BLACKMUN, J., Concurring and Dissenting Opinion

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

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

Today, *Roe v. Wade,* 410 U.S. 113 (1973), and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive, but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and JUSTICE SCALIA would overrule *Roe* (the first silently, the other explicitly) and would return to the States [p538] virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term. Although today, no less than yesterday, the Constitution and the decisions of this Court prohibit a State from enacting laws that inhibit women from the meaningful exercise of that right, a plurality of this Court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that, sometime down the line, the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973. Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions.

Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort to read the real meaning out of the Missouri statute to its intended evisceration of precedents and its deafening silence about the constitutional protections that it would jettison, the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed," albeit "modif[ied] and narrow[ed]." *Ante* at 521. But this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and

knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State. The simple truth is that *Roe* would not survive the plurality's analysis, and that the plurality provides no substitute for *Roe*'s protective umbrella.

I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court.

I dissent. [p539]

I

THE CHIEF JUSTICE parades through the four challenged sections of the Missouri statute *seriatim.* I shall not do this, but shall relegate most of my comments as to those sections to the margin. [n1] Although I disagree with the Court's consideration [p540] of §§ 1.205, 188.210, and 188.215, and am especially disturbed by its misapplication of our past decisions in upholding Missouri's ban on the performance of abortions at [p541] "public facilities," its discussion of these provisions is merely prologue to the plurality's consideration of the statute's viability testing requirement, § 188.029 -- the only section of the Missouri statute that the plurality construes as implicating *Roe* itself. There, tucked away at the end of its opinion, the plurality suggests a radical reversal of the law of abortion; and there, primarily, I direct my attention.

In the plurality's view, the viability testing provision imposes a burden on second-trimester abortions as a way of furthering the State's interest in protecting the potential life of the fetus. Since, under the *Roe* framework, the State may not fully regulate abortion in the interest of potential life (as opposed to maternal health) until the third trimester, the plurality finds it necessary, in order to save the Missouri testing provision, to throw out *Roe's* trimester framework. *Ante* at 518-520. In flat contradiction to *Roe,* 410 U.S. at 163, the plurality concludes that the State's interest in potential life is compelling before viability, and upholds the testing provision [p542] because it "permissibly furthers" that state interest. *Ante* at 519.

A

At the outset, I note that, in its haste to limit abortion rights, the plurality compounds the errors of its analysis by needlessly reaching out to address constitutional questions that are not actually presented. The conflict between § 188.029 and *Roe's* trimester framework, which purportedly drives the plurality to reconsider our past decisions, is a contrived conflict: the product

of an aggressive misreading of the viability testing requirement and a needlessly wooden application of the *Roe* framework.

The plurality's reading of § 188.029 is irreconcilable with the plain language of the statute, and is in derogation of this Court's settled view that "'district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'" *Frisby v. Schultz*, 487 U.S. 474, 482 (1988), quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985). Abruptly setting aside the construction of § 188.029 adopted by both the District Court and Court of Appeals as "plain error," the plurality reads the viability testing provision as requiring only that, before a physician may perform an abortion on a woman whom he believes to be carrying a fetus of 20 or more weeks gestational age, the doctor must determine whether the fetus is viable and, as part of that exercise, must, to the extent feasible and consistent with sound medical practice, conduct tests necessary to make findings of gestational age, weight, and lung maturity. *Ante* at 514-517. But the plurality's reading of the provision, according to which the statute requires the physician to perform tests only in order to determine *viability*, ignores the statutory language explicitly directing that

> 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

in the mother's medical record. § 188.029 (emphasis added). The [p543] statute's plain language requires the physician to undertake whatever tests are necessary to determine gestational age, weight, and lung maturity, regardless of whether these tests are necessary to a finding of viability, and regardless of whether the tests subject the pregnant woman or the fetus to additional health risks or add substantially to the cost of an abortion. [n2]

Had the plurality read the statute as written, it would have had no cause to reconsider the *Roe* framework. As properly construed, the viability testing provision does not pass constitutional muster under even a rational basis standard, the least restrictive level of review applied by this Court. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). By mandating tests to determine fetal weight and lung maturity for every fetus thought to be more than 20 weeks gestational age, the statute requires physicians to undertake procedures, such as amniocentesis, that, in the situation presented, have no medical justification, impose significant additional health risks on both the pregnant woman and the fetus, and bear no rational relation to the State's interest in protecting fetal life. [n3] As written, § 188.029 is an arbitrary imposition of discomfort, risk, and expense, furthering no discernible interest except to make the procurement of an abortion as arduous and difficult as possible. Thus, were it not for [p544] the plurality's tortured effort to avoid

the plain import of § 188.029, it could have struck down the testing provision as patently irrational irrespective of the *Roe* framework. [n4]

The plurality eschews this straightforward resolution in the hope of precipitating a constitutional crisis. Far from avoiding constitutional difficulty, the plurality attempts to engineer a dramatic retrenchment in our jurisprudence by exaggerating the conflict between its untenable construction of § 188.029 and the *Roe* trimester framework.

No one contests that, under the *Roe* framework, the State, in order to promote its interest in potential human life, may regulate and even proscribe nontherapeutic abortions once the fetus becomes viable. *Roe,* 410 U.S. at 164-165. If, as the plurality appears to hold, the testing provision simply requires a physician to use appropriate and medically sound tests to determine whether the fetus is actually viable when the estimated gestational age is greater than 20 weeks (and therefore within what the District Court found to be the margin of error for viability, *ante* at 515-516), then I see little or no conflict with *Roe.* [n5] Nothing in *Roe,* or any of its progeny, holds that a State may not effectuate its compelling interest in the potential life of a viable fetus by seeking to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age. A requirement that a physician make a finding of viability, one way or [p545] the other, for every fetus that falls within the range of possible viability does no more than preserve the State's recognized authority. Although, as the plurality correctly points out, such a testing requirement would have the effect of imposing additional costs on second-trimester abortions where the tests indicated that the fetus was not viable, these costs would be merely incidental to, and a necessary accommodation of, the State's unquestioned right to prohibit nontherapeutic abortions after the point of viability. In short, the testing provision, as construed by the plurality, is consistent with the *Roe* framework, and could be upheld effortlessly under current doctrine. [n6]

How ironic it is, then, and disingenuous, that the plurality scolds the Court of Appeals for adopting a construction of the statute that fails to avoid constitutional difficulties. *Ante* at [p546] 514, 515. By distorting the statute, the plurality manages to avoid invalidating the testing provision on what should have been noncontroversial constitutional grounds; having done so, however, the plurality rushes headlong into a much deeper constitutional thicket, brushing past an obvious basis for upholding § 188.029 in search of a pretext for scuttling the trimester framework. Evidently, from the plurality's perspective, the real problem with the Court of Appeals' construction of § 188.029 is not that it raised a constitutional difficulty, but that it raised the wrong constitutional difficulty -- one not implicating *Roe.* The plurality has remedied that, traditional canons of construction and judicial forbearance notwithstanding.

