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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS

WILLIAM C. BRYSON
Acting Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

ROGER CLEGG
STEVEN R. VALENTINE
Deputy Assistant Attorneys General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-605

WILLIAM L. WEBSTER, ET AL., APPELLANTS

v.

REPRODUCTIVE HEALTH SERVICES, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

Appellants have asked this Court to reconsider its decision in *Roe* v. *Wade*, 410 U.S. 113 (1973). The United States has previously filed briefs as amicus curiae in *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), questioning the regime of judicial review established by *Roe* v. *Wade*. The United States continues to believe that *Roe* v. *Wade* unduly restricts the proper sphere of legislative authority in this area and should be overruled by this Court.

In addition, the United States has a direct programmatic interest in the disposition of this case. The court of appeals struck down provisions of a Missouri statute that forbid the expenditure of public funds "for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. §188.205) and that prohibit the use of public facilities and public employees "for the

purpose of performing or assisting an abortion not necessary to save the life of the mother" (§§188.210, 188.215). The United States has placed similar restrictions on federally funded programs. Title X of the Public Health Services Act of 1970, 42 U.S.C. 300 *et seq.*, authorizes the federal government to make grants to public and private nonprofit entities for family planning projects, but expressly provides that "[n]one of the funds appropriated under this [title] shall be used in programs where abortion is a method of family planning" (42 U.S.C. 300a-6).[1] Similarly, the Adolescent Family Life Act of 1981, 42 U.S.C. 300z *et seq.*, provides funds for demonstration projects designed to discourage adolescent pregnancy, but specifies that grants may be awarded only to "programs or projects which do not provide abortions or abortion counseling or referral" (42 U.S.C. 300z-10(a)).[2] The Court's ruling with respect to the funding and public facilities provisions of the Missouri statute may affect the outcome of pending constitutional challenges to these analogous federal provisions.

STATEMENT

In 1986, the State of Missouri passed a statute regulating abortions. The first section of the statute contains a general

---

[1] The Department of Health and Human Services promulgated regulations in 1988 setting standards for compliance with Title X of the Public Health Services Act. See 53 Fed. Reg. 2922 (1988). Under the regulations, both "counseling concerning the use of abortion as a method of family planning" and "referral for abortion as a method of family planning" are forbidden. 53 Fed. Reg. 2945 (1988) (to be codified in 42 C.F.R. 59.8(a)(1)). The Title X regulations have been enjoined on constitutional grounds by two district courts, *Massachusetts* v. *Bowen*, 679 F. Supp. 137 (D. Mass. 1988), appeal pending, No. 88-1279 (1st Cir.); *Planned Parenthood Fed'n* v. *Bowen*, 680 F. Supp. 1465 (D. Colo. 1988), appeal pending, No. 88-2251 (10th Cir.), but have been upheld by a third, *New York* v. *Bowen*, No. 88-701 (S.D.N.Y. June 30, 1988), appeal pending, No. 88-6204 (2d Cir.).

[2] This Court recently upheld the funding provisions of the Adolescent Family Life Act against a facial attack under the Establishment Clause in *Bowen* v. *Kendrick*, No. 87-253 (June 29, 1988).

"finding" by the state legislature that "[t]he life of each human being begins at conception," and a requirement that all state laws be interpreted to provide unborn children with all the rights of other persons "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court" (Mo. Stat. Ann. §1.205.1-2). Among its various other provisions, the statute requires that, prior to performing an abortion on any woman whom a physician has reason to believe is 20 or more weeks pregnant, the physician must determine whether the fetus is viable by performing "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child" (§188.029). The statute also provides that no public funds, employees, or facilities may be used for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life or for "performing or assisting" an abortion not necessary to save the life of the mother (§§188.205, 188.210, 188.215).

Five publicly employed physicians and nurses and two nonprofit corporations brought a class action challenging the constitutionality of these and other provisions of the Missouri statute. The district court held the challenged provisions unconstitutional (J.S. App. A1-A55) and the court of appeals affirmed (*id.* at A56-A84). The court of appeals concluded (*id.* at A64) that Missouri's declaration that life begins at conception was "simply an impermissible state adoption of a theory of when life begins to justify its abortion regulations." The court of appeals rejected (*ibid.*) Missouri's reliance on the declaration's caveat requiring compatibility with the Constitution and Supreme Court precedent on the ground that a mere recitation of the Supremacy Clause "cannot * * * validate state laws that are in fact incompatible with the constitution."[3]

---

[3] Judge Arnold dissented (J.S. App. A83-A84) from this aspect of the decision below, contending that Missouri's declaration of when life begins

The court further concluded (J.S. App. at A59-A60) that the requirement that physicians perform viability tests is an unconstitutional legislative intrusion on a matter of medical skill and judgment. The court found that tests to determine fetal weight at 20 weeks are unreliable, inaccurate, and would add $125 to $250 to the cost of an abortion. And the court determined that "amniocentesis, the only method available to determine lung maturity, is contrary to accepted medical practice until 28-30 weeks of gestation, expensive, and imposes significant health risks for both the pregnant woman and the fetus." *Id.* at A60 n.5.

The court of appeals also invalidated the provision prohibiting the use of public funds for "encouraging or counseling a woman to have an abortion not necessary to save her life" (Mo. Ann. Stat. §188.205), finding that provision both overly vague and inconsistent with the right to abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973).[4] "[T]he statute is vague," the court stated (J.S. App. A68), "because the word 'counsel' is fraught with ambiguity; its range is incapable of objective measurement." In addition, the court held (*id.* at A70), the prohibition "is an unacceptable infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently." The court rejected as "completely inapt" (*id.* at A72) the analogy to the bans on the use of public funds to

---

should be upheld "insofar as it relates to subjects other than abortion," such as "creating causes of action against persons other than the mother" for wrongful death or bringing fetuses within the protection of the criminal law.

