No. 88-605

In the

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Books, Articles and Other Publications:

PAGE

Constitutions, Statutes and Regulations:

Miscellaneous:

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973) should be neither reconsidered nor overruled. The right to choose abortion is properly among the fundamental liberties protected by this Court's jurisprudence. It is a right consistent with our concept of ordered liberty, our history, and tradition. Recognition of viability as the point at which a state interest in fetal survival becomes compelling is also consistent with our history, medical reality, and the constitutional principle that a woman's autonomy not be abrogated by state action because of a pregnancy.

The declaration of when life begins is unconstitutional because it is the foundation of an Act that regulates abortion and it has impermissible substantive effect. It requires the abortion regulations in the Act to reach a variety of methods of contraception. Alternatively, this issue should be remanded for consideration of unaddressed questions of state law.

The testing requirement is unconstitutional because it burdens the obtaining of abortions for no legitimate reason. The State's reading of the statute is implausible, and deference is due the statutory interpretation of the Court of Appeals. If this Court believes that construction is obviously wrong, then abstention should be ordered.

There appears no longer to be a case or controversy about the restriction on the use of public funds for the purpose of counseling or encouraging a woman to have an abortion. The State has not appealed and is not challenging the holding invalidating the same restrictions on public employees and anyone in a public facility. This issue should be remanded for consideration of mootness. To reach the merits presumes there is a restriction on the speech of the plaintiffs. Such a restriction violates the first amendment because it is government manipulation of highly important personal communications. It is viewpoint discriminatory and unconstitutionally vague. It violates the fourteenth amendment rights of women to make a choice about abortion in consultation with their physicians.

The public facilities provision is unconstitutional because it imposes a substantial obstacle for women who must obtain an abortion in a hospital owned and operated by the State, even

when no State funds are involved. It will also interfere with and penalize private conduct in private institutions solely because that conduct implicates some asset controlled by the State.

ARGUMENT

I. THE STATE'S AND THE SOLICITOR GENERAL'S SUGGESTION THAT THIS COURT OVERRULE *ROE V. WADE* SHOULD BE REJECTED

Once again this Court has been asked to reconsider and to retreat from its holding in *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* is a decision of enduring constitutional significance. It shielded a woman's private choice of whether to terminate or continue a pregnancy from the vicissitudes of the political process, making clear that the fourteenth amendment's guarantee of liberty "extends to women as well as to men." *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986). By so doing, the Court enabled millions of American women to enter the work force, continue their education, and escape the spectre of illegal abortions or forced pregnancies which had threatened the lives of countless women before them.

Roe was a logical and necessary outgrowth of the long line of cases preceding it which recognized a fundamental right to privacy in matters of childbearing and family life. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (childrearing). Those cases embodied the principle that the value our society places on individual autonomy demands that decisions with a profound effect on personal identity and destiny be placed largely beyond the reach of government. *Eisenstadt*, 405 U.S. at 453; *Thornburgh*, 476 U.S. at 772. *Roe* arose inevitably out of that principle because this Court recognized that the decision to terminate or continue a pregnancy has the same, if not greater, implications

for altering the course of a woman's life[1] as the decisions on contraception and marriage which it had previously found to be protected by the fundamental privacy right. 410 U.S. at 153.

A. The Values Embodied In The Doctrine of *Stare Decisis* Demand That *Roe v. Wade* Not Be Overruled

A proponent of overruling precedent normally must meet a "heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). That burden must be especially heavy in this case. Overruling *Roe* has the potential to undermine the values served by *stare decisis* to a greater extent than any such action in the history of this Court.

First, in overruling *Roe*, this Court would, for the first time in its history, withdraw from constitutional protection a previously recognized fundamental personal liberty.[2] Concomitantly, also in an unprecedented manner, constitutionally protected conduct undertaken daily by literally thousands of citizens would be open to abrupt criminalization.[3]

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1 *Roe* recognized the difficulties of caring for an unwanted child, the stigma of unwed motherhood, the taxing of mental and physical health by child care, and the health risks of pregnancy. 410 U.S. at 153. Studies have documented the profound effect on educational and employment opportunities for women of untimely pregnancies as well as the continued advances in the safety of abortion since its legalization. *See* Brief *Amici Curiae* of Seventy-seven Organizations Committed to Women's Equality In Support of Appellees; Brief *Amicus Curiae* of American Public Health Association In Support of Appellees.

2 Although this Court has modified rights, it has never adjusted precedent so as to withdraw from constitutional protection a fundamental individual liberty. While cases repudiating the principles of *Lochner v. N.Y.*, 198 U.S. 45 (1905), recognized greater governmental power in the area of economic regulation, they in no sense withdrew a fundamental freedom comparable to the right recognized in *Roe*, one that is central to basic life choices.

3 A number of states have already enacted their intention to do so in laws scheduled to take effect should *Roe* be overruled. *See* statutes cited at *infra* note 30.

Second, there can be no assurance that overruling *Roe* will be "like a restricted railroad ticket, 'good for this day and train only.' " *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)). Because *Roe* is a necessary outgrowth of the sixty years of constitutional evolution delineating the right to privacy, overruling it will open to question the fundamental principles of personal autonomy upon which that right rests, principles which continue to be recognized and applied pervasively in American law.[4]

Third, this Court has already twice in the past six years rejected suggestions that *Roe* be overruled, resoundingly reaffirming in each instance the principles of that decision. In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), this Court rejected the argument that *Roe* "erred in interpreting the Constitution," *id.* at 419, and enumerated the "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.

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4 *See, e.g.*, this Court's post-*Roe* cases applying the right to privacy: *Carey v. Population Services International*, 431 U.S. 678 (1977) (contraception); *Moore v. East Cleveland, Ohio*, 431 U.S. 494 (1977) (right to make a home with immediate family members); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (pregnancy); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Turner v. Safley*, 107 S.Ct. 2254 (1987) (prisoners' right to marry). *See also* state cases applying the privacy right: *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (right to privacy includes right to decline medical treatment); *Clites v. Iowa*, 322 N.W. 2d 917, 922 (Iowa App. 1982) (forcible injection of psychotropic drugs violates right to privacy); *Owens v. City of Jennings Municipal Fire and Police Civil Service Bd.*, 454 So. 2d 426 (La. Ct. App. 1984) (right to privacy includes right not to be penalized for unwed pregnancy).

Id. at 420 n.1 (citations omitted).

Again, in *Thornburgh*, the Solicitor General urged this Court to overrule *Roe v. Wade*. But, this Court held: "[a]gain today, we reaffirm the general principles laid down in *Roe* and in *Akron*." 476 U.S. at 759. In doing so, this Court noted that "[t]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." *Id.*

Given the potential for uprooting legal principles so recently reaffirmed and so pervasively relied upon throughout society, overruling *Roe* strikes at the heart of the value of *stare decisis*: that "bedrock principles," which establish rules of conduct and scope of rights, have continuity and predictability because they are "founded in the law rather than in the proclivities of individuals." *Vasquez*, 474 U.S. at 265. Surely, meeting the burden of convincing this Court to disturb those values in circumstances such as these must encompass factors more enduring[5] than a change in the composition of this Court. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with

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5 This Court has deviated from the rule of *stare decisis* only when special circumstances demanded that course. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 492-94 (1954). Such circumstances include changed factual conditions, *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 456 (1851); experience showing that the prior rule has been "unsound in principle and unworkable in practice," *Garcia v. San Antonio Metrop. Transit Auth.*, 469 U.S. 528, 546 (1985); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938); *Mapp v. Ohio*, 367 U.S. 643, 651-53 (1961); and the existence of intervening decisions so inconsistent with the prior rule as to have eroded its force. *See, e.g., Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2808 (1987); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Katz v. United States*, 389 U.S. 347, 353 (1967). As the discussion *infra* will demonstrate, none of these factors is present in this case. Both the factual and legal arguments now offered as grounds for rejecting *Roe* were made at the time of the decision itself. The rule of *Roe* has proved as "workable in practice" as any principled decision conferring hard-won and controversial rights. Finally, intervening decisions have supported, rather than eroded, the holding in *Roe*. *See, e.g., Thornburgh*, 476 U.S. 747; *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron*, 462 U.S. 416.

them." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

As shown below, both the State and the Solicitor General have utterly failed to meet their burden of justifying the radical step they propose.[6]

B. The Decision To Terminate Or Continue A Pregnancy Is A Fundamental Right

The State and the Solicitor General argue first that *Roe* should be abandoned because the right to abortion is not a fundamental right. This argument is based on three assertions: that abortion is not an explicit guarantee in the Bill of Rights, that it is not deeply rooted in the nation's history and tradition, and that, because of the presence of the fetus, it is different in kind from any privacy right heretofore recognized by this Court.

In support of his argument that *Roe* should be abandoned because there is no explicit right to abortion in the Constitution, the Solicitor General asserts that *Roe* was this Court's first privacy case *not* based on an explicit guarantee in the Bill of Rights. As an historical matter, this is patently false.[7] There can

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6 Notably, the State fails to link its suggestion that *Roe* be overruled to any specific issue in this case. Thus, while it argues that the rational basis test is the correct standard of review for abortion legislation, it does not propose how any provisions of the Act would meet that constitutional test. For example, its defense of the testing requirements (§ 188.029) is based solely in what it alleges to be an error of statutory construction by the Court of Appeals.

The Solicitor General, likewise, only coyly suggests that certain of the provisions "may" run afoul of *Roe*, Solicitor General's Brief at 8 n.5, but offers no explanation of how or why they would fare better under some other mode of analysis.

7 Although in *Griswold v. Connecticut*, 381 U.S. 479, Justice Douglas based the right to privacy on penumbras of the Bill of Rights, five Justices wrote three separate concurrences to emphasize that the holding was not dependent on any explicit constitutional guarantee. *See, e.g., id.* at 502 (White, J., concurring). The Solicitor General similarly mischaracterizes *Eisenstadt v. Baird*, 405 U.S. 438, as simply an equal protection case. In holding that the state may not discriminate between the married and unmarried in access to contraception, the Court said, "[i]f the right of privacy

be no doubt, in any event, that the right to privacy, apart from any right to abortion, exists in this Court's modern day jurisprudence as a fundamental right founded on the fourteenth amendment's "liberty" guarantee alone. *See, e.g., Carey v. Population Services International*, 431 U.S. at 684; *Zablocki v. Redhail*, 434 U.S. at 384; *Turner v. Safley*, 107 S. Ct. at 2265 (citing *Zablocki*).

The State and the Solicitor General next argue that abortion is not a fundamental right because it is not "implicit in the concept of ordered liberty" or "deeply rooted in the Nation's history and tradition," in part because abortion was illegal in many states by the time the fourteenth amendment was adopted. Solicitor General's Brief ("S.G. Brief") at 13; State's Brief at 17. Factually, they give an incomplete view of history; and legally their conclusions are fallacious.