B

Having set up the conflict between § 188.029 and the *Roe* trimester framework, the plurality summarily discards *Roe's* analytic core as "'unsound in principle and unworkable in practice.'" *Ante* at 492 U.S. 518"]518, quoting 518, quoting *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546 (1985). This is so, the plurality claims, because the key elements of the framework do not appear in the text of the Constitution, because the framework more closely resembles a regulatory code than a body of constitutional doctrine, and because, under the framework, the State's interest in potential human life is considered compelling only after viability, when, in fact, that interest is equally compelling throughout pregnancy. *Ante* at 519-520. The plurality does not bother to explain these alleged flaws in *Roe.* Bald assertion masquerades as reasoning. The object, quite clearly, is not to persuade, but to prevail.

1

The plurality opinion is far more remarkable for the arguments that it does not advance than for those that it does. The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an "unenumerated" general right to [p547] privacy as recognized in many of our decisions, most notably *Griswold v. Connecticut,* 381 U.S. 479 (1965), and *Roe,* and, more specifically, whether, and to what extent, such a right to privacy extends to matters of childbearing and family life, including abortion. *See, e.g., Eisenstadt v. Baird,* 405 U.S. 438 (1972) (contraception); *Loving v. Virginia,* 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (childrearing). [n7] These are questions of unsurpassed significance in this Court's interpretation of the Constitution, and mark the battleground upon which this case was fought by the parties, by the Solicitor General as *amicus* on behalf of petitioners, and by an unprecedented number of *amici.* On these grounds, abandoned by the plurality, the Court should decide this case.

But rather than arguing that the text of the Constitution makes no mention of the right to privacy, the plurality complains that the critical elements of the *Roe* framework -- trimesters [p548] and viability -- do not appear in the Constitution, and are, therefore, somehow inconsistent with a Constitution cast in general terms. *Ante* at 518-519. Were this a true concern, we would have to abandon most of our constitutional jurisprudence. As the plurality well knows, or should know, the "critical elements" of countless constitutional doctrines nowhere appear in the Constitution's text. The Constitution makes no mention, for example, of the First Amendment's "actual malice" standard for proving certain libels, *see New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), or of the standard for determining when speech is obscene. *See Miller v. California,* 413 U.S. 15 (1973). Similarly, the Constitution makes no mention

of the rational basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause. The reason is simple. Like the *Roe* framework, these tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government.

With respect to the *Roe* framework, the general constitutional principle, indeed the fundamental constitutional right, for which it was developed is the right to privacy, *see, e.g., Griswold v. Connecticut*, 381 U.S. 479"]381 U.S. 479 (1965), a species of "liberty" protected by the Due Process Clause, which under our past decisions safeguards the right of women to exercise some control over their own role in procreation. As we recently reaffirmed in 381 U.S. 479 (1965), a species of "liberty" protected by the Due Process Clause, which under our past decisions safeguards the right of women to exercise some control over their own role in procreation. As we recently reaffirmed in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), few decisions are "more basic to individual dignity and autonomy" or more appropriate to that "certain private sphere of individual liberty" that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end [p549] a pregnancy. *Id.* at 772. It is this general principle, the "'moral fact that a person belongs to himself and not others nor to society as a whole,'" *id.* at 777, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub.Aff. 288-289 (1977), that is found in the Constitution. *See Roe,* 410 U.S. at 152-153. The trimester framework simply defines and limits that right to privacy in the abortion context to accommodate, not destroy, a State's legitimate interest in protecting the health of pregnant women and in preserving potential human life. *Id.* at 154-162. Fashioning such accommodations between individual rights and the legitimate interests of government, establishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication. To the extent that the trimester framework is useful in this enterprise, it is not only consistent with constitutional interpretation, but necessary to the wise and just exercise of this Court's paramount authority to define the scope of constitutional rights.

The plurality next alleges that the result of the trimester framework has "been a web of legal rules that have become increasingly intricate, resembling a code of regulations, rather than a body of constitutional doctrine." *Ante* at 518. Again, if this were a true and genuine concern, we would have to abandon vast areas of our constitutional jurisprudence. The plurality complains that, under the trimester framework, the Court has distinguished between a city ordinance requiring that second-trimester abortions be performed in clinics and a state law requiring that these abortions be performed in hospitals, or

between laws requiring that certain information be furnished to a woman by a physician or his assistant and those requiring that such information be furnished by the physician exclusively. *Ante* at 518, n. 15, citing *Simopoulos v. Virginia*, 462 U.S. 506 (1983), [p550] and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). Are these distinctions any finer, or more "regulatory," than the distinctions we have often drawn in our First Amendment jurisprudence, where, for example, we have held that a "release time" program permitting public school students to leave school grounds during school hours to receive religious instruction does not violate the Establishment Clause, even though a release time program permitting religious instruction on school grounds does violate the Clause? *Compare Zorach v. Clauson*, 343 U.S. 306 (1952), *with Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203 (1948). Our Fourth Amendment jurisprudence recognizes factual distinctions no less intricate. Just this Term, for example, we held that, while an aerial observation from a helicopter hovering at 400 feet does not violate any reasonable expectation of privacy, such an expectation of privacy would be violated by a helicopter observation from an unusually low altitude. *Florida v. Riley*, 488 U.S. 445, 451 (1989) (O'CONNOR, J., concurring in judgment). Similarly, in a Sixth Amendment case, the Court held that, although an overnight ban on attorney-client communication violated the constitutionally guaranteed right to counsel, *Geders v. United States*, 425 U.S. 80 (1976), that right was not violated when a trial judge separated a defendant from his lawyer during a 15-minute recess after the defendant's direct testimony. *Perry v. Leeke*, 488 U.S. 272 (1989).

That numerous constitutional doctrines result in narrow differentiations between similar circumstances does not mean that this Court has abandoned adjudication in favor of regulation. Rather, these careful distinctions reflect the process of constitutional adjudication itself, which is often highly fact-specific, requiring such determinations as whether state laws are "unduly burdensome" or "reasonable" or bear a "rational" or "necessary" relation to asserted state interests. In a recent due process case, THE CHIEF JUSTICE wrote for the [p551] Court:

> [M]any branches of the law abound in nice distinctions that may be troublesome but have been thought nonetheless necessary:

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized.

Daniels v. Williams, 474 U.S. 327, 334 (1986), quoting *LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring).