[4] In addition to banning the use of public funds to encourage or counsel a woman to have an abortion, the Missouri statute also forbids any public employee acting within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life and forbids the use of any public facilities for that purpose. See Mo. Stat. Ann. §§ 188.210, 188.215. Although the court of appeals also struck down those provisions (J.S. App. A47-A51), the State of Missouri has not appealed from this aspect of the judgment below.

perform or assist abortions upheld in *Harris* v. *McRae*, 448 U.S. 297 (1980), and *Maher* v. *Roe*, 432 U.S. 464 (1977). "Missouri," the court concluded (J.S. App. A72), "is not simply declining to fund abortions when it forbids its doctors to encourage or counsel women to have abortions. Instead, it is erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth."

Finally, the court of appeals struck down Missouri's prohibition on the use of public facilities and public employees "to perform or assist an abortion not necessary to save the life of the mother." Mo. Stat. Ann. §§188.210, 188.215. The court distinguished this Court's cases holding that the government need not provide funding for elective abortions on the grounds that "'[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. App. A75 (quoting *Nyberg* v. *City of Virginia*, 667 F.2d 754, 758 (8th Cir. 1982), appeal dismissed, cert. denied, 462 U.S. 1125 (1983)). The court noted (J.S. App. A79) that all of the public facilities' costs in providing abortion services, including the costs of employees' services, are recouped from funds provided by the patient. Hence, the court stated (*id.* at A75), the question at issue is not whether the State is required to fund abortions but whether "the state creates an undue burden or obstacle to the free exercise of the right to choose an abortion" when it prohibits the use of public facilities and public employees to perform or assist abortions.

SUMMARY OF ARGUMENT

Roe v. *Wade*, as the Court is well aware, has been intensely controversial from the day it was decided. That controversy is more than simply a reflection of the deep divisions in American society over the underlying question of abortion. Rather, the controversy has, in substantial

measure, been a product of the decision itself. *Roe* rests on assumptions that are not firmly grounded in the Constitution; it adopts an unworkable framework tying permissible state regulation of abortion to particular periods in pregnancy; and it has allowed courts to usurp the function of legislative bodies in weighing competing social, ethical, and scientific factors in reaching a judgment as to how much state regulation is appropriate in this highly sensitive area. In similar circumstances, the Court has "not hesitated" to overrule a prior interpretation of the Constitution. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). It should do so here as well.

The Court's decision in *Roe* v. *Wade* rests upon two key premises—that there is a fundamental right to abortion and that the States do not have a compelling interest in protecting prenatal human life throughout pregnancy. Neither premise, however, is supportable. The fundamental right to abortion can draw no support from the text of the Constitution or from history. Even assuming that the various "privacy" cases relied upon by *Roe* establish a generalized right to privacy, it does not follow that the abortion decision is encompassed within such a right. Abortion involves the destruction of the fetus, and is therefore "different in kind from the decision not to conceive in the first place" (*Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U.S. 747, 792 n.2 (1986) (White, J. dissenting)). *Roe*'s other critical assumption—that a State that wishes to regulate abortion does not have a compelling interest in protecting prenatal life throughout pregnancy—is similarly lacking in any logical or historical foundation. "[*P*]*otential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward." *Akron*, 462 U.S. at 461 (O'Connor, J. dissenting) (emphasis in original).

Roe's flaws are both illustrated and compounded by the manner in which the Court sought to implement its unfounded premises. The Court in *Roe* erected a framework

for reviewing abortion regulations based on the division of pregnancy into three trimesters, with different types of state regulation permitted in each trimester. The dividing lines were grounded not in any principle of constitutional law, but rather in medical findings. As a consequence, the lines must either become increasingly arbitrary over time or change as medical technology changes. Debate over these and other issues has spawned extensive litigation and has put the Court in the position of reviewing medical and operational practices beyond its competence.

We therefore believe that the time has come for the Court to abandon its efforts to impose a comprehensive solution to the abortion question. Under the Constitution, legislative bodies cannot impose irrational constraints on a woman's procreative choice. But, within those broad confines, the appropriate scope of abortion regulation "should be left with the people and to the political processes the people have devised to govern their affairs." *Doe* v. *Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting). Other Western countries have, through the legislative process, reached reasonable accommodations of the competing interests involved in the abortion controversy. There is no reason to believe that American legislatures, if basic decision-making responsibility were returned to them, would not similarly arrive at humane solutions.

Even if the Court is not inclined to reconsider *Roe* v. *Wade*, we believe that the court below erred in striking down provisions of the Missouri statute prohibiting the use of public funds to counsel a woman to have an abortion and the use of public facilities and public employees to perform abortions. Through these provisions, the State of Missouri has placed no obstacles in the path of women seeking to obtain an abortion. The State has simply chosen not to encourage or assist abortions in any respect. That is a permissible choice even assuming the continued vitality of *Roe* v. *Wade*.