At the time of the founding of our Republic, abortion before quickening was an accepted practice, protected at common law.[8] Early nineteenth century abortion laws, passed in a few states, mirrored the common law.[9] In the mid-nineteenth century, abortion began to be practiced for the first time on a large scale by married middle-class women in order to limit family size.[10] An effort to suppress this practice resulted in a proliferation, between 1860 and 1880, of the laws banning abortion throughout pregnancy which remained in effect into the twentieth century.[11] These laws were not primarily motivated, however, by notions that abortion was immoral because it took fetal

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means anything, it is 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." *Id.* at 453. *See also Loving v. Virginia*, 388 U.S. at 12 (right to marry is based on the due process clause of the fourteenth amendment).

8 *See generally* J.C. Mohr, Abortion in America: The Origins and Evolution of National Policy 3-19 (1978); Brief *Amici Curiae* of American Historians In Support of Appellees.

9 Mohr, *supra* note 8, at 43-45.

10 *Id.* at 86-118.

11 *Id.* at 200-201.

life, but rather by a broad combination of desires to protect women from unsafe practices,[12] to secure the role of the emerging medical profession,[13] to enforce a narrow vision of the role of women in society,[14] and to stem the falling birth rate among white native-born women at a time of mass immigration.[15] Thus, the arrival and existence of these statutes at the time of the adoption of the fourteenth amendment is of little relevance to the question of our "nation's history and tradition" when they are considered against the backdrop of abortion as a generally accepted practice and the reasons for their enactment.[16]

Moreover, as a legal matter, the existence of laws at the time of the enactment of the fourteenth amendment does not mean such laws are outside the protection of that amendment. The purpose of the fourteenth amendment was precisely to provide protection against state restrictions on liberty then in effect. *Southwestern Oil v. Texas*, 217 U.S. 114, 119 (1910). If it were otherwise, then much of this Court's twentieth century constitutional jurisprudence would have to be discarded. *Compare Brown v. Board of Education*, 347 U.S. 483 (1954) and *Reed v. Reed*, 404 U.S. 71 (1971) *with Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

Specifically, this Court has never considered the status of state laws at mid-nineteenth century relevant to ascertaining the scope of the right to privacy. *Griswold*, 381 U.S. 479, for example, struck down an 1879 state law forbidding the use of contraceptives. That law was itself part of a nationwide wave of similar "Comstock laws" passed contemporaneously with the

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12 *Roe v. Wade*, 410 U.S. at 148-49.

13 Mohr, *supra* note 8, at 147-170.

14 *Id.* at 168-69.

15 *Id.* at 166-67. *See also id.* at 180-81, 207-208.

16 The State's and the Solicitor General's analogy to *Bowers v. Hardwick*, 478 U.S. 186 (1986), is misplaced. In *Bowers*, this Court declined to find a right to engage in sodomy within the right to privacy because laws against sodomy had "ancient roots," *id.* at 192, dating at least to the common law received by the states at the time of the ratification of the Bill of Rights. In contrast, "laws generally proscribing abortion . . . are not of ancient or even of common-law origin." *Roe*, 410 U.S. at 136.

1860-80's abortion legislation discussed above. *See Poe v. Ullman*, 367 U.S. 497, 519-20 n.10 (1961) (Douglas, J., dissenting).[17] In fact, the 1873 federal Comstock Act was passed by a Congress presumably made up largely of the same members who voted to propose the fourteenth amendment to the states seven years earlier.[18]

The Solicitor General's most serious error is his argument that a fundamental right to abortion does not flow logically out of the general right to privacy or personal autonomy which protects matters of procreation and family life, including contraception, because the woman is not "isolated in her privacy" in making the abortion decision. S.G. Brief at 14, citing *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting). Apparently, the Solicitor General believes that the presence of the fetus, rather than going to the nature of countervailing state interests, as acknowledged in *Roe*, undercuts the "fundamental" nature of the right itself.

This line of argument misconceives the nature of the "privacy" right in such cases as *Griswold* and *Eisenstadt*. That right is in no way dependent on whether an individual is "isolated" in his or her privacy. Rather, it is a right, "*as against the Government* . . . to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added), in making the intensely personal decisions regarding the bearing and begetting of children. Such decisions are best left to the individual rather than the state, not because of some abstract value in solitary decisionmaking, but because of the profound effect such decisions have on an individual's destiny.

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17 *See* Mohr, *supra* note 8, at 196-99, 220-21.

18 Moreover, regardless of its historical position a hundred years ago, the fact is that abortion, through its nationwide legalization sixteen years ago, has become so assimilated into the fabric of society as to become "deeply rooted." This Court noted just nine years after its decision in *Brown v. Board of Education*, 347 U.S. 483, that the rights recognized in that case had become "long-declared and well-established." *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963). So too the abortion right, exercised by some 20 million women since 1973, has become part of the pattern of American life. Millions of women and teen-age girls today have literally lived their entire childbearing years with the option of safe, legal abortion in the event of an unwanted pregnancy.

Roe, 410 U.S. at 153. In terms of the effect on an individual's future life and the consequent need for personal autonomy, there is little to differentiate such decisions before and after conception.[19] If anything, an individual's privacy interest becomes more weighty after conception. While an individual denied the right to use contraception can avoid pregnancy by avoiding sexual intercourse, a pregnant woman has no alternative beside abortion to avoid bearing a child against her will. *Carey*, 431 U.S. at 713 (Stevens, J., concurring). *See also Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring).

Indeed, if this Court adopts the Solicitor General's proposed analysis of fundamental rights, according to which the countervailing state interests undercut the nature of the right itself rather than guiding the extent to which it can be abridged, it will have set itself on a course which reaches far beyond the narrow issue of proscription of abortion. If the presence of the fetus demotes the pregnant woman's privacy right to less-than-fundamental status, what other incursions on her personal liberty will be allowed? Since she is no longer "isolated in her privacy," will government be able to dictate her lifestyle and working conditions with the only proviso being that such restrictions pass merely a "rational basis" test?[20] Conversely, can government compel abortion to further rational interests in population control or to save society the expenses of caring for unwanted or handicapped children? Clearly, the wholesale derailment of personal liberty entailed in that analysis is not consistent with the Court's recognizing as "fundamental" those rights necessary to a "free, egalitarian and democratic society." *Thornburgh*, 476 U.S. at 793 (White, J., dissenting).

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19 The view that the presence of the fetus changes the nature of the privacy right is difficult not only jurisprudentially, but in practice. Distinctions between some forms of contraception and abortion are increasingly complicated. Under the definitions in the Missouri statute, all fertilized ovum—even before implantation (when pregnancy occurs)—are protected. This definition, should abortion be made illegal, would prohibit those forms of contraception that act post-fertilization but prior to implantation, such as those discussed in Point II.A.2., *infra* pp. 21-23.

20 Surely, a case such as *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) would be overruled by such an analysis.

C. The Compelling State Interest In The Fetus Logically Arises At Viability

The State and the Solicitor General argue that even if there is a fundamental right to decide about abortion, *Roe* was flawed in holding that the State's countervailing compelling interest in fetal life arises only at viability. They argue that conception, not viability, is the compelling point because (1) viability is an "arbitrary" point, and (2) it is an unworkable principle because it shifts with changing medical technology.

There is nothing arbitrary about fetal viability as the point at which the state interest in fetal life becomes sufficiently substantial to justify interfering with a woman's choice about abortion. Prior to viability, the fetus is dependent upon the body of the woman who conceived it, and it cannot survive without her. Any recognition of an overriding state interest in the fetus during the previability phase necessarily eradicates the woman's privacy interest. After viability, by comparison, the fetus is capable of survival outside of the woman's body, and thus, from that point, a state interest in preventing destruction of the fetus may be implemented without necessarily subordinating the woman's ability to make a choice. Of course, as this Court has consistently held, that state interest never overrides the woman's right to protect her health. *Thornburgh*, 476 U.S. at 769.

The balance struck by placing the compelling point at viability is an eminently practical one within a framework of limited government. It allows vindication of the state's interests while leaving this critical life decision, to the maximum extent feasible, in the hands of the person it most affects—the woman. *See Thornburgh*, 476 U.S. at 781 (Stevens, J., concurring) ("it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny").

To hold, as the State and *amici* would have this Court do, that fetal interests are compelling throughout pregnancy would be to say that there is no meaningful distinction between a "freshly fertilized egg" and "a 9 month-gestated fully sentient fetus." *Thornburgh*, 476 U.S. at 779 (Stevens, J., concur-

ring).[21] Not only does this position defy logic, its ramifications are profoundly disturbing. Like the argument that abortion should be stripped of its "fundamental" status, an overriding interest in fetal life throughout pregnancy could justify state intervention in areas of individual autonomy other than abortion. The Illinois Supreme Court foresaw such ramifications recently in rejecting a child's suit against its mother for tortious pre-natal injuries. "Any action which negatively impacted on fetal development would be a breach of the pregnant woman's duty to her developing fetus. Mother and child would be legal adversaries from the moment of conception until birth." *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (1988).[22]

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21 In recognizing viability as the compelling point, the *Roe* Court maintained the historic legal tradition of assigning greater value to fetal life late in pregnancy. As this Court observed in *Roe*, to the extent that limitations on abortion did exist in ancient and common law, they were imposed after quickening or "viability." For example, this Court observed that "[m]ost [ancient] Greek thinkers . . . commended abortion, at least prior to viability," 410 U.S. at 131, and that if abortion was a crime at all at common law, it was only abortion after quickening. *Id.* at 132-36. The earliest American statutes governing abortion applied only after quickening, *id.* at 138, and those that applied throughout pregnancy "dealt severely with abortion after quickening but were lenient with it before quickening." *Id.* at 139.

The significance of quickening at common law "appears to have developed from a confluence of earlier philosophical, theological, and civil and common law concepts of when life begins." *Id.* at 133. It has also been suggested that the "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognize[d] the greater health hazards inherent in late abortion . . ." *Id.* at 151-52.

Thus, throughout history, many religious, legal and philosophical perspectives have assigned greater significance to fetal existence at an indefinite point late in pregnancy. Viability constitutes the modern day, and medically meaningful, equivalent of quickening.

22 Efforts by the states to restrain the liberty of pregnant women in order to advance fetal interests have become commonplace. *See, e.g., In the matter of Steven S.*, 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (Cal. Ct. App. 1981) (pregnant woman detained two months because of alleged inability to care for herself or fetus—appeal dismissed as moot); *People v. Stewart*, No. M508197 (San Diego Mun. Ct. Feb. 26, 1987) (woman jailed for "fetal neglect" after taking drugs and failing to follow doctor's orders while

The State's and Solicitor General's argument that viability is unworkable because it is a "shifting" point is both factually exaggerated and legally unsound.

Contrary to the State's assertion, there is no evidence that viability is moving inexorably toward conception. All available evidence indicates little if any change in this Court's original understanding that viability, a flexible point, arises between the twenty-fourth and twenty-eighth weeks of pregnancy. *Roe*, 410 U.S. at 160. As the District Court found, medical testimony from both defendants' and plaintiffs' experts and recent medical literature "provid[e] clear evidence that 23½ to 24 weeks gestation is the earliest point in pregnancy when a reasonable possibility of viability exists." Jurisdictional Statement ("J.S.") at A32-33.[23] A recent study concludes that this point may well be immutable.

