432 U.S. at 473; *Doe*, 410 U.S. at 198 ("[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand.").

245. *See supra* notes 22-137 and accompanying text.

246. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). Like the right to practice sodomy, the broadly defined right to abortion privacy is neither "implicit in the concept of ordered liberty . . . [such that] neither liberty nor justice would exist if [it] were sacrificed," Palko v. Connecticut, 302 U.S. 319, 325 (1937), nor is it "deeply rooted in this Nation's history and tradition," *Moore*, 431 U.S. at 503 (Powell, J., plurality opinion).

247. Those decisions are prime examples of one of the oldest and most oft-repeated criticisms of the judicial abortion doctrine: the judges who created it and applied it "are not restrained by a modest conception of the judicial function but will be activists when a statute offends their policy preferences." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 54 (1976).

248. Carey v. Population Servs. Int'l, 431 U.S. 678, 705 (1977) (Powell, J., concurring in part, concurring in the judgment).

249. Justice Powell noted in his concurrence to United States v. Richardson, 418 U.S. 166 (1974):

Excessive judicial review by federal courts of state abortion legislation has been one of the most controversial and highly criticized exercises of judicial power in the history of our nation.[250] Numerous legal scholars, including prochoice advocates, have criticized the abortion decisions for failing to articulate a persuasive principle that transcends mere "political judgment."[251] But, the standard of judicial review in abortion decisions of the Supreme Court has exacerbated the obvious subjectivity. The abortion cases even have suggested that the constitutionality of abortion regulations might depend upon such disparate factors as (1) the trimester of pregnancy regulated,[252] (2) prevailing medical opinions,[253] and (3) legislative motives.[254]

Webster took the first step toward moderating and clarifying the standard of judicial review of abortion regulations. *Webster* indicated that the Court will defer to the state's reasonable policy judgment when the state's challenged abortion legislation does not substantially and directly curtail the private decision to choose abortion. In such cases the Court will apply the rational-relation standard of review.[255]

> [R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative [sic] the actions of the other branches.

Id. at 188 (Powell, J., concurring).

250. *See Roe*, 410 U.S. at 221-22 (White, J., dissenting); *see also* A. BICKEL, THE MORALITY OF CONSENT 27-30 (1975); A. COX, *supra* note 247, at 113; J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 20-32; Blasi, *The Rootless Activism of the Berger Court*, in THE BERGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 212 (V. Blasi ed. 1983); Ely, *supra* note 178; Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1974); Freund, *Storms Over the Supreme Court*, 69 A.B.A. J. 1474 (1983); Wardle, *supra* note 181, at 231.

251. A. COX, *supra* note 247, at 13-14. Even federal judges charged with the duty of developing the abortion privacy doctrine have "labelled Roe v. Wade massive 'judicial legislation.'" Caldeira, *Judges Judge the Supreme Court*, 61 JUDICATURE 208, 212 (1977) ("For these judges, the justices' opinions in *Roe* lacked sufficient reasoning to justify this judicial excursion into the field of morals.").

252. *See, e.g., City of Akron*, 462 U.S. at 431-34; *Roe*, 410 U.S. at 164-65.

253. *See, e.g., City of Akron*, 462 U.S. at 431.

254. *See, e.g., Thornburgh*, 476 U.S. at 763-71.

255. *See id.* at 828 (O'Connor, J., dissenting); *City of Akron*, 462 U.S. at 461-67 (O'Connor, J., dissenting). A majority of the Court also has indicated that it is ready (in an appropriate case) to uphold even some direct and substantial abortion restrictions if necessary to effectuate the "compelling" state interest in protecting premature life. *See supra* note 223 and accompanying text.

III. AUXILLIARY PRECAUTIONS: THE STRUCTURE OF LIBERTY

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[256]

A. Roe's *Restructuring and* Webster's *Restoration*

Roe v. Wade effected a substantial reallocation of law-making powers between the state legislatures and the federal judiciary.[257] *Roe* so curtailed the legislative role that it rendered the American abortion lawmaking process unique among western democracies.[258] More importantly, the American abortion lawmaking process deviates from the constitutional scheme of federalism and self-government.[259] By constitutionalizing the abortion issue, the *Roe* Court placed the process of developing abortion policy largely beyond the control of the states and the legislative process. *Roe* foreclosed significant legislative initiative and political debate, processes widely and effectively utilized to address the abortion issue.[260] Ironically, by depriving state legislatures of the power to determine the legality of abortion, the *Roe* Court terminated the very process by which a constitutional consensus regarding abortion could emerge.

Legislation restricting abortion is one of the oldest and most persistent expressions of self-government in America. In 1821 Connecticut

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256. THE FEDERALIST No. 51 (J. Madison).

257. Indeed, after *Roe* it seemed that the government of the United States consisted of one branch of government, rather than three, at least with respect to abortion issues.

258. From the comparative point of view, abortion policy in the United States is "singular . . . because [it] was not worked out in the give-and-take of the legislative process." M. GLENDON, *supra* note 208, at 24-25. To a greater extent than in any other developed country in North America or Western Europe, the courts in America "have shut down the legislative process of bargaining, education, and persuasion on the abortion issue." *Id.* at 2; *see also id.* at 25, 44-47, 62. Even compared to non-Western nations, the degree to which the American judiciary has curtailed the legislative process is remarkable. For instance, in Japan, which has an extremely liberal abortion law and a practice of abortion comparable to that in the United States, the legislature established and has continued to debate and modify the nation's abortion policy. *See, e.g.*, S. COLEMAN, FAMILY PLANNING IN JAPANESE SOCIETY 18-29, 57-86 (1983); Wagatsuma, *Induced Abortion in Japan*, in BASIC READINGS ON POPULATION AND FAMILY PLANNING IN JAPAN 101-11 (M. Muramatsu 3d ed. 1985); Ishihara, *A History of the Eugenic Protection Law*, 53 SANFUJINKA CHIRYO 391 (1986) (copy and translation in author's possession); Ishii, *The Abortion Problem in Family Law in Japan: A Reconsideration of Legalized Abortion Under the Eugenic Protection Law*, 26 ANN. INSTITUTE OF SOCIAL SCIENCE 64, 69 (Mar. 1985).

259. *See infra* text accompanying notes 326-57.

260. *See generally* L. WARDLE & M. WOOD, A LAWYER LOOKS AT ABORTION 33-44 (1982) (discussing reforms in abortion law prior to *Roe* that allowed abortions when "justified").

became the first state to adopt a statute prohibiting abortion.[261] By 1861 more than two-thirds of the states had adopted statutes prohibiting abortion, and by the end of the nineteenth century virtually every state had enacted legislation prohibiting most abortions.[262] This abortion legislation was substantially identical to the common law which for many centuries had prohibited abortion in England and America.[263] The enactment of abortion legislation essentially codifying the common law expressed the preference of citizens in these young democracies to have their elected representatives, not judges, determine abortion law (even if the result was essentially the same). Today, the persistence of state legislatures in enacting abortion legislation, despite more than a decade of judicial hostility, continues this historic preference for legislative rather than judicial policymaking regarding abortion.[264]

Legislation regarding abortion is inevitable.[265] The only question is whether the state legislatures or the federal courts will take the

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261. *See generally id.* at 30 (using the history of abortion law in Connecticut to exemplify the legal treatment of abortion in the United States) (citing CONN. STAT. tit. 22, §§ 14, 16 (1821) (based on Lord Ellenborough's Act (Miscarriage of Women Act), 1803, 43 Geo. 3, ch. 58 (enacted to prevent "malicious" abortions)).

262. *See generally* J. MOHR, ABORTION IN AMERICA, THE ORIGINS AND EVOLUTION OF POLICY, 1800-1900 (1978) (tracing evolution of abortion policy in the United States from tolerance in 1800 to antiabortion legislation in 1900); Delapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 389-407 (1979); Destro, *Abortion and the Constitution: The Need for Life Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Quay, *Justifiable Abortion — Medical and Legal Foundations*, 49 GEO. L.J. 395 (1961); Witherspoon, *Reexamining* Roe: *Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985).

263. As early as the thirteenth century, Bracton had declared that the abortion of a "formed or quickened" fetus constituted common law homicide. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (Thorne ed. 1968) (G. Woodbine trans.); *see also* 3 E. COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 50-51 (rev. ed. 1979) (1st ed. 1628). While over time, the relevance of "quickening" increased and the severity of sanctions imposed decreased, the basic approach of prohibiting abortions generally and making narrow exceptions for cases of necessity remained remarkably constant. *See* L. WARDLE & M. WOOD, *supra* note 260, at 28-29.

Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND, published on the eve of the American Revolution, summarized the common law regarding abortion:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor.

1 W. BLACKSTONE, COMMENTARIES *130-31.

264. *See infra* text accompanying notes 316-21.

265. *See id.*

initiative. The *Webster* Court returned to the historic pattern of state legislative initiative, partially removing the judicially erected barriers that have prevented the legislative process from operating effectively to settle public policy regarding abortion.[266]

The *Webster* Court took a significant step to restore federalism by reinstating the state legislatures in the role of determining the substance of abortion laws. Chief Justice Rehnquist's opinion endorsed the primary role of the legislature in establishing abortion policy.[267]

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266. State legislators may not welcome this message. No longer can they blame the Court for the policy or the law. They must deal with what clearly is a "hot" political issue, and they must share the burden and the blame for the law.

267. For the Court he quoted with approval from Poelker v. Doe, 432 U.S. 519 (1977), in which "[t]he Court emphasized that the Mayor's 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.'" *Webster*, 109 S. Ct. at 3053 (quoting *Poelker*, 432 U.S. at 521 (1977); *see also id.* at 3051 (discussing cases in which the Court upheld state and city regulations providing aid to pregnant women choosing childbirth over abortions). For the plurality Chief Justice Rehnquist strongly endorsed the primary role of state legislatures in determining abortion policies through democratic processes:

> There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti* . . . and *Akron* . . . . But the goal of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them . . . . The dissent's suggestion, . . . that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the dark ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.

Id. at 3058 (Rehnquist, C.J., plurality opinion). He added that "[t]he goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Id.* (Rehnquist, C.J., plurality opinion).

Likewise, Justice Scalia's concurrence expressed particular concerns about the "costs" that the abortion privacy doctrine was having "for the Court and for the principles of self-governance." *Id.* at 3066 n.* (Scalia, J., concurring in part, concurring in the judgment). He noted, in the first place, that "most of the cruel questions posed [were] political and not juridical," *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment), and that the political branches of government were more appropriate targets for "the sort of organized public pressure" that the abortion cases, particularly *Webster*, had generated. *Id.* (Scalia, J., concurring in part, concurring in the judgment). Furthermore, abortion was "a political issue," *id.* at 3065 (Scalia, J., concurring in part, concurring in the judgment), and the Court's "self-awarded sovereignty over a field where it [had] little proper business," *id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment), had done "great damage" to the Court by "continuously distort[ing] the public perception of the role of [the] Court." *Id.* at 3065 (Scalia, J., concurring in part, concurring in the judgment).

Justice O'Connor's concurrence did not discuss her view of the proper role of state legislatures in setting abortion policy.[268] She cited, however, her dissenting opinions in *City of Akron* and *Thornburgh*, which outline her support of federalism in the form of state legislative power.[269]

Yet, a strong minority are reluctant to trust the resolution of abortion policy to the democratic processes. Justice Blackmun's sharp dissent expressed his fears that state legislatures will re-enact "the severe limitations that generally prevailed in this country before January 22, 1973,"[270] the date of the *Roe* decision.[271] He perceived a "coercive and brooding influence" in the state legislatures and thus "fear[ed] for the future."[272] He argued that "'the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts.'"[273] He acknowledged that abortion "involves the most

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268. As a former state legislator herself, Justice O'Connor might have a particularly well-informed opinion on the subject.

269. *Webster*, 109 S. Ct. at 3053 (O'Connor, J., concurring in part, concurring in the judgment) (citing *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *City of Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)). In *Thornburgh* she emphasized, "[T]he Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*." *Thornburgh*, 476 U.S. at 814-15 (O'Connor, J., dissenting). In *City of Akron* she noted, "[L]egislatures are better suited to make the necessary factual judgments in this area." *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting); *see also id.* at 456 n.4 (O'Connor, J., dissenting) (emphasizing that legislators have superior fact-finding capabilities as compared to courts). She stated that recognizing the state legislatures' superiority to take the initiative in setting abortion policy did not constitute judicial nonfeasance:

> [Taking initiative] does not mean . . . that [the Court should merely] defer to the judgment made by state legislatures. "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem."

Id. at 465 (O'Connor, J., dissenting) (quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)); *see also id.* at n.10 (O'Connor, J., dissenting) (discussing the amicus curiae brief in support of the City of Akron by the Solicitor General of the United States).

270. *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part, dissenting in part). The characterization of the abortion laws in effect on January 22, 1973 as "severe" is highly debatable.

271. *See Roe*, 410 U.S. 113.

272. *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part, dissenting in part).

273. *Id.* at 3077 n.11 (Blackmun, J., concurring in part, dissenting in part) (quoting West Virginia Bd. of Educ. v. Barnett, 319 U.S. 624, 638 (1943)). Justice Blackmun seems to have forgotten, however, how the Bills of Rights came into being. It was not, like the abortion privacy doctrine, by ipse dixit or judicial fiat. The Bill of Rights resulted from a great political compromise, following intense national debate. A two-thirds vote of Congress passed the Bill of Rights, which consisted of 12 proposed amendments. State legislatures ratified 10 of those

politically devisive domestic legal issue of our time,"[274] but maintained the Court has a "constitutional duty" to place that issue "beyond the reach of the democratic process" and "beyond the will or the power of any transient majority."[275]

B. *The Rule of Law and the Structure of Liberty*

1. Self-Government

By making room for reasonable legislative judgment, the *Webster* Court reaffirmed the separation of powers and strengthened the liberty envisioned by the Founders. The drafters of the Constitution sought to establish what John Adams called "a government of laws and not of men."[276] The Founders believed that separation of powers was "essential to the preservation of liberty."[277] As Robert H. Jackson later wrote, "[T]he rule of law is in unsafe hands when courts cease to

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amendments in the requisite three-fourths of the states. The other two proposed amendments, which did not receive requisite state ratification, did not become part of the Bill of Rights. *See generally* H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 64-70 (1981).

274. *Webster*, 109 S. Ct. at 3079 (Blackmun, J., concurring in part, dissenting in part).

275. *Id.* at 3077 n.11 (Blackmun, J., concurring in part, dissenting in part). Given the centuries of consistent proscription of abortion in Anglo-American common law and statutes, *see supra* notes 263-64 and accompanying text, Justice Blackmun's reference to "transient" majorities was rather curious.

Justice Stevens's partial dissent did not discuss directly the proper role of the legislature. *See Webster*, 109 S. Ct. at 3079-85 (Stevens, J., concurring in part, dissenting in part). But, in *Thornburgh* he stressed the importance of protecting the right of individuals "to make decisions that have a profound effect upon their destiny" free from "the will of a transient majority." *Thornburgh*, 476 U.S. at 781-82 (Stevens, J., concurring).

276. Adams, *Massachusetts Bill of Rights: 1780*, in DOCUMENTS OF AMERICAN HISTORY 110 (H. Commager ed. 1968). The heart of this concept is that persons exercising governmental authority are subject to definite legal limitations on the exercise of that authority. *See* A. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 104 (1961).

277. *See, e.g.*, THE FEDERALIST No. 9 (A. Hamilton) ("The regular distribution of power into distinct departments; the introduction of legislative balances and checks; . . . the representation of the people in the legislature . . . these . . . are means . . . by which the excellencies of republic government may be retained and its imperfections lessened or avoided"); *id.* No. 47 (J. Madison) ("No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty[,] than that [the separation of powers is essential to liberty]."); *id.* No. 47 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *id.* No. 48 (J. Madison) ("It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."); *id.* No. 51 (J. Madison) ("[T]hat well-established maxim . . . requires a separation between the different departments of power."); *id.* No. 66 (A. Hamilton) ("[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.").

function as courts and become organs for control of policy."[278] The Founders were mindful of this risk. Their hope that the judiciary would "always be the least dangerous to the political rights of the Constitution" because it would possess "neither FORCE nor WILL but merely judgment"[279] presupposed judicial respect for the Court's institutional boundaries. As Hamilton declared, "[T]he general liberty of the people can never be endangered from [the judiciary] . . . *so long as the judiciary remains truly distinct from both the legislature and the executive* . . . .'[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.'"[280]

Besides the need to maintain separation of powers, the need to preserve public confidence in the federal judiciary also mandates judicial self-restraint.[281] When the Court creates new constitutional rights, and then proceeds to interpret and measure the scope of its own creation, the Justices invariably violate James Madison's first principle of impartial justice by becoming "judge[s] in their own cause."[282]

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278. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 322 (1941).

279. THE FEDERALIST No. 78 (A. Hamilton); *see also id.* No. 81 (A. Hamilton) ("It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom.").

280. *Id.* No. 78 (A. Hamilton) (quoting 1 C. MONTESQUIEU, THE SPIRIT OF THE LAWS 186) (edition unknown) (emphasis added); *see also id.* No. 48 (J. Madison) ("It is equally evident that none of [the three branches of government] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."). For this reason the drafters of the Constitution rejected the suggestion that the federal judiciary serve in a "Council of Revision" to pass upon the wisdom of "every act of the National Legislature before it shall operate." M. FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (1911). Nathaniel Gorham of Massachusetts argued that he "did not see the advantage of employing the Judges in this way . . . . because [judges] are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." 2 *id.* at 73 (quoting Nathaniel Gorham). It also was argued that it was "necessary that the Supreme Judiciary should have the confidence of the people" and this confidence would "soon be lost, if [judges] are employed in the task of remonstrating against popular measures of the Legislature." *Id.* at 76-77. Elbridge Gerry of Massachusetts asserted that "[h]e relied for his part on the Representatives of the people as the guardians of their Rights and interests." *Id.* at 75 (quoting Elbridge Gerry). During the darkest days of the Republic, when a decision of the Court had provoked a national crisis that soon would lead to a bloody civil war, Abraham Lincoln also perceived this danger:

> [I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties and personal actions[,] the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of the imminent tribunal.

A. LINCOLN, *First Inaugural Address*, in 4 COLLECTED WORKS, *supra* note 231, at 262, 268.

281. *See* A. COX, *supra* note 247.

282. THE FEDERALIST No. 10 (J. Madison).

Moreover, the absence of a constitutional consensus for the abortion privacy doctrine compels respect for legislative resolution of such a controversial issue.[283] The legislature can better address controversial issues and resolve them fairly because of its superior fact-finding capability[284] and public accountability (by popular election and direct political accessibility).[285] Furthermore, the proper functioning of the open legislative processes[286] benefits democracy by fostering societal respect for the lawmaking system. The toll of the abortion cases on the Court's

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283. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (emphasizing the lack of a constitutional consensus in a minority set-aside equal protection program, which might demand legislative resolution). That is what government "of the people, and by the people, and for the people" is all about. A. LINCOLN, *Address Delivered at the Dedication of the Cemetery at Gettysburg*, in 7 COLLECTED WORKS, *supra* note 231, at 22-23 (final text version).

284. As Justice Black once stated, "When a 'political theory' embodied in our Constitution becomes outdated . . . a majority . . . of this Court are not only without constitutional power but are far less qualified to choose a new constitutional theory than the people of this country proceeding in a manner provided by Article V." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 678 (1966) (Black, J., dissenting); *see also* Ely, *supra* note 178, at 935 n.89 ("[B]ecause the claims involved [in the abortion controversy] are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly not under the guise of enforcing the Constitution."). *See generally* Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1867 (1986).

285. Justice Powell warned in his concurring opinion in United States v. Richardson, 418 U.S. 166, 188 (1974): "We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch." *Id.* The political process provides a means to secure the "continuing consent" necessary for the government to maintain its claim to contemporary moral validity. *Id.* (Powell, J., concurring); *see generally* D. ELAZAR, *supra* note 212, at 100.

286. One commentator noted,

> [T]he exercise of [the judiciary's power of review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way . . . . The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

J. THAYER, JOHN MARSHAL 106-07 (1901); *see also* Ball v. James, 451 U.S. 355, 373 (1981) (Powell, J., concurring) (state legislatures, responsive to the interests of all the people, normally are better qualified to make judgments concerning local problems than the federal courts); *infra* text accompanying notes 326-28.

In this sense the "legislatures are ultimate guardians of the liberties and welfare of the people in as great a degree as the courts." Missouri K. & T. Ry. v. May, 194 U.S. 267, 270 (1904), *cited in* Maher v. Roe, 432 U.S. 464, 479-80 (1977). As Judge Learned Hand wrote, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 70 (1958).

institutional integrity demonstrates the wisdom of judicial deference to the policy decisions of the legislative branch when a controversial policy has not reached the level of constitutional consensus.[287]

2. Federalism

Webster also reflects the influence of the revival of federalism on the abortion privacy doctrine.[288] Federalism recognizes the fact that the things that matter most in life matter differently to different people. Thus, the genius of our Constitution is that it is "made for people of fundamentally differing views."[289] Federalism, the form of American government,[290] checks concentrated governmental power,[291] facilitates participatory self-government,[292] and protects the right of

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287. The abortion privacy doctrine has jeopardized the institutional boundaries of the judicial branch. Every year antiabortion protestors rally in Washington, D.C. on January 22, the anniversary of the *Roe* decision. In 1989 police estimated that 67,000 protestors gathered despite midwinter conditions. *See* Wash. Post, Jan. 24, 1989, at A1, col. 1. The *Webster* decision created even more chaos. Hundreds of thousands of demonstrators marched to influence the Court's decision. *Id.*, Apr. 10, 1989, at A1, col. 2. The Court received "carts full of mail from the public." *Webster*, 109 S. Ct. at 3065 (Scalia, J., concurring in part, concurring in the judgment). The New York Times reported that at one point during the pendency of the *Webster* case the Court was receiving 40,000 letters (40 times the normal number) and hundreds of phone calls each day from prolife and prochoice supporters. N.Y. Times, Apr. 19, 1989, at A 23, col. 1. Moreover, the intense popular media interest caused a "circuslike atmosphere" to prevail at the Court. Wall St. J., June 16, 1989, at A1, col. 5. And, as Justice Scalia noted, the Court was inundated by "organized public pressure" directed toward influencing the Justices' vote. *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part, concurring in the judgment); *see also supra* note 12 (unprecedented number of amicus briefs). If our constitutional system of government were functioning properly, those protestors, letter-writers, lobbyists, and journalists would have been focusing their attention on the statehouses, not at a courthouse.