ARGUMENT

I. *ROE* v. *WADE* SHOULD BE RECONSIDERED AND, UPON RECONSIDERATION, OVERRULED

Appellants have asked the Court (J.S. II) to reconsider the approach to determining the constitutionality of abortion regulations established in *Roe* v. *Wade*, 410 U.S. 113 (1973). We think this case presents a proper occasion for such a reconsideration. As we argue below (see Part II, *infra*), those provisions of the Missouri statute related to abortion counseling and the use of state facilities and personnel to perform abortions should be upheld even assuming the continued validity of *Roe*. But other provisions of the Missouri statute appear to reflect legislative choices foreclosed by *Roe*. In particular, the provision mandating the performance of certain viability tests when a woman is 20 or more weeks pregnant and the declaration that human life begins at conception are in tension with the severe limitations imposed by *Roe* on the ability of the States to adopt any measures to protect prenatal life prior to viability.[5] We accordingly agree

---

[5] The mandated viability tests (Mo. Stat. Ann. §188.029) are aimed at promoting the State's interest in the life of the unborn child rather than in maternal health. To the extent that these tests add to the cost of an abortion prior to the end of the second trimester, they may run afoul of the rigid trimester approach mandated in *Roe*. See *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 434-438 (1983). They may also run afoul of the Court's repeated admonition that the determination of viability is to be left wholly to "the judgment of the attending physician on the particular facts of the case before him." *Colautti* v. *Franklin*, 439 U.S. 379, 388-389 (1979). See also *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 64 (1976). The provisions of the statute setting forth a general "finding" by the state legislature that "[t]he life of each human being begins at conception," and a requirement that all state laws be interpreted to provide unborn children with all the rights of other persons "subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court" (Mo. Stat. Ann. §1.205.1-2), may run afoul of the Court's assertion that "a State may not adopt one theory of when life begins to justify its regulation of abortions." *Akron*, 462 U.S. at 444. It may also—to the extent it provides unborn children with property rights and the protection of state tort and criminal laws—place a burden of uncertain scope on the performance of

with the State of Missouri that a consideration of the constitutionality of these provisions raises the question whether *Roe* v. *Wade* should be reconsidered.

A. We recognize of course that the principle of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and appearance of integrity in our judicial system. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Those considerations must be given due weight in this as in any other area of the law. See *Akron*, 462 U.S. at 420 n.1.

Nonetheless, as Justice Frankfurter explained, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). Furthermore, it is well settled that *stare decisis* has less force in constitutional litigation, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. *Monell* v. *Department of Social Services*, 436 U.S. 658, 696 (1978); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962). For that reason, "[i]t is * * * not only [the Court's] prerogative but also [its] duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 627-628 (1974) (Powell, J., concurring). See also *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 n.30 (1977); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938).

---

abortions by supplying a general principle that would fill in whatever interstices may be present in existing abortion precedents.

Although this Court has never adopted a "rigid formula" for determining when a prior construction of the Constitution should be overruled (*Vasquez*, 474 U.S. at 266), it has identified several factors that bear on this inquiry. One question of obvious importance is whether the prior ruling is inconsistent with basic assumptions about the nature of the Constitution or established methods for giving effect to its key provisions. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. at 547-555; *New Orleans* v. *Dukes*, 427 U.S. 297, 306 (1976); *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943); *Erie R.R.* v. *Tompkins*, 304 U.S. at 78-80. Another factor that is clearly relevant is whether the prior rule has proved to be unworkable, has bred confusion, or has led to unforeseen or anomalous results. See *Solorio*, slip op. at 12-14; *Garcia*, 469 U.S. at 537-547; *Erie R.R.* v. *Tompkins*, 304 U.S. at 74-78. Finally, the Court has stated that prior decisions, even if of fairly recent vintage, should be reconsidered if they "disserve[] principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Taken together, these factors strongly suggest that the regime of judicial review established by *Roe* v. *Wade* should be abandoned.

B. The decision in *Roe* v. *Wade* rests on two crucial but highly problematic premises: that a woman has a fundamental right to decide whether or not to terminate her pregnancy and that the States do not have a compelling interest in protecting prenatal human life throughout the term of a woman's pregnancy. See *Thornburgh*, 476 U.S. at 796 (White, J., dissenting). The first premise—that the right to an abortion is fundamental—means that abortion regulation is subject to strict scrutiny and, thus, that the State must demonstrate that it has a compelling interest before it may burden that right. The second premise—that the State does not have a compelling interest in protecting fetal life throughout pregnancy—yields the conclusion that, except for regulations designed to preserve the health of the mother, the Constitution prohibits any effort by the State to regulate

or discourage abortion in the early months of pregnancy. Neither of those essential premises, however, is tenable.

1. All Members of this Court who have addressed the issue agree "that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause." *Thornburgh*, 476 U.S. at 790 (White, J., dissenting). See also *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting). The presence of such a liberty interest, however, ordinarily means only that any state regulation affecting that interest must be procedurally fair and must bear a rational relation to valid state objectives. See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955). In order to subject state regulation to the far more demanding requirements of strict scrutiny, it is necessary to show that it interferes with a "fundamental" constitutional right. The abortion decision, however, cannot be counted as a "fundamental" constitutional right under any of the traditional means used to identify such rights.[6]

The primary source for fundamental rights lies in the provisions of the Constitution other than the Fourteenth Amendment itself. "[T]he Court is on relatively firm ground when it deems certain of the liberties set forth in the Bill of Rights to be fundamental and therefore finds them incorporated in the Fourteenth Amendment's guarantee that no State may deprive any person of liberty without due process of law." *Thornburgh*, 476 U.S. at 790 (White, J., dissenting). All of the "privacy" cases that preceded *Roe* v.

---

[6] This judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, A. Cox, *The Court and the Constitution* 322-338 (1987); J. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); A. Bickel, *The Morality of Consent* 27-29 (1975); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973).

