No. 88-605

IN THE

Supreme Court Of The United States

October Term, 1988.

WILLIAM L. WEBSTER, et al.,

Appellants,

v.

REPRODUCTIVE HEALTH SERVICE, et al.,

Appellees.

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

BRIEF OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, OHIO, PENNSYLVANIA, TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA, *AMICI CURIAE*, IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae —- The Rutherford Institute and its affiliated state chapters —- have as two of their purposes, strengthening the traditional family and fostering respect for the uniqueness and paramount worth of human life. These values are deeply rooted in America's common law and Constitutional tradition and its morality and values. Diminishing the value of family relationships and respect for life, even potential life, diminishes, in one form or another, the lives and the quality of life of all citizens. That is why The Rutherford Institute believes that this case, with issues concerning the power of states to regulate abortion, and ultimately, to sustain and protect the traditional American family, will be

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

important to our Constitutional jurisprudence and the growth and progress of the Nation.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. The Rutherford Institute and its affiliated state chapters undertake to assist litigants and to participate in significant cases relating to the protection and safeguarding of human life and family values. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

The facts of this case have been stated in the Jurisdictional Statement, pages 2-8, and are incorporated herein by this reference.

SUMMARY OF ARGUMENT

Roe v. *Wade* [2] stands as an unnecessary source of division and conflict in American life. If left to stand, it threatens to undermine the institutional stature of this Court and the rule of law in American society. The legitimacy of *Roe* has been disputed not only by doctrinaire pro-life advocates, but by the Executive Branch of the United States Government, by distinguished legal scholars, by the legislative branches of the Federal and several state governments, by the people in referenda in several states and by significant segments of American society. Indeed, in the Court's last decision on the subject, three justices of this Court questioned the legitimacy of *Roe*, with a fourth calling for its reexamination.[3]

Roe has failed because its premises were not rooted in the tradition of the Nation. Its reading of history was flawed, its reliance on precedent, misplaced, and its Constitutionalization of

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[2] 410 U.S. 113 (1973) (hereinafter cited alternatively as "*Roe*" and "*Roe v. Wade*").

[3] Justices White and O'Connor, both joined by then Justice Rehnquist, disputed the legitmacy of *Roe*. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 791 (White, J., dissenting) and 829 (O'Connor, J., dissenting). Then Chief Justice Burger called for re-examination of *Roe*. *Id.* at 785 (Burger, C. J., dissenting).

an essentially legislative issue, mistaken. Even more egregious was its transposition of Constitutional values, namely, the arbitrary elevation of "liberty" over "life" —- the latter being the compelling basis of the dignity of man and the prerequisite for all basic constitutional rights.[4] This failure of jurisprudence rivals this Court's decision in the *Dred Scott Case*.[5]

It is time for the Court to recognize its error in *Roe* v. *Wade*, as it has over 100 times in other cases, and to reverse *Roe* or, at the very least, confine it to its narrow holding. Accordingly, this Court should uphold the Missouri statutory provisions based on a standard of review that requires legislation to bear a rational relationship to a legitimate state objective.

ARGUMENT

I. ROE V. WADE SHOULD IN THE INTEREST OF JUSTICE BE EXPRESSLY OVERRULED OR CONFINED TO ITS NARROW HOLDING.

This Court has recognized that it "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*, 106 S.Ct. 2841, 2846 (1986). Legitimacy is essential because the judiciary "is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication."[6] Absent legitimacy, respect for law is greatly diminished,[7] legal institutions are undermined,[8] law

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[4] Decision of The Federal Constitutional Court of the Federal Republic of Germany (West Germany), translated in Jonas & Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade —- With Commentaries*, 9 J. Mar. J. Prac. & Proc. 551, 642 (1976).

[5] *Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857).

[6] A. Cox, *The Role of the Supreme Court in American Government* 103 (1976).

[7] *250 Arrested at Jersey Anti-Abortion Protest*, The New York Times, September 18, 1988, at 46; Thompson, *Atlanta Police Use Tougher Tactics As Abortion Foes Return to Streets*, The Washington Post, October 5, 1988, at A3; Abramowitz, *153 Arrested in Abortion Protest at D. C. Clinic*, The Washington Post, January 24, 1989, B1.

[8] Woodward, *The Abortion Papers*, The Washington Post, January 22, 1989, at D1. *See also*, R. Terry, *Operation Rescue* 283 (1988) ("We hereby declare *Roe* v. *Wade* and all subsequent court decisions and legislation which permit, support,

enforcement is jeopardized,[9] and the gap between the law and the moral order produces increasing conflict and social turmoil.[10] The judiciary is otherwise left to the embarrassing and defensive position of justifying its misadventures under increasingly indiscriminate standards.[11]

Unfortunately, the plight of the Federal courts since the landmark decision of *Roe* v. *Wade* has been repeatedly to defend it. After fifteen years, and even more revisits to the subject by this Court,[12] the people through their elected representatives continue to seek guidance in determining what, if any, regulation may be imposed on abortion. But with each new decision, it becomes increasingly obvious that any "limits" *Roe* purports to impose on

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or protect wanton child killing to be unjust, illegitimate, non-binding and unlawful").

[9] *See* Hentoff, *Civil Rights and Anti-Abortion Protests*, The Washington Post, February 6, 1989, A11 ("The only actual violence connected with Operation Rescue has been inflicted by the police, most viciously, in Atlanta where one of the Planned Parenthood's 13 civil rights leaders is mayor"); Hiskey, *Thousands Join "Rescue Movement" Around Nation*, 32 Christianity Today 52, December 9, 1988 (Some law enforcement officials torn between moral beliefs and duties).

[10] Judge Ruth Bader Ginsburg, a supporter of the abortion right, has suggested that "....*Roe* ventured too far in the change it ordered....Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. C. L. Rev. 375, 381, 385 (1985). *See also, e.g.*, the articles cited in note 7, *supra*; *3 State Referendums Give New Impetus to Anti-Abortion Efforts*, The Washington Post, November 10, 1988, at B-1; and *Letter to Medical Staff* and *Roe v. Wade Revisited at North Memorial Medical Center*, 20 Medical Staff News, North Memorial Medical Center, Minneapolis, Minnesota, No. 1 at 4 and 5, January 1989 (*Roe* v. *Wade* is at the center of a dispute among physicians, requiring a vote of hospital staff on whether to do abortions).

[11] *See* Will, *Splitting Differences*, Newsweek, February 13, 1989, at 86, and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 814, 829 (O'Connor, J., dissenting): "[N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion....[T]he Court strains to discover 'the anti-abortion character of the statute'...and invents an unprecedented canon of construction under which 'in cases involving abortion, a permissible reading of the statute is to be avoided at all costs.'"