> The increasing ability over the past decade to save progressively younger neonates is primarily due to the ability to support and assist, at an earlier age, the organs already present in the fetus. The developmental biology of the fetus, however, has not changed. After reviewing the developmental biology of several crucial fetal organs, including the brain, the kidneys, and the lungs, the Committee concluded that a point exists before which the fetal organs are too immature to function even with the assistance of sophisticated medical technology. This point in time is 23-24 weeks of gestation; prior to that time, fetal life cannot be maintained outside the womb.

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pregnant—charges later dismissed); *Reyes v. Super. Ct.*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (charges against woman for prenatal child abuse for taking drugs while pregnant and failing to seek prenatal care dismissed on appeal); *U.S. v. Vaughn*, Crim. No. F-2172 88B, 117 Daily Wash. L. Rptr. 441, Mar. 7, 1989 (D.C. Sup. Ct. Aug. 23, 1988) (woman found guilty of check forging misdemeanor, who tested postive for cocaine, ordered jailed until birth of child despite prosecutor's recommendation of probation).

23 Nevertheless, the average survival rate of fetuses in the 23½–25 week range is only 10%. Tr. 4-49 (Keenan).

Report of the Committee on Fetal Extrauterine Survivability to the New York State Task Force on Life and the Law 9 (January 1988).[24]

Moreover, as a legal proposition, there is nothing "unworkable" or novel about the fact that the viability of a particular fetus and hence the physician's duties under the criminal law may vary depending on the state of medical technology, the place where the abortion is performed, and the medical facts of the individual woman's pregnancy. The facts and circumstances of each case determine the scope of many other constitutional protections. For example, in order for a state to establish that speech is obscene and outside the protection of the first amendment, it must show that the speech violates contemporary community standards of decency and does not have overriding artistic, literary or social value as defined by a broader reasonable person standard. *Miller v. California*, 413 U.S. 15 (1973). *See also Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (right of access to public property differs depending on the character of the property at issue); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) ("totality of the circumstances" determines whether a person has a reasonable expectation of privacy under the fourth amendment).

Moreover, legal rights and duties change continuously with changes in scientific knowledge. *See, e.g., Katz v. United*

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24 *See also* similar conclusions in Brief *Amici Curiae* for American Medical Association and others In Support of Appellees; and Royal College of Obstetricians and Gynecologists, Report on Fetal Viability and Clinical Practice 14 (1985). *See also* Law, *Rethinking the Constitution*, 132 U. Pa. L. Rev. 955, 1023 n.245 (1984) (clarifying sources cited in *City of Akron*, 462 U.S. at 457 and n.15 (O'Connor, J., dissenting)).

The state's suggestion that the testimony presented to the lower court in this case documents its assertion is patently false. The State claims that evidence showed "a woman who appears to be carrying an unborn child of twenty weeks gestional age (LMP) may have a viable unborn child under 1986 technology . . . two months prior to the third trimester time drawn in *Roe v. Wade*." State's Brief at 13. What the record did show is that a woman who *appears* to be twenty weeks pregnant may on further examination and testing be found to be 24 weeks pregnant and therefore possibly carrying a viable fetus. J.S. at A33 n.38. For this reason, the district court upheld the requirement that the physician determine whether the fetus is viable if the woman appears to be twenty weeks pregnant.

States, 389 U.S. 347 (1967) (wiretappping applied to the fourth amendment); *Schmerber v. California*, 384 U.S. 757 (1966) (blood alcohol testing applied to the fifth amendment). Indeed, the wisdom of an abortion regulation tied to viability is that it does not require legislative action in order to adjust to changes in technology. Rather, the physician's obligations under such a regulation change as technology changes, in the same manner as physicians' tort law obligations continuously change to reflect improvements in all areas of medical care.

D. The Precedents Set In *Roe* And Its Progeny Are Neither Complex Nor Difficult To Apply; At Any Rate, Complexity Is Not An Adequate Justification For Abandoning Constitutional Rights

The Solicitor General next contends that *Roe* should be overruled because judicial applications of *Roe* have become "increasingly complex." S.G. Brief at 19-20. Contrary to the Solicitor's assertion, however, application of *Roe* has decreased in complexity. The fine points of the scope and application of *Roe* have been largely resolved by this Court's decisions in *Akron* and *Thornburgh*. Following those decisions, numerous lower courts were able to resolve summarily the question of the constitutionality of the statutes before them.[25] State legislatures have passed fewer legislative measures regulating abortions for adult women,[26] focusing instead on parental notice and consent for minors, an issue not yet entirely resolved by this Court. This

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25 *See, e.g., Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983); *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984); *Eubanks v. Collins*, No. C 82-0360 L(A) (W.D. Ky. Sept. 11, 1985); *Munson v. Meierhenry*, No. 80-3043 (D.S.D. Sept. 29, 1983); *Women's Community Health Center, Inc. v. Tierney*, Nos. 79-162-P, 79-165-P (D. Me. Sept. 9, 1983).

26 For example, the year after the enactment of the Akron Ordinance (1979), ten states enacted similar laws. Thereafter, the numbers declined, apparently in response to lower federal court decisions declaring such laws unconstitutional, to four such laws in 1980, three in 1981. Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Family Planning Perspectives 63, 66 (1979). In contrast, in 1984, the year after *City of Akron* was decided, only one state legislature enacted a comprehensive anti-abortion statute. The Alan Guttmacher Institute, Legislative Record, State Legislatures—1984 Bills Enacted (1984).

refusal to retreat from the principles established in *Roe v. Wade*, and its consistent application of these principles in subsequent decisions, has plainly clarified the law for both courts and legislatures.

But even if this were not so, "complexity" of any degree has never alone provided a ground for retreat from heightened constitutional protection of fundamental rights. Indeed, the precise contours of equality in education under this Court's seminal decision in *Brown v. Board of Education*, 347 U.S. 483, remain the subject of pending litigation to this day.[27] If mere "complexity" in application could undermine constitutional guarantees, the Bill of Rights itself would be in jeopardy.[28]

Moreover, unless this Court wholly immunizes abortion from judicial review, it will remain in the business of drawing lines. Even a more lenient rational basis test, as advocated by the Solicitor General, will require continued judicial review and line drawing. Only clear reaffirmation of *Roe* will serve to diminish the burden on this Court of repeated litigation, and contribute to quieting the ranks of those who have resisted the right of women to make reproductive decisions in accord with personal conscience instead of majority vote.

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27 *See Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987), *appeal pending*, No. 87-1668 (10th Cir.) (*Brown III*) (deciding whether vestiges of *de jure* segregation remain in Topeka schools).

28 For example, this Court has not retreated from the fundamental principles of religious freedom underlying the Establishment Clause simply because of the often great difficulties of determining when and how to maintain separation between state governments and religious institutions. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977) (upholding state program of providing speech and hearing diagnostic services and off-site remedial services to parochial school students but invalidating loans of secular instructional materials such as maps and science kits and provision of field trip services). *Compare Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding state's released-time program for private religious instruction outside of public school building during school hours) *with Illinois ex rel. McCollom v., Board of Educ.*, 333 U.S. 203 (1948) (invalidating state's released-time program for private religious instruction *in* public school building during school hours).

E. Returning The Abortion Issue To The States Defeats Basic Principles of Constitutional Government

The Solicitor General finally argues that resolution of the conflict between a woman's right to autonomy and the State's interest in fetal life is not amenable to judicial resolution because the only "principled" resolution of this conflict involves "adopting a moral theory of the sanctity of the person, or a theory of when human life begins—neither of which can be derived through ordinary processes of adjudication." S.G. Brief at 20. It is wrong to characterize the resolution of *Roe* as unprincipled. *Roe* has been reaffirmed twice by this Court and continues to command broad respect in our nation[29] and in other nations. *See Morgentaler v. Her Majesty, The Queen*, 1 S.C.R. 30, 40 D.L.R.4th 385 (Canada S. Ct. 1988); *Paton v. United Kingdom* (1980) 3 E.H.R.R. 408, 415 (European Commission of Human Rights); *The Queen v. Bayliss and Culleon* (1986) 9 Qld Lawyer Reps. 8, 10, 49, 54-56 (Queensland, Australia). Moreover, the Solicitor General cannot assert credibly that his proposal to subjugate totally a woman's autonomy to the State's interest in fetal life is somehow more "principled" than *Roe*.

There is no promise and should be no expectation that leaving abortion to the states will result in some acceptable "compromise" of the conflicts between privacy rights and state interests. Such a default will more likely result in many legislatures acting upon the sweeping authority proposed by the Solicitor General to outlaw abortion entirely,[30] resulting in a

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29 Over thirty briefs *amici curiae* have been filed in support of appellees and urging that *Roe* be retained. These briefs represent the interests of hundreds of individuals and organizations, including the American Medical Association, American College of Obstetricians and Gynecologists, American Public Health Association, American Academy of Pediatrics, American Psychological Association, National Association of Public Hospitals, American Nurses Association and Members of Congress.

30 The Solicitor General notes the tendency of some state legislatures to enact "inflammatory" abortion statutes and remarkably blames *Roe* for this phenomenon. S.G Brief at 21 n.15. A more honest assessment would blame

patchwork of state restrictions which allow the affluent to exercise their right of choice, while condemning others, hampered by class, race and economics, to seek out illegal procedures or bear children against their will.

The Solicitor General is even more wrong in principle than he is in logic. Critical to the Solicitor's comparison of the law of this nation to the legislative resolution of abortion rights in others, is the assumption that we are not somehow "radically different." *See* S.G. Brief at 24. But we *are* different. We are a constitutional democracy and we have a Bill of Rights.

> 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, to free speech, a free press, freedom of worship and assembly, and *other fundamental rights* may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

Finally, appellees note that the right of choice in childbearing may be grounded in other constitutional rights in addition to the "liberty" guarantee of the fourteenth amendment: equal protection, the right to be free of involuntary survitude and cruel and unusual punishment, and the rights of the people under the ninth amendment. In the unlikely event this Court decides to abandon the rationale of *Roe v. Wade*, appellees urge this Court to remand this case for consideration of what

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hostility in those legislatures to a woman's right to choose abortion. That assessment indicates that if *Roe* is eliminated, inflammatory legislation will not abate, but will flourish unchecked. Indeed, five states have announced their intention to criminalize abortion (except only to save the life of the mother) if and when this Court permits them to do so: Idaho Code § 18-614 (Michie 1987); Ill. Ann. Stat. ch.38, § 81-21 (Smith Hurd 1977); Ky. Rev. Stat. Ann. § 311.710(5) (Michie 1983); La. Rev. Stat. Ann. § 40:1299.35.0 (West 1989 Supp.); S.D. Codified Laws Ann. § 34-23A-21 (Michie 1986).

other constitutional principles can support the right recognized in *Roe*.