Wade—and upon which the Court relied in *Roe*—are explicable in terms of some other constitutional command beyond the generalized interest in "liberty" secured by the Fourteenth Amendment. They were rooted in accepted principles, whether of equal protection,[7] or of freedom of expression at the core of the First Amendment,[8] or of freedom from unreasonable searches assured by the Fourth Amendment.[9] In contrast, the right to abortion identified in *Roe* was grounded only in the liberty clause of the Fourteenth Amendment. As this Court recently reaffirmed,

---

[7] *Skinner* v. *Oklahoma*, 316 U.S. 535, 538 (1942) (criminal sterilization act violated equal protection by distinguishing without an adequate basis between persons convicted of larceny and embezzlement); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriages involved "invidious racial discriminations"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446-455 (1972) (statute prohibiting distribution of contraceptives violated equal protection by treating married and unmarried women differently without a rational basis).

[8] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923) (invalidating law prohibiting the teaching of foreign languages in private elementary schools because "[m]ere knowledge of the German language cannot reasonably be regarded as harmful"); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (invalidating statute requiring all children to attend public schools); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) (prosecution of Jehovah's Witness under statute prohibiting sale by minors of periodicals implicates but does not violate freedom of religion); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (invalidating criminal conviction for mere possession of obscene films in defendant's home).

[9] As one commentator has explained, this Court's decision in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), invalidating a statute regulating the *use* of contraceptives, as opposed to their manufacture or sale, indicated an underlying concern that enforcement of the statute *"would have been virtually impossible without* the most outrageous sort of governmental prying into the privacy of the home." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 929-930 (1973) (emphasis in original). A statute limiting a medical procedure performed by a doctor in a clinic or hospital is simply not analogous; abortion statutes could obviously be enforced without the necessity of repulsive searches. Fourth Amendment policies accordingly provide no support for the holding in *Roe* v. *Wade*.

"[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986).

In addition to rights secured by specific provisions of the Constitution, the Court has indicated that an interest will be deemed to be constitutionally fundamental if it is "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)) or "deeply rooted in this Nation's history and tradition" (*Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)). See *Bowers*, 478 U.S. at 191-192. It cannot be credibly argued, however, that the abortion decision forms a part of any historically recognized right that is fundamental in this sense. As the Court in *Roe* acknowledged in its review of the history of abortion regulation (410 U.S. at 129-141), and as Justice Rehnquist emphasized in his dissent (*id.* at 174-176 & n.1), state laws condemning or limiting abortion were very common at the time the Fourteenth Amendment was adopted.[10] "By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today." *Id.* at 174-176 (Rehnquist, J., dissenting).[11] Against this background, the right to abortion cannot be described as one that is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Compare *Bowers* v. *Hardwick*, 478 U.S.

---

[10] Indeed, the period between 1860 and 1880 witnessed "the most important burst of anti-abortion legislation in the nation's history." J. Mohr, *Abortion in America* 200 (1978).

[11] Prior to the mid-Nineteenth Century, the legal status of abortion was more uncertain. It is clear, however, that the abortion of a fetus after "quickening" was regarded as a crime at common law. *Roe*, 410 U.S. at 132-136. And the earliest English abortion statute, adopted in 1803, made abortion a criminal offense throughout pregnancy. *Id.* at 136.

at 192-194 (rejecting claim that there is a fundamental right to engage in homosexual sodomy based in part on discussion of criminal sodomy laws existing "[i]n 1868, when the Fourteen Amendment was ratified").

The most plausible source of support for a fundamental right to abortion lies in the Court's "privacy" decisions that antedate *Roe*. But even assuming that cases like *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), establish a general right to privacy or personal autonomy under the Fourteenth Amendment, see *Carey* v. *Population Services International*, 431 U.S. 678, 684-686 (1977), it does not follow that the abortion decision is encompassed within such a right. "The pregnant woman," this Court acknowledged (*Roe*, 410 U.S. at 159), "cannot be isolated in her privacy." Her decision to seek an abortion is "inherently different" from decisions concerning marital privacy and the use of contraceptives because it "involves the purposeful termination of a potential life" (*Harris* v. *McRae*, 448 U.S. at 325). As Justice White has observed (*Thornburgh*, 476 U.S. at 792 n.2):

> That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself. For if the liberty to make certain decisions with respect to contraception without governmental constraint is "fundamental," it is not only because those decisions are "serious" and "important" to the individual, * * * but also because some value of privacy or individual autonomy that is somehow implicit in the scheme of ordered liberties established by the Constitution supports a judgment that such decisions are none of the government's business. The same cannot be said where, as here, the individual is not "isolated in her privacy."

If a woman does not have a fundamental constitutional right to choose an abortion, then the *Roe* framework collapses. Absent such a right, abortion regulations, like other forms of regulation that affect general liberty interests, should be upheld as long as they are procedurally fair and bear some rational relationship to a permissible governmental goal.

2. Equally central to the *Roe* holding was the Court's determination that a State that chooses to regulate abortion does not have a compelling interest in preserving fetal life throughout the term of pregnancy. The Court acknowledged (410 U.S. at 154) that a woman's right to terminate her pregnancy "is not unqualified and must be considered against important state interests * * * in safeguarding health, in maintaining medical standards, and in protecting potential life." But the Court concluded that these interests are not present in the same degree from conception to birth; instead, the court found (*id.* at 162-163) that they "grow[] in substantiality as the woman approaches term." Especially critical in this regard was the Court's conclusion that "the State's important and legitimate interest in potential life" does not become "compelling," *i.e.*, sufficiently weighty to overcome the fundamental right to abortion, until the fetus has reached the point of viability (*id.* at 163).