[12] The Court has decided 18 abortion decisions since *Roe* v. *Wade* and *Doe* v. *Bolton*.

abortion are, in reality, shallow rhetoric for "abortion on demand," *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 782-784 (1986) (Burger, C. J., dissenting) (hereinafter "*Thornburgh*"). Even more obvious is the fact that *Roe* is "clearly on a collision course with itself," *City of Akron* v. *Akron Center for Reproductive Health*, 462 U. S. 416, 458 (1983) (O'Connor, J. dissenting) (hereinafter "*Akron*"). "As time passes, not only does the *Roe* decision appear to be collapsing from within, but the opinions of leading constitutional law writers, many of them not opposed to abortion in principle, have been marshaled against it. Archibald Cox, Alexander Bickel, John Hart Ely, Harry Wellington, Richard Epstein and Paul Freund have all been highly critical." Mary Ann Glendon, *Abortion and Divorce in Western Law* 44 (1987) (hereinafter "Glendon"). Finally, the repeated solicitations of the Executive Branch of the United States Government, through its successive Solicitor Generals, imploring this Court to confine *Roe* v. *Wade* to its narrow holding or to overrule it, has reflected increased public sentiment questioning the validity of *Roe*. *See Briefs of the United States As Amicus Curiae in Support of Appellants* in *Akron* and *Thornburgh*.

It is imperative that this national undercurrent of doubt and skepticism about the Nation's highest court and abortion be rectified. Unfortunately, the Court's unequivocal affirmances of *Roe* in the *Akron* case, where it appealed to *stare decisis*, and its more forceful affirmance in *Thornburgh*, where its resolution was intimated to be as strong as in *Brown* v. *Board of Education*,[13] have done little to calm the unrest and dissent. *Stare decisis* is a very slender reed upon which to justify a decision as wanting in precedent as *Roe* v. *Wade*. And *Brown v. Board of Education*, unlike *Roe*, was secure because it had Constitutional warrant as well as being morally correct: "the fourteenth amendment provided an explicit and settled constitutional mandate to justify that decision, apart from the moral force of the decision's reasoning."[14] The "undesired and uncomfortable straightjacket" that *Roe* and its more recent progeny have "tailored for the 50 states" has, instead,

[13] 349 U. S. 294 (1955).

[14] Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L. J. 267, 282 (1986).

sparked "a significant and important judicial debate,...not only about the legitimacy of *Roe* and its effect upon the Court as an institution, but also about the nature of the right granted in *Roe* and the state interest in protecting the fetus as a living entity."[15]

Despite the importance of *stare decisis* to our legal system, this Court has not in the past hesitated to correct Constitutional error.

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right....But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406-407 (1932).[16] No matter how valuable a consistent course of constitutional adjudication, blind adherence to *stare decisis* can transform it—like any other formal rule—into so many "high words, that [bear] semblance of worth, [but] not substance."[17] Formal rules and good intentions do not suffice when the underlying decision they

[15] *Id.* at 321-322. *See* the discourse between Justices White and Stevens in the *Thornburgh* case, 476 U. S. at 772-782 (Stevens, J., concurring), and 785-814 (White, J., dissenting), and the dissenting opinions of Chief Justice Burger, and Justice O'Connor in the same case, 476 U. S. at 782-785 (Burger, C. J., dissenting) and at 814-833 (O'Connor, J., dissenting). There have also been rumblings in the Circuit Courts of Appeal. *See, e.g., Margaret S.* v. *Edwards*, 794 F.2d 994, 995-996, 996,n.3 (5th Cir. 1986)(Higginbotham, J.); and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 737 F.2d 283, 317 (Adams, J.) and 319 (Weis, J.) (3rd Cir. 1984)(on denial of pet. for rehearing).

[16] Prominent examples of reversal in the last fifty years are *South Carolina* v. *Baker*, 108 S.Ct. 1355 (1988) [where the Court expressly overruled *Pollack* v. *Farmer's Loan & Trust Co.*, 158 U. S. 601 (1896), which itself expressly overruled *Hylton* v. *United States*, 3 Dall. (3 U. S.) 171 (1796); these multiple reversals spanned almost our entire Constitutional history]; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 557 (1985); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943); *United States* v. *Darby*, 312 U. S. 100 (1941); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937).

For a complete review of the history of the Court's reversals, *see*, Pfeifer, *Abandoning Error: Self-Correction by the Supreme Court*, in *Abortion and the Constitution* 3–22 (D. Horan, E. Grant & P. Cunningham, ed. 1987).

[17] John Milton, *Paradise Lost* I: 528-529.

seek to justify fails "to trace its premises to the charter from which it derives its authority"[18] and deprives the people of power to explore and shape a societal response to a controversial subject involving important, but conflicting social values.[19] As Justice Frankfurter has written:

> The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.

American Federation of Labor v. *American Sash Co.*, 335 U. S. 538, 557 (1949) (Frankfurter, J. concurring).

The long and short of the matter is that it is past time for this Court to acknowledge and correct error in *Roe* v. *Wade*. It has abandoned error over 100 times in its history, [20] and it should now overrule it outright or, at the very least, confine *Roe* v. *Wade* to its narrow holding.

II. IT WAS ERROR TO CLASSIFY A WOMAN'S DECISION TO TERMINATE HER PREGNANCY AS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT'S CONCEPT OF PERSONAL LIBERTY.

This Court has recognized certain fundamental rights that are protected by the Due Process Clause of the Fourteenth Amendment. These rights have been held to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934),[21] and

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[18] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 949 (1973).

[19] Freund, *Storms Over the Supreme Court*, 69 A.B.A.J. 1474, 1480 (1983). *See also*, *Thornburgh*, 476 U. S. at 786-794, 796-797 (White, J. dissenting), and *Bowers*, 106 S.Ct. at 2844-46.

[20] Blaustein and Field, *'Overruling' Opinions in the Supreme Court*, 57 Mich. L. Rev. 152-156 (1958); and Pfeifer, *supra* note 16, at 5-10.

[21] *See also*, *Moore* v. *City of East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of Powell, J.) and *Griswold* v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J.

so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if [they] were sacrificed." *Palko* v. *State of Connecticut*, 302 U. S. 319, 325 (1937).[22] Because of the value placed on such rights, the Court has required a necessary relationship between any state action restricting them and a compelling state interest in order for the action to be upheld. *Griswold* v. *Connecticut*, 381 U. S. 479, 497 (1965).