II. SECTIONS 1.205.1(1) and (2), WHICH PURPORT TO DEFINE WHEN HUMAN LIFE BEGINS AND GRANT TO THE UNBORN "PROTECTABLE INTERESTS IN LIFE, HEALTH, AND WELL-BEING," VIOLATE THE UNITED STATES AND MISSOURI CONSTITUTIONS

A. Sections 1.205.1(1) And (2) Violate The United States Constitution

1. Sections 1.205.1(1) And (2) Are Operative Statutory Provisions Which Define The Reach Of The State's Abortion Regulations

Sections 1.205.1(1) and (2) declare that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being." The Court of Appeals held that these sections are "simply an impermissible state adoption of a theory of when life begins." J.S. at A64.

In an attempt to save these sections, the State argues that they inform only the reach of § 1.205 itself, but have no substantive effect on and relation to the other abortion restrictions which are the subject of the Act. State's Brief at 21-23.[31]

The State's claim defies logic. Section 1.205.1 was enacted as part of "AN ACT To repeal [certain sections of Missouri's revised statutes] *relating to unborn children and abortion*, and to enact . . . new sections relating to the *same subject* . . . ."[32] These sections are not identified in the statute as "preamble," nor is there any other textual source for the State's claim that they were intended as mere "prefatory state-

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31 The State contradicts itself as to the effect of §§ 1.205.1(1) and (2). It claims both that these provisions have no substantive effect and that they guide the interpretation of § 1.205. State's Brief at 21.

32 H.B. No. 1596, Mo. Gen. Assem., 2d Sess. (1986) (emphasis added). To the extent the Act relates to subjects other than, or in addition to, unborn children and abortion, as claimed by the State, it is unconstitutional under Missouri law. *See* Point II.B, *infra* pp. 23-24.

ments of fact." State's Brief at 21. Rather, they are the first sections of a comprehensive Act regulating abortion,[33] clearly intended to guide the interpretation of every provision of that Act. The State acknowledges as much when it argues that the legislature may make the findings in §§ 1.205.1(1) and (2) "pursuant to a public policy of protecting the life and health of unborn children to the *fullest extent possible in . . . abortion law.*" State's Brief at 21 (emphasis added). Thus, the Court of Appeals correctly concluded that:

> [T]he declaration of when life begins can only have been intended as an introductory and foundational comment . . . . The only plausible inference is that the state intended its abortion regulations to be understood against the backdrop of its theory of life. Rather than being abortion-neutral, the statute is simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations.

J.S. at A64.[34] *See Roe*, 410 U.S. at 159-62; *City of Akron*, 462 U.S. at 444.[35]

Indeed, these sections already have been given substantive effect. In *Deaconess Hospital v. McRoberts*, No. 874-00172

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33 That § 1.205 is located elsewhere in Missouri's revised statutes from Chapter 188 (Regulation of Abortions) does not render meaningless its connection to abortion. *See* State's Brief at 22. To argue otherwise necessarily means that § 1.205 has no effect upon "state tort, property, and criminal law," as claimed by the State, because these subjects are also codified in different chapters of Missouri's revised statutes. It is §§ 1.205.1(1) and (2)'s location in the abortion bill passed by the state legislature, and not its numerical designation in the revised statutes when codified, that is determinative.

34 The Court of Appeals also rejected the State's reasoning that the statute is saved from unconstitutionality by making it subject to the United States Constitution and the decisions of this Court:

> Such a statement cannot . . . validate state laws that are in fact incompatible with the constitution. To accept the state's position would be to hold that every state law is valid as long as it contains a clause subjecting the law to the supremacy clause. We decline to so hold.

J.S. at A64-65.

35 *See* Brief of Distinguished Scientists and Physicians, Including Nobel Laureates, As *Amici Curiae* in Support of Appellees.

(Mo. Cir. Ct. St. Louis County May 21, 1987), a court heard a hospital's petition to perform a cesarean section upon a woman, finding that it had jurisdiction "pursuant to Section 1.205(1)-(2) (sic) . . . [because] the life, health and well-being of the unborn child . . . may be jeopardized" by the woman's refusal to permit the performance of such a procedure upon her body.[36] The court ordered the surgical procedure performed, concluding that "the intrusion involved in the life of [the woman was] outweighed by the duty of the State to protect a living unborn human being . . . ." *Id. Deaconess* thus negates the State's claim that §§ 1.205.1(1) and (2) are "legislative findings without operative effect."

2. Sections 1.205.1(1) And (2) Extend The Meaning Of The Act's Abortion Restrictions To Severely Restrict Access To Some Contraceptives

When viewed as a "backdrop" to the State's abortion regulations, it is clear that §§ 1.205.1(1) and (2) have substantial and far reaching effect. Just as the State recognizes that these provisions "provide guidance in interpreting the operative language of § 1.205," State's Brief at 21, so too will they provide guidance to the state courts in interpreting the operative language of the other challenged provisions of the Act. For example, § 188.215 prohibits the use of "any public facility for the purpose of performing or assisting an abortion." Section 188.015(1) defines abortion as the intentional destruction of "human life" and §§ 1.205.1(1) and (2) establish that protectable human life begins at "conception," which Missouri law defines as the "fertilization of the ovum of a female by a sperm of a male."[37] Thus, by giving a fertilized egg the status of a live

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36 The woman had undergone three previous cesarean deliveries, and desired to deliver her fourth baby vaginally. The court issued the surgical order against the woman's wishes and despite her willingness and informed consent to undertake any risk involved in a vaginal delivery. *See Court-Ordered Cesareans: A Growing Concern for Indigent Women*, 1988 Clearinghouse Review 1064, 1065.

37 Section 188.015(3) (definition of "conception"). The Missouri legislature's definition of conception as synonymous with fertilization is contrary

human being, and defining abortion as the intentional destruction of such "life," the Missouri law reaches those methods of contraception which can operate after fertilization but prior to the implantation of the fertilized ovum and the onset of pregnancy: the intrauterine device (IUD), progestogen-only oral contraceptives (the "mini-pill"), and the so-called "morning after" or postcoital contraceptives.[38]

The Act's expansive definition of protectable "life" means that it would be illegal under the public facilities provision (§ 188.215) for a physician in a public facility to insert an IUD, prescribe the "mini-pill," or administer postcoital contraceptives. Additionally, physicians or other health-care providers who are public employees would be forbidden under the "perform or assist" restriction of § 188.210 from prescribing or administering these contraceptive methods. Moreover, if the public funds provision restricts physicians' speech,[39] then publicly-employed physicians will not be able to "encourage or counsel" women to use the IUD, the "mini-pill," or post-coital contraceptives. This means that the statute interferes with the rights of the thousands of women who use methods of birth control which can act after fertilization and subjects to possible

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to the accepted medical view. The American College of Obstetricians and Gynecologists (ACOG) defines conception as "the implantation of the blastocyst [fertilized ovum]," and pregnancy as "the state of a female after conception and until termination of the gestation." Obstetric-Gynecologic Terminology 229, 327 (E. Hughes ed. 1972). Conception and the onset of pregnancy occur six to seven days after fertilization, when the blastocyst implants in the uterus. D. Mishell & V. Davagan, Infertility, Contraception, & Reproductive Technology 109-110 (2d ed. 1986).

38 Each of these contraceptive methods is believed to act in part by interfering with implantation of the fertilized ovum in the uterus. *See* Burnhill, *Intrauterine Contraception*, in Fertility Control 271, 280 (1985) (IUD); International Planned Parenthood Federation, Family Planning Handbook for Doctors 62 (6th ed. 1988) ("mini-pill"); Yuzpe, *Postcoital Contraception*, in Fertility Control 289 (1985) (postcoital contraceptives).

39 *See infra* Point IV.B.

sanction those health care providers who prescribe such methods.[40]

Thus, rather than prefatory statements without operative effect, §§ 1.205.1(1) and (2) impact directly upon the other challenged provisions of the Act. By defining the fertilized ovum as a human being with protectable interests in life, health, and well-being, the Act's restrictions reach the right to contraception, which this Court has held is protected by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey v. Population Services International*, 431 U.S. 678, 687-91 (1977).[41]

B. Sections 1.205.1(1) And (2) Violate The Missouri Constitution

This Court has enunciated a strong policy of "avoiding the unnecessary adjudication of federal constitutional questions" where state law might provide "independent support" for the judgment below. *City of Mesquite v. Aladdin's Castle, Inc.* 455 U.S. 283, 294-95 (1982). Moreover, this Court has recognized that the federal courts of appeal are in a better position than it to resolve state law issues. *Id.* at 293. There are at least two provisions of Missouri's constitution which provide independent support for the judgment of the Court of Appeals. Plaintiffs urge this Court to affirm the judgment below or remand this issue for consideration of alternative state grounds to support that judgment.[42]

If this Court agrees that § 1.205 "expands existing state tort, property, and criminal law protection for unborn children,"

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40 Plaintiff health care providers and facilities offer abortion counseling and services as well as contraceptive services and thus have standing to challenge §§ 1.205.1(1) and (2). *See, e.g., Doe v. Bolton*, 410 U.S. 179, 187-89 (1973); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). *See also* 851 F.2d at 1075-76, J.S. at 62-63; 662 F. Supp. at 412, J.S. at A13.

41 *See* Brief *Amici Curiae* of the Association of Reproductive Health Professionals And Others In Support Of Appellees, at Point I.

42 Because the Court of Appeals affirmed the district court's judgment that §§ 1.205.1(1) and (2) were unconstitutional under the United States Constitution, it stated that it need not address the argument that these sections violated the state constitution. J.S. at A65.

State's Brief at 22, then it should remand the issue of § 1.205's constitutionality to the Court of Appeals to consider whether that statutory provision violates the Missouri constitution. Article 3, § 23 of the constitution prohibits a bill from containing more than one subject and requires that the subject be clearly expressed in the bill's title.[43]

In *In re Ray*, 83 B.R. 670 (Bankr. E.D. Mo. 1988), the court held unconstitutional a statutory provision because the provision had no relationship with the rest of the bill's contents, which dealt only with the subjects encompassed in the title. *Id.* at 672. *See also In re Bowen*, 82 B.R. 102 (Bankr. E.D. Mo. 1988) (holding unconstitutional the same statute); *Berry v. Majestic Milling Co.*, 223 S.W. 738, 741 (Mo. 1920) (holding unconstitutional a section of an act because "it [did] not come within the subjects expressed in the title of the act.")

Here too, tort, property, and criminal law are not subjects encompassed by the title of the Act.[44] Nor do these various subjects have any relation to the rest of the bill's contents, which deal with abortion. Section 1.205 thus violates Art. 3, § 23 of the Missouri constitution.

Additionally, consideration of the constitutionality of § 1.205 should be remanded to the Court of Appeals because the statute violates another section of the State constitution. Section 1.205 purports to amend all the laws of the State so as to grant "rights, privileges, and immunities" to the unborn from the moment of conception without including "the words to be inserted [in the various statutes]. . . together with the act or section set forth in full as amended," as required by Article

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43 Mo. Const. Art. 3, § 23 states:

> No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.