288. *See generally* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (healthy competition among limited federal and state governments spurs the race toward constitutional remedies); Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1 (1978) (strongest and most consistent trend of Court is a policy of limiting federal power); Merritt, *The Guarantee Clause in State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (the political process gives states their primary protection against destructive federal intrusions); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341; Spaeth, *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729 (1988) (partnership between federal and state courts would greatly strengthen and enrich the law).

289. Lochner v. New York, 198 U.S. 45, 76 (1905) (Harlan, J., dissenting).

290. D. ELAZAR, *supra* note 212, at 6, 14.

291. *See* Merritt, *supra* note 288, at 4-6; Rapaczynski, *supra* note 288, at 380-95.

292. *See* Merritt, *supra* note 288, at 7-8; Rapaczynski, *supra* note 288, at 395-408.

state governments to experiment in social progress.[293] Federalism also guarantees pluralism.[294]

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293. *See* Merritt, *supra* note 288, at 9-10; Rapaczyynski, *supra* note 288, at 408-14. Justice Brandeis's classic statement of the proposition merits reiteration:

> To stay experimentation and things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Likewise, Justice Holmes wrote,

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compilation of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by several States, even though the experiments may seem futile or even noxious to me and to those whose judgments I most respect.

Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). Justice Frankfurter echoed that concern when he wrote,

> The veto power of the Supreme Court over the social economic legislation of the states, thus exercised through the due process clause, is the most vulnerable aspect of undue centralization. It is . . . the most destructive, because judicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error . . . . The inclination of a single Justice or two, the tip of his mind or his fears, may determine the opportunity of a much needed social experiment to survive, or may frustrate for a long time intelligent attempts to deal with the social evil.

F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 50, 51 (1930). More recently, in Whalen v. Roe, 429 U.S. 589, 597 (1977), another privacy decision, the Court emphasized that individual states must "have broad latitude in experimenting with possible solutions to problems of vital local concern." *Id.* As the Court noted in San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973) (ironically, the same year it decided *Roe*):

> The ultimate wisdom as to these [issues] is not likely to be divined for all time even by the scholars who now so earnestly debate [them]. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to keeping even partial solutions to [such] problems and to keep abreast of ever changing conditions.

Id. at 42-43.

294. One scholar has noted,

> For the United States it can fairly be said that federalism has been of the utmost importance in maintaining pluralism. Federalism has worked in both directions at various times: in the ability of the states to resist federal encroachments and in the ability of the federal government to assault state-fostered or sanctioned encroachments on the legitimate pluralism. What is important about federal ar-

In one sense *Roe v. Wade* and its progeny furthered pluralism by mandating radical individualism.[295] However, radical individualism is not the only, or necessarily the best, form of pluralism. By forcing a policy of strict individualism regarding abortion in every state, the Court abolished all other forms of pluralism. By insisting on uniform radical individualism, the Court's abortion decisions subverted other manifestations of pluralism, including the open-minded eclecticism of state legislation on criminal, family, and moral matters that has characterized American law.

By disregarding state legislation even when no overriding federal interest exists, federal courts erode the constitutional allocation of lawmaking functions between state and federal governments.[296] By constitutionalizing the abortion issue in derogation of federal principles and by imposing its expansive abortion privacy doctrine on the states, the Court drifted away from that federalism and disregarded the reality of diversity, plurality, and evolving morality in American society.[297] The Supreme Court has a primary responsibility to preserve the structure of constitutional government, which has fostered an unprecedented enjoyment of human liberty. By circumventing the federal structure, the abortion decisions paradoxically undermined pluralism in the name of pluralism.[298] By imposing on all states a policy of unrestricted previability abortion, the Court obliterated the genius of structural pluralism.[299] By mandating a national abortion policy despite the lack of a national consensus regarding abortion, the Court thwarted the process by which consensus emerges from pluralism.[300]

> rangements is not a simple matter of power devolved by the more complex matter of power shared, allowing different avenues of recourse for injured parties or for those who wish to protect themselves against injury.

D. ELAZAR, *supra* note 212, at 51.

295. *See id.* at 45-47.

296. *Cf.* Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring) (two conflicting systems of law controlling the primary activity of citizens gives rise to a debilitating uncertainty in the planning of every day affairs).

297. The fact is that the world is "'more like a federal republic than like an empire or a kingdom.'" Levinson, *William James and the Federal Republican Principle*, PUBLIUS, Fall 1979, at 65 (quoting W. JAMES, A PLURALISTIC UNIVERSE 145 (1977)).

298. *Id.* at 50 ("In other words, pluralism is not enough [to preserve pluralistic values] because sentiments for pluralism are not enough. Only constitutional barriers will overcome the natural propensity of ambitious men to consolidate power"); *see also id.* at 17-18, 22, 47, 52, 134-38, 140-47, 159, 166-77.

299. D. ELAZAR, *supra* note 212, at 159 (structural pluralism is an organization with "multiple channels, intelligent redundancy, fail-safe mechanisms, and cells linked together so that not every cell has to function perfectly for the system to work").

300. *See* Sandalow, *Federalism and Social Change*, 43 LAW & CONTEMP. PROBS., Summer 1980, at 1, 29-36. At the time the Court decided *Roe*, "a national consensus plainly had not

IV. The Creation and Constraints of Consensus and Tolerance

A. *Constitutional Consensus*

Since the Founders gathered in Philadelphia in May of 1787, the underlying and overarching goal of American "government by the people" has been to achieve "a more perfect Union."[301] The American constitutional system depends upon the states to foster shared moral values and conceptions of the common good.[302] The Constitution's shared sovereignty scheme of federalism guarantees that in the absence of a constitutional consensus, i.e., a clearly manifest, sustained, super-majoritarian solidarity, a policy may not be enforced as the supreme law of the land.[303]

1. The Constraint of Consensus in Constitutional Adjudication

Constitutional consensus is the only plausible source of authority for the abortion privacy doctrine enunciated by the Court in *Roe* and its progeny.[304] Despite the lack of evidence of proper constitutional consensus in the text or history of the Constitution,[305] *Roe* and its

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evolved regarding abortion." *Id.* at 36. If the States are liberated from the stifling abortion privacy doctrine that treats them as if they are "subordinate governmental agencies subject to societal norms determined at the national level," *id.*, "the law might come to reflect a tolerable accommodation of competing views, differing from state to state in accordance with the differences among their citizens." *Id.*

301. U.S. CONST. preamble.

302. *See generally* D. ELAZAR, *supra* note 212, at 168-72 (discussing the interrelationship between the federal Constitution and state constitutions). On some notable occasions when the federal government has tried to foster a moral community, it generally has failed. *Id.* (using prohibition as an example).

303. A principle does not rise to the level of constitutional law unless it has been proposed by two-thirds vote of both houses of Congress, or a convention requested by two-thirds of the state legislatures, and been ratified by the state legislatures or constitutional conventions in three-fourths of the states. U.S. CONST. art. V. The public support represented by such a process is a "constitutional consensus." Alternatively, the Supreme Court occassionally declares principles or practices to be constitutional "liberties" because of long, deep, consistent historical practice or recognition as being essential to ordered liberty. These tests, too, should evidence solid, sustained, supermajoritarian support.

304. In American constitutional theory, the consent of the governed is the exclusive and ultimate source of all just governmental authority. The Declaration of Independence para. 2 (U.S. 1776); THE FEDERALIST No. 22 (A. Hamilton); *id.* No. 49 (J. Madison); *id.* No. 78 (A. Hamilton).

305. *See, e.g.*, Ely, *supra* note 178, at 943, 947; Sandalow, *supra* note 300, at 36; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 311 (1973).

progeny might be legitimate if the doctrine forbidding restriction of previability abortion enjoyed the support of a real, sustained, de facto constitutional consensus in contemporary America. While article V of the Constitution identifies the proper method for determining whether such a constitutional consensus exists for a proposed new constitutional liberty,[306] the Court is in the postion, because of its power of judicial review, effectively to institutionalize a new constitutional liberty, provided that a bona fide constitutional consensus exists.

In other contexts the Court has acknowledged explicitly that it looks to whether a "national consensus" exists to determine the "evolving standards" that provide the contemporary perception of the broad normative concepts embodied in the Bill of Rights.[307] However, judicial *interpretation* of the meaning of the Constitution's broad, normative terms differs drastically from judicial invention of new, unwritten constitutional liberties. The legitimate method of effecting the latter must be *at least* as constrained as that of the former. Since consent of the governed is the ultimate, validating principle of American constitutionalism, a real and abiding national consensus may legitimate judicial creation despite the circumvention of the constitutional process.[308]

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306. *See* U.S. CONST. art. V.

307. Regarding interpretations of the due process clause, Justice Frankfurter explained,

> The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment . . . . An important safeguard against . . . merely individual judgment is an alert deference to the judgment of the state court under review.

Malinski v. New York, 324 U.S. 401, 417 (Frankfurter, J., concurring); *see also* Leland v. Oregon, 343 U.S. 790, 799 (1952); Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring). For a discussion of the scope of the ninth amendment, see Griswold v. Connecticut, 381 U.S. 479, 493-96 (1965) (Goldberg, J., concurring). For a discussion of the meaning of the eighth amendment, see Stanford v. Kentucky, 109 S. Ct. 2969, 2974-75 (1989); Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989); Thompson v. Oklahoma, 108 S. Ct. 2687, 2691 (1988) (Stevens, J., plurality opinion); *id.* at 2706, 2711 (O'Connor, J., concurring); *id.* at 2715, 2718 (Scalia, J., dissenting); *see also* Ford v. Wainwright, 477 U.S. 399, 406 (1986); Edmund v. Florida, 458 U.S. 782, 788-89 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977); Furman v. Georgia, 408 U.S. 238, 277-79 (1972) (Brennan, J., concurring); Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion).

308. The consent of the governed is, after all, the short answer to charges that the Constitution itself is illegitimate inasmuch as it was drafted by delegates convened "'for the sole and express purpose of revising the Articles of Confederation'" and inasmuch as it authorized the replacement of those Articles upon ratification by only 9 of the 13 states, whereas the Articles themselves required unanimous state ratification. C. BOWEN, MIRACLE AT PHILADELPHIA 4, 226-33. "The convention succeeded because its usurpation was accepted by national consensus every step along the way." D. ELAZAR, *supra* note 212, at 246.

When an actual, albeit latent, "constitutional consensus" exists regarding a new, unwritten constitutional liberty, judicial review may facilitate the constitutional expression of that consensus. Supreme Court decisions in recent decades effectuating equal rights for racial minorities and women offer a prime example of the Court's power to invoke a nonformalized constitutional consensus to support constitutional rights.[309] Supreme Court decisions invalidating laws denying equal rights to racial minorities and women coalesced the existing, latent national consensus by stimulating the other branches of government into action. The effect was to produce unequivocal evidence verifying the Court's conclusion that a constitutional consensus really existed. Within a matter of a few years, Congress and state legislatures embraced, implemented, and extended the new constitutional principles.[310]

Thus, the Supreme Court may play a significant role in creating constitutional consensus.[311] The range of the Court's role in creating constitutional rights is limited, however.[312] The Court erodes its own credibility as an institution and the integrity of the constitutional system of self-government when it uses its judicial power to restrict legislative power by creating new constitutional liberties not clearly supported by a constitutional consensus. This situation has existed since *Roe* with respect to the abortion privacy doctrine.

2. Evidence of Constitutional Consensus Opposing the Expansive *Roe* Abortion Privacy Doctrine

No constitutional consensus has ever supported the *Roe* abortion privacy doctrine of unrestricted (for any reason) access to previability abortion. The most reliable objective evidence of nonformal constitutional consensus is state legislation.[313] Most state abortion legislation, before and after *Roe*, has been at odds with the abortion privacy doctrine.

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309. In both of these instances, however, both the text and the history of the Civil War amendments to the Constitution provided powerful support for (if not a mandate for) the new rule of law.

310. *See* Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375, 376 (1985); Wardle, *supra* note 181, at 249-51.

311. *See generally* S. SCHEINGOLD, THE POLITICS OF RIGHTS 83-116, 131 (1974) (law shapes the context in which American politics is conducted); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

312. THE FEDERALIST No. 78 (A. Hamilton); *id.* No. 81 (A. Hamilton).

313. *See, e.g.*, Stanford v. Kentucky, 109 S. Ct. 2969, 2975 (1989); Penry v. Lynaush, 109 S. Ct. 2934, 2953 (1989); Thompson v. Oklahoma, 108 S. Ct. 2687, 2691 (1988) (Stevens, J., plurality opinion); *id.* at 2706 (O'Connor, J., concurring); *id.* at 2715 (Scalia, J., dissenting).

When the Court decided *Roe*, abortion legislation in all states provided substantial restrictions and regulations of abortion. Previability abortion generally was prohibited in 47 states and the District of Columbia; in fact, 46 states and the District of Columbia prohibited abortion throughout pregnancy except in specified "hard cases."[314] Moreover, these laws were not stale and forgotten remnants of an earlier era. Debate over the legality of abortion had swept the country for more than a decade before the Court decided *Roe*, and more than one-third of the states adopted modernizing amendments to prior abortion statutes in the six years immediately preceding *Roe*. In most other states, legislatures had debated the abortion issue.[315] *Roe* invalidated, in whole or in large part, all of these laws.

Since *Roe* was decided, virtually all state legislatures have persisted in enacting laws restricting or regulating abortion.[316] For sixteen years, during which the Supreme Court and the lower federal courts have decided hundreds of cases expanding the *Roe* doctrine,[317] state legislatures and Congress have continued to enact abortion restrictions.[318] In the face of consistent judicial hostility to abortion regulation, state legislatures have enacted more than 300 separate bills regulating abortion since *Roe*.[319] Currently, *all* states have existing statutes regulating at least some aspects of abortion.[320] Even Congress has enacted eighteen new abortion regulations since *Roe*.[321]

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314. *See generally* J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 33-34; L. WARDLE & M. WOOD, *supra* note 260, at 33-44; Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L. FORUM 177, 178-83.

315. J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 33-34; L. WARDLE & M. WOOD, *supra* note 260, at 33-44; Lampe, *The World in Perspective*, in ABORTION AND SOCIAL JUSTICE 89, 94-98 (1972).

316. *See* Appendix A.

317. *See supra* note 7 and accompanying text; *see also* L. WARDLE, THE ABORTION PRIVACY DOCTRINE (1980).

318. Thus, to say that the *Webster* decision "invited" legislation to restrict abortion, *see Webster*, 109 S. Ct. at 3067, 3077 (Blackmun, J., concurring in part, dissenting in part), is like saying the Court invited the sun to rise or the surf to roar.

319. For the bills enacted from 1973 to 1984, see Wardle, *supra* note 181, at 247 n.83. For the period since then, see The Alan Guttmacher Institute, Washington Memo, June 2, 1989, at 2-3 (by April 1989, five separate pieces of abortion legislation enacted by state legislatures); *id.* Jan. 12, 1989, at 4 (in 1988, nine separate pieces of abortion legislation were enacted by state legislatures); *id.* Jan. 21, 1988, at 7 (in 1987, eight pieces of abortion legislation were enacted by state legislatures); *id.* Jan. 14, 1986, at 5 (in 1985, 18 separate abortion bills were enacted by state legislatures). The extent of sentiment in favor of restricting abortion, and the degree of screening that is done in state legislatures, is indicated by the bills introduced, but not passed. For example, in 1988 200 bills regulating abortion were introduced in state legislatures, but only nine were enacted into law that year. *Id.* Jan. 12, 1989, at 4.

320. For a comprehensive list of state statutes regulating abortion, see Tables A-1 through A-15 in Appendix A. Notably, the Missouri legislature adopted the Missouri law challenged in

Along with the lack of a national legislative consensus supporting the abortion privacy doctrine,[322] public opinion surveys[323] consistently have revealed strong public sentiment against legalizing abortion except in the three "hard cases": when the mother's life or health is endangered, when rape or incest caused the pregnancy, or when the fetus would be born with a severe birth defect. As the Supreme Court prepared to hear oral arguments in *Webster*, newspapers published the results of the most recent nationwide polls confirming this consensus against unrestricted legal previability abortion.[324] The consensus in public opinion surveys, over time and over the broad range of polls, reveals that the American people do not support the *Roe* abortion privacy doctrine of unrestricted (for any reason) previability abor-

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Webster by an overwhelming vote. The Missouri Senate voted 23 to 5 in favor of the legislation. J. SEN. OF MO., Apr. 16, 1986, at 1159. The Missouri House of Representatives voted 119 to 36. J.H. REP. OF MO., Apr. 23, 1986 at 1512-13.

321. *See* Appendix B.

322. *See* Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989).

323. Ordinarily, public opinion surveys are not reliable evidence of national consensus for a number of reasons. The Court noted in *Penry* that "public sentiment expressed in . . . polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which [the Court] can rely." *Penry*, 109 S. Ct. at 2955. However, in the abortion context, not only do the general findings of opinion surveys corroborate the indication of a national consensus evidenced by state legislation, but the results have been so consistent, over such a long period of time, in so many different surveys, that their general tenor cannot be dismissed.

324. The Boston Globe reported,

> When pregnancy results from rape or incest, when the mother's physical health [life] is endangered, and when there is likely to be a genetic deformity in the fetus, those queried strongly approve of legal abortion. But when pregnancy poses financial or emotional strain, or when the women is alone or a teenager — the reasons that are given by most women seeking abortions — an overwhelming majority of Americans believes that abortion should be illegal.

Bronner, *Most in U.S. Favor Ban on Majority of Abortions, Poll Finds*, Boston Globe, Mar. 31, 1989, at 1, col. 1. A New York Times/CBS News poll found that "Americans strongly favor legal abortion when a woman's health is in danger but oppose it in cases where a pregnancy might get in the way of a woman's education or career." N.Y. Times, Apr. 26, 1989, at A1, col. 6. A Los Angeles Times poll found that the approval rate for abortions in the three hard cases ranged from 74% to 88%, while the approval rate for abortion in all other cases ranged from only 13% to 41%. L.A. Times, Mar. 19, 1989, at II, col. 2. *But cf. id.* at 26, col. 3 (74% agreed with the following statement: "I personally feel that abortion is morally wrong, but I also feel that whether or not to have an abortion is a decision that has to be made by every woman for herself"); *Digest, Majority of Americans Oppose Overturning* Roe v. Wade *and Banning Abortion Outright, Polls Show*, 21 FAM. PLAN. PERSP. 138 (1989) (interviewer's misstatement of interviewees' misunderstanding of the holding of *Roe* may be a significant flaw in these surveys).

tion.[325] Indeed, the polls reveal a national consensus against deregulation of previability abortion and against "private choice" abortion, except in the three hard cases.

B. *Toward Moderation and Tolerance*

1. Radicalization of the Abortion Debate

The Court is largely responsible for the radicalization of the abortion controversy. First, in *Roe* and its progeny the Court effectively shut down the normal channels of democratic resolution of policy conflicts.[326] Persons affected by the Court's abortion privacy doctrine could not participate in creating that doctrine in 1973, nor has the general public since had any opportunity to modify the doctrine. By "constitutionalizing" the abortion issue, the *Roe* Court removed the issue from democratic processes and thereby generated a "crisis of legitimacy."[327] The result has been increasingly hostile confrontation and "violence born of complete frustration" at the closure of the democratic processes.[328]

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325. *See* Blake & Del Pinal, *Negativism, Equivocation, and Wobbly Ascent: Public "Support" for the Pro-Choice Platform on Abortion*, 18 DEMOGRAPHY 309 (1981) (analysis of numerous public opinion surveys taken in the 1960s and 1970s shows that largest group of respondents, about 50%, consistently endorsed abortion in some circumstances and rejected abortion in other circumstances; this group of respondents was closer in attitude to respondents who strongly opposed abortion than they were to respondents who strongly support abortion); Grandberg & Grandberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, 12 FAM. PLAN. PERSP. 250 (1980) (approval of legal abortion increased dramatically between 1965 and 1973, remained stable through 1977, then showed significant decrease until 1980); Rossi & Sitaraman, *Abortion in Context: Historical Trends and Future Changes*, 20 FAM. PLAN. PERSP. 273, 274, 274 Fig. 1 (1988); Tedrow & Mahoney, *Trends in Attitudes Toward Abortion: 1972-1976*, 43 PUB. OPINION Q. 181 (1979) (approval rate for "hard reasons" rose three percent between 1972 and 1976 and rose five percent for "soft reasons"). Approval rates peaked in 1974 and have dropped since then. *See generally* R. ADEMEK, ABORTION AND PUBLIC OPINION IN THE UNITED STATES (1986) (National Right to Life Education Trust Fund Publication).

326. *See* M. GLENDON, *supra* note 216, at 40; *supra* text accompanying notes 257-58.

327. S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 202-04 (1985).

328. M. GLENDON, *supra* note 216, at 2, 40, 45. A notable contrast exists between the intemperate and hostile nature of the abortion debate in the United States and the more restrained processes and moderate results in Western Europe. Glendon observed,

> [T]he experience of other societies that have been just as deeply divided as ours, if not more so, on the abortion question, shows that when the legislative process is allowed to operate, *political* compromise is not only possible but typical. These compromises, reached in the usual democratic way, are not entirely satisfactory to everyone . . . . But the European countries have been able to live relatively peacefully with these laws without experiencing the violence born of complete frustration and without foreclosing re-examination and renegotiation of the issues.

