No. 88-605

In the United States Supreme Court

October Term, 1988

WILLIAM L. WEBSTER, ET AL., Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, ET AL.

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

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

By WILLIAM J. GUSTE, JR.,
Attorney General of Louisiana

With Attorneys General Joining for the States of Arizona, Idaho, Pennsylvania, and Wisconsin

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QUESTION PRESENTED

Appellants have presented seven Questions for review. *Amicus*, State of Louisiana, wishes to address those questions as follows:

Whether the Police Power reserved to the States and the people by the Tenth Amendment to the Constitution allows the States the exercise of power to balance the competing interests of the mother's right to abortion and the unborn child's right to life?

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STATEMENT OF THE CASE

Attorneys General in several states come together to present their interest in the Court's decision in this case which may affect many state laws regulating abortion.[1]

[1] The opinion below is reported at 851 F.2d 1071 (8th Cir. 1988).

The states of Arizona, Idaho, Pennsylvania and Wisconsin have joined with Louisiana in support of the Appellants to demonstrate the public interest in limiting and regulating the right to abortion and to allow the individual state legislatures to define when human life begins. Other states have aligned with Massachusetts in support of Appellees to encourage expanding the right to abortion. This decision will determine the power states may lawfully exercise in regulating abortion and in protecting the rights of unborn children.

INTEREST OF THE AMICUS CURIAE

This brief is filed, *amicus curiae*, by William J. Guste, Jr., Attorney General of Louisiana, pursuant to his official duty to defend the constitutionality of State statutes. Robert K. Corbin, Attorney General of Arizona, Jim Jones, Attorney General of Idaho, Ernest D. Preate, Attorney General of Pennsylvania, and Donald J. Hanaway, Attorney General of Wisconsin, have joined this brief with Louisiana to restore to the States their right to legislate in matters related to abortion. The interests of Louisiana in this case are significantly similar to those of Missouri in that Louisiana has statutes which, for example, define that human life begins at the moment of conception; which make the unborn child a legal person for purposes of the unborn child's right to life as protected by State laws; which forbid the use of public funds, institutions and/or public employees from participating in abortions except to prevent the death of the mother; and which regulate abortion to the extent permitted by the decisions of the United States Supreme Court.[2] The interests

[2] The Missouri and Louisiana Statutes are reproduced in Appendices A and B respectively, at App. 1 and 5.

of other states are likewise similar; therefore, these several states have a direct and substantial interest in the disposition of this case. The position of *amicus* is solely to uphold the right of the States to determine the power states may lawfully exercise in regulating abortion and in protecting the rights of unborn children.

SUMMARY OF ARGUMENT

I. THE RIGHT OF THE SEVERAL STATES TO LEGISLATE IN MATTERS OF PUBLIC POLICY RELATED TO ABORTION IS A PROPER EXERCISE OF THE POLICE POWER RESERVED TO THE STATES AND THE PEOPLE BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Louisiana laws are significantly similar to those of Missouri and may be at risk in these proceedings. Louisiana urges the Court to reject further attempts to balance the interests of the unborn child against those of the mother and to allow *Amicus* to resolve this issue through the democratic process at the state level. *Amicus* further urges that the court allow the states to exercise their general police powers to legislate in abortion-related matters because of this Court's precedents and because

of the Framers' concept of the constitutional division of power between the federal and state goverments.

The Court has long recognized the wisdom of abstention from involvement in matters distinctively political in nature. The nature of the opposing forces in abortion issues is essentially political and therefore not amenable to judicial resolution. *Amicus* suggests that the instant case, as well as *Roe v. Wade*[3] and its progeny, are inappropriate for judicial resolution. To achieve federal-state harmony on this issue, *Amicus* urges this court to reverse or to modify *Roe*.

II. THERE ARE SIGNIFICANT SIMILARITIES BETWEEN THE LAWS AND PUBLIC POLICIES OF MISSOURI AND LOUISIANA BALANCING THE COMPETING RIGHT TO ABORTION AND RIGHT TO LIFE OF THE UNBORN CHILD

Under both Missouri and Louisiana laws, it has been a longstanding policy that an unborn child is a human being from the time of conception. Both states have a compelling interest in protecting an unborn child's right to life and in regulating and limiting abortion to the extent permitted by the Constitution.

