***Webster v. Reproductive Health Services* (1989) - Justice Rehnquist -** 5/4.

The *Webster* Court:
Burger & Powell are OUT — Scalia & Kennedy are IN.
Majority (5): Rehnquist, White, O'Connor, Scalia & Kennedy.
Minority (4): Blackmun, Brennan, Marshall & Stevens.

Issue: Constitutionality of Missouri's amended abortion statutes.

Held: A prohibition of the use of public facilities or personnel to perform abortions not necessary to save the mother's life was upheld. And, a requirement that various tests be performed to determine viability after 20 weeks was upheld.

Reasoning: **Part I...**Justice Rehnquist/White/O'Connor/Scalia/Kennedy. Missouri's amended abortion statutes consist of 20 provisions, 5 of which are now before the Court. The first provision contains "findings" by the state legislature that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being." The Act further requires that all Missouri laws be interpreted to provide unborn children with the same rights enjoyed by other persons, **subject to the Federal Constitution and this Court's precedents**. The Act requires that, prior to performing an abortion on any woman whom a physician has reason to believe is 20 or more weeks pregnant, the physician ascertain whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child." The Act also prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, and it prohibits the use of public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an

abortion not necessary to save her life.

The Court of Appeals: (1) determined that Missouri's declaration that life begins at conception was "an impermissible state adoption of a theory of when life begins to justify its abortion regulations;" (2) relying on *Colautti v. Franklin*[1], held that the requirement that physicians perform viability tests was an unconstitutional legislative intrusion on a matter of medical skill and judgment; (3) invalidated the prohibition on the use of public facilities and employees to perform abortions not necessary to save the mother's life; and (4) struck down the provision prohibiting the use of public funds for "encouraging or counseling" women to have nontherapeutic abortions.

Part II-A. Justice Rehnquist/White/O'Connor/Scalia/Kennedy...Certainly the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice. The Court has emphasized that *Roe v. Wade*[2] "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." *Maher v. Roe*[3]. The preamble can be read simply to express that sort of value judgment.

Part II-B. Justice Rehnquist/White/O'Connor/Scalia/Kennedy...Section 188.210 provides that "it shall be unlawful for any public employee to perform or assist an abortion **not necessary to save the life of the mother**" while §188.215 makes it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion **not necessary to save the life of the mother**." The Court of Appeals held that these provisions contravened this Court's abortion decisions. We take the contrary view.

As we said in *DeShaney v. Winnebago County:* "Our cases have recognized that the Due Process Clauses generally confer **no affirmative right to governmental aid**, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."

The State's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *McRae.* Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," **Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all**. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital. This circumstance is more easily

---

[1]Case 9A-AP-10 on this website.

[2]Case 9A-AP-4 on this website.

[3]Case 9A-AP-9 on this website.

remedied, and thus considerably less burdensome, than indigency, which "may make it difficult -- and in some cases, perhaps, impossible -- for some women to have abortions" without public funding. *Maher.* Having held that the State's refusal to fund abortions does not violate *Roe* v. *Wade*, it strains logic to reach a contrary result for the use of public facilities and employees. If the State may "make a value judgment favoring childbirth over abortion and...implement that judgment by the allocation of public funds" (*Maher),* surely it may do so through the allocation of other public resources, such as hospitals and medical staff.

Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions...

Therefore, as previously stated, the "right to an abortion" is a misnomer.

Part II-D. Justice Rehnquist/White/Kennedy. Section 188.029 of the Missouri Act provides:

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

The State emphasizes the language of the first sentence, which speaks in terms of the physician's determination of viability being made by the standards of ordinary skill in the medical profession. Appellees stress the language of the second sentence, which prescribes such "tests as are necessary" to make a finding of gestational age, fetal weight, and lung maturity.

