REHNQUIST, C.J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

492 U.S. 490

Webster v. Reproductive Health Services

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88-605 Argued: April 26, 1989 --- Decided: July 3, 1989

CHIEF JUSTICE REHNQUIST announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C, and an opinion with respect [p499] to Parts II-D and III, in which JUSTICE WHITE and JUSTICE KENNEDY join.

This appeal concerns the constitutionality of a Missouri statute regulating the performance of abortions. The United States Court of Appeals for the Eighth Circuit struck down several provisions of the statute on the ground that they violated this Court's decision in Roe v. Wade, 410 U.S. 113 (1973), and cases following it. We noted probable jurisdiction, 488 U.S. 1003 (1989), and now reverse. [p500]

I

In June, 1986, the Governor of Missouri signed into law Missouri Senate Committee Substitute for House Bill No. 1596 (hereinafter Act or statute), which amended existing state law concerning unborn children and abortions. [n1] [p501] The Act consisted of 20 provisions, 5 of which are now before the Court. The first provision, or preamble, contains "findings" by the state legislature that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and wellbeing." Mo.Rev.Stat. §§ 1.205.1(1), (2) (1986). The Act further requires that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents. § 1.205.2. Among its other provisions, the Act requires that, prior to performing an abortion on any woman whom a physician has reason to believe is 20 or more weeks pregnant, the physician ascertain whether the fetus is viable by performing

> such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child.

§ 188. 029. The Act also prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, and it prohibits the use of public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life. §§ 188.205, 188.210, 188.215.

In July, 1986, five health professionals employed by the State and two nonprofit corporations brought this class action in the United States District Court for the Western District of Missouri to challenge the constitutionality of the Missouri statute. Plaintiffs, appellees in this Court, sought declaratory and injunctive relief on the ground that certain statutory provisions violated the First, Fourth, Ninth, and Fourteenth Amendments to the Federal Constitution. App. A9. They asserted violations of various rights, including the "privacy [p502] rights of pregnant women seeking abortions"; the "woman's right to an abortion"; the "righ[t] to privacy in the physician-patient relationship"; the physician's "righ[t] to practice medicine"; the pregnant woman's "right to life due to inherent risks involved in childbirth"; and the woman's right to "receive . . . adequate medical advice and treatment" concerning abortions. Id. at A17-A19.

Plaintiffs filed this suit

> on their own behalf and on behalf of the entire class consisting of facilities and Missouri licensed physicians or other health care professionals offering abortion services or pregnancy counseling and on behalf of the entire class of pregnant females seeking abortion services or pregnancy counseling within the State of Missouri.

Id. at A13. The two nonprofit corporations are Reproductive Health Services, which offers family planning and gynecological services to the public, including abortion services up to 22 weeks "gestational age," [n2] and Planned Parenthood of Kansas City, which provides abortion services up to 14 weeks gestational age. Id. at A9-A10. The individual plaintiffs are three physicians, one nurse, and a social worker. All are "public employees" at "public facilities" in Missouri, and they are paid for their services with "public funds," as those terms are defined by § 188.200. The individual plaintiffs, within the scope of their public employment, encourage and counsel pregnant women to have nontherapeutic abortions. To of the physicians perform abortions. App. A54-A55.

Several weeks after the complaint was filed, the District Court temporarily restrained enforcement of several provisions of the Act. Following a 3-day

trial in December, 1986, the District Court declared seven provisions of the Act unconstitutional and enjoined their enforcement. 662 F.Supp. 407 (WD Mo.1987). These provisions included the preamble, § 1.205; the "informed consent" provision, which required [p503] physicians to inform the pregnant woman of certain facts before performing an abortion, § 188.039; the requirement that post-16-week abortions be performed only in hospitals, § 188.025; the mandated tests to determine viability, § 188.029; and the prohibition on the use of public funds, employees, and facilities to perform or assist nontherapeutic abortions, and the restrictions on the use of public funds, employees, and facilities to encourage or counsel women to have such abortions, §§ 188.205, 188.210, 188.215. Id. at 430.