"Fundamental liberties and interests are most clearly present when the Constitution provides specific textual recognition of their existence and importance." *Thornburgh*, 476 U. S. at 790 (White J., dissenting). Thus, rights expressly granted in the Bill of Rights have been applied by this Court against the states through the Due Process Clause of the Fourteenth Amendment. In *Roe* v. *Wade*, where a woman's decision to terminate a pregnancy was recognized as a "fundamental" right encompassed in the right to privacy, this Court found no explicit textual mandate to justify the right, but, instead, relied on the "Fourteenth Amendment's concept of personal liberty and restrictions on state action" and "the Ninth Amendment's reservation of rights to the people." *Roe* at 153.

In support of its decision, the Court relied on an historical, sociological and medical analysis to determine why the decision to terminate pregnancy was fundamental and therefore protected by the right of privacy. In its extensive survey of the socio-medical and legal history of abortion, this Court concluded that restrictive criminal abortion laws were "of relatively recent vintage" (*id.* at 129), and that ancient and Anglo-American law had generally treated abortion with less severity than the state statutes then in force. The Court summarized: "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th Century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140, 157-158, 165. These findings provided an essential premise for the Court's ultimate legal conclusion.

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concurring) (Fundamental liberties are those that "are deeply rooted in this Nation's history and tradition.").

[22] *See also*, *Roe* v. *Wade*, 410 U. S. at 152; *Moore* v. *City of East Cleveland*, 431 U. S. at 537 (Stewart, J. dissenting).

Even though governing standards may permit the Court to identify "fundamental" liberty interests in historical tradition or concepts of ordered liberty, it cannot be gainsaid that the Court is most vulnerable if such interests are not *in fact* so rooted. For if "the roots of substantive due process decisions are not already in the nation, the decisions [of this Court] will lack 'power' or 'authority'." Perry, *Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases*, 71 Nw. L. Rev. 417 (1976). Unfortunately, the central problem with *Roe v. Wade* is that it fails to establish the necessary link between bedrock values inherent in our Constitutional tradition and a woman's decision to terminate potential life within her. As Dean Ely has eloquently written, "[a] neutral and durable principle may be a thing of beauty and joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it." Ely, *supra* note 18 at 949.

The failures of *Roe* lie in three specific areas: the Court's historical analysis of the socio-medical-legal tradition of abortion, the Court's treatment of applicable precedent and the Court's removal of abortion policy from the legislative agenda in our Constitutional system.

a. *Historical Exegesis*. The historical exegesis undertaken in *Roe* is distinctly problematical. Justice Rehnquist's dissent in *Roe* presaged what has now become a more considered and well-documented view that the Court had misread history. At the time his dissent concluded that "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 174 (Rehnquist J., dissenting).[23]

The historical difficulties in *Roe* arise from the Court's cursory and incomplete treatment of the ancient history of abortion, [24] its skewed view of the ancient Greek Hippocratic Oath (which forbade abortion),[25] its blinking at over 1000 years of Judeo-Christian ethics and law (where opposition to abortion was

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[23] Justice White has since elaborated extensively upon this subject in his dissent in *Thornburgh*, 476 U. S. at 788-794.

[24] Connery, *The Ancients and the Medievals on Abortion: The Consensus the Court Ignored*, in *Abortion and the Constitution*, *supra* note 16, at 123-135.

[25] Arbagi, *Roe and the Hippocratic Oath*, in *id.* at 159-181.

predominantly constant)[26] and, perhaps most importantly, its distortion of the common law and statutory tradition.[27] These deficiencies have been itemized extensively elsewhere[28] and will not be repeated here. Suffice it to say, in the words of Archibald Cox, that "[n]either historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either natural law or the Constitution."[29] A more deliberate consideration of the record raises substantial doubt about the Court's rendition of the socio-medical-legal tradition of abortion and, therefore, casts a long shadow over its consequent legal conclusion that a woman's decision to terminate pregnancy is traditionally rooted in the right to privacy.

b. *Misplaced Reliance on Precedent.* The extension of the "guarantee of personal privacy" to abortion was justified in *Roe* by reliance on precedents "relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541-542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U. S. at 453-454; *id.*, at 460, 463-465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska*, [262 U. S. 390, 399 (1923)]." *Roe* v. *Wade*, 410 U. S. at 152-153. The Court recognized at the same time, however, that the privacy of the abortion decision was significantly different from the privacy of its precursors. Unlike them:

> [t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. The situation therefore is inherently

[26] *Special Project: Survey of Abortion Law*, 1980 Ariz. St. L. J. 67, 75-76, 79-88.

[27] Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford. L. Rev. 807, 814-835 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1267-1282 (1975); Dellapena, *The History of Abortion: Technology, Morality and Law*, 40 U. Pitt. L. Rev. 359, 365-416 (1979).

[28] *See* the opinion and articles cited in notes 23-26, *supra*; *see also* Horan & Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *Abortion and the Constitution*, *supra* note 16 at 57.

[29] A. Cox, *supra* note 6, at 114.

> different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. [citation omitted].

Roe v. *Wade*, 410 U. S. at 159. The doctrinal outworking of this distinction is that the woman's privacy right was subjected to the state's compelling interests in preserving maternal health and protecting "potential life" as the pregnancy progressed, trimester by trimester, to term.[30]

The very same distinction between *Roe* and its predecessors has provided fruitful ground for argument that the privacy right should have never been extended to abortion in the first place. This is because the existence of developing life in the pregnant woman presents a significant social dimension that is missing from other personal or family autonomy cases.

> However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being. Given that the continued existence and development —- that is to say, the life[31] —- of such an entity are so directly at stake in

[30] As a practical matter, "[t]he restriction on the [abortion] liberty appeared to be illusory. For the nine months of life within the womb the child was at the gravida's disposal —- with two restrictions: she must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion." J. T. Noonan, *A Private Choice* 12 (1979).

[31] Even Cyril Means, the legal counsel for the National Association for the Repeal of Abortion Laws, upon whose historical work the Court relied extensively in *Roe*, has recognized that abortion involves a "human being":

> It is "human," since it was produced by human parents, and it is a "being" since it exists. And it is "autonomous," if nothing else is meant by that adjective than that it possesses a unique genetic organization. The question is whether, prior to birth, the offspring of human

> the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.

Thornburgh, 476 U. S. at 792 (White, J., dissenting). Because the privacy freedom removes societal restraints on the destruction of the developing life, the abortion decision is literally a matter of life and death for the unborn, with the state being essentially powerless to protect it.[32] The stakes are far less in the cases involving marriage, contraception, procreation, education and family relationships, which are either victimless or encourage normative conduct that has been historically and traditionally recognized as contributing to the social and moral order.

"Specifying what individual freedom is for makes it possible to begin to work out distinctions between liberty and license, by referring to the purpose for which the freedom is claimed." Glendon at 37. Abortion is, and always has been, a destructive and aggressive action, *i.e.* the killing of "unwanted" natural life. As Blackstone said, "[t]o *kill* a *child* in it's mother's womb, is now no murder, but a great misprison...."[33] Abortion is thus more in the

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> parents is a human *person*. Only persons are the subjects of legal rights, whether constitutional or other.

