O'CONNOR, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

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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

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I concur in Parts I, II-A, II-B, and II-C of the Court's opinion.

I

Nothing in the record before us or the opinions below indicates that subsections 1(1) and 1(2) of the preamble to Missouri's abortion regulation statute will affect a woman's decision to have an abortion. JUSTICE STEVENS, following appellees, see Brief for Appellees 22, suggests that the preamble may also "interfer[e] with contraceptive choices," post at 492 U.S. 564"]564, because certain contraceptive devices act on a female ovum after it has been fertilized by a male sperm. The Missouri Act defines "conception" as "the fertilization of the ovum of a female by a sperm of a male," Mo.Rev.Stat. § 188.015(3) (1986), and invests "unborn children" with "protectable interests in life, health, and wellbeing," § 1.205.1(2), from "the moment of conception. . . . " § 1.205.3. JUSTICE STEVENS asserts that any possible interference with a woman's right to use such postfertilization contraceptive devices would be unconstitutional under 564, because certain contraceptive devices act on a female ovum after

it has been fertilized by a male sperm. The Missouri Act defines "conception" as "the fertilization of the ovum of a female by a sperm of a male," Mo.Rev.Stat. § 188.015(3) (1986), and invests "unborn children" with "protectable interests in life, health, and wellbeing," § 1.205.1(2), from "the moment of conception. . . . " § 1.205.3. JUSTICE STEVENS asserts that any possible interference with a woman's right to use such postfertilization contraceptive devices would be unconstitutional under Griswold v. Connecticut, 381 U.S. 479 (1965), and our subsequent contraception cases. Post at 564-566. Similarly, certain amici suggest that the Missouri Act's preamble may prohibit the developing technology of in vitro fertilization, a technique used to aid couples otherwise unable to bear children in which a number of ova are removed from the woman and fertilized by male sperm. This process often produces excess fertilized ova ("unborn children" under the Missouri Act's definition) that are discarded, rather than reinserted into the woman's uterus. Brief for Association of Reproductive Health Professionals [p523] et al. as Amici Curiae 38. It may be correct that the use of post-fertilization contraceptive devices is constitutionally protected by Griswold and its progeny, but, as with a woman's abortion decision, nothing in the record or the opinions below indicates that the preamble will affect a woman's decision to practice contraception. For that matter, nothing in appellees' original complaint, App. 8-21, or their motion in limine to limit testimony and evidence on their challenge to the preamble, id. at 57-59, indicates that appellees sought to enjoin potential violations of Griswold. Neither is there any indication of the possibility that the preamble might be applied to prohibit the performance of in vitro fertilization. I agree with the Court, therefore, that all of these intimations of unconstitutionality are simply too hypothetical to support the use of declaratory judgment procedures and injunctive remedies in this case.

Similarly, it seems to me to follow directly from our previous decisions concerning state or federal funding of abortions, Harris v. McRae, 448 U.S. 297"]448 U.S. 297 (1980), 448 U.S. 297 (1980), Maher v. Roe, 432 U.S. 464"]432 U.S. 464 (1977), and 432 U.S. 464 (1977), and Poelker v. Doe, 432 U.S. 519 (1977), that appellees' facial challenge to the constitutionality of Missouri's ban on the

utilization of public facilities and the participation of public employees in the performance of abortions not necessary to save the life of the mother, Mo.Rev.Stat. §§ 188.210, 188.215 (1986), cannot succeed. Given Missouri's definition of "public facility" as

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

§ 188.200(2), there may be conceivable applications of the ban on the use of public facilities that would be unconstitutional. Appellees and amici suggest that the State could try to enforce the ban against private hospitals using public water and sewage lines, or against private hospitals leasing state-owned equipment or state land. See Brief for Appellees 49-50; Brief for National Association of Public Hospitals as Amicus Curiae [p524] 9-12. Whether some or all of these or other applications of § 188.215 would be constitutional need not be decided here. Maher, Poelker, and McRae stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional, and that is enough to defeat appellees' assertion that the ban is facially unconstitutional.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987).

