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The Supreme Court's Abortion Jurisprudence: Will the Supreme Court Pass the "Albatross" Back to the States?

Since the Supreme Court decided Roe v. Wade, the Court and state legislatures have battled to define the limits on a state's power to regulate a woman's decision of whether to have an abortion. The conflict began with Roe, in which the Supreme Court established a woman's fundamental right to choose an abortion. Roe invalidated the majority of existing state abortion statutes, and replaced them with the Court's trimester approach. The trimester approach restricted the states' ability to regulate the area.

Roe caused sweeping change in abortion regulation and shifted the traditional balance between federal and state power in the abortion-legislation area. Prior to Roe, state legislatures had broad-ranging power to regulate abortion. Roe shifted this power to the federal level and, particularly, the Supreme Court by giving the Supreme Court the power to strictly scrutinize state abortion legislation.

While Roe established a woman's fundamental right to choose an abortion, the decision also identified the compelling state interests regarding abortion. These aspects of Roe defined the boundary lines in the ensuing conflict between the Court and the states. The trimester approach identified three compelling state interests: safeguarding mater-

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1 Professor Ely, in his article, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973), predicted that Roe would be a durable decision because the state legislatures would be content to remove "this particular albatross [the abortion issue]" from their necks. Id. at 946-47. Professor Ely does not support Roe's reasoning and criticizes it as "bad constitutional law because it is not constitutional law and doesn't try to be." Id. at 947. As this Note argues, many states have not been content to pass responsibility for this issue on to the Court. The ensuing battle has created problems for both the Court and the state legislatures. This Note will trace the evolution of that battle and suggest a solution to alleviate the conflict.

2 410 U.S. 113 (1973).

3 Twenty-eight states had abortion statutes similar to the Texas statute which prohibited abortions except to save the mother's life: Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming. Id. at 118 n.2.

Doe v. Bolton, 410 U.S. 179 (1973), the companion case to Roe, invalidated fourteen state statutes modeled after the ALI model. Roe, 410 U.S. at 140 n.37. These states included Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, Virginia. Id.

Alaska, Hawaii, New York, and Washington had repealed the criminal penalties for abortions performed in the early stages of pregnancy. Id.

4 The Court's decision to recognize only three compelling state interests negated other important state interests regarding abortion. The Court's trimester approach excluded state objectives such as preferring childbirth to abortion and protecting pregnant minors. Thus, because the Court did not identify these interests as compelling, the state could not promote them because these interests could not justify restricting the abortion decision within the Court's trimester approach. See infra note 9. See generally N. REDLICH, B. SCHWARTZ & J. ATTANASIO, CONSTITUTIONAL LAW 501-02 (1989).
From 1973 to the present, state legislatures have passed legislation restricting abortions by promoting these compelling interests, particularly the potential life of the fetus. The Court struck down the majority of these statutes because either they violated the trimester framework or infringed upon the woman's freedom of choice. During this period, the Court increased the level of scrutiny it applied to state abortion regulations in order to ensure that they did not overly burden the woman's fundamental right to an abortion. \(^5\)

The conflict intensified throughout the Court's abortion decisions from *Roe* to *Thornburgh v. American College of Obstetricians and Gynecologists*, in 1986. \(^6\) The escalating tension between the Court and the states highlighted the trimester framework's inability to accommodate the complex abortion issue, and illustrated the need for change. The Court's increased scrutiny had at least two negative effects. First, state legislatures generally have been unable to meet the Court's demanding and shifting standard of review when formulating abortion regulations. \(^8\) Increased

\(^5\) Justice Blackmun explained that the weight of these interests varied during the pregnancy and rejected claims that the fundamental right recognized in *Roe* was absolute.

The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, 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 to privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.

*Roe*, 410 U.S. at 154.

\(^6\) The Court's abortion decisions have been truly a battle between the Court and the states. After the Court struck down the vast majority of state abortion statutes, see *supra* note 3, the states responded by passing legislation affecting their interests in maternal health, medical standards, and potential life. Their aggressive legislation sought to define the general terms of the trimester approach. Some regulations have withstood judicial scrutiny, see, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)(spousal and parental consent requirements held unconstitutional)(recordkeeping and patient consent requirements upheld). Other cases have not withstood judicial scrutiny, see, e.g., *Thornburgh* v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)(mandatory information about risks of abortion, possible availability of medical assistance and child support, and availability of printed matter concerning characteristics of fetus and organizations to assist with alternatives to abortion, and provisions regulating postviability abortions held unconstitutional); City of Akron v. Akron Center of Reproductive Health, Inc., 462 U.S. 416 (1983)(holding unconstitutional a city ordinance requiring physician to inform pregnant woman, before her consent to abortion, of fetus' state of development, risks of abortion, and availability of assistance from agencies; a 24-hour waiting period after consent; a requirement of hospitalization for all second-trimester abortions; a parental-consent requirement; a disposal-of-fetal-remains provision). The states, however, continued to test the *Roe* framework with more restrictive regulation. For example, the states have fought particularly hard to exert greater control over a minor's abortion decision than over an adult's decision. See, e.g., *Akron*, 462 U.S. 416 (1983); *Bellotti* v. Baird, 443 U.S. 622 (1979) [hereinafter *Bellotti II*]; Danforth, 428 U.S. 52 (1976). In response, the Court has strictly scrutinized state regulations in that area, insuring that *Roe* is not undercut by restrictive regulation. *See Bellotti II*, 443 U.S. 416 (1979). The Court and the states have continuously exchanged attacks attempting to carve greater areas of control for each opposing side in this battle. Each side, in turn, has taken a more aggressive and entrenched stance in supporting its position, the result being an impasse in this country's abortion regulations.

\(^7\) 476 U.S. 747 (1986).

\(^8\) The Supreme Court has upheld some state abortion legislation. These regulations have tended to be less intrusive on the woman's freedom of choice. For example, a regulation requiring a
scrutiny prevented the states from furthering their legitimate interests enumerated in Roe's trimester framework, as well as other interests that the Court did not recognize as compelling in Roe. Second, as the Court increased its level of scrutiny, it also relied more heavily on the doctrine of substantive due process to strike down state abortion laws. Substan-

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...doctor notify a minor's parent or parents withstood the Court's scrutiny. In H.L. v. Matheson, 450 U.S. 398, 400 (1981), the Court upheld a Utah statute requiring doctors to "notify, if possible" the parents or guardian of a minor seeking an abortion. The Court did not consider the statute's lack of a judicial-bypass mechanism for mature minors whose interests would be best served by waiving notice because the plaintiff had made no showing sufficient to give her standing to challenge the law as a mature minor.

Statutes specifying medical conditions have also withstood judicial review. In Simopoulos v. Virginia, 462 U.S. 506 (1983), the Court upheld a hospitalization requirement by broadly reading the statutory definition of "hospital" to include licensed outpatient clinics. In Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983), the Court upheld a second-physician requirement for third-trimester abortions. Justice Powell based the plurality's opinion on the state's compelling interest in the potential human life because 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"....

The first physician's primary concern will be the life and health of the woman.... A second physician, in situations where Missouri permits third-trimester abortions, may be of assistance to the woman's physician in preserving the health and life of the child.

Id. at 482, citing Roe, 410 U.S. at 164-65.

Statutes requiring the woman's consent have been upheld. In Danforth, 428 U.S. at 65-66, Missouri's consent requirement was deemed constitutional because it "insures that the pregnant woman retains control over the discretion of her consulting physician." Consent statutes for minors, which typically require the consent of a parent, guardian, or a court, have not found as much success before the Court. For a discussion of the Court's most significant opinion dealing with consent statutes for minors, see the discussion of Bellotti II, 462 U.S. 416 (1983), infra notes 87-102 and accompanying text. Unlike Bellotti II, in which the Court struck down the statute, the Court upheld the consent statute for minors in Ashcroft. In upholding the statute, Justice Powell relied on the court of appeals' interpretation which found that Missouri's juvenile court could deny permission to a minor for any "good cause," but such denial was not permitted "unless it first found — after having received the required evidence — that the minor was not mature enough to make her own decision." Ashcroft, 462 U.S. at 493. Thus, as so interpreted, the statute validly furthered the state's interest in protecting immature minors and provided the necessary "judicial alternative" to parental consent. See also Ashcroft, 462 U.S. at 488-90 (1983) (upheld requiring pathology reports on fetal tissue filed with the state).

9 The trimester approach only recognizes three compelling state interests: maternal health, medical standards, and potential life. Roe, 410 U.S. at 184. The framework ignores other state interests such as promoting childbirth over abortion which is not a compelling state objective within the framework. Cf. Maher v. Roe, 432 U.S. 464 (1977) (upholding an abortion-funding restriction). Under the current analysis, in which the Court applies strict scrutiny to all regulations, legislation intended to promote childbirth over abortion cannot withstand the compelling state interest standard because the trimester framework does not consider this objective compelling.

The Court has recognized the state's interest in promoting childbirth over abortion in Maher. Id. at 474 (Roe did not limit the state's authority "to make a value judgment favoring childbirth over abortion and to implement that judgment by allocation of public funds."). That case decided whether the Constitution requires states to fund both medically-necessary abortions and childbirth under their Medicare plans. The Court held that the state had no duty to fund both procedures and was free to subsidize the costs of childbirth and not medically-necessary abortions. Id. at 465-66. In upholding the law, the Court used the "unduly burdensome" standard. The Court applied a rational basis standard and concluded that the law was a rational means of accomplishing a valid state purpose — promoting childbirth over abortion. Id. at 474. The Court did not strictly scrutinize the law because the funding restrictions did not create an undue burden on the woman's choice. Id.

10 The doctrine of substantive due process has no universally-accepted definition. In general, it is based on the due process clause of the fourteenth amendment. Courts have interpreted the clause to have certain substantive content because certain rights are so fundamental to our concepts of ordered liberty that, in some cases, no process at all can deprive an individual of these rights, unless the state has a compelling state interest and the law is narrowly tailored to affect only that interest. See generally Roe, 410 U.S. at 155. Justice Harlan, a proponent of an open-ended interpretation of the due process clause of the fourteenth amendment, stated in Griswold that the Court's proper inquiry is
tive due process doctrine placed the Court in the ill-suited role of legisla-
turing.\textsuperscript{11} It also prevented the states from effectively responding to local constituents' diverse interests and opinions surrounding this complicated issue.\textsuperscript{12}

The Court's recent decision in \textit{Webster v. Reproductive Health Services}\textsuperscript{13} marks a shift in the Court's abortion jurisprudence. The plurality severely criticized \textit{Roe}'s trimester framework. After \textit{Webster}, it appears that a majority of the justices no longer support this aspect of \textit{Roe}.\textsuperscript{14} Furthermore, in \textit{Webster}, the plurality retreats from the active role the Court played in \textit{Roe} and its progeny by abandoning strict scrutiny and the doctrine of substantive due process. This retreat potentially alleviates the present conflict between the Court and the state legislatures. \textit{Webster}, however, does not establish a new standard of review for abortion regulations. The plurality applied a modified rationality standard in upholding the regulations.\textsuperscript{15} On the other hand, Justice O'Connor, in her

\textit{Id.} at 729-30.

\textsuperscript{11} See Ely, \textit{supra} note 1, at 935 n.89 ("[B]ecause the claims involved [in the abortion controversy] are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them — certainly not under the guise of enforcing the Constitution.").

\textsuperscript{12} The legislature is in a better position than the judiciary to address such issues and resolve them fairly because of the legislative branch's superior fact-finding capability, its superior public accountability (by popular election and direct political accessibility), and the superior benefits afforded the public and democracy when the open legislative processes function properly. In this sense, the "legislatures are ultimate guardians of the liberties and welfare of the people in as great a degree as the courts." Missouri K. & T. Ry. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.), \textit{cited in} \textit{Maher}, 432 U.S. at 479-80. \textit{See also} M. Glendon, \textit{Abortion and Divorce} in \textit{Western Law} 40 (1987).

\textsuperscript{13} \textit{109 S. Ct.} 3040 (1989).

\textsuperscript{14} Chief Justice Rehnquist wrote the plurality opinion in \textit{Webster}, joined by Justices White and Kennedy, in which he criticized and abandoned \textit{Roe}'s trimester framework. \textit{Id.} 3054-58. In that section of the plurality opinion, the Chief Justice stated, with respect to his critique of the Court's "web of legal rules" in the abortion-regulation area, that "[w]e do not think these distinctions are of any constitutional import in view of our abandonment of the trimester framework." \textit{Id.} at 3057 n.15. Justice Scalia, concurring in part and concurring in the judgment, believed the plurality's opinion regarding the viability-testing requirement effectively overruled \textit{Roe}. He stated that "I think that should be done, but would do it more explicitly. . . ." \textit{Id.} at 3064 (Scalia, J., concurring). Justice O'Connor's concurring opinion in \textit{Webster} is the most problematic in terms of its position on \textit{Roe} and the Court's proper role in reviewing abortion regulation. It is problematic because of the cautious way Justice O'Connor avoided finding a conflict between the viability-testing provision and \textit{Roe}. \textit{See infra} note 229-40 and accompanying text regarding her opinion on the viability-testing provision. She did not indicate that she no longer adheres to the "unduly burdensome" standard, nor did she extol the trimester framework. \textit{See infra} notes 153-62 and accompanying text for a discussion of the "unduly burdensome" standard. \textit{See infra} notes 51-66 and accompanying text for a description of the trimester framework. Rather, she stated that "I continue to consider \textit{[Roe's trimester framework]} problematic . . . ." \textit{Id.} at 3063 (O'Connor, J., concurring). This Note contends that, even though Justice O'Connor's \textit{Webster} concurrence did not explicitly support overturning \textit{Roe} or the trimester framework, she continues to support her "unduly burdensome" standard, which does not adhere to the trimester framework. For a discussion of the "unduly burdensome" standard as applied to the viability-testing provision in \textit{Webster}, \textit{see infra} text accompanying notes 229-40.

\textsuperscript{15} In \textit{Webster}, it is not clear what standard the plurality applied to Missouri's viability-testing provision. The plurality stated that "we are satisfied that the requirement of these tests \textit{permissibly furthers} the State's interest in protecting potential life . . . ." \textit{109 S. Ct.} at 3057 (emphasis added). It
concurring opinion, continued to apply the “unduly burdensome” standard which she first articulated in her dissent in City of Akron v. Akron Center for Reproductive Health. In the future, the Court may choose to apply one of these standards to abortion regulations. Thus, Webster is a transition in the Court’s abortion jurisprudence from the strict scrutiny of Roe to a new, more deferential, standard.

This Note argues that the Court should adopt Justice O’Connor’s “unduly burdensome” standard. Her approach recognizes a woman’s fundamental right to an abortion and thereby maintains constitutional protection for that right. Justice O’Connor’s approach, however, only

added that “[t]he Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable . . . .” Id. at 3058 (emphasis added). One cannot determine conclusively whether this standard is a form of rational basis review or a compelling state interest standard because the plurality did not identify it. One can draw conclusions from the tone of the plurality opinion and the level of scrutiny it applied. First, the plurality’s tone is generally critical of pre-Webster abortion opinions, which applied heightened scrutiny to most abortion regulations.

We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in Roe has resulted in subsequent cases like Colautti and Akron making constitutional law in this area a virtual Procrustean bed.

Id. at 3056.

Roe and its progeny partially created this “Procrustean bed” because they strictly scrutinized abortion regulations. This analysis under Roe created a “web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.” Id. at 3057 & n.15. In light of this criticism the plurality’s “permissibly furthers” language would appear to be closer to a rationality rather than a compelling state interest standard.

Second, the plurality did not strictly scrutinize the viability-testing provision as the Court had similar previability regulations in earlier abortion opinions. The plurality stated that the testing provision ran afoul of Roe and Colautti v. Franklin, 439 U.S. 379 (1979) (Pennsylvania statute regulating standard of care to be used by physician performing abortion of possibly viable fetus void for vagueness), and might have violated Akron. Id. at 3056. The fact that the plurality upheld the provision in light of these prior holdings showed that it was not strictly scrutinizing the viability-testing provision.