The substantive laws of both states grant certain rights to the unborn child. In particular, both states prohibit public employees, facilities or funds from involvement in abortions except when medically necessary to prevent the mother's death. In the area of inheritance law, the unborn child has inheritance rights particularly well-

[3] 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973).

grounded in Louisiana, which has adopted much of the Roman Civil Law on this subject. In the area of tort law, Louisiana was the first state to allow recovery for injuries to an unborn child, rejecting the traditional common-law rule on this issue. *Amicus* submits that it is blatantly inconsistent to grant a legal remedy to an unborn child injured during pregnancy, as Louisiana does, and to deny that same unborn child the right to life, as *Roe* does.

Amicus likewise contends that the question of when human life begins is crucial to any discussion of abortion and that this question ought to be resolved through the political process at the state level.

Roe and its progeny have established the competing rights of the mother and the unborn child, both of which are linked to the states' compelling interests. *Amicus* argues that the point at which these compelling interests intervene is inherently unstable because the competing interests are on a collision course with each other. The Constitution does not provide for a "trimester" and "viability" approach. The Constitution reserves to the states and the people through the Tenth Amendment the exercise of power to legislate in matters of public policy related to the right to abortion and the right to life of the unborn child.

ARGUMENT

I. THE RIGHT OF THE SEVERAL STATES TO LEGISLATE IN MATTERS OF PUBLIC POLICY RELATED TO ABORTION IS A PROPER EXERCISE OF THE POLICE POWER RESERVED TO THE STATES AND THE PEOPLE BY THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The State of Louisiana has a long and unbroken legislative history in the area of abortion related legislation. Like the appellant, State of Missouri, *Amicus* has at risk in these proceedings the viability of numerous laws affecting the health, peace and tranquility of its citizens.

Seeking to restore order from conflict, Louisiana urges this court not to become once more entangled in the thicket of the medical, ethical, moral and social controversy from which *Roe v. Wade*[4] and its progeny emanate. Rather, *Amicus* urges the Court to forsake further attempts to balance the interests of the unborn child against those of the mother, and recognize that a definitive and workable resolution of that issue is and ought to be accomplished appropriately through the political process, and adjudged beyond the capacity of this Court to resolve through constitutional principles.

Chief Justice Taney, in the beginnings of the Court's work, cautioned that, "It is the province of a court to expound the law, not to make it." Further, ". . . it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums." *Luther v. Bor-*

[4] *Supra* 3.

den, 48 U.S. 1 at 40, 46 (1849). This cardinal precept of judicial restraint was again affirmed in *Mobile v. Bolden*, 446 U.S. 55, 100 S Ct. 1490, 64 L Ed 2d 47 (1980) wherein this Court noted that:

> It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. See *Shapiro v. Thompson*, 394 U.S. 618, 634, 638, 22 L Ed 2d 600, 89 S Ct 1322 *id.*, at 642-644, 22 L Ed 2d 600, 89 S Ct 1322 (concurring opinion). See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 30-32, 36 L Ed 2d 16, 93 S Ct 1278. But plainly "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.*, at 33, L Ed 16, 93 S Ct 1278. See *Lindsey v. Normet*, 405 U.S. 56, 74, 31 L Ed 2d 36, 92 S Ct 862; *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L Ed 2d 491, 90 S Ct 1153. Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from 'the settled mode of constitutional analysis of legislat[ion] . . ., involving questions of economic and social policy,' *San Antonio Independent School District v. Rodriguez*, *supra*, at 33, 36 L Ed 2d 16, 93 S Ct 1278. Mr. Justice Marshall's dissenting opinion would discard these fixed principles in favor of a judicial inventiveness that would go "far toward making this Court a 'superlegislature.' *Shapiro v. Thompson*, *supra*, at 655, 661, 22 L Ed 2d 600, 89 S Ct 1322 (Harlan, J., dissenting). We are not free to do so." *id.* at 76.