I also agree with the Court that, under the interpretation of § 188.205 urged by the State and adopted by the Court, there is no longer a case or controversy before us over the constitutionality of that provision. I would note, however, that this interpretation of § 188.205 is not binding on the Supreme Court of Missouri which has the final word on the meaning of that State's statutes. Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 395 (1988); O'Brien v. Skinner, 414 U.S. 524, 531 (1974). Should it happen that § 188.205, as ultimately interpreted by the Missouri Supreme Court, does prohibit publicly employed health professionals from giving specific medical advice to pregnant women,

> the vacation and dismissal of the complaint that has become moot "clears the path for future relitigation of the issues between the parties," should subsequent events rekindle their controversy.

Deakins v. Monaghan, 484 U.S. 193, 201, n. 5 (1988), quoting United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950). Unless such events make their appearance and give rise to relitigation, I agree that we and all federal [p525] courts are without jurisdiction to hear the merits of this moot dispute.

II

In its interpretation of Missouri's "determination of viability" provision, Mo.Rev.Stat. § 188.029 (1986), see ante at 513-521, the plurality has proceeded in a manner unnecessary to deciding the question at hand. I agree with the plurality that it was plain error for the Court of Appeals to interpret the second sentence of § 188.029 as meaning that "doctors must perform tests to find gestational age, fetal weight and lung maturity." 851 F.2d at 1075, n. 5 (emphasis in original). When read together with the first sentence of § 188.029 -- which requires a physician to determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions

-- it would be contradictory nonsense to read the second sentence as requiring a physician to perform viability examinations and tests in situations where it would be careless and imprudent to do so. The plurality is quite correct:

> 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,

ante at 514, and, I would add, only those examinations and tests that it would not be imprudent or careless to perform in the particular medical situation before the physician.

Unlike the plurality, I do not understand these viability testing requirements to conflict with any of the Court's past decisions concerning state regulation of abortion. Therefore, there is no necessity to accept the State's invitation to reexamine the constitutional validity of Roe v. Wade, 410 U.S. 113 (1973). Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so, for "[t]he Court will not 'anticipate a question of constitutional law in advance of the [p526] necessity of deciding it.'" Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), quoting Liverpool, New York and Philadelphia S. S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). Neither will it generally "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 297 U.S. at 347. Quite simply, "[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." Burton v. United States, 196 U.S. 283, 295 (1905). The Court today has accepted the State's every interpretation of its abortion statute, and has upheld, under our existing precedents, every provision of that statute which is properly before us. Precisely for this reason, reconsideration of Roe falls not into any "good-cause exception" to this "fundamental rule of judicial restraint. . . ." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C., 467 U.S. 138, 157 (1984). See post at 532-533 (SCALIA, J., concurring in part and concurring in judgment).

When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of Roe v. Wade, there will be time enough to reexamine Roe. And to do so carefully.

In assessing § 188.029, it is especially important to recognize that appellees did not appeal the District Court's ruling that the first sentence of § 188.029 is constitutional. 662 F.Supp. at 420-422. There is, accordingly, no dispute between the parties before us over the constitutionality of the "presumption of viability at 20 weeks," ante at 492 U.S. 515"]515, created by the first sentence of § 188.029. If anything might arguably conflict with the Court's previous decisions concerning the determination of viability, I would think it is the introduction of this presumption. The plurality, see ante at 515, refers to a passage from 515, created by the first sentence of § 188.029. If anything might arguably conflict with the Court's previous decisions concerning the determination of viability, I would think it is the introduction of this presumption. The plurality, see ante at 515, refers to a passage from Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 64 (1976):

> The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must [p527] be, a matter for the judgment of the responsible attending physician.

The 20-week presumption of viability in the first sentence of § 188.029, it could be argued (though, I would think, unsuccessfully), restricts "the judgment of the responsible attending physician," by imposing on that physician the burden of overcoming the presumption. This presumption may be a "superimpos[ition] [of] state regulation on the medical determination whether a particular fetus is viable," ante at 517, but, if so, it is a restriction on the physician's judgment that is not before us. As the plurality properly interprets the second sentence of § 188.029, it does nothing more than delineate means by which the unchallenged 20-week presumption of viability may be overcome if those means are useful in doing so and can

be prudently employed. Contrary to the plurality's suggestion, see ante at 517, the District Court did not think the second sentence of § 188.029 unconstitutional for this reason. Rather, both the District Court and the Court of Appeals thought the second sentence to be unconstitutional precisely because they interpreted that sentence to impose state regulation on the determination of viability that it does not impose.