These "differences of degree" fully account for our holdings in *Simopoulos, supra,* and *Akron, supra.* Those decisions rest on this Court's reasoned and accurate judgment that hospitalization and doctor counseling requirements unduly burdened the right of women to terminate a pregnancy, and were not rationally related to the State's asserted interest in the health of pregnant women, while Virginia's substantially less restrictive regulations were not unduly burdensome and did rationally serve the State's interest. [n8] That the Court exercised its best judgment in evaluating these markedly different statutory schemes no more established the Court as an "'*ex officio* medical board,'" *ante* at 519, quoting *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 99 (1976) (opinion of WHITE, J., concurring in part and dissenting in part), than our decisions involving religion in the public schools establish the Court as a national school board, or our decisions concerning prison regulations establish the Court as [p552] a bureau of prisons. *See Thornburgh v. Abbott,* 490 U.S. 401 (1989) (adopting different standard of First Amendment review for incoming, as opposed to outgoing, prison mail). f, in delicate and complicated areas of constitutional law, our legal judgments "have become increasingly intricate," *ante* at 518, it is not, as the plurality contends, because we have overstepped our judicial role. Quite the opposite: the rules are intricate because we have remained conscientious in our duty to do justice carefully, especially when fundamental rights rise or fall with our decisions.

3

Finally, the plurality asserts that the trimester framework cannot stand because the State's interest in potential life is compelling throughout pregnancy, not merely after viability. *Ante* at 519. The opinion contains not one word of rationale for its view of the State's interest. This "it is so because we say so" jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.

In answering the plurality's claim that the State's interest in the fetus is uniform and compelling throughout pregnancy, I cannot improve upon what JUSTICE STEVENS has written:

> I should think it obvious that the State's interest in the protection of an embryo -- even if that interest is defined as "protecting those who will be citizens" . . . -- increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus -- and pregnancy itself -- are not static conditions, and the assertion that the government's interest is static simply ignores this reality. . . . [U]nless the religious view that a fetus is a "person" is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if [p553] there is not such a difference, the permissibility

> of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection -- even though the fetus represents one of "those who will be citizens" -- it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences.

Thornburgh, 476 U.S. at 778-779 (footnote omitted). *See also Roe*, 410 U.S. at 129-147.

For my own part, I remain convinced, as six other Members of this Court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that, as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows "quickening" -- the point at which a woman feels movement in her womb -- and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while [p554] providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy.[n9] Although I have stated previously for a majority of this Court that "[c]onstitutional rights do not always have easily ascertainable boundaries," to seek and establish those boundaries remains the special responsibility of this Court. *Thornburgh*, 476 U.S. at 771. In *Roe*, we discharged that responsibility as logic and science compelled. The plurality today advances not one reasonable argument as to why our judgment in that case was wrong and should be abandoned.

C

Having contrived an opportunity to reconsider the *Roe* framework, and then having discarded that framework, the plurality finds the testing provision unobjectionable because it "permissibly furthers the State's interest in protecting potential human life." *Ante* at 519-520. This newly minted [p555]

standard is circular, and totally meaningless. Whether a challenged abortion regulation "permissibly furthers" a legitimate state interest is the question that courts must answer in abortion cases, not the standard for courts to apply. In keeping with the rest of its opinion, the plurality makes no attempt to explain or to justify its new standard, either in the abstract or as applied in this case. Nor could it. The "permissibly furthers" standard has no independent meaning, and consists of nothing other than what a majority of this Court may believe at any given moment in any given case. The plurality's novel test appears to be nothing more than a dressed-up version of rational basis review, this Court's most lenient level of scrutiny. One thing is clear, however: were the plurality's "permissibly furthers" standard adopted by the Court, for all practical purposes, *Roe* would be overruled. [n10]

The "permissibly furthers" standard completely disregards the irreducible minimum of *Roe:* the Court's recognition that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy. That right receives no meaningful recognition in the plurality's written opinion. Since, in the plurality's view, the State's interest in potential life is compelling as of the moment of conception, and is therefore served only if abortion is abolished, every hindrance to a woman's ability to obtain an abortion must be "permissible." Indeed, the more severe the hindrance, the more effectively (and permissibly) the State's interest would be furthered. A tax on abortions or a criminal prohibition would both satisfy the plurality's standard. So, for that [p556] matter, would a requirement that a pregnant woman memorize and recite today's plurality opinion before seeking an abortion.

The plurality pretends that *Roe* survives, explaining that the facts of this case differ from those in *Roe:* here, Missouri has chosen to assert its interest in potential life only at the point of viability, whereas, in *Roe,* Texas had asserted that interest from the point of conception, criminalizing all abortions except where the life of the mother was at stake. *Ante* at 521. This, of course, is a distinction without a difference. The plurality repudiates every principle for which *Roe* stands; in good conscience, it cannot possibly believe that *Roe* lies "undisturbed" merely because this case does not call upon the Court to reconsider the Texas statute or one like it. If the Constitution permits a State to enact any statute that reasonably furthers its interest in potential life, and if that interest arises as of conception, why would the Texas statute fail to pass muster? One suspects that the plurality agrees. It is impossible to read the plurality opinion, and especially its final paragraph, without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception. All these laws will satisfy the plurality's nonscrutiny until, sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law. [n11] [p557]

D

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children. The plurality does so either oblivious or insensitive to the fact that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life. The plurality would clear the way once again for government to force upon women the physical labor and specific and direct medical and psychological harms that may accompany carrying a fetus to term. The plurality would clear the way again for the State to conscript a woman's body and to force upon her a "distressful life and future." *Roe,* 410 U.S. at 153.

The result, as we know from experience, *see* Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 8 Family Planning Perspectives 86, 92 (1976), would be that, every year, 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, or they would attempt to perform abortions upon themselves, [p558] with disastrous results. Every year, many women, especially poor and minority women, would die or suffer debilitating physical trauma, all in the name of enforced morality or religious dictates or lack of compassion, as it may be.

Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the tough-approach plurality utters not a word. This silence is callous. It is also profoundly destructive of this Court as an institution. To overturn a constitutional decision is a rare and grave undertaking. To overturn a constitutional decision that secured a fundamental personal liberty to millions of persons would be unprecedented in our 200 years of constitutional history. Although the doctrine of *stare decisis* applies with somewhat diminished force in constitutional cases generally, *ante* at 518, even in ordinary constitutional cases, "any departure from . . . *stare decisis* demands special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984). *See also Vasquez v. Hillery,* 474 U.S. 254, 266 (1986) ("[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained,'" quoting *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). This requirement of justification applies with unique force where, as here, the Court's abrogation of precedent would destroy people's firm belief, based on past decisions of this Court, that they possess an unabridgeable right to undertake certain conduct. [n12] [p559]

As discussed at perhaps too great length above, the plurality makes no serious attempt to carry "the heavy burden of persuading . . . that changes in

society or in the law dictate" the abandonment of *Roe* and its numerous progeny, *Vasquez*, 474 U.S. at 266, much less the greater burden of explaining the abrogation of a fundamental personal freedom. Instead, the plurality pretends that it leaves *Roe* standing, and refuses even to discuss the real issue underlying this case: whether the Constitution includes an unenumerated right to privacy that encompasses a woman's right to decide whether to terminate a pregnancy. To the extent that the plurality does criticize the *Roe* framework, these criticisms are pure *ipse dixit.*

This comes at a cost. The doctrine of *stare decisis*

> permits society to presume that bedrock principles are founded in the law, rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

474 U.S. at 265-266. Today's decision involves the most politically divisive domestic legal issue of our time. By refusing to explain or to justify its proposed revolutionary revision in the law of abortion, and by refusing to abide not only by our precedents, but also by our canons for reconsidering those precedents, the plurality invites charges of cowardice and [p560] illegitimacy to our door. I cannot say that these would be undeserved.