Second, the policy decisions embodied in the Court's abortion decisions have been radical. The *Roe* abortion privacy doctrine places the United States on the extreme end of the spectrum of abortion law in developed nations.[329] The abrupt and radical changes in constitutional law decreed by the *Roe* Court have invited imitation. For example, the "rights" language of the abortion decisions and the decisions themselves have tended toward an absolute tone and mentality, encouraging supporters and critics of these decisions to think and talk in absolutist, categorical terms.[330]

Third, the constitutionalization of the abortion privacy doctrine in *Roe* absolutely eliminated all competing points of view regarding acceptable policy alternatives. The Court's sharp rejection of moral justifications for abortion legislation in *Roe* and its progeny invited and encouraged moral intolerance.[331] Particularly ominous are cases seeking to "gag" antiabortion protestors,[332] to intimidate them with coercive

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Id. at 40; *see also id.* at 18, 19 ("Furthermore, the French experience provides strong support for the proposition that, contrary to what one constantly hears from both sides of the abortion controversy in the United States, a divided society *can* compromise successfully on the abortion issue."). The recent arrests of thousands of antiabortion protestors (most peacefully sitting in sidewalks and walkways to block access to abortion clinics) signifies the widely shared perception that political solutions to an intolerable judicially imposed rule are so limited that massive civil disobedience is the only viable alternative. In fact, in 1988 alone, police arrested approximately 10,000 antiabortion protesters in the United States. *See* Sachs, *Abortion on the Ropes*, Time, Dec. 5, 1988, at 58-59; Wall St. J., Dec. 8, 1988, at A22, col. 3-7; *see also*, L.A. Times, Mar. 27, 1989, § I, at 3, col. 1 (more than 700 antiabortion protestors arrested in L.A.); N.Y. Times, Oct. 30, 1988, at A26, col. 1 (2,200 abortion protestors arrested in 27 cities in demonstrations on October 28-29, 1988); N.Y. Times, Oct. 5, 1988, A22, col. 1 (400 antiabortion protestors arrested in Atlanta); N.Y. Times, Sept. 25, 1988, at A33, col. 6 (158 antiabortion protestors arrested in Reston, Washington); N.Y. Times, Jul. 30, 1988, at A30, col. 3 (13 antiabortion protestors arrested in Atlanta); N.Y. Times, Jul. 6, 1988, at A7, col. 1 (600 protestors block the entrance to a clinic in Pennsylvania); N.Y. Times, May 3, 1988, at B1, col. 2 (503 antiabortion protestors arrested in Manhattan).

329. *See* M. GLENDON, *supra* note 216, at 24 (*Roe* "put the United States in a class by itself, at least with respect to other developed nations"); *see also id.* at 2.

330. *See id.* at 39, 55-58.

331. Carl Schneider wrote, "A trend [toward diminution of moral discourse in the law] becomes one of its own causes. As moral discourse and family law becomes rarer, judges, legislatures, and the public are increasingly likely to feel that such discourse is inappropriate." Schneider, *supra* note 284, at 1874-75.

332. *See, e.g.*, Mississippi Women's Medical Clinic V. McMillan, 866 F.2d 788, 797 (5th Cir. 1989) (declining to issue injunction against "stark" language that might create a bad atmosphere outside the abortion clinic); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988) (modifying injunction to restrict shouting and yelling by antiabortion protestors only to the extent that it interferes with performance of business within the abortion clinic); New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1250-51

(S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989) (enjoining protestors from blocking access to the clinic and harassing patients, but specifically allowing expressive activity); Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1160 (E.D. Pa. 1987) (entering an injunction against blocking access, but declining to enter an injunction against expressive activities), *aff'd in part*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 110 S. Ct. 261 (1989).

The Supreme Court and lower courts are not unaware of the first amendment controversies surrounding the public demonstration activities of antiabortion activists. *See* Frisby v. Shultz, 108 S. Ct. 2495 (1988) (upholding application of law forbidding picketing at any residence or dwelling); *see also* Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989) (upholding prohibition against use of hand-held amplifier within 150 feet of abortion or medical facility); Markley v. State, 507 So. 2d 1043 (Ala. Crim. App. 1987) (restriction against priest from going within 500 yards of, making utterances near, or picketing at abortion clinics as a term of probation upheld); State v. Elliott, 548 A.2d 28 (Del. Super. Ct. 1988) (conviction for distributing antiabortion literature on private property); State v. Scholberg, 395 N.W.2d 454 (Minn. Ct. App. 1986) (no first amendment right to distribute antiabortion literature on private property); State *ex rel.* O'Brian v. Moreland, 703 S.W.2d 597 (Mo. Ct. App. 1986) (injunction against protestors from entering women's clinic); Brown v. Davis, 203 N.J. Super. 41, 495 A.2d 900 (Ch. Div. 1984) (no right to distribute literature or talk to customers in business complex), *aff'd sub nom.* State v. Brown, 212 N.J. Super. 61, 513 A.2d 974 (App. Div.), *cert. denied*, 107 N.J. 53, 526 A.2d 140 (1986); People v. Maher, 137 Misc. 2d 162, 520 N.Y.S.2d 309 (Crim. Ct. 1987) (restricting protestors to area behind barricade on sidewalk did not violate protestors first amendment rights), *aff'd*, 142 Misc. 2d 977, 543 N.Y.S.2d 892 (App. Div.), *appeal denied*, 74 N.Y.2d 794, 544 N.E.2d 233, 545 N.Y.S.2d 555 (1989); State *ex rel* Tillford v. Crush, 39 Ohio St. 3d 174, 529 N.E.2d 1245 (1988) (defendant class enjoined from screaming, mass picketing, etc.); Fairfield Common Condominium Ass'n v. Stasa, 30 Ohio App. 3d 11, 506 N.E.2d 237 (1985) (contempt conviction of antiabortion protestors' violation of an injunction against picketing condominium professional offices), *cert. denied*, 479 U.S. 1055 (1987); City of Portland v. Ayers, 93 Or. App. 731, 764 P.2d 556 (1988) (affirming conviction of antiabortion protestor for using loud speaker), *review denied*, 308 Or. 79, 775 P.2d 322 (1989); Hoffart v. State, 686 S.W.2d 259 (Tex. Ct. App.) (antiabortion demonstrator convicted of criminal trespass; term of probation forbidding him to enter any premises to picket did not violate free speech), *cert. denied*, 479 U.S. 824 (1986); Sunnyside v. Lopez, 50 Wash. App. 786, 751 P.2d 313 (1988) (antiabortion demonstrator convicted of criminal trespass; first amendment does not protect literature distribution on private property); State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985) (criminal trespass conviction for entering private property to encourage persons not to have an abortion), *aff'd*, 139 Wis. 2d 473, 407 N.W.2d 854 (1987).

In *McMillan*, 866 F.2d 788, Judge Gee wrote,

> The clinic wishes potential clients to be shielded from hearing advocacy with which it disagrees so that they will obtain abortions . . . . Neither we nor the clinic can cut off the peaceful communication of information, distasteful to some though it be. Neither in the precedent of the Supreme Court, nor in that of ours, do we find the faintest hint that the "uninhibited, robust, and wide-open" debate on public issues extolled by Justice Brennan in New York Times v. Sullivan, 376 U.S. 254, 270 . . . (1964), is to be limited to "things that do not matter much," West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 . . . (1943), or to the other fellow's cherished ideas and beliefs, not our own.
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> . . . [I]t is not likely that the public interest would be served by insulating potential abortion clients from the information, stark and unsavory though it may be, which these protestors seek to communicate. The right to choose abortion services at MWMC still exists, though the choice may be made harder because the wrapping is undone. The First Amendment retains a primacy in our jurispru-

litigation, and to punish them financially for their antiabortion demonstrations.[333]

> dence because it represents the foundation of a democracy — informed public discourse. If the people are to choose wisely what laws they wish to live under and what rights and privileges are to be maintained, then neither the MWMC nor this Court must be permitted to cull and censor the information upon which their choices are to be made.

Id. at 796-97.

Nonetheless, several courts have prohibited antiabortion demonstrators from referring to abortionists as "killers" or "murderers." *See, e.g.*, Planned Parenthood of Monmouth County, Inc. v. Cannizzaro, 204 N.J. Super. 531, 499 A.2d 535 (Ch. 1985), *aff'd*, 217 N.J. Super. 623, 526 A.2d 741 (A.D. 1987); Bering v. SHARE, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987). *But cf.* O.B.G.Y.N. Ass'n v. Birthright of Brooklyn & Queens, Inc., 64 A.D.2d 894, 407 N.Y.S.2d 903 (App. Div. 1978) (modifying injunction to permit defendants to use words "murder" or "killer" on placards because prohibition would violate first amendment). *See generally* Rasnic, *Crying "Foul" on Foul Language on the Picket Line: The Anomalous Displacement of Non-Striker's Right to Sue*, 25 DUQ. L. REV. 457 (1987) (federal law protects strikers' right of free speech even when such speech is violative of state law); Note, *Abortion, Protest, and Constitutional Protection*, 62 WASH. L. REV. 311, 322, 326 (1987) (describing the restriction of free speech to protect children from its harmful effects as having "repressive implications" and being "inimical to the marketplace of ideas"); Comment, Bering v. SHARE: *Abortion Protestors Lose Ground in the State of Washington*, 18 CUMB. L. REV. 205, 220-30 (1987). Also, financially punitive civil damage suits, alleging violations of federal racketeering statutes, have curtailed and punished the expressive activities of antiabortion protestors. *See infra* note 333.

333. One federal court already has awarded damages to abortion clinics under RICO. *McMonagle*, 665 F. Supp. 1147 ($887 jury damages trebled); *see also Portland Feminist*, 859 F.2d 681 (noting that plaintiff filed suit under, *inter alia*, Oregon RICO statute); Armes v. City of Philadelphia, 706 F. Supp. 1156 (E.D. Pa. 1989) (noting RICO suit filed against antiabortion protestors); *McMonagle*, 689 F. Supp. 465 (denying motion for new trial; upholding RICO judgment); Roe v. Operation Rescue, 123 F.R.D. 508 (E.D. Pa. 1988) (noting probability of success on RICO claim); National Org. for Women, Inc. v. Scheidler (N.D. Ill. 1989) (No. 86-C-78888) (first amended class actions complaint).

Other cases have charged antiabortionists with the deprivation of civil rights under color of state law. *McMillan*, 866 F.2d 788 (no evidence of state action). Other plaintiffs have argued that the protestors have conspired to deny civil rights and equal protection. However, the federal courts have split as to whether 42 U.S.C. §§ 1985(3) and 1986 can be applied against antiabortion protestors. The courts that have considered most thoroughly the issue have held that no cause of action exists. *See McMillan*, 866 F.2d 788 (no "class," therefore no cause of action); Roe v. Abortion Abolition Soc'y, 811 F.2d 931 (5th Cir. 1987) (plaintiffs did not form a class protected by the statute), *cert. denied*, 108 S. Ct. 145 (1987); Portland Feminist Women's Center v. Advocates for Life, Inc., 681 F. Supp. 688 (D. Or. 1988) (statute does not apply to private interference). *But cf.* Northern Va. Women's Medical Center v. Balch, 617 F.2d 1045 (4th Cir. 1980) (substantial federal claims including § 1985 support pendant jurisdiction); *Terry*, 704 F. Supp. at 1247 (conspiracy to deprive women seeking abortion of that guaranteed right is actionable).

Finally, various tort claims are possible. *See, e.g., Portland Feminist*, 859 F.2d at 681; *Terry*, 697 F. Supp. at 1324; *Operation Rescue*, 123 F.R.D. at 508; *McMonagle*, 665 F. Supp. at 1147.

2. Shadows of Intolerance in *Webster*

Webster evidences how difficult it will be to break the pattern of intolerance established in the abortion cases. Three of the four lower court judges and four of the nine Supreme Court Justices ruled that the Constitution forbids elected officials from making a public declaration that life begins at conception.[334] Justice Blackmun wrote an uncommonly vituperative dissenting opinion, filled with *ad hominems* and injudicious language.[335] Justice Scalia added his own sharply worded criticisms.[336] But, the most ominous shadow on future abortion debate and litigation was cast by Justice Stevens, whose dissenting opinion was interjected with a note of religious animosity. Justice Stevens

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334. *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., concurring in part, dissenting in part); *id.* at 3080 (Stevens, J., concurring in part, dissenting in part); *Webster*, 851 F.2d at 1076-77; *Webster*, 662 F. Supp. at 413. These actions of the lower courts and arguments of the Supreme Court disenters are uncomfortably reminiscent of such ominously intolerant precedents as the prosecution of Galileo for daring to espouse the Copernican theory of the solar system and the ruling of the judge in the *Scope* trial that the state could outlaw the teaching of evolution regardless of the scientific merit of the dotrine. *See* E. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION 63-67 (1985); G. SANTILLANA, THE CRIME OF GALILEO 237-60 (1955).

335. The primary object of Justice Blackmun's vitriolic language was "the plurality" which he accused of acting in a "deceptive fashion" with "feigned restraint." He charged them with "aggressive[ly] misreading" the precedents, *id.* at 3069 (Blackmun, J., concurring in part, dissenting in part), with making a "tortured effort to avoid the plain import" of the Missouri statute "in the hope of precipitating a constitutional crisis," *id.* at 3070 (Blackmun, J., concurring in part, dissenting in part), and with using "a pretext for scuttling the trimester framework." *Id.* at 3071 (Blackmun, J., concurring in part, dissenting in part). He further accused them of making a "[b]ald assertion masquerad[ing] as reasoning," *id.* at 3072 (Blackmun, J., concurring in part, dissenting in part), of acting with the sole object "not to persuade, but to prevail," *id.* (Blackmun, J., concurring in part, dissenting in part), and of raising an issue "merely [as] an excuse for avoiding the real issues . . . and [as] a mask for its hostility" to *Roe*. *Id.* at 3072 n.7 (Blackmun, J., concurring in part, dissenting in part). Finally, he accused them of using "an attempted exercise of brute force," *id.* at 3075 (Blackmun, J., concurring in part, dissenting in part), of advocating "unadulterated nonsense," *id.* at 3077 n.11 (Blackmun, J., concurring in part, dissenting in part), of being "oblivious or insensitive," *id.* at 3077 (Blackmun, J., concurring in part, dissenting in part), and of "invit[ing] charges of cowardice and illegitimacy." *Id.* at 3079 (Blackmun, J., concurring in part, dissenting in part).

336. *Id.* at 3064-67 (Scalia, J., concurring in part, concurring in the judgment). He chastised Justice O'Connor for taking positions inconsistent with those she had taken in earlier cases, *id.* at 3064-65 (Scalia, J., concurring in part, concurring in the judgment), and asserting arguments that "cannot be taken seriously." *Id.* at 3064 (Scalia, J., concurring in part, concurring in the judgment). He upbraided both Chief Justice Rehnquist and Justice O'Connor for trying to "run into a corner," *id.* at 3066 (Scalia, J., concurring in part, concurring in the judgment), and for making an indecisive decision that was the "least responsible" of all the options facing the Court. *Id.* at 3067 (Scalia, J., concurring in part, concurring in the judgment).

stressed repeatedly that the legislative "finding" that life begins at conception was a purely "theological" belief and a constitutionally impermissible "endorsement of a *particular* religious tradition."[337] While perhaps in some other context this kind of finger pointing at a religion might be excused as the essentially harmless product of mere insensitivity, in the abortion context such aspersions are not so innocuous, even when they are manifested courteously. Capitalizing on anti-religion (particularly anti-Catholic) sentiment has been a political ploy long-used by the advocates of unrestricted access to abortion.[338] How-

337. *Id.* at 3085 (Stevens, J., concurring in part, dissenting in part) (emphasis added); *see also id.* at 3083, 3084-85 (Stevens, J., concurring in part, dissenting in part); *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring) ("I recognize that a powerful theological argument can be made for [the] position [that there is a governmental interest in protecting fetal life throughout pregnancy], but I believe our jurisdiction is limited to the evaluation of secular state interests"); *id.* at 778 n.7 ("The responsibility for nurturing the soul of the newly born, as well as the unborn, rests with [the] individual parent[,] not the State. No matter how important a sacrament such as baptism may be, a State surely could not punish a mother for refusing to baptize her child."). Justice Stevens focused his antitheological criticism by reference "to the position on this issue that was endorsed by St. Thomas Acquinas and widely accepted by the leaders of the Roman Catholic Church for many years," and summarized medieval Catholic Church doctrine as described in CATHOLIC TEACHING ON ABORTION which has been repudiated by the Catholic Church. *Webster*, 109 S. Ct. at 3083 (Stevens, J., concurring in part, dissenting in part) (citing C. WHITTIER, CATHOLIC TEACHING ON ABORTION: ITS ORIGIN AND LATER DEVELOPMENT (May 15, 1981), *reprinted in* Brief for Americans United for Separation of Church and State as *Amicus Curiae*, app. A), *criticized and repudiated* in CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION: HEARINGS BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 479 (1981)).

338. *See, e.g.*, L. LADER, ABORTION II: MAKING THE REVOLUTION (1973); L. LADER, POLITICS, POWER IN THE CHURCH, THE CATHOLIC CRISIS AND ITS CHALLENGE TO AMERICAN PLURALISM 11, 56-71, 225 (1987) (American pluralism is in jeopardy because of a political combination of Roman Catholic hierarchy and American conservatives, regarding, *inter alia*, abortion); B. NATHANSON, ABORTING AMERICA 51-52 (1979) (describing discussions and decisions about strategy made by leaders of the National Association for the Repeal of Abortion Laws and other prochoice activists in the late 1960s and early 1970s); J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 53-57 (perpetuation of the "legend" that opposition to abortion is essentially religious, especially Catholic; media builds the legend by emphasizing "Roman Catholic" religious affiliation of leading antiabortion activists; analogy to Conservative Party in England "play[ing] the Orange Card" to win votes); *id.* at 74-79 (detailing stories by *inter alia* The New York Times, The Associated Press, and CBS Television program); M. OLASKI, THE PRESS AND ABORTION, 1838-1988, at 104, 128, 137-38 (describing anti-Catholic arguments published in the Boston Globe, New York Times, etc.).

By lending the prestige of his office to such arguments, Justice Stevens fans the flames of religious animosity and legitimates a type of argument that is coercive, intolerant, and destructive of the "more perfect union" which the Constitution he purports to expound was intended to achieve. Ironically, the dissenting opinions of both Justice Stevens and Justice Blackmun demonstrate the nonjudicial, political nature of the issues involved. Personalized, *ad hominem* argumentation and religious attacks are the hallmarks of political debate, not legal analysis or judicial reasoning.

ever, such religious bigotry has no place in legitimate constitutional discourse.

3. Finessing the Truth

Exacerbating the intolerance characteristic of the abortion decisions is the tendency of prochoice advocates to "finesse" the facts. For example, at oral arguments in *Webster*, the lawyer for the abortion clinics, after acknowledging that thirty percent of all pregnancies in America today end in abortion, asserted that the rate "has not changed one whit from the time that the Constitution was enacted through the 1800's and through the 1900's. That has always been the rate."[339] This assertion is simply false. Reliable data about the number, rate, and ratio of abortions in the United States shows that the number of abortions has more than doubled, the rate of abortion has nearly doubled, and the ratio of abortions has increased by over fifty percent in the thirteen years since *Roe*.[340]

Justice Blackmun's dissent in *Webster* also finessed the facts. For example, his insistence that "the threshold of fetal viability is, and will remain, no different from what it was at the time *Roe* was decided"[341] contradicted his own declarations in *Roe* about when viability occurs. In *Roe* he had declared that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[342] In *Webster* he admitted that viability may occur as early as 23 weeks gestational age,[343] five weeks earlier than his general definition and one week earlier than his earliest estimate he gave in *Roe*. Moreover, Justice Blackmun had emphasized twice before that the concept of viability needed to be "flexible for anticipated advancements in medical skill."[344]

Similar factual distortions, by both prochoice and prolife advocates, have been a part of the abortion debate for many years.[345] Manipulation

339. Record at 31, *Webster* (No. 88-605).

340. *See* Appendix D and sources cited therein.

341. *Webster*, 109 S. Ct. at 3076 n.9 (Blackmun, J., concurring in part, dissenting in part).

342. *Roe*, 410 U.S. at 160.

343. *Webster*, 109 S. Ct. at 3075 (Blackmun, J., concurring in part, dissenting in part).

344. Colautti v. Franklin, 439 U.S. 379, 387 (1978); *see also* Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976).

345. *See* M. FAUX, *ROE v. WADE* 87-88, 217 (1988); B. NATHANSON, *supra* note 338, at 50-53. *Compare* Petitti & Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 AM. J. PUB. HEALTH 860 (1977) (predicting up to 90 deaths annually if publicly funded abortions were restricted by the Hyde Amendment) *with* Gold & Cates, *Restriction of Federal Funds for Abortion: 18 Months Later*, 69 AM. J. PUB. HEALTH 929 (1979) (finding only three deaths "associated to some degree" with funding restriction). Justice Blackmun cited Dr. Cates in his dissenting opinion in *Webster*, 109 S. Ct. at 3077 (Blackmun, J., concurring in part, dissenting in part).

of the truth can create public appeal[346] and can be profitable.[347] Reliance on "finessed facts" has been a part of the abortion doctrine since *Roe*.[348] But, such distortions pose a serious danger when presented in constitutional litigation because the "constitutional facts" provide the critical foundation for the development of constitutional doctrine.[349]

4. Signs of Moderation in *Webster*

Despite the remnants of the intolerance that were present in *Webster*, *Webster* represents a significant step in the direction of tolerance and moderation. By upholding all of the challenged provisions it reviewed,[350] the *Webster* Court showed tolerance towards state legislation. The Court thus foreshadowed receptivity to reasonable legislative efforts to regulate abortion.[351] Significantly, the Court accepted the reasonable construction of the Missouri statutes offered by the Missouri Attorney General, reversing the lower court's decision to reject the state's construction of its own law.[352]

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346. *See, e.g.*, TIME, Mar. 20, 1989, at 57 (Planned Parenthood ad: "How would you like the police to investigate your miscarriage"); N.Y. Times, Jan. 23, 1989, at A25 (Planned Parenthood ad: "Human life is sacred and they'll risk yours to prove it.").

347. *See, e.g.*, Goss, *Abortion-Rights Groups Strike a Fundraising 'Bonanza' Following Supreme Court's Decision to Review the Issue*, THE CHRONICLE OF PHILANTHROPY, Mar. 7, 1989, at 4 (prochoice groups reported "a staggering financial response to their 'public education' campaign"; Planned Parenthood had 50% jump in contributions in January, 1989; NARAL brought in $350,000 in one month from a full-page ad; A.C.L.U. had similar response to its advertisements); Yost, *As Abortion-Rights Groups Rally Support, Foes Set Legislative Drive in 4 States*, Wash. Post, July 5, 1989, at A10, col. 1 (NARAL raised $1,000,000 in May 1989, up from $300,000 a year earlier; substantial increase in membership); *see also* Kornhauser, *Abortion Case Has Been Boon to Both Sides*, Legal Times, July 3, 1989, at 1, col. 4 (NARAL anticipates 65,000 new members; similar increases in donations or membership by Planned Parenthood, A.C.L.U., and N.O.W.).