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N. Y. Law Forum 335 (1971).

What or who is a "person" in the positivistic legal sense is, of course, dependent upon recognition of that status by this Court. It failed to recognize blacks as "citizens" in *Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857), although it conferred "personhood" status on corporations in *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394 (1886) without the apparent difficulty it had in *Roe* deciding whether the unborn would have the same status within the meaning of the Fourteenth Amendment.

[32] The number of abortions in the United States in recent years has averaged 1.5 million per year. The total number of abortions from the month *Roe* was decided through 1985 is 17,526,600 million. Henshaw, Forrest & Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Family Planning Perspectives 63 (1987).

[33] W. Blackstone, 4 Commentaries on the Laws of England 198 (emphasis added). In Blackstone's time, murder was a capital offense, whereas a misprison

nature of assault, conduct which has normally been subject to state regulation and control.

Marriage, contraception, procreation, child rearing and family relationships, on the other hand, involve non-destructive acts that foster longstanding and well accepted societal traditions. Deserving of greater individual freedom, they nevertheless strengthen generally desirable social bonds. In fact, procreation —- the perpetuation of life —- is antithetical to abortion. The decision not to conceive is different in kind from the destruction of life that has commenced. And marriage, child rearing and family life, which promote interdependence and commitment, are primary relationships, the foundation of community in society, whereas abortion represents isolation —- a pushing away that is frequently the product of relationships lacking permanent commitment.

Weighed against precedent, therefore, the decision in *Roe* to extend the zone of personal privacy to include termination of pregnancy represented a transposition of values. In the name of liberty, an essentially destructive, anti-social act was elevated above the power of the state to protect life. This, despite a strong common law tradition permitting the state to proscribe abortion, and an equally, if not more, important Constitutional tradition that accorded as great a value to "life" as to "liberty,"[34] be it in the text of our Founding documents, the Declaration of Independence and the Fifth Amendment to the Constitution, as well as later, in the

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was a high public offense deserving of public disapprobation and punishment. *Id.* at 119.

[34] Even taking into account the mother's "liberty" interest as a countervailing factor, abortion cannot be viewed as *necessary* to the "concept of ordered liberty." Ordered liberty is presumably liberty exercised within a societal context, taking into account important societal interests. Whatever "liberty" interest the mother may have, the American Constitutional tradition and experience bespeak an equally important and compelling societal interest in protecting "life." Never before *Roe* has this "life" interest been, nor should it hereafter be, subordinate to any license that, in the name of "liberty," permits the destruction of inchoate citizens without requiring some justification to society. "It is one thing to emancipate women from discrimination and tyranny; it is quite another to emancipate them from all human claims and obligations toward the rights of others." D. Callahan, *Abortion: Law, Choice and Morality* 82 (1970)

Fourteenth Amendment and in Article 1, Section 2 of the Missouri Constitution.[35]

The value judgments implicit in *Roe* have been studied comparatively with the abortion experience in 20 Western countries by Harvard Law Professor Mary Ann Glendon in her recent book *Abortion and Divorce in Western Law*. The comparison of *Roe* with a similar case decided differently by the Constitutional Court of the Federal Republic of Germany in 1975 on different value premises illustrates what is generally viewed to be the "singular status" of American abortion law.[36] In Professor Glendon's words, "both [the *Roe* and Western German] courts substituted a set of values for those promoted by the respective legislatures [but] the content of those values differs markedly." [37] The West German court was called upon to interpret the application of a provision of their Basic Law which provided that "Everyone has the right to life." Article 2, Paragraph 2, Sentence 1, Basic Law.[38] Interpreting this provision in the context of legislation permitting abortion, the court ruled:

> [T]he protection...of [the Basic Law] cannot be limited either to the 'completed' human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who 'lives', and *no distinction can be made here between various stages of life developing itself before*

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[35] Art. 1, Sec. 2 of the Missouri Constitution states, in part, that "all persons have a natural right to life" and that "all persons are created equal." Before *Roe*, it was recognized by more than one Federal court that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Steinberg* v. *Brown*, 321 F. Supp. 741 (Three Judge Court, W. D. Ohio 1970). And there remains the simple, but eloquent conclusion of another great judge in another difficult case: "I determined to act on the side of life." *Application of the President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, 1010 (D. C. Cir. 1964) (Wright, J., In Chambers).

[36] Glendon at 24-25.

[37] *Id.* at 35.

[38] The provision was included in the Basic Law "as a reaction to the 'destruction of life unworthy of life,' to the 'final solution' and 'liquidations,' which were carried out by the National Socialist Regime as measures of state." Jonas & Gorby, *supra* note 4, at 637.

> *birth, or between unborn or born life. Everyone in the sense of [the law] is everyone living; expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being.* (emphasis added).

Jonas and Gorby, *supra* note 4 at 638.

Professor Glendon comments on the values reflected in the two opinions:

> *Roe* v. *Wade*, like its predecessor, *Eisenstadt* v. *Baird*, embodies a view of society as a condition of separate autonomous individuals. The West German decision emphasizes the connections among the woman, developing life, and the larger community. Donald Kommers has therefore characterized the difference between the two decisions as one between individualistic and communitarian values. He points to *Roe*'s emphasis on the individual woman, her privacy and autonomy (not to mention Justice Douglas's equating privacy with "preferred life style"), and contrasts it with *the West German court's emphasis on the interest that society as a whole has, not only in the abortion decision itself, but in the long-range formation of beliefs and attitudes about human life.* (emphasis added).

Glendon at 35. The consequences of these value choices for the respective societies are dramatic: "Today, in order to find a country where the legal approach to abortion is as indifferent to unborn life as it is in the United States, we have to look to countries which are much less comparable to us politically, socially, culturally and economically, and where concern about population expansion overrides *both* women's liberty and fetal life [viz. China[39]]....From the comparative point of view abortion policy in the United States appears singular, not only because it requires no protection of unborn life at any stage of pregnancy, in contrast to all the other countries with which we customarily compare ourselves, but also

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[39] In the People's Republic of China, abortion is encouraged as part of a population control policy which authorizes only one child per family. Glendon at 24.

because our abortion policy was not worked out in the give-and-take of the legislative process....Nowhere have the courts gone so far as has the United States Supreme Court in precluding further statutory development." *Id.* at 24-25.