This Note describes the plurality’s standard as a modified rationality standard to denote a standard of review less demanding than the compelling state interest test, yet distinct from the “unduly burdensome” standard.

The standard applied by Justice O’Connor in her concurring opinion in Webster, like the plurality’s, is unclear. She did not explicitly identify that she was applying the “unduly burdensome” standard. A close reading of her opinion, however, reveals that she tests the viability-testing provision under that standard with one alteration: previability, “a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion.” 109 S. Ct. at 3063 (quoting Akron, 462 U.S. at 453 (O’Connor, J., dissenting)). One cannot determine whether the term “previability” applies only to the facts of Webster or whether it altered the standard. Nonetheless Justice O’Connor does apply the “unduly burdensome” standard to the viability-testing provision.

She stated that such tests do “not impose an undue burden on a woman’s abortion decision.” Id. at 3063 (emphasis added), and that the increased cost associated with the test was not an undue burden on the woman. Id. This Note argues that Justice O’Connor applied the “unduly burdensome” standard in Webster.

Justice O’Connor’s “unduly burdensome” standard recognizes a woman’s fundamental right to choose whether to have an abortion, whereas Justice Rehnquist’s approach in his Roe dissent protects a woman’s interest in making the abortion decision within her liberty interest in the fourteenth amendment.

This Note does not argue that the Court’s finding in Roe, that the right to privacy encompasses a woman’s freedom to choose abortion, was wrong. Rather, it argues that the Court’s legislative action in Roe and its progeny implementing the trimester approach, was wrong. Thus, the Court should continue to protect the fundamental right to abortion but under the “unduly burdensome” standard, its traditional fundamental rights analysis. See Akron, 462 U.S. at 453, 462-66 (O’Connor, J., dissenting). See infra notes 154-55 (discussion of traditional basis for “unduly burdensome” standard).
requires the Court to strictly scrutinize state abortion regulations that unduly burden the woman's choice. When state laws do not unduly burden the woman's decision, the Court will apply the rationality standard. This standard provides greater deference to state legislatures' decisions, and relieves them of the burden of fine-tuning all abortion regulations to meet the Court's highest scrutiny. Consequently, Justice O'Connor's "unduly burdensome" standard allows states to more freely promote their legitimate interests identified in Roe and other interests that Roe did not recognize, while maintaining constitutional protection for a woman's right to have an abortion against unduly burdensome state regulation.

Part I of this Note traces the constitutional right to privacy from its inception, in Griswold v. Connecticut, through Roe v. Wade, in which the Court protected a woman's abortion decision under the right to privacy. It also examines how the Court's initial privacy decisions laid the foundation for the present conflict between the Court and state legislatures. Part II examines the states' response to Roe, particularly the conflict over the permissible extent of abortion regulation. Part II focuses on the interplay between state pressure to affect their legitimate interests and the Court's increasing level of scrutiny. This Part illustrates how state pressure, in part, caused the Court to become increasingly active in the abortion area by heightening its level of judicial scrutiny. Part III examines the dissenting opinions throughout the Court's abortion decisions and their different approaches to the abortion issue. By critiquing the various dissents, Part III shows the strengths of Justice O'Connor's "unduly burdensome" approach as a future method of judicial analysis of state abortion legislation. Part IV discusses the Court's Webster opinion in detail. It highlights instances in which the opinion breaks from the Court's prior reasoning in its abortion opinions. It also identifies the standards of review available as alternatives to Roe's trimester framework. Finally, Part V concludes that the Court can most effectively relieve the conflict between itself and state legislatures by adopting Justice O'Connor's "unduly burdensome" standard. This standard abandons the per se strict scrutiny, which the Court applied in the past, while maintaining constitutional support for the woman's right identified in Roe.

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19 See, e.g., Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955). The law at issue in Williamson regulated the eyeglass-manufacturing business. The Court rejected both due process and equal protection arguments. The opinion illustrates the deferential rationality standard which the Court applies to most economic regulations:

[The law need not be in every respect logically consistent with the aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.]

Id. at 487.

This Note does not suggest that the Court should apply a rationality standard to all abortion regulations. The "unduly burdensome" standard defers to the legislative judgment by not strictly scrutinizing a regulation unless it creates an undue burden on the woman's freedom to choose an abortion. The excerpt from Williamson simply exemplifies the rationality standard and, in particular, the greater deference given to legislative judgments under that rationale than under the compelling state interest standard.

20 381 U.S. 479 (1965).
I. The Foundation of the Conflict: *Griswold v. Connecticut* and *Roe v. Wade*

The Supreme Court established a constitutional right to privacy in *Griswold v. Connecticut*. 21 Within this right to privacy *Roe v. Wade* found protection for a woman's constitutional right to an abortion. The present conflict over abortion regulation originated in the creation of the fundamental right to privacy in *Griswold*. In *Griswold*, the majority's constitutional basis for the right to privacy was ambiguous. This ambiguity led the dissent and others to criticize the Court for reviving the discredited doctrine of substantive due process in reaching its decision. 22 This ambiguity in the privacy right has left the woman's right to abortion difficult to define. This Part discusses the ambiguous nature of the right to privacy and the initial warnings from the dissenters in *Griswold* and *Roe* against the dangers of using the doctrine of substantive due process.

A. *Griswold, Substantive Due Process, and the Unsteady Foundation for the Right to Privacy*

The constitutional foundation of the right to privacy is tenuous. The Constitution does not explicitly grant a right to privacy. The Supreme Court derived it from the "penumbras" of other constitutional rights explicitly granted. 23 This tenuous foundation has left the privacy right's legitimacy in question and weakened the basis for a woman's right to abortion. 24

The Supreme Court established the right to privacy in *Griswold v. Connecticut*. 25 The Court struck down a birth control statute that re-

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21 Some commentators find the roots of the current right to privacy in *Skinner v. Oklahoma*, 316 U.S. 535 (1942):

The fundamental character of the reproductive decisions was recognized in a watershed decision, *Skinner v. Oklahoma*, where the Court invalidated a state statute providing for the sterilization of persons convicted two or more times of "felonies involving moral turpitude." The Court characterized the right to reproduce as "one of the basic civil rights of man.

L. Tribe, *American Constitutional Law* 1339 (1988). The Court also stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race," *Skinner*, 316 U.S. at 541, laying the foundation for the subsequent cases of *Griswold* and *Roe*. *Skinner*, however, did not establish a new fundamental right; it was decided on equal protection grounds. *Id.* at 541-43.

22 *Griswold*, 381 U.S. at 507 (Black, J., and Steward, J., dissenting). For Justices Black and Stewart's arguments concerning the use of substantive due process, see *infra* text accompanying notes 67-71.

23 See *infra* notes 27-28 and accompanying text.

24 See *infra* text accompanying notes 199-62 & 214-19.

25 See also *supra* note 21 and accompanying text. The right to privacy in *Griswold* only pertained to married individuals. 381 U.S. at 481, 485-86. The majority found that the traditional role of marriage in American society contained a marital right to privacy which the state could not violate without a "compelling state interest":

In sum, I believe that the right of privacy in the marital relation is fundamental and basic — a personal right 'retained by the people' within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the State. *Id.* at 499 (Goldberg, J., concurring).

Seven years later, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court struck down a statute prohibiting the distribution of contraceptives to single persons. *Id.* at 454-55. *Eisenstadt* was decided on equal protection grounds. *Id.* The majority found no justifying state purpose to differentiate between married and unmarried adults with respect to contraceptives. *Id.* at 453. The Court's equal
stricted the use of contraceptives among married couples. The Court acknowledged the absence of any explicit right to privacy in the text of the Constitution or the Bill of Rights. Instead, it based its decision on a right to privacy found in the "specific guarantees in the Bill of Rights [which] have penumbras, formed by emanations from those guarantees that help give them life and substance." The Court identified five amendments from which the right to privacy "emanated": the first, third, fourth, fifth, and ninth.

In dicta, Justice Brennan stated that

[It] is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each of a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

26 The statute prohibited the use of contraceptives by married and single persons. Only that portion of the statute prohibiting the use of contraceptives among married couples was before the Court. The statute also prohibited any person from counselling others to use contraceptives.

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

381 U.S. at 480. Justice Douglas elaborated on the penumbral rights to privacy that are related to specific guarantees in the Bill of Rights. See infra note 28. His discussion, however, highlights the lack of any explicit constitutional guarantee related to personal matters of procreative liberty.

27 381 U.S. at 483.

28 Id. at 484.

Various guarantees [in the Constitution] create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. Citing the ninth amendment, Justice Goldberg, concurring, began a debate between himself and Justice Black, dissenting. The ninth amendment is controversial because it is potentially a broad constitutional basis upon which the Court could expand constitutional protection of personal rights. Justice Goldberg believed the ninth amendment evidenced the framers' intent that the people retain fundamental rights not enumerated in the Constitution. "[T]he Framers did not intend that the first eight amendments be construed to exhaust the basic fundamental rights which the Constitution guaranteed to the people." Id. at 490 (Goldberg, J., concurring).

Justice Goldberg denied Justice Black's assertion that the Court was overstepping the bounds of the Constitution by using the ninth amendment to identify fundamental personal rights.

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.

Id. at 492.

Justice Black contended that the Court was using the ninth amendment reminiscent to the Court's substantive due process era in the first third of this century. See supra note 10. Justice Black argued that the Court was using the ninth amendment to "strike down all state legislation which this Court thinks violates 'fundamental principles of liberty and justice,' or is contrary to the 'traditions and collective conscience of our people.'" Id. at 518-19 (Black, J., dissenting). Justice Black argued
This string of supporting amendments weakened rather than strengthened the right to privacy's foundation by highlighting the Court's lack of textual support within the Constitution. Furthermore, the lack of textual support bolstered the criticism that the majority was reviving substantive due process doctrine. The dissent argued that the Court should determine whether the law violated a personal right guaranteed by the Constitution, rather than judge the "propriety" of the law in their individual opinions.

Griswold's nontextual foundation left the privacy right open to other criticisms. Lack of explicit constitutional support for creating and later expanding the right to privacy left the Court open to claims of illegitimately usurping legislative power. Also, other than the doctrine of stare

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that using the ninth amendment extends the power of the Court, contradicting the original intent of the amendment.

The Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court.

Id. at 520 (Black, J., dissenting).

29 Justice Black, in dissent, argued that the Court was evaluating the legitimate laws of state legislatures and replacing their policy choices with those of the justices.

[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious, or irrational.

Id. at 520-21 (Black, J., dissenting). This criticism resembles that which the dissenters in Roe and its progeny have leveled against the majority, that the Court is replacing the policy choices of state legislatures in the abortion area with its own. See also infra text accompanying notes 139-62.

30 One line of criticism from the dissenting justices in Roe and its progeny has been that the policy decisions and the process of formulating abortion regulations is more appropriate for the state legislatures than the Supreme Court. The plurality in Webster puts faith in the legislatures' ability to deal with this issue. It stated that

[the dissent's suggestion that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the dark ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.


Justice Scalia, frustrated with the Court's role in reviewing abortion legislation, stated in his Webster concurrence:

The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical . . . .

Id. at 3064 (Scalia, J., concurring).

In his Roe dissent, Justice Rehnquist expressed the problem inherent with substantive due process. He stated that the Court must consciously weigh competing factors, yet such weighing "is far more appropriate to a legislative judgment than a judicial one." 410 U.S. 113, 173 (1973)(Rehnquist, J., dissenting).

Griswold nor Roe advocate a free-market theory of jurisprudence, in which the justices are not bound by the text or structure of the Constitution. For a discussion of the arguments for and against limiting the justices to interpreting the explicit text of the Constitution, see supra note 10. Rather, Griswold and Roe attempt to tie their holdings to the Constitution: whether to the "penumbras" of the Bill of Rights, as in Griswold, or in the fourteenth amendment's concept of "liberty," as in Roe. The problem in Roe and Griswold is that the Court has no explicit constitutional language in which to base its holdings. Thus, as the Court expands and strengthens such a right, as it did with
decisis, there was no compelling reason for dissenting justices to uphold these right to privacy decisions once they comprise a majority; the justices feel less compelled to uphold prior opinions they believe are not constitutionally based. The majority attempted to refute these criticisms: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Yet, this argument that the majority was acting as a super-legislature, has weakened the right to privacy and, subsequently, the right to choose an abortion.

Critics argue that the doctrine of substantive due process rests upon the individual justices' concept of just laws, tradition, and fundamental values in society, rather than upon specific constitutional language. As such, a right based upon the theory of substantive due process will fluctuate with changing justices or shifting social norms. Substantive due process decisions leave personal rights ambiguous and state legislatures unable to draft legislation that satisfies judicial scrutiny.

the right to seek an abortion through Roe's progeny, the Court must continually justify the expansion. Without explicit constitutional support, it becomes more difficult for the Court to justify creating an absolute right. See M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 38 (1987) ("The right to privacy... has become one of the most absolute rights known to the American legal system.").

Professor Ely also noted the stringent protection that Roe provided the abortion right: "What 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 in issue, any general value derivable from the provisions they included, or the nation's governmental structure." Ely, supra note 1, at 935-36. Professor Ely noted that "The problem with Roe is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business." Id. at 943.

In contrast to the right to privacy, the right to free speech has explicit constitutional support. U.S. CONST. amend. I. It also has a history in our nation's traditions as a highly protected constitutional right. Thus, when the Court erects tests to judge state legislation impacting the freedom of speech, it has little problem showing constitutional and historical support for its actions.

The Webster plurality makes clear that stare decisis is little impediment to questioning prior holdings if the members of the Court feel there is no constitutional support for the holdings. With respect to the force of the stare decisis argument, the plurality stated that "[S]tare decisis is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes." 109 S. Ct. at 3056.

Justice Rehnquist argued against using substantive due process in his Roe dissent: As in Lochner and similar cases applying substantive due process standards to economic and social legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular interest put forward may or may not be "compelling:"

410 U.S. at 174 (Rehnquist, J., dissenting).

The Court's opinions during its previous era of substantive due process were inconsistent. The Court reached different results regarding similar economic regulations. See N. REDLICH, B. SCHWARTZ & J. ATTANASIO, supra note 4, at 418-19 (1989). See also, L. TRIBE, supra note 21, at 560-86. During the Lochner era, the Court used techniques other than substantive due process to invalidate economic regulations, namely federalism. See, e.g., Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)(wage and price controls); Hammer v. Dagenhart, 247 U.S. 251 (1918)(child labor laws); United States v. Butler, 297 U.S. 1 (1936)(Agricultural Adjustment Act); Carter v. Carter Coal Co., 298 U.S. 238 (1936)(Bituminous Coal Conservation Act).
B. Broadening the Right to Privacy and Judicial Legislation: Roe v. Wade

In Roe, the Court assumed an active role in the abortion issue. Roe v. Wade expanded the constitutional right to privacy established in Griswold to include a woman's right to choose an abortion. Roe held that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court, however, went beyond expanding the fundamental right to privacy. It implemented the trimester framework to restrict states' ability to legislate the issue. The trimester framework is the first example of judicial legislation by the Court.

The trimester framework restricts a state's legislative power regarding abortion. It identifies state interests that the Court considers compelling. It then weighs those interests differently so that a state may promote a compelling state interest only in specified instances. The result of the trimester framework is that states can regulate abortions to differing degrees depending upon the trimester of pregnancy. Furthermore, because personal privacy is a fundamental right, the Court emphasized that state legislation must further a "compelling state

35 410 U.S. at 153. The Court identified the source of the right to privacy more precisely than it had in Griswold. The Court specifically found the right to privacy in the fourteenth amendment's concept of personal liberty.