44 *See supra* p. 19.

3, § 28 of the Missouri constitution.[45] The purpose of this constitutional limitation on statutory amendment is to apprise legislators and the public of the changes in the law and to prevent ambiguities and uncertainties in legislative enactments. *State ex rel. McNary v. Stussie*, 518 S.W.2d 630, 632-34 (Mo. banc 1974).

In *Stussie*, the Missouri Supreme Court held unconstitutional an act which lowered the age of majority in the state to eighteen years and gave persons attaining that age "all the privileges, rights, and immunities . . . of adulthood." *Id.* at 631. The court held that:

> If . . . [the Act] is construed to require substitution of "age of eighteen" for "age of twenty-one" whenever the latter appears, then we are going beyond what [the Act] literally states and directs and we would be amending statutes based on what we believe the General Assembly intended by their attempted blanket amendment. This is what Art. III, § 28 was designed to avoid. Statutory amendments should set out the statute as amended and not leave us to guess as to whether and in what respect an existing statute was amended.

Id. at 634. *See also Protection Mutual Insurance Company v. Kansas City*, 504 S.W.2d 127, 130 (Mo. 1974) (statute held unconstitutional under Art. 3, § 28; absent a legislative act amending a particular law, statute revisors have no authority to change the substantive meaning and application of a law).

Here too, we are left guessing as to whether and in what respect the various laws of the State of Missouri are amended by § 1.205. None of the words to be inserted are included, and the laws as amended are not set forth in full. When the legislature's intent is unclear, as it is here, the statute's codifiers have

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45 Article 3, § 28 of the Missouri constitution provides, in relevant part:

> No act shall be amended by providing that words be stricken out or inserted but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended.

no authority to revise the substantive meaning of the law. Section 1.205 is invalid under Article 3, § 28 of the State constitution.

III. SECTION 188.029, REQUIRING PHYSICIANS TO MAKE FINDINGS OF GESTATIONAL AGE, FETAL WEIGHT AND LUNG MATURITY, IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW

A. Section 188.029 Advances No Legitimate State Interest

Mo. Rev. Stat. § 188.029 requires a physician to make a determination of viability whenever a woman who appears to be twenty weeks pregnant requests an abortion. The District Court upheld this requirement, J.S. at A35-36, and plaintiffs do not challenge that holding. Section 188.029 further provides:

> 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.

J.S. at A90. The Court of Appeals and District Court struck this requirement because it unduly constrains physicians' judgment by requiring medical procedures which are expensive and dangerous in order to make "findings" which are irrelevant to determining viability. J.S. at A59-60 and n.5; *id.* at A37.

The facts supporting the lower courts' decisions are not in dispute. The State concedes in its brief that prior to thirty weeks of pregnancy, the only one of the required "findings" relevant to determining viability is the finding of gestational age[46] and the standard medical procedure for ascertaining it is ultrasono-

46 The State says: "[t]he undisputed evidence further indicated that no current test other than measurements which can be performed with the use of ultrasound provide information necessary to determine viability prior to at least thirty weeks gestational age (Keenan Tr. 4-78; Maulik Tr. 1-55; Crist Tr. 1-98, 1-117; Pearman Tr. 1-139; Widdicombe Tr. 2-65)." State's Brief at 32. The ultrasound tests alluded to by the cited witnesses are ultrasound tests used to determine gestational age.

graphy.[47] The State has not disputed that "findings" of fetal weight are accomplished by using more sophisticated ultrasound equipment than is used to determine fetal age alone,[48] and would unnecessarily add approximately $125-250 to the cost of an abortion. J.S. at A36. Neither has the State disputed the finding of the District Court, concurred in by the State's own witness, Dr. Keenan,[49] that the only known test to determine fetal lung maturity is amniocentesis.[50] Amniocentesis is an invasive procedure which would add hundreds of dollars to the cost of an abortion, pose risks to both the woman and the fetus, including risks resulting from delays required to schedule the procedure, and yet yield no information useful to the determination of viability until *at least* the twenty-eighth to thirtieth week of pregnancy. J.S. at A36, A37 n.41.[51]

The State has never argued that § 188.029 is constitutional if it requires any of the tests described above—either additional ultrasonography to determine fetal weight or amniocentesis to make a finding of lung maturity. The reasons are obvious, regardless of the constitutional "standard of review" which is utilized. Even under the most lenient "rational basis" test advocated by the State and the Solicitor General for reviewing

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47 Ultrasound is a process using sound waves to create a visual image.

48 Tr. 1-99-100 (Crist). The more sophisticated equipment is required because, while fetal age requires only linear measurements of the diameter of the fetal skull or length of the femur, weight estimations require three-dimensional measurements of the girth of the fetal abdomen and/or chest. *Id.*

49 Tr. 4-81.

50 Amniocentesis involves inserting a hollow needle into the uterus to extract amniotic fluid. The fluid is then analyzed for the presence of certain chemicals which indicate the presence of surfactant in the fetal lungs. Surfactant is the substance which indicates that the lungs are mature. J.S. at A36 n.39.

51 The reason amniocentesis yields no useful information until that point is that, while fetuses may be "viable"—able to survive with artificial aid—at twenty-four weeks of gestation, their lungs do not mature until thirty or more weeks of pregnancy. Tr. 1-41, 42 (Maulik). Immature lungs make the fetus more prone to hyaline membrane disease, a leading cause of morbidity and mortality in premature infants.

abortion legislation, legislative enactments must "bear a rational relation to valid state objectives." S. G. Brief at 11, *quoting Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). *See also* State's Brief at 18. Assuming the statute is intended to insure protection of viable fetuses, there is simply no rationality to requiring expensive and intrusive tests to make "findings" which do not become relevant to the determination of viability until at least eight to ten weeks later in pregnancy. Of course, such an overbroad effort to protect fetal life also violates the principles of strict scrutiny applicable to abortion legislation, *Roe*, 410 U.S. at 155, as well as this Court's holdings that the manner in which viability is determined must be left to the discretion of the attending physician. *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979).

B. The State's Statutory Interpretation Is Too Implausible To Represent An Acceptable Saving Construction

The State's sole defense of this provision is an attempt to interpret the statutory language so as to avoid constitutional infirmities. This interpretation, however, is utterly illogical, denying both the plain meaning of the language of the statute and established rules of statutory construction. This Court should defer to the Court of Appeals, which rejected it.

The State argues that the challenged "tests" and "findings" provision must be read in light of the sentence which precedes it, requiring physicians determining viability to exercise "that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician . . . " State's Brief at 33 (quoting J.S. at A89-90). According to the State, this means that, under the challenged provision, a physician must utilize only "such medical examinations or tests as are necessary to make *appropriate* findings in the case before him or her. An unnecessary test should never be utilized . . . " State's Brief at 34 (emphasis added). The physician need only "record his findings regarding viability and the findings derived from such tests as he deems necessary to render a decision." *Id.* Although somewhat self-contradictory on this point, the State seems to be saying that neither specific tests, nor any findings at

all on fetal age, weight or lung maturity are necessary:[52] the physician need only exercise reasonable care in determining viability and record what he finds about *viability* on the patient's chart.

This interpretation simply wishes the challenged language out of existence. Except for the requirement to record findings regarding viability, the Act would have exactly the same meaning if the challenged language were excised as it has under the State's interpretation. This alone violates a basic principle of statutory construction: "Each 'word, clause, sentence and section' of a statute should be given meaning." *State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 225 (Mo. banc 1986) (citing *Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874, 881 (Mo. banc 1983)). Moreover, the State's construction is simply at odds with the plain meaning of the provision and was for that reason rejected by the Court of Appeals. As the Court of Appeals said, it is not tests necessary to determine *viability* the statute requires, but tests necessary to make specific *findings* regardless of their relevance to viability. J.S. at A60 n.5. *See also* J.S. at A38.

The State's interpretation of the statutory language is nonsensical and this Court should reject it for that reason alone. Moreover, this Court should reject it for the independent reason that a federal court sitting in Missouri has done so. This is in keeping with the practice of "deferr[ing] to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Frisby v. Schultz*, 108 S. Ct. 2495, 2500

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52 *Cf.* State's Brief at 32: The General Assembly "has specified *three* factors—consistent with medical science—for which a finding must be made." (emphasis in original). The State has been similarly inconsistent in the position it has taken on the meaning of this statute to the District Court and the Court of Appeals. To the District Court it argued that all findings had to be made but no tests were necessary; to the Court of Appeals, it argued, as it does here, that neither findings nor tests are necessary. *Compare* J.S. at A37-38 *with* J.S. at A60 n.5. This inconsistency is yet another reason to reject the State's proffered interpretation as implausible.

(1988) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985)).

C. If This Court Is Inclined To View § 188.029 As Fairly Susceptible To The State's Proposed Construction, It Should Abstain From Federal Jurisdiction

Implausible as it is, the construction the State suggests for § 188.029 virtually eliminates the constitutional issue in this case. Yet, although this Court has a duty to construe state laws so as to avoid constitutional infirmities, *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493 (1983), it is powerless to adopt a limiting construction which is neither obvious from the face of the statute, nor proposed by an authoritative source. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Kolender v. Lawson*, 461 U.S 352, 355 (1983). This is the case here, as the State's interpretation results not from any obvious reading of the statute but from a wholesale excision of its substance, *cf. Ashcroft*, 462 U.S. at 493; moreover, the Attorney General is not an authoritative source of statutory interpretation, as he has no power to bind the state courts or law enforcement authorities. *Virginia v. American Booksellers Ass'n Inc.*, 108 S. Ct. 636, 644 (1988).[53] Therefore, if this Court is inclined to read § 188.029 as "fairly susceptible" to the State's proposed construction (although not obviously so), the proper course is for it to abstain from federal jurisdiction in order to allow the state courts to render the saving construction the State has proposed. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). *See also Brockett v. Spokane Arcades Inc.*, 472 U.S. at 508 (O'Connor, J., concurring).

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53 Missouri law is clear that the Attorney General's opinions are not binding interpretations of state law. *Mesker Brothers Industries, Inc. v. Leachman*, 529 S.W.2d 153, 158 (Mo. 1975).

IV. THE BAN ON THE USE OF PUBLIC FUNDS FOR "ENCOURAGING OR COUNSELING A WOMAN TO HAVE AN ABORTION" SHOULD BE REMANDED FOR CONSIDERATION OF MOOTNESS; IF THIS ISSUE IS NOT MOOT, THE RESTRICTION MUST BE FOUND UNCONSTITUTIONAL IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

A. There Appears No Longer To Be A Case Or Controversy

The Act contains three provisions relating to "encouraging or counseling a woman to have an abortion not necessary to save her life." Section 188.205 states that no public funds can be used for that purpose; section 188.210 states that no public employees can, within the scope of their employment, engage in that speech; and section 188.215 forbids such speech in so-called "public facilities."