The Court of Appeals for the Eighth Circuit affirmed, with one exception not relevant to this appeal. 851 F.2d 1071 (1988). The Court of Appeals determined that Missouri's declaration that life begins at conception was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." Id. at 1076. Relying on Colautti v. Franklin, 439 U.S. 379, 388-389 (1979), it further held that the requirement that physicians perform viability tests was an unconstitutional legislative intrusion on a matter of medical skill and judgment. 851 F.2d at 1074-1075. The Court of Appeals invalidated Missouri's prohibition on the use of public facilities and employees to perform or assist abortions not necessary to save the mother's life. Id. at 1081-1083. It distinguished our decisions in Harris v. McRae, 448 U.S. 297 (1980), and Maher v. Roe, 432 U.S. 464 (1977), on the ground that

> "[t]here is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital."

851 F.2d at 1081, quoting Nyberg v. City of Virginia, 667 F.2d 754, 758 (CA8 1982), appeal dism'd, 462 U.S. 1125 (1983). The Court of Appeals struck down the provision prohibiting the use of public funds for "encouraging or counseling" women to have nontherapeutic abortions, for the reason that this provision was both overly vague and inconsistent with the right to an abortion enunciated in Roe v. Wade. 851 F.2d at 1077-1080. The court also invalidated the hospitalization [p504] requirement for 16-week abortions, id. at 1073-1074, and the prohibition on the use of public employees and facilities for abortion counseling, id. at 1077-1080, but the State has not appealed those parts of the judgment below. See Juris. Statement I-II. [n3]

II

Decision of this case requires us to address four sections of the Missouri Act: (a) the preamble; (b) the prohibition on the use of public facilities or employees to perform abortions; (c) the prohibition on public funding of

abortion counseling; and (d) the requirement that physicians conduct viability tests prior to performing abortions. We address these seriatim.

A

The Act's preamble, as noted, sets forth "findings" by the Missouri legislature that "[t]he life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and wellbeing." Mo.Rev.Stat. §§ 1.205.1(1), (2) (1986). The Act then mandates that state laws be interpreted to provide unborn children with "all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," subject to the Constitution and this Court's precedents. § 1.205.2. [n4] In invalidating [p505] the preamble, the Court of Appeals relied on this Court's dictum that "'a State may not adopt one theory of when life begins to justify its regulation of abortions.'" 851 F.2d at 1075-1076, quoting Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444 (1983), in turn citing Roe v. Wade, 410 U.S. at 159-162. It rejected Missouri's claim that the preamble was "abortion-neutral," and "merely determine[d] when life begins in a nonabortion context, a traditional state prerogative." 851 F.2d at 1076. The court thought that "[t]he only plausible inference" from the fact that "every remaining section of the bill save one regulates the performance of abortions" was that "the state intended its abortion regulations to be understood against the backdrop of its theory of life." Ibid. [n5]

The State contends that the preamble itself is precatory, and imposes no substantive restrictions on abortions, and that appellees therefore do not have standing to challenge it. Brief for Appellants 21-24. Appellees, on the other hand, insist that the preamble is an operative part of the Act intended to guide the interpretation of other provisions of the Act. Brief for Appellees 19-23. They maintain, for example, that the preamble's definition of life may prevent physicians [p506] in public hospitals from dispensing certain forms of contraceptives, such as the intrauterine device. Id. at 22.

In our view, the Court of Appeals misconceived the meaning of the Akron dictum, which was only that a State could not "justify" an abortion regulation otherwise invalid under Roe v. Wade on the ground that it embodied the State's view about when life begins. Certainly the preamble does not, by its terms, regulate abortion or any other aspect of appellees' medical practice. The Court has emphasized that Roe v. Wade "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." Maher v. Roe, 432 U.S. at 474. The preamble can be read simply to express that sort of value judgment.

We think the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide. State law has offered protections to unborn children in tort and probate law, see Roe v. Wade, supra, at 161-162,

and § 1.205.2 can be interpreted to do no more than that. What we have, then, is much the same situation that the Court confronted in Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945). As in that case:

> We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure.

Id. at 460. It will be time enough for federal courts to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way. Until then, this [p507] Court

> is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result a to the thing in issue in the case before it.

Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900). See also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982). [n6] We therefore need not pass on the constitutionality of the Act's preamble.

B

Section 188.210 provides that

> [i]t shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother,

while § 188.215 makes it

> unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother. [n7]

The Court of Appeals held that these provisions contravened this Court's abortion decisions. 851 F.2d at 1082-1083. We take the contrary view.

As we said earlier this Term in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989):

> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

In Maher v. Roe, supra, the Court upheld a Connecticut welfare regulation under which Medicaid recipients received payments for medical services related [p508] to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization of childbirth and abortion was impermissible under Roe v. Wade. As the Court put it:

> The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles -- absolute or otherwise -- in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult -- and in some cases, perhaps, impossible -- for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

432 U.S. at 474. Relying on Maher, the Court in Poelker v. Doe, 432 U.S. 519, 521 (1977), held that the city of St. Louis committed

> no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

More recently, in Harris v. McRae, 448 U.S. 297 (1980), the Court upheld "the most restrictive version of the Hyde Amendment," id. at 325, n. 27, which withheld from States federal funds under the Medicaid program to reimburse the costs of abortions, "'except where the life of the mother would be endangered if the fetus were carried to term.'" Ibid. (quoting Pub.L. 94-439, § 209, 90 Stat. 1434). As in Maher and Poelker, the Court required only a showing that Congress' authorization of "reimbursement for medically necessary services generally, but not for certain medically necessary [p509]

abortions" was rationally related to the legitimate governmental goal of encouraging childbirth. 448 U.S. at 325.

The Court of Appeals distinguished these cases on the ground that

> [t]o prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows, and in some cases forecloses, the availability of abortion to women.

851 F.2d at 1081. The court reasoned that the ban on the use of public facilities

> could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance.

Ibid. It also thought that "[s]uch a rule could increase the cost of obtaining an abortion and delay the timing of it as well." Ibid.

We think that this analysis is much like that which we rejected in Maher, Poelker, and McRae. As in those cases, the State's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." McRae, 448 U.S. at 315. Just as Congress' refusal to fund abortions in McRae left

> an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all,

id. at 317, Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital. This circumstance is more easily remedied, and thus considerably less burdensome, than indigency, which "may make it difficult -- and in some cases, perhaps, impossible -- for some women to have abortions" without public funding. Maher, 432 U.S. at 474. Having held that the State's refusal to fund abortions does not violate Roe v. Wade, it strains logic to reach a contrary result for the use [p510] of public facilities and employees. If the State may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds," Maher, supra, at 474, surely it may do so through the allocation of other public resources, such as hospitals and medical staff.

The Court of Appeals sought to distinguish our cases on the additional ground that "[t]he evidence here showed that all of the public facility's costs in providing abortion services are recouped when the patient pays." 851 F.2d at 1083. Absent any expenditure of public funds, the court thought that Missouri was "expressing" more than "its preference for childbirth over abortions," but rather was creating an "obstacle to exercise of the right to choose an abortion [that could not] stand absent a compelling state interest." Ibid. We disagree.

"Constitutional concerns are greatest," we said in Maher, supra, at 476,

> when the State attempts to impose its will by the force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions. Brief for Appellees 46-47. Indeed, if the State does recoup all of its costs in performing abortions, and no state subsidy, direct or indirect, is available, it is difficult to see how any procreational choice is burdened by the State's ban on the use of its facilities or employees for performing abortions. [n8] [p511]

Maher, Poelker, and McRae all support the view that the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so. In Poelker, the suit was filed by an indigent who could not afford to pay for an abortion, but the ban on the performance of nontherapeutic abortions in city-owned hospitals applied whether or not the pregnant woman could pay. 432 U.S. at 520; id. at 524 (BRENNAN, J., dissenting). [n9] The 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, as St. Louis has done.

Id. at 521. Thus we uphold the Act's restrictions on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions.