This right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restriction upon state action, as we feel it is, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. It is interesting to compare the Court's interpretation of "liberty" in the privacy cases with that of the Lochner era. In the prior era, the Court defined privacy in terms of the right to contract:

The liberty mentioned in [the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

The post-Lochner Court interpreted "liberty" in its modern substantive due process cases in terms of personal autonomy and autonomy over family matters, such as the education of children, procreation, and abortion. See, e.g., Roe v. Wade, 410 U.S. 113 (1973)(abortion); Skinner v. Oklahoma, 316 U.S. 535 (1942)(procreation); Pierce v. Society of Sister, 268 U.S. 510 (1925)(guaranteed right to send one's children to parochial school); Meyer v. Nebraska, 262 U.S. 390 (1923)(law prohibiting teaching of German to public school children unconstitutional). For example, Meyer defined "liberty" as follows:

[The term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.]

262 U.S. at 399.

36 Professor Ely distinguished Lochner and Roe. First, Lochner expressed a rational basis standard but misapplied it; Roe explicitly treated the right as fundamental and required a compelling state interest. Ely, supra note 1, at 941. Second, Lochner refuted the legislative judgment by either finding that the legislative goal was impermissible or "denying the plausibility of the legislature's empirical judgment that its action would promote that goal." Id. Roe admitted that the state goal of protecting the fetus was valid and that prohibiting abortions promoted it, but the Court stated that that interest is not important enough and thereby questioned the legislative balancing. Id. at 942.

interest" and be "narrowly drawn" to further only those compelling interests. Thus, under Roe, the Court would strike down overly-broad state legislation that was not narrowly tailored to a compelling state objective.

Within this framework for abortion legislation, the Court identified three compelling state interests. The Court also recognized that the woman's right to an abortion is not absolute and that the state has legitimate interests in regulating the area. First, the state has an interest in "preserving and protecting the health of the pregnant woman . . . ." Second, the state may protect the "potentiality of human life" represented by the fetus. Third, a state has a compelling interest in maintaining medical standards.

The Court balanced these interests by defining at what point each interest becomes compelling. The state's interest in maternal health becomes compelling at "approximately the end of the first trimester." The Court found viability of the fetus to be the point at which the state's interest in the potential life becomes compelling. Thus, under Roe, state power to regulate abortion varied according to the trimester of pregnancy. In the first trimester, the state could not regulate abortion.

The Court recognized that most of the previous state abortion statutes had been struck down as overly broad. Those [courts] striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his patient might decide that she should have an abortion in the early stages of pregnancy.

The Court rejected the argument that the state has no right to interfere with the woman's abortion decision at any stage of the pregnancy. It stated that "appellants and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree." We agree with this approach.

The Court elaborated that because abortion was statistically safer than childbirth until the second trimester, the state interest in maternal health becomes compelling at that point. With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, that until the end of the first trimester mortality in abortions may be less than mortality in normal childbirth.

Thus, as Justice O'Connor points out in her Akron dissent, the point at which the state may regulate abortion to protect the mother's health will advance further into the pregnancy as medical technology makes abortions safer through advanced techniques. See infra note 153.

The Court has not strictly followed this rule. It has upheld abortion regulation reasonably related to valid state objectives. For example, recording requirements and written consent are per-
The decision was left to the woman and her physician. During the second trimester, the state was permitted to regulate the abortion procedure so long as the legislation is "reasonably related" to "the preservation of maternal health." In the third trimester, or after viability, Roe allowed the state to further its interest in the potential life of the fetus by regulating and even prohibiting abortions except when necessary for "preservation of the life or health of the mother."

By separating pregnancy into trimesters, the Court imposed a national framework for abortion regulation. It displaced individual state abortion laws that existed prior to Roe. State legislation after Roe focused on regaining this lost power to regulate abortion, instead of on finding a workable solution to the abortion controversy within the state.

The trimester framework exhibited the negative effects associated with substantive due process. Reliance on substantive due process to resolve the abortion issue has at least four negative effects: (1) the Supreme Court must act as a super-legislature for which it is ill-suited; (2) the states are not allowed to experiment with different legislative responses to a social problem; (3) the state legislatures cannot fine-tune their solutions to local opinion; and (4) the Supreme Court violates the permissible regulations in the first trimester. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

The Court has continuously protected the privacy of the physician-patient relationship. In Roe, the Court said that in the context of first trimester abortions the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Id. See also the Court's holdings as to the informed-consent provisions in Akron and Thornburgh, in which the state specified that certain information the physician had to give the woman, violated Roe by "wedging" the state's message preferring childbirth over abortion into the private physician-patient relationship. See infra text accompanying notes 115-17 & 128-32.

"With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." Id. at 163-64.

Roe differs from Griswold in that Griswold did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such it was far different from the opinion, if not the holding of Roe v. Wade, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy.

Webster, 109 S. Ct. 3040, 3058 (1989). Thus, by going beyond establishing the right to abortion, to attempt to fashion a system to balance the competing interests in the abortion issue "once and for all," Roe judicially legislated the abortion regulation area, which had been "traditionally subject to state regulation . . . ." Id.

For a comparison of the judicially-created tests in the abortion/right to privacy area versus the first amendment area, see supra note 30. In brief, the distinction between the two areas lies not in the tests themselves. Rather, in the free speech area, the Court is dealing with one of the most explicit constitutional guarantees. It thus has textual support for creating elaborate tests that stringently protect that right. In the privacy area, however, where there is no explicit constitutional support for the right, and the Court becomes uncomfortable with formulating protective tests for the right.

See infra notes 57-72 and accompanying text.
principles of federalism and, specifically, the vertical separation of powers between itself and the state's residuary police power.

The first problem lies in the Supreme Court's inability to act as a legislature for complex social issues. The Court acknowledged in *Roe* that the abortion issue involves many competing views, ideas, and factors. The Court is ill-suited to take account of these competing inter-

56 The American system is based on federalism to keep check on concentrated governmental power, facilitate participatory self-government, and perform experiments in social progress in the smaller laboratories of state and local government. Perhaps most importantly, federalism guarantees pluralism.

Justice Brandeis described this proposition in a classic statement:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Likewise, Justice Holmes wrote:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by several States, even though the experiments may seem futile if even noxious to me and to those whose judgments I most respect.

*Traux v. Corrigan*, 257 U.S. 312, 342-44 (1921) (Holmes, J., dissenting). Justice Frankfurter echoed that concern when he wrote:

The veto power of the Supreme Court over the social-economic legislation of the states, thus exercised through the due process clause, is the most vulnerable aspect of undue centralization. It is . . . the most destructive, because judicial nullification on grounds of constitutionality stops experimentation at its source, and bars increase to the fund of social knowledge by scientific tests of trial and error . . . . The inclination of a single Justice or two, the tip of his mind or his fears, may determine the opportunity of a much needed social experiment to survive, or may frustrate for a long time intelligent attempts to deal with the social evil.

F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 50, 51 (1930). More recently, in *Whalen v. Roe*, 429 U.S. 589, 597 (1977), another privacy decision, the Court emphasized that individual states must "have broad latitude in experimenting with possible solutions to problems of vital local concern."

The Court noted in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42-43 (1973):

The ultimate wisdom as to these [issues] is not likely to be divined for all time even by the scholars who now so earnestly debate [them]. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to keeping even partial solutions to [such] problems and to keep abreast of ever-changing conditions.

In a recent book on the American constitutional system, Professor Elazar wrote:

For the United States it can fairly be said that federalism has been of the utmost importance in maintaining pluralism. Federalism has worked in both directions at various times: in the ability of the states to resist federal encroachments and in the ability of the federal government to assault state-fostered or sanctioned encroachments on the legitimate pluralism.

What is important about federal arrangements is not a simple matter of power devolved but the more complex matter of power shared, allowing different avenues of recourse for injured parties or for those who wish to protect themselves against injury.


57 Justice Blackmun began his *Roe* opinion by addressing the abortion issue's complexity. We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward human life and family and their values, and the moral standards one
ests, balance them and formulate a national solution.\textsuperscript{58} The state legislatures are the appropriate democratic body to know and respond to local constituents' values. Substantive due process prevents state legislatures from assuming their proper role as a democratic body and addressing social issues that have been traditionally within their police power.\textsuperscript{59}

Second, when the Supreme Court "legislates" for the nation, it negates the benefit derived from allowing the states to experiment with various legislative schemes to a particular problem.\textsuperscript{60} Throughout its abortion decisions, the Court has continuously implemented and tailored new solutions to abortion-related problems.\textsuperscript{61} These schemes become the national standard and prevent state legislatures from experimenting with new and more effective means of addressing these various issues that are within their police power. The Court's use of substantive due process deprived the nation of this benefit inherent in our federal system.\textsuperscript{62}

The third problem follows from the second problem. By mandating a national approach to the abortion issue, the Court has prolonged its

\textsuperscript{58} Professor Ely pointed out the problem in having the Court balance competing interests. The problem with the Court making moral choices between competing interests is that it is not guided by any constitutional wording or preferences, thus the justices must supply their own moral choices. Ely, supra note 1, at 927. Professor Ely noted that the Court in \textit{Roe} did not attempt to support its decision with the framers' intent or the governmental system contemplated by the Constitution. \textit{Id.} at 927-28.

\textsuperscript{59} As Chief Justice Rehnquist argued in \textit{Roe}, "the Court's sweeping invalidation of any restriction on abortion during the first trimester ... and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established [rational relationship] test is far more appropriate to a legislative judgment than to a judicial one. 410 U.S. at 173 (Rehnquist, J., dissenting).

\textsuperscript{60} Justice Goldberg, concurring in \textit{Griswold}, argued that state experimentation is not always beneficial. He believed that certain rights are so fundamental that the Constitution should not allow them to be abridged in favor of federalism. He stated that:

"While I quite agree with Mr. Justice Brandeis that * * * 'a * * State may * * * serve as a laboratory; and try novel social and economic experiments,' ... I do not believe that this includes the power to experiment with the fundamental liberties of citizens * * *.' The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government. 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

\textsuperscript{61} The Court has modified its approach on the issue of a minor's right to an abortion. In \textit{Danforth}, the Court struck down a parental-consent statute and required that the minor have the option to seek judicial approval. 428 U.S. 52, 72-75 (1976). Then, in \textit{Bellotti II}, 443 U.S. 622, 643 (1979), the Court further required that the minor have the option of seeking either parental or judicial approval.

\textsuperscript{62} A prime example of such judicial legislation is the Court's choice in \textit{Roe} to break pregnancy into trimesters. Chief Justice Rehnquist stated in \textit{Roe}, that the decision to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one ... partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. 410 U.S. at 174 (Rehnquist, J., dissenting).
conflict with the states as well as the abortion controversy in general. There is no national consensus on abortion. States and regions of the country have different values and judgments. Often the spectrum of opinions on the abortion issue are less divergent within one state than they are nationally. When the Court mandates a national solution, it preempts the state legislatures from devising an effective solution that may resolve the issue locally.

Justices Black and Stewart, in *Griswold*, and Justice Rehnquist, in *Roe*, articulated the fourth problem: the doctrine of substantive due process violates the principles of federalism. When the Court uses substantive due process, it preempts the states from legislating in areas that were traditionally left within a state's police power, by acting as a super-legislature to review the "wisdom" and "propriety" of a state's abortion legislation. The Court makes legislative judgments that are normally each state's responsibility. The Court balances competing factors on a particular issue and decides which shall prevail. This role violates the vertical division of power.

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63 By mandating a national policy on abortion legislation before a national consensus emerged, the Court inhibited the process by which consensus arises from pluralism. See Sandalow, *Federalism and Social Change, 43 LAW & CONTEMP. PROBS.,* Summer 1980, at 29-36. At the time the Court decided *Roe* and certainly since then, "a national consensus plainly had not evolved regarding abortion." Id. at 36. If the states are liberated from the stifling abortion privacy doctrine that treats them as if they are "subordinate governmental agencies subject to societal norms determined at the national level, ... the law might come to reflect a tolerable accommodation of competing views, differing from state to state in accordance with the differences among their citizens." Id.

64 A New York Times/CBS News Poll, taken between April 13-16, 1989, asked: Should abortion be legal as it is now, or legal only in such cases as rape, incest or to save the life of the mother, or should it not be permitted at all? Forty-nine percent of the people surveyed said that abortion should be legal as it is now, 39% said that it should be legal only in certain cases, and 9% said that it should not be permitted at all. N.Y. Times, April 26, 1989, at 13, col. 2. The opinion poll also showed that a person's response to whether a woman should be able to obtain a legal abortion varied greatly according to the circumstances of the pregnancy. Eight-seven percent of the people surveyed favored legal abortions if the woman's health is seriously endangered by the pregnancy. This percentage of acceptance dropped to 69% if there is a strong chance of serious defect in the baby. Forty-three percent of those surveyed believed a legal abortion should be available if the family has a very low income and cannot afford any more children. Forty-two percent favored legal abortions if the woman is not married and does not want to marry the father, and only 26% favored abortion if the pregnancy interfered with the woman's work or education. Id. at 1, col. 3.

65 Some states have been more aggressive about their views on abortion. These states have continuously demonstrated that abortion is a significant public concern by promoting extensive regulation. See, e.g., *Akron* (Ohio); *Thornburgh* (Pennsylvania); *Webster* (Missouri). Other states have shown their satisfaction or lack of concern with *Roe* by not pursuing elaborate regulation since 1973. New York, for example, had a liberal abortion law before *Roe* and has not tested the limits of that opinion.

66 *Newsweek* estimated the reaction of each state and the District of Columbia to abortion regulation if *Roe* did not exist. Twenty-two states would be likely to restrict abortions. Abortions would be legal in 13 states. In 16 states, there was no clear consensus as to which path the state would follow. *Newsweek*, May 1, 1989, at 38.

67 See supra note 56.

68 See supra note 30.

69 See supra note 29.

70 These policy choices are not subject to judicial review or are, at most, subject to de minimus review under a rationality standard.
cal separation of powers between federal and state government, thereby frustrating the states’ attempts at abortion legislation.\(^7\)

II. From *Roe* to *Thornburgh*: The Increasing Scrutiny of the Court

Since the *Roe* decision in 1973, there has been a continuous battle between the Supreme Court and various state legislatures over the permissible extent of state abortion regulation. Many states sought to restrict a woman’s abortion right by regulating the facilities and procedures used.\(^7\) Sensing that the states were attempting to undermine *Roe*,\(^3\) the Court responded by increasing its level of scrutiny in evaluating state abortion statutes. As a result, many state abortion laws were struck down. This Part analyzes several of *Roe’s* progeny, in which the Court’s attempts to judicially legislate were even more pronounced. It also illustrates the effects of substantive due process analysis in the results of these cases.\(^4\).

A. Planned Parenthood of Central Missouri v. Danforth: *The Court Applies the “Unduly Burdensome” Standard*

*Planned Parenthood v. Danforth*\(^7\) was the first case to reach the Court after *Roe* in which a state sought to protect its maternal health and potential life interests. The Missouri law extensively regulated abortion. It required written consent of the patient, her spouse, and a parent or guardian in the case of a minor.\(^6\) Also, it imposed a standard of care for

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\(^7\) Justice O’Connor, in her *Akron* dissent, recommended the Court look to the state legislatures as the appropriate forum for solving the problem. Justice O’Connor stated that

we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, “the appropriate forum for their resolution in a democracy is the legislature... This does not mean that in determining whether a regulation imposes an “undue burden” on the *Roe* right we defer to the judgments made by state legislatures.

“The point is, rather, that when we face a complex problem with many hard questions and few answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.”


\(^8\) For example, states have imposed licensing requirements on physicians and facilities performing abortions, hospitalization requirements for abortions after the first trimester, consent provisions for the woman and/or her parents if she is a minor. *E.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 421-25 nn. 2-8 (1983)(quoting from Akron ordinance No. 160-1978); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 58-59 (1976)(ordinance at issue).

\(^7\) The majority sensed pressure from the state legislatures in *Thornburgh*. It stated:

In the years since this Court’s decision in *Roe*, States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice... The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.


\(^\star\) See supra text accompanying notes 56-71.

\(^7\) 428 U.S. 52 (1976).

\(^8\) Id. at 84-89.
the physician to maintain regarding the fetus and required the physician to report certain patient information to the state.