Appellees suggest that the interpretation of § 188. 029 urged by the State may "virtually eliminat[e] the constitutional issue in this case." Brief for Appellees 30. Appellees therefore propose that we should abstain from deciding that provision's constitutionality "in order to allow the state courts to render the saving construction the State has proposed." Ibid. Where the lower court has so clearly fallen into error, I do not think abstention is necessary or prudent. Accordingly, I consider the constitutionality of the second sentence of § 188.029, as interpreted by the State, to determine whether the constitutional issue is actually eliminated.

I do not think the second sentence of § 188.029, as interpreted by the Court, imposes a degree of state regulation on the medical determination of viability that in any way conflicts with prior decisions of this Court. As the plurality [p528] recognizes, the requirement that, where not imprudent, physicians perform examinations and tests useful to making subsidiary findings to determine viability "promot[es] the State's interest in potential human life, rather than in maternal health." Ante at 515. No decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible. Quite the contrary. In Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), the Court considered a constitutional challenge to a Pennsylvania statute requiring that a second physician be present during an abortion performed "when viability is possible." Id. at 769-770. For guidance, the Court looked to the earlier decision in Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983), upholding a Missouri statute requiring the presence of a second physician during an abortion performed after viability. Id. at 482-486 (opinion of Powell, J.); id. at 505

(O'CONNOR, J., concurring in judgment in part and dissenting in part). The Thornburgh majority struck down the Pennsylvania statute merely because the statute had no exception for emergency situations, and not because it found a constitutional difference between the State's promotion of its interest in potential life when viability is possible and when viability is certain. 476 U.S. at 770-771. Despite the clear recognition by the Thornburgh majority that the Pennsylvania and Missouri statutes differed in this respect, there is no hint in the opinion of the Thornburgh Court that the State's interest in potential life differs depending on whether it seeks to further that interest postviability or when viability is possible. Thus, all nine Members of the Thornburgh Court appear to have agreed that it is not constitutionally impermissible for the State to enact regulations designed to protect the State's interest in potential life when viability is possible. See id. at 811 (WHITE, J., dissenting); id. at 832 (O'CONNOR, J., dissenting). That is exactly what Missouri has done in § 188.029. [p529]

Similarly, the basis for reliance by the District Court and the Court of Appeals below on Colautti v. Franklin, 439 U.S. 379 (1979), disappears when § 188.029 is properly interpreted. In Colautti, the Court observed:

> Because this point [of viability] may differ with each pregnancy, 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. Viability is the critical point.

Id. at 388-389. The courts below, on the interpretation of § 188.029 rejected here, found the second sentence of that provision at odds with this passage from Colautti. See 851 F.2d at 1074; 662 F.Supp. at 423. On this Court's interpretation of § 188.029, it is clear that Missouri has not substituted any of the "elements entering into the ascertainment of viability" as "the determinant of when the State has a compelling interest in the

life or health of the fetus." All the second sentence of § 188.029 does is to require, when not imprudent, the performance of "those tests that are useful to making subsidiary findings as to viability." Ante at 514 (emphasis added). Thus, consistent with Colautti, viability remains the "critical point" under § 188.029.

Finally, and rather half-heartedly, the plurality suggests that the marginal increase in the cost of an abortion created by Missouri's viability testing provision may make § 188.029, even as interpreted, suspect under this Court's decision in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 434-439 (1983), striking down a second-trimester hospitalization requirement. See ante at 517. I dissented from the Court's opinion in Akron because it was my view that, even apart from Roe's trimester framework, which I continue to consider problematic, see Thornburgh, supra, at [p530] 828 (dissenting opinion), the Akron majority had distorted and misapplied its own standard for evaluating state regulation of abortion which the Court had applied with fair consistency in the past: that, previability, "a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion." Akron, supra, at 453 (dissenting opinion) (internal quotations omitted).