Amicus suggests that, absent a finding of an issue involving fundamental personal rights which are uniquely secured by the Constitution, further inquiry into whether the Missouri statutes in question are beneficial, wise, or

in the best interest of those thereby affected, are, in the words of Justice Sutherland, "wholly irrelevant to the inquiry of constitutionality." *Carter v. Carter Coal Co.*, 298 U.S. 238, 295, 56 S Ct 855, 80 L Ed 1160 (1936).

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S Ct 1278 at 40, 36 L Ed 2d 16 (1973) the Court held that "strict judicial scrutiny" should be applied only when legislation may be said to have deprived or interfered with the exercise of some fundamental personal right or liberty. See: also, *Akron v. Akron Center For Reproductive Health*, 462 U.S. 416, 462, 103 S Ct 2481, 76 L Ed 2d 687 (1983), (O'Connor, dissenting.)

Amicus agrees with and adopts the arguments and reasoning of Justice White in *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 790, 791, 106 S Ct 2169, 90 L Ed 2d 779 (1986), (White, J., dissenting, joined by Rehnquist, J.) to the effect that the woman's ability to choose an abortion is not so fundamental as to "call into play anything more than the most minimal judicial scrutiny." *Id.* at 790. As then Justice Rehnquist noted in his dissent in *Roe*, ". . . the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" 410 U.S. at 174.

Justice White, speaking for the Court in *Bowers v. Hardwick*, 478 U.S. 186, 106 S Ct 2841, 92 L Ed 2d 140, (1986) found no fundamental right to privacy allowing homosexual sodomy, and characterized such rights as being those "liberties that are 'deeply rooted in this Nation's history and tradition.'" 478 U.S. at 192.

Amicus suggests that the woman's election to abort an unborn child is, for certain, not rooted in either the history or tradition of this Nation, nor so fundamental that legislation placing limitations thereon should receive anything more than the minimal scrutiny of this Court in terms of the rational relationship thereof to legitimate government objectives. To the extent that the language of *Roe* suggests otherwise, that decision should therefore be overruled. ". . . [W]hen it has become apparent that a prior decision has departed from a proper understanding of the Constitution, that decision must be overruled." *Thornburgh, supra*, 476 U.S. at 788 (White dissenting).[5]

In the context of judicial review of abortion legislation, the Court has already given partial recognition to

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[5] Supreme Court reversing error: *e.g. Hudson and Smith v. Guestier*, 6 Cranch 281, 285 (1810) overruling *Rose v. Himely*, 4 Cranch 241 (1808); *Edwards v. California*, 314 U.S. 160, 176-77 (1941) overruling *City of New York v. Miln*, 36 U.S. (11 Pet) 102 (1837); *Jones v. Opelika*, 319 U.S. 103 (1943) overruling *Jones v. Opelika*, 316 U.S. 584 (1942); *Legal Tender Cases*, 12 Wall 457, 603 (1870) overruling *Griswold v. Hepburn*, 2 Duvall 20 (1869); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) overruling *Ex parte Bakelite* 279 U.S. 438 (1929); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) overruling *Swift v. Tyson*, 16 Pet 1 (1842); *Williams v. North Carolina*, 317 U.S. 287 (1942) overruling *Haddock v. Haddock* 201 U.S. 562 (1906); *Benton v. Maryland*, 395 U.S. 784, 794 (1968) overruling *Palko v. Connecticut*, 308 U.S. 319 (1937); *West Virginia State Board of Education v. Barnette*, 319 U.S. 64, 642 (1943) overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) overruling explicitly *Adkins v. Children's Hospital* 261 U.S. 525 (1922) and abandoning error in *Lochner v. New York*, 198 U.S. 45 (1905); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954) overruling *Plessy v. Ferguson*, 163 U.S. 537 (1895).

this limitation in, *Maher v. Roe*, 432 U.S. 464, 97 S Ct 2376, 53 L Ed 2d 484 (1977) to the extent that it therein declined to substitute its judgment for that of the legislature relative to abortion funding. The Court concluded that:

> 'The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and values over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on weighing of its wisdom or social desirability, for this Court does not strike down state laws because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, 99 L Ed 563, 75 S Ct 461 (1955), quoted in *Dandridge v. Williams*, *supra*, at 484, 25 L Ed 491, 90 S Ct 1153. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) *id.* at 479, 480.