The Court used the "unduly burdensome" standard as a guide in applying the trimester approach. It did not strictly scrutinize every aspect of the Missouri law. Instead, the Court applied the rational relationship standard to those provisions that would not create a complete obstacle to the woman's decision. Consequently, the decision upheld both the patient's written consent provision and the physician's reporting requirements as reasonably related to promoting the state's maternal health interest.

As to those provisions potentially creating a complete obstacle to the woman's decision, the Court applied strict scrutiny to determine if the state statute was justified by a compelling state interest, and was narrowly drawn to affect that interest. The spousal consent and parental consent provisions each presented a potentially complete obstacle to a woman's decision.

The Court struck this provision without determining whether it burdened the woman's decision because the standard of care applied to all trimesters of pregnancy.

[The provision] does not specify that such care need be taken only after the stage of viability has been reached. As the provision now reads, it impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy.

Sections 10 and 11 of Missouri Act imposed recordkeeping requirements for health facilities and physicians concerned with abortions irrespective of the pregnancy stage. The requirement's purpose was to preserve "maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law." The Act provided for the confidentiality of records, except that the "records . . . may be inspected and health data acquired by local, state, or national public health officials." The records were to be kept for 7 years. The Act, however, did not specify what exact information doctors would take from the woman. The Missouri division of health was to draft the forms.

The Court found that this provision was reasonably related to maternal health:

The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

The Court found no burden on the woman's choice so long as the recording requirements related to protecting maternal health and provided for her anonymity. The Court deferred to the Missouri legislature's judgment:

[We see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship. We naturally assume, furthermore, that these recordkeeping and record-maintaining provisions will be interpreted and enforced by Missouri's Division of Health in the light of our decision with respect to the Act's provisions, and that, of course, they will not be utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction.

The Court found that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision [to terminate the pregnancy], the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that period." The Court deferred to the Missouri legislature's judgment:

Justice Blackmun found that the parental-consent provision burdened the minor's decision because "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."
The Court held that neither consent provision furthered the compelling state interest in protecting maternal health. The state argued, however, that its interests in promoting unity in the marriage and parental authority over minor children justified the burden placed on the woman's abortion decision. The Court considered neither of these legitimate state interests compelling within the trimester approach, and therefore, could not justify the consent requirements.

*Danforth* represented the low point in the Court’s use of substantive due process in its abortion decisions. The Court faithfully applied the trimester approach without increasing its reliance on substantive due process by using the “unduly burdensome” standard to guide it in applying the *Roe* framework. The Court strictly scrutinized only those regulations that unduly burdened a woman’s choice, i.e., presented an “absolute obstacle[] or severe limitation [] on the abortion decision.” As a result, the state was able to implement its legitimate goals of furthering maternal health and protecting potential life.

### B. Judicial Activism Regarding a Minor’s Abortion Decision: *Bellotti v. Baird*

The Court’s decisions concerning a minor’s abortion decision exhibit a higher level of scrutiny and judicial intervention than do other areas of its abortion decisions. *Bellotti v. Baird (Bellotti II)* illustrates

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83 The Court also struck down the Act’s ban on using the saline amniocentesis method after the first 12 weeks of pregnancy as not reasonably related to preserving maternal health. The Court strictly scrutinized this regulation because it severely limited the woman’s choice.

[T]he outright proscription of [the] saline [amniocentesis method] fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks.

*Id.* at 79.

84 The state argued that the spousal consent provision protected the “mutuality of decisions vital to the marriage relationship.” *Id.* at 71. The Court did not see how this provision could serve such a purpose because “it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.”

*Id.* at 71.

The Court came to a similar conclusion regarding the parental-consent provision:

One suggested interest is safeguarding the family unit and parental authority. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit.

*Id.* at 75.

85 *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting). The Court has applied the “unduly burdensome” standard only to previability abortion regulations. *See infra* note 154. This fact, along with Justice O’Connor’s prefacing her restatement of the standard in her *Webster* concurring opinion, *see infra* notes 236-40 and accompanying text, raises the issue of whether she has altered the “unduly burdensome” standard since *Akron*. Does the standard apply only to statutes that regulate abortion previability? If this were true, then there would be an amalgam of the “unduly burdensome” standard and *Roe’s* trimester framework. Viability would remain a critical point in the pregnancy because before it, a regulation would be tested under the “unduly burdensome” standard. After viability, the third-trimester standard of *Roe* would apply, allowing the state to prohibit all abortions except where necessary to save the life or health of the mother.


88 *See supra* notes 56-71 and accompanying text.
how the doctrine of substantive due process frustrated states' attempts to satisfy the Court's standard of review. In Bellotti II, the Court reviewed a Massachusetts statute regulating a minor's abortion decision. Massachusetts had reacted to the Court's prior abortion opinions in drafting its abortion statute. Unlike the statute in Danforth, the Massachusetts' statute did not provide a minor's parents with an absolute veto over her decision. Rather, it required a minor seek the consent of both parents and, if either one or both refused, then the state allowed her to seek judicial approval.

Bellotti II came before the Court, for the first time, in 1976. The Supreme Court remanded the case to the Supreme Judicial Court of Massachusetts for interpretation. The finding upon remand was that a minor must notify her parents in every case, even when she seeks judicial approval. The Court held that such consultation unduly burdened the minor's right to seek an abortion and that "there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court."

This holding supplanted Massachusetts' policy choice that a minor should consult with her parents before having an abortion. It reweighed the competing interests that arise in a minor's abortion decision. The Court proposed its own legislative scheme to deal with a minor's decision, reflecting the Court's belief that the minor's freedom to choose abortion outweighed the benefit that Massachusetts believed came from having her first consult with her parents.

The Court enumerated the components of a valid statute: "If the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." The Court supplied the state with the factors it must look to when deciding whether to authorize a minor's abortion. The Court stated that the state must authorize a minor's abortion if she shows "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation

89 The Massachusetts statute provided:
If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary.

443 U.S. at 625.
90 Massachusetts passed their parental-consent statute after the Supreme Court's Danforth opinion.
91 See supra notes 81-85 and accompanying text.
93 Bellotti II, 443 U.S. at 628-29.
94 "As a general rule, a minor who desires an abortion may not obtain judicial consent without first seeking both parents' consent." Id. at 630. Further, "[e]ven if the judge . . . finds 'that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion,' he is entitled to withhold consent' in circumstances where he determines that the best interests of the minor will not be served by an abortion." Id. at 630.
95 Id. at 647.
96 Id.
97 See supra notes 12 & 30.
98 443 U.S. at 643.
with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."

_Bellotti II_ also illustrated the Court's increasing scrutiny of state abortion laws after _Roe_. In _Bellotti II_, the Court lowered the threshold at which state legislation unduly burdens the woman's decision whether to have an abortion. The Court found that requiring a minor to first consult with her parents unduly burdened her decision, even though the Massachusetts regulation did not inhibit a woman's decision to the extent to which the Court had found an undue burden in prior opinions. As compared to _Danforth_, in which the undue burden consisted of a possible, complete veto of the woman's decision, the Massachusetts statute did not present the possibility of a veto over the minor's decision. She remained free to seek judicial approval if her parents refused to give their consent. The Court's increasing standard regarding the permissible level of state interference hindered the state's attempt at legislating its interests in the health of minors.

_Bellotti II_ shows the Court's willingness to frustrate federalism principles by fashioning a national solution to the abortion question. Assuming the Court was correct in striking down the statute as unduly burdensome, it was improper for the Court to suggest its own legislative model. The Court justifiably may use the compelling state interest standard to strike down a state regulation that unduly burdens a woman's decision. The Court should not, however, provide its own legislative alternative and preempt the states from formulating their own solutions.

**C. Discarding the "Unduly Burdensome" Standard: Akron and Thornburgh**

In _City of Akron v. Akron Center for Reproductive Health_, the Court continued to abandon the "unduly burdensome" standard, which it applied in _Danforth_, and began to apply strict scrutiny to all abortion regulations. As the Court felt increased pressure from state legislative attempts to regulate abortion, it turned its inquiry to the legislature's intent in passing the abortion regulation. The Court began searching for an anti-abortion intent behind a statute instead of testing the law against the "unduly burdensome" standard. This method intruded into the state's legislative process and further frustrated state attempts to legislate their interests in maternal health and potential life. The Court's increasingly active and demanding role paralleled that which the _Griswold_ majority had rejected and which its dissenters, and those of _Roe_, had warned against:

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99 Id. at 643-44.
101 See supra notes 81-85 and accompanying text.
102 Even though the Massachusetts Supreme Judicial Court found that a judge could refuse to give a mature minor his consent if he believed it was in her best interests, _Bellotti II_, 443 U.S. at 630, the Court could have simply struck down that interpretation of the statute. The Court did not need to decide that the state could not require a minor to first consult with her parents. It could have deferred to the state's determination that it would be in the best interests of a minor to consult with her parents first.
"We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch . . . social conditions." From Akron to Thornburgh, the Court did not restrain itself to striking down only those laws that severely impaired a woman's decision; rather, it became the nation's legislature, reviewing the abortion legislation of the various states.

1. City of Akron v. Akron Center for Reproductive Health

In Akron, the Court reviewed five sections of an Ohio ordinance requiring that 1) all abortions after the first trimester be performed in a hospital; 2) parents be notified and consent to their unmarried daughter's abortion;105 3) the physician give the woman specific information to insure her informed consent;106 4) the patient wait twenty-four hours after giving her consent to have the abortion; and 5) the fetal remains be "disposed of in a humane and sanitary manner."107

In Akron, the Court changed the trimester framework, further shifting the standard and making state compliance more difficult. The Court added a new dimension to the trimester framework by requiring that states tailor their abortion legislation to meet "accepted medical standards."108 The Court stated that "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interests will be furthered."109 This requirement fragmented the rigid trimester approach because abortion techniques did not parallel the trimesters of pregnancy. Thus, states could no longer rely on the brightlines established by Roe and its progeny in formulating abortion legislation.

The Court utilized this new obligation to invalidate Ohio's hospitalization requirement. At the time of the Akron opinion, accepted medical standards recommended hospitalization for only the second half of the second trimester.110 The state's hospitalization requirement applied to the full second trimester. The state had not tailored its regulation to the

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105 The Court had discussed the constitutionality of parental notification requirements in Bellotti II, 443 U.S. 622 (1979). The Court reviewed the ordinance's two-parent notification provision, id. at 649, and stated that it was not unconstitutional. However, the Court qualified its statement by illustrating the circumstances it envisioned: "At least when the parents are together and the pregnant minor is living at home, both father and mother have an interest — one normally supportive — in helping to determine the course that is in the best interest of a daughter." Id.
106 For the specific information the statute required a doctor to give the woman, see Akron, 462 U.S. at 425 n.5.
107 Id. at 421-24 & nn. 2-7.
108 "The State's discretion to regulate on this basis does not, however, permit it to adopt abortion regulations that depart from accepted medical standards." Id. at 431. Justice O'Connor argued that the trimester approach was no longer viable because advancing technology revealed that the approach could not deal with new technology. See infra note 153 (Justice O'Connor describes the trimester framework as on a collision course with itself).
109 462 U.S. at 434.
108 "[T]he ACOG [the American College of Obstetricians and Gynecologists] no longer suggests that all second-trimester abortions be performed in a hospital" Id. at 437. The Court acknowledged that the states ability to legislate within the trimester approach fluctuated with the advances in medical technology, pushing forward the point when abortions become more dangerous than childbirth. This position had strong support at the time of Roe v. Wade, as hospitalization for second-trimester abortions was recommended by the American Public Health Association. . .
Since then, however, the safety of second-trimester abortions has increased dramatically.
specific period within the second trimester for which "accepted medical standards" recommended hospitalization. By qualifying the brightlines of the trimester framework with an "accepted medical standards" requirement, the Court frustrated the state's attempt to comply with Roe; the state had relied on earlier decisions treating the trimesters as indivisible units and not flexible guidelines that vary with "accepted medical standards."111

_Akron_ also indicated the Court's willingness to lower its definition of undue burden and, therefore, the point at which it strictly scrutinized abortion regulation. In _Danforth_, the Court strictly scrutinized only those regulations presenting a potential "absolute obstacle" to the woman's decision.112 In _Akron_, however, the Court strictly scrutinized the hospitalization requirement after determining that it presented a "significant obstacle in the path of women seeking an abortion."113 This provision, however, did not prevent the woman from exercising her choice as did the regulation in _Danforth_.114

_Akron_ illustrates the Court's increasing use of substantive due process analysis to strike down "unwise" regulations. The Court held the informed consent provisions unconstitutional because the state required a physician and not another qualified person to give the patient specified information.115 The Court stated that "we believe it is unnecessary for a State to insist that only a physician is competent to provide the informa-

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The principal reason is that the D & E [dilation and evacuation] procedure is now widely and successfully used for second-trimester abortions.

Id. at 435-36.

Justice O'Connor addressed this weakness of the trimester approach in her _Akron_ dissent: The Roe framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

Id. at 458 (O'Connor, J., dissenting).

111 The fact that the Court has had to adjust the trimester framework suggests that the Court is ill-suited at determining a national solution. The Court is inherently slower at responding to medical changes because it must necessarily wait for a case dealing with the appropriate issue. State legislatures are free to fine-tune their abortion legislation at any time in response to medical advances. This fact gives legislatures the ability to adopt better responses to the changing issues in the abortion context. _See also supra_ note 56.

112 _See supra_ notes 73-84 and accompanying text.

113 462 U.S. at 434. The Court found that the hospitalization requirement added to the costs of abortions, in time and money. _Id._ at 435. _Danforth_, however, found Missouri's hospitalization requirement unduly burdensome because it "inhibit[ed] the vast majority of abortions after the first 12 weeks." 428 U.S. at 79 (emphasis added). Even as to hospitalization requirements, the Court's definition of an undue burden lowered from _Danforth_ to _Akron_.

114 _See supra_ notes 81-85 and accompanying text.

115 The four sections that the Court refused to sever and uphold required that the patient be informed by the attending physician of the fact that she is pregnant, . . . the gestational age of the fetus, . . . the availability of information on birth control and adoption, . . . and the availability of assistance during pregnancy and after childbirth. . . . This information, to the extent it is accurate, certainly is not objectionable, and probably is routinely made available to the patient. We are not persuaded, however, to sever these provisions from the remainder of [the provision]. They require that all of the information be given orally by the attending physician when much, if not all of it, could be given by a qualified person assisting the physician.

462 U.S. at 445 n.37.
tion and counseling relevant to informed consent.”116 Likewise, as to the twenty-four hour waiting period, the Court concluded that “we [are not] convinced that the State’s legitimate concern that the woman’s decision be informed is reasonably served by requiring a 24-hour delay . . . .”117 Yet, neither of these provisions presented a potential, complete obstacle or severe limitation to a woman’s decision. Therefore, under the Court’s earlier decisions, the Court should not have subjected the provision to strict scrutiny. Rather, the Court should have applied a rationality standard. If the Court had done so, it would have found that the regulations were rationally related to protecting maternal health. Instead, the Court used the doctrine of substantive due process and strict scrutiny to strike down the regulations as “unnecessary.”

2. Thornburgh v. American College of Obstetricians and Gynecologists

Thornburgh118 is the pinnacle of the Court’s intervention into the states’ sphere of legislative authority. The Court continued to use the doctrine of substantive due process, evaluating the “wisdom” and “propriety” of state laws instead of determining whether the regulation imposed an undue burden on the woman’s decision.

Thornburgh also illustrates the intensity of the conflict between the Court and the state legislatures. The Court explicitly relied on the finding of an antiabortion intent as a basis to strike down the law. The Court began its opinion with a verbal attack on the Pennsylvania legislature, admonishing it for what the Court believed to be the state’s intention behind the Act: “The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.”119 The Court felt that the Pennsylvania legislature’s intent was not to legitimately regulate abortion, but rather “to deter a woman from making a decision that, with her physician, is hers to make.”120 The Court relied, in part, upon this finding of an antiabortion intent to invoke strict scrutiny, instead of applying the “unduly burdensome” standard.