The reality of *Roe* and its progeny, despite pronouncements to the contrary, is that the American woman *is* completely isolated in her privacy. As a matter of practice, she may terminate the unborn life at any time[40] for virtually any reason.[41] Not only does this not even comport with *Roe*, it is also a departure from precedent and from the values explicitly reflected in the Due Process Clause, as well as our history and tradition. It is time for this Court to reexamine *Roe* afresh in light of the standards this Court has long established for recognizing what rights are "fundamental" in the liberty protected by the Due Process Clause.

c. *Constitutionalization of an Essentially Legislative Issue.* A third problem with *Roe* is its Constitutionalization of an essentially legislative issue. The Constitution and Bill of Rights apportion powers and responsibilities to the coordinate branches of government. They also reserve powers to the states and grant rights to the people. Frequently explicit, these powers, reservations and grants often reflect values, some explicit, some implicit. However, much of the Constitutional language is nevertheless broadly worded. The Framers thus left to this Court, and also to the coordinate branches, the states and the people, through the practice and life of the Nation, the task of determining much of its meaning and reach.

The Federal courts have been particularly active in providing guidance concerning the interstices of the Due Process Clause of

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[40] Koop, *The Slide to Auschwitz*, in R. Reagan, *Abortion and the Conscience of the Nation*, 41, 45 (1984); Noonan, *supra* note 30 at 12; Hentoff, *supra* note 9; Will, *supra* note 11; *Thornburgh*, 476 U. S. at 783-784 (Burger, C. J., dissenting).

[41] According to a recent survey commissioned by the Alan Guttmacher Institute of 1900 women who obtained an abortion, the reasons for abortion were variously financial (21%); relationship problems (12%); not ready for responsibility (32%); already enough children (8%); would involve change in life style (16%); fetus has health problem (3%); mother has health problem (3%); rape or incest (1%); threat to life of the mother (none listed); other (3%). Torres and Forrest, *Why Do Women Have Abortions*, 20 Family Planning Perspectives 169 July - Aug. 1988 .

the Fourteenth Amendment. Principled standards of adjudication, however, have not prevented this Court from ranging far afield, even in our recent past. *See Plessy* v. *Ferguson*, 163 U. S. 637 (1896), and *Brown* v. *Board of Education*, 347 U. S. 483 (1954), or *Lochner* v. *New York*, 198 U. S. 45 (1905), and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). These cases make clear that the recognition of immutable and neutral principles does not immunize the judiciary from changing perceptions over time. The resulting changes in Constitutional doctrine reflect, no doubt, broad social and political currents. Notwithstanding the forces of change, the basic social contract between the people and their government —-reflected in the Constitutional arrangement —- is essentially democratic, with the judiciary exercising limited powers of interpretation of broad Constitutional mandates.

In recognition of Constitutional restraints on its decision-making function, this Court has imposed its own self-constraints on its power to "constitutionalize" issues. As previously mentioned, it has adopted a rule of lenity in Due Process litigation, approving most governmental action that is rationally related to a legitimate governmental interest.[42] State action affecting "fundamental" rights is subjected to strict scrutiny, but only in certain limited classes of cases involving "fundamental" rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." *See* discussion at pages 7-8, *supra*.

> [The] utility [of these standards] lies in their effort to identify some source of constitutional value that reflects not the philosophical predictions of individual judges, but basic choices made by the people themselves in constituting their system of government —- *the balance struck by this country* —- and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both liberty and democratic order.

Thornburgh, 476 U. S. at 791-792 (White, J., dissenting).

[42] *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

The problem with *Roe* is that the balance struck by the Court on abortion departs from the balance struck by the country. As Dean Ely has written, "[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem at issue, any general value derivable from the provisions they included, or the nation's governmental structure."[43] And it is clear that "[t]he problem of abortion regulation in the United States is immeasurably aggravated...by the fact that the extreme position of the Supreme Court in abortion cases represents the views of only a minority of Americans." Glendon at 47.

Roe displayed an extraordinary insensitivity to commonly understood institutional and decisional constraints. Its departure from these constraints was brought out in the *Akron* case where the United States argued that institutional factors required a standard of greater deference to the legislative judgment in matters of abortion. *Brief of the United States As Amicus Curiae in Support of Appellants*. The argument was that legislatures possess "superior fact-finding capability" and freedom of inquiry, factors important for complex, controversial issues. *Id.* at 12. Moreover, legislatures "must periodically account to the people," thereby rendering government more accountable on such issues. *Id.* Finally, "the quality of the lawmaking product is enhanced by leaving the issued exposed for a time to the legislative process and the public pressures that are brought to bear on the process." *Id.* at 13.[44] Thus, it was argued, "in those cases where the issue might be fairly characterized as involving either a choice among competing policy alternatives, or a pronouncement of constitutional prin-

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[43] Ely, *supra* note 18, at 936.

[44] Solicitor General Rex E. Lee went on to point out the dangers and problems that arise when the legislative process is short-circuited:

> To whatever extent the issues are constitutionalized, they are thereby removed from this refining process —- the process by which lawmakers learn through experimentation and correction. Constitutionalization eliminates all but one of the competing points of view as acceptable alternatives; the issue is removed from the realm of public debate and decisionmaking.

Id. at 14-15.

ciple, the presumption should favor treating the issue as one of policy choice." *Id.* at 15.

In addition to the problem posed by the Court's removing abortion from the legislative agenda, the balance of the national debate on abortion is characterized largely by legislative, rather than constitutional considerations, i.e., the Who, What, When, Where, and Why of abortion. The debate centers on these issues because abortion has never been intertwined with Constitutional values and principles. To quote General Lee, abortion regulation "is an unfair burden to impose upon any Constitution. It is especially unfair to impose it on a Constitution that contains no mention of the words 'privacy' or 'abortion' and that can be extended to those matters only by piecing together a combination of shadows from a variety of explicit guarantees contained in the document." *Brief*, at 19.

d. *Summary.* To summarize, the Court's extension of the privacy right to abortion was extreme. It declared a right not clearly rooted in any constitutional text, history or tradition. It subordinated the value of unborn life to "preferred life styles" and other short-range values characteristic of the consumption society [convenience, family planning, economics, dislike of children, embarrassment of illegitimacy, etc.[45]] and provided little or no societal protection to unborn life. And, it removed the authority of the people to govern, preventing society through its elected representatives from determining what mix of interdependent and individualistic value preferences should be brought to bear on the subject. *Roe* v. *Wade* was, therefore, an imprudent departure from the mainstream of our Constitutional tradition and an unwarranted usurpation of power in the Constitutional system on the issue of abortion. Like *Lochner* v. *New York*, 198 U. S. 40 (1905), *Roe* v. *Wade* was a judicial misadventure that should now be "allowed a deserved repose." *Adkins* v. *Children's Hospital*, 261 U. S. 525, 570 (1923) (Holmes, J., dissenting).