It is the position of *Amicus* that the Court should extend its application of the logic of *Maher*, *supra.*, to the case, *sub judice*. The Court can reach this result by a finding that, within those powers expressly reserved to the several States by the Tenth Amendment[6] is the

[6] U.S. Constitution, Amend. X: "The Powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

general police power to legislate in those matters related to abortion which affect the health, peace, welfare and moral fiber of its people, and to proscribe conduct adverse thereto. *United States v. Darby*, 31 U.S. 100, 124, 61 S Ct 451, 462, 85 L Ed 609 (1941); *National League of Cities v. Usrey*, 426 U.S. 833, 96 S Ct 2465, 49 L Ed 2d 245 (1976).

Judicial deference to the political process at the State level is not only consonant with this Court's prior expressions, but is also in conformity with the Framer's concept of the constitutional division of power between the federal and state governments.

Madison, in *Federalist* 45, argued that the creation of a strong union would not, "derogate from the importance of the governments of the individual States." He further opined that, "The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State."[7]

For virtually as long as this Court has sat in judgment it has given recognition to the wisdom of abstention from involvement in matters distinctively political in nature. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court tersely noted that, "Questions in their nature political." . . . "can never be made to this court." *id.* at 168. Justice Story later judiciously forecast the pitfalls of the Court's intrusion into matters best left to the will of the people when he observed that, "The predicament in which this court stands in relation to the nation

[7] *Federalist*, 45 (Madison) pp. 289, 293.

at large is full of perplexities and embarrassments. . . . It stands therefore, in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more that its duty; and I trust, it will always be found to possess firmness enough to do that." *Trustees of Dartmouth College v. Woodward*, 7 U.S. (4 Wheat.) 518, 712, 4 L Ed 629 (1819).

History reveals that in those vexing cases to which Justice Story alluded, where sharply and deeply divided lines have been drawn based on moral, cultural or religious convictions, this Court has most ably fulfilled its constitutional role when, in recognition of the political nature of the issue before it, it has relegated such matters for resolution to the legislative forum.

Even in those instances where the Congress and the people have legislated in such matters, the Court has expressed a willingness to defer to the States wherever possible. The sovereignty of the States was thusly recognized to permit them to enact prohibition laws within their territorial limits, notwithstanding the adoption of the ill-fated 18th Amendment. *McCormick & Company v. Brown*, 286 U.S. 131, 52 S.Ct. 522, 76 L Ed S Ct 1017 (1931). Following the repeal of that Amendment, the courts have generally upheld the power of the States to regulate the sale or consumption of alcohol. *U.S. v. Constantine*, 296 U.S. 287, 56 S.Ct. 223, 80 L Ed 2d 233 (1935); *Hughes v. United States*, 112 F 2d 417 (1940); *Crews v. Undercofler*, 249 F.Supp. 13 (1966), affirmed 371 F. 2d 534; *Commonwealth v. Stofcheck*, 185 Atl. 840, 322 Pa. 513 (1936).

Similarly, this Court has declined to elevate the constantly contested social, moral and political issues surrounding the legalization of gambling to the level of constitutional scrutiny. *State v. Rozenthal*, 559 P 2d 830, 93 Nev. 36, appeal dismissed, 434 U.S. 803, 98 S Ct 32, 54 L Ed 2d 61 (1977). The Court has likewise refrained from finding 14th Amendment privacy rights to bar the States from enacting penal statutes against homosexual conduct.[8]

Amicus readily acknowledges that the issues at stake herein are of uniquely greater moment than alcohol abuse, gambling, or homosexuality. However, the nature of the abortion issue differs therefrom only in degree, not in kind. The nature of the national unending struggle of opposing forces, in each instance, is, in essence, political, value laden, and not therefore amenable to judicial resolution.

This Court has not otherwise been loath to categorize questions presented for determination as being essentially political in nature, and therefore non-justiciable. Foremost in any such determination is the lack of adequate criteria for the making of a decision, or the impossibility of the Court's rendering a decision without an initial policy determination of a kind clearly non-judicial in nature.[9]

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[8] *Bowers v. Hardwick*, *supra.*, 478 U.S. 186.