348. For example, the Court in *Roe* relied upon the suggestion made by Professor Cyril Means that "abortion was never established as a common-law crime." *Roe*, 410 U.S. at 135 n.26 (citing Means, *The Phoenix of Abortional Freedom: Is a Penumbralor Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?*, 17 N.Y.L.F. 335 (1971)). This suggestion, however, has been thoroughly discredited. *See generally* Dellapenna, *supra* note 262, at 364-407; Destro, *supra* note 262, at 1267-73. Likewise, it was asserted that the plaintiff in *Roe* had become pregnant as a result of being "gang-raped." Recently, however, she has admitted that she fabricated the story to convince people to help her get an abortion. M. FAUX, *supra* note 345, at 8, 19, 328; N.Y. Times, Sept. 9, 1987, at A23, col. 1.

349. *See generally* Pine, *supra* note 23, at 655-59.

350. *See supra* text accompanying notes 22-137.

351. *See supra* text accompanying notes 265-69.

352. *See supra* text accompanying notes 196-97.

The *Webster* Court's analysis of the abortion precedents was more tolerant and less rigid than in the past.[353] The Court suggested that a standard of review more moderate than strict scrutiny would apply to some types of abortion regulations.[354] The Court's apparent adoption of an objective standard of review, as opposed to a subjective standard in which the Court determines whether legislators have "bad motives,"[355] was a clear step towards tolerance. By applying an objective standard of review, the Court upheld the right of state legislatures to express their views as to when human life begins.[356] The *Webster* Court's method of analysis also provides hopeful signs of judicial moderation, leaving time and room for further democratic dialogue and doctrinal development.[357] Overall, *Webster* represents a significant step toward open discussion, tolerance, and moderation.

V. The Process of Constitutional Adjudication

Webster's greatest significance may lie in the Court's prudent approach to constitutional adjudication, particularly relating to the abortion privacy doctrine. The *Webster* Court deviated substantially from past abortion cases in both its modest method of addressing constitutional issues and the cautious pace it adopted for making changes in constitutional doctrine. Despite the dissenters' disagreements regarding the propriety of addressing constitutional issues modestly and cautiously,[358] the majority clearly adopted a conservative approach to constitutional adjudication.

A. *Conservative Method of Constitutional Analysis In and Beyond* Webster

Justice Blackmun's dissenting opinion in *Webster* provided a striking contrast to the opinions written by the Justices comprising the new majority. Justice Blackmun's abortion opinions are written in the

353. *See supra* text accompanying notes 138-44, 198.

354. *See supra* text accompanying notes 232-39.

355. *See supra* text accompanying note 202.

356. *See supra* text accompanying notes 32-37.

357. *See infra* text accompanying notes 376-94.

358. While Justice Blackmun sharply criticized the new substantive direction taken by the Court, his sharpest criticisms focused on the plurality's decisionmaking process. *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part, dissenting in part). Likewise, Justice Scalia's sharpest criticism of the plurality and Justice O'Connor focused on their concept of the process the Court should follow to deal with the dilemma created by the *Roe* abortion privacy doctrine. *Id.* at 3064-65 (Scalia, J., concurring in part, concurring in the judgment).

style of grand, jurisprudential essays.[359] His dissent in *Webster* was broadly written, anticipating and answering summarily, but conclusively, a multitude of profound issues. In *Webster* he repeatedly assailed the plurality for failing to "join, the true jurisprudential debate."[360]

By contrast Chief Justice Rehnquist wrote a lean plurality opinion in *Webster*. His analysis of most issues was specific and businesslike.[361] He aimed to resolve the case before the Court and correct the lower courts' judgments. He indulged in arguably "unnecessary" analysis only once, on a carefully selected issue succinctly resolved.[362]

Justice O'Connor's opinion provided an even sharper contrast to Justice Blackmun's approach than did Chief Justice Rehnquist's opinion.[363] With precise analysis she succeeded in resolving all of the necessary issues without ever raising any significant doctrinal issues, much less great jurisprudential questions. Moreover, she vigorously defended deciding the case on narrow grounds and avoided, whenever possible, discussion of the great jurisprudential questions that might effect major changes in constitutional doctrine.[364]

The sharp contrast between Justice Blackmun's approach and those of Justice O'Connor and Chief Justice Rehnquist reveals the Court's conflict regarding whether to continue or abandon *Roe*'s broad, jurisprudential approach to deciding abortion cases. Justice Blackmun has been the author of the Court's opinion in five of the most expansive

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359. *See id.* at 3067 (Blackmun, J., concurring in part, dissenting in part) ("[the plurality's] deafening silence"); *id.* at 3077 ("'not with a bang, but a whimper,' the plurality discards a landmark case of the last generation"); *id.* at 3078 ("[The plurality] utters not a word. This silence is callous. It is also profoundly destructive of this Court as an institution."); *id.* at 3079 ("The plurality invites charges of cowardice and illegitimacy to our door.").

360. *See id.* at 3072 (Blackmun, J., concurring in part, dissenting in part). The great jurisprudential issue was "whether the Constitution includes an 'unenumerated' general right to privacy . . . , and, more specifically, whether and to what extent such a right to privacy extends to matters of childbearing and family life, including abortion." *Id.* (Blackmun, J., concurring in part, dissenting in part).

361. For example, he answered Justice Blackmun's broad complaint about the narrowness of his opinion by simply distinguishing the case upon which Justice Blackmun relied. *Id.* at 3057-58 (Rehnquist, C.J., plurality opinion).

362. *See supra* text accompanying notes 160-65.

363. Justice Scalia also declined the invitation to write an advisory opinion on the great issues. *Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part, concurring in the judgment). But he strongly criticized the majority, and especially Justice O'Connor, for making resolution of any constitutional issue academic. *Id.* at 3064-66 (Scalia, J., concurring in part, concurring in the judgment).

364. *Id.* at 3060-61 (O'Connor, J., concurring in part, concurring in the judgment).

abortion cases.[365] In all of these cases, he wrote sweeping, jurisprudential opinions, substantially extending the abortion privacy doctrine with broad analysis or applying the doctrine in bold and provocative ways.

The *Webster* Court plainly rejected Justice Blackmun's "sweeping analysis" approach. While *Webster* was not the first abortion case in which the Court had taken a cautious approach,[366] no earlier case had involved such a range of issues and never before did so many Justices disassociate themselves with the "broad approach."[367]

The "sweeping analysis" approach contains many flaws and engenders profound problems.[368] The abortion cases illustrate why Dean Pound stated, "We rate the judge who is only a lawyer higher than the judge who is only a philosopher."[369] The "sweeping analysis" approach reflects a desire for certainty in areas of law in which certainty simply does not exist.[370] Justice Cardozo noted that there are "few rules; there are chiefly standards and degrees."[371] Much of the public opposition to the major abortion decisions has resulted from the provocative language and overbreadth of the Court's analysis in the abor-

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365. *See Thornburgh*, 476 U.S. 747; Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); *Roe*, 410 U.S. 113. In the other two most expansive cases, Justice Blackmun joined the most expansive opinions, which were written by Justice Powell. *See City of Akron*, 462 U.S. at 416; Bellotti v. Baird, 443 U.S. 622 (1979).

366. The Court applied the abortion doctrine narrowly in all five previous funding cases. *See* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); *supra* notes 7, 87-94 and accompanying text.

367. Only two other Justices, Brennan and Marshall, signed Justice Blackmun's opinion in *Webster*. *See Webster*, 109 S. Ct. at 3067.

368. As Justice Cardozo noted, "We do not pick our rules of law full-blossomed from the trees." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 103 (1921) [hereinafter B. CARDOZO, NATURE]. Justice Cardozo also noted that "[u]nique situations can never have their answers ready made as in the complete letter-writing guides or the manuals of the art of conversation." B. CARDOZO, *supra* note 1, at 133.

369. A. GOODPHART, *The New York Court of Appeals and the House of Lords*, in R. COVINGTON, E. STASON, J. WADE, E. CHEATHAM & T. SMEDLEY, CASES AND MATERIALS FOR A COURSE ON LEGAL METHODS 56 (1969) (quoting Dean Pound).

370. As Jerome Frank noted, "[L]aw is uncertain and must be uncertain, [and] overeagerness for legal certainty and denials of legal contingency are harmful." J. FRANK, LAW AND THE MODERN MIND 239 (1936) (describing Justice Cardozo's contribution to legal theory); *see also* B. CARDOZO, NATURE, *supra* note 368, at 28 ("Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless becoming.").

371. B. CARDOZO, NATURE, *supra* note 368, at 161. Jerome Frank observed, "It is unnecessary and undesirable to attack on all fronts at once." J. FRANK, *supra* note 370, at 251.

tion cases, rather than from dissatisfaction with the particular result of the decision.[372]

Justice Blackmun's error in his "sweeping jurisprudential" *Webster* dissent and his opinions in other abortions cases is the same mistake that many first-year law students make. Fledgling law students yearn to discover in the law a system of broad coherence and theoretical tidiness. They favor general propositions, rather than specific ones, and broad holdings, rather than narrow ones. But, lawyers know that general propositions in the law inevitably mislead.[373] Thus, "[s]omewhere along the line, beginning with the first classroom command to state what a case holds, every good lawyer-judge [and law student] learns to distrust what an appellate court said."[374] American courts, even our Supreme Court, have better things to do, and can do many things better, than engage in "jurisprudential debate," what Justice Holmes called the "'theological working out of dogma.'"[375] *Webster* revived the force of these truisms as surely as *Roe* verified them.

B. *The Prudential Pace of Judicial Change*

The second great dispute about the process of constitutional adjudication in *Webster* concerned the speed of constitutional change. Most of the major abortion decisions have entailed abrupt, extensive change in constitutional doctrine.[376] The *Webster* case illustrated judicial restraint, a marked departure from the *Roe* approach.

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372. John Noonan wrote, "Without the courts the [abortion] controversy would have had a very different, and much smaller, shape." J. NOONAN, A PRIVATE CHOICE, *supra* note 217, at 3.

373. Karl Llewellyn noted, "We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules, and who do learn them, and who learn nothing more, will take away the shell and not the substance." K. LLEWELLYN, THE BRAMBLE BUSH 12 (1969). Oliver Wendel Holmes observed that "general propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Justice Holmes also said, "I always say that I will admit any general proposition that any one wants to lay down and [still] decide the case either way." 1 HOLMES-LASKI LETTERS 390 (M. Howe ed. 1953). The late Professor Bickel noted, "[T]he compelling force of the judgment goes only to the actual case before the Court. For, as we have seen, the Court's peculiar capacity to enunciate basic principles inheres in large part in its opportunity to derive and test whatever generalization it proclaims in the concrete circumstances of a case." A. BICKEL, THE LEAST DANGEROUS BRANCH 70 (1957).

374. Craven, *Paean to Pragmatism*, 50 N.C.L. REV. 977, 982 (1972).

375. J. FRANK, *supra* note 370, at 254 (quoting Oliver Wendell Holmes). "'Certitude is not the test of certainty. We have been cock-sure of many things that were not so.'" *Id.* (quoting Oliver Wendell Holmes).

376. *See supra* note 8.

Webster upheld all of the challenged provisions of the Missouri statute properly before the Court without abrupt, fundamental changes in the abortion privacy doctrine. The plurality would not have reversed *Roe*, but would have expressly repudiated the trimester framework and would have expressly recognized the state's compelling interest in protecting prenatal life before viability.[377] For this approach Justice Scalia criticized Chief Justice Rehnquist for not moving quickly enough,[378] while Justice Blackmun attacked the plurality for disregarding a landmark constitutional decision.[379]

Justice O'Connor cast the deciding vote, however, and she was content to uphold the Missouri statutes without substantially changing, or endorsing, the *Roe* abortion privacy doctrine.[380] She vigorously defended her approach, reminding the plurality in their own words that hastiness was unnecessary; there would be other cases and "time enough to reexamine *Roe*. And to do so carefully."[381]

As one commentator has noted, "[r]estraint in exercising the judicial power to overrule precedents is essential to the stability of the law. Yet, abstention from exercising this power defeats stability itself."[382] The tension created by these two principles is the tension that existed between the approach of Justice O'Connor (and, to a large extent, of Chief Justice Rehnquist) and that of Justice Blackmun (and, in this case, Justice Scalia also). The question concerns whether judicial change in constitutional law should be abrupt or gradual, by avulsion or accretion.[383] In *Webster*, due primarily to Justice O'Connor, the Court opted for the gradual approach.[384]

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377. *See supra* text accompanying notes 160-65.

378. Justice Scalia would have overruled *Roe* explicitly. *See supra* text accompanying notes 166-68. He expressed his impatience and frustration with the approach that both the plurality and Justice O'Connor followed. *Id.* He would have applied the *Roe* approach to rapidly change the *Roe* abortion privacy doctrine. He criticized the Court for its indecisive decision, the plurality for its excessive diplomacy, and Justice O'Connor for her "extraordinary reluctance" even to raise the constitutional issue. *Webster*, 109 S. Ct. at 3064, 3066-67 (Scalia, J., concurring in part, concurring in the judgment).

379. Justice Blackmun accused Justice Rehnquist and the plurality of fomenting disregard for the law, *id.* at 3067 (Blackmun, J., concurring in part, dissenting in part), and for forcing an unnecessary change in constitutional law. *Id.* at 3069-70; *see supra* note 170 and accompanying text. However, primarily the direction of the change, not the tempo of the process of court-initiated change in constitutional law, aroused his ire.

380. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring in part, concurring in the judgment).

381. *Id.* at 3061 (O'Connor, J., concurring in part, concurring in the judgment).

382. R. KEATON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 15-17 (1972), *quoted in* R. ALDISERT, THE JUDICIAL PROCESS 837 (1976).

383. S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 221-24, 230-33 (1985).

384. *See* B. CARDOZO, NATURE, *supra* note 368, at 161-62.

In other recent cases dealing with privacy, the Court has adopted a similar, cautious approach.[385] A cautious approach allows time for understanding to develop, effects to surface, and the risk of dogmatism to subside. Judicial restraint further creates incentive for political responsibility and legislative accountability.

Yet, to entirely abandon judicial review of abortion legislation would distort the political process because *Roe* already has distorted the political balance substantially. *Roe* introduced into American society the profitmaking legal abortion industry.[386] In 1982 America spent an estimated $500,000,000 on abortion services.[387] Thus, while prolife and prochoice organizations have seen significant growth in public awareness and grassroots political support since *Roe*, politically powerful economic and institutional interests have created a huge medical-reproductive-control industry that supports and perpetuates the *Roe* ethics with financial resources, influence, prestige, organization, and institutional credibility.[388] Repairing the distortion of the political process will take time, and the Court should begin the reparations carefully.

The gradual approach to changing the abortion privacy doctrine also represents a return to the common law process. The ability of judges to work incremental changes in common law is one of the historic sources of legitimacy for the Supreme Court's claim to participation in the process of constitutional evolution through judicial decision-

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385. *See, e.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333 (1989); DeShaney v. Winnebago County Dep't of Social Serv., 109 S. Ct. 998 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

386. M. GLENDON, *supra* note 216, at 20.

387. *Contraception & Abortion Costs Are a Tiny Portion of U.S. Health Spending*, 18 FAM. PLAN. PERSP. 37 (1986). In 1985 more than $66,000,000 of public funds were used to subsidize abortions. Gold & Macias, *Public Funding of Contraceptive, Sterilization and Abortion Services, 1985*, 18 FAM. PLAN. PERSP. 259, 263 tab. 3 (1986) (188,000 abortions paid for or subsidized).

388. Thus, in the *Webster* case, while several ad hoc or issue-oriented associations of medical practitioners filed amicus briefs in support of the Missouri prolife position, virtually every prominent national medical organization filed or joined amicus briefs in support of the abortion clinics prochoice position. *See Overwhelming and Broad-Based Support of Right to Abortion Shown in Amicus Briefs, March*, Washington Memo, Apr. 19, 1989, *supra* note 12, at 1 ("More than 300 organizations, including virtually every major medical and health association in the country . . . signed one of the 31 prochoice briefs . . . . The list includes such prominent national organizations as the American Medical Association, American Public Health Association, American College of Ob/Gyns, American Nurses Association, American Academy of Pediatrics, American Psychiatric Association . . . ."). Of course, similar organizations have filed amicus briefs in most of the previous abortion cases. For instance, the last major abortion decision of the Supreme Court before *Webster* was filed by the American College of Obstetricians and Gynecologists. *See Thornburgh*, 476 U.S. 747; *see also supra* note 347 (describing profitability of exploiting the abortion issue).

making.[389] The common law process, however, operated gradually over centuries.[390] Thus, the Court strays furthest from its source of legitimacy when it attempts abrupt, revolutionary change in constitutional adjudication.[391]

An important difference separates changing law and changing legal doctrine. By reading the abortion cases narrowly, Justice O'Connor's conservative approach changed law, not legal doctrine. After the Court has had enough experience working out the applications of the law, "time enough" will remain to recast the legal doctrine. By then, the Court will have a sound grounding in the practical dimensions of the cases and law on which to premise a legal doctrine that is workable.[392]

Finally, a subtle difference exists in writing the Court's opinion versus writing a concurring or dissenting opinion. The author of the Court's opinion must observe constraints that other opinion authors do not have to observe. The author of the Court's opinion must first actually decide the case and determine the rights, liberties, and legal interests of real persons, the parties to the controversy. The author of the Court's opinion also may engage in "conversation" about the theory or doctrine of the law, which influences future decisions by stating the principles endorsed by the majority of the justices. Thus, the author of the Court's opinion may exercise great influence upon the development of "law as doctrine" or "law as theory."

In contrast, the authors of concurring or dissenting opinions are unconstrained by the responsibilities of rendering judgment. The authors of such opinions are concerned only with influencing the prospective evolution of the "law as doctrine" or "law as theory." The main purpose for writing a concurring or dissenting opinion is to engage in the "conversation" regarding the evolving doctrine and theory of the law. Concurring and dissenting opinions often are written more broadly

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389. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 169-85 (1928); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 391-95 (1981); *see also* THE FEDERALIST NOS. 78, 81 (A. Hamilton).

390. Cardozo noted, "Little by little the old doctrine is undermined." B. CARDOZO, NATURE, *supra* note 368, at 178. He also observed that "the duty of a judge becomes itself a question of degree, and he is a useful judge or a poor one as he estimates the measure accurately or loosely." *Id.* at 161-62. *See generally* H. ABRAHAM, THE JUDICIAL PROCESS 12-13 (3d ed. 1975).

391. "Great constitutional provisions must be administered with caution." Missouri, K & T. Ry. v. May, 194 U.S. 267, 270 (1904); *see also* Santosky v. Kramer, 455 U.S. 745, 772 (1982) (Rehnquist, J., dissenting).

392. For a discussion of the radicalization of the *Roe* abortion privacy doctrine, see *supra* notes 326-33. Again, the prudence of a moderate approach is particularly apparent when the abrupt gyrations of constitutional law have created enormous practical problems for the lower courts and a crisis of legitimacy for the Supreme Court.

to clarify, correct, and moderate the theory and doctrine of the law, to influence the development of the "law as judgment" in future cases.[393] But, that approach is seldom appropriate in the opinion for the Court.

In the pre-*Webster* abortion cases, the authors of the Court's opinions often failed to accept the greater responsibilities and narrower constraints of writing the Court's opinion. The *Webster* Court, especially Justice O'Connor, stepped off the treadmill of making abrupt, radical changes in the abortion privacy doctrine. Perhaps by refocusing attention on deciding the cases one at a time, the Court will not feel compelled to extend precipitously and unwisely the logic of its past jurisprudential ruminations to excessive and damaging extremes.

VI. CONCLUSION

Webster is a major decision because it is a modest decision. While the *Webster* Court made important adjustments to the abortion privacy doctrine and revealed that further changes are likely and while the decision revived concern for matters of constitutional system and structure, the *Webster* decision is more important for the greater changes the Court could have made but did not make. Paradoxically, the *Webster* Court's conservative vision of the process of constitutional adjudication reveals *Webster*'s true significance. The rejection of the "sweeping jurisprudential" approach to deciding abortion cases and the adoption of an incremental approach in effecting change in constitutional doctrine through litigation may prove to be the most significant facets of the *Webster* decision.

The Supreme Court does not have to overrule bad decisions in order to make good decisions, nor does the Court have to reformulate legal doctrine in order to disregard bad law. (Has *Lockner v. New York*[394] ever been overruled? Does it really matter?) Sometimes the Court is wise to allow constitutional doctrine to take care of itself for a while. If the Court can make a reasonable decision in each abortion case that it hears, the Court will have "time enough" to rewrite the abortion privacy doctrine. But then, if the Court does its job well, that may not be necessary.

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393. In this sense Justice Blackmun's dissent in *Webster* was a more appropriate opinion than his majority opinions in cases such as *Roe*, *Doe*, and *Danforth*.

394. 198 U.S. 45 (1905).

APPENDIX A*

STATE STATUTES REGARDING ABORTION (MARCH 1990)

(Current Legislation Regulating, Restricting, or Prohibiting Abortion in All 50 States)

A-1 Trimester/Health Regulations

AK ALASKA STAT. § 08.64.105 (1987) (state medical board to regulate); *id.* § 18.16.010(a)(1) (1986) (licensed physician); *id.* § 18.16.010(a)(2) (hospital or approved facilities).

AR ARK. STAT. ANN. § 5-61-101 (1987) (medical license necessary); *id.* § 5-61-102 (unlawful after quickening); *id.* § 20-9-302 (clinics licensed, registered; regulated by Department of Health; fines).

CA CAL. HEALTH & SAFETY CODE § 25951 (West 1984) (authority to perform; requirements); *id.* § 25952 (pregnancy resulting from rape or incest); *id.* § 25953 (medical staff committee); *id.* § 25954 (mental health defined); *id.* § 25955.5 (system for reporting); *id.* § 25955.9 (rights of infant born alive).

CO COLO. REV. STAT. § 18-6-101 (Repl. vol. 1986) (definitions); *id.* § 18-6-101(1)(b) (less than 16 weeks of gestation); *id.* § 18-6-101(4) (hospital board); *id.* § 25-1-666 (sale of drug only through prescription).