II

For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

[1.] Contrary to the Court, I do not see how the preamble, § 1.205, realistically may be construed as "abortion-neutral." It declares 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) and (2) (1986). By the preamble's specific terms, these declarations apply to all of Missouri's laws which, in turn, are to be interpreted to protect the rights of the unborn to the fullest extent possible under the Constitution of the United States and the decisions of this Court. § 1.205.2. As the Court of Appeals concluded, the Missouri Legislature "intended its abortion regulations to be understood against the backdrop of its theory of life." 851 F.2d 1071, 1076 (CA8 1988). I note the Solicitor General's acknowledgment that this backdrop places

> a burden of uncertain scope on the performance of abortions by supplying a general principle that would fill in whatever interstices may be present in existing abortion precedents.

Brief for United States as *Amicus Curiae* on behalf of appellants 8-9, n. 5.

In my view, a State may not expand indefinitely the scope of its abortion regulations by creating interests in fetal life that are limited solely by reference to the decisional law of this Court. Such a statutory scheme, whose scope is dependent on the uncertain and disputed limits of our holdings, will have the unconstitutional effect of chilling the exercise of a woman's right to terminate a pregnancy and of burdening the freedom of health professionals to provide abortion services. In this case, moreover, because the preamble defines fetal life as beginning upon "the fertilization of the ovum of a female by a sperm of a male," § 188.015(3), the provision also unconstitutionally burdens the use of contraceptive devices, such as the IUD and the "morning after" pill, which may operate to prevent pregnancy only after conception as defined in the statute. *See* Brief for Association of Reproductive Health Professionals *et al.* as *Amici Curiae* 30-39.

The Court upholds §§ 188.210 and 188.215 on the ground that the constitutionality of these provisions follows from our holdings in *Maher v. Roe,* 432 U.S. 464"]432 U.S. 464 (1977), 432 U.S. 464 (1977), *Poelker v. Doe,* 432 U.S. 519"]432 U.S. 519 (1977), and 432 U.S. 519 (1977), and *Harris v. McRae,* 448 U.S. 297 (1980). There were strong dissents in all those cases.

Whatever one may think of *Maher, Poelker,* and *Harris,* however, they most certainly do not control this case, where the State not only has withdrawn from the business of abortion, but has taken affirmative steps to assure that abortions are not performed by private physicians in private institutions. Specifically, by defining "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, the Missouri statute prohibits the performance of abortions in institutions that, in all pertinent respects, are private, yet are located on property owned, leased, or controlled by the government. Thus, under the statute, no abortion may be performed at Truman Medical Center in Kansas City -- where, in 1985, 97 percent of all Missouri hospital abortions at 16 weeks or later were performed -- even though the Center is a private hospital, staffed primarily by private doctors, and administered by a private corporation: the Center is located on ground leased from a political subdivision of the State.

The sweeping scope of Missouri's "public facility" provision sharply distinguishes this case from *Maher, Poelker,* and *Harris.* In one of those cases, it was said:

> The State may have made childbirth a more attractive alternative . . . but it . . . imposed no restriction on access to abortions that was not already there.

Maher, 432 U.S. at 474. Missouri's public facility ban, by contrast, goes far beyond merely offering incentives in favor of childbirth (as in *Maher* and *Harris*), or a straightforward disassociation of state-owned institutions and personnel from abortion services (as in *Poelker*). Here, by defining as "public" every health care institution with some connection to the State, no matter how attenuated, Missouri has brought to bear the full force of its economic power and control over essential facilities to discourage its citizens from exercising their constitutional rights, even where the State itself could never be understood as authorizing, supporting, or having any other positive association with the performance of an abortion. *See* R. Dworkin, The Great Abortion Case, New York Review of Books, June 29, 1989, p. 49.

The difference is critical. Even if the State may decline to subsidize or to participate in the exercise of a woman's right to terminate a pregnancy, and even if a State may pursue its own abortion policies in distributing public benefits, it may not affirmatively constrict the availability of abortions by defining as "public" that which in all meaningful respects is private. With the certain knowledge that a substantial percentage of private health care providers will fall under the public facility ban, *see* Brief for National Association of Public Hospitals as *Amicus Curiae* 10-11, Missouri does not "leav[e] a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all," *ante* at 509; rather, the public facility ban leaves the pregnant woman with far fewer choices, or, for those too sick or too poor to travel, perhaps no choice at all. This aggressive and shameful infringement on the right of women to obtain abortions in consultation with their chosen physicians, unsupported by any state interest, much less a compelling one, violates the command of *Roe.*

Indeed, JUSTICE O'CONNOR appears to recognize the constitutional difficulties presented by Missouri's "public facilities" ban, and rejects respondents' "facial" challenge to the provisions on the ground that a facial challenge cannot succeed where, as here, at least some applications of the challenged law are constitutional. *Ante* at 523-524. While I disagree with this approach, JUSTICE O'CONNOR's writing explicitly leaves open the possibility that some applications of the "public facilities" ban may be unconstitutional, regardless of *Maher*, *Poelker,* and *Harris.*

I concur in Part II-C of Court's opinion, holding that respondents' challenge to § 188.205 is moot, although I note that the constitutionality of this provision might become the subject of relitigation between these parties should the Supreme Court of Missouri adopt an interpretation of the provision that differs from the one accepted here. *See Deakins v. Monaghan,* 484 U.S. 193, 201, n. 5 (1988).

[2.] I consider irrefutable JUSTICE STEVENS' discussion of this interpretive point. See post at 560-563.

[3] The District Court found that "the only method to evaluate [fetal] lung maturity is by amniocentesis," a procedure that "imposes additional significant health risks for both the pregnant woman and the fetus." 662 F.Supp. 407, 422 (WD Mo.1987). Yet the medical literature establishes that to require amniocentesis for all abortions after 20 weeks would be contrary to sound medical practice and, moreover, would be useless for the purpose of determining lung maturity until no earlier than between 28 and 30 weeks gestational age. Ibid.; see also Brief for American Medical Association et al. as Amici Curiae 41. Thus, were § 188.029 read to require a finding of lung maturity, it would require physicians to perform a highly intrusive procedure of risk that would yield no result relevant to the question of viability.