The assumption that a State's asserted interest in protecting prenatal life is qualitatively different at different periods of pregnancy is debatable at best. As Justice O'Connor has observed, "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward." *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) (emphasis in original). See also *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). But even if there is a core of common sense in the notion that a State's legitimate interest in prenatal life "grows in substantiality" along with the development of the fetus, it does not follow that this interest should not be regarded as

compelling throughout pregnancy. An interest may be sufficiently weighty to be compelling in the constitutional sense even if subsequently it takes on even greater urgency.

The problem with the Court's treatment of the State's interest in fetal life is that it is not rooted in any analysis of what interests have been historically recognized as compelling. Deciding what is a "compelling" state interest is a little like deciding whether or not a particular value is "fundamental." Judges have not been left "free to roam where unguided speculation might take them." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). See *New York* v. *Ferber*, 458 U.S. 747, 756-758 (1982) (citing prior judicial decisions, legislative findings, and the enactment of legislation by "virtually all" States and the United States as relevant factors in identifying a compelling interest). The historical record here is clear (see pp. 13-14, *supra*). The tenor and contemporaneous understanding of the anti-abortion laws enacted from the mid-Nineteenth Century up to the time of the decision in *Roe* v. *Wade* leave little doubt that they were directed not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or nascent human life. See J. Mohr, *Abortion in America* (1978). Moreover, the historical record reveals that this interest has been consistently asserted by the States *throughout* the term of pregnancy, not just after viability or "quickening" or some other arbitrary line of demarcation.[12]

---

[12] Prior to concluding that a State does not have a compelling interest in prenatal life throughout pregnancy, the Court in *Roe* observed that Nineteenth Century English and American law typically treated abortion after quickening as a more serious crime than an abortion performed before quickening. 410 U.S. at 136-139. Obviously, however, the fact that an abortion performed in the early months of pregnancy was regarded as "only" a misdemeanor, rather than a felony, does not support the conclusion that the State has no compelling interest in preventing abortion in the earlier period. See Mohr, *supra*, at 200 ("most of the legislation passed between 1860 and 1880 explicitly accepted the [regular physicians'] assertions that the interruption of gestation *at any point in*

If a State that wishes to regulate abortion has a compelling interest in protecting prenatal life throughout pregnancy, then *Roe*'s framework cannot survive. For even if there is a fundamental right to abortion, that right may be overridden by the State's compelling interest in protecting prenatal life. Laws that impinge upon fundamental rights are not automatically invalid; rather, they will survive strict scrutiny if they are "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, 410 U.S. at 155 (citing cases). If a State's interest in protecting prenatal life is compelling throughout pregnancy, then abortion regulation designed to advance that interest in a rational manner should be permissible throughout pregnancy.

C. The untenable nature of *Roe*'s premises is demonstrated and compounded by the unworkable framework the Court adopted to implement those premises. To provide a framework for delimiting the permissible scope of abortion regulation, *Roe* divided pregnancy into three trimesters, with radically different consequences for state regulatory power in each. During the first trimester, both "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (410 U.S. at 164). During the second trimester, the State "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health" (*ibid.*). After viability, the State "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (*id.* at 165).

---

pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion") (emphasis supplied). That conclusion is further undermined by the Court's observation that, "[b]y the end of the 1950's, a large majority of the jurisdictions banned abortion, however and *whenever* performed, unless done to save or preserve the life of the mother." *Id.* at 139 (emphasis supplied).

This analytical framework has proved to be "a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context." *Akron*, 462 U.S. 454 (O'Connor, J., dissenting). For example, it is difficult to grasp why the compelling quality of a State's interest in safeguarding maternal health should undergo a radical change at the end of the first trimester. Indeed, "[t]he fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible" (*id.* at 460 (emphasis in original)).

The Court in *Roe* chose the end of the first trimester as a crucial point based on its determination—basically one of legislative fact—that "in the light of present medical knowledge * * * until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (410 U.S. at 149, 163). However, "developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, * * * have extended the period in which abortions are safer than childbirth" (*Akron*, 462 U.S. at 429 n.11). The fact that the Court in *Akron*, despite this evidence, found it "prudent" to retain the end of the first trimester as the sharply determinative point demonstrates the essential arbitrariness of the framework: the Court "simply concluded that a line must be drawn * * * and proceeded to draw that line" (*Garcia*, 469 U.S. at 543).

It was similarly arbitrary for the Court in *Roe* to determine that the State's legitimate interest "in protecting prenatal life" (410 U.S. at 150, 153-154) undergoes a constitutionally significant transformation at the point of fetal viability. The Court defined "viability" as the point when

the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160; see *Colautti*, 439 U.S. at 387. There is no obvious constitutional connection between the ability of a fetus to survive outside the womb with artificial support and the magnitude of a State's lawful concern to protect future life. As Justice O'Connor said in her *Akron* dissent, "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. * * * The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward" (462 U.S. at 461 (emphasis in original)). "[T]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh,* 476 U.S. at 795 (White, J., dissenting).