These provisions would restrict the speech of the named plaintiff doctors and other health care professionals,[54] who counsel women with problem pregnancies about abortion. The restrictions would have occurred either when these individuals were acting as public employees or when, although acting in a private capacity, they were doing so in a so-called public facility. Additionally, the public funds provision appeared to pose an overlapping restriction, because when the plaintiffs acted as public employees they would be paid with public funds; and as the District Court observed, the public funds provision "certainly is broad enough to make 'encouraging or counseling' unlawful for anyone who is paid from [public funds]." J.S. at A46.

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54 The District Court certified this as a class action with two classes: (a) facilities and Missouri-licensed physicians, or other health care professionals, which offer abortion counseling and services; and (b) pregnant women seeking abortion services or pregnancy counseling within Missouri. These broadly defined classes were appropriate because many of the provisions of the Act affected all doctors and their patients. *See, e.g.*, section 188.029. Only subsets of the certified classes are affected by the public employees, public facilities, and public funds provisions; and it is unclear which subset, if any, is affected by the public funds provision as it is presented on this appeal.

Both lower courts essentially considered these three provisions together, and found them to be unconstitutional because they restrict the speech of physicians, are vague, and interfere with a woman's right to make an informed choice about abortion.

The State did not appeal the Court of Appeals' holdings with respect to the public employee and public facility provisions. J.S. at I-II ("Questions Presented"), State's Brief at I-II ("Questions Presented"). It has stated that it does not challenge these holdings. State's Brief at 9.

It has, however, appealed the holding with respect to the public funds provision, arguing that "the court of appeals did not separately focus on the 'encouraging and counseling' language of [this provision]," State's Brief at 37;[55] and that the public funds provision is different from the public employees and public facilities provisions. The public funds provision "directs officials not to expend public funds under their control for the purpose of . . . encouraging or counseling. . . ." *Id.* at 38. "[It] is not directed at the conduct of any physician or health care provider, private or public. Instead, it is directed solely at those persons responsible for expending public funds." *Id.* at 43. By comparison, the public employees and public facilities provisions "sought to forbid speech by employees and in public facilities." *Id.* at 38.

The public funds provision—isolated and distinguished from the other two provisions, as the State has chosen to present it on this appeal—appears not to affect Plaintiffs adversely. They are protected by the unchallenged holdings of the Court of Appeals declaring their rights as public employees or as private practitioners in public facilities. The State here seems to disavow any interpretation of the public funds provision that would allow it to function as an overlapping restriction; for example, as a basis for withholding a physician's salary because he counseled a woman to have an abortion. And plaintiffs are neither grant-

55 The State posits that the "court below was primarily concerned with the more restrictive language" of the public employees and public facilities provisions. State's Brief at 38. In fact, the language of all three provisions is the same; and the Court of Appeals was obviously concerned that none of the provisions be used to censor speech and manipulate information.

ees nor employees of programs—if such exist—facing possible discontinuation because the purpose of the program is to counsel or encourage women to have abortions.

Article III of the Constitution requires the presence of an "ongoing controvers[y] between litigants" even at this advanced stage of litigation; and mootness as to an issue can arise because of a decision made by one litigant subsequent to the final ruling of the court of appeals. *Deakins v. Monaghan*, 108 S. Ct. 523, 528 (1988).

Here, the State has made such a decision. It states that it does not challenge the holding of the Court of Appeals that it cannot prevent public employees or individuals speaking in public facilities from encouraging or counseling a woman to have an abortion. It disavows any such purpose for the public funds provision, and defends it as being instead a legislative directive to public officials responsible for making funding choices.

Thus, as to the public funds provision, there appears no longer to be " 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Steffel v. Thompson*, 415 U.S. 452, 460 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

This Court should note that the constitutional issues connected to governmental funding decisions about abortion counseling, and to efforts to justify impermissible suppressions of speech as governmental funding decisions, are the subject of evolving litigation and legal debate.[56] Given the "gravity and delicacy" of these constitutional questions, this Court should adhere to its tradition of "rigid insistence" upon an actual case

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56 *See, e.g., Planned Parenthood Federation of America v. Bowen*, 680 F. Supp. 1465 (*prelim. inj.*), 687 F. Supp. 540 (*final judgment*) (D. Colo. 1988), *appeal pending* No. 88-2251 (10th Cir.); *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *appeal pending* Nos. 88-6204, 6206 (2d Cir.); *Massachussets v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *appeal pending* No. 88-1279 (1st Cir.). *See also* Brief *Amicus Curiae* of National Family Planning and Reproductive Health Association in support of Appellees; Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 Harv. L. Rev. 1916 (1988); Hirt, *Why the Government is Not Required to Subsidize Abortion Counseling and Referral*, 101 Harv. L. Rev. 1895 (1988).

or controversy, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), before undertaking to resolve them.[57]

"When this Court has entertained doubt about the continuing nature of a case or controversy, it has remanded the case to the lower court for consideration of the possibility of mootness." *Sosna v. Iowa*, 419 U.S. 393, 402 n.12 (1975). Similarly, earlier this term, this Court remanded an issue in a case involving significant constitutional concerns when it could not "resolve [an] ambiguity on the basis of the record before [it]." *Treasury Employees v. Von Raab*, U.S. Docket No. 88-1879, slip op. at 20 (March 21, 1989).

That is the appropriate disposition for the public funds provision. On such a remand the parties will be able to develop an appropriate record[58] to clarify the scope of the public funds provision standing alone in the light of the unchallenged holdings declaring the public employees and public facilities restrictions unconstitutional. That record may confirm what appears here—that there is no longer a case or controversy as to the public funds provision—or it may uncover a constitutional problem neither apparent nor capable of discovery through the exchange of briefs before this Court. If a controversy remains, then there can be an orderly "reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims." *Kremens v. Bartley*, 431 U.S. 119, 129-36 (1977). Then, that controversy can be addressed specifically. If no controversy remains, then the litigation on this issue will end. In either event, the remand will avoid the problem presented now: that this dispute is, "so unfocused as to make informed resolution of [it] almost impossible." *Id.* at 134. *See also Rescue Army v. Municipal Court of*

57 "The availability of thoroughly prepared attorneys to argue both sides of a constitutional question, and of numerous *amici curiae* ready to assist in the decisional process . . . does not dispense with the requirement that there be a live dispute . . . before we decide such a question." *Kremens v. Bartley*, 431 U.S. at 134 n.15.

58 For example, pleadings can be amended to address specifically this issue; if necessary, discovery can be undertaken; and stipulations can be negotiated.

Los Angeles, 331 U.S. 549, 575 (1947) (appeal dismissed because "constitutional issues come to us in highly abstract form"); *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (Harlan, J., concurring) (writ of certiorari dismissed because "record too opaque to permit any satisfactory adjudication . . .").

B. If There Is a Case or Controversy, Then The Public Funds Provision Is Unconstitutional

If there is a case or controversy here—that is, if plaintiffs are adversely affected by the public funds provision—then that must be because, contrary to the State's assertions, the public funds provision does restrict the speech of physicians and health care professionals paid with public funds.[59] Any such restriction violates first amendment rights of the physicians and health care professionals and first and fourteenth amendment rights of their patients.

1. The Public Funds Provision Violates The First Amendment

This Court recognized in *Griswold v. Connecticut*, 381 U.S. at 482, that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Even the dissent in *Griswold* recognized that had the doctor there only "express[ed] opinions [to patients] . . . that certain contraceptive devices, medicines or practices would do them good and would be desirable, . . ." his conviction would have violated the first amendment. *Id.* at 507-508 (Black, J., dissenting). Indeed, as Justice Douglas observed, "The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting).[60]

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59 It is also possible that the restriction will reach private speech in a government owned and operated public facility. This is the sort of ambiguity that argues for a remand of this issue.

60 The dissent was from a standing decision which did not discuss the first amendment question one way or the other.

Although this is not a commercial speech case, this Court has recognized that, even in that context, government is strictly limited in its ability to regulate communications when there are " 'substantial individual and societal interests' " in the information being communicated, and when that information relates to activity protected from unwarranted government interference. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 69 (1983) (*quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976)). *See also Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). This Court has consistently underscored that, for a woman considering continuation or termination of a pregnancy, the unimpeded advice and counsel of her physician is precisely that kind of substantial individual interest. *Colautti v. Franklin*, 439 U.S. at 387 ("central role of the physician . . . in consulting with the woman . . ."); *City of Akron*, 462 U.S. at 427 (woman's right that her physician be free to "assist . . . in the decision-making process . . ."); *id.* at 443 ("primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances").[61]

In the light of these constitutional principles, a restriction upon the ability of physicians, when they are being paid with public funds, to speak as candidly and, if need be, emphatically as they choose cannot stand. Such a restriction will "officially structure . . . the dialogue between the woman and her physician;" and impose upon her the "state medicine" condemned in *Thornburgh*, "not the professional medical guidance she seeks." 476 U.S. at 763.[62]

This restriction will impact in instances where professional guidance is most significant. These circumstances include seri-

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61 Of course, the first amendment protects the right to receive "information and ideas." *Virginia State Board of Pharmacy*, 425 U.S. at 756-57; *Griswold*, 381 U.S. at 482.

62 The restriction here is more damaging than the one invalidated in *Thornburgh*. There, no restriction was placed upon what a physician could say; he was, however, required to give certain information in all circumstances. 476 U.S. at 759-61. Here, the physician is restricted in his ability to provide advice. Thus, unlike *Thornburgh*, the quantum of information made available is reduced. *See also infra* at p. 43.

ous, even lethal, fetal abnormalities, or severe health threats to the mother which will be exacerbated by pregnancy, such as cardiac disease, stroke, or diabetic retinopathy.[63] Although even in these circumstances physicians do not dictate one course of treatment over another, they will frequently be guided by their professional responsibility to their patients to recommend or urge a particular course of treatment, including abortion. J.S. at A71 n.12.[64] *See also* American Medical Association, Current Opinions of the Council on Ethical and Judicial Affairs § 8.07 (1986) (physician's obligation "to present the medical facts accurately to the patient . . . and to make recommendations . . .").

A central tenet to this Court's first amendment jurisprudence is the protection of the individual's capacity for informed and autonomous choice. *Cohen v. California*, 403 U.S. 15, 24 (1971) (right of free expression "comport[s] with the premise of individual dignity and choice upon which our political system rests"). That concept is totally undermined by the prospect of government manipulation of the advice and information provided by government funded professionals to individuals relying upon that advice and information in making choices central to their well-being.[65]

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63 Additionally, the restrictions will threaten the ability of physicians and health care professionals to provide counseling about contraceptive choices. For example, federal law requires that before an intrauterine device (IUD) is prescribed for a woman, she must be counseled that should she become pregnant with it in place, severe complications are possible and she should be prepared to consider an abortion. 21 C.F.R. § 801.427(b)(2) (1988). *See also Amici Curiae* Briefs in Support of Appellees of the American Medical Association and of the Association of Reproductive Health Professionals.