[4] I also agree with the Court of Appeals, 851 F.2d at 1074-1075, that, as written, § 188.029 is contrary to this Court's decision in Colautti v. Franklin, 439 U.S. 379, 388-389 (1979).

[5] The plurality never states precisely its construction of § 188.029. I base my synopsis of the plurality's views mainly on its assertion that the entire provision must be read in light of its requirement that the physician act only in accordance with reasonable professional judgment, and that the provision imposes no requirement that a physician perform irrelevant or dangerous tests. Ante at 514-515. To the extent that the plurality may be reading the provision to require tests other than those that a doctor, exercising reasonable professional judgment, would deem necessary to a finding of viability, the provision bears no rational relation to a legitimate governmental interest, and cannot stand.

[6] As convincingly demonstrated by JUSTICE O'CONNOR, ante at 492 U.S. 527"]527-531, the cases cited by the plurality are not to the contrary. As noted by the plurality, in both Colautti v. Franklin, 439 U.S. at 388-389, and 527-531, the cases cited by the plurality are not to the contrary. As noted by the plurality, in both Colautti v. Franklin, 439 U.S. at 388-389, and Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976), we stressed that the determination of viability is a matter for the judgment of the responsible attending physician. But § 188.029, at least as construed by the plurality, is consistent with this requirement. The provision does nothing to remove the determination of viability from the purview of the attending physician; it merely instructs the physician to make a finding of viability using tests to determine gestational age, weight, and lung maturity when such tests are feasible and medically appropriate.

I also see no conflict with the Court's holding in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), that the State may not impose "a heavy, *and unnecessary,* burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.* at 438 (emphasis added). In *Akron,* we invalidated a city ordinance requiring that all second-trimester abortions be performed in acute-care hospitals on the ground that

such a requirement was not medically necessary, and would double the cost of abortions. *Id.* at 434-439. By contrast, the viability determination at issue in this case (as read by the plurality), is necessary to the effectuation of the State's compelling interest in the potential human life of viable fetuses, and applies not to all second-trimester abortions, but instead only to that small percentage of abortions performed on fetuses estimated to be of more than 20 weeks gestational age.

[7.] The plurality, ignoring all of the aforementioned cases except Griswold, responds that this case does not require consideration of the "great issues" underlying this case because Griswold, "unlike Roe, did not purport to adopt a whole framework . . . to govern the cases in which the asserted liberty interest would apply." Ante at 520. This distinction is highly ironic. The Court in Roe adopted the framework of which the plurality complains as a mechanism necessary to give effect both to the constitutional rights of the pregnant woman and to the State's significant interests in maternal health and potential life. Concededly, Griswold does not adopt a framework for determining the permissible scope of state regulation of contraception. The reason is simple: in Griswold (and Eisenstadt), the Court held that the challenged statute, regulating the use of medically safe contraception, did not properly serve any significant state interest. Accordingly, the Court had no occasion to fashion a framework to accommodate a State's interests in regulating contraception. Surely the plurality is not suggesting that it would find Roe unobjectionable if the Court had forgone the framework and, as in the contraception decisions, had left the State with little or no regulatory authority. The plurality's focus on the framework is merely an excuse for avoiding the real issues embedded in this case, and a mask for its hostility to the constitutional rights that Roe recognized.

[8.] The difference in the Akron and Simopoulos regulatory regimes is stark. The Court noted in Akron that the city ordinance requiring that all second-trimester abortions be performed in acute care hospitals undoubtedly would have made the procurement of legal abortions difficult and often prohibitively expensive, thereby driving the performance of abortions back underground where they would not be subject to effective regulation. Such a requirement obviously did not further the city's asserted interest in maternal health. 462 U.S. at 420, n. 1. On the other hand, the Virginia law at issue in Simopoulos, by permitting the performance of abortions in licensed outpatient clinics as well as hospitals, did not similarly constrict the availability of legal abortions, and therefore did not undermine its own stated purpose of protecting maternal health.

[9.] Notably, neither the plurality nor JUSTICE O'CONNOR advances the now-familiar catch-phrase criticism of the Roe framework that, because the point of viability will recede with advances in medical technology, Roe "is clearly on a collision course with itself." See Akron, 462 U.S. at 458 (dissenting opinion). This critique has no medical foundation. As the medical literature

and the amicus briefs filed in this case conclusively demonstrate, "there is an 'anatomic threshold' for fetal viability of about 23-24 weeks of gestation." Brief for American Medical Association et al. as Amici Curiae 7. See also Brief for 167 Distinguished Scientists and Physicians, including 11 Nobel Laureates, as Amici Curiae 8-14. Prior to that time, the crucial organs are not sufficiently mature to provide the mutually sustaining functions that are prerequisite to extrauterine survival, or viability. Moreover, "no technology exists to bridge the development gap between the three-day embryo culture and the 24th week of gestation." Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and the Law 3 (1988). Nor does the medical community believe that the development of any such technology is possible in the foreseeable future. Id. at 12. In other words, the threshold of fetal viability is, and will remain, no different from what it was at the time Roe was decided. Predictions to the contrary are pure science fiction. See Brief for A Group of American Law Professors as Amicus Curiae 23-25.

[10.] Writing for the Court in Akron, Justice Powell observed the same phenomenon, though in hypothetical response to the dissent in that case:

> In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational basis test. It also appears that even where heightened scrutiny is deemed appropriate, the dissent would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life. . . .This analysis is wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade.*

462 U.S. at 420-421, n. 1.

[11.] The plurality claims that its treatment of Roe, and a woman's right to decide whether to terminate a pregnancy, "hold[s] true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." Ante at 521. This is unadulterated nonsense. The plurality's balance matches a lead weight (the State's allegedly compelling interest in fetal life as of the moment of conception) against a feather (a "liberty interest" of the pregnant woman that the plurality barely mentions, much less describes). The plurality's balance -- no balance at all -- places nothing, or virtually nothing, beyond the reach of the democratic process.

JUSTICE SCALIA candidly argues that this is all for the best. *Ante* at 532. I cannot agree.

> 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.

> One's right to life, liberty, and property . . . may not be submitted to vote; they depend on the outcome of no elections.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). In a Nation that cherishes liberty, the ability of a woman to control the biological operation of her body and to determine with her responsible physician whether or not to carry a fetus to term must fall within that limited sphere of individual autonomy that lies beyond the will or the power of any transient majority. This Court stands as the ultimate guarantor of that zone of privacy, regardless of the bitter disputes to which our decisions may give rise. In *Roe,* and our numerous cases reaffirming *Roe,* we did no more than discharge our constitutional duty.