DE DEL. CODE ANN. tit. 24, § 1790(a) (Repl. vol. 1987) (licensed physician; hospital); *id.* § 1790(b)(1) (no more than 20 weeks gestation); *id.* § 1790(c) (written report from hospital board); *id.* § 1795 (protect live birth).

FL FLA. STAT. § 390.001(2) (1989) (no termination in last trimester; when allowed); *id.* § 390.001(3) (physician required); *id.* § 390.001(4)(c) (in emergency may terminate with one corroborative opinion); *id.* § 390.002 (records, reporting); *id.* § 797.03(1)-(2) (hospital, clinic, required; license required for clinic); *id.* § 797.03(3) (no third-trimester abortions unless in hospital).

GA GA. CODE ANN. § 15-11-116 (Supp. 1989) (medical emergency); *id.* § 16-12-141(a) (1988) (physician); *id.* § 16-12-141(b) (licensed hospital or facility after first trimester); *id.* § 16-12-141(c) (two physicians certify, health of mother after second trimester; medical aid rendered if born alive); *id.* § 16-12-141(d) (certificate of abortion).

HI HAW. REV. STAT. § 338-9 (Repl. vol. 1988) (record of fetal death filed); *id.* § 453-16(a)(1) (licensed physician or surgeon); *id.* § 453-16(a)(2) (hospital; attorney general opinion says not enforceable during first trimester).

ID IDAHO CODE § 18-608(1) (Repl. vol. 1987) (physician; hospital; clinic, first trimester); *id.* § 18-608(2) (second trimester); *id.* § 18-608(3) (third trimester); *id.* § 18-609(3) (confirmed pregnancy test); *id.* § 18-609(4) (report); *id.* § 39-261 (Repl. vol. 1985) (induced abortion reporting form).

IL ILL. ANN. STAT. ch. 38, para. 81-23.1 (Smith-Hurd Supp. 1989) (medical judgment); *id.* para. 81-30 (reports); *id.* para. 81-30.1 (report of abortion complications); *id.* para. 81-32 (analysis of fetal tissue); *id.* para. 81-54 (abortions allowed on minors); *id.* ch. 111½, para. 157-8.1 to -8.16 (Ambulatory Surgical Treatment Center Act).

IN IND. CODE ANN. § 35-1-58.5-2(1) (Burns 1985) (first trimester); *id.* § 35-1-58.5-2(1)(A) (physician); *id.* § 35-1-58.5-2(2) (after first trimester; before viability); *id.* § 35-1-58.5-3 (determination of trimester and viability); *id.* § 35-1-58.5-5 (forms submitted to state board of health).

IA IOWA CODE ANN. § 707.7 (West 1979) (feticide after end of second trimester); *id.* § 707.10 (duty to preserve live fetus).

KS KAN. STAT. ANN. § 21-3407(2) (Repl. vol. 1988) (license to practice medicine); *id.* § 21-3407(2)(a) (licensed hospital or other place designated); *id.* § 65-445 (Repl. vol. 1985) (hospital keeps records).

KY KY. REV. STAT. ANN. § 311.723 (Baldwin 1989) (when physician may perform) (subsection 1 unconstitutional); *id.* § 311.750 (licensed physician); *id.* § 311.760 (minimum standards); *id.* § 311.770 (no saline after first trimester); *id.* § 213.055 (Baldwin 1982) (abortion reporting) (attorney general opinion determined unconstitutional).

LA LA. REV. STAT. ANN. § 40:1299.35.2 (West Supp. 1989) (abortion by physician); *id.* § 40:1299.35.3 (abortion after first trimester must be in hospital); *id.* § 40:1299.35.8 (records); *id.* § 40:1299.35.10 (reports); *id.* § 40:1299.35.11 (forms); *id.* § 40:1299.35.12 (emergency); *id.* § 40:1299.35.15 (instructions after abortions).

ME ME. REV. STAT. ANN. tit. 22, § 1596(2) (Repl. vol. 1980) (reports); *id.* § 1598(3) (persons who may perform abortions).

MD MD. HEALTH-GEN. CODE ANN. § 20-208 (Repl. vol. 1987) (physician required in hospital; no more than 26 weeks of gestation; authorization by hospital review board; records and reports) (subsections (a)-(c) unconstitutional).

MA MASS. ANN. LAW ch. 38, § 6 (Law. Co-op 1983) (duty to report death); *id.* ch. 112, § 12L (Law. Co-op 1975) (physician if less than 24 weeks); *id.* § 12M (1985) (after 24 weeks); *id.* § 12O (protection of unborn child); *id.* § 12P (preservation of life/health of child); *id.* § 12Q (further restrictions under 12L and 12M); *id.* § 12R (written statements of reason; tests on pregnant patients; report).

MI MICH. COMP. LAWS ANN. § 52.202 (West Supp. 1989) (county medical examiner investigates death by abortion); *id.* § 52.203 (notice to county medical examiner); *id.* § 333.2835 (West 1980) (reports, abortion defined).

MN MINN. STAT. ANN. § 145.412(1) (West 1989) (physicians); *id.* § 145.412(2) (hospital or abortion facility after first trimester); *id.* § 145.413 (recording, reporting); *id.* § 145.416 (licensing and regulating).

MS MISS. CODE ANN. § 97-3-3(1) (1973) (duly licensed, practicing physician).

MO MO. ANN. STAT. § 188.020 (Vernon 1983) (physicians required); *id.* § 188.025 (Vernon Supp. 1990) (subsequent 16 weeks, hospital required); *id.* § 188.052 (Vernon 1983) (physician's report); *id.* § 188.055 (forms to be supplied to facilities and physicians).

MT MONT. CODE ANN. § 50-20-109(1) (1989) (licensed physician; after three months, hospital); *id.* § 50-20-110 (reporting).

NE NEB. REV. STAT. § 28-335 (1985) (licensed physician); *id.* § 28-336 (accepted medical procedures); *id.* § 28-343 (Bureau Vital Statistics reporting form); *id.* § 28-345 (Department of Health file).

NV NEV. REV. STAT. ANN. § 442.250(1)-(2) (Michie 1986) (licensed physician, within 24 weeks; after 24 weeks, in hospital); *id.* § 442.256 (records); *id.* § 442.260 (health division adopts regulations); *id.* § 442.265 (hospital must submit vital statistics).

NJ N.J. STAT. ANN. § 30:4D-6.1 (West 1981) (must be performed in hospital; physician must submit report).

NM N.M. STAT. ANN. § 24-14-18 (1978) (report of induced abortion).

NY N.Y. PENAL LAW § 125.05(3) (McKinney 1987) (duly licensed physician; within 24 weeks).

NC N.C. GEN. STAT. § 14-45.1 (1986) (physician's license; first 20 weeks in hospital or facility; after 20 weeks; statistical reports).

ND N.D. CENT. CODE § 14-02.1-04(1) (Repl. vol. 1981) (licensed physicians); *id.* § 14-02.1-04(2) (first 12 weeks, but before viability; licensed hospital); *id.* § 14.02.1-07 (records required); *id.* § 14.02.1-07.1 (forms available at Department of Health).

OH OHIO REV. CODE ANN. § 3701.341 (Anderson 1988) (public health rules on abortion shall be adopted by Public Health Council).

OK OKLA. STAT. ANN. tit. 63, § 1-731(A) (West 1984) (physician's license); *id.* § 1-731(B) (must be in hospital after first trimester); *id.* § 1-733 (self-induced abortion; advice of physician); *id.* § 1-737 (hospitals which may perform); *id.* § 1-738 (form to be completed); *id.* § 1-739 (records required).

OR OR. REV. STAT. § 435.496 (Supp. 1987) (report to Vital Statistics Unit).

PA 18 PA. CONS. STAT. ANN. § 3207(a)-(b) (Purdon Supp. 1989) (abortion facilities, reports); *id.* § 3214 (reporting) (held unconstitutional).

SC S.C. CODE ANN. § 44-41-20 (Law. Co-op. 1988) (legal abortions first, second, third trimesters); *id.* § 44-41-60 (reported to State Registrar); *id.* § 44-41-70 (promulgation of rules for hospitals); S.C. CODE REGS. 61-12 §§ 101-609 (1976) (rules and regulations for abortion clinics, minimum licensing standards).

SD S.D. CODIFIED LAWS ANN. § 34-23A-3 (1986) (during first 12 weeks); *id.* § 34-23A-4 (during second 12 weeks, place of performance); *id.* § 34-23A-5 (after 24 weeks for medical necessity); *id.* § 34-23A-6 (blood supplies and testing facilities); *id.* § 34-23A-19 (reports required).

TN TENN. CODE ANN. § 39-4-201(c)(1) (Repl. vol. 1982) (first three months with consent and pursuant to medical judgment of physician); *id.* § 39-4-201(c)(2) (after three months before viability; hospital); *id.* § 39-4-203 (records and reports required).

TX TEX. REV. CIV. STAT. ANN. art. 4512.8 (Vernon Supp. 1989) (Texas Abortion Facility Reporting and Licensing Act).

UT UTAH CODE ANN. § 26-2-23(3) (Repl. vol. 1989) (records kept); *id.* § 76-7-302 (Repl. vol. 1978) (performed by a physician, 90 days after, must be in hospital); *id.* § 76-7-303 (concurrence of attending physician); *id.* § 76-7-309 (pathologist's report); *id.* § 76-7-313 (Supp. 1989) (physician's report).

VA VA. CODE ANN. § 18.2-72 (Repl. vol. 1988) (when lawful in first trimester); *id.* § 18.2-73 (when lawful in second trimester); *id.* § 18.2-74 (when lawful after second trimester); *id.* § 18.2-74.1 (when necessary to save life of woman); *id.* § 32.1-264 (Repl. vol. 1985) (reports required).

WA WASH. REV. CODE ANN. § 9.02.060 (West 1988) (lawful termination); *id.* § 9.02.070 (not quick, not more than four months after conception; accredited hospital); *id.* § 43.20A.625 (West 1983) (records required by Registrar).

WV W. VA. CODE § 16-2F-6 (Repl. vol. 1985) (reporting requirements).

WI WIS. STAT. ANN. § 69.186 (West Supp. 1989) (induced abortion reporting required).

WY WYO. STAT. § 35-6-107 (Michie 1977) (forms for reporting); *id.* § 35-6-108 (complications of abortion; reports required).

A-2 Viability and Post-Viability Regulations

AK ALASKA STAT. § 18.16.010(d) (1986) (abortion defined; terminate nonviable fetus).

AZ ARIZ. REV. STAT. ANN. § 36-329 (Repl. vol. 1986) (postviability fetal death registration); *id.* § 36-2301 (doctor's duty to preserve life of viable fetus; postviability reasons; duty; methods; second physician; definition viability).

AR ARK. STAT. ANN. § 20-16-703 (1987) (presume nonviable to end of 25 week); *id.* § 20-16-704 (penalty); *id.* § 20-16-705 (postviability abortion prohibition; rape and health exceptions); *id.* § 20-16-706 (method or technique); *id.* § 20-16-707 (attendance of second physician).

FL FLA. STAT. § 390.001(5) (1989) (standard of medical care during viability).

GA GA. CODE ANN. § 16-12-141 (1988) (medical aid if capable of life).

HI HAW. REV. STAT. § 453-16(b) (Repl. vol. 1985) (abortion is defined as termination of unviable fetus).

ID IDAHO CODE § 18-608(3) (Repl. vol. 1987) (third trimester; if possible, save fetus).

IL ILL. ANN. STAT. ch. 38, para. 81-25 (Smith-Hurd Supp. 1989) (preservation of life and health of mother; viability of fetus); *id.* para. 81-26 (preservation of life and health of viable fetus); *id.* para. 81-26(2)(a) (attending physician); *id.* para. 81-32 (evidence of live birth, viability reported); *id.* ch. 110, para. 11-107.1 (injunctive relief for father after viability).

IN IND. CODE ANN. § 35-1-58.5-2(3) (Burns 1985) (after viability); *id.* § 35-1-58.5-7(3) (after viability, two physicians; preserve life of fetus born alive; legal status of fetus born alive).

IA IOWA CODE ANN. § 707.10 (West 1979) (duty to preserve viable fetus).

KY KY. REV. STAT. ANN. § 311.780 (Baldwin 1986) (prohibition after viability; exceptions).

LA LA. REV. STAT. ANN. § 14:87.5 (West 1986) (intentional failure to sustain life of aborted viable infant); *id.* § 40:1299.35.4 (West Supp. 1989) (no abortion after viability; exceptions; additional physician; preserve life).

ME ME. REV. STAT. ANN. tit. 22, § 1598(4) (1964) (abortions after viability are criminal).

MN MINN. STAT. ANN. § 145.415 (West 1989) (live fetus after abortion); *id.* § 145.412 subd. 3 (abortion unlawful when fetus potentially viable; exceptions).

MO MO. ANN. STAT. § 188.029 (Vernon Supp. 1989) (physician determination of viability); *id.* § 188.030 (Vernon 1983) (abortion of viable child; when permitted).

MT MONT. CODE ANN. § 50-20-108 (1987) (protection of premature infants born alive); *id.* § 50-20-109(c) (no abortions after viability).

NE NEB. REV. STAT. § 28-329 (1985) (no abortion after viability); *id.* § 28-330 (abortion procedure; protection of viable child).

NY N.Y. PUB. HEALTH LAW § 4164 (McKinney 1985) (induced viable births).

ND N.D. CENT. CODE § 14-02.1-04(3) (Repl. vol. 1981) (after viability, no abortion except in hospital); *id.* 14.02.1-05 (preserving life of viable child).

OK OKLA. STAT. ANN. tit. 63, § 1-732 (West 1984) (viable fetus; grounds to abort; procedure); *id.* § 1-734 (live-born fetus, care and treatment).

PA 18 PA. CONS. STAT. ANN. § 3210 (Purdon Supp. 1989) (abortion after viability); *id.* § 3211 (viability determination) (held unconstitutional).

UT UTAH CODE ANN. § 76-7-302 (Repl. vol. 1978) (after viability; when necessary for mother's health); *id.* § 76-7-307 (medical procedures to save unborn child); *id.* § 76-7-308 (medical skills).

WI WIS. STAT. ANN. § 940.15(2) (West Supp. 1988) (no abortion after viability, unless necessary to preserve life of woman, then, in hospital; method).

WY WYO. STAT. § 35-6-102 (Michie 1988) (no abortion after viability); *id.* § 35-6-103 (viability not affected by abortion); *id.* § 35-6-104 (means of treatment for viable infant).

A-3 Informed Consent

DE DEL. CODE ANN. tit. 24, § 1794 (Repl. vol. 1987) (consent of woman).

FL FLA. STAT. § 390.001(4) (1989) (informed consent); *id.* § 390.025(2) (abortion referral and counseling agencies).

GA GA. CODE ANN. § 15-11-112(a)(2) (Supp. 1988) (minor signs consent).

ID IDAHO CODE § 18-609 (Repl. vol. 1987) (informed consent); *id.* § 18-610 (refusal to consent by pregnant woman).

IL ILL. ANN. STAT. ch. 38, para. 81-26(6) (Smith-Hurd Supp. 1989) (inform woman of pain reliever for fetus); *id.* para. 81-54(2) (informed consent of minor).

IN IND. CODE ANN. § 35-1-58.5-2(1)(B) (Burns 1985) (woman's consent filed).

IA IOWA CODE ANN. § 707.8 (West 1979) (nonconsensual termination).

KY KY. REV. STAT. ANN. § 311.726 (Baldwin 1986 & Supp. 1988) (voluntary, informed consent); *id.* § 311.729 (information on alternatives) (probably unconstitutional).

LA LA. REV. STAT. ANN. § 40:1299.33(D) (West 1977) (written consent); *id.* § 40:1299.35.6 (West Supp. 1989) (informed consent).

ME ME. REV. STAT. ANN. tit. 22, § 1599 (Supp. 1988) (informed consent; 48-hour waiting period).

MD MD. HEALTH-GEN. CODE ANN. § 20-211(d) (Repl. vol. 1987) (information before abortion; signed recognition).

MA MASS. ANN. LAW ch. 112, § 12S (Law Co-op. 1985) (informed written consent).

MN MINN. STAT. ANN. § 145.412(4) (West 1989) (informed consent).

MO MO. ANN. STAT. § 188.027 (Vernon 1983) (informed consent); *id.* § 188.039 (Vernon 1983 & Supp. 1989) (consent form).

MT MONT. CODE ANN. § 50-20-104(3)(c) (disclosure of alternatives); *id.* § 50-20-106 (1987) (informed consent; when not required; coercion).

NE NEB. REV. STAT. § 28-327 (1985) (informed consent required).

NV NEV. REV. STAT. ANN. § 442.252 (Michie 1987) (physician to certify informed consent); *id.* § 442.253 (requirements).

NY N.Y. PENAL LAW § 125.053 (McKinney 1987) (consent).

ND N.D. CENT. CODE § 14-02.1-03(1) (Repl. vol. 1981) (full informed consent).

OH OHIO REV. CODE ANN. § 2919.12(A) (Anderson 1987) (informed consent).

OK OKLA. STAT. ANN. tit. 63, § 1-738 (West 1984) (consent).

PA 18 PA. CONS. STAT. ANN. § 3205 (Purdon Supp. 1989) (informed consent) (held unconstitutional); *id.* § 3208 (printed information) (held unconstitutional).

RI R.I. GEN. LAWS § 23-4.7-2 (1985) (informed written consent required); *id.* § 23-4.7-3 (required disclosures); *id.* § 23-4.7-5 (consent form).

SC S.C. CODE ANN. § 44-41-20 (Law. Co-op. 1985) (first, second, third trimesters; woman's consent); *id.* § 44-41-30(a) (persons from whom consent is required).

SD S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986) (consent of patient); *id.* § 34-23A-10 (information of counseling services required); *id.* § 34-23A-10.1 (statement of informed consent).

TN TENN. CODE ANN. § 39-4-201(c) (Repl. vol. 1982) (woman's consent); *id.* § 39-4-202 (informed, written consent).

UT UTAH CODE ANN. § 76-7-305.5 (Supp. 1989) (informed consent).

VA VA. CODE ANN. § 18.2-76 (Repl. vol. 1988) (informed consent required).

WA WASH. REV. CODE ANN. § 9.02.070 (1988) (prior consent).

WI WIS. STAT. ANN. § 146.78 (West 1989) (informed consent).)

A-4 Parental Participation Requirements

AL ALA. CODE § 26-21-1 (Supp. 1988) (legislative purpose); *id.* § 26-21-2 (definition); *id.* § 26-21-3 (written consent; notice; incest; emancipation; waiver); *id.* § 26-21-4 (procedure for waiver); *id.* 26-21-5 (emergency exception); *id.* § 26-21-6 (penalties); *id.* § 26-21-7 (nonliability of physicians); *id.* § 26-21-8 (confidentiality; reports).

AK ALASKA STAT. § 18.16.010(a)(3) (1986) (parental consent).

AZ ARIZ. REV. STAT. ANN. § 36-2152 (Supp. 1988) (parental consent; emergency exception; penalties); *id.* § 36-2153 (parental consent waiver proceedings).

CA CAL. CIV. CODE § 34.5 (West Supp. 1989) (unemancipated minor consent); CAL. HEALTH & SAFETY CODE *id.* § 2435 (West Supp. 1989) (attorney in fact; authority to consent); *id.* § 25958 (unemancipated minors; consent).

CO COLO. REV. STAT. § 18-6-101(1) (Repl. vol. 1986) (parental consent requirements).

DE DEL. CODE ANN. tit. 24, § 1790(b)(3) (Repl. vol. 1987) (two parents if minor resides in same household; otherwise one parent).

FL FLA. STAT. § 390.001(4)(a) (1989) (if unmarried, under 18, parent or court).

GA GA. CODE ANN. § 15-11-112(a)(1)(A) (Supp. 1988) (parental notification required); *id.* § 15-11-112(b) (waiver provision).

ID IDAHO CODE § 18-609(6) (Repl. vol. 1987) (unmarried minor, 24-hour notice to parents).

IL ILL. ANN. STAT. ch. 38, para. 81-54(3) (Smith-Hurd Supp. 1989) (parental consent for minor); *id.* para. 81-64 (notice required for unemancipated minor); *id.* para. 81-65 (waiver of notice); *id.* para. 81-66 (medical emergency, exceptions); *id.* para. 81-67 (other exceptions); *id.* ch. 40, para. 1015 (no parental liability for expense incurred because abortion performed without consent).

IN IND. CODE ANN. § 35-1-58.5-2.5(a) (Burns Supp. 1988) (unemancipated minor; consent of one parent); *id.* § 35-1-58.5-2.5(b) (petition juvenile court); *id.* § 35-1-58.5-2.5(c) (waiver).

KY KY. REV. STAT. ANN. § 311.732(2) (Baldwin 1986) (written consent of minor, both parents); *id.* § 311.733 (severability).

LA LA. REV. STAT. ANN. § 40:1299.33(D) (West 1977) (unemancipated minor, written parental consent); *id.* § 40:1299.35.5(A) (West Supp. 1989) (parental consent; court permission).

ME ME. REV. STAT. ANN. tit. 22, § 1597 (Repl. vol. 1980) (parental notification; consent not required).

MD MD. HEALTH-GEN. CODE ANN. § 20-103 (1987) (notice required for unmarried minor; incomplete notice; waiver; evidence of notice).

MA MASS. ANN. LAWS ch. 112, § 12S (Law Co-op. 1985) (minor, unmarried, her consent; parents or judge's order).

MN MINN. STAT. ANN. § 144.343 subd. 6 (substitute notification) (West 1989); *id.* § 144.344 subd. 2 (parental notice for unemancipated minor; 48 hours).

MS MISS. CODE ANN. § 41-41-53(1) (Supp. 1989) (unemancipated minor; written consent both parents); *id.* § 4-41-53(3) (petition for waiver).

MO MO. ANN. STAT. § 188.028.1(1)-(3) (Vernon 1989) (written consent; minor and one parent; consent of emancipated minor; court order).

MT MONT. CODE ANN. § 41-1-405 (1989) (self-consent of minors not applicable to abortion); *id.* § 50-20-107 (written notice to spouse or parent required; parent if under 18 and unmarried).

NE NEB. REV. STAT. § 28-347 (1985) (minor; notice required; exceptions; waiver).