The "viability" standard is particularly unworkable as a constitutional reference point because, as the Court has acknowledged, the point when a fetus may survive outside the womb with artificial aid changes with "advancements in medical skill" (*Colautti*, 439 U.S. at 387). The "increasingly earlier fetal viability" demonstrated in recent scientific studies (462 U.S. at 457 (O'Connor, J., dissenting)) is the product of improvements in medical techniques, not of any change in our perceptions about how fully developed or worthy of life a fetus is at any point in time. It is disturbing to attribute constitutional significance to a point which, besides being in motion rather than being fixed, moves in response to advances in medical science rather than in response to forces more familiar to traditional judicial analysis. And it is troubling to contemplate a constitutional doctrine that would permit the State's power to regulate to vary from community to community—or from hospital to hospital—depending on the availability of sophisticated medical technology.

The arbitrary nature of *Roe*'s analytical framework is also reflected in the increasingly complex linedrawing of its

progeny. A State may require that certain information be furnished to a woman by a physician or his assistant (*Akron*, 462 U.S. at 448), but it may not require that such information be furnished to her by the physician himself (*id.* at 449). A State may require that second-trimester abortions be performed in clinics (*Simopoulos* v. *Virginia*, 462 U.S. 506 (1983)), but may not require that they be performed in hospitals (*Akron*, 462 U.S. at 437-439). As each set of these subtle distinctions has been crafted, still more unanswered questions have been posed. During the decade and a half since *Roe* v. *Wade*, the adversaries in the abortion debate have come back again and again, asking this Court to spin an ever finer web of regulations.[13] The adversaries are back again today, and they are sure to return.

D. At the heart of the abortion controversy lies a divisive conflict between a woman's interest in procreative choice and the State's interest in protecting the life of an unborn child and promoting respect for life generally. This is not the kind of conflict that is amenable to judicial resolution. If a "principled" resolution of this conflict is to be reached, it can only be by 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.[14] Failing such a resolution, it will be necessary to

---

[13] Between the decision in *Roe* and 1985, state legislatures enacted more than 250 statutes regulating abortion. Wardle, *Rethinking* Roe *v.* Wade, 1985 B.Y.U. L. Rev. 231, 247.

[14] *Roe* specifically declined to adopt either type of theory. The Court stated (410 U.S. at 154): "it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck* v. *Bell*, 274 U.S. 200 (1927) (sterilization)." And the Court declined to address the question of when life may be said to begin (410 U.S. at 159): "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at

reach an accommodation among the competing interests involved. Under our democratic system of government such an accommodation can be reached only through the political process. As long as the various factions continue to look to the courts, however, a constructive dialogue will be impossible.[15]

The proper role of a court in reviewing abortion legislation is neither to substitute its judgment for that of the legislature, nor to abdicate. Instead, as long as such legislation is procedurally fair and does not violate any of the specific prohibitions of the Bill of Rights, a court should simply ask whether the resolution reached by the legislature is rational—whether it is reasonably related to the advancement of legitimate governmental objectives. That standard of review is deferential, but it is not toothless. Compare, *e.g., Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447 (1985); *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). The important point is that the resolution of the abortion controversy, including

---

any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

[15] The Court's continuing effort to oversee virtually all elements of the abortion controversy has seriously distorted the nature of abortion legislation. Because *Roe* and its progeny have resolved most of the central questions about the permissible scope of abortion regulation, legislative action in this area has been relegated to relatively peripheral issues. And because legislators know that whatever they enact in this area will be subject to de novo review by the courts, they have little incentive to try to moderate their positions. The result, all too often, has been statutes that are significant primarily because of their highly "inflammatory" symbolic content—such as fetal description requirements and humane disposal provisions. *Thornburgh*, 476 U.S. at 762 n.10. This process has undermined the accountability of legislative bodies, and has disserved the courts and the Constitution. As James Bradley Thayer once observed, the "tendency of a common and easy resort" to the power of judicial review "is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." J.B. Thayer, *John Marshall* 106-107 (1901). See also *Plyler* v. *Doe*, 457 U.S. 202, 253-254 (1982) (Burger, J. dissenting); *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

any compromise, must come from the legislature; it cannot be imposed by the courts from above.

It is possible to envision a standard of review more deferential than that adopted by *Roe* v. *Wade*, yet more stringent than rationality review, such as the "undue burden" analysis thoroughly delineated by Justice O'Connor in her separate opinions in *Akron* and *Thornburgh*, and urged in our brief in *Akron*. On reflection, however, we believe that any such intermediate standard would inevitably fall prey to the same difficulties that have beset the *Roe* framework. The concept of an "undue burden" obviously is not self-defining; in giving effect to such a concept, the Court would be required to develop a new regime of substantive abortion rights. Like the regime it would replace, this new system would lack any moorings in the Constitution and would quickly reintroduce the arbitrary linedrawing characteristic of *Roe*. And because it would hold forth the promise of continued and intensive (albeit not strict) judicial arbitration of the competing interests, it would undermine the attempts of the legislative branch to negotiate a compromise among those interests. If such a political resolution of the abortion controversy is ever to become a reality, the Court must unequivocally announce its intention to allow the States to act "free from the suffocating power of the federal judge, purporting to act in the name of the Constitution." *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. at 93 (White, J., dissenting).[16]

---

[16] If the Court does adopt an "undue burden" analysis, we think the appropriate characterization of the liberty interest that must not be burdened is not a "right to abortion," but rather an interest in procreational choice—"whether or not to beget or bear a child" (*Carey* v. *Population Services International*, 431 U.S. 678, 685 (1977)). Thus, in asking whether any particular state regulation imposes an undue burden, the relevant question would be whether a woman has been afforded a meaningful opportunity to avoid an unwanted pregnancy, taking into account all of the options available to her, including abstinence and contraception. Under this type of analysis, a regulation that prohibits the use of abortion as a form of routine family planning might not be regarded as imposing an undue burden, because it could not be said in this context that a woman