C

The Missouri Act contains three provisions relating to "encouraging or counseling a woman to have an abortion not necessary to save her life." Section 188.205 states that no public funds can be used for this purpose;

§ 188.210 states that public employees cannot, within the scope of their employment, engage in such speech; and § 188.215 forbids such speech in public facilities. The Court of Appeals did not consider § 188.205 separately from §§ 188.210 and 188.215. It held that all three of these provisions were unconstitutionally vague, and that

> the ban on using public funds, employees, and facilities to encourage or counsel a woman to have an abortion is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving [p512] the medical information necessary to exercise the right knowingly and intelligently.

851 F.2d at 1079. [n10]

Missouri has chosen only to appeal the Court of Appeals' invalidation of the public funding provision, § 188.205. See Juris. Statement I-II. A threshold question is whether this provision reaches primary conduct, or whether it is simply an instruction to the State's fiscal officers not to allocate funds for abortion counseling. We accept, for purposes of decision, the State's claim that § 188.205 "is not directed at the conduct of any physician or health care provider, private or public," but "is directed solely at those persons responsible for expending public funds." Brief for Appellants 43. [n11]

Appellees contend that they are not "adversely" affected under the State's interpretation of § 188.205, and therefore that there is no longer a case or controversy before us on this question. Brief for Appellees 31-32. Plaintiffs are masters of their complaints, and remain so at the appellate stage of a litigation. See Caterpillar Inc. v. Williams, 482 U.S. 386, 398-399 (1987). A majority of the Court agrees with appellees that the controversy over § 188.205 is now moot, because appellees' argument amounts to a decision to no longer seek a declaratory judgment that § 188.205 is unconstitutional and accompanying declarative relief. See Deakins v. Monaghan, 484 U.S. 193, 199-201 (1988); United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950). We accordingly direct the Court of Appeals to vacate the judgment of the District Court [p513] with instructions to dismiss the relevant part of the complaint. Deakins, 484 U.S. at 200.

> Because this [dispute] was rendered moot in part by [appellees'] willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated.

Ibid.

D

Section 188.029 of the Missouri Act provides:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother. [n12]

As with the preamble, the parties disagree over the meaning of this statutory provision. The State emphasizes the language of the first sentence, which speaks in terms of the physician's determination of viability being made by the standards of ordinary skill in the medical profession. Brief for Appellants 32-35. Appellees stress the language of the second sentence, which prescribes such "tests as are necessary" to make a finding of gestational age, fetal weight, and lung maturity. Brief for Appellees 26-30. [p514]

The Court of Appeals read § 188.029 as requiring that, after 20 weeks, "doctors must perform tests to find gestational age, fetal weight and lung maturity." 851 F.2d at 1075, n. 5. The court indicated that the tests needed to determine fetal weight at 20 weeks are "unreliable and inaccurate," and would add $125 to $250 to the cost of an abortion. Ibid. It also stated that

> amniocentesis, the only method available to determine lung maturity, is contrary to accepted medical practice until 28-30 weeks of gestation, expensive, and imposes significant health risks for both the pregnant woman and the fetus.

Ibid.

We must first determine the meaning of § 188.029 under Missouri law. Our usual practice is to defer to the lower court's construction of a state statute, but we believe the Court of Appeals has "fallen into plain error" in this case. Frisby v. Schultz, 487 U.S. 474, 483 (1988); see Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500, n. 9 (1985).

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Philbrook v. Glodgett, 421 U.S. 707, 713 (1975), quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849). See Chemehuevi Tribe of Indians v. FPC,

420 U.S. 395, 402-403 (1975); Kokoszka v. Belford, 417 U.S. 642, 650 (1974). The Court of Appeals' interpretation also runs "afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." Frisby, supra, at 483.

We think the viability testing provision makes sense only if the second sentence is read to require only those tests that are useful to making subsidiary findings as to viability. If we construe this provision to require a physician to perform those tests needed to make the three specified findings in all circumstances, including when the physician's reasonable professional judgment indicates that the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus, the second sentence of § 188.029 would [p515] conflict with the first sentence's requirement that a physician apply his reasonable professional skill and judgment. It would also be incongruous to read this provision, especially the word "necessary," [n13] to require the performance of tests irrelevant to the expressed statutory purpose of determining viability. It thus seems clear to us that the Court of Appeals' construction of § 188.029 violates well-accepted canons of statutory interpretation used in the Missouri courts, see State ex rel. Stern Brothers & Co. v. Stilley, 337 S.W.2d 934, 939 (Mo.1960) ("The basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression"); Bell v. Mid-Century Ins. Co., 750 S.W.2d 708, 710 (Mo.App.1988) ("Interpreting the phrase literally would produce an absurd result, which the Legislature is strongly presumed not to have intended"), which JUSTICE BLACKMUN ignores. Post at 545-546.