NV NEV. REV. STAT. ANN. § 442.255 (Michie 1987) (unemancipated minor, notify parent; court order); *id.* § 442.2555 (appeal court ruling).

ND N.D. CENT. CODE § 14-02.1-03(1) (Repl. vol. 1981) (notification to parents of unemancipated minor; before viability); *id.* § 14-02.1-03(2)(a) (consent of husband subsequent to viability); *id.* § 14-02.1-03(2)(b) (unmarried minor, consent of parent); *id.* § 14.02.1-03.1 (1981 & Supp. 1987) (parental consent or judicial authorization).

OH OHIO REV. CODE ANN. § 2919.12(B)(1)(a) (Anderson 1987) (unemancipated minor, 24-hour notice to one parent; juvenile court waivers; notice to others besides parents).

OK OKLA. STAT. ANN. tit. 63, § 1-738 (West 1984) (consent of parents); *id.* § 2602 (right of self-consent, minor).

PA 18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1989) (parental consent).

RI R.I. GEN. LAWS § 23-4.7-6 (1985) (minors, parental consent); *id.* § 23-4.8-2 (notify husband); *id.* § 23-4.8-3 (exceptions).

SC S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1985) (third trimester, husband's consent); *id.* § 44-41-30(b)(c) (unmarried minor, incompetent).

SD S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986) (unmarried minor, consent of parents; married minor, consent of husband).

TN TENN. CODE ANN. § 37-10-303 (Supp. 1988) (unemancipated minor, written consent of parents; waiver); *id.* § 37-10-304 (applicability to minors); *id.* § 39-4-202(f) (Repl. vol. 1982) (notice required to parents of unemancipated, emancipated minors).

UT UTAH CODE ANN. § 76-7-304 (Repl. vol. 1978) (notify minor's parents or husband, if married).

VA VA. CODE ANN. § 18.2-76 (Repl. vol. 1988) (when consent of parent required).

WA WASH. REV. CODE ANN. § 9.02.070(a) (1988) (married, consent of husband; under 18 unmarried, consent of legal guardian).

WV W. VA. CODE § 16-2F-3 (Repl. vol. 1985) (parental notice required, unemancipated minors; waiver); *id.* § 16-2F-4 (waiver of notice; petition); *id.* § 16-2F-5 (emergency exception).

WI WIS. STAT. ANN. § 146.78(5) (West 1989) (parental notice for minor).

A-5 Spousal Participation Requirements

CO COLO. REV. STAT. § 18-6-101(1) (Repl. vol. 1986) (spousal consent requirements).

FL FLA. STAT. § 390.001(4)(b) (1989) (if married, husband gets notice).

IL ILL. ANN. STAT. ch. 40, para. 1015 (Smith-Hurd Supp. 1989) (no spousal liability without consent).

KY KY. REV. STAT. ANN. § 311.735 (Baldwin 1986) (notice to spouse) (probably unconstitutional).

LA LA. REV. STAT. ANN. § 40:1299.33(D) (West 1977) (minor emancipated by marriage, spousal consent).

MT MONT. CODE ANN. § 50-20-107 (1987) (written notice to spouse or parent required; parent if under 18 and unmarried).

RI R.I. GEN. LAWS § 23-4.8-2 (1985) (notify husband); *id.* § 23-4.8-3 (exceptions).

SC S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1985) (third trimester, husband's consent).

SD S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986) (married minor, consent of husband).

UT UTAH CODE ANN. § 76-7-304 (Repl. vol. 1978) (notify minor's parents or husband, if married).

WA WASH. REV. CODE ANN. § 9.02.070(a) (West 1988) (if married, consent of husband).

A-6 Conscience Protection Provisions

AK ALASKA STAT. § 18.16.010(b) (1986) (no requirement for hospital or person to participate; no liability if refuse).

AZ ARIZ. REV. STAT. ANN. § 36-2151 (Repl. vol. 1986) (hospital, person's right to refuse).

AR ARK. STAT. ANN. § 20-16-601 (1987) (refusal to participate; immunity from liability).

CA CAL. HEALTH & SAFETY CODE § 25955 (West Supp. 1989) (refusal to participate); *id.* § 25955.3 (West 1984) (no loss of public benefits).

CO COLO. REV. STAT. § 18-6-104 (Repl. vol. 1986) (failure to comply; no discipline).

DE DEL. CODE ANN. tit. 24, § 1791 (Repl. vol. 1987) (refusal to perform).

FL FLA. STAT. § 390.001(8) (1989) (refusal to participate).

GA GA. CODE ANN. § 16-12-142 (1988) (no requirement for physician or hospital).

HI HAW. REV. STAT. § 453-16(d) (Repl. vol. 1985) (no participation required).

ID IDAHO CODE § 18-612 (Repl. vol. 1987) (refusal to perform; effective upon governor's proclamation).

IL ILL. ANN. STAT. ch. 38, para. 81-33 (Smith-Hurd Supp. 1989) (conscientious objections); *id.* ch. 111½, para. 5201 (Smith-Hurd Supp. 1988) (refusal to recommend or participate); *id.* para. 5301-5314 (Right of Conscience Act).

IN IND. CODE ANN. § 16-10-1-5-8 (hospitals not required to provide abortion services) (Burns 1983); *id.* § 16-10-3-1 (no private denominational hospital required to use facilities for abortions); *id.* § 16-10-3-2 (performance not required).

IA IOWA CODE ANN. § 146.1 (West 1989) (no requirement for persons to assist abortions); *id.* § 146.2 (nonpublic hospital not required to assist abortions).

KS KAN. STAT. ANN. § 65-443 (Repl. vol. 1985) (performance not required, persons); *id.* § 65-444 (refusal to permit, hospital).

KY KY. REV. STAT. ANN. § 311.800(3)-(4) (Baldwin 1986) (no private hospital, physician or staff required).

LA LA. REV. STAT. ANN. § 40:1299.31 (West 1977) (discrimination against persons); *id.* § 40:1299.32 (discrimination against hospital).

ME ME. REV. STAT. ANN. tit. 22, § 1591-92 (Repl. vol. 1980) (immunity and employment protection; discrimination for refusal).

MD MD. HEALTH-GEN. CODE ANN. § 20-214 (Repl. vol. 1987) (participation not required by doctors, hospitals, patients).

MA MASS. ANN. LAWS ch. 112, § 12I (Law. Co-op. 1983) (refusal to participate); *id.* ch. 272, § 21B (Law. Co-op. 1989) (private hospital).

MI MICH. COMP. LAWS ANN. §§ 333.20181-.20182 (West 1980) (hospital, physician, staff not required); *id.* § 333.20183 (refusal to give advice); *id.* § 333.20184 (discrimination).

MN MINN. STAT. ANN. § 145.414 (West 1989) (abortion not mandatory); *id.* § 145.42 (nonliability for refusal to perform).

MO MO. ANN. STAT. § 188.105 (Vernon Supp. 1989) (discrimination by employer); *id.* § 188.110 (discrimination by colleges); *id.* § 197.032 (Vernon 1983) (hospital and medical person may refuse).

MT MONT. CODE ANN. § 50-20-111 (1989) (right to refuse to participate).

NE NEB. REV. STAT. § 28-337 (1985) (not required to admit in hospital clinic); *id.* § 28-338 (not required to perform); *id.* §§ 28-339 to -341 (discrimination).

NJ N.J. STAT. ANN. §§ 2A:65A-1 to -2 (West 1987) (no person or hospital required to perform abortion); *id.* § 2A:65A-3 (nonliability for refusal to perform).

NM N.M. STAT. ANN. § 30-5-2 (Repl. vol. 1984) (persons, hospitals not required to perform abortions).

NY N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1976) (discrimination against person refusing to perform abortion).

NC N.C. GEN. STAT. § 14-45.1(e) (1981) (physician, nurse not required to participate); *id.* § 14-45.1(f) (hospital not required to participate).

ND N.D. CENT. CODE § 23-16-14 (Repl. vol. 1978) (participation in abortion not mandatory).

OK OKLA. STAT. ANN. tit. 63, § 1-741 (West 1984) (refusal to perform).

OR OR. REV. STAT. § 435.475 (1987) (refusal to admit for abortion); *id.* § 435.485 (medical persons not required to participate).

PA 18 PA. CONS. STAT. ANN. § 3202(d) (Purdon 1983) (right of conscience); PA. STAT. ANN. tit. 43, § 955.2 (Purdon Supp. 1989) (hospital immunity from requirement to perform).

RI R.I. GEN. LAWS § 23-17-11 (1985) (protection of nonparticipants).

SC S.C. CODE ANN. § 44-41-40 (Law. Co-op. 1985) (certain hospitals or clinics may refuse); *id.* § 44-41-50 (medical employees not required to aid in abortions).

SD S.D. CODIFIED LAWS ANN. § 34-23A-11 (1986) (counselor not liable); *id.* § 34-23A-12 (no liability for refusal to perform); *id.* § 34-23A-13 (discrimination by medical facility); *id.* § 34-23A-14 (hospital not required to perform).

TN TENN. CODE ANN. § 39-4-204 (Repl. vol. 1982) (right to refuse to perform); *id.* § 39-4-205 (rights of hospital to refuse).

TX TEX. REV. CIV. STAT. ANN. art. 4512.7 (Vernon Supp. 1989) (right not to perform).

UT UTAH CODE ANN. § 76-7-306 (Repl. vol. 1978) (physicians, hospital employees, hospitals not required to participate).

VA VA. CODE ANN. § 18.2-75 (Repl. vol. 1988) (conscience clause).

WA WASH. REV. CODE ANN. § 9.02.080 (West 1988) (objecting to participation).

WV W. VA. CODE § 16-2F-7 (Repl. vol. 1985) (physicians, persons not required to perform).

WI WIS. STAT. ANN. § 448.03(5) (West 1988) (no civil liability).

WY WYO. STAT. § 35-6-105 (1988) (private institutions not required; no liability for refusal); *id.* § 35-6-106 (persons not required).

A-7 Public Funding, Participation Restrictions

AZ ARIZ. REV. STAT. ANN. § 15-1630 (Repl. vol. 1984) (nonlifesaving abortion at state education facility prohibited); *id.* § 35-196.02 (Supp. 1989) (prohibits use of any public funds).

CA CAL. HEALTH & SAFETY CODE § 25955.3 (West 1984) (no loss of privileges or public benefits).

CO COLO. CONST. art. V, § 50; COLO. REV. STAT. §§ 26-4-105.5, 26-15-104.5 (Supp. 1987) (no public funds for abortion; exception).

ID IDAHO CODE §§ 41-2142, 41-2210A (Supp. 1988) (insurance, limitation elective abortions); *id.* § 56-209c (denial of payments for abortions).

IL ILL. ANN. STAT. ch. 23, para. 5-5 (Smith-Hurd 1988) (no medical payment for abortions from Department of Medical Assistance); *id.* para. 6-1 (no financial aid); *id.* para. 7-1 (no local aid).

IN IND. CODE ANN. § 16-10-3-3 (Burns 1983) (state funding of abortion prohibited); *id.* § 35-1-58.5-2.5(e) (Burns Supp. 1988) (county pays for minor's attorney in abortion proceeding).

KY KY. REV. STAT. ANN. § 311.715 (Baldwin 1988) (use of public funds prohibited); *id.* § 311.810 (Baldwin 1986) (no denial of government assistance for accepting or rejecting abortion).

LA LA. REV. STAT. ANN. § 40:1299.34 (West Supp. 1989) (no state employee may counsel abortion); *id.* § 40:1299.34.5 (no use of public funds).

MD MD. HEALTH-GEN. CODE ANN. § 20-208 comment (1987) (state funding not required).

MA MASS. ANN. LAWS ch. 29, § 20(B) (Law Co-op. 1983) (no payment for appropriation for abortion); *id.* ch. 258A, § 3(a) (Supp. 1989) (no emergency rape funds for abortion or abortion counseling).

MN MINN. STAT. ANN. § 145.925 subd. 2 (West 1989) (family planning grants, not for abortion); *id.* § 261.28 (West Supp. 1989) (subsidy for abortions prohibited); *id.* § 256B.40 (subsidy prohibited); *id.* § 393.07 subd. 11 (no welfare funding).

MO MO. ANN. STAT. § 188.205 (Vernon Supp. 1989) (use of public funds prohibited); *id.* § 188.210 (use of public employees prohibited); *id.* § 188.215 (use of public facilities prohibited); *id.* § 208.152(14) (family planning services; no payment for abortions).

NJ N.J. STAT. ANN. § 30:4D-6.1 (West 1981) (funding of abortions, restrictions).

ND N.D. CENT. CODE § 14-02.3-01 (Repl. vol. 1981) (use of public funds restricted); *id.* § 14.02.3-02 (use of family planning, referrals prohibited); *id.* § 14.02.3-04 (abortion in government hospitals restricted).

OH OHIO REV. CODE ANN. § 5101.55(B) (Anderson 1989) (no loss of public benefits for refusal to consent to abortion); *id.* § 5101.55(C) (restrictions on state or public funds).

PA 18 PA. CONS. STAT. ANN. § 3215 (Purdon Supp. 1989) (publicly owned facilities, public officials, public funds); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1989) (expenditure of public funds for abortion limited).

SD S.D. CODIFIED LAWS ANN. § 28-6-4.5 (1984) (public funds not to be used).

UT UTAH CODE ANN. § 26-18-4 (Repl. vol. 1989) (no Medicaid); *id.* § 76-7-322 (Supp. 1989) (public funds for provision of contraceptives or abortion services restricted); *id.* § 76-7-323 (public funds for support entities restricted).

VA VA. CODE ANN. § 32.1-92.1 (Repl. vol. 1985) (funding when pregnancy resulted from rape or incest); *id.* § 32.1-92.2 (funding when physical deformity or mental deficiency in fetus).

WI WIS. STAT. ANN. § 46.24 (West 1987) (assistance to minors concerning abortion notification); *id.* § 59.07(136) (West 1988) (county subsidy restricted); *id.* § 66.04(1)(m) (West Supp. 1989) (municipal subsidy restricted).

WY WYO. STAT. § 35-6-117 (Michie 1988) (use of appropriated funds, exceptions).

A-8 Private Advertising, Promotion, Speech Restrictions

AZ ARIZ. REV. STAT. ANN. § 13-3605 (Repl. vol. 1989) (advertising, misdemeanor).

CA CAL. BUS. & PROF. CODE § 601 (West 1974) (advertisement a felony).

CO COLO. REV. STAT. § 25-1-665 (Repl. vol. 1982) (unlawful to sell or advertise abortion drugs, substances).

CT CONN. GEN. STAT. ANN. § 53-31 (West 1985) (fine for encouraging abortion by public advertisement, lecture, etc.).

FL FLA. STAT. § 797.02 (1989) (advertising drugs, etc., penalty).

ID IDAHO CODE § 18-603 (Repl. vol. 1987) (limiting advertising); *id.* § 18-607 (unauthorized sales of abortifacients).

LA LA. REV. STAT. ANN. § 14:87.4 (West 1986) (abortion advertising).

MD MD. HEALTH-GEN. CODE ANN. § 20-201 (Repl. vol. 1987) (no advertising of abortions; no abortion referral services);

MA MASS. ANN. LAWS ch. 272, § 20 (Law. Co-op. 1970) (penalty for advertising).

MI MICH. COMP. LAWS ANN. § 750.15 (West 1968) (advertising, selling); *id.* § 750.34 (immoral advertising); *id.* § 750.40 (publications).

MN MINN. STAT. ANN. § 617.25 (West 1987) (indecent articles and information); *id.* § 617.26 (mailing, carrying obscene matter).

MS MISS. CODE ANN. § 97-3-5 (1973) (advertising, sale or gift).

MT MONT. CODE ANN. § 50-20-109(4) (1987) (no soliciting, advertising).

NV NEV. REV. STAT. ANN. § 202.200 (Michie 1987) (advertising goods and services to produce miscarriage).

ND N.D. CENT. CODE § 14-02.1-06 (Repl. vol. 1981) (soliciting for abortions prohibited).

OK OKLA. STAT. ANN. tit. 63, § 1-736 (West 1984) (advertisement of counseling to pregnant women).

VT VT. STAT. ANN. tit. 13, § 104 (Supp. 1988) (advertising).

VA VA. CODE ANN. § 18.2-76.1 (Repl. vol. 1988) (encouraging, promoting abortions prohibited).

WI WIS. STAT. ANN. § 943.145 (West Supp. 1988) (criminal trespass to medical facility).

WY WYO. STAT. § 35-6-116 (1988) (advertising).

A-9 Legislative Purpose, Public Policy, Declaration

AL ALA. CODE § 26-21-1 (Supp. 1988) (legislative purpose for parental participation).

AR ARK. STAT. ANN. § 20-16-701 (1987) (intent to regulate abortion consistent with Supreme Court decisions).

CT CONN. GEN. STAT. ANN. § 53-31a (West 1985) (abortion or miscarriage public policy); *id.* § 53-31b (severability) (both sections unconstitutional).

IL ILL. ANN. STAT. ch. 38, para. 81-21 (Smith-Hurd Supp. 1989) (legislative intent); *id.* para. 81-51 (legislative intent, parental consent); *id.* para. 81-62 (legislative purpose and findings).

IN IND. CODE ANN. § 16-10-3-4 (Burns 1983) (childbirth preferred over abortion).

KY KY. REV. STAT. ANN. § 311.710 (Baldwin 1986) (legislative finding).

LA LA. REV. STAT. ANN. § 40:1299.35.0 (West Supp. 1989) (legislative intent).

ME ME. REV. STAT. ANN. tit. 22, § 1596 (Supp. 1989) (abortions).

MA MASS. ANN. LAWS ch. 6, § 15FF (Law Co-op 1988) (prolife month).

MI MICH. COMP. LAWS ANN. § 256B.011 (West 1982) (policy for childbirth and abortion funding); *id.* § 333.9131(2) (West 1980) (clinical abortions not family planning).

MN MINN. STAT. ANN. § 393.07 subd. 11 (West Supp. 1989) (public policy, childbirth over abortion).

MO MO. ANN. STAT. § 1.205 (life begins at conception); *id.* § 188.010 (Vernon Supp. 1989) (intent of general assembly).

MT MONT. CODE ANN. § 50-20-102 (1987) (statement of purpose); *id.* § 50-20-103 (legislative intent).

NE NEB. REV. STAT. § 28-325 (1985) (abortion; declaration of purpose).

ND N.D. CENT. CODE § 14-02.1-01 (Repl. vol. 1981) (purpose of the Abortion Control Act).

PA 18 PA. CONS. STAT. ANN. § 3202 (Purdon 1983) (legislative intent).

RI R.I. CONST. art. I, § 2 (no right granted relating to abortion); R.I. GEN. LAWS § 23-4.8-1 (1985) (declaration of purpose for spousal notice).

TN TENN. CODE ANN. § 37-10-301 (Supp. 1988) (legislative intent for parental consent).

UT UTAH CODE ANN. § 78-11-23 (Repl. vol. 1987) (right-to-life policy).

WV W. VA. CODE § 16-2F-1 (Repl. vol. 1985) (legislative findings and intent; parental notice).

A-10 Disposition of Aborted Fetuses Regulations

AZ ARIZ. REV. STAT. ANN. § 36-329 (Repl. vol. 1986) (fetal death registration; delayed report; interment; disposal).

AR ARK. STAT. ANN. §§ 20-17-801, 20-17-802(a) (1987) (doctor's choice; dispose like other tissue).

CA CAL. HEALTH & SAFETY CODE § 25957 (West 1984) (disposal, storage).

FL FLA. STAT. § 390.001(7) (1989) (fetal remains).

GA GA. CODE ANN. § 16-12-141.1 (1988) (disposal of fetus).

LA LA. REV. STAT. ANN. § 40:1299.35.14 (West Supp. 1989) (disposal of remains) (held unconstitutional in Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986)).

MN MINN. STAT. ANN. § 145.1621 (West 1989) (disposition of fetus).

MS MISS. CODE ANN. § 41-39-1 (1981) (disposal of fetus).

MT MONT. CODE ANN. § 50-20-105 (1987) (disposition).

NY N.Y. PUB. HEALTH LAW § 4162 (McKinney 1985 & Supp. 1989) (fetal deaths, burial); *id.* § 4164(4) (McKinney 1985) (disposal of aborted child).

ND N.D. CENT. CODE § 14-02.1-09 (Repl. vol. 1981) (humane disposal).

WY WYO. STAT. § 35-6-109 (1988) (disposal).

A-11 Fetal Experimentation and Transplantation Restrictions

AZ ARIZ. REV. STAT. ANN. § 36-2302 (Repl. vol. 1986) (experimentation prohibition); *id.* § 36-2303 (violation class-five felony).

AR ARK. STAT. ANN. § 20-17-802(b)(1) (1987) (no experiments if born alive); *id.* § 20-17-802(b)(2) (no experiments if born dead, without mother's permission); *id.* § 20-17-802(c)-(d) (no sale, exchange).

CA CAL. HEALTH & SAFETY CODE § 25956 (West 1984) (research restrictions, fetal remains); *id.* § 25957 (fetal remains, experimentation).

FL FLA. STAT. § 390.001(6) (1989) (experimentation prohibited; exceptions).

IL ILL. ANN. STAT. ch. 38, para. 81-26(7) (Smith-Hurd Supp. 1989) (no sale or experimentation of fetus); *id.* para. 81-31 (analysis of fetal tissue); *id.* para. 81-32.1 (use not prohibited if fetal tissue not result of abortion).

IN IND. CODE ANN. § 35-1-58.5-6 (Burns 1986) (experimentation, transport prohibited; class A misdemeanor).

KY KY. REV. STAT. ANN. § 436.026 (Baldwin 1986) (sale, transportation of viable aborted child for experimentation prohibited).

LA LA. REV. STAT. ANN. § 14:87.2 (West 1986) (human experimentation, live fetus); *id.* § 40:1299.35.13 (West Supp. 1989) (experimentation).

ME ME. REV. STAT. ANN. tit. 22, § 1593 (Repl. vol. 1980) (sale or use of fetus).

MA MASS. ANN. LAWS ch. 112, § 12J(a)(I)-(IV) (Law. Co-op. 1985) (experimentation prohibited; no sale or transfer of fetus).

MI MICH. COMP. LAWS ANN. §§ 333.2685-.2687, .2689 (West 1980) (human research); *id.* § 333.2690 (sale, transfer).