The Court strictly scrutinized two regulations intended to promote the potential life of the fetus even though the provisions did not constitute an undue burden under the Court’s prior holdings nor violate the trimester framework. One required the physician to use the same degree of care with a viable fetus that he would use to preserve the life of an unborn child not meant to be aborted, unless it “would present a significantly greater medical risk to the life or health of the pregnant woman.”121 The second provision required that a second physician be present during the abortion of a possibly viable fetus to “take control of

116 Id. (emphasis added).
117 Id. at 450 (emphasis added). The state argued that the 24-hour waiting period “furthered [its] interest in ensuring ‘that a woman’s abortion decision is made after careful consideration of all the facts applicable to her particular situation.’ ” Id. at 449.
119 Id. at 759.
120 Id.
121 Id. at 768.
the child and . . . provide immediate care to preserve the child's life and health." 122

The Court struck down the standard-of-care provision, finding that it required the woman to accept a greater health risk to save the viable fetus. 123 The Court, however, ignored the compelling state interest in protecting potential life that exists after viability. 124 Justice White argued, in his dissent, that Roe recognized such a "tradeoff between maternal health and protection of the fetus, for it [Roe] plainly permits the State to forbid a postviability abortion even when such an abortion may be statistically safer than carrying the pregnancy to term, provided that the pregnancy is not medically necessary." 125 The Court also struck down the second-physician requirement for failing to provide a medical-emergency exception when the woman's health or life is endangered and a second physician is unavailable. 126 The Court, however, ignored a statutory provision providing a complete defense for a physician charged with violating the second-physician requirement if he or she believed "that the abortion was necessary to preserve maternal health or life." 127

The Court also struck down provisions intended to protect maternal health. The first provision specified that information be given to the woman to insure her informed consent. 128 Like a similar provision in Akron, 129 Pennsylvania's Act informed the woman of public agencies that could assist her in carrying her child to term, described the fetal development, and the risks to her health involved in abortion. 130 The Court found that it was not intended to further maternal health, but rather was an attempt "to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 131

The Court's review of the informed-consent provision illustrates its active role in passing on the "wisdom" of state abortion legislation. The Court unnecessarily reviewed the informed-consent provision as one designed to inhibit abortions. The Court could have reviewed the provision as one intended to promote the woman's health by providing her

122 Id. at 769-70.
123 Id. at 768-69. The Court agreed with the court of appeals "that § 3210(b) was unconstitutional because it required a 'trade-off' between the woman's health and fetal survival, and failed to require that maternal health be the physician's paramount consideration." It would not allow such a " 'trade-off' between the woman's health and additional percentage points of fetal survival." Id.
124 See infra text accompanying notes 228-40.
125 476 U.S. at 809-10 (White, J., dissenting).
126 Id. at 771. The majority inferred a sinister intent in the Pennsylvania legislature's statute.
   It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so. . . . We necessarily concluded that the legislature's failure to provide a medical-emergency exception in § 3210(c) was intentional. All factors are here for chilling the performance of a late abortion, which more than one performed at an earlier date, perhaps tends to be under emergency conditions.
Id.
127 Id. at 811 (White, J., dissenting).
129 See supra note 115.
130 Thornburgh, 476 U.S. at 759-62.
131 Id. at 762.
with full knowledge of her options and allowing her to make her own decision. If her choice is to forgo the abortion in favor of childbirth, then the provision has not violated Roe. Roe held that the woman has the freedom to choose whether to have an abortion. Roe did not require that states favor abortion over childbirth. Thus, by skewing the provision's intended effect to be that of inhibiting abortions — instead of providing for the woman's informed consent — the Court prevented the state from furthering its interest in women's health.

The Court also struck down the reporting requirements of the law. The Act required reporting the following information: the name of the physician; the basis for the determination of a nonviable fetus after the first trimester; the woman's age, race, marital status, and number of previous pregnancies; and the method of payment. The Court found that these requirements were not intended to further the state's interest in maternal health. Instead, the Court found that exposure of the woman's identity was the legislature's main purpose. As such, the provision was invalid for not advancing a legitimate state purpose. The Court, by finding an unstated purpose behind the reporting requirements, invalidated the regulation upon that basis. Because the requirement itself provided anonymity for the woman and her physician, however, it is unlikely that identification was the state's intent. If the Court had applied the "unduly burdensome" standard, it would have determined whether the requirement imposed an undue burden on the woman's decision. The reporting requirement did not present an absolute obstacle or severe limitation to the woman's choice and would have been upheld as a rational means of promoting maternal health and maintaining medical standards.

III. The Conflict—Fosters Strong Dissents

The unusually active role played by the Supreme Court has caused not only public controversy, but controversy on the Court. Many of the justices have disagreed with the Court's abortion decisions. The dissents have grown stronger and more persuasive as the Court battled with the state legislatures from Roe in 1973 to Thornburgh in 1986.

132 Justice White stated [t]hat the result of the provision of information may be that some women will forgo abortions by no means suggests that providing the information is unconstitutional, for the ostensible objective of Roe v. Wade is not maximizing the number of abortions, but maximizing choice. Id. at 801 (White, J., dissenting).

133 Id. at 767-68.

134 Id. at 765.

135 Id. at 765-66.

136 "Although the statute does not specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely." Id. at 766-67.

137 Id. 767-68.

138 See supra note 128.

139 Roe v. Wade was decided in 1973 by a 7-2 vote. In 1976 the vote was 6-3 in Danforth. Thornburgh was decided in 1986 by a 5-4 vote. In 1987 the Court was split evenly, 4-4, in Hartigan v. Zbaraz, 484 U.S. 171 (1987)(24-hour waiting period unconstitutional but severable and parental-notification provision enjoined). Moreover, within the Court there was growing concern about ap-
were of two forms. One line of argument, first expressed by Chief Justice Rehnquist in *Roe* and the dissenters in *Griswold*, took issue with the Court’s role.140 The other argument, by Justice O’Connor in *Akron*, acknowledged Justice Rehnquist’s argument but went further to urge a new abortion jurisprudence for the Court.141

**A. Chief Justice Rehnquist: The Court Returns to its Ill-Suited Role as Legislator**

Chief Justice Rehnquist’s argument is based on his criticism, and the Court’s historical aversion to the doctrine of substantive due process as a basis to strike down state laws.142 Chief Justice Rehnquist views the doctrine of substantive due process and the compelling state interest standard as inappropriate methods of judicial review in the abortion context.143 In *Roe*, Chief Justice Rehnquist found the woman’s right to abortion in the fourteenth amendment’s concept of personal “liberty.”144 As such, that interest is subject to the state’s regulatory power over social and economic matters within the limits of due process. The appropriate test, therefore, to determine if the woman’s “liberty” has been violated, is “whether or not a law, such as that challenged, has a rational relation to a valid state objective.”145 Chief Justice Rehnquist would not test any state abortion regulation under the strict scrutiny of the compelling state interest standard. As a result, the woman’s freedom of choice could be completely frustrated so long as the regulation has a rational relation to a valid state objective.146

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142 See supra notes 10 & 147. First, Justice Rehnquist questioned whether the right to privacy is the issue in abortion. *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting). He, instead, based his argument on the term “liberty” within the fourteenth amendment and the “claim of a person to be free from unwanted state regulation of consensual transactions. . . .” Id. Thus, under Chief Justice Rehnquist’s argument there is no fundamental right to abortion, but rather, a person’s more general right of personal liberty.

143 See infra text accompanying notes 147-51.

144 *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).

145 Id. at 173.

146 Chief Justice Rehnquist would uphold the Texas statute making abortion illegal except to save the woman’s life. This approach is incompatible with a position that continues to recognize a woman’s constitutional right to choose abortion. *Id.* at 172 (Rehnquist, J., dissenting) (“I would reach a conclusion opposite to that reached by the Court. . . .”).
Chief Justice Rehnquist also viewed \textit{Roe} as a resurgence of substantive due process doctrine, a theory discredited by the Court in the 1930s.\textsuperscript{147} Chief Justice Rehnquist stressed the problems that using substantive due process entails. The doctrine involves "the conscious weighing of competing factors that the Court[] . . . substitutes for the established [rational relationship] test . . . ."\textsuperscript{148} Chief Justice Rehnquist argued that substantive due process invariably compels the Court to examine the "wisdom" of state legislation in determining whether an interest is compelling.\textsuperscript{149} Chief Justice Rehnquist urged that such weighing "is far more appropriate to a legislative judgment than a judicial one."\textsuperscript{150} The doctrine thus puts the Court in the position of super-legislature.\textsuperscript{151}

Chief Justice Rehnquist's argument does not present a workable solution to the present abortion conflict between the Court and the states. The initial decision in \textit{Roe}, finding that a woman's right to choose an abortion is within her privacy right, was within the Court's authority to protect and interpret constitutional guarantees.\textsuperscript{152} The conflict arose, in part, because of the Court's affinity to step beyond protecting and interpreting constitutional rights. It began formulating policy and legislative schemes. The Court expanded its role beyond protecting the woman's

\textsuperscript{147} Before 1968, the Court previously used substantive due process doctrine in the first third of the twentieth century. This era is named after its most infamous case, \textit{Lochner} v. New York. 198 U.S. 45 (1905). In \textit{Lochner}, the Court struck down a New York law that limited the number of hours bakery employees could work per week. The Court relied upon a right to freely contract one's labor. The Court's activity became particularly controversial during President Roosevelt's New Deal legislation in the 1930s. The Court struck down New Deal legislation as violating the due process clause and one's personal "liberty" to contract. The Court grounded these opinions by substantively reading a right to contract into the fourteenth amendment. Many observers contend that the Court was trying to implement its theory of \textit{laissez faire} economics in the face of Roosevelt's New Deal legislation. L. Tribe, \textit{supra} note 21, at 568.

After tremendous pressure from President Roosevelt in the infamous "court-packing crisis," the Court changed its stance and upheld the New Deal legislation. See \textit{United States v. Carolene Prods. Co.}, 304 U.S. 144, 152-55 n.4 (1938). Since this era, the Court generally defers to the legislature's social and economic judgments. See \textit{supra} note 19. The Court looks back to that period of judicial activism with disfavor. Justice White, dissenting in \textit{Thornburgh}, 476 U.S. 747 (1986), criticized \textit{Roe} by comparing it to the \textit{Lochner} era.

\textit{[T]he hallmark of a correct decision of constitutional law is that it rests on principles selected by the people through their Constitution, and not merely on the personal philosophies, be they libertarian or authoritarian, of the judges of the majority. While constitutional adjudication involves judgments of value, it remains the case that some values are indeed "extraconstitutional," in that they have no roots in the Constitution that the people have chosen. The Court's decision in \textit{Lochner} v. New York was wrong because it rested on the Court's belief that the liberty to engage in a trade or occupation without governmental regulation was somehow fundamental — an assessment of value that was unsupported by the Constitution. I believe that \textit{Roe v. Wade} — and today's decision as well — rests on similarly extraconstitutional assessments of the value of the liberty to choose an abortion. . . .}

\textit{Id. at 797} (citations omitted). See generally, N. Redlich, B. Schwartz & J. Attanasio, \textit{supra} note 4, at 415-16, 418-19.

\textsuperscript{148} 410 U.S. at 173 (Rehnquist, J., dissenting).

\textsuperscript{149} \textit{Id.} at 174.

\textsuperscript{150} \textit{Id.} at 173.

\textsuperscript{151} Chief Justice Rehnquist argued, for example, that "[t]he decision here to break pregnancy into three distinct terms . . . partakes more of judicial legislation than it does of a determination of intent of the drafters of the Fourteenth Amendment." \textit{Id.}

right to abortion and became a super-legislature that reviewed the nation's abortion laws. The Court does not need to overturn Roe, as would Chief Justice Rehnquist, to alleviate the present conflict. Rather, the Court should return to its role as a protector and interpreter of constitutional guarantees and refrain from legislative activity.

B. Justice O’Connor: The "Unduly Burdensome" Standard

Justice O’Connor’s Akron dissent introduced an alternative framework for the Court to review abortion regulation. Justice O’Connor did not argue that a woman’s right to an abortion is not fundamental. Rather, she advocated using the Court’s traditional fundamental rights analysis, which she believed the majority has abandoned in Roe’s progeny.

153 Justice O’Connor criticized the Court’s analysis in its abortion decisions since Roe. Justice O’Connor argued that

[...] the Roe framework . . . is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.


She believed the Court had placed itself in the position of medical review board for the nation. Id. In Akron, the Court stated that a state’s abortion legislation may not deviate from accepted medical practice. Id. at 455-56. Therefore, the Court must ascertain the level of medical technology in reviewing abortion cases to determine if the regulations meet the corresponding level of technology. Roe’s trimester framework cannot withstand medical advances if it is tied to the changes in medical technology. Justice O’Connor explains that, under Roe, "[j]ust as improvements in medical technology inevitably will move forward the point at which the State may regulate for reasons of maternal health, different technological improvements will move backward the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother." Id. at 456.

154 The Court adheres to the undue burden analysis outside the abortion-regulation context. The Court applies strict scrutiny only when the state statute substantially impacts the fundamental right. The Court, therefore, defers to the state’s policy choices and will not reevaluate the "wisdom" or "propriety" of the legislation. In privacy matters not related to abortion, "[s]tate legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part." Whalen v. Roe, 429 U.S. 589, 597 (1977) (patient-identification requirements in New York Controlled Substances Act neither impact reputation or independence of patients sufficiently to constitute invasion of right or liberty protected by fourteenth amendment).

In Roe v. Wade, the Court declared that "[w]here certain 'fundamental rights' are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest,' Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 298, 406 (1963)." 410 U.S. at 155. In all three of the cases relied on by the Court, however, the intrusion that triggered the strict standard of scrutiny was very substantial. In Kramer, the Court reviewed legislation that denied a citizen the right to vote. 395 U.S. at 627. In Shapiro, the Court reviewed classifications that penalized the exercise of the fundamental right. 394 U.S. at 634. In Sherbert, the Court emphasized that denying benefits to persons who practiced certain religious beliefs effectively penalized them for exercising their first amendment rights. 374 U.S. at 406.

Since Roe v. Wade, the Court continually required a significant intrusion upon fundamental rights before applying strict scrutiny. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (opinion for the Court written by Marshall, J., and joined by Brennan, Blackmun, White, JJ., and Burger, C.J.) ("[c]ritical examination" is appropriate when government classification "significantly interferes with the exercise of" fundamental right to marry); id. at 387 (rigorous judicial scrutiny appropriate when legislation "does interfere directly and substantially with the right to marry" and citizens "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental") (emphasis added); id. at 397 (Powell, J., concurring in judgment) ("the Court has yet to hold that all regulation touching upon marriage implicates a 'fundamental right' triggering the most ex-
Justice O’Connor’s test does not subject every state abortion regulation to the “compelling state interest” test and strict scrutiny. “Rather, the right [identified in Roe] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.”

If the impact of the regulation is not unduly burdensome, “then [the Court’s] . . . inquiry is limited to whether the state law bears ‘some rational relationship to legitimate state purposes.’” Justice O’Connor further defined what the Court had traditionally considered an undue burden: “The abortion cases demonstrate that an ‘undue burden’ has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision.”

Justice O’Connor’s “unduly burdensome” standard allows the states flexibility in drafting their abortion laws. Within Justice O’Connor’s “unduly burdensome” standard there is no differentiation by trimesters.

acting judicial scrutiny”); id. at 408 (Stevens, J., concurring in judgment) (state laws “may ‘significantly interfere with decisions to enter into the marital relationship.’ That kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences . . . .”); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (Powell, J., plurality opinion) (“the usual judicial deference” is unwarranted when the government “undertakes such intrusive regulation [of a fundamental protected right]”).