The Court of Appeals read §188.029 as requiring that after 20 weeks "doctors *must* perform tests to find gestational age, fetal weight and lung maturity." The court indicated that the tests needed to determine fetal weight at 20 weeks are "unreliable and inaccurate" and would add $125 to $250 to the cost of an abortion. It also stated that "amniocentesis, the only method available to determine lung maturity, is contrary to accepted medical practice until 28-30 weeks of gestation, expensive, and imposes significant health risks for both the pregnant woman and the fetus."

We think the viability-testing provision makes sense only if the second sentence is read to require only those tests that are useful to making subsidiary findings as to viability. If we construe this provision to require a physician to perform those tests needed to make the three specified findings *in all circumstances*, including when the physician's reasonable professional judgment indicates that

the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus, the second sentence of §188.029 would conflict with the first sentence's *requirement* that a physician apply his reasonable professional skill and judgment. It would also be incongruous to read this provision, especially the word "necessary," to require the performance of tests irrelevant to the expressed statutory purpose of determining viability. It thus seems clear to us that the Court of Appeals' construction of §188.029 violates well-accepted canons of statutory interpretation used in the Missouri courts.

The viability-testing provision of the Missouri Act is concerned with promoting the State's interest in potential human life rather than in maternal health. Section 188.029 creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. It also directs the physician's determination as to viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity. The District Court found that "the medical evidence is uncontradicted that a 20-week fetus is *not* viable," and that "23 ½ to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability exists." But it also found that there may be a 4-week error in estimating gestational age which supports testing at 20 weeks.

In *Roe* v. *Wade*, the Court recognized that the State has "important and legitimate" interests in protecting maternal health and in the potentiality of human life. During the second trimester, the State "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." After viability, when the State's interest in potential human life was held to become compelling, the State "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

In *Colautti v. Franklin,* upon which appellees rely, the Court held that a Pennsylvania statute regulating the standard of care to be used by a physician performing an abortion of a possibly viable fetus was void for vagueness. But in the course of reaching that conclusion, the Court reaffirmed its earlier statement in *Planned Parenthood v. Danforth*[4] that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." Justice Blackmun ignores the statement in *Colautti* that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus." To the extent that §188.029 regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination whether a particular fetus is viable. The Court of Appeals and the District Court thought it unconstitutional for this reason. To the extent that the viability tests increase the cost of what are in fact second-trimester abortions, their validity may also be questioned under *Akron,* where the Court held that a requirement that second-trimester abortions must be performed in hospitals was invalid because it substantially increased the expense of those procedures.

---

[4]Case 9A-AP-8 on this website.

We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual **Procrustean bed**. Statutes specifying elements of informed consent to be provided abortion patients, for example, were invalidated if they were thought to "structure...the dialogue between the woman and her physician." As the dissenters in *Thornburgh* pointed out, such a statute would have been sustained under any traditional standard of judicial review or for any other surgical procedure except abortion.

Hope you find this interesting.

Procrustean bed : a plan or scheme to produce uniformity or conformity by arbitrary methods.

Procrustes was a Greek legendary figure who championed forced conformity. He owned an iron bed which he believed all should "conform" to. Short people were stretched to fit and long people's feet were cut off to fit.

Just another ELL added bonus!

***Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice." We think the *Roe* trimester framework falls into that category...**

The key elements of the *Roe* framework -- trimesters and viability -- are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. As Justice White has put it, the trimester framework has left this Court to

serve as the country's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood v. Danforth*.

In the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. "The State's interest, if compelling after viability, is equally compelling before viability."

The tests that §188.029 requires the physician to perform are designed to determine viability. The State here has chosen viability as the point at which its interest in potential human life must be safeguarded. It is true that the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the viability of the fetus. Since the tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe §188.029 to be constitutional.

Justice Blackmun takes us to task for our failure to join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold*[5] and *Roe*. But *Griswold*, unlike *Roe*, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of *Roe* v. *Wade*, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy. That framework sought to deal with areas of medical practice traditionally subject to state regulation, and it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying. The experience of the Court in applying *Roe* v. *Wade* in later cases, suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, as the Court described it in *Akron,* a "limited fundamental constitutional right," which Justice Blackmun today treats *Roe* as having established or a liberty interest protected by the Due Process Clause, which we believe it to be. The Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable -- an end which all concede is legitimate -- and that is sufficient to sustain its constitutionality.