The viability testing provision of the Missouri Act is concerned with promoting the State's interest in potential human life, rather than in maternal health. Section 188.029 creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. It also directs the physician's determination as to viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity. The District Court found that "the medical evidence is uncontradicted that a 20-week fetus is not viable," and that "23 1/2 to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability [p516] exists." 662 F.Supp. at 420. But it also found that there may be a 4-week error in estimating gestational age, id. at 421, which supports testing at 20 weeks.

In Roe v. Wade, the Court recognized that the State has "important and legitimate" interests in protecting maternal health and in the potentiality of human life. 410 U.S. at 162. During the second trimester, the State "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." Id. at 164. After viability, when the State's interest in potential human life was held to become compelling, the State

> may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 165. [n14]

In Colautti v. Franklin, 439 U.S. 379 (1979), upon which appellees rely, the Court held that a Pennsylvania statute regulating the standard of care to be used by a physician performing an abortion of a possibly viable fetus was void for vagueness. Id. at 390-401. But in the course of reaching that conclusion, the Court reaffirmed its earlier statement in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 64 (1976), that

> "the determination of whether a particular [p517] fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."

439 U.S. at 396. JUSTICE BLACKMUN, post at 545, n. 6, ignores he statement in Colautti that

> neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus.

439 U.S. at 388-389. To the extent that § 188.029 regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination whether a particular fetus is viable. The Court of Appeals and the District Court thought it unconstitutional for this reason. 851 F.2d at 1074-1075; 662 F.Supp. at 423. To the extent that the viability tests increase the cost of what are in fact second-trimester abortions, their validity may also be questioned under Akron, 462 U.S. at 434-435, where the Court held that a requirement that second-trimester abortions must be performed in hospitals was invalid because it substantially increased the expense of those procedures.

We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in Roe has resulted in subsequent cases like Colautti and Akron making constitutional law in this area a virtual Procrustean bed. Statutes specifying elements of informed consent to be provided abortion patients, for example, were invalidated if they were thought to "structur[e] . . . the dialogue between the woman and her physician." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 763 (1986). As the dissenters in Thornburgh pointed out, such a statute would have been sustained under any traditional

standard of judicial review, id. at 802 (WHITE, J., dissenting), or for any other surgical procedure except abortion. Id. at 783 (Burger, C.J., dissenting). [p518]

Stare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. See United States v. Scott, 437 U.S. 82, 101 (1978). We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice." Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985); see Solorio v. United States, 483 U.S. 435, 448-450 (1987); Erie R. Co. v. Tompkins, 304 U.S. 64, 74-78 (1938). We think the Roe trimester framework falls into that category.

In the first place, the rigid Roe framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the Roe framework -- trimesters and viability -- are not found in the text of the Constitution, or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. [n15] AS JUSTICE WHITE has put it, the trimester framework [p519] has left this Court to serve as the country's "ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 99 (opinion concurring in part and dissenting in part). Cf. Garcia, supra, at 547.

In the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in Thornburgh, writing in the context of the Roe trimester analysis, would have recognized this fact by positing against the "fundamental right" recognized in Roe the State's "compelling interest" in protecting potential human life throughout pregnancy. "[T]he State's interest, if compelling after viability, is equally compelling before viability." Thornburgh, 476 U.S. at 795 (WHITE, J., dissenting); see id. at 828 (O'CONNOR, J., dissenting) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'") (citation omitted).

The tests that § 188.029 requires the physician to perform are designed to determine viability. The State here has chosen viability as the point at which its interest in potential human life must be safeguarded. See Mo.Rev.Stat. § 188.030 (1986) ("No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman"). It is true that the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the viability of the fetus. Since the

tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were, in fact, second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers [p520] the State's interest in protecting potential human life, and we therefore believe § 188.029 to be constitutional.