The Court has also required a significant intrusion upon the abortion right before it will apply heightened scrutiny in a limited number of instances. These instances occur in pre-Akron and abortion-funding cases. Roe, 410 U.S. at 156 (“statute’s infringement upon Roe’s rights”); Bolton, 410 U.S. at 192 (“unduly restrict the woman’s right of privacy”); id. at 199 (“impermissibly restricts the physician’s right”); id. at 198 (“unduly restrictive of the patient’s rights” and “substantial and irrational roadblocks”); id. at 199 (“unduly infringes on the physician’s right to practice”); Danforth, 428 U.S. 52, 66-67 (1976) (“unduly burdensome interference”); Maher, 432 U.S. 444, 473-476 (1977) (“the right protects the woman from unduly burdensome interference”); Bellotti II, 443 U.S. 622, 640 (1979) (opinion of Powell, J.) (the question the Court must answer is whether a statute “does not unduly burden the right to seek an abortion”). See generally Thornburgh, 476 U.S. 747, 829 (1986) (O’Connor, J., dissenting); Akron, 462 U.S. 416, 452-53, 462 n.8 (1983) (O’Connor, J., dissenting).

Justice O’Connor cited precedent demonstrating that the Court traditionally requires that a law substantially infringe upon a right before it will invoke heightened scrutiny:

The requirement that state interference “infringe substantially” or “heavily burden” a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context. In San Antonio Independent School District v. Rodriguez, we observed that we apply “strict judicial scrutiny” only when legislation may be said to have “‘deprived,’ ‘infringed,’ or ‘interfered’ with the free exercise of some fundamental person right or liberty.” If the impact . . . does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears “some rational relationship to legitimate state purposes.”

Id. (citations omitted).

Justice O’Connor also cited cases in the first amendment area as examples that the Court first requires the law “infringe substantially,” Gibson v. Florida Legislative Comm., 372 U.S. 559, 545 (1963), or that there is a “significant encroachment upon personal liberty,” Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), before it applies heightened scrutiny.

156 462 U.S. at 462 (O’Connor, J., dissenting).

157 Id. at 464. Justice Scalia severely criticized the notion of an “undue burden” in his concurring opinion in Webster. He stated that

Justice O’Connor would nevertheless uphold the law because it “does not impose an undue burden on a woman’s abortion decision.” This conclusion is supported by the observation that the required tests impose only a marginal cost on the abortion procedure, far less of an increase than the cost-doubling hospitalization requirement invalidated in Akron. The fact that the challenged regulation is less costly than what we struck down in Akron tells us only that we cannot decide the present case on the basis of that earlier decision. It does not tell us whether the present requirement is an “undue burden,” and I know of no basis for determining that this particular burden (or any other for that matter) is “due,”

Therefore, her approach does not require the states to promote certain state interests within defined trimesters of pregnancy. The state statute and its companion state objective are tested throughout the pregnancy. Thus, both the state interest in promoting maternal health and protecting potential life are considered compelling throughout the pregnancy.\(^ {158}\)

Justice O'Connor's "unduly burdensome" standard relieves the conflict that \emph{Roe} and its progeny created. The "unduly burdensome" standard does not employ the two judicial methods that helped create the conflict. First, the Court would no longer strictly scrutinize all abortion regulations; rather, the Court would reserve its highest level of scrutiny for regulations that unduly burden the woman's decision.\(^ {159}\) By not strictly scrutinizing all regulations, the Court allows the states to determine their own policy in the abortion area. Strict scrutiny necessarily entails a balancing of interests through which the Court replaces the state's policy choices with its own.\(^ {160}\) Thus, by not strictly scrutinizing all regulations, the Court will interfere less with states' policy choices.

By abandoning the \emph{per se} rule of strict scrutiny, the "unduly burdensome" standard leads the Court away from substantive due process.\(^ {161}\)

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\(^ {158}\) \emph{Akron}, 462 U.S. at 459-61 (O'Connor, J., dissenting).

\(^ {159}\) See supra note 153-54. Justice O'Connor defines an "undue burden" as those "situations involving absolute obstacles or severe limitations on the abortions decision." \emph{Akron}, 462 U.S. at 464 (O'Connor, J., dissenting). For example, she cites state abortion laws that prohibited all or nearly all abortions. She stated that in \emph{Roe}, the Court invalidated a Texas statute that criminalized all abortions except those necessary to save the life of the mother. In \emph{Danforth}, the Court invalidated a state prohibition of abortion by saline amniocentesis because the ban had "the effect of inhibiting... the vast majority of abortions after the first 12 weeks. The Court today acknowledges that the regulation in \emph{Danforth} effectively represented a complete prohibition on abortions in certain circumstances." \emph{Danforth}, the Court also invalidated state regulations requiring parental or spousal consent as a prerequisite to a first-trimester abortion because the consent requirements effectively and impermissibly delegated a "veto power" to parents and spouses during the first trimester of pregnancy.

\(^ {160}\) See supra note 10 & 147.

\(^ {161}\) The "unduly burdensome" standard would not produce the negative effects that have resulted from the Court's strict scrutiny. First, the Court would not play the role of super-legislature.
the second judicial method that helped create the conflict. Substantive due process doctrine allows the Court to balance competing interests in the abortion issue by judging the "wisdom" and "propriety" of the law. This process results in judicial opinions that reflect the justices' beliefs as to the correct solution to a problem and replaces those of the legislatures. Since Roe, this process preempted the states' ability to affect their interests in abortion and has added to the conflict over which institution, the Court or state legislatures, would have primary responsibility for controlling abortion. The "unduly burdensome" standard would eliminate these two judicial methods and relieve the conflict between the Court and the states.162

IV. Webster: A Break with the Past and a Door to the Future

Webster v. Reproductive Health Services163 is a transition in the Court's abortion jurisprudence. It signals the end of Roe's trimester framework and the Court's use of substantive due process in its abortion decisions. Webster, however, does not establish a new standard of review that the Court will apply in future abortion cases. Nonetheless, it marks the end of the era in which the Court strictly scrutinized all state abortion laws that impacted a woman's choice.

Webster presents the alternative standards of review that the Court may apply in future abortion cases. The plurality's standard determined whether the Missouri regulations "permissibly further[ed]"164 a legitimate state interest. That standard, however, is only adopted by a plurality.165 Justice O'Connor's concurring opinion reflected her "unduly burdensome" standard, which she espoused in her Akron and Thornburgh dissents.166 While a majority of the justices did not adopt Justice O'Connor's approach, the plurality made reference to the "unduly bur-

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The Court would not strictly scrutinize all abortion regulations and, therefore, not review the state's policy choices. This approach provides greater deference to state legislatures and increases their ability to draft legislation that withstands judicial review.

Second, the "unduly burdensome" standard does away with the trimester framework, allowing states to experiment with various responses to the abortion controversy. Third, this standard's deference to legislative judgment allows states to fine-tune their legislation to local opinion. This ability may help relieve the abortion controversy nationally and relieve the conflict between the Court and the states. Lastly, the standard is true to the principles of federalism and the horizontal separation of powers between state and federal government. The Court would return to its role as an interpreter of the Constitution and protector of individual rights under the "unduly burdensome" standard. It gives states primary responsibility for this social issue.

162 Justice O'Connor does not advocate completely deferring to the state legislature's judgement in the abortion area. It was argued in Akron that the state legislature should be able to define what constitutes an undue burden. 462 U.S. 416, 465 n.10 (O'Connor, J., dissenting). Justice O'Connor rejected this argument: "[t]he "unduly burdensome" standard is appropriate not because it incorporates deference to legislative judgement at the threshold stage of analysis, but rather because of the limited nature of the fundamental right that has been recognized in the abortion cases." Id.

164 Id. at 3057.
165 Chief Justice Rehnquist is joined by Justices White and Kennedy in parts II-D and III, dealing with the viability-testing provision. Id. at 3046. It is within this section that the plurality applies the "permissibly further[s]" standard. Id. at 3057, 3058.
166 See supra text accompanying notes 155-58.
densome" standard within its opinion.\textsuperscript{167} It would appear that Justice O'Connor's standard continues to be a viable alternative.\textsuperscript{168} Thus, \textit{Webster} represents a passage from the trimester framework and strict scrutiny of the \textit{Roe} era to a new, as yet, unknown standard. The Court will decide whether to adopt a modified rationality standard, as exemplified by the plurality's "impermissibly furthers" standard, or Justice O'Connor's "unduly burdensome" standard.

A. The Court Rejects the Role of Super-Legislature

\textit{Webster}'s plurality opinion is a marked change from the Court's opinions in \textit{Roe} and its progeny. The plurality's review of the Missouri law is restrained. It does not seek to find an antiabortion intent upon which to strike down the law.\textsuperscript{169} Rather than strictly scrutinizing the abortion regulations, as it had consistently done in prior abortion decisions, the Court upheld the Missouri regulations under a modified rationality standard. The Court also refused to reevaluate Missouri's policy decisions.

The Court faced the Missouri statute's four provisions regulating abortion. These provisions included: 1) the preamble; 2) the prohibition on using public facilities or employees to perform abortions; 3) the prohibition on publicly funding abortion counseling; and 4) the requirement that physicians conduct viability tests prior to performing certain abortions.\textsuperscript{170} It is insightful into the Court's new approach that it addressed these provisions "seriatim."\textsuperscript{171} The Court's distinct and separate review of each provision signals a departure from the past.\textsuperscript{172} The Court's prior opinions often looked to the antiabortion impact of the whole statute to find an impermissible burden on the woman's right to an abortion.\textsuperscript{173} The plurality begins its \textit{Webster} opinion by signaling that it will judge each

\begin{enumerate}
\item See \textit{Webster}, 109 S. Ct. at 3052 ("circumstance is more easily remedied and thus considered less burdensome") (emphasis added); \textit{id.} ("it is difficult to see how any procreational choice is burdened by the State's ban on the use of facilities or employees") (emphasis added).
\item Justice Blackmun also appeared to adopt the language of the "unduly burdensome" standard. \textit{See Webster}, 109 S. Ct. at 3074 ("decisions rest on this Court's reasoned and accurate judgment that . . . requirements unduly burdened the right of women to terminate a pregnancy . . . while substantially less restrictive regulations were not unduly burdensome . . . .") (emphasis added).
\item See supra notes 119-20 and accompanying text. \textit{See generally Akron}, 462 U.S. 416 (1983). This intent element was key in the Eighth Circuit's holding that the declaration that life begins at conception was unconstitutional, 851 F.2d 1071, 1075-76 (1988), that the restriction on the use of state resources to counsel or encourage abortion was unconstitutional, \textit{id.} at 1080, and that the prohibition against public employees performing or assisting abortions was unconstitutional. \textit{Id.} at 1013. The Supreme Court did not use this antiabortion-intent argument. \textit{Cf. supra} note 126.
\item 109 S. Ct. at 3049.
\item \textit{Id.} "Seriatim means to approach a group of issues "[s]everally; separately; individually; [or] one by one." \textit{Black's Law Dictionary} 1226 (5th ed. 1979).
\item See, e.g., \textit{Thornburgh}, 476 U.S. 747 (1986)(mandatory information about risks of abortion, possible availability of medical assistance and child support, and availability of printed matter concerning characteristics of fetus and organizations to assist with alternatives to abortion, and provisions regulating postviability abortions held unconstitutional); \textit{Akron}, 462 U.S. 416 (1983)(holding unconstitutional a city ordinance requiring physician to inform pregnant woman, before her consent to abortion, of state of development of fetus, risks of abortion, and availability of assistance from agencies; a 24-hour waiting period after consent; a requirement of hospitalization for all second-trimester abortions; a parental-consent requirements; a disposal-of-fetal-remains provision).
\item See supra text accompanying notes 119-32.
\end{enumerate}
provision independently and not aggregate their collective impact on a woman's decision.

1. Preamble

The plurality's opinion on the preamble's constitutionality breaks from the past because it narrowly reads the Court's abortion precedent and defers to the state's policy choices. The Missouri law's preamble stated "findings" that "'[t]he life of each human being begins at conception,' and that '[u]nborn children have protectable interests in life, health, and well-being.'" The preamble mandated that state law be "interpreted to provide unborn children with 'all the rights, privileges, and immunities available to other persons, citizens, and residents of this state,' subject to the Constitution" and Supreme Court precedent.

The Court rejected the Eighth Circuit's holding that the preamble violated the Court's dictum in \textit{Akron} that "'a state may not adopt one theory of when life begins to justify its regulation of abortions.'" The Court found that the court of appeals had applied the dictum too broadly. It said that the dictum in \textit{Akron} meant only that "a State could not 'justify' an abortion regulation otherwise invalid under \textit{Roe v. Wade} on the ground that it embodied the State's view about when life begins." The Court rejected the appellees argument that the preamble would be an operative part of the statute used to implement the other abortion regulations. Therefore, the preamble did not fall under \textit{Akron}'s dictum because it "does not by its terms regulate abortion or any other aspect of appellee's medical practice." The Court also rejected a second argument that the preamble could proscribe certain forms of contraception that act upon a fertilized egg. Here again, the Court found that the preamble had not been applied in such a manner. Therefore, the Court would not address the preamble's constitutionality based on its potential to restrict the availability of contraceptives.

The Court's review of the preamble retreated from prior decisions that expressed disdain for state legislation embodying an antiabortion objective. The Court emphasized that \textit{Roe} "'implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion . . . and [that] [t]he preamble can be read simply to express that sort of value judgment.'" \textit{Webster}'s deference to state policy favoring childbirth over abortion is a break from the Court's opinions in \textit{Akron} and

\begin{itemize}
  \item[174] 109 S. Ct. at 3049.
  \item[175] Id.
  \item[176] Id.
  \item[177] Id. at 3050.
  \item[178] Id.
  \item[179] Id. Justice Blackmun argued that the state could use the preamble to prohibit the use of certain contraceptives: "because the preamble defines fetal life as beginning upon 'the fertilization of the ovum of a female by a sperm of a male' the provision also unconstitutionally burdens the use of contraceptive devices, such as the IUD and the 'morning after' pill, which may operate to prevent pregnancy only after conception as defined in the statute." \textit{Id.} at 3068 n.1 (Blackmun, J., dissenting) (citation omitted).
  \item[180] See supra text accompanying notes 128-31.
  \item[181] 109 S. Ct. at 3050.
\end{itemize}
Thornburgh in which such an intent triggered the Court's heightened scrutiny.

Justice O'Connor addressed the preamble in her concurring opinion. She agreed with the plurality's decision that the preamble does not "affect a woman's decision to have an abortion" and, therefore, does not violate the dictum of Akron.\textsuperscript{182} As to the argument that the state may use the preamble to prevent certain post-fertilization contraceptives, Justice O'Connor again agreed that until the state uses the preamble in such a manner, the Court should not pass on such a hypothetical application. Justice O'Connor intimated that such an application would be unconstitutional under Griswold.\textsuperscript{183}

Justice Blackmun, joined by Justices Brennan and Marshall, dissented from the plurality's opinion and found that the preamble violated the Court's abortion precedent. Justice Blackmun approved both arguments in favor of striking down the preamble. First, he found that the preamble would be used to "regulate abortion." The state intended it to be a "general principle that would fill in whatever interstices [that] may be present in existing abortion precedents."\textsuperscript{184} Therefore, it violated the dictum of Akron, as interpreted by the plurality, that a "State could not 'justify' an abortion regulation otherwise invalid under Roe v. Wade on the ground that it embodied the State's view about when life begins."\textsuperscript{185} Second, Justice Blackmun found that the preamble "unconstitutionally burden[ed] the use of contraceptive devices, . . . which may operate to prevent pregnancy only after conception. . . ."\textsuperscript{186}

The plurality's opinion and Justice Blackmun's dissenting opinion represent the new and old approach respectively in the Court's abortion jurisprudence. The opinions differ on the deference given to the state legislature's policies. The plurality construed the preamble narrowly and did not strain to determine, prematurely, its constitutionality. In doing so, the plurality allowed the state to make policy encouraging childbirth over abortion because there was no evidence that such a policy implicated a woman's abortion decision. In contrast, Justice Blackmun's dissent strikes down the preamble because the state could potentially apply it to restrict contraceptives. Justice Blackmun's opinion would prevent the state from making a legislative policy choice. The plurality's deferential approach breaks away from the strict scrutiny with which the dissent and prior abortion decisions reviewed abortion regulations.