Justice Blackmun also accuses us of cowardice and illegitimacy in dealing with "the most politically divisive domestic legal issue of our time." There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti v. Franklin* and *Akron v. Akron Center for Reproductive Health, Inc.*[6] But the goal

---

[5]Case 9A-AP-1 on this website.

[6]Case 9A-AP-13 on this website.

of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today. Justice Blackmun's suggestion that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the Dark Ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.

Part III. Justice Rehnquist/White/Kennedy...The appellants have urged that we overrule our decision in *Roe* v. *Wade*. The facts of the present case, however, differ from those at issue in *Roe*. Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In *Roe*, on the other hand, the Texas statute criminalized the performance of *all* abortions, except when the mother's life was at stake. This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases.

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

CONCURRENCE: Justice Scalia...As to Part II-D, I share Justice Blackmun's view that it effectively would overrule *Roe v. Wade.* I think that should be done, but I would do it more explicitly.

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 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, adhere to the strict and venerable rule that we should avoid "deciding 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. 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."

...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.

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 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.

Abstemious : characterized by abstinence or moderation.

CONCURRENCE/DISSENT: Justice Blackmun/Brennan/Marshall...Today, *Roe v. Wade* 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 virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term.

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.

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. In flat contradiction to *Roe,* the plurality concludes that the State's interest in potential life is compelling before viability, and upholds the testing provision because it "permissibly furthers" that state interest.

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." 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. The plurality does not bother to explain these alleged flaws in *Roe*.

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 and viability -- do not appear in the Constitution and are, therefore, somehow inconsistent with a Constitution cast in general terms. 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*) or of the standard for determining when speech is obscene (*Miller v. California*). 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 *Griswold,* 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,* 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 a pregnancy. It is this general principle, the "moral fact that a person belongs to himself and not others nor to society as a whole," that is found in the Constitution. 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. 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." 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* with *McCollum v. Board of Education...*

Justice Blackmun, you surely must be kidding! You equate the regulatory nightmare that has sprung from *Roe v. Wade* to the *Zorach/McCollum* establishment dichotomy? Hardly comparable in my book.

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. 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.

Justice Blackmun (author of *Roe v. Wade*) critical of "it-is-so-because-we-say-so" jurisprudence?

I remain 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. **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 providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy. The plurality today advances not one reasonable argument as to why our judgment in *Roe* was wrong and should be abandoned.

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. 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.

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 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." 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 illegitimacy to our door.

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.

CONCURRENCE/DISSENT: Justice Stevens...Missouri's declaration implies regulation not only of pre-viability abortions, but also of common forms of contraception such as the IUD and the morning-after pill. 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* & *Eisenstadt.*

One might argue that the *Griswold* holding applies to devices "preventing conception" – 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 a theological basis for such an argument, 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. *Stone v. Graham*. 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.

Any ramifications for the future?

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; Harris v. McRae,* or on the fact that the legislators who voted to enact it may have been motivated by religious considerations, see *Washington v. Davis*. 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, serves no identifiable secular purpose. **That fact alone compels a conclusion that the statute violates the Establishment Clause.**

What do you think? Does religion/faith have anything to do with the definition of the "beginning"of life? Does not life also "begin" for the child of atheist parents? I think this is a red herring. *Roe* did, indeed, refer to "potential life." If that is the issue, I find it impossible to conclude that, at a minimum (and, irrespective of when we define a "person" as coming into being), "potential life" begins when cells start splitting. If you disagree with that definition, do you have a better one?

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 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 in 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, for example, in the Council of Trent (1545-1563), which restricted penalties for homicide to abortion of an animated fetus only."

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. 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 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.

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. The Missouri Legislature may not inject its endorsement of a particular religious tradition into this debate, for "the Establishment Clause does not allow public bodies to foment such disagreement." *County of Allegheny* v. *ACLU*.