It is clear to me that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision. On this ground alone, I would reject the suggestion that § 188.029 as interpreted is unconstitutional. More to the point, however, just as I see no conflict between § 188.029 and Colautti or any decision of this Court concerning a State's ability to give effect to its interest in potential life, I see no conflict between § 188.029 and the Court's opinion in Akron. The second-trimester hospitalization requirement struck down in Akron imposed, in the majority's view, "a heavy, and unnecessary, burden," 462 U.S. at 438, more than doubling the cost of "women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." Ibid.; see also id. at 434. By contrast, the cost of examinations and tests that could

usefully and prudently be performed when a woman is 20-24 weeks pregnant to determine whether the fetus is viable would only marginally, if at all, increase the cost of an abortion. See Brief for American Association of Prolife Obstetricians and Gynecologists et al. as Amici Curiae 3 ("At twenty weeks gestation, an ultrasound examination to determine gestational age is standard medical practice. It is routinely provided by the plaintiff clinics. An ultrasound examination can effectively provide all three designated findings of sec. 188.029"); id. at 22 ("A finding of fetal weight can be obtained from the same ultrasound test used to determine gestational age"); id. at 25 ("There are a number of different [p531] methods in standard medical practice to determine fetal lung maturity at twenty or more weeks gestation. The most simple and most obvious is by inference. It is well known that fetal lungs do not mature until 33-34 weeks gestation. . . . If an assessment of the gestational age indicates that the child is less than thirty-three weeks, a general finding can be made that the fetal lungs are not mature. This finding can then be used by the physician in making his determination of viability under section 188.029"); cf. Brief for American Medical Association et al. as Amici Curiae 42 (no suggestion that fetal weight and gestational age cannot be determined from the same sonogram); id. at 43 (another clinical test for gestational age and, by inference, fetal weight and lung maturity, is an accurate report of the last menstrual period), citing Smith, Frey, & Johnson, Assessing Gestational Age, 33 Am.Fam.Physician 215, 219-220 (1986).

Moreover, the examinations and tests required by § 188.029 are to be performed when viability is possible. This feature of § 188.029 distinguishes it from the second-trimester hospitalization requirement struck down by the Akron majority. As the Court recognized in Thornburgh, the State's compelling interest in potential life postviability renders its interest in determining the critical point of viability equally compelling. See supra at 527-528. Under the Court's precedents, the same cannot be said for the Akron second-trimester hospitalization requirement. As I understand the Court's opinion in Akron, therefore, the plurality's suggestion today that Akron casts doubt on the validity of § 188.029, even as the Court has

interpreted it, is without foundation, and cannot provide a basis for reevaluating Roe. Accordingly, because the Court of Appeals misinterpreted § 188.029, and because, properly interpreted, § 188.029 is not inconsistent with any of this Court's prior precedents, I would reverse the decision of the Court of Appeals.

In sum, I concur in Parts I, II-A, II-B, and II-C of the Court's opinion and concur in the judgment as to Part II-D. [p532]

SCALIA, J., Concurring Opinion

SUPREME COURT OF THE UNITED STATES

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JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join Parts I, II-A, II-B, and II-C of the opinion of the Court. As to Part II-D, I share JUSTICE BLACKMUN's view, *post* at 556, that it effectively would overrule *Roe v. Wade,* 410 U.S. 113 (1973). I think that should be done, but would do it more explicitly. Since today we contrive to avoid doing it, and indeed to avoid almost any decision of national import, I need not set forth my reasons, some of which have been well recited in dissents of my

colleagues in other cases. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 786-797 (1986) (WHITE, J., dissenting); *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 453-459 (1983) (O'CONNOR, J., dissenting); *Roe v. Wade, supra,* at 172-178 (REHNQUIST, J., dissenting); *Doe v. Bolton,* 410 U.S. 179, 221-223 (1973) (WHITE, J., dissenting).

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business, since the answers to most of the cruel questions posed are political, and not juridical -- a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.