JUSTICE BLACKMUN takes us to task for our failure to join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe. But Griswold v. Connecticut, unlike Roe, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of Roe v. Wade, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy. That framework sought to deal with areas of medical practice traditionally subject to state regulation, and it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying. The experience of the Court in applying Roe v. Wade in later cases, see supra at 518, n. 15, suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, as the Court described it in Akron, 462 U.S. at 420, n. 1, a "limited fundamental constitutional right," which JUSTICE BLACKMUN today treats Roe as having established, post at 555, or a liberty interest protected by the Due Process Clause, which we believe it to be. The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable -- an end which all concede is legitimate -- and that is sufficient to sustain its constitutionality.

JUSTICE BLACKMUN also accuses us, inter alia, of cowardice and illegitimacy in dealing with "the most politically divisive domestic legal issue of our time." Post at 559. There is [p521] 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 v. Franklin, 439 U.S. 379 (1979), and Akron v. Akron Center for Reproductive Health, Inc., supra. 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 goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today. JUSTICE BLACKMUN's suggestion, post at 538, 557-558, 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.

III

Both appellants and the United States as Amicus Curiae have urged that we overrule our decision in Roe v. Wade. Brief for Appellants 12-18; Brief for United States as Amicus Curiae 8-24. The facts of the present case, however, differ from those at issue in Roe. Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In Roe, on the other hand, the Texas statute criminalized the performance of all abortions, except when the mother's life was at stake. 410 U.S. at 117-118. This case therefore affords us no occasion to revisit the holding of Roe, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, id. at 164, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases. [p522]

Because none of the challenged provisions of the Missouri Act properly before us conflict with the Constitution, the judgment of the Court of Appeals is

Reversed.

[1.] After Roe v. Wade, the State of Missouri's then-existing abortion regulations, see Mo.Rev.Stat. §§ 559.100, 542.380, and 563.300 (1969), were declared unconstitutional by a three-judge federal court. This Court summarily affirmed that judgment. Danforth v. Rodgers, 414 U.S. 1035 (1973). Those statutes, like the Texas statute at issue in Roe, made it a crime to perform an abortion except when the mother's life was at stake. 410 U.S. at 117-118, and n. 2.

In June, 1974, the State enacted House Committee Substitute for House Bill No. 1211, which imposed new regulations on abortions during all stages of pregnancy. Among other things, the 1974 Act defined "viability," § 2(2); required the written consent of the woman prior to an abortion during the first 12 weeks of pregnancy, § 3(2); required the written consent of the woman's spouse prior to an elective abortion during the first 12 weeks of pregnancy, § 3(3); required the written consent of one parent if the woman was under 18 and unmarried prior to an elective abortion during the first 12 weeks of pregnancy, § 3(4); required a physician performing an abortion to exercise professional care to "preserve the life and health of the fetus" regardless of the stage of pregnancy and, if he should fail that duty, deemed him guilty of manslaughter and made him liable for damages, § 6(1); prohibited the use of saline amniocentesis, as a method of abortion, after the first 12 weeks of pregnancy, § 9; and required certain recordkeeping for health facilities and physicians performing abortions, §§ 10, 11. In Planned

Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976), the Court upheld the definition of viability, id. at 63-65, the consent provision in § 3(2), id. at 65-67, and the recordkeeping requirements. Id. at 79-81. It struck down the spousal consent provision, id. at 67-72, the parental consent provision, id. at 72-75, the prohibition on abortions by amniocentesis, id. at 75-79, and the requirement that physicians exercise professional care to preserve the life of the fetus regardless of the stage of pregnancy. Id. at 81-84.

In 1979, Missouri passed legislation that, inter alia, required abortions after 12 weeks to be performed in a hospital, Mo.Rev.Stat. § 188.025 (Supp.1979); required a pathology report for each abortion performed, § 188.047; required the presence of a second physician during abortions performed after viability, § 188.030.3; and required minors to secure parental consent or consent from the juvenile court for an abortion, § 188.028. In Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ascroft, 462 U.S. 476 (1983), the Court struck down the second-trimester hospitalization requirement, id. at 481-482, but upheld the other provisions described above. Id. at 494.