[45] *Roe*, 410 U. S. at 221 (White, J., dissenting).

III. ASSUMING FOR PURPOSES OF ARGUMENT THAT THE ABORTION DECISION INVOLVES A FUNDAMENTAL RIGHT, THE STATE'S INTEREST IN PROTECTING POTENTIAL LIFE IS COMPELLING THROUGHOUT PREGNANCY AND SHOULD BE BALANCED AGAINST THAT RIGHT UNDER A TWO-TIERED STRICT SCRUTINY/RATIONAL RELATIONSHIP TEST, DEPENDING UPON THE NATURE OF THE STATE ACTION.

Even if the decision of a woman to terminate pregnancy were to remain recognized as a fundamental right, the right is nevertheless clearly a limited one and not absolute. *Roe*, 410 U. S. at 159. "[T]he right in *Roe* v. *Wade* can be understood only by considering *both* the woman's interest and the nature of the State's interference with it." *Maher* v. *Roe*, 432 U. S. 464, 473 (1977) (emphasis added). *Roe* attempted to structure a sort of balance of these interests by segmenting the state's regulatory power into trimesters, coincidental with the then prevailing medical technology. The state's interests in "maternal health" and "potential life," thus, became more compelling as the unborn child reached viability.

In the most recent abortion cases, *Akron* and *Thornburgh*, the Court has adhered to the *Roe* trimester/viability approach. It has also continued to show extraordinary sensitivity to protecting the sanctity of the doctor-patient relationship in abortion and has routinely invalidated regulatory statutes that purportedly depart from "accepted medical practice." The combined effect of these factors has made it very difficult for states to exercise any regulation of abortion or abortion procedures.

The Court's strict and highly structured approach has been criticized on two grounds. First, it subjects legal standards to everchanging medical technology and statistics "whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of childbirth and abortion or new advances in providing for the separate existence of a foetus."[46] Second, logic

[46] A. Cox, *supra* note 6, at 113-114. The problems of basing Constitutional doctrine on rapidly changing medical technology may be seen in the shifting medical standards discussed in Justice Powell's majority opinion, and in Justice O'Connor's penetrating dissent, in the *Akron* case. 462 U. S. 416, 434-439,

and reason dictate that "*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). The state has a compelling governmental interest in "protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent upon the probability that the fetus may be capable of surviving outside the womb at any given point of its development.... *Thornburgh*, 476 U. S. at 795 (White, J. dissenting). Thus, to condition the weight of the state interest on trimesters and viability "mistakes a definition for a syllogism."[47] And though trimesters and viability may provide the appearance of rationality, why this particular regime and set of rules, as opposed to some other, is mandated by the Constitution is not readily discernable. Nor is it clear why it could not be supplanted by different findings of state or national legislatures.

The problems endemic with *Roe* suggest that the process of balancing the limited "fundamental" right to abortion with the compelling state interest in potential life is in need of reassessment and adjustment. This should include consideration of other state interests that have received little attention from this Court, but which are implicit in the state's "strong and legitimate interest in encouraging normal childbirth,"[48] — namely, family integrity[49]

454-461. *See also*, Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 Yale L. J. 639, 697 (1986); Callahan, *How Technology is Reframing the Abortion Debate*, 16 Hastings Center Report 33 (1986).

[47] Ely, *supra* note 18, at 924, *cited in Thornburgh*, 476 U. S. at 795 (White, J. dissenting).

[48] *Maher* v. *Doe*, 432, U. S. 464, 478 (1977).

[49] *H.L.* v. *Matheson*, 450 U. S. 398, 411 (1981) (familial integrity); *see also* Peirce, *BRI v. Leonard: The Role of the Courts in Preserving Family Integrity*, 23 N. Eng. L. Rev. 185 (1988); Mattinson, *The Effects of Abortion on a Marriage* in Abortion: Medical Progress and Social Implications, 1985 Ciba Foundation Symposium 165-177; McAll & Wilson, *Ritual Mourning for Unresolved Grief*, 80 Southern Medical Journal 817 (1987); Furlong & Black, *Pregnancy Termination for Genetic Indications: The Impact on Families*, 10 Social Work in Health Care 1 (1984).

Several studies show that abortion may destroy or stigmatize male-female relationships. Shostak, *Abortion As Fatherhood Lost: Problems and Reforms*, 28 The Family Coordinator 569 (1979); Milling, *The Men Who Wait*, Woman's Life, 48-49, 69-71, April 1975 (70% failure); Patterson, *Whose Freedom of Choice?*,

and parental rights.[50] There is also much speculation, but apparently no definitive research, about "post abortion syndrome" and other psychological problems associated with abortion.[51] These problems appear to have credence and may, after due investigation, provide yet another perspective on "maternal health" requiring restriction of the abortion right.

Justice O'Connor's suggested alternative to the *Roe* standard, first expressed in the *Akron* case and further elaborated upon in her dissent in the *Thornburgh* case, would hold that in cases where particular state action poses an "absolute obstacle" or a "severe limitation" on the abortion right, the Court must determine whether the state's compelling interest "unduly burdens" the

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46 The Progressive 42, April 1982; Mithers, *Abortion: Are Men There When Women Need Them Most?*, Mademoiselle at 231, April 1981; Weidner & Griffitt, *Abortion as a Stigma: In the Eyes of the Beholder*, 18 Journal of Research and Personality 359 (1984).

[50] RSMo. 1.205.1(3) (1986), which was not challenged by appellees below, provides that "[t]he natural parents of unborn children have protectable interests in the life, health and well-being of their unborn children." *See also*, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1926); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Parham* v. *J.R.*, 442 U. S. 584 (1979).

[51] Surgeon General C. Everett Koop has recently indicated that scientific research is not definitive as to the existence of clinically proven psychological harm to women having abortions.

Notwithstanding the Surgeon General's failure to discern empirically based harm, it appears likely that clinical studies will demonstrate psychological after-affects. In a Februarty 5, 1989, article in The Washington Post, Colman McCarthy writes that scientific studies abroad indicate that "[t]he incidence of serious, permanent psychiatric aftermath [from abortion] is variously reported as between 9 and 59 percent." He also quotes one Washington, D. C., abortionist, Dr. Julius Fogel, a psychiatrist who has performed and observed the effects of 20,000 abortions, as saying:

> There is no question about the emotional grief and mourning following an abortion....[A] psychological price is paid. I can't say exactly what. It may be alienation, it may be a pushing away from human warmth, perhaps a hardening of the maternal instinct. Something happens on the deeper levels of a woman's consciousness when she destroys a pregnancy. I know that as a psychiatrist.