\textsuperscript{182} Id. at 3059.

\textsuperscript{183} Justice O'Connor discussed whether the preamble conflicted with Griswold: "It may be correct that the use of postfertilization contraceptive devices is constitutionally protected by Griswold and its progeny but, as with a woman's abortion decision, nothing in the record or the opinions below indicates that the preamble will affect a woman's decision to practice contraception." Id.

Justice O'Connor's opinion is more concerned with the integrity of the general right to privacy than is the plurality. By affirmatively citing Griswold as a limit on the state's ability to regulate an individual's right to practice contraception, Justice O'Connor evidenced her support for a general right to privacy. This approach follows her "unduly burdensome" standard, which recognizes the right to privacy and a woman's right to choose an abortion as part of that right.

\textsuperscript{184} Id. at 3068 n.1.

\textsuperscript{185} Id. at 3050.

\textsuperscript{186} Id.
2. Prohibiting the Use of Public Facilities or Employees to Perform Abortions

A majority of the Webster Court upheld the Missouri provision that prohibited spending public funds to assist or perform an abortion, not necessary to save the life of the mother.\textsuperscript{187} The statute also applied the same restriction on using public facilities and public employees acting "within the scope of [their] employment."\textsuperscript{188} The Court reversed the district court and the court of appeals which had struck down the restrictions.\textsuperscript{189}

In reversing the court of appeals, the Court relied on its reasoning in prior abortion-funding cases, that "the State’s decision here to use public facilities and staff to encourage childbirth over abortion ‘places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.’"\textsuperscript{190} The Court found that the Missouri funding restriction was less burdensome on a woman than restrictions in prior funding cases.\textsuperscript{191} Once again, the plurality opinion deferred to the state's

\textsuperscript{187} See Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1077 n.9 (8th Cir. 1988)(text of Missouri Act prohibiting expenditure of public funds for abortion).

\textsuperscript{188} 851 F.2d at 1077 n.9.

\textsuperscript{189} The district court held that the restriction on the use of public funds or public employees to perform or assist abortions violated the eighth amendment. Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 429 (W.D. Mo. 1987). The state could use the provision to prevent the use of public money or employees from transporting female prisoners for elective abortions. \textit{Id.} The court found this possible application to be cruel and unusual punishment. \textit{Id.}

The court also found that the restriction on using public facilities and employees differed from a restriction on using public funds. The court distinguished the Supreme Court’s decision in Poelker v. Doe, 432 U.S. 519 (1977), on that distinction. Poelker upheld a St. Louis policy prohibiting a public hospital from performing nontherapeutic abortions. \textit{Id.} at 428. The district court interpreted the policy upheld in Poelker as a cost-avoidance measure and distinguished it from the Missouri provision which prohibited the use of public facilities even if the patient paid for the services. \textit{Id.} The court buttressed this distinction with the Eighth Circuit's opinion in Nyberg v. City of Virginia, 667 F.2d 754 (8th Cir. 1982), which distinguished a prohibition against using funds from broader restrictions that have a "secondary effect" of restricting a woman's access to abortion facilities that she is willing to pay for. 662 F. Supp. at 428.

The court of appeals distinguished Supreme Court precedent that upheld public-funding prohibitions. The court of appeals "reasoned that the ban on the use of public facilities 'could prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance.'" Webster, 109 S. Ct. at 3051-52 (citation omitted). The court found that "'[t]o prevent access to a public facility does more than demonstrate a political choice in favor of childbirth; it clearly narrows and in some cases forecloses the availability of abortion to women.'" \textit{Id.} at 3051.

\textsuperscript{190} 109 S. Ct. at 3052.

\textsuperscript{191} The Missouri restriction that prevented women from obtaining abortions in a public hospital was "less burdensome, than indigence, [the burden facing women in prior abortion-funding cases]
'value judgment favoring childbirth over abortion' and its means of implementing that choice. In this section of its opinion, the plurality refused to impose a different policy choice on Missouri because it opted to promote childbirth. The Court rejected the court of appeals' argument that the Missouri law differed from prior abortion-funding cases because "'all of the public facility's costs in providing abortion services are recouped when the patient pays.' " The Court said that "'[n]othing in the Constitution requires States to enter or remain in the business of performing abortions. . . . [O]ur precedent] support[s] the view that the State need not commit any resources to facilitating abortions, even if it can turn a profit by doing so. . . .' " Justice O'Connor wrote a concurring opinion to the plurality's public-funding restriction section. She agreed with the plurality that the constitutionality of the provisions "follows directly" from the Court's prior abortion-funding opinions. Once again, Justice O'Connor was more cautious than the plurality, and she warned that there may be an unconstitutional application of the ban on using public facilities. Such a ban may be unconstitutional if a state were to apply the ban broadly to prevent private hospitals from performing abortions that use public water, sewage lines, or hospitals that lease publicly-owned equipment or land. Justice O'Connor, however, left this decision for a future case when, and if, the state applied the ban in such a manner. Justice Blackmun, writing for Justices Brennan and Marshall, dissented from the Court's holding regarding the ban on public resources for nontherapeutic abortions. He argued that the Court's decision should not flow from its prior abortion-funding cases. First, he cited the strong dissents in those cases. Second, he distinguished the Missouri law from those in prior cases because Missouri had not simply "withdrawn from the business of abortion, but had taken affirmative steps to assure that abortions are not performed by private physicians in private institutions." Justice Blackmun argued that Missouri's public-funding restriction went beyond a means of favoring childbirth over abortion to impose "the full force of [the state's] economic power and control over essential facilities" to prevent women from exercising their constitutional right to choose an abortion. Justice Blackmun rejected the argument that the ban left a woman with the same choices as if the state had not chosen to operate public hospitals; rather "the public facility ban which 'may make it difficult — and in some cases, perhaps, impossible . . . to have abortions' without public funding."
leaves the pregnant woman with far fewer choices, or, for those too sick or too poor to travel, perhaps no choices at all.”

The Webster plurality and dissenting opinions approached Missouri’s statute differently. The plurality deferred to the state’s determination that public-funding restrictions are an appropriate means to implement its policy favoring childbirth over abortion. The plurality did not strain to find prematurely an unconstitutional application of the restriction. The dissent, however, strictly scrutinized the ban, finding that the state could potentially apply it in ways that violate the Court’s precedent. The dissenting opinion overreaches. It would strike down the statute because it could be unconstitutionally applied. This approach frustrates the state’s attempt to pass legislation that will withstand judicial review because the Court does not presume good faith on the part of the legislature. Rather, the Court strikes down the legislation because it presumes the legislature passed the law in bad faith, to frustrate the Court’s abortion precedent.

3. Prohibiting Publicly-Funded Abortion Counseling

The Missouri Act contained three provisions relating to “‘encouraging or counseling a woman to have an abortion not necessary to save her life.’” It prohibited using public funds for this purpose, prohibited public employees from engaging in such speech while within the scope of their employment, and prohibited such speech in public facilities. Both the district court and the court of appeals struck down these three provisions. Missouri appealed only the decision on the public-funding provision.

The first issue facing the Court was whether the provision prohibited conduct of all public employees within all public facilities, as the appellants argued, or whether it was simply an “instruction to the State’s fiscal officers not to allocate funds for abortion counseling,” as the state argued. The Court adopted the state’s interpretation. As a result, the appellants contended that they were no longer adversely affected by the provision and that there was no longer a case or controversy.

199 Id.
200 The district court struck down the provisions because they were unconstitutionally vague and they interfered with the physician's discretion to give advice to his or her patients regarding abortion. The court found that these effects presented a significant barrier to a “woman's right to consult with her physician and exercise her freedom of choice.” Reproductive Health Servs. v. Webster, 662 F. Supp. 407, 427 (W.D. Mo. 1987).

The court also rejected the state's interpretation of the statute as applying only to state and local officials responsible for expending public funds. The court stated that the language “certainly is broad enough” to include “anyone who is paid from” public funds. Id. at 425.

The court of appeals affirmed the district court judgment. The court agreed that the statute was vague and implicated constitutional rights of speech and abortion. Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1077-79 (1988). The court also found that the ban on counseling and encouraging was an unconstitutional obstacle to the woman's freedom to make an informed choice whether to have an abortion. The provision was not a legitimate means of implementing the state policy favoring childbirth because it prevented women “from making a fully informed and intelligent choice.” Id. at 1080.

201 Id. at 3053.
202 Id.
203 Id.
Court thus directed the court of appeals to vacate the district court judgment and dismissed the appellees' claim. Both Justice O'Connor, concurring, and Justice Blackmun, dissenting, agreed with the plurality, unless the state later interpreted the provision to differ from the one accepted by the Court. 204

4. Viability-Testing Requirement

The viability-testing provision presented the Court with the most direct challenge to Roe and its trimester framework. Within this portion of the plurality's opinion, Chief Justice Rehnquist severely criticized the trimester approach. The plurality found a conflict between the testing requirement and prior abortion cases. Instead of striking down the Missouri provision, the plurality used this opportunity to criticize Roe.

The viability-testing provision provided that:

Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinary skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determinations of viability in the medical record of the mother. 205

The provision could be interpreted in different ways. Thus, the Court's first question was whether the provision required doctors to perform tests to determine gestational age, fetal weight, and lung maturity, as the district court and court of appeals found; or whether the provision required the doctor to make only those tests that are useful in making the subsidiary findings as to viability. The plurality found that the lower courts committed "plain error" in their statutory interpretation and violated the "well-accepted canons of statutory interpretation" practiced in Missouri, interpreting the second sentence to mandate the specified tests. The Supreme Court, however, determined that the viability-testing provision's second sentence "require[d] only those tests that are useful to making subsidiary findings as to viability." 206 The plurality argued that to interpret the second sentence to require such tests in all circum-

204 Id. at 3060 (O'Connor, J., concurring).
206 109 S. Ct. at 3055.
stances, "including when the physician's reasonable professional judgment indicates that the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus, . . . would conflict with the first sentence's requirement that a physician apply his reasonable professional skill and judgment." 207

After interpreting the provision as requiring only those tests that are useful in determining viability, the plurality proceeded through a step-by-step analysis of the viability-testing provision. The plurality's analysis undercut the Roe trimester framework, but purported to leave the holding intact. 208 The plurality first acknowledged that the state intended the viability-testing provision to promote its interest in potential life. 209 The plurality acknowledged that Roe grants a state a compelling interest in potential life, which becomes compelling upon viability. The plurality next illustrated the conflict between the "method" for determining viability, provided by the Missouri provision, and the Court's prior decision in Coluatti v. Franklin. 210 Coluatti held that determining viability was a "matter for the judgment of the responsible attending physician." 211 "Neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other factor — as the determinant of when the State has a compelling interest in the life or health of the fetus." 212 The plurality found a conflict between Coluatti and the Missouri provision. It found "[t]o the extent that [the Missouri provision] regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination of whether a particular fetus is viable." 213

After determining that the Missouri provision conflicted with the Court's precedent, the plurality evaluated Roe's trimester framework instead of simply striking down the provision on the basis of its Coluatti holding.

We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in Roe has resulted in subsequent cases like Coluatti and Akron making constitutional law in this area a virtual Procrustean bed. 214 The plurality proceeded to lay out reasons why stare decisis should not prevent it from reevaluating the Roe trimester framework. First, the plurality noted that stare decisis has less force when the Court is faced with constitutional cases: "[S]ave for constitutional amendments, this Court is

207 Id.
208 The plurality declined to explicitly overturn Roe: "[t]his case . . . affords us no occasion to revisit the holding of Roe, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow Roe in succeeding cases." Id. at 3058.
209 Id. at 3055.
211 109 S. Ct. at 3056, citing Coluatti, 439 U.S. at 396.
212 Id., citing Coluatti, 439 U.S. at 388-89.
213 Id.
214 Id.
the only body to make needed changes.”\textsuperscript{215} Second, the Roe framework’s intricate set of rules do not fit the traditional “notion of a Constitution cast in general terms . . . .”\textsuperscript{216} The plurality questioned the trimester approach’s validity because none of its components, viability and trimesters of pregnancy, appear in the text of the Constitution. Because the components of the Roe framework are thus not limited by the Constitution, the Court’s opinions have yielded a “web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.”\textsuperscript{217} Third, Roe’s determination is arbitrary that viability is the point at which a state’s interest in potential life becomes compelling. The plurality cited Justice O’Connor’s Thornburgh dissent, with approval, proposing that “the State’s interest [in potential life], if compelling after viability, is equally compelling before viability.”\textsuperscript{218} The plurality has lost faith in the trimester framework as a method of constitutional analysis, but it stopped short of overturning Roe.\textsuperscript{219}

In place of the trimester framework, the plurality applied a modified rationality standard. The viability-testing provisions “permissibly further[ed] the State’s interest in protecting potential human life”\textsuperscript{220} and, therefore, the plurality upheld the provision. Even though the plurality acknowledged that the provision would violate the trimester approach,\textsuperscript{221} it applied a rationality standard to uphold the provision. By not striking down the provision on the basis of Roe, the plurality clearly indicated that it will no longer apply the trimester framework.

Responding to Justice Blackmun’s dissent, the plurality described the problems that Roe’s trimester approach has engendered.\textsuperscript{222} The plurality, first, distinguished Roe from Griswold. Unlike Roe, Griswold did not attempt to erect a “framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply.”\textsuperscript{223} Then the plurality recognized the distinction between establishing a fundamental right within the Constitution and announcing a framework within which states may regulate that right.\textsuperscript{224} By announcing
a framework in Roe, the Court "sought to deal with areas of medical practice traditionally subject to state regulation."\footnote{225} Furthermore, the Court overstepped its capabilities by attempting to resolve any dispute regarding abortion by "balanc[ing] once and for all" the competing state interests.\footnote{226} As a result, the Court deprived the states of their power to fashion a response to the abortion issue and prolonged the conflict by its inability to fashion a workable national solution. This experience, the plurality stated, "suggests . . . that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between" the varying descriptions of Roe’s fundamental right that different justices have espoused.\footnote{227} The plurality demonstrated through its language that it is no longer willing to take on the intricate task of strictly scrutinizing each abortion regulation. It will defer to a state’s choice as to which means further a particular end. What is uncertain at this juncture is what standard the Court will apply in the future.

Justice O’Connor’s opinion is more restrained in its criticism of Roe than the plurality. Justice O’Connor concurred only with the plurality’s judgment in respect to the viability-testing provision. She did not see a need to reevaluate Roe in deciding the constitutionality of the Missouri law. Her concurring opinion demonstrated that she continues to adhere to the “unduly burdensome” standard. Although her concurrence is not an explicit endorsement of that standard, she reviewed the viability-testing provision under that approach.\footnote{228}

Justice O’Connor began her opinion by agreeing with the plurality’s interpretation of the viability-testing provision’s second sentence. She agreed that it requires "‘only those tests that are useful to making subsidiary findings as to viability.’"\footnote{229} She tempered the plurality’s interpretation by adding that the second sentence only requires a physician to perform those exams that are “not imprudent or careless.”\footnote{230} Unlike the plurality, Justice O’Connor did not find that this interpretation conflicted with any of the Court’s abortion precedent and “[t]herefore, there is no necessity to reexamine the constitutional validity of Roe v. Wade . . .”\footnote{231}

Justice O’Connor viewed the regulation as a rational means of promoting the state’s interest in potential life when viability is possible.\footnote{232} First, Justice O’Connor interpreted the Court’s opinion in Thornburgh as supporting the view that a state’s interest in potential life “does not dif-
fer[ ] depending on whether it seeks to further that interest post viability or when viability is possible. . . ." Therefore, the viability-testing provision did not contradict Roe or its progeny because it regulated the state's interest in potential life when viability is possible.

Second, Justice O'Connor found that the provision did not conflict with the holding in Colautti that the state may not proclaim the elements used in determining viability. As interpreted, the "substantial findings as to viability" required by Missouri did not substitute for the physician's judgment. Therefore, according to Justice O'Connor, the Missouri law left viability as the "critical point" in determining the state's interest in potential life and did not conflict with Colautti.