[9] *Coleman v. Miller*, 307 U.S. 433, 454, 455, 59 S Ct 972, 88 L Ed 1385; *Baker v. Carr*, 369 U.S. 186, 82 S Ct 691, 7 L Ed 2d 663 (1962); *Colegrove v. Green*, 328 U.S. 549, 66 S Ct 1198, 90 L Ed 1432 (1945), reh. den. 329 U.S. 825, 67 S Ct 118, 91 L Ed 701, motion for reargument den. 329 U.S. 828, 67 S Ct. 199, 91 L Ed 703.

In *Baker v. Carr*, 369 U.S. 186 (1962), this Court carefully delineated circumstances which require a finding that the nature of the matter before the Court is essentially unsuitable for judicial determination:

> A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. *id.* 369 U.S. at 82.

Amicus suggests that the Court now has before it precisely the sort of question described in *Baker* which renders this case, and all prior decisions emanating from *Roe v. Wade*,[10] *supra.*, and, for that matter even *Roe* itself, inappropriate for judicial resolution. The question relates not to 14th Amendment privacy rights; rather, it requires a declaration of the ever shifting status of the unborn child, measured on the sliding scale of pre-natal "meaningful life and his resulting rights balanced against those of his mother," *cf. Roe v. Wade.*

The dissenting opinion in, *Akron v. Akron Center for Reproductive Services*, 462 U.S. 416, 1035 S Ct 2481, 76 L Ed 2d 687 (1983) most aptly states the argument of *Amicus* on this point. Justice O'Connor therein cautions that:

> 'We should not forget that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, K.*

[10] *Supra* 3.

> *& T. R. Co. v. May*, 194 U.S. 267, 270, 48 L Ed 971, 24 S Ct 638 (1904) (Holmes, J.) *Maher*, 432 U.S. at 479-480, 53 L Ed 2d 484, 97 S Ct 2376 (footnote omitted). This does not mean that in determining whether a regulation imposes an 'undue burden' on the *Roe* right we defer to the judgments made by state legislatures. The point is, rather, that 'when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.' *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103, 36 L Ed 2d 772, 93 S Ct 2080 (1973). *id.* at 465 (O'Connor, J., dissenting, joined by White, J., and Rehnquist, J.).

Justice O'Connor then proceeds to articulate the dissent's perception of the "many hard questions" with "few easy answers" in the following terms:

> The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time. . . . A. Cox, *The Role of the Supreme Court in American Government* 114 (1976). The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation en-

> sues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes 'accepted medical practice' at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments. *id.* at p. 458.

For this Court to either affirm or reverse the decision below in this appeal on the merits will ultimately involve a reconsideration of the ever shifting knowledge and values to which the dissent in *Akron* alludes. *Amicus* urges the Court to decline this invitation, and rather to defer to the several States for a resolution of these issues in the appropriate political forum.

II. THERE ARE SIGNIFICANT SIMILARITIES BETWEEN THE LAWS AND PUBLIC POLICIES OF MISSOURI AND LOUISIANA BALANCING THE COMPETING RIGHT TO ABORTION AND RIGHT TO LIFE OF THE UNBORN CHILD

A. The Nature of the Laws

The Louisiana Legislature reaffirmed the longstanding policy of Louisiana that the unborn child is a human being from the time of conception and is a legal person for the purpose of the unborn child's right to life as follows:

> 1299.35.0 Legislative intent
>
> It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and

> find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.[11]

In the definitions enacted, "'Unborn child' means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy."[12]

The Louisiana state interest in protecting the unborn child's right to life is clear and compelling and forms the basis for regulating and limiting abortion to the extent permitted by the United States Supreme Court. The Missouri Act defining human life as beginning at conception also forms a statutory basis to establish inheritance rights inuring to the unborn child's heirs. These statutes do not constitute state action impinging on any privacy right to abortion. These statutes demonstrate public

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[11] La. R.S. 40:1299.35.0. (See App. 6)
[12] La. R.S. 40:1299.35.1. (See App. 6)

interest in recognizing the competing right to life of the unborn child from the moment of conception.