In a recent study of the abortion laws of 20 Western countries, a leading comparative law scholar reported two striking conclusions. M.A. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987). First, under the abortion regime established by *Roe*, "we have less regulation of abortion in the interest of the fetus than any other Western nation * * *." *Id.* at 2.[17] The fact that the regime established by *Roe* is out of step with the legislative judgment of virtually every other country with which we share a common cultural tradition by itself suggests that the decision ought to be reconsidered. Second, and more fundamentally, "[t]o a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue." *Id.* at 2.[18] The survey indicates that

---

lacks a meaningful opportunity to exercise procreational choice. On the other hand, a regulation that prohibits abortion in cases of rape or incest presumably would entail an undue burden, because in such cases, where the pregnancy is the result of coercion, a woman has not been afforded a meaningful opportunity to avoid pregnancy through alternative means. We reiterate, however, that these judgments are more appropriately drawn by legislatures rather than courts.

[17] Professor Glendon reports that two countries (Belgium and Ireland) have blanket prohibitions against abortion in their criminal law, subject only to the defense of necessity. Four countries (Canada, Portugal, Spain, and Switzerland) permit abortion only in early pregnancy and only in restricted circumstances, as where there is a serious danger to the pregnant woman's health, a likelihood of serious disease or defect in the fetus, or where the pregnancy resulted from rape or incest. Eight countries (England, Finland, France, West Germany, Iceland, Italy, Luxembourg, and the Netherlands) permit abortion in early pregnancy in a wider variety of circumstances that pose a particular hardship for the pregnant woman. Five countries (Austria, Denmark, Greece, Norway, and Sweden) permit elective abortions in early pregnancy, though abortions are strictly limited thereafter. Glendon, *supra*, at 13-15 & Table 1. Only in the United States is elective abortion permitted until viability. *Ibid.*

[18] After the publication of Glendon's book, the Canadian Supreme Court struck down its abortion law on grounds similar to those stated in *Roe* v. *Wade*. See *Morgentaler* v. *Her Majesty the Queen*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988). The West German high court, by contrast, had earlier struck down a law liberalizing access to abortion on the grounds that "life

democratic legislatures are fully capable of reaching a resolution of the competing interests in the abortion controversy. Indeed, the fact that this issue touches or can touch nearly everyone's life—not just those representing a special interest or defending a discrete and insular minority—means that it should be capable of resolution through the process of political dialogue. In short, unless the American political culture is somehow radically different from that of other countries with which we share a common heritage, it would appear that there is nothing inherent in the abortion controversy, or the sharply conflicting interests and viewpoints in this area, that makes it uniquely resistant to legislative resolution.

Under the Constitution, legislative bodies cannot impose irrational constraints on a woman's procreative choice. But within those broad confines, the proper scope of abortion regulation "should be left with the people and to the political processes the people have devised to govern their affairs." *Doe* v. *Bolton*, 410 U.S. at 222 (White, J., dissenting). The effect of the decisions in *Roe* and its progeny has been "to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." *Poe* v. *Ullman*, 367 U.S. at 546 (Harlan, J., dissenting). The time has come to end this "difficult and continuing venture in substantive due process." *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. at 92 (White, J., dissenting).

---

developing within the womb is constitutionally protected." See *Judgment of Feb. 25, 1975*, 39 BVerfGE 1 (quoted in Glendon, *supra*, at 26).

II. THE STATE OF MISSOURI IS NOT REQUIRED BY THE CONSTITUTION EITHER TO FUND PRO-ABORTION COUNSELING OR TO USE PUBLIC EMPLOYEES AND PUBLIC FACILITIES TO PERFORM ABORTIONS

The State of Missouri has chosen not to encourage or assist abortions in any respect. We believe that is a permissible choice, even assuming the continued vitality of *Roe* v. *Wade*. Missouri's prohibitions on the use of public funds to counsel a woman to have an abortion and on the use of public facilities and public employees to perform abortions should therefore be upheld even if this Court's abortion precedents remain intact.

A. Missouri's prohibition on the use of public funds to encourage or counsel a woman to have an abortion not necessary to save her life is not unconstitutionally vague. This Court has stressed that civil statutes are not to be held to the same standards of precision as criminal statutes, *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982). Missouri's prohibition on the use of public funds does not impose any criminal penalties and can be enforced only by injunctive action. See J.S. 3; Mo. Stat. Ann. §188.220.[19] In any event, it cannot be said that the statute is "so vague that 'men of common intelligence must necessarily guess at its meaning.' " *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973) (citation omitted).

As the State of Missouri explains (J.S. 25), the statute "does not prohibit the use of public funds to provide information regarding abortions or to inform a woman of the options she may have to cope with an unwanted pregnancy." Rather, the statute forbids only the use of public funds to advise a woman that she should have an abortion that is not

[19] The court of appeals suggested (J.S. App. A67) that Missouri's prohibition must meet a higher standard of precision because it "implicates both first and fourteenth amendment rights of both physicians and their patients." As explained below, however, the law does not in fact burden any fundamental rights and, thus, no heightened scrutiny is appropriate.

necessary to save her life. See Mo. Stat. Ann. §188.205. "[A]lthough [that prohibition] may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *CSC* v. *Letter Carriers*, 413 U.S. 548, 579 (1973). See *Planned Parenthood* v. *Arizona*, 718 F.2d 938, 948-949 (9th Cir. 1983) (state prohibition on the use of state funds for "counseling for abortion procedures" not unconstitutionally vague).