McCarthy, *The Real Anguish of Abortions*, The Washington Post, February 5, 1989, F2.

abortion right. *Harris* v. *McRae*, 448 U. S. 297, 314 (1980); *Maher* v. *Roe*, 432 U. S. 464, 473 (1977); *Beal* v. *Doe*, 432 U. S. 438, 446 (1977); and *Belotti* v. *Baird*, 428 U. S. 132, 147 (1976); *see also*, *Akron*, 462 U. S. at 461-466 (O'Connor, J., dissenting) and *Thornburgh*, 476 U. S. at 828-830 (O'Connor, J. dissenting). In other cases, where less restrictive state regulation of abortion does not impose an absolute obstacle to abortion, the particular state action must only manifest a rational relationship to a legitimate state objective. This more traditional two-tiered analysis limits strict judicial scrutiny of legislative action affecting abortion only to those cases which, in effect, put an absolute ban on a woman's ability to exercise her limited right. It is a more balanced approach than the Court's current standards and recognizes a significant and appropriate role for the legislative branch in the promulgation of societal standards on this issue.

This slight shift of analytical method is not only grounded in precedent and sound as a matter of logic, it also reinforces important values. As Professor Glendon urges in her study of the abortion laws of 20 Western countries,

> [p]erhaps it is fitting that abortion law at present should mirror our wonder as well as our ignorance about the mystery of life, our compassion for women who may be frightened and lonely in the face of a major crisis, and our instinctive uneasiness at terminating a form of innocent human life, whether we call it a fetus, an embryo, a baby or an unborn child.

Glendon at 46. Removing a significant amount of abortion regulation from strict constitutional scrutiny comports far more with American history and tradition and acknowledges far better than the present jurisprudence the proper role that the courts, the legislatures, the people and the affected parties all have to contribute in resolving this issue.

IV. THE MISSOURI STATUTE DOES NOT POSE ANY ABSOLUTE OBSTACLE OR SEVERE RESTRICTION ON ABORTION AND SHOULD THEREFORE BE UPHELD AS RATIONALLY RELATED TO THE STATE'S INTEREST IN PROTECTING THE UNBORN.

In the context of the present case, it is respectfully submitted that none of the statutes promulgated by the State of Missouri poses an "absolute obstacle" or "severe limitation" on the abortion right. There are no criminal or coercive sanctions.[52] There is no "absolute veto" of any woman's abortion decision. And the state regulation does not "frustrate" or "heavily burden" the exercise of any constitutional rights. Absent such intrusive or proscriptive measures, the State of Missouri's statutory requirements need not be subjected to strict scrutiny, but must nevertheless demonstrate a rational relationship to legitimate state objectives.

a. *Viability Testing.* The State of Missouri requires a viability assessment for 20+ week pregnancies. Physicians are required to assess viability of the unborn child "using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician engaged in similar practice under the same or similar conditions." This viability assessment was upheld by the Court of Appeals below; however, the Court invalidated a related testing requirement requiring the physician to perform, in connection with the viability assessment, "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child."

This testing requirement does not pose an "absolute obstacle" to abortion. The burden of testing is on the physician, not the woman. Any burden of cost, of course, rests with the woman, but neither the burden of testing or cost can be said to pose an absolute obstacle to abortion. *Maher v. Roe*, 432 U.S. 464, 474 (1977).

Missouri is also *not* proclaiming *any single factor* as a measure of viability, or forcing any particular test, or requiring any particular findings. *Colautti* v. *Franklin*, 439 U. S. 379, 389 (1979).

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[52] *See Jurisdictional Statement* at 25.

Nor is it infringing upon the medical discretion of the physician. *Id.* The physician is charged, instead, with using his normal standard of professional care and skill to assess viability and is required to undertake only such tests as are *necessary* concerning gestational age, weight and lung maturity. Given the medical uncertainty of determining how long toward term a pregnancy is, and given rapidly changing technological capabilities whereby viability has moved from 28 weeks to 24 weeks, and in some reported instances, 22 weeks,[53] it is not unreasonable for a state to require physicians, in connection with an assessment of viability, to undertake necessary tests to provide findings as to gestational age, weight and lung maturity.

b. *Missouri's Declaration of State Policy Concerning the Unborn.* This may be the first time in history for this Court to invalidate legislative findings which have virtually no direct substantive impact on the facts or law of the case. It is difficult to see why the Court of Appeals found the declaration constitutionally damning. The findings merely declare the State of Missouri's interest in encouraging normal childbirth, protecting potential life and protecting the common law interests of natural parents of the unborn. These findings, as well as the laws of Missouri, are made expressly subject to the United States Constitution *and* the decisional interpretations of this Court.

Legislation has been previously upheld by this Court if it furthers a state's interest in making childbirth "a more attractive alternative, thereby influencing the woman's decision," provided it "places no obstacles —- absolute or otherwise —- in the pregnant woman's path to an abortion." *Maher* v. *Roe*, 432 U. S. 464, 474 (1977). Instead of applying this analysis, the Court of Appeals read the Missouri findings to violate *Roe*'s admonition, repeated in *Akron*, that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[54] The *Akron* statement, however, was in the context of a mandatory requirement that information be furnished to a woman prior to her abortion. That is not the case here. The State's theory of life is not being foisted

[53] *See Akron*, 462 U. S. at 457, n.5 and related text. (O'Connor, J. dissenting).
[54] *Akron*, 462 U. S. at 444, *cited* by the Court of Appeals, 851 F.2d at 1075.

upon anyone. Here, the less restrictive *Maher* rule should govern since the legislative findings are not linked to any affirmative *action* by the State that poses an obstacle to abortion. For that reason, even under the stringent *Akron* and *Thornburgh* precedents, the Missouri findings should not have been struck down, if only because of the obviously valid arguments that they are intended to and do affect substantively the common and statutory law of Missouri in the areas of tort, criminal and property law.[55]

c. *Public Funds, Employees and Facilities*. The State of Missouri has also decided that it will not permit funds to be expended to encourage or counsel persons desiring to have abortions, except those where the life of the mother is at risk. It also does not permit public employees to perform abortions, or permit abortions to be performed in public facilities.

In *Maher* v. *Doe*, 432 U. S. 464, 474 (1977), this Court held that the freedom of a woman 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." Accordingly, the State of Connecticut was not required to pay for "nontherapeutic" abortions even though it subsidized pregnancy and childbirth benefits under its state welfare program. The Court explained that there is "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475. Likewise, in *Harris* v. *McRae*, 448 U. S. 297 (1980), the Federal government was permitted to engage in "unequal subsidization of abortion and other medical services in order to encourage alternate activity deemed in the public interest." *Id.* at 315. Finally, in *Poelker* v. *Doe*, 432 U. S. 519, 521 (1977), this Court ruled that the *prohibition* of abortions in the city-owned hospitals of St. Louis was "identical in principle" to the refusal to provide subsidies for abortion, while providing subsidies for childbirth.