[12] Cf. South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (SCALIA, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence and the surrounding law becomes premised on their validity").

Moreover, as Justice Powell wrote for the Court in *Akron:*

> There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade.* That case was considered with special care. It was first argued during the 1971 Term, and reargued -- with extensive briefing -- the following Term. The decision was joined by THE CHIEF JUSTICE and six other Justices. Since *Roe* was decided in January, 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

462 U.S. at 420, n. 1. *See, e.g., Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52 (1976); *Bellotti v. Baird,* 428 U.S. 132 (1976); *Beal v. Doe,* 432 U.S. 438 (1977); *Maher v. Roe,* 432 U.S. 464 (1977); *Colautti v. Franklin,* 439 U.S. 379 (1979); *Bellotti v. Baird,* 443 U.S. 622 (1979); *Harris v. McRae,* 448 U.S. 297 (1980); *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986).

STEVENS, J., Concurring and Dissenting Opinion

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

JUSTICE STEVENS, concurring in part and dissenting in part.

Having joined Part II-C of the Court's opinion, I shall not comment on § 188.205 of the Missouri statute. With respect to the challenged portions of §§ 188.210 and 188.215, I agree with JUSTICE BLACKMUN, *ante* at 539-541, n. 1 (concurring in part and dissenting in part), that the record identifies a sufficient number of unconstitutional applications to support the Court of Appeals' judgment invalidating those provisions. The reasons why I would also affirm that court's invalidation of § 188.029, the viability testing provision, and §§ 1.205.1(1), (2) of the preamble, [n1] require separate explanation.

I

It seems to me that in Part II-D of its opinion, the plurality strains to place a construction on § 188.029 [n2] that enables [p561] it to conclude: "[W]e would modify and narrow *Roe* and succeeding cases," *ante* at 521. That statement is ill-advised, because there is no need to modify even slightly the holdings of prior cases in order to uphold § 188.029. For the most plausible nonliteral construction, as both JUSTICE BLACKMUN, *ante* at 542-544 (concurring in part and dissenting in part), and JUSTICE O'CONNOR, *ante* at 525-531 (concurring in part and concurring in judgment), have demonstrated, is constitutional and entirely consistent with our precedents.

I am unable to accept JUSTICE O'CONNOR's construction of the second sentence in § 188.029, however, because I believe it is foreclosed by two controlling principles of statutory interpretation. First, it is our settled practice to accept

> the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion.

Bishop v. Wood, 426 U.S. 341, 346 (1976). [n3] Second,

> [t]he fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute.

Public Citizen v. Department of Justice, 491 U.S. 440, 481 (1989) (KENNEDY, J., concurring [p562] in judgment). [n4] In this case, I agree with the Court of Appeals, 851 F.2d 1071, 1074-1075 (CA8 1988), and the District Court, 662 F.Supp. 407, 423 (WD Mo.1987), that the meaning of the second sentence of § 188.029 is too plain to be ignored. The sentence twice uses the mandatory term "shall," and contains no qualifying language. If it is implicitly limited to tests that are useful in determining viability, it adds nothing to the requirement imposed by the preceding sentence.

My interpretation of the plain language is supported by the structure of the statute as a whole, particularly the preamble, which "finds" that life "begins at conception" and further commands that state laws shall be construed to provide the maximum protection to "the unborn child at every stage of development." Mo.Rev.Stat. §§ 1.205.1(1), 1.205.2 (1986). I agree with the District Court that "[o]bviously, the purpose of this law is to protect the potential life of the fetus, rather than to safeguard maternal health." 662 F.Supp. at 420. A literal reading of the statute tends to accomplish that goal. Thus it is not "incongruous," *ante* at 515, to assume that the Missouri Legislature was trying to protect the potential human life of

nonviable fetuses by making the abortion decision more costly. [n5] On the contrary, I am satisfied that the Court of Appeals, as well as the District Court, correctly concluded that the Missouri Legislature meant exactly what it said in the second sentence of § 188.029. I am also satisfied, [p563] for the reasons stated by JUSTICE BLACKMUN, that the testing provision is manifestly unconstitutional under *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955),"'irrespective of the *Roe v. Wade,* 410 U.S. 113 (1973),] framework." *Ante* at 544 (concurring in part and dissenting in part).

II

The Missouri statute defines "conception" as "the fertilization of the ovum of a female by a sperm of a male," Mo.Rev.Stat. § 188.015(3) (1986), even though standard medical texts equate "conception" with implantation in the uterus, occurring about six days after fertilization. [n6] Missouri's declaration therefore implies regulation not only of previability abortions, but also of common forms of contraception such as the IUD and the morning-after pill. [n7] Because the preamble, read in context, threatens serious encroachments upon the liberty of the pregnant woman and the health professional, I am persuaded that these plaintiffs, appellees before us, have [p564] standing to challenge its constitutionality. *Accord,* 851 F.2d at 1075-1076.

To the extent that the Missouri statute interferes with contraceptive choices, I have no doubt that it is unconstitutional under the Court's holdings in *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); and *Carey v. Population Services International,* 431 U.S. 678 (1977). The place of *Griswold* in the mosaic of decisions defining a woman's liberty interest was accurately stated by Justice Stewart in his concurring opinion in *Roe v. Wade,* 410 U.S. 113, 167-170 (1973):

> [I]n *Griswold v. Connecticut,* 381 U.S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *[Ferguson v.] Skrupa,* [372 U.S. 726 (1963),] the Court's opinion in *Griswold*

> understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.
>
> * * * *
>
> Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia,* 388 U.S. 1, 12 [(1967)]; *Griswold v. Connecticut, supra; Pierce v. Society of Sisters,* [268 U.S. 510 (1925)]; *Meyer v. Nebraska,* [262 U.S. 390 (1923)]. *See also* [p565] *Prince v. Massachusetts,* 321 U.S. 158, 166 [(1944)]; *Skinner v. Oklahoma,* 316 U.S. 535, 541 [(1942)]. As recently as last Term, in *Eisenstadt v. Baird,* 405 U.S. 438, 453, we recognized

the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

> That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are

of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters,* 268 U.S. 510"]268 U.S. 510 (1925), or the right to teach a foreign language protected in 268 U.S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska,* 262 U.S. 390 (1923).

> *Abele v. Markle,* 351 F.Supp. 224, 227 (Conn.1972).
>
> Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

(Emphasis in original; footnotes omitted.) [n8]

One might argue that the *Griswold* holding applies to devices "preventing conception," 381 U.S. at 480 -- that is, fertilization -- but not to those preventing implantation, and therefore, that *Griswold* does not protect a woman's choice to use an IUD or take a morning-after pill. There is unquestionably [p566] a theological basis for such an argument, [n9] just as there was unquestionably a theological basis for the Connecticut statute that the Court invalidated in *Griswold.* Our jurisprudence, however, has consistently required a secular basis for valid legislation. *See, e.g., Stone v. Graham,* 449 U.S. 39, 40 (1980) (per curiam). [n10] Because I am not aware of any secular basis for differentiating between contraceptive procedures that are effective immediately before and those that are effective immediately after fertilization, I believe it inescapably follows that the preamble to the Missouri statute is invalid under *Griswold* and its progeny.

Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions, *see*

McGowan v. Maryland, 366 U.S. 420, 442 (1961); *Harris v. McRae,* 448 U.S. 297, 319-320 (1980), or on the fact that the legislators who voted to enact it may have been motivated by religious considerations, *see Washington v. Davis,* 426 U.S. 229, 253 (1976) (STEVENS, J., concurring). Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some, but by no means all, Christian faiths, [n11] serves no identifiable [p567] secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause. [n12] *Wallace v. Jaffree,* 472 U.S. 38, 56 (1985).

My concern can best be explained by reference to the position on this issue that was widely accepted by the leaders of the Roman Catholic Church for many years. The position is summarized in a report, entitled "Catholic Teaching On Abortion," prepared by the Congressional Research Service of the Library of Congress. It states in part:

> The disagreement over the status of the unformed as against the formed fetus was crucial for Christian teaching on the soul. It was widely held that the soul was not present until the formation of the fetus 40 or 80 days after conception, for males and females respectively. Thus, abortion of the "unformed" or "inanimate" fetus (from *anima,* soul) was something less than true homicide, rather a form of anticipatory or quasi-homicide. This view received its definitive treatment in St. Thomas Aquinas, and became for a time the dominant interpretation m the Latin Church.
>
> * * * *
>
> For St. Thomas, as for mediaeval Christendom generally, there is a lapse of time -- approximately 40 to 80 days -- after conception and before the soul's infusion. . . .
>
> For St. Thomas, "seed and what is not seed is determined by sensation and movement." What is

> destroyed in abortion of the unformed fetus is seed, not man. This distinction received its most careful analysis in St. Thomas. It was the general belief of Christendom, reflected, [p568] for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of an animated fetus only.

C. Whittier, Catholic Teaching on Abortion: Its Origin and Later Development (1981), reprinted in Brief for Americans United for Separation of Church and State as *Amicus Curiae* 13a, 17a (quoting *In octo libros politicorum* 7.12, attributed to St. Thomas Aquinas). If the views of St. Thomas were held as widely today as they were in the Middle Ages, and if a state legislature were to enact a statute prefaced with a "finding" that female life begins 80 days after conception and male life begins 40 days after conception, I have no doubt that this Court would promptly conclude that such an endorsement of a particular religious tenet is violative of the Establishment Clause.

In my opinion the difference between that hypothetical statute and Missouri's preamble reflects nothing more than a difference in theological doctrine. The preamble to the Missouri statute endorses the theological position that there is the same secular interest in preserving the life of a fetus during the first 40 or 80 days of pregnancy as there is after viability -- indeed, after the time when the fetus has become a "person" with legal rights protected by the Constitution. [n13] To sustain that position as a matter of law, I believe Missouri has the burden of identifying the secular interests that differentiate the first 40 days of pregnancy from the period immediately [p569] before or after fertilization when, as *Griswold* and related cases establish, the Constitution allows the use of contraceptive procedures to prevent potential life from developing into full personhood. Focusing our attention on the first several weeks of pregnancy is especially appropriate, because that is the period when the vast majority of abortions are actually performed.

As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state

interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescinds the theological concept of ensoulment -- or one accepts St. Thomas Aquinas' view that ensoulment does not occur for at least 40 days -- 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.

There have been times in history when military and economic interests would have been served by an increase in population. No one argues today, however, that Missouri can assert a societal interest in increasing its population as its secular reason for fostering potential life. Indeed, our national policy, as reflected in legislation the Court upheld last Term, is to prevent the potential life that is produced by "pregnancy and childbirth among unmarried adolescents." *Bowen v. Kendrick,* 487 U.S. 589, 593 (1988); *accord, id.* at 602. If the secular analysis were based on a strict balancing of fiscal costs and benefits, the economic costs of unlimited childbearing would outweigh those of abortion. There is, of course, an important and unquestionably valid secular interest in "protecting a young pregnant woman from the consequences of an incorrect decision," *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 102 (1976) [p570] (STEVENS, J., concurring in part and dissenting in part). Although that interest is served by a requirement that the woman receive medical and, in appropriate circumstances, parental, advice, [n14] it does not justify the state legislature's official endorsement of the theological tenet embodied in §§ 1.205.1(1), (2).

The State's suggestion that the "finding" in the preamble to its abortion statute is, in effect, an amendment to its tort, property, and criminal laws is not persuasive. The Court of Appeals concluded that the preamble "is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." 851 F.2d at 1076. Supporting that construction is the state constitutional prohibition against legislative enactments

pertaining to more than one subject matter. Mo.Const., Art. 3, § 23. *See In re Ray*, 83 B.R. 670 (Bkrtcy Ct., ED Mo.1988); *Berry v. Majestic Milling Co.*, 223 S.W. 738 (Mo.1920). Moreover, none of the tort, property, or criminal law cases cited by the State was either based on or buttressed by a theological answer to the question of when life begins. Rather, the Missouri courts, as well as a number of other state courts, had already concluded that a "fetus is a 'person,' 'minor,' or 'minor child' within the meaning of their particular wrongful death statutes." [p571] *O'Grady v. Brown*, 654 S.W.2d 904, 910 (Mo.1983) (en banc). [n15]

Bolstering my conclusion that the preamble violates the First Amendment is the fact that the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate. [n16] The Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate, for "[t]he Establishment Clause does not allow public bodies to foment such disagreement." *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, post* at 651 (STEVENS, J., concurring in part and dissenting in part).

In my opinion, the preamble to the Missouri statute is unconstitutional for two reasons. To the extent that it has substantive impact on the freedom to use contraceptive procedures, it is inconsistent with the central holding in *Griswold*. To the extent that it merely makes "legislative findings without operative effect," as the State argues, Brief for Appellants 22, it violates the Establishment Clause of the First [p572] Amendment. Contrary to the theological "finding" of the Missouri Legislature, a woman's constitutionally protected liberty encompasses the right to act on her own belief that -- to paraphrase St. Thomas Aquinas -- until a seed has acquired the powers of sensation and movement, the life of a human being has not yet begun. [n17]

1. The State prefers to refer to subsections (1) and (2) of § 1.205.1 as "prefatory statements with no substantive effect." Brief for Appellants 9; see id. at 21; see also 851 F.2d 1071, 1076 (CA8 1988). It is true that § 1.205 is codified in Chapter 1, Laws in

Force and Construction of Statutes, of Title I, Laws and Statutes, of the Missouri Revised Statutes, while all other provisions at issue are codified in Chapter 188, Regulation of Abortions, of Title XII, Public Health and Welfare. But because § 1.205 appeared at the beginning of House Bill No. 1596, see ante at 500-501, it is entirely appropriate to consider it as a preamble relevant to those regulations.