64 The Court of Appeals noted the evidence showing that the ambiguity of the words "counsel" and "encourage" would force physicians to steer wider than the unlawful zone and refrain from most comments relative to abortion. J.S. at A68-69 n.11.

65 "A theory of freedom of expression that ignores the communicative powers of the public sector may fail to protect the liberal democratic values it

This manipulation of information is particularly egregious because it is viewpoint biased. As Circuit Judge Arnold recognized in his concurring and dissenting opinion, "a physician, for example, could discourage an abortion, or counsel against it . . . but he or she could not encourage or counsel in favor of it. That kind of distinction is flatly inconsistent with the First Amendment . . . ." J.S. at A83. Judge Arnold's conclusion is mandated by this Court's holding that:

> [T]he State may sometimes curtail speech when necessary to advance a significant and legitimate state interest . . . . [T]here are some purported interests—such as a desire . . . to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule.

City Council v. Taxpayers For Vincent, 466 U.S. 789, 804 (1984) (citations omitted).

The State argues that it is not required to subsidize the exercise of constitutional rights and that therefore the first amendment is not violated by this restriction on the use of public funds. State's Brief at 36, 38. If there is a case or controversy here, then the State's argument misperceives the dispute: the question is not whether government can be forced to subsidize an activity; the question is whether government can manipulate or censor the medical information or advice provided to patients by doctors paid with public funds. This is not a choice about allocation of resources. This is an attempt to manipulate private behavior of citizens by censoring information they receive from state funded advisors.

The applicable standard of review, therefore, is whether the State has demonstrated a compelling state interest that could not be achieved through a narrower restriction. *Boos v. Barry*, 108 S. Ct. 1157, 1164-65 (1988). The State has made no serious effort to meet this test.

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is designed to serve. Government has the potential to engineer public consent by . . . selectively disclosing or revealing information." M. Yudoff, When Government Speaks 145 (1983).

The State's reliance on *Rankin v. McPherson*, 483 U.S. 378, *reh'g denied*, 108 S. Ct. 31 (1987), and *Connick v. Myers*, 461 U.S. 138 (1983), is misplaced. Those cases balance the competing interests of public employees in commenting upon matters of public concern with the interests of government employers in operating an efficient public service. Efficiency is not the issue here. At issue, instead, is what state interest, if any, justifies manipulation of advice and information given by publicly-paid health care professionals when the subject matter involved is central to their professional responsibilities, and when the hearer of the advice and information is dependent upon it for the purpose of making a profound personal decision.

The State's invocation of *Rankin* and *Connick* implies an unrealistically one-dimensional view of the first amendment considerations that bear upon the speech of publicly paid speakers. This Court has repeatedly recognized that applying the first amendment to regulations of government employee speech will involve balancing different considerations in different contexts. *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410, 415 n.4 (1979); *Connick*, 461 U.S. at 154.

Primary among those considerations in this case is the interests of the recipients of the speech. Those recipients are individual members of the public with indisputable concerns about the uncensored content, advice, and information they receive from their physicians. *See supra* p. 37. The interests of the speaker in the speech in question is another significant consideration. Surely a physician's interest in giving complete and conscientious medical advice to a patient is at least as important as the interest of the clerk in *Rankin* who commented upon the attempted assassination of President Reagan. When these interests are considered, and "balanced" against the notably absent assertion of a significant state interest, the restrictions on speech imposed by the public funds provision must be rejected.[66]

The analogy to public education found in *Maher v. Roe*, 432 U.S. 464, 477 (1977) is more instructive. State's Brief at 36-37.

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66 *See* Brief *Amici Curiae* of American Civil Liberties Union and others in Support of Appellees.

The dispute here is not analogous to a dispute over whether government must fund private schools equally with public schools, or must fund a particular curriculum. Rather, the dispute here is analogous to a dispute over the power of government, once a curriculum is set, to dictate the content of discourse in the classrooms of its public universities. The Constitution has unswervingly protected freedom of communication between teachers (even in public universities) and their students. "The First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.' " *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)). *See also Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

These cases recognize that the fact that government pays the speaker does not justify government manipulation of the speaker's message when doing so undermines and is antithetical to the core values of the relationship and communication involved. In the universities, those core values relate to open-mindedness and critical inquiry. *Sweezy*, 354 U.S. at 261-63 (Frankfurter, J., concurring). In the medical profession the core values relate to individual choice based on full disclosure of information and access to unfettered professional advice. *See, e.g.*, Brief *Amici Curiae* of the American Medical Association and others In Support of Appellees. State imposed limitations on such information and advice when the physician is paid with public funds is equivalent to restrictions on the speech of professors in public universities. Both restrictions undermine and are antithetical to the core values at stake. Thus, as the "pall of orthodoxy" is not tolerated in the public university, neither should it be tolerated in publicly-funded medicine.

Finally, the State's freedom of subsidy position also entirely fails to address the fact that the public funds provision imposes a viewpoint discriminatory restriction on speech. The opinions of this Court make clear that even when a subsidy is at issue, "a more stringent, prophylactic rule" is appropriate, "when the subsidy pertains to the expression of a particular viewpoint on a matter of political concern." *Arkansas Writer's Project v. Ragland*, 107 S. Ct. 1722, 1731 (1987) (Scalia, J., dissenting). *See also Regan v. Taxation With Representation*, 461 U.S. 540,

548 (1983), *id.* at 551 (Blackmun, J., concurring); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383-84 (1984), *id.* at 406-408 (Rehnquist, J., dissenting).

2. The Phrase "Counseling and Encouraging" Is Unconstitutionally Vague

"The most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally-protected rights." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). As pointed out above, and as the Court of Appeals recognized, J.S. at A67, a restriction on the ability of a publicly-paid physician to speak freely to a patient about abortion threatens to inhibit the exercise of both first and fourteenth amendment rights, and is therefore subject to rigid vagueness analysis.[67]

Under such an analysis, the public funds provision must fall. Phrases such as "counsel" or "encourage" have a long history of being viewed as unconstitutionally vague. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1964). It seems self-evident that physicians of "common intelligence" will have to "guess" at their meaning, and in particular at which words, gestures, expressions, or tones of voice pass beyond the permissible. *Baggett*, 377 U.S. at 367.

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67 The State says that "First Amendment freedoms are not implicated here." State's Brief at 41. That is true if the public funds provision is not used to restrict the speech of publicly-paid physicians and other health care professionals, in which case, as pointed out above, there is no case or controversy here and this issue has become moot. If the provision does restrict such speech, then obviously first amendment freedoms are implicated.

The State also emphasizes that these sections are civil, not criminal, in nature. Civil statutes are subject to invalidation for vagueness. *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233 (1925). Moreover, civil and criminal labels are not necessarily dispositive of the vagueness standard question. Nominally civil statutes that nonetheless threaten to exact penalties are treated as criminal statutes. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). *See also Alsager v. Polk County*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976). That is the case here because of the threat that by acting "unlawfully" in "encouraging or counseling," a physician stands to lose his license. Mo. Rev. Stat. § 334.100.

How is a physician who is counseling a patient to know when he or she, when referring to abortion, has transgressed the boundaries of these sections? Given the entirely subjective nature of these two words and borrowing the words of this Court, it is inevitable that physicians and counselors will steer far wider than the "unlawful" zone, in order to be certain not to run afoul of its vague boundaries. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).[68]

This dilemma is not solved by the State's proposed "narrow-[ing]" construction of "affirmative advocacy." State's Brief at 42.[69] As the Court of Appeals noted, this interpretation is unacceptable because it seeks to merge two separate restrictions ("encourage" or "counsel") under one label. J.S. at A67. The State's construction thus runs afoul of the basic canon of statutory construction that every part of a law be given significance or effect. *Lisbon v. Henry*, 204 S.W.2d 310, 315 (Mo. 1947). This Court cannot indulge such a construction when it is neither readily apparent from the language of the statute, *see Grayned v. City of Rockford*, 408 U.S. at 110, nor an "authoritative" construction rendered by the state courts or responsible enforcement agency. *See Kolender v. Lawson*, 461 U.S. at 355.

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68 The Court of Appeals noted the evidence that the counseling and encouraging restrictions would have had precisely this effect. J.S. at A68 n.11.

69 The State also repeats here its argument, rejected by the Court of Appeals, that this provision is no more vague than the term "counseling for abortion procedures" found not vague by the Ninth Circuit Court of Appeals in *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938 (1983), *appeal after remand*, 789 F.2d 1348, *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). There, however, the Court relied upon an existing Arizona Attorney General's Opinion that strictly limited the phrase and specifically directed that the phrase, " 'not be construed to interfere with the doctor-patient privilege.' " 718 F.2d at 918 (quoting Arizona Att'y Gen. Op. No. 179-252). The Ninth Circuit added that if the Arizona phrase was not limited by the opinion then the "vagueness claim would have been stronger." *Id.* There is no such interpretive opinion here, only the various arguments offered in the State's several briefs.

3. The Public Funds Restriction Violates The Fourteenth Amendment

This Court has unswervingly recognized that a woman's right to choose abortion encompasses the right to the unimpeded advice and counsel of her physician. *Roe v. Wade* identified many of the factors (which also were established in the trial before the District Court here) which would bear on a woman's choice, and recognized that these were factors "the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153. *Colautti v. Franklin*, 439 U.S. at 387, reiterated that "*Roe* stressed repeatedly the central role of the physician." *City of Akron* also emphasized repeatedly the centrality of a physician's unencumbered consultation and advice to the woman's right of choice. In rejecting government efforts to "influence the woman's informed choice," this Court held: "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances. . . ." 462 U.S. at 443. *See also id.* at 427, 429-30.

Most recently in *Thornburgh*, this Court rejected Pennsylvania's attempt to require that certain information be given by the physician to his patients because it came "close to being state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician." *Id.* at 763.

Neither *Thornburgh* nor *City of Akron* involved restrictions on speech. They involved statutes which required the giving of information intended to manipulate the woman's choice. These restrictions left the physician free, however, to add whatever additional information or advice he deemed appropriate. That is not the case here where the restriction limits advice and information. Thus the public funds restriction here is a more egregious state interference with the professional medical guidance to which the woman is entitled, because it reduces the quantum of information available.

Maher v. Roe, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980), do not excuse the public funds restriction.

Maher and *Harris* held that a state's choice not to pay for abortions even when it paid for childbirth was constitutionally permissible because it left "indigent wom[en] with . . . the same range of choice in deciding whether to obtain [an abortion]." *Harris*, 448 U.S. at 317. The restriction here, by comparison, restricts that "range of choice" by limiting the physician's ability to provide advice to his patient.