MN MINN. STAT. ANN. § 145.422 (West 1989) (experimentation or sale).

MO MO. ANN. STAT. § 188.036 (Vernon Supp. 1989) (prohibited abortions); *id.* § 188.037 (Vernon 1983) (fetal experimentation).

MT MONT. CODE ANN. § 50-20-108(3) (1987) (no experimentation of premature infant born alive).

NE NEB. REV. STAT. § 28-246 (1985) (experimentation prohibited); *id.* § 28-342 (aborted child).

NV NEV. REV. STAT. ANN. § 451.015 (Michie 1987) (commercial use prohibited).

NM N.M. STAT. ANN. §§ 24-9A-1 to -7 (1986) (Maternal, Fetal, and Infant Experimentation Act).

ND N.D. CENT. CODE § 14.02.2-01 (Repl. vol. 1981) (live fetal experimentation); *id.* § 14.02.2-02 (experiments on dead fetus).

OH OHIO REV. CODE ANN. § 2919.14 (Anderson 1987) (experimentation, selling aborted fetus prohibited).

OK OKLA. STAT. ANN. tit. 63, § 1-735 (West 1984) (sale, experimentation).

PA 18 PA. CONS. STAT. ANN. § 3216 (Purdon 1983) (fetal experimentation).

RI R.I. GEN. LAWS §§ 11-54-1 to -2 (Supp. 1988) (experimentation on fetus prohibited).

SD S.D. CODIFIED LAWS ANN. § 34-23A-17 (1986) (consent required for experimentation).

TN TENN. CODE ANN. § 39-4-208 (Repl. vol. 1982) (research, sale, experimentation).

UT UTAH CODE ANN. § 76-7-310 (Repl. vol. 1978) (experimentation prohibited); *id.* § 76-7-311 (selling, buying prohibited).

WY WYO. STAT. § 35-6-115 (1988) (penalty for giving away live or viable child for experimentation).

A-12 Feticide Restrictions

CA CAL. PENAL CODE § 187(a) (West 1987) (unlawful killing of fetus is murder); *id.* § 270 (failure to provide necessaries for preborn child).

GA GA. CODE ANN. § 16-5-80 (1988) (feticide if quick; life imprisonment).

IA IOWA CODE ANN. § 707.7 (West 1979) (feticide, class C felony; attempted feticide is a class D felony).

LA LA. REV. STAT. ANN. § 14:2(7) (West 1986) (person, for criminal purposes, includes unborn from conception).

ME ME. REV. STAT. ANN. tit. 22, § 1594 (Supp. 1988) (failure to preserve life, subject to homicide laws).

MI MICH. COMP. LAWS ANN. § 750.322 (West 1968) (willful killing of unborn quick child); *id.* § 750.323 (death of quick child; medicine).

MN MINN. STAT. ANN. § 609.21(3) (West 1987) (vehicular homicide of unborn child); *id.* §§ 609.266-.2691 (crimes against unborn; murder; manslaughter).

MS MISS. CODE ANN. § 97-3-37 (1972) (homicide, killing of unborn quick child).

NM N.M. STAT. ANN. § 30-3-7 (Supp. 1988) (injury to pregnant woman); *id.* § 66-8-101.1 (1978) (vehicular).

OK OKLA. STAT. ANN. tit. 21, § 713 (West 1983) (manslaughter to kill quick unborn child).

PA 18 PA. CONS. STAT. ANN. § 3212 (Purdon 1983) (infanticide).

RI R.I. GEN. LAWS § 11-23-5 (1981) (manslaughter if quick unborn child).

A-13 Wrongful Birth/Life/Death Regulation

CA CAL. CIV. CODE § 43.6 (West 1982) (parental immunity from liability).

ID IDAHO CODE § 5-334 (Supp. 1988) (act or omission preventing abortion not actionable).

IL ILL. ANN. STAT. ch. 70, para. 2.2 (Smith-Hurd 1988) (no wrongful death action).

IN IND. CODE ANN. § 34-1-1-11 (Burns Supp. 1988) (no actions for wrongful life).

ME ME. REV. STAT. ANN. tit. 22, § 1594 (Repl. vol. 1964) (failure to preserve life, wrongful death).

MN MINN. STAT. ANN. § 145.424 (West 1989) (prohibition of tort actions for act or omission causing no abortion).

MO MO. ANN. STAT. § 188.130 (Vernon Supp. 1989) (no cause of action for not causing abortion).

NV NEV. REV. STAT. ANN. § 442.270 (Michie 1987) (failure to exercise reasonable care to preserve life, wrongful death).

ND N.D. CENT. CODE § 32-03-43 (Supp. 1987) (wrongful life action prohibited).

SD S.D. CODIFIED LAWS ANN. §§ 21-55-1 to -4 (1987) (action for damages for not causing abortion prohibited).

UT UTAH CODE ANN. § 78-11-24 (Repl. vol. 1987) (act or omission not causing abortion not actionable).

A-14 General Criminal Prohibitions

AL ALA. CODE § 13A-13-7 (1975) (inducing abortion, fine and prison); *id.* § 26-21-6 (Supp. 1988) (penalties for violating parental participation, class A misdemeanors).

AK ALASKA STAT. § 18.16010(c) (1986) (knowing violation of abortion restrictions, fine, imprisonment).

AZ ARIZ. REV. STAT. ANN. § 13-3603 (Repl. vol. 1989) (nonlifesaving abortion prohibited, two to five years in prison); *id.* § 13-3604 (solicitation, submission, one to five years); *id.* § 36-2152(C) (Supp. 1989) (failure of parental notification, class one misdemeanor).

AR ARK. STAT. ANN. § 5-61-101 (1987) (nondoctor abortion); *id.* § 5-61-102(b) (unlawful abortion, one to five years); *id.* § 20-16-704 (viability violation, class A misdemeanor); *id.* § 20-17-802(f) (experimentation, class A misdemeanor).

CA CAL. PENAL CODE § 187 (West 1988) (murder defined; death of fetus); *id.* § 274 (supplying or administering abortifacient; exception; punishment); *id.* § 275 (soliciting or submitting to abortifacient; exception; punishment); *id.* § 276 (soliciting use of abortifacient); *id.* § 1108 (West 1985) (abortion, corroboration of testimony); *id.* § 11413 (West Supp. 1989) (terrorism, arson, proabortion or antiabortion facilities); *id.* § 12022.9 (termination of pregnancy without consent of woman).

CO COLO. REV. STAT. § 18-6-102 (Repl. vol. 1986) (elements of offense of criminal abortion); *id.* § 18-6-103 (pretended criminal abortion); *id.* § 18-6-105 (distributing abortifacients, class 1 misdemeanor).

CT CONN. GEN. STAT. ANN. § 53-29 (West 1985) (attempt to procure abortion; fine or imprisonment); *id.* § 53-30 (woman may be fined or imprisoned) (all held unconstitutional); *id.* § 53-31 (encouraging abortion, class D felony).

DE DEL. CODE ANN. tit. 11, § 651 (Repl. vol. 1987) (abortion, class D felony); *id.* § 652 (self-abortion, class A misdemeanor); *id.* § 653 (issuing abortional articles, class B misdemeanor); *id.* tit. 24, § 1795 (live birth, violation, class A misdemeanor); *id.* § 1766(b) (felony if title 24 violated).

FL FLA. STAT. § 390.001(10)(a) (1989) (penalties for violations, third-degree felony); *id.* § 390.001(10)(b) (if results in death of woman, second-degree felony); *id.* § 390.025 (penalty first degree misdemeanor for violation, referral agencies); *id.* § 797.03 (1989) (second-degree misdemeanor for willful violation of prohibited acts).

GA GA. CODE ANN. § 15-11-118 (Supp. 1989) (violations of parental notification); *id.* § 16-12-140 (1988) (criminal abortion, penalty); *id.* § 16-12-143 (failure to file reports misdemeanor).

HI HAW. REV. STAT. § 453.16(c) (Repl. vol. 1985) (knowing violation; fine, imprisonment).

ID IDAHO CODE § 18-605 (Repl. vol. 1987) (unlawful abortions, procurement; felony); *id.* § 18-606 (unlawful abortion; accomplice felony); *id.* § 18-607 (abortifacients, unlawful sale, misdemeanor); *id.* § 18-614 (abortion, procurement; effective upon governor's proclamation); *id.* § 18-615 (submission to abortion; effective upon governor's proclamation).

IL ILL. ANN. STAT. ch. 38, para. 81-23.1 (Smith-Hurd Supp. 1989) (violation, class-two felony); *id.* para. 81-25 (violation, class two felony); *id.* para. 81-26 (violation, class-three felony); *id.* para. 81-31 (violation, class A misdemeanor violations, unprofessional conduct); *id.* para. 81-31.1 (abortion referral fee, class-four felony); *id.* para. 81-55 (violations); *id.* para. 81-68 (penalty).

IN IND. CODE ANN. § 35-1-58.5-4 (Burns 1985) (penalties for performing illegal abortions).

IA IOWA CODE ANN. § 707.7 (West 1979) (performing abortions without license, class C felony); *id.* § 707.8 (nonconsensual termination); *id.* § 707.9 (murder of fetus aborted alive, class B felony).

KS KAN. STAT. ANN. § 21-3407 (Repl. vol. 1988) (criminal abortion, class D felony).

KY KY. REV. STAT. ANN. § 311.990 (Baldwin 1986) (criminal, civil penalties); *id.* § 436.026 (imprisonment for experimentation).

LA LA. REV. STAT. ANN. § 14:87 (West 1986) (imprisonment for committing abortion); *id.* § 14:87.1 (killing a child during delivery); *id.* § 14:87.2 (human experimentation); *id.* § 14:87.4 (advertising); *id.* § 14:87.5 (aborted viable fetus); *id.* § 14.88 (distribution of abortifacients); *id.* § 40:1299.35.18 (West Supp. 1989) (penalties); *id.* § 40:66 (West 1977 & Supp. 1989) (failure to complete form, misdemeanor); LA. CODE CRIM. PROC. ANN. art. 465 (West 1966 & Supp. 1989) (indictment form).

ME ME. REV. STAT. ANN. tit. 22, § 1593 (Repl. vol. 1980) (punishment, sale or use of fetus); *id.* § 1598(4) (abortions after viability, criminal).

MD MD. HEALTH-GEN. CODE ANN. § 20-206 (Repl. vol. 1987) (penalty for abortion referral services violations); *id.* § 20-210 (1987 & Supp. 1988) (unlawful acts); *id.* § 20-211(e) (1987) (penalty for not giving information).

MA MASS. ANN. LAWS ch. 112, § 12J(a)(V)-(VII) (Law. Co-op. 1985) (violation, imprisonment, defense); *id.* § 12N (punishment for violation of 12L or 12M); *id.* § 12T (violations of 12O to 12R, punishment); *id.* ch. 272, § 19 (procuring miscarriage); *id.* 20 (Law. Co-op. 1980) (penalty for advertising); *id.* § 21 (instruments for abortion); *id.* ch. 277, § 79 (indictment, form).

MI MICH. COMP LAWS ANN. § 333.2691 (West 1980) (violations of §§ 333.2685 to .2690); *id.* § 333.20199(2) (violations of §§ 333.20181 to .20184); *id.* § 750.14 (West 1968) (intent to procure); *id.* § 750.15 (drugs, medicine); *id.* § 750.34 (immoral advertising); *id.* § 750.40 (publications); *id.* § 750.149 (compounding offenses); *id.* § 750.322 (willful killing unborn quick); *id.* § 750.323 (death of quick child, medicine); *id.* § 767.2 (West 1982) (manslaughter).

MN MINN. STAT. ANN. § 144.343 subd. 5 (West 1989) (penalty); *id.* § 145.412 (criminal acts); *id.* § 617.20 (West 1987) (drugs to produce miscarriage); *id.* § 617.25 (indecent articles and information); *id.* § 617.26 (mailing and carrying obscene matter).

MS MISS. CODE ANN. § 41-41-61 (Supp. 1988) (penalties for violations of confidence); *id.* § 97-3-3 (1972) (abortion): *id.* § 97-3-5 (advertisement, etc.).

MO Mo. Ann. Stat. § 188.035 (Vernon 1983) (death of child aborted alive); *id.* § 188.070 (breach of confidentiality); *id.* § 188.075 (violation of §§ 188.010-.085); *id.* § 188.080 (Vernon 1983 & Supp. 1989) (abortion by person other than physician).

MT Mont. Code Ann. § 50-20-106 (1987) (violation is misdemeanor); *id.* § 50-20-108 (protection of premature infants born alive, felony); *id.* § 50-20-109 (violation of (1)-(3) felony; violation of (4), misdemeanor); *id.* § 50-20-110 (violation of reporting requirements, misdemeanor); *id.* § 50-20-112 (penalties).

NE Neb. Rev. Stat. § 28-328 (1985) (abortion without informed consent, class II misdemeanor); *id.* § 28-332 (penalty for violations); *id.* 28-335 (licensed physician); *id.* § 28-336 (unaccepted medical procedures); *id.* § 28-339 (discrimination); *id.* § 28-342, -346 (experimentation); *id.* § 28-344 (reporting form violation); *id.* § 28-706 (1985 & Supp. 1988) (criminal nonsupport).

NV Nev. Rev. Stat. Ann. § 200.220 (Michie 1987) (woman taking drugs to terminate pregnancy); *id.* § 201.120 (abortion, punishment); *id.* § 201.130 (selling drugs to produce miscarriage); *id.* § 202.200 (advertising, misdemeanor); *id.* § 442.257 (criminal penalty).

NH N.H. Rev. Stat. Ann. § 585:12 (1986) (attempt to procure miscarriage); *id.* § 585.13 (intent to destroy quick child); *id.* § 585.14 (penalty for causing death to woman); *id.* § 630.1(IV) (fetus not included under capital murder statute).

NM N.M. Stat. Ann. § 24-9A-6 (Repl. vol. 1986) (penalties); *id.* § 125.15(2) (manslaughter second degree); *id.* § 125.20(3) (manslaughter first degree); *id.* § 125.40 (abortion in second degree); *id.* § 30-5-3 (1984) (criminal abortions).

NY N.Y. Penal Law § 125.00 (McKinney 1987) (homicide definition includes abortion); *id.* § 125.45 (abortion in first degree); *id.* § 125.50 (self-abortion in second degree); *id.* § 125.55 (self-abortion in first degree); *id.* § 125.60 (unlawfully procuring miscarriage); *id.* § 265.00(17)(b) (McKinney 1980) (serious offense includes issuing abortion articles); N.Y. Crim. Proc. Law § 700.05 (McKinney 1984) ("designated offense").

NC N.C. Gen. Stat. §§ 14-44 to -46 (1981) (using drugs or instruments to destroy unborn child, to produce miscarriage, or to injure pregnant woman; concealing birth of child).

ND N.D. Cent. Code § 12.1-17.1-02 (Supp. 1987) (murder of unborn child); *id.* § 12.1-17.1-03 (manslaughter of unborn child); *id.* § 12.1-17.1-04 (negligent homicide of unborn child); *id.* § 12.1-17.1-05 (aggravated assault of unborn child); *id.* § 12.1-17.1-06 (assault of unborn child); *id.* § 12.1-17.1-07 (exceptions); *id.* § 14-02.1-04(4)-(5) (Repl. vol. 1981) (penalties, unlawful abortions); *id.* 14-02.1-05 (penalties, failure to preserve viable child); *id.* § 14-02.1-08 (protection of viable fetus born alive); *id.* § 14-02.1-10 (concealing stillbirth); *id.* § 14-02.1-11 (general penalty); *id.* § 14-02.3-05 (penalty).

OH Ohio Rev. Code Ann. § 2919.12(D) (Anderson 1987) (unlawful abortion); *id.* § 2919.13 (abortion manslaughter).

OK Okla. Stat. Ann. tit. 21, § 713 (West 1983) (killing unborn quick child; manslaughter); *id.* § 714 (procuring destruction of unborn child); *id.* § 861 (procuring an abortion); *id.* § 862 (submitting to, soliciting attempt to commit abortion); *id.* § 863 (concealing stillbirth; death); *id.* tit. 63, § 1-731(A) (West 1984) (persons who perform; violations, penalties); *id.* § 1-732(F) (homicide).

OR Or. Rev. Stat. § 435.990 (1987) (penalties).

PA 18 Pa. Cons. Stat. Ann. § 3213 (Purdon 1983 & Supp. 1989) (prohibited acts); *id.* § 3218 (criminal penalties).

RI R.I. GEN. LAWS § 11-9-18 (Supp. 1988) (care of babies born alive during attempted abortions); *id.* § 11-54-2 (penalties); *id.* § 23-4.8-4 (1985) (penalties).

SC S.C. CODE ANN. § 16-1-10 (Law. Co-op. 1988) (illegal abortion is felony); *id.* § 44-41-80 (Law. Co-op. 1985) (performing, soliciting unlawful abortion).

SD S.D. CODIFIED LAWS ANN. § 22-17-5 (1988) (unauthorized abortion is felony); *id.* § 22-17-6 (intentional killing of fetus by injury to mother); *id.* § 34-23A-10.2 (1986) (statement of informed consent, misdemeanor report of physician's conviction).

TN TENN. CODE ANN. § 37-10-306 (Supp. 1988) (violations); *id.* § 39-4-201 (Repl. vol. 1982) (criminal abortions); *id.* § 39-4-206 (violation of section is felony); *id.* § 39-4-208 (violation of section is felony).

TX TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (destroying unborn child).

UT UTAH CODE ANN. § 76-7-314 (Repl. vol. 1978) (violations); *id.* § 76-7-324 (Supp. 1989) (violation of restriction of public funds).

VT VT. STAT. ANN. tit. 13, § 101 (1974) (definition and punishment); *id.* § 103 (joining with murder indictment).

VA VA. CODE ANN. § 18.2-71 (1988) (penalty for producing abortion).

WA WASH. REV. CODE ANN. § 9.02.010 (West 1988) (definition of punishment); *id.* § 9.02.020 (pregnant women attempt abortion); *id.* § 9.02.030 (selling drugs, instruments to procure abortion); *id.* § 9.02.050 (concealing birth).

WV W. VA. CODE § 16-2F-8 (Repl. vol. 1985) (penalties for performing abortions on unemancipated minors); *id.* § 61-2-8 (Repl. vol. 1989) (abortion, homicide as result of; penalty); *id.* § 62-9-5 (form of indictment).

WI WIS. STAT. ANN. § 940.04 (West 1982) (abortion); *id.* § 940.13 (West Supp. 1988) (abortion exception for women); *id.* § 940.15 (abortion); *id.* § 943.145 (criminal trespass).

WY WYO. STAT. § 35-6-110 (1988) (penalty for violations); *id.* § 35-6-111 (penalty for person other than physician who performs abortion); *id.* § 35-6-112 (penalty for using other means); *id.* § 35-6-113 (penalty).

A-15 Miscellaneous Regulations

AL ALA. CODE § 26-21-3 (Supp. 1988) (written consent to perform abortion on unemancipated minor).

AK ALASKA STAT. § 18.16.010(a)(4) (Supp. 1988) (domicile or presence, 30 days).

AR ARK. STAT. ANN. § 20-16-702 (1987) (definitions); *id.* § 26-65-302 (court permission if guardian consents for incapacitated person).

CA CAL. BUS. & PROF. CODE § 2660 (discipline of physical therapists); *id.* § 2746.6 (West Supp. 1989) (discipline of nurse-midwife for aiding); *id.* §§ 2761(2)(c), 2878(2)(c) (discipline of nurses for aiding); *id.* § 4521 (discipline of psychiatric technicians); CAL. HEALTH & SAFETY CODE § 429.50 (West 1979) (California Department of Health Services may compile data for study); *id.* § 464 (Chapter 11: Therapeutic Abortion Act; lists of family planning clinics); CAL. FOOD & AGRIC. CODE §§ 13121-13130 (West 1986) (Birth Defect Prevention Act); *id.* § 13122 (prevent pesticide-induced abortions); CAL. PENAL CODE §§ 3405, 4028 (West Supp. 1989) (restrictions on prisoners); CAL. WELF. & INST. CODE §§ 220, 1773 (West 1984) (no restrictions for inmates).

CO COLO. REV. STAT. § 12-36-117(b) (Repl. vol. 1985) (unprofessional conduct to aid in criminal abortion).

DE DEL. CODE ANN. tit. 11, § 222(22) (Repl. vol. 1987) (therapeutic abortion defined); *id.* § 654 (defined); *id.* tit. 24, § 1792 (no person shall assist in unlawful abortion); *id.* § 1793 (residency requirements).

FL FLA. STAT. § 390.001(1) (1989) (definitions); *id.* § 406.11(1)(a)(9) (exam by medical examiner when criminal abortion); *id.* § 462.14(z) (revocation of naturopathy license for unlawful termination of pregnancy).

GA GA. CODE ANN. § 15-11-110 (Supp. 1988) (Parental Notification Act); *id.* § 15-11-111 (definitions); *id.* § 15-11-113 (time and notice of waiver hearing); *id.* § 15-11-114 (conduct of hearing, appeal); *id.* § 15-11-115 (applicability to nonresident minors); *id.* § 15-11-117 (immunity of healthcare providers acting in good faith); *id.* § 43-34-37(a)(8) (1988) (discipline physician for criminal abortion).

HI HAW. REV. STAT. § 453-8(1) (Repl. vol. 1985) (revocation of license to practice medicine for criminal abortion); *id.* § 453-16(a)(3) (domicile required; attorney general opinion says this requirement is unconstitutional).

ID IDAHO CODE § 18-604 (Repl. vol. 1987) (definitions); *id.* § 18-611 (physicians may accept patient's representations); *id.* § 18-613 (statutory changes effective upon governor's proclamation; §§ 18-604 to -611 repealed); *id.* § 18-612 to -615 (effective); *id.* § 19-2115 (abortion and abduction, corroborating testimony); *id.* § 32-102 (unborn child as existing person); *id.* § 39-241(c) (definition of fetal death); *id.* § 54-1814 (grounds for medical discipline).