[2.] The testing provision states:

> 188.029. Physician, determination of viability, duties
>
> 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.

Mo.Rev.Stat. § 188.029 (1986).

[3.] See also United States v. Durham Lumber Co., 363 U.S. 522, 526-527 (1960); Propper v. Clark, 337 U.S. 472, 486-487 (1949); Hillsborough v. Cromwell, 326 U.S. 620, 630 (1946); Huddleston v. Dwyer, 322 U.S. 232, 237 (1944); MacGregor v. State Mutual Life Ins. Co., 315 U.S. 280, 281 (1942) (per curiam).

[4.] We have stated that we will interpret a federal statute to avoid serious constitutional problems if "a reasonable alternative interpretation poses no constitutional question," Gomez v. United States, 490 U.S. 858, 864 (1989), or if "it is fairly possible to

interpret the statute in a manner that renders it constitutionally valid," Communications Workers v. Beck, 487 U.S. 735, 762 (1988), or "unless such construction is plainly contrary to the intent of Congress," Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988).

[5.] As with the testing provision, the plurality opts for a construction of this statute that conflicts with those of the Court of Appeals, 851 F.2d at 1076-1077, and the District Court, 662 F.Supp. 407, 413 (WD Mo.1987).

[6.] The fertilized egg remains in the woman's Fallopian tube for 72 hours, then travels to the uterus' cavity, where cell division continues for another 72 hours before implantation in the uterine wall. D. Mishell & V. Davajan, Infertility, Contraception and Reproductive Endocrinology 109-110 (2d ed.1986); see also Brief for Association of Reproductive Health Professionals et al. as Amici Curiae 31-32 (ARHP Brief) (citing, inter alia, J. Pritchard, P. MacDonald, & N. Gant, Williams Obstetrics 88-91 (17th ed.1985)). "[O]nly 50 per cent of fertilized ova ultimately become implanted." ARHP Brief 32, n. 25 (citing Post Coital Contraception, The Lancet 856 (Apr. 16, 1983)).

[7.] An intrauterine device, commonly called an IUD, "works primarily by preventing a fertilized egg from implanting." Burnhill, Intrauterine Contraception, in Fertility Control 271, 280 (S. Corson, R. Derman, & L. Tyrer eds.1985). See also 21 CFR § 801.427, p. 32 (1988); ARHP Brief 34-35. Other contraceptive methods that may prevent implantation include "morning-after pills," high-dose estrogen pills taken after intercourse, particularly in cases of rape, ARHP Brief 33, and the French RU 486, a pill that works "during the indeterminate period between contraception and abortion," id. at 37. Low-1evel estrogen "combined" pills -- a version of the ordinary, daily ingested birth control pill -- also may prevent the fertilized egg from reaching the uterine wall and implanting. Id. at 35-36.

[8.] The contrast between Justice Stewart's careful explication that our abortion precedent flowed naturally from a stream of

substantive due process cases and JUSTICE SCALIA's notion that our abortion law was "constructed overnight in Roe v. Wade," ante at 537 (concurring in part and concurring in judgment) is remarkable.

[9.] Several amici state that the "sanctity of human life from conception and opposition to abortion are, in fact, sincere and deeply held religious beliefs," Brief for Lutheran Church-Missouri Synod et al. as Amici Curiae 20 (on behalf of 49 "church denominations"); see Brief for Holy Orthodox Church as Amicus Curiae 12-14.

[10.] The dissent in Stone did not dispute this proposition; rather, it argued that posting the Ten Commandments on schoolroom walls has a secular purpose. 449 U.S. at 43-46 (REHNQUIST, J., dissenting).

[11.] See, e.g., Brief for Catholics for a Free Choice et al. as Amici Curiae 5 ("There is no constant teaching in Catholic theology on the commencement of personhood").

[12.] Pointing to the lack of consensus about life's onset among experts in medicine, philosophy, and theology, the Court in Roe v. Wade, 410 U.S. 113, 158, 162 (1973), established that the Constitution does not permit a State to adopt a theory of life that overrides a pregnant woman's rights. Accord, Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444 (1983). The constitutional violation is doubly grave if, as here, the only basis for the State's "finding" is nonsecular.

[13.] No Member of this Court has ever questioned the holding in Roe, 410 U.S. at 156-159, that a fetus is not a "person" within the meaning of the Fourteenth Amendment. Even the dissenters in Roe implicitly endorsed that holding by arguing that state legislatures should decide whether to prohibit or to authorize abortions. See id. at 177 (REHNQUIST, J., dissenting) (arguing that the Fourteenth Amendment did not "withdraw from the States the power to legislate with respect to this matter"); Doe v. Bolton, 410 U.S. 179, 222 (1973) (WHITE, J., dissenting jointly in Doe and Roe). By characterizing the basic question as "a political

issue," see ante at 535 (concurring in part and concurring in judgment), JUSTICE SCALIA likewise implicitly accepts this holding.

14.

> The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes -- to marry, to abort, to bear her child out of wedlock -- the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental consent requirement will necessarily involve a parent in the decisional process.

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 103 (STEVENS, J., concurring in part and dissenting in part).

15. The other examples cited by the State are statutes providing that unborn children are to be treated as though born within the lifetime of the decedent, see Uniform Probate Code § 2-108 (1969), and statutes imposing criminal sanctions in the nature of manslaughter for the killing of a viable fetus or unborn quick child, see, e.g., Ark.Stat.Ann. § 41-2223 (1947). None of the cited statutes included any "finding" on the theological question of when life begins.

16. No fewer than 67 religious organizations submitted their views as amici curiae on either side of this case. Amici briefs on both sides, moreover, frankly discuss the relation between the

abortion controversy and religion. See generally, e.g., Brief for Agudath Israel of America as Amicus Curiae, Brief for Americans United for Separation of Church and State et al. as Amici Curiae, Brief for Catholics for a Free Choice et al. as Amici Curiae, Brief for Holy Orthodox Church as Amicus Curiae, Brief for Lutheran Church-Missouri Synod et al. as Amici Curiae, Brief for Missouri Catholic Conference as Amicus Curiae. Cf. Burke, Religion and Politics in the United States, in Movements and Issues in World Religions 243, 254-256 (C. Fu & G. Spiegler eds.1987).

17.

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time, it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects -- or even intolerance among "religions" -- to encompass intolerance of the disbeliever and the uncertain. As

> Justice Jackson eloquently stated in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943):
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> The State . . no less than the Congress of the United States, must respect that basic truth.

Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985) (footnotes omitted).