By the democratic process, the Louisiana Legislature further expresses the strong interest of the state to prohibit public funds, facilities or employees from participating in abortions except when medically necessary to prevent the death of the mother.[13]

B. Treatment of the Fetus in Property Law

(1) The Fetus in Property Law

At common law, fetal rights were recognized in property law from the time of conception.[14] For instance, the states have established mechanisms for protecting the unborn child's right to inherit property upon its birth.[15] In Louisiana, a Civil Law Jurisdiction, former Civil Code Article 29, found in Book 1 "Of Persons," recognizes the unborn child's property rights and rights of forced heirship as rights preserved for its own sake as a person:

Article 29. Children in mother's womb

Children in the mother's womb are considered, in

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[13] La. R.S. 40:1299.34. Employees of state and political subdivisions; counseling abortion prohibited. (See Append. B).

[14] Lenow, J.L., *The Fetus as a Patient: Emerging Rights as a Person*, A.J. Law and Med. 9 Vol. 1, 3 (1983) citing C.J.S. *Wills* sec 655 (1976). "The word 'children' includes those *en ventre sa mere* at the time of the testator's death, especially where such intention is clear by reason of express provision in the will."

[15] *Id.* Michigan, for example, provides for the appointment of a guardian ad litem to protect an unborn child's property, etc.: "The guardian ad litem is authorized to engage counsel and do whatever is necessary to defend and protect the interest of the unborn person."

> whatever relates to themselves, as if they were already born; thus the inheritances which devolve to them before their birth, and which may belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit.[16]

This principle stems directly from the classical period of Roman law[17] which is again ingrained in the Louisiana Civil Code in Book III, "Of the Different Modes of Acquiring the Ownership of Things," and stipulates that the capacity or ability to own rights is the core of one's legal personality.[18] The redactors of the Louisiana Civil Code clearly treated the fetus as a person directly traced to antiquity.

2. The Fetus in Tort Law

The traditional rule of tort law was to deny recovery for prenatal injuries even if the child were born alive.[19] However, the live birth requirement for a wrongful death remedy was logically indefensible on the following grounds:

> To deny a right of action to a stillborn child produces the incongruous result that a tortfeasor would be liable for injuries to an unborn child who is later still-

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[16] The original version of Civil Code Article 29 as it appeared in the Digest of 1808 included the passage "yet the hope that such children may be born alive, causes them to be considered" in the law. Effective January 1, 1988, La. C.C. art. 26 became Article 29 without changing the law.

[17] *Weeks v. Garrison*, civil action No. 73-469, La. Eastern Distict (1973) at 12; Brief cites Pugh, Nina, "Nasiturum, the Roman Law on the Inception of Human Personality," Master's thesis, L.S.U. (1963) at 25-28.

[18] *e.g.*, La. C.C. arts 953-957, 963.

[19] 410 U.S. at 162.

> born. This rewards tortfeasors for killing rather than maiming a fetus and also creates an incentive for tortfeasors to withhold efforts to save their victim's lives.[20]

In *Cooper v. Blanck*, 39 So.2d 352 (La. App. Orl. 1923), Louisiana became the first state in the union to allow recovery for pre-natal injuries to a child. The Louisiana Court rejected the common law precedent in *Allaire v. St. Luke's Hospital*, 56 N.E. 638 (Ill. 1900), which found that the child before birth is a part of the mother and is only severed from her at birth. The lack of a separate legal personality was first expressed by Justice Holmes in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884), where the court of Massachusetts denied recovery for pre-natal injuries because the unborn child had no separate existence. Rejecting *Dietrich*, Louisiana set a precedent for the nation by finding a remedy for wrongful death, holding that the civil law stipulated that the unborn child is separate from its mother and has a right of recovery for its own injuries. Louisiana further found that the pecuniary damages for the lost benefit of an unborn child were not too speculative on the following grounds:

> "Life," said Blackstone, "begins, in contemplation of the law, as soon as the infant is able to stir in its mother's womb." If the Common Law decisions are uniformly opposed to this view, or if, as was said in the majority opinion in *Allaire v. St. Luke's Hospital*, the doctrine of the Civil Law and Ecclesiastical law has not been indulged in the courts of the Common Law, we cannot follow them in the application

[20] Lenow, 14 *supra* at 7.

> of principles of our law, which while it presents many analogies, is yet a distinct system. *Cooper*, *supra*, 39 So.2d at 358.