The court of appeals was also mistaken in holding that the Missouri statute violates the right of pregnant women to have an abortion. Missouri has merely decided not to encourage abortions in any respect, and this Court has already held that the States are not precluded from making "a value judgment favoring childbirth over abortion, and * * * implement[ing] that judgment by the allocation of public funds." *Maher* v. *Roe*, 432 U.S. at 474. The State of Missouri is not "erecting an obstacle in the path of women seeking full and uncensored medical advice about alternatives to childbirth" (J.S. App. A72). While the State has chosen not to urge women to have elective abortions, women in Missouri are still free to make a contrary choice and to seek out medical advice and encouragement consonant with their decision.

In a separate opinion, Judge Arnold suggested (J.S. App. A83) that Missouri's prohibition violated the First Amendment because it "sharply discriminate[s] between kinds of speech on the basis of their viewpoint: a physician, for example, could discourage an abortion, or counsel against it, while in a public facility, but he or she could not encourage or counsel in favor of it." See also Mot. to Aff. 13. The State of Missouri does not, however, impose any restrictions on speech by private parties. Nor does it impose any limitations on the type of counseling or advice that a pregnant woman may receive from private sources. It is simply implementing its legislative preference for childbirth over

abortion by declining to devote public resources to encouraging or counseling women to have abortions.

"Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher* v. *Roe*, 432 U.S. at 476. A State may thus spend state funds to encourage activities deemed to be in the public interest without simultaneously funding activities that are inconsistent with state policy. *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 93-95 (1976). "The Constitution presumably does not engraft an 'equal time' requirement onto the dispensation of state funds for the encouragement of matters reflecting a legitimate state interest." *Planned Parenthood Ass'n of Chicago* v. *Kempiners*, 700 F.2d 1115, 1128 (7th Cir. 1983) (Cudahy, J., concurring).[20] "There is a basic difference," this Court has noted (*Maher* v. *Roe*, 432 U.S. at 475), "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

B. The court of appeals also held (J.S. App. A79) that "the state's desire to discourage abortions" is an insufficient justification for Missouri's prohibition on the use of public facilities and public employees to perform or assist abortions that are not necessary to save the life of the mother. The court concluded that as long as the patient pays for the

---

[20] Recipients of federal funding under Title X are required to counsel clients concerning various methods of birth control. As a consequence, Catholic organizations have largely refused to participate in the Title X program. No one suggests, however, that Title X therefore violates the First Amendment. Catholic organizations are still free to counsel against the use of any artificial method of birth control, and they are not "penalized" in any respect for doing so. They are simply unable to take part in a government-sponsored program with a different purpose. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980). See also *Maher* v. *Roe*, 432 U.S. at 474-475 n.8.

services in question, the State has no legitimate grounds for not providing them. In effect, the court of appeals has held that the Constitution compels Missouri to go into the abortion business, provided the State can break even or turn a profit in doing so. But there is no legal basis for the rule that what the government cannot ban, it must sell if it can do so profitably. This Court has stressed (*Maher* v. *Roe*, 432 U.S. at 474) that a woman's "freedom to decide whether to terminate her pregnancy * * * implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." The same principle applies when the State chooses to implement its value judgment by the allocation of public facilities and the services of public employees.

The court of appeals' decision on this question cannot be reconciled with *Poelker* v. *Doe*, 432 U.S. 519 (1977) (per curiam), in which the Court upheld a decision by the City of St. Louis not to perform abortions in city hospitals. Although the suit in *Poelker* was filed by an indigent who could not afford to pay for her abortion, the prohibition at issue in that case applied whether or not the pregnant woman was able to pay. 432 U.S. at 520; *id.* at 524 (Brennan, J., dissenting). Furthermore, the suit was brought by the plaintiff "on her own behalf and on behalf of the entire class of pregnant women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis for the termination of pregnancies." 497 F.2d 1063, 1065 (8th Cir. 1974). The complaint sought general relief from the City's policy against providing abortion services, not simply relief for indigents. 515 F.2d 541, 542 (8th Cir. 1975). In rejecting this broad challenge, this Court stated (432 U.S. at 521) that, whatever other medical services it provides, the City of St. Louis has no constitutional

obligation to provide "services for nontherapeutic abortions."

The court of appeals' conclusion that Missouri's refusal to perform abortions creates an "undue burden or obstacle to the free exercise of the right to choose an abortion" is unfounded. The State is not placing restrictions on the right of women to seek abortions from private sources. It is simply refusing to provide abortion services itself. We are informed by the State of Missouri that there are more than 9,000 licensed physicians practicing in the State; only 292 (or less than 4%) work full-time or part-time for the State of Missouri. There are more than 160 private hospitals and clinics in the State, and only 19 state hospitals. Under these circumstances, the State's decision to stay out of the abortion business cannot be said to erect an impermissible obstacle to a woman's effort to seek an abortion.

Furthermore, the court of appeals' conclusion (J.S. App. A79) that Missouri's prohibition on the use of public facilities and public employees to perform or assist abortions must be supported by a "compelling state interest" runs directly counter to this Court's statement that it is "abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth" (*Maher* v. *Roe*, 432 U.S. at 477). Whether that policy choice is implemented by the State's allocation of public funds, public facilities, or public employees acting within the scope of their employment is constitutionally irrelevant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROGER CLEGG
STEVEN R. VALENTINE
Deputy Assistant Attorneys General
MICHAEL K. KELLOGG
Assistant to the Solicitor General

FEBRUARY 1989