[2.] The Act defines "gestational age" as the "length of pregnancy as measured from the first day of the woman's last menstrual period." Mo.Rev.Stat. § 188.015(4) (1986).

[3.] The State did not appeal the District Court's invalidation of the Act's "informed consent" provision to the Court of Appeals, 851 F.2d at 1073, n. 2, and it is not before us.

[4.] Section 1.205 provides in full:

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

> 3. As used in this section, the term "unborn children" or "unborn child" shall include all unborn child [sic] or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
>
> 4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

[5] Judge Arnold dissented from this part of the Court of Appeals' decision, arguing that Missouri's declaration of when life begins should be upheld "insofar as it relates to subjects other than abortion," such as "creating causes of action against persons other than the mother" for wrongful death or extending the protection of the criminal law to fetuses. 851 F.2d at 1085 (opinion concurring in part and dissenting in part).

[6] Appellees also claim that the legislature's preamble violates the Missouri Constitution. Brief for Appellees 23-26. But the considerations discussed in the text make it equally inappropriate for a federal court to pass upon this claim before the state courts have interpreted the statute.

[7] The statute defines "public employee" to mean "any person employed by this state or any agency or political subdivision thereof." Mo.Rev.Stat. § 188.200(1) (1986). "Public facility" is defined as

> any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivisions thereof.

§ 188.200(2).

[8] A different analysis might apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded. This case might also be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose. See Harris v. McRae, 448 U.S. 297, 317, n.19 (1980).

[9] 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.

Doe v. Poelker, 497 F.2d 1063, 1065 (CA8 1974).

[10] In a separate opinion, Judge Arnold argued that Missouri's prohibition violated the First Amendment because it

> sharply discriminate[s] between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it.

851 F.2d at 1085.

[11] While the Court of Appeals did not address this issue, the District Court thought that the definition of "public funds" in Mo.Rev.Stat. § 188.200 (1986) "certainly is broad enough to make 'encouraging or counseling' unlawful for anyone who is paid from" public funds as defined in § 188.200. 662 F.Supp. 407, 426 (WD Mo.1987).

[12] The Act's penalty provision provides that

> [a]ny person who contrary to the provisions of sections 188.010 to 188.085 knowingly performs . . . any abortion or knowingly fails to perform any action required by [these] sections . . . shall be guilty of a class A misdemeanor.

Mo.Rev.Stat. § 188.075 (1986).

[13] See Black's Law Dictionary 928 (5th ed.1979) ("Necessary. This word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought").

[14] The Court's subsequent cases have reflected this understanding. See Colautti v. Franklin, 439 U.S. 379, 386 (1979) (emphasis added) ("For both logical and biological reasons, we indicated in [in Roe] that the State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy"); id. at 389 ("Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other"); accord, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 61 (State regulation designed to protect potential human life limited to period "subsequent to viability"); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428 (1983), quoting Roe v. Wade, 410 U.S. at 163 (emphasis added) (State's interest in protecting potential human life "becomes compelling only at viability, the point at which the fetus 'has the capability of meaningful life outside the mother's womb'").

[15] For example, the Court has held that a State may require that certain information be given to a woman by a physician or his assistant, Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. at 448, but that it may not require that such information be furnished to her only by the physician himself. Id. at 449. Likewise, a State may require that abortions in the second trimester be performed in clinics, Simopoulos v. Virginia, 462 U.S. 506 (1983), but it may not require that such abortions be performed only in hospitals. Akron, supra, at 437-439. We do not think these distinctions are of any constitutional import in view of our abandonment of the trimester framework. JUSTICE BLACKMUN's claim, post at 539-541, n. 1, that the State goes too far, even under Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); and Harris v. McRae, 448 U.S. 297 (1980), by refusing to permit the use of public facilities, as defined in Mo.Rev.Stat. § 188.200 (1986), for the performance of abortions is another example of the fine distinctions endemic in the Roe framework.help