Maher and *Harris* distinguished what they permitted—affirmative encouragement of an activity through allocation of funds—from what they would not permit—state efforts to place "obstacles" or to impose "restriction[s] . . . not already there." *Harris*, 448 U.S. at 314-15 (quoting *Maher*, 432 U.S. at 474, 475-76). *City of Akron* characterized government attempts to influence doctor-patient communications as "unreasonabl[e] . . . 'obstacles'," 462 U.S. at 445 (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977)), and noted that such attempts to "influence . . . informed choice" were different from what *Maher* and *Harris* permit. 462 U.S. at 444. Thus, the Court of Appeals was on firm ground when it held that there could be "few obstacles more burdensome to the right to decide" than a restriction on publicly-paid physicians' right to give full advice and guidance to their patients. J.S. at A73.

V. THE BAN ON ABORTIONS IN PUBLIC FACILITIES IS UNCONSTITUTIONAL BECAUSE IT AFFECTS TOTALLY PRIVATE CONDUCT

Section 188.215 bans the use of so-called "public facilities" for performing or assisting abortions. In declaring this provision unconstitutional, the Court of Appeals focused on its impact upon the access of women and their physicians to public institutions, *i.e.*, publicly owned and governmentally operated institutions. The Court of Appeals held that, in such instances, this provision goes beyond the restriction upheld in *Poelker v. Doe*, 432 U.S. 519 (1977), because it does more than elect, "as a policy choice, to provide publicly financed hospital services for childbirth" without doing likewise for abortion. *Id.* at 521. It bans all access to public institutions for abortions, even when

neither public funds nor publicly-paid physicians are involved. J.S. at A74-77.

This holding, while correct, does not address the staggeringly broader reach of the public facilities provision. The provision reaches not only governmental institutions such as the "city-owned" hospital in *Poelker*, 432 U.S. at 519, but also purely private, otherwise legal activities wherever "any physical asset"[70] of the government is involved, regardless of the actual role, which may be none, of the government in the conduct of that activity, or the public or private status of the institutions and individuals involved, or the sources, public or private, of payment for the services. Thus, even if this Court believes *Poelker* could be expanded to shut the door on all use of governmentally operated institutions for abortion, the public facilities restriction must fall because it reaches so much further.

A. The Public Facilities Provision Unconstitutionally Interferes With Wholly Private Medical Treatment In Government Owned and Operated Institutions

Poelker found no constitutional violation in a government choice "to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." 432 U.S. at 521. This Court reached that conclusion because the constitutional question was "identical in principle" with the question resolved in *Maher*, 432 U.S. 464, regarding the government's choice to provide Medicaid reimbursement for childbirth expenses but not for abortion expenses. *Poelker*, 432 U.S. at 521.

The central holding in *Maher* was that government may "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474. *Maher* circumscribed this holding by recognizing the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activ-

70 The Act defines a 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." Section 188.200(2).

ity . . ." *id.* at 475, and by noting that the latter "places no obstacles . . . in the pregnant woman's path to an abortion." *Id.* at 474. *See Harris*, 448 U.S. at 314-15.

These principles also limit *Poelker*, and explain why the public facilities provision, just in terms of its impact on governmentally operated institutions, is unconstitutional. As the Court of Appeals stated, " '[t]here is a fundamental difference between providing direct funding to effect the abortion decision and allowing staff physicians to perform abortions at an existing publicly owned hospital.' " J.S. at A75 (*quoting Nyberg v. City of Virginia*, 667 F.2d 754, 758 (8th Cir. 1982), *cert. denied*, 462 U.S. 1125 (1983)).

Where a woman and her doctor decide that an abortion should be performed in a hospital,[71] and the doctor has staff privileges only at a governmentally operated hospital, the public facilities provision will force the woman either to undergo the procedure with her doctor outside the hospital, or to locate a different doctor with privileges at some other, nongovernmental hospital. This will happen even though no public subsidy is involved. Closing the door of the public hospital to private physicians and their patients is therefore a direct and unconstitutional intervention in the abortion decision.[72] *See City of Akron*, 462 U.S. at 434-35 (hospitalization requirement

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71 There are some situations where abortions should be performed in a hospital setting to insure maternal health and safety. Tr. 2-17 (Hern). For instance, abortions of molar pregnancies should be performed in a hospital operating room because of the increased risk of severe hemorrhage and "in case of pulmonary embolism and acute respiratory embarrassment." W. Hern, Abortion Practice 198-99. Other factors such as a maternal history of anemia, chronic infection or diabetes also increase the risk that a major hemorrhage will occur, which could require blood transfusions. *Id.* at 176.

72 In many smaller communities, hospitals are the only location where an abortion can be obtained. Henshaw, *et al.*, *Abortion Services In The United States 1984 and 1985*, 19 Family Planning Perspectives 63, 67 (1987). Frequently, the only hospital in such communities is a government owned or operated hospital, or at least a public facility within the broad meaning of the provision here. *See, e.g.*, *Nyberg v. City of Virginia*, 667 F.2d 754. In all of these communities, the dislocation caused by the public facilities provision will be multiplied by the absence of nearby alternatives and the vicissitudes of travel.

unconstitutional because it imposed significant obstacles of travel, increased cost, and additional health risk, and was not justified by State's interest in maternal health).

These problems will not be solved by other hospitals stepping in to fill the breach. The unchallenged evidence at trial showed that private hospitals do not step in to expand abortion services if they become less available in a community, J.S. at A25 n.20, and Missouri has statutorily imposed limits on the ability of health care institutions to offer new health services or open new facilities. Mo. Rev. Stat. Chap. 197.

The State and the Solicitor General both argue that if government cannot ban abortions at government hospitals, this means government must go into the abortion business. State's Brief at 47; S.G. Brief at 28. The holding of the Court of Appeals means nothing of the kind. It means government cannot close the doors of an otherwise suitable facility to private physicians who seek to provide abortions to their patients at that facility if those physicians are otherwise qualified to practice at that facility.[73] It does not require the government to undertake any affirmative step.

B. The Public Facilities Provision Unconstitutionally Interferes With Wholly Private Medical Treatment In Private Institutions And Other Private Settings

Even if government can close the doors of its own facilities, the public facilities provision undertakes to close many more doors as well. Private institutions or individuals located on

73 The Court of Appeals also invalidated the restriction on public employees performing or assisting abortions. Section 188.210. J.S. at A78-9. Plaintiffs had challenged this provision as violating the eighth amendment, *see* J.S. at A51-54; but the Court of Appeals interpreted the phrase "perform or assist" in a narrow way that resolved plaintiffs' eighth amendment concerns. J.S. at A79-82. The Court of Appeals found, nonetheless, that the restriction on public employees was invalid because it "would be totally incongruous to hold that the state cannot deny use of public facilities for paid abortions but may forbid public employees from assisting in those surgical procedures." J.S. at A78 n.15. Plaintiffs agree that the public employees provision is unconstitutional insofar as it prevents private physicians and their patients from obtaining access to suitable government owned and operated facilities for the purpose of abortion procedures.

property "owned, leased, or controlled" by the government will also be barred from providing abortions.

Contrary to the State's bald assertion that this provision will not "impose any obstacle which would substantially burden the effectuation of a woman's decision to obtain an abortion," State's Brief at 49, the impact of this provision in Missouri will be devastating. In 1985, 97 percent of all hospital-based abortions at 16 weeks or greater gestation in Missouri were performed at a hospital that will be forced to cease providing that service because it is housed on property that it leases from a political subdivision of the State. J.S. at A51 n.57.

That hospital is not a publicly owned or government operated institution.[74] It is a private Missouri corporation. Its employees are not public employees; they are employees of the private corporation. Its physicians are not, for the most part, public employees; they are employees of a second private corporation that provides physician services to the hospital corporation pursuant to a contract.[75] Moreover, no public funds are involved in the abortion services provided at the hospital.[76] J.S. at A76 n.14.

Moreover, it is not true, as the State suggests, that there are no other instances in Missouri where this provision will prevent access to abortion services. State's Brief at 49. Wherever, for example, a physician's office is located on property "owned, leased, or controlled" by the government, that physician will be barred from providing an abortion to patients in his or her office.

Presumably the State's interests are related to a policy choice to promote childbirth and to disengage itself from the provision

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74 The hospital is commonly thought of as a "public" hospital because it provides care to indigent residents of the city and county in which it is located.

75 Letter from G. Wilcher, General Counsel, Truman Medical Center, to Roger Evans, dated February 29, 1989.

76 The State says that this hospital is the only hospital in Missouri that provides abortions on a regular basis and is a public facility. State's Brief at 49, n.12. This assertion is not supported by the record; we do not know which other non-governmental hospitals would fall within the broad reach of this provision.

of abortion services.[77] *Maher* and *Harris* recognize the right of government to make this choice; but they do not recognize the right of government to implement that choice as the State has done in the public facilities provision. In those cases the government decisions to fund childbirth while not funding abortion provided affirmative incentives. They did not impose obstacles to private conduct. Here, by comparison, the public facilities provision—both as it applies to government institutions, and as it applies more broadly to other institutions and individuals on property owned, leased, or controlled by government—is an obstacle, not an incentive.

The public facilities provision is likewise not rescued by the State's interest in disengaging itself from the provision of abortion services. While it can disengage itself, it must do so in a way that is narrowly tailored so as not to penalize protected private conduct. *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 944-45 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348, *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). Here, protected private conduct will be made "unlawful" in the State's far-reaching efforts at disengagement.

In *Maher* and *Harris*, this Court found the funding incentives rationally related to the legitimate objective of promoting childbirth. Here, even a rational basis test cannot be met. The principle the State seeks to vindicate here goes far beyond its right affirmatively to encourage childbirth; it is seeking vindication of its choice to become an adversary to private institutions and individuals seeking to provide abortions.

To uphold the public facilities provision would be to constitutionally enshrine a principle of far-reaching consequences. The State ban on the use of "any physical asset" it owns, leases, or controls for the performance of abortions seemingly reaches such public facilities as water and sewage lines which

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77 Presumably, also, the State seeks to demonstrate its opposition to abortion. As Justice Scalia observed earlier this term in a different context, "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point . . . ." *Treasury Employees v. Von Raab*, U.S. Docket no. 86-1879, slip op. at 8 (March 21, 1989) (Scalia, J., dissenting).

are involved in the provision of abortions. Upholding the State's power to withdraw such facilities is to uphold the power of government to drive underground otherwise legal activity. That power can reach beyond abortion to other legitimate but disfavored activities. Could the State, for example, next ban the utilization of contraceptives in publicly owned housing? Abortion is a fundamental constitutional right, but, as Justice Stevens observed in a related context,[78] one need not posit a constitutional right to characterize the public facilities restriction as irrational and perverse.

CONCLUSION

Acceding to the State's and the Solicitor General's request that this Court overrule *Roe v. Wade* would strike at the heart of the values embodied in the rule of *stare decisis* and the role of this Court as a guardian of individual liberties, above the political fray. This Court should reaffirm its sixteen years of consistent rulings protecting the right to choose an abortion by affirming the judgment of the Court of Appeals.

78 Justice Stevens observed, "It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse." *Carey v. Population Services International*, 431 U.S. at 715 (Stevens, J., concurring). *See also Everson v. Board of Education*, 330 U.S. 1, 17 (1947).

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