JUSTICE O'CONNOR's assertion, *ante* at 526, that a "'fundamental rule of judicial restraint'" requires us to avoid reconsidering *Roe,* cannot be taken seriously. By finessing *Roe* we do not, as she suggests, *ante* at 526, adhere to the strict and venerable rule that we should avoid "'decid[ing] questions of a constitutional nature.'" We have not disposed of this case on some statutory or procedural ground, but have decided, and could not avoid deciding, whether the Missouri statute meets the requirements of the United States Constitution. [p533] The only choice available is whether, in deciding that constitutional question, we should use *Roe v. Wade* as the benchmark, or something else. What is involved, therefore, is not the rule of avoiding constitutional issues where possible, but the quite separate principle that we will not "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ante* at 526. The latter is a sound general principle, but one often departed from when good reason exists. Just this Term, for example, in an opinion authored by JUSTICE O'CONNOR, despite the fact that we had already held a racially based set-aside unconstitutional because unsupported by evidence of identified discrimination, which was all that was needed to decide the case, we went on to outline

the criteria for properly tailoring race-based remedies in cases where such evidence is present. *Richmond v. J. A. Croson Co.,* 488 U.S. 469, 506-508 (1989). Also this Term, in an opinion joined by JUSTICE O'CONNOR, we announced the constitutional rule that deprivation of the right to confer with counsel during trial violates the Sixth Amendment even if no prejudice can be shown, despite our finding that there had been no such deprivation on the facts before us -- which was all that was needed to decide that case. *Perry v. Leeke,* 488 U.S. 272, 278-280 (1989); *see id.* at 285 (KENNEDY, J., concurring in part). I have not identified with certainty the first instance of our deciding a case on broader constitutional grounds than absolutely necessary, but it is assuredly no later than *Marbury v. Madison,* 1 Cranch 137 (1803), where we held that mandamus could constitutionally issue against the Secretary of State, although that was unnecessary given our holding that the law authorizing issuance of the mandamus by this Court was unconstitutional.

The Court has often spoken more broadly than needed in precisely the fashion at issue here, announcing a new rule of constitutional law when it could have reached the identical result by applying the rule thereby displaced. To describe [p534] two recent opinions that JUSTICE O'CONNOR joined: In *Daniels v. Williams,* 474 U.S. 327 (1986), we overruled our prior holding that a "deprivation" of liberty or property could occur through negligent governmental acts, ignoring the availability of the alternative constitutional ground that, even if a deprivation had occurred, the State's postdeprivation remedies satisfied due process, *see id.* at 340-343 (STEVENS, J., concurring in judgment). In *Illinois v. Gates,* 462 U.S. 213 (1983), we replaced the preexisting "two-pronged" constitutional test for probable cause with a totality-of-the-circumstances approach, ignoring the concurrence's argument that the same outcome could have been reached under the old test, *see id.* at 267-272 (WHITE, J., concurring in judgment). It is rare, of course, that the Court goes out of its way to *acknowledge* that its judgment could have been reached under the old constitutional rule, making its adoption of the new one unnecessary to the decision, but even such explicit acknowledgment is not unheard of. *See Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981); *Perez v. Campbell,* 402 U.S. 637

(1971). For a sampling of other cases where the availability of a narrower, well-established ground is simply ignored in the Court's opinion adopting a new constitutional rule, though pointed out in separate opinions of some Justices, *see Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976); *Pointer v. Texas,* 380 U.S. 400 (1965); and *Mapp v. Ohio,* 367 U.S. 643 (1961). It would be wrong, in any decision, to ignore the reality that our policy not to "formulate a rule of constitutional law broader than is required by the precise facts" has a frequently applied good-cause exception. But it seems particularly perverse to convert the policy into an absolute in the present case, in order to place beyond reach the inexpressibly "broader than was required by the precise facts" structure established by *Roe v. Wade.* The real question, then, is whether there are valid reasons to go beyond the most stingy possible holding today. It seems to me there are not only valid but compelling ones. [p535] Ordinarily, speaking no more broadly than is absolutely required avoids throwing settled law into confusion; doing so today preserves a chaos that is evident to anyone who can read and count. Alone sufficient to justify a broad holding is the fact that our retaining control, through *Roe,* of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court. We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us -- their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will -- to follow the popular will. Indeed, I expect we can look forward to even more of that than before, given our indecisive decision today. And if these reasons for taking the unexceptional course of reaching a broader holding are not enough, then consider the nature of the constitutional question we avoid: in most cases, we do no harm by not speaking more broadly than the decision requires. Anyone affected by the conduct that the avoided holding would have prohibited will be able to challenge it himself and have his day in court to make the argument. Not so with respect to the harm that many States believed, pre-*Roe,* and many may continue to believe, is caused by largely unrestricted abortion. That will continue to occur if the States have the constitutional