In *Roe*, the majority opined that the right to an abortion is not inconsistent with the parents' rights for a wrongful death remedy for a stillborn child due to prenatal injuries.[21] Although there are commentators who agree that *Roe* is not inconsistent with wrongful death actions, an examination of the origin of the action reveals blatant inconsistencies that grant a legal remedy for the unborn child who is injured during pregnancy yet deny that same unborn child the basic right to life.

C. State's Interest in Protecting Fetal Life

The question of when human life begins is fundamental to the discussion on abortion. In *Roe*, the court decided that it need not resolve the difficult question of when human life begins because even scholars disagree.[22] This Court declared in *Roe*[23] and reaffirmed in *Planned Parenthood of Central Missouri v. Danforth*,[24] that the right to abortion is not absolute. The right is "inherently different" from other aspects of the constitutional right to privacy.[25] The right is qualified by "compelling state interests."[26]

It is evident from *Roe*, *Planned Parenthood* and *Akron*[27] that the points at which these "compelling interests" intervene are inherently unstable.

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[21] 410 U.S. at 162.
[22] 410 U.S. at 159.
[23] 410 U.S. at 153.
[24] 428 U.S. 52 (1976).
[25] 410 U.S. at 159.
[26] 410 U.S. at 154.
[27] 462 U.S. 416.

This Court originally set the intervention of the State interest in the health of the mother at the end of the first trimester "*in light of present medical knowledge.*"[28] This Court likewise held that a state's interest in "potential" life begins at "viability," by which is meant "potentially able to live outside the mother's womb, albeit with artificial aid."[29]

In *Akron v. Akron Center for Reproductive Health*,[30] this Court expands the *Roe* framework of dividing the pregnancy into stages and sets the intervention of the State's interest in the health of the mother at the end of the second trimester.[31] In the case presently before the court, the Missouri statutes recognize that the present state of medical knowledge has advanced the stage at which the unborn child becomes viable to a point in time before the end of the second trimester. The Missouri statutes seek to protect the interest of the unborn child at this stage of development which the Appellees will argue is in direct conflict with the rights of the mother as the court has found them to exist in *Akron*. Anticipating this problem, Justice O'Connor criticized the *Roe* trimester framework and the role of viability. She suggests that the point at which the state may intervene is on a "collision course with itself."[32]

Obviously, the settings for these two compelling in-

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[28] 410 U.S. at 163 (emphasis added).

[29] 410 U.S. at 160.

[30] *Supra* 462 U.S. 416, 103 S.Ct 2481, 76 L.Ed. 687 (1983).

[31] *Id.*, *Akron* overruled state actions regulating abortions in the second trimester unless medically necessary because the abortion procedure is hailed as less dangerous than the delivery.

[32] 402 U.S. 416, 103 S.Ct. 2481 at 458.

terests are not sacrosanct. First of all, the point of "viability" was "purposefully left flexible for professional determination and dependent upon developing medical skill and technical ability."[33] As to the interest in maternal health, that interest must be balanced with the State's interest competing to protect the life of the unborn child. Present science makes it possible for the unborn, fertilized *in vitro*, to survive outside the womb immediately after conception "albeit with artificial aid," for purposes of successful transplantation. Faced with such advancements in medicine, by implication from the reasoning in *Roe*, it is urged by *Amicus* that this Court should recognize that the State's interests in protecting the life of the unborn child is compelling from conception.

The competing interests of the mother and the unborn child, under the theory of *Roe*, are in irreconcilable conflict with each other. Therefore, since the Constitution does not provide for a "trimester" and "viability" approach, and the Constitution reserves to the States through the Tenth Amendment the exercise of power to legislate in matters of public policy, *Amicus* urges this Court to overturn *Roe* and to uphold the constitutionality of the Missouri statutes.

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[33] *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

CONCLUSION

Amicus respectfully urges this Court to rule in favor of Appellants, and to uphold the constitutionality of the Missouri statutes based on compelling state interests in balancing the right to abortion and the right to life of the unborn child through the legitimate exercise of police power reserved to the states and the people by the Tenth Amendment of the United States Constitution.

February 23, 1989

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