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[55] Unborn life is commonly afforded protection by the States in other areas of the law, including inheritance, insurance, welfare, civil rights, public health and child abuse. *See* Callahan, *How Technology is Reframing the Abortion Debate*, 16 *Hastings Center Report* 33, 40 (1986); Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 252-254.

It is difficult to see how and why *state subsidization* of abortions would be Constitutionally different from *state prohibitions* on funding encouragement or counseling of abortions or on the performance of abortions by state employees in state facilities. When a state withdraws a subsidy, it is denying the *means* for abortions by refusing to pay for them. When it prohibits state performed abortions in state facilities, it is simply denying abortion services *in kind* by refusing to provide doctors or facilities to do them. How can it be that a state *can* refuse to fund abortions, but *cannot* prohibit state employees (whom it funds) from performing abortions on state property (which it funds)?

The Court of Appeals attempted to describe the difference as one between *refusing to pay* for abortions, as opposed to *denying access* to abortion. However, if the state employee/facility abortion ban were effective, there would be only slightly fewer places to obtain abortions, but that does not significantly burden a woman's choice to have the abortion or cause her any more harm than failing to provide her a subsidy to obtain her abortion. As the Court said in the *Maher* case, "The indigency that may make it difficult —- and in some cases, perhaps, impossible —- for some women to have abortions is neither created nor in any way affected by the... regulation." *Maher* v. *Roe*, 432 U. S. at 474. And to require the state to use its facilities for abortions, or its employees to perform them or fund activities that encourage or counsel with respect to them, is nothing short of an abuse of judicial power. This is just the type of reasoning that *Harris* rejected:

> It cannot be that because government may not prohibit the use of contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479, or prevent parents from sending their child to a private school, *Pierce* v. *Society of Sisters*, 268 U. S. 510, government, therefore, has an *affirmative* constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools....Nothing in the Due Process Clause supports such an extraordinary result. (emphasis added).

Harris, 448 U. S. at 318. It is likewise preposterous to declare, in effect, an affirmative Constitutional mandate requiring states to

fund activities that encourage or counsel abortion or to require state employees to perform abortions in state facilities.

In the present case, women who, but for the Missouri statute, would have otherwise received counseling or abortions from state employees in state facilities, are not precluded from obtaining an abortion or otherwise "unduly burdened" in exercising choice in the matter. Abortions and counseling may readily be obtained in the private sector or from other governmental agencies with the assistance of persons other than employees of the State of Missouri. As for the so-called "state-imposed blackout" on abortion information, this rhetorical flourish of the Court of Appeals mistakenly assumes that the State of Missouri is the fount of all information and wisdom on abortion, when in reality, a woman can just as easily, or perhaps more easily, obtain information in the private sector on how and where to abort.

Justice Oliver Wendell Holmes wrote that the sovereign's "right to absolutely exclude all right to use [public property] necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." *Davis* v. *Commonwealth*, 167 U. S. 43, 48 (1897), *affirming Commonwealth* v. *Davis*, 162 Mass. 510 (1895). Hopefully, this maxim, as with so many other conventions which have been reinterpreted and given new meaning in an abortion context, will not now also be given a modern interpretation, in effect, to prevent heretofore sovereign governments from directing their employees and controlling the use of their properties and funds. There is no constitutional requirement, nor should there be, for states to pay state-employed physicians in state-owned facilities to counsel, encourage or perform abortions. To suggest otherwise is nothing short of "nonsensical"[56] and yet another

[56] The word is Justice White's employed in a similar a context criticizing the stereotypical, but untenable, premise of *Roe* and its progeny, of the physician as fatherly counselor. *Thornburgh*, 476 U. S. at 802 (White, J. dissenting). The reality is that "[a]t least six out of ten abortions performed in the United States are performed in freestanding clinics. Doctors in such clinics typically have a direct financial interest in seeing that abortions are performed as rapidly and efficiently as possible. Frequently, the only time a doctor sees the patient is when she is on the operating table awaiting the procedure." Wood and Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship*, 1978

indication of the inherent distortion that *Roe*, if left to its logical outcome, would otherwise work in American jurisprudence.

CONCLUSION

On more than one occasion in the recent past, law has been the medium, and lawyers the agents, responsible for masking one class of humanity and preventing it from being visible.[57] Not only has *Roe* made its own contribution in this area, it has brought an unprecedented "distortion in the Court's constitutional jurisprudence"[58] and has had "an institutionally debilitating effect,"[59] on the business of the Court. It has also been a source of much social instability and conflict.

Even now, in homes, churches, police stations, schools, universities, law schools, legislatures, newspapers, magazines, on radio and television, and on the streets in front of abortion clinics, the legitimacy of *Roe* v. *Wade* is widely questioned and challenged. Sadly, with all due respect to this great Court, it is now starting to be heard across the land in disrespect for the law generally. It is important that the questioning stop. That can best be accomplished by admitting this Court's error in *Roe*, and taking action to overrule it or, at the very least, to confine *Roe* v. *Wade* to its narrow holding.

The judgment of the Court of Appeals should be reversed, and the case remanded with instructions to vacate the judgment

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B.Y.U.L. Rev. 231,244. Abortion practice is "fast-track, quick-fix [and] volume-for-profit." Wardle, *supra* note 55, at 244.

[57] This is a paraphrase of then Professor, now Circuit Judge John T. Noonan. *See* Noonan, *The Root and Branch of Roe v. Wade*, 63 Neb. L. Rev. 668, 669, 675 (1984). *See also*, *Scott* v. *Sanford*, 60 U. S. (19 How.) 393 (1857) (blacks are not citizens); *United States ex rel. Standing Bear* v. *Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (Indians are non-persons); *Cf. Korematsu* v. *United States*, 323 U. S. 283 (1944) (loss of citizenship and exclusion of Japanese citizens from West Coast war area); and Alexander, *Medical Science Under Dictatorship*, 241 New Eng. J. Med. 39-47 (July 4, 1949) (Describing how the Nazi Holocaust began with physicians and their concept of "life not worthy to be lived" and expanded to reach the chronically sick, the socially unproductive, the ideologically unwanted, the racially unwanted, and finally all non-Germans.)

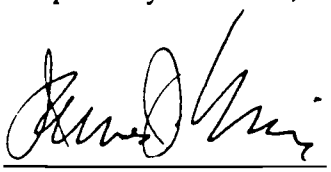
[58] *Thornburgh*, 476 U. S. at 814 (O'Connor, J., dissenting).

[59] *Id.*

and injunction as to those portions of the statute that were the subject of the appeal.

February 23, 1989.

Respectfully submitted,



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