IL ILL. ANN. STAT. ch. 38, para. 81-22 (Smith-Hurd Supp. 1989) (definitions); *id.* para. 81-26(8) (no abortion based on sex of fetus); *id.* para. 81-30.1 (violation, revocation of license); *id.* para. 81-34 (severability); *id.* para. 81-35 (short title); *id.* para. 81-52 (title of act); *id.* para. 81-53 (abortion defined); *id.* para. 81-61 (short title; parental notice); *id.* para. 81-63 (definitions); *id.* para. 81-68.1 (invalidity, severability); *id.* ch. 111, para. 4267 (physical therapists, disciplinary actions for aiding); *id.* para. 4400-22 (disciplinary grounds; elective abortion); *id.* ch. 111 1.2, para. 87-9 (1988) (abortion services not required by act); *id.* ch. 127, para. 526 (Smith-Hurd Supp. 1989) (health benefits do not include expenses of abortion).

IN IND. CODE ANN. § 35-1-58.5-1 (Burns 1985) (definitions).

IA IOWA CODE ANN. § 205.1 (West 1987) (sale of abortifacients); *id.* § 205.2 (exception); *id.* § 707.10 (West 1979) (duty to preserve life of fetus).

KS KAN. STAT. ANN. § 65-2837(b)(5) (Supp. 1988) (professional incompetency).

KY KY. REV. STAT. ANN. § 211.027 (Baldwin 1986) (rules and regulations by cabinet for human resources); *id.* § 304.5-160 (insurance rider for elective abortions); *id.* § 311.720 (definitions) (subsections (6), (8) unconstitutional); *id.* § 311.790 (birth and death certificates for child born alive after attempted abortion); *id.* § 311.820 (no fee for counseling on abortion); *id.* § 311.830 (severability).

LA LA. REV. STAT. ANN. § 14:87 (West 1986) (definition of abortion); *id.* § 37:1285 (West 1985) (physicians, revocation of license for aiding after viability); *id.* § 40:1299.35.1 (West Supp. 1989) (definitions); *id.* § 40:62 (1977) (abortion; purpose of section); *id.* § 40:63 (forms for collection of data); *id.* § 40:65 (completion of forms).

ME ME. REV. STAT. ANN. tit. 22, § 1595 (Repl. vol. 1980) (definition of live born and live birth); *id.* § 1596 (Supp. 1989) (abortion data).

MD MD. HEALTH-GEN. CODE ANN. § 20-202 (Repl. vol. 1987) (no agreement with abortion referral service in another state); *id.* § 20-203 (registration of abortion referral services); *id.* § 20-204 (fee-splitting prohibition); *id.* § 20-205 (rules, regulations, referral services); *id.* § 20-207 (physician defined).

MA MASS. ANN. LAWS ch. 6, § 15FF (Law. Co-op. 1988) (prolife month); *id.* ch. 32A, §§ 4, 10C, 14 (Law. Co-op. Supp. 1989) (insurance, state employees); *id.* ch. 32B, §§ 3, 16 (insurance, policy subdivision); *id.* ch. 112, § 12J(b) (Law. Co-op. 1987 & 1985) (legal procedures); *id.* § 12K (definitions applicable to §§ 12L-12U); *id.* § 12U (enjoining abortion); *id.* ch. 176G, § 17 (Law. Co-op. 1987) (health maintenance organizations; no payment for abortions).

MI MICH. COMP. LAWS ANN. § 380.1507 (West 1988) (schools and school districts, reproductive health education programs); *id.* § 767.72 (West 1982) (dying declarations).

MN MINN. STAT. ANN. § 62D.20 (West Supp. 1989) (rules; health maintenance organizations; abortions); *id.* § 145.411 (West 1989) (definitions); *id.* § 145.421 (definitions); *id.* § 145.423 (abortions; live births); *id.* § 147.091(c) (physician; conviction of felony); *id.* § 148.75(d) (physical therapist revocation); *id.* § 390.32 subd. 1(1) (West 1986 & Supp. 1989) (investigation of deaths arising from criminal abortion); *id.* § 617.21 (West 1987) (evidence).

MS MISS. CODE ANN. § 41-41-51 (Supp. 1988) (definitions); *id.* § 41-41-55 (applicability; court proceedings, standard for waiver of consent requirement); *id.* § 41-41-57 (exception for medical emergencies); *id.* § 41-41-59 (violation as prima facie unprofessional conduct); *id.* § 41-41-61 (confidentiality of records); *id.* § 41-41-63 (severability); *id.* § 41-61-59 (report death to medical examiner); *id.* § 73-25-29(5) (physician, revocation of license if abortion not medically indicated).

MO MO. ANN. STAT. § 58.451 (Vernon 1966 & Supp. 1989) (death by criminal action); *id.* § 58.455 (death certificate); *id.* § 188.015 (Vernon 1983 & Supp. 1989) (definitions); *id.* § 188.047 (Vernon 1983) (tissue sample); *id.* § 188.060 (records retained 7 years); *id.* § 188.065 (revocation of license); *id.* § 188.085 (not exclusive); *id.* § 188.100 (Vernon Supp. 1989) (definitions); *id.* § 188.115 (severability clause); *id.* § 188.120 (cause of action); *id.* § 188.200 (definitions); *id.* § 188.220 (taxpayer standing); *id.* § 376.805 (elective abortion, insurance).

MT MONT. CODE ANN. § 37-3-322 (1987) (unprofessional conduct; performing abortion against law); *id.* § 41-1-103 (rights of unborn children); *id.* § 50-20-101 (short title "Montana Abortion Control Act"); *id.* § 50-20-104 (definitions).

NE NEB. REV. STAT. § 28-326 (Supp. 1988) (terms defined); *id.* § 28-331 (1985) (care and treatment of child aborted; born alive); *id.* § 71-148(8) (1986 & Supp. 1988) (license revocation).

NV NEV. REV. STAT. ANN. § 175.301 (Michie 1987) (trial for unlawful abortion; corroborative evidence); *id.* § 201.120 (abortion; definition); *id.* § 201.140 (evidence; witness must testify); *id.* § 442.240 (defined); *id.* § 442.268 (civil immunity for judicially authorized abortion); *id.* § 630A.370(4) (homeopathic physicians, unlawful abortion); *id.* §§ 632.220(6)(b), .320(6)(b) (nurses, aiding abortions); *id.* § 633.131(1)(i) (osteopathic physician; unlawful abortions); *id.* § 634.018(2) (chiropractic unprofessional conduct: aiding criminal abortion).

NJ N.J. STAT. ANN. § 2A:65A-4 (West 1987) (severability); *id.* § 45:9-16(c) (Supp. 1989) (medical license revoked for criminal abortion).

NM N.M. STAT. ANN. § 30-5-1 (Repl. vol. 1984) (definitions); *id.* § 61-6-14(B)(1) (Repl. vol. 1986) (physician license revoked for performing criminal abortion); *id.* § 61-10A-5(A) (Repl. vol. 1980) (osteopathic physician's assistant; license revoked for criminal abortion).

NY N.Y. EXEC. LAW § 291(3) (McKinney 1982) (opportunity for medical treatment for aborted infant born alive); N.Y. GEN. BUS. LAW § 394-e (McKinney 1984) (report on request for abortion services); N.Y. JUD. LAW § 4 (McKinney 1983) (court not open to public for abortion); N.Y. PENAL LAW § 125.05 (McKinney 1987); N.Y. PUB. HEALTH LAW § 17 (McKinney Supp. 1989) (release of medical records concerning abortion not to parents).

NC N.C. GEN. STAT. § 90-14(a)(2) (Supp. 1988) (revocation of license for unlawful abortion).

ND N.D. CENT. CODE § 14-02.1-02 (Repl. vol. 1981) (definitions); *id.* § 14-02.3-03 (payment by health insurance policies).

OH OHIO REV. CODE ANN. § 2701.15 (Anderson 1981) (court may not order abortion); *id.* § 2919.11 (Anderson 1987) (definitions); *id.* § 2919.12(E) (civil liability); *id.* § 4731.22(21) (physician, discipline for violating abortion rules); *id.* § 4734.09 (chiropractor cannot perform abortions).

OK OKLA. STAT. ANN. tit. 59, § 509(1) (West 1971 & Supp. 1989) (unprofessional conduct definition); *id.* § 524 (West Supp. 1989) (abortion, infant prematurely born alive right to medical treatment); *id.* tit. 63, § 1-730 (West 1984) (definitions); *id.* tit. 63, § 938(a) (types of deaths to be investigated).

OR OR. REV. STAT. § 432.120 (1987) (records, disclosure rule); *id.* § 435.435 (effect of refusal to consent to termination); *id.* § 465.110 (places used for unlawful abortion, nuisance); *id.* § 659.029 (employment discrimination); *id.* § 685.110(4) (revocation of naturopath license for performing abortion).

PA 18 PA. CONS. STAT. ANN. § 3201 (Purdon & Supp. 1989) (Abortion Control Act); *id.* § 3203 (definitions); *id.* § 3217 (civil penalties); *id.* § 3219 (State Board of Medical Education and Licensure Act); 42 *id.* § 6144 (Purdon 1982) (dying declarations in case of abortion).

RI R.I. GEN. LAWS § 23-4.7-1 (1985) (abortion defined); *id.* § 23-4.7-4 (emergency); *id.* § 23-4.7-7 (liability of physician); *id.* § 23-4.7-8 (severability); *id.* § 23-4.8-5 (severability); *id.* § 27-18-28 (Supp. 1988) (health insurance); *id.* § 36-12-2.1 (1986) (health insurance for employees; abortions excluded).

SC S.C. CODE ANN. § 44-41-10 (Law. Co-op. 1985) (definitions).

SD S.D. CODIFIED LAWS ANN. § 34-23A-1 (1986) (definitions); *id.* § 34-23A-2 (lawful only under specified conditions); *id.* § 34-23A-16 (birth certificate for live birth resulting from abortion); *id.* § 34-23A-16.1 (right to life of babies born alive); *id.* § 34-23A-18 (abortion as evidence in termination of parental rights case); *id.* 34-23A-20 (severability); *id.* § 34-23A-21 (repeal of chapter when states given exclusive authority); *id.* § 36-4-30(1) (unprofessional conduct).

TN TENN. CODE ANN. § 37-10-302 (Supp. 1988) (definitions); *id.* § 37-10-305 (medical emergencies); *id.* § 37-10-307 (civil actions); *id.* § 39-4-201(d) (Repl. vol. 1982) (residency); *id.* § 39-4-206 (rights to medical treatment; infant born alive during abortion; no cause of action for wrongful death); *id.* § 39-4-207 (custody of infant prematurely born alive during abortion); *id.* § 63-1-120(14) (Repl. vol. 1986) (revocation of license); *id.* § 63-9-111(b) (revocation of license, osteopath); *id.* § 68-11-201(1) (Supp. 1988) (definition of ambulatory surgical treatment center).

TX TEX. FAM. CODE ANN. § 12.05 (Vernon 1986) (rights of living child after abortion); *id.* § 15.022 (definition; termination of parental rights of child born alive during abortion); *id.* § 17.011 (living child after abortion); TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1989) (revocation of license).

UT UTAH CODE ANN. § 76-7-301 (Supp. 1989) (definitions); *id.* § 76-7-312 (Repl. vol. 1978) (no intimidation, coercion); *id.* § 76-7-315 (emergency exceptions); *id.* § 76-7-316 (actions not precluded); *id.* § 76-7-317 (Repl. vol. 1989) (separability clause); *id.* § 76-7-321 (Supp. 1989) (definitions); *id.* § 78-11-25 (Repl. vol. 1987) (failure, refusal to prevent birth not a defense).

VT VT. STAT. ANN. tit. 13, § 102 (1974) (dying declaration as evidence in prosecutions under § 101).

VA VA. CODE ANN. § 19.2-8 (Supp. 1988) (limitation of prosecution); *id.* § 54.1-2914(A)(1) (Repl. vol. 1988) (unprofessional conduct).

WA WASH. REV. CODE ANN. § 9.02.010 (West 1988) (defined); *id.* § 9.02.040 (evidence, abortion prosecutions); *id.* § 9.02.070(b) (residence requirement); *id.* § 9.02.090 (act submitted to electorate); *id.* § 18.130.180(18) (West 1989) (unprofessional conduct).

WV W. VA. CODE § 16-2B-2 (Repl. vol. 1985) (abortion not approved method of family planning); *id.* § 16-2F-2 (definitions); *id.* § 16-2F-3 (referral of minor for counseling); *id.* § 16-2F-9 (severability).

WY WYO. STAT. § 35-6-101 (1988) (definitions).

*Prepared by Randall Richards, J.D.

APPENDIX B:

CURRENT FEDERAL STATUTES REGARDING ABORTION

1. 10 U.S.C. § 1093 (1988) (defense appropriations may not be used for abortions).
2. 18 U.S.C. § 552 (1988) (crime for federal officer to violate abortion importation law).*
3. 18 U.S.C. § 1461 (1988) (crime to mail information about abortion).*
4. 18 U.S.C. § 1462(a) (1988) (crime to import abortifacient).*
5. 19 U.S.C. § 1305 (1988) (Tariff Act, importation of illegal abortion material prohibited).*
6. 20 U.S.C.A. § 1687 note (West Supp. 1989) (education, discrimination based on sex or blindness, abortion-neutral).
7. 20 U.S.C.A. § 1688 (West Supp. 1989) (education, discrimination based on sex or blindness, abortion-neutral).
8. 22 U.S.C. § 2151b (1982) (international development funds may not be used for abortion promotion).
9. 22 U.S.C.A. § 2151n (West Supp. 1988) (international development report on international abortion coercion required).
10. 22 U.S.C.A. § 2304 (Supp. V 1987) (international military assistance human rights violation reports include coerced abortion).
11. 29 U.S.C.A. § 706 note (West Supp. 1989) (rehabilitation services antidiscrimination law; abortion neutral). *See supra* 20 U.S.C.A. § 1688 (West Supp. 1989).
12. 29 U.S.C.A. § 794 note (West Supp. 1989) (nondiscrimination under Federal Rehabilitation grants; abortion neutral).
13. 42 U.S.C. § 300a-6 (1982) (Public Health Service prohibition against funding programs using abortion as family-planning method).
14. 42 U.S.C. § 300a-7(b)-(c) (1982) (Public Health Service prohibition of public officials requiring grant recipients to perform, assist, or provide facilities for abortion or discriminating in employment because of beliefs about abortion).
15. 42 U.S.C. § 300a-8 (1982) (Public Health Service penalty for government officer or employee endeavoring to coerce abortion upon beneficiary of federal program).
16. 42 U.S.C. § 300z-5 (1982) (Adolescent Family Life Act demonstration projects; parental consent not required if parents compel abortion).
17. 42 U.S.C. § 300z-10 (1982) (Adolescent Family Life Act demonstration project grants available only to programs not providing abortion counseling).
18. 42 U.S.C. § 1975c(f) (Supp. V 1987) (Civil Rights Commission denied authority to study abortion).
19. 42 U.S.C. § 2000d-4a note (1982) (university civil rights requirements in federally assisted programs; abortion neutral). *See supra* 20 U.S.C.A. § 1688 (West Supp. 1989).
20. 42 U.S.C. § 2000e (1982) (Equal Employment Opportunities provisions do not require health insurance to cover abortion).

21. 42 U.S.C. § 2996(b)(8) (1982) (Legal Services Corporation prohibited from handling abortion litigation).

22. 42 U.S.C.A. § 6107 note (West Supp. 1989) (age discrimination provisions in federally assisted programs; abortion-neutral). *See supra* 20 U.S.C.A. § 1688 (West Supp. 1989).

*Apparently, pre-1973.

APPENDIX C

CHARTS OF GALLUP AND NORC PUBLIC OPINION SURVEYS

TABLE C-1

Summary of the Gallup Polls 1975-1988: National Trends in American Public Opinion Regarding Abortion

Question: "Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?"

	1975	1977	1978	1979	1980	1981	1983	1988
Any Circumstances	21%	22%	22%	22%	25%	23%	23%	24%
Certain Circumstances	54%	55%	55%	54%	53%	52	58%	57%
Illegal	22%	19%	19%	19%	18%	21%	16%	17%
No Opinion	3%	4%	4%	5%	4%	4%	3%	2%

Sources: G. GALLUP, THE GALLUP POLL at 28 (1978); G. GALLUP, THE GALLUP REPORT, No. 281, at 17 (Feb. 1989).

TABLE C-2

GALLUP POLLS, 1978-79 ABORTION: CIRCUMSTANCES WHEN FAVORED

Question: "Now, thinking about the [first] three months of pregnancy, under which of these circumstances do you think abortions should be legal?:

(Respondents were handed a card with six circumstances listed; asked of those who said abortion should be legal only under certain circumstances)

	1977—1st Trimester	1977—2nd Trimester	1977—3rd Trimester
Life Endangered	77%	64%	60%
Rape, Incest	65%	38%	24%
Health Damage	54%	46%	34%
Deformity	45%	39%	28%
Mental Health	42%	31%	24%
Financial	16%	9%	6%
	1979—1st Trimester	1979—2nd Trimester	1979—3rd Trimester
Life Endangered	78%	66%	59%
Rape, Incest	59%	32%	19%
Health Damage	52%	46%	33%
Deformity	44%	37%	28%
Mental Health	42%	31%	22%
Financial	15%	9%	4%

Sources: G. GALLUP, THE GALLUP POLL 134-42 (1979); G. GALLUP, THE GALLUP POLL 32-33 (1978).

TABLE C-3

National Opinion Research Council (University of Chicago): Percentage of Respondents Favoring Specific Circumstances As Legal Grounds For Abortions.*

Question: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion . . .

1) If the woman's own health is seriously endangered by the pregnancy?"
2) If she became pregnant as a result of rape?"
3) If there is a strong chance of serious defect in the baby?"
4) If the family has a very low income and cannot afford any more children?"
5) If she is not married and does not want to marry the man?"
6) If she is married and does not want any more children?"
7) If the woman wants it for any reason?" (not asked prior to 1977)

	1965	1972	1973	1974	1975	1976	1977	1978	1980	1982	1983	1984	1985	1987	1988
1)	73	88	90	90	88	89	88	88	88	89	85	87	87	88	86
2)	59	74	80	83	80	80	80	80	80	83	78	77	78	80	77
3)	57	74	82	83	80	82	83	80	80	81	75	77	76	79	76
4)	22	46	52	52	50	51	52	45	50	50	41	44	42	45	40
5)	18	40	47	48	46	48	47	40	46	47	37	43	40	41	38
6)	16	38	46	45	44	45	44	39	45	46	37	41	39	41	39
7)	—	—	—	—	—	—	36	32	39	39	32	37	36	39	35

*The above results represent the number of "yes" answers to the total number of "yes," "no," "don't know," and "no response" answers.

Sources: J. DAVIS, GENERAL SOCIAL SURVEYS 1972-84 (1984); Telephone interview with T.W. Smith, Director of General Social Surveys, National Opinion Research Center (June 27, 1989) (for 1982, 1985-88); Letter from T.W. Smith, Director of General Social Surveys, National Opinion Research Center (July 5, 1989) (raw data for the years 1972-1988).

APPENDIX D

ABORTION IN THE UNITED STATES

The following chart was compiled from data published by researchers affiliated with the prochoice Alan Guttmacher Institute. They have compiled the most complete and reliable data about abortion in the United States. (The Center for Disease Control publishes abortion statistics also, but it uses state-gathered information, whereas A.G.I. also obtains data from abortion providers). Thus, some C.D.C. annual abortion reports have been 15% underinclusive. *See* C. TIETZE, INDUCED ABORTION: A WORLD REVIEW, 1981, at 19-26 (1981).

Year Married	Number of Abortions Late a **** b	Abortion Rate * a	Abortion Ratio ** a	% Repeat *** b	% Under 19 Yrs. b	% Not Married b	Past 1st Trimester **** b
1972	587,000	—	—	—	—	—	
1973	745,000	16.3	193	—	32.8	71.0	14.6
1974	899,000	19.3	220	15.2	32.5	72.4	12.0
1975	1,034,000	21.7	249	20.5	32.9	73.7	10.8
1976	1,179,000	24.2	265	22.7	32.1	75.4	9.8
1977	1,317,000	26.4	286	26.6	31.3	77.2	9.0
1978	1,410,000	27.7	294	29.5	30.8	76.5	8.9
1979	1,498,000	28.8	297	31.7	30.8	78.5	8.8
1980	1,554,000	29.3	300	33.0	29.6	79.4	8.7
1981	1,577,000	29.3	300	35.1	28.5	81.1	8.8
1982	1,574,000+	28.8	299	36.8	27.5	80.9	8.1
1983	1,575,000++	27.4	294	38.8	27.1	81.3	9.5
1984	1,577,000	28.1	297	—	—	—	—
1985	1,589,000	28.0	298	—	—	—	—
1986	—	—	—	—	—	—	—
1987	—	—	—	42.9	25.5	81.5	

* Per 1,000 women 15-44

** Per 1,000 known pregnancies (live births plus abortions)

*** Women having second or more abortion

**** Thirteen or more weeks from last menstrual period

a CENTER FOR DISEASE CONTROL, ABORTION SURVEILLANCE, ANNUAL SUMMARY, 1978, at Table 1 (1980) (for 1972); Henshow, *Trends in Abortion, 1982-84*, 18 FAM. PLAN. PERSP. 34 (1986); Henshaw, Forrest & Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119, 121 (1984) (for 1981-82); Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63 (1987) (for 1985); Henshaw, Forrest, Sullivan & Titeze, *Abortion Services in the United States, 1979 and 1980*, 14 FAM. PLAN. PERSP. 1, 6 (1982) (for 1973-80) estimated 3%-6% shortfall in data); *Contraception and Abortion Costs Are Tiny Portion of U.S. Health Spending*, 18 FAM. PLAN. PERSP. 37 (1986).

b Forrest, Sullivan & Tietze, *Abortion in the United States, 1977-78*, 11 FAM. PLAN. PERSP. 329 (1979) (for 1973-78); Henshaw, *The Characteristics and Prior Contraceptive Use of U.S. Abortion Patients*, 20 FAM. PLAN. PERSP. 158 (1988) (for 1987); Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 FAM. PLAN. PERSP. 5 (1987) (for 1982-83); Henshaw, Binkin, Blaine & Smith, *A Portrait of American Women*

Who Obtain Abortions, 17 FAM. PLAN. PERSP. 90 (1985) (for 1980-81); Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States, 1979 and 1980*, 15 FAM. PLAN. PERSP. 5 1983) (for 1979-80).

\+ Total cost for all abortions in 1982—$484 million.

\+ + Average amount paid for *1,068,000 first-trimester abortions* in 1983—*$200 per abortion.*