Lastly, Justice O'Connor addressed the plurality's argument that the viability-testing provision may impermissibly add to the costs of a second-trimester abortion and therefore violate Akron. Within this portion of her opinion, Justice O'Connor most clearly applied the "unduly burdensome" standard, finding the provision constitutional. Justice O'Connor noted that she continues to consider the Roe trimester frame-

233 109 S. Ct. at 3062. Thornburgh, 476 U.S. 747 (1986), involved, inter alia, a Pennsylvania statute requiring a "second physician be present during an abortion performed 'when viability is possible.'" Id. at 769-70 (emphasis added). The Court invalidated the regulation because it lacked a medical-emergency exception. Id. at 770-71. Justice O'Connor construed this opinion, in which the justices did not differentiate between postviability and possible viable, to mean that the "nine Members of the Thornburgh Court appear to have agreed that it is not constitutionally impermissible for the state to enact regulations designed to protect the state's interest in potential life when viability is possible." 109 S. Ct. at 3062.

234 Justice Scalia severely criticized Justice O'Connor's Webster opinion in which she reconciled the viability-testing provision with the Court's prior viability decisions. In particular, he criticized the notion of "potential viability":

Similarly irrational is the new concept that Justice O'Connor introduces into the law in order to achieve her result, the notion of a State's "interest in potential life when viability is possible." Since "viability" means the mere possibility (not the certainty) of survivability outside the womb, "possible viability" must mean the possibility of a possibility of survivability outside the womb. Perhaps our next opinion will expand the third trimester into the second even further, by approving state action designed to take account of "the chance of possible viability."

109 S. Ct. at 3066 n* (Scalia, J., concurring).

235 This portion of Justice O'Connor's Webster opinion indicates she is unwilling to overturn Roe. Her opinion did not find a conflict between Missouri's viability-testing provision and Roe's holding that viability is the point at which the state's interest in potential life becomes compelling. If Justice O'Connor had wanted to overturn Roe, then she could have found a conflict or reiterated her argument supporting the "unduly burdensome" standard. Both avenues could have led her to possibly reconsider Roe. Justice O'Connor's restrained approach illustrates that, although the Court is in a transition away from Roe, none of the possible alternatives to the Roe framework have the support of a majority of the justices.

236 A provision of the Ohio law in Akron required that all second-trimester abortions be performed in a fully-licensed hospital. 469 U.S. 416 (1983). The Akron majority found this requirement imposed "a heavy, and unnecessary, burden" on the woman's decision whether to have an abortion. Id. at 438. The regulation would double the cost of 'women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure.'" Id. at 438.

In determining the scope of the "unduly burdensome" standard, it is difficult to determine Justice O'Connor's position on the Akron hospitalization requirement. She argued that it did not create an undue burden in her Akron dissent, but cited it as an example of an undue burden in her Webster concurrence. One may infer that she now considers the Akron requirement an undue burden. In comparison, Justice O'Connor found that the viability-testing provision in Webster was not an undue burden because "the cost of examinations and tests that could usefully and prudently be performed when a woman is 20-24 weeks pregnant to determine whether the fetus is viable would only marginally, if at all, increase the cost of an abortion." 109 S. Ct. at 3063.
work "problematic." In its place, she would apply the "unduly burdensome" standard, which provides "that, previability, 'a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion.'" Applying this standard to the viability-testing provision, she found that "requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision." These tests would only "marginally ... increase the cost of an abortion" and are appropriate to further the state's interest in determining viability. Because the provision did not impose an undue burden on the woman's decision, Justice O'Connor upheld the regulation as a rational means of furthering the state's interest in potential life.

Justice Blackmun dissented, joined by Justices Marshall and Brennan, from the plurality's viability-testing opinion. Justice Blackmun accused the plurality of creating a constitutional crisis between the Missouri provision and Roe's trimester framework where none existed. Justice Blackmun believed that such action was irresponsible and dangerous to the women who relied on the fundamental right created in Roe. It also undercut the Court's credibility. He argued that the plurality's "permissibly furthers" standard is a disguised rationality standard that would take the nation's abortion laws back to their pre-Roe standard.

Justice Blackmun criticized the plurality's opinion as "aggressive misreading" of the statute and a "wooden application of the Roe framework." In Justice Blackmun's view, the Court should have adhered to its policy of deferring to a lower courts' interpretation of local law. The statute would thus require that "the physician ... undertake whatever tests are necessary to determine gestational age, weight, and lung maturity, regardless of whether these tests are necessary to a finding of viability." Under this interpretation, the provision would not pass even a rationality standard because the tests have "no rational relation to the State's interest in protecting fetal life." It was simply "an arbitrary

237 109 S. Ct. at 3063.
238 Id., citing Akron, 462 U.S. at 453. Here again, Justice O'Connor uses an example of the Court adopting the "unduly burdensome" standard limited to regulations that apply previability. For a discussion of whether this addition alters the standard, see supra note 16.
239 109 S. Ct. at 3063.
240 Id.
241 Id. at 3070 (Blackmun, J., dissenting).
242 Justice Blackmun stated that the plurality, by implicitly overturning the Roe framework and by hinting that it will explicitly overturn Roe in the future, is undermining the faith the public has in the Court as an institution: "I fear for the integrity of, and public esteem for, this Court." Id. at 3067.
243 Id. at 3069.
244 Id. at 3070.
245 Id. The provision could be construed to mandate amniocentesis at 20 weeks which would pose significant health risks to the fetus and mother. Id. at n.3.
imposition of discomfort, risk, and expense” on the woman’s decision that did not relate to any legitimate state interest.246

As further evidence that the plurality contrived a “constitutional crisis,” Justice Blackmun argued, in accord with Justice O’Connor, that the plurality’s interpretation of the viability-testing provision did not conflict with Roe or its progeny.247 Justice Blackmun said that, under Roe, a state may affect its interest in potential life by prescribing such viability tests. These tests were a valid means of promoting that interest, ensuring that “no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age . . . .” 248 Thus, according to Justice Blackmun, the plurality disregarded “traditional canons of construction and judicial forbearance” to create a constitutional conflict that allowed them to reevaluate the trimester approach.249

Justice Blackmun then addressed the plurality’s reasons for finding that Roe’s trimester framework is “‘unsound in principle and unworkable in practice’.” 250 (1) the key elements of the trimester approach do not appear in the text of the Constitution; (2) the Court’s abortion decisions under Roe resemble a regulatory code rather than a body of constitutional doctrine; and (3) the state’s interest in potential life should be compelling throughout the pregnancy.251

In response to the first criticism, Justice Blackmun accused the plurality of skirting the main issue: “whether and to what extent . . . [the] right to privacy extends to matters of childbearing and family life, including abortion. . . .” 252 Instead of addressing whether the fundamental right in Roe is justifiably found in the Constitution, the plurality criticized Roe’s framework because the “Key elements” of the trimester framework are not found in the text of the Constitution. Justice Blackmun argued that under the plurality’s approach “countless constitutional doctrines”253 would fail.254 Roe’s trimester framework is an appropriate measure which the Court must fashion. It helps define a constitutional

246 Id.
247 Id. at 3070-71. Justice Blackmun agreed with Justice O’Connor’s concurring opinion finding that the viability-testing provision did not conflict with the Court’s abortion precedent. Id. at 3071 n.6. The provision, as construed by the plurality, did not conflict with Colautti because it “does nothing to remove the determination of viability from the purview of the attending physician . . . .” Id. Furthermore, the provision did not violate Akron because the regulation was not “unnecessary;” it was “necessary to the effectuation of the State’s compelling interest in the potential human life of viable fetuses . . . .” Id.
249 109 S. Ct. at 1071.
250 Id., citing Webster, 109 S. Ct. at 3056.
251 Id. at 3072.
252 Id.
253 Id.
254 Id. Justice Blackmun expounded on the various constitutional doctrines that he argued would be unconstitutional under the plurality’s approach:

The Constitution makes no mention . . . of the First Amendment’s “actual malice” standard for proving certain libels . . . or . . . the standard for determining when speech is obscene. Similarly, the Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause.

Id. at 3072-73.
right’s scope by balancing individual rights against governmental interests. “Fashioning such accommodation between individual rights and the legitimate interests of government ... lies at the very heart of constitutional adjudication.”

Justice Blackmun’s analysis is correct. The Court will fashion “judge-made methods” to evaluate the competing interests of individual rights and government interests. The Court is, however, reluctant to fashion such doctrine when the underlying right is not embodied in the text of the Constitution. For example, regarding freedom of speech, the Constitution contains its most clear and explicit language. The Court, therefore, is confident in developing doctrine to weigh the competing interests of individual freedom and government regulation of free speech because it has explicit constitutional support to do so. In the privacy area, however, Roe established a right to abortion from within the “penumbras” of the Constitution. The Court has become increasingly uneasy fashioning intricate “judge-made methods” for evaluating the competing rights that Roe recognized because of Roe’s nontextual foundation.

Justice Blackmun took issue with the plurality determining that the trimester framework was invalid because the state’s interest in potential life is present throughout the pregnancy and not only after viability. Justice Blackmun criticized the plurality’s lack of reasoning and described it as “’it-is-so-because-we-say-so’ jurisprudence.” Justice Blackmun provided a detailed analysis of the reasoning behind viability being the point at which the state’s interest becomes compelling. “The viability line reflects the biological facts and truths of fetal development,” and justifies the trimester approach and its recognition that viability is the logical point after which the state may protect the fetus. While Justice Blackmun’s reasons supporting the viability line may appear more intellectually satisfying than the plurality’s, the real issue is not the strength of the various justices’ reasoning, but rather who should undertake that reasoning process: the Court or state legislatures. With regard to this issue, the Webster plurality is not willing to maintain and fine tune a system that strictly scrutinizes state abortion regulation. It will not engage in the debate over the appropriate way to balance the competing interests in this area. Justice Blackmun feels, however, that the Court should continue to strictly scrutinize state abortion statutes by balancing competing interests and determining which abortion regulations are justified. Webster retreats

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255 Id. at 3073.
257 Justice Blackmun’s argument responding to the plurality’s criticism of Roe — that the decisions under Roe resemble a regulatory code rather than a body of constitutional doctrine — parallels his argument refuting the criticism that the key elements of the trimester approach do not appear in the text of the Constitution. Justice Blackmun argued that as a result of the plurality’s approach the Court “would have to abandon vast areas of our constitutional jurisprudence.” 109 S. Ct. at 3073, 3073-75 (Blackmun, J., dissenting).
258 Id. at 3075.
259 Id.
260 Id.
from the Court's active role in *Roe* and its progeny to a position in which the Court gives greater deference to state legislative responses to abortion. This movement will relieve many of the negative effects of the Court's adherence to the substantive due process approach. It will also mitigate the conflict between the Court and the states.\(^{261}\)

V. Conclusion: The Future of the Abortion-Regulation Battle

In *Roe*, the Court initially sought to protect the woman's freedom to choose whether to terminate her pregnancy. It struck down the Texas statute which prohibited abortions except when necessary to save the woman's life.\(^{262}\) In doing so, the Court was within its role as protector and interpreter of a fundamental right to extend the right to privacy to include a woman's abortion decision. The Court justifiably concluded that the Texas statute unconstitutionally infringed upon the woman's right to privacy\(^ {263}\) because it clearly negated any freedom of choice a woman had to choose an abortion.

In *Roe*, the Court went beyond simply protecting the woman's right and proposed a framework within which the states could exercise their right to regulate abortion. By adopting the trimester approach the Court advanced its own judgment regarding the balance of competing state interests in the abortion area. *Roe v. Wade* and the Court's trimester framework constituted judicial legislation.

The present conflict between the Supreme Court and the states over abortion regulation will continue under the *Roe v. Wade* analysis. The Court appears to be in transition, however, as evidenced by its *Webster* decision, away from the jurisprudence of *Roe* and its progeny that helped create the conflict between itself and the state legislatures. It is clear that the dissenting justices throughout the *Roe* line of cases became uncomfortable with the majority's *per se* strict scrutiny of state abortion regulations. It was not so much the substantive abortion issues that were spurring the dissenters to call for a reexamination of *Roe*. Rather, it was

\(^{261}\) For a discussion of the possible effects of the plurality's standard of review according to Justice Blackmun, see *id.* at 3076-77. Justice Blackmun argued that the plurality's "permissibly furthers" standard would abolish abortion because "the State's interest in potential life is compelling as of the moment of conception, and is therefore served only if abortion is abolished, [and therefore] every hindrance to a woman's ability to obtain an abortion must be 'permissible.'" *Id.* at 3076. Justice Blackmun fears that the plurality's standard does not protect the woman's right to an abortion because "the more severe the hindrance, the more effectively (and permissibly) the State's interest would be furthered. A tax on abortions or a criminal prohibition would both satisfy the plurality's standard. . . ." *Id.* at 3076.

Justice Blackmun's argument illustrates the implications of the Court's choice as to which standard it will apply to abortion regulations: the "unduly burdensome" standard or a rationality standard. The "unduly burdensome" standard departs less radically from *Roe* than does the rationality standard; it retains heightened constitutional protection for a woman's right to abortion. This approach may be preferable for its moderation; it does not completely reverse the Court's abortion jurisprudence and therefore may not create a backlash from supporters of *Roe* and a woman's right to abortion. The "unduly burdensome" standard can be viewed as a compromise to the conflict between the Court and the state legislatures.


\(^{263}\) *Id.* at 164-66.
the role that the Court had chosen to play. The present conflict has shown that the Court is ill-suited to strictly scrutinize state abortion legislation to determine its “wisdom” and “propriety.” Until the Court retreats from its stance, the ongoing conflict with the states over regulating abortion will continue.

*Webster* contains two possible approaches for the Court to adopt in the future. First, the Court could return to the pre-*Roe* era by adopting the plurality’s “modified rationality” standard. Second, the Court could apply the “unduly burdensome” standard articulated in Justice O’Connor’s *Akron* dissent and applied in her *Webster* concurrence. The Supreme Court should adopt Justice O’Connor’s “unduly burdensome” standard. This standard insures a woman’s fundamental right to abortion, but allows states to advance their legitimate maternal health and potential life interests. Justice O’Connor’s position does not require that the Court abandon the woman’s right to an abortion found in *Roe*. It simply requires that the Court treat the right under the “unduly burdensome” standard, its traditional fundamental rights analysis. This analysis defers to state policy and provides the states with the freedom to further their legitimate interests, without having to satisfy the Court’s demanding compelling state interest test for every abortion statute.

The “unduly burdensome” standard will not allow a state to regulate abortion into nonexistence. The standard requires courts to determine whether the regulations present an “absolute obstacle [ ] or severe limitation[ ] on the abortion decision.” If so, the court must then examine the regulation under the compelling state interest standard. The court can uphold the regulation only if it reasonably relates to a compelling state interest, and is narrowly drawn to affect only that interest. Unlike the Court’s previous review standard, this framework does not frustrate the state’s legislative process. This approach balances

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264 The Court may reacquire the political capital that it may have lost through fashioning the extensive abortion right if it adopts the “unduly burdensome” standard. Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977), argued that the Court loses legitimacy when it creates rights that have no roots in the Constitution:

*The Judiciary . . . is the 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 even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappears in the conflict between the Executive and the Judiciary in the 1930s and 1940s, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.*

*See, e.g., Whalen v. Roe, 429 U.S. 589, 597 (1977)(“The holding in *Lochner* has been implicitly rejected many times. State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary . . . .”).

265 Historically, the Court has gone through periods of strictly scrutinizing laws under the substantive due process doctrine only to retreat under federal or state pressure. *See supra* notes 10 & 147.

266 *See supra* notes 153-54.


268 *Id.* at 462. *See supra* note 156.

269 *Id.*
the woman's fundamental right with legitimate state interests, and therefore, relieves the present conflict between the Court and state legislatures over the permissible extent of abortion regulation.

David J. Zampa