power to prohibit it, and would do so, but we skillfully avoid telling them so. Perhaps those abortions cannot constitutionally be proscribed. That is surely an arguable question, the question that reconsideration of *Roe v. Wade* entails. But what is not at all arguable, it seems to me, is that we should decide now, and not insist that we be run into a corner before we grudgingly yield up our judgment. The only sound reason for the latter course is to prevent a change in the law -- but to think that desirable begs the question to be decided. [p536]

It was an arguable question today whether § 188.029 of the Missouri law contravened this Court's understanding of *Roe v. Wade,* [*] and I would have examined *Roe*rather than [p537] examining the contravention. Given the Court's newly contracted abstemiousness, what will it take, one must wonder, to permit us to reach that fundamental question? The result of our vote today is that we will not reconsider that prior opinion, even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it -- and even then (under our newly discovered "no broader than necessary" requirement) only minor problematical aspects of *Roe* will be reconsidered, unless one expects state legislatures to adopt provisions whose compliance with *Roe* cannot even be argued with a straight face. It thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade,* must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.

Of the four courses we might have chosen today -- to reaffirm *Roe,* to overrule it explicitly, to overrule it *sub silentio,* or to avoid the question -- the last is the least responsible. On the question of the constitutionality of § 188.029, I concur in the judgment of the Court and strongly dissent from the manner in which it has been reached.

[*] That question, compared with the question whether we should reconsider and reverse Roe, is hardly worth a footnote, but I think JUSTICE O'CONNOR answers that incorrectly as well. In Roe v. Wade, 410 U.S. 113, 165-166 (1973), we said that

> the physician [has the right] to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention.

We have subsequently made clear that it is also a matter of medical judgment when viability (one of those points) is reached.

> The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 64 (1976). Section 188.029 conflicts with the purpose, and hence the fair import, of this principle, because it will sometimes require a physician to perform tests that he would not otherwise have performed to determine whether a fetus is viable. It is therefore a legislative imposition on the judgment of the physician, and one that increases the cost of an abortion.

JUSTICE O'CONNOR would nevertheless uphold the law because it "does not impose an undue burden on a woman's abortion decision." *Ante* at 492 U.S. 530"]530. This conclusion is supported by the observation that the required tests impose only a marginal cost on the abortion procedure, far less of an increase than the cost-doubling hospitalization requirement invalidated in 530. This conclusion is supported by the observation that the required tests impose only a marginal cost on the abortion procedure, far less of an increase than the cost-doubling hospitalization requirement invalidated in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). *See ante* at 530-531. The fact that the challenged regulation is less costly than what we struck down in *Akron* tells us only that we cannot decide the present case on the basis of that earlier decision. It does not tell us whether the present requirement is an "undue burden," and I know of no basis for determining that this particular burden (or any other for that matter) is "due." One could with equal justification conclude that it is not. To avoid the

> question of *Roe v. Wade's* validity, with the attendant costs that this will have for the Court and for the principles of self-governance, on the basis of a standard that offers "no guide but the Court's own discretion," *Baldwin v. Missouri,* 281 U.S. 586, 595 (1930) (Holmes, J., dissenting), merely adds to the irrationality of what we do today.

Similarly irrational is the new concept that JUSTICE O'CONNOR introduces into the law in order to achieve her result, the notion of a State's "interest in potential life when viability is possible." *Ante* at 528. Since "viability" means the mere *possibility* (not the certainty) of survivability outside the womb, "possible viability" must mean the possibility of a possibility of survivability outside the womb. Perhaps our next opinion will expand the third trimester into the second even further, by approving state action designed to take account of "the chance of possible viability."