NOTE

JUDICIAL RESTRAINT AND THE NON-DECISION IN *WEBSTER v. REPRODUCTIVE HEALTH SERVICES*

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I. INTRODUCTION

In July 1989, the American public anticipated what was billed as a milestone in the life of one of its most bitter social controversies: the right of a woman to terminate her pregnancy in abortion. Largely taken from the reach of the democratic process in 1973 by the Supreme Court decision in *Roe v. Wade*,[1] government regulation of abortion remained primarily a matter for judicial control until the appointment of Justice Anthony Kennedy brought about the strongest likelihood to date that the abortion issue would be returned to the fifty state legislatures.[2] It appeared the "test case" would be a decision by the Eighth Circuit finding that a Missouri law unconstitutionally restricted the abortion right.[3] As the court prepared to hear argu-

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1. 410 U.S. 113 (1973). Although *Roe* allowed for the possibility of state regulation of the abortion procedure, the vast majority of potential regulations were precluded by that decision.

2. Justice Kennedy, like Justice Scalia, had given no public indication of his opinion of *Roe* at the time of his nomination, but his generally conservative jurisprudence and his appointment by a President publicly hostile to a woman's constitutional right to an abortion were taken as signals that he might join in reversing *Roe*. *See High court to rethink abortion?*, Christian Science Monitor, Sept. 16, 1988, at 3, col. 1 (In a speech to law students at the University of Arkansas, Justice Blackmun said that the appointment of Anthony Kennedy meant that "there is a very distinct possibility that [*Roe*] will [be overruled] this term. You can count the votes.").

Chief Justice Rehnquist and Justice White dissented from the 1973 abortion cases. *See Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting). Justice O'Connor had been highly critical of the *Roe* trimester framework in the past and was seen as another likely vote. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1976) (O'Connor, J., dissenting).

Though lost in the controversy surrounding Justice O'Connor's tightrope approach to the abortion issue, Justice Kennedy's position on *Roe* also remained largely unclear even after the end of the October 1988 term. *But see infra* note 136 and accompanying text.

3. *See* Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988).

ment in *Webster v. Reproductive Health Services*,[4] thousands marched on the nation's capitol, and the Court was flooded with an unprecedented number of amicus briefs,[5] almost all addressing the core issue of *Roe*'s legitimacy. In oral argument, the United States as amicus curiae urged the abandonment of *Roe*, and the Court engaged in an in-depth colloquy as to its continued validity.[6]

Rather than use *Webster* as the occasion to resolve the Court's proper role in reviewing statutes restricting abortions, a plurality led by Chief Justice Rehnquist found it appropriate only to limit *Roe* and its progeny to find the Missouri statute constitutional,[7] while Justice O'Connor declared the legislation constitutionally trouble-free even under existing precedent.[8] The refusal to reconsider *Roe* drew especially harsh criticism from Justice Scalia, who argued that *Roe* should be overruled,[9] and from *Roe*'s author, Justice Blackmun, in dissent.[10] Both faulted the plurality and Justice O'Connor for hinting at serious faults in *Roe* while refusing to reconsider its validity until confronted with a statute directly implicating it. By doing so, these Justices charged, the plurality and Justice O'Connor implicitly and irresponsibly encouraged state legislatures to pass laws further encroaching upon the abortion right recognized in *Roe*.[11]

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4. 109 S. Ct. 3040 (1989).

5. *See id.* at 3072 (Blackmun, J., concurring in part and dissenting in part).

6. *See* N.Y. Times, Apr. 27, 1989, at B12, col. 1.

7. *See Webster*, 109 S. Ct. at 3058 (plurality opinion). Chief Justice Rehnquist delivered the opinion of the Court with respect to all but one section of the challenged statute. The Chief Justice spoke for a plurality concerning that one section, joined by Justices White and Kennedy. Throughout this Note, the term "plurality" refers to the opinion of these three Justices. On the issue of whether *Roe* should be reconsidered, the plurality and Justice O'Connor, in concurrence, argued that *Roe* need not be reconsidered. Justice Scalia, in his concurrence, criticized these four Justices for not reconsidering *Roe*. The Court was unanimous in finding the controversy surrounding another section of the statute moot. *See id.* at 3046.

8. *See id.* at 3060-61 (O'Connor, J., concurring in part and concurring in judgment).

9. *See id.* at 3064 (Scalia, J., concurring in part and concurring in judgment).

10. *See id.* at 3067 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun was joined by Justices Brennan and Marshall. Justice Stevens wrote a separate opinion, concurring in part and dissenting in part.

11. The result of our vote today is that we will not reconsider that prior opinion, even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it—and even then . . . only minor problematical aspects of *Roe* will be reconsidered, unless one expects State legislatures to adopt provisions whose compliance with *Roe* cannot even be argued with a straight face.

Id. at 3066-67 (Scalia, J., concurring in part and concurring in judgment).

> [A] plurality of this Court implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases . . . . Never in my memory has a plurality announced a judg-

In deciding not to decide, the Chief Justice and Justice O'Connor appealed to traditional notions of stare decisis and prudent decisionmaking.[12] These concepts of judicial nonactivism are clearly appropriate in most contexts to ensure that the Court maintains its limited role in reviewing the work of democratically elected legislatures. This Note will suggest, however, that where, as in *Webster*, the Court is faced with the prospect of extricating itself from an area where it has become too involved, the cautious approach at issue defeats the very purpose behind it and risks appearing disingenuous. If the standard is truly judicial restraint,[13] then a majority believing the Court to have unduly encroached into a particular area should use the first available dispute implicating the right in question to overrule its previous authority. The alternative devotion to the traditional *means* of maintaining a limited judicial role only guarantees the Court a needlessly prolonged intrusion where it does not belong. On each successive occasion that the Court strains to find a statute constitutional on narrower ground or under existing precedent, as it did in *Webster*, it gives continued legitimacy to a framework the existence of which depends upon a right it would not recognize anew if given the opportunity. In the process, the Court neglects an interest the legislatures might legitimately protect: in the abortion context, the life of the human fetus.

Part II of this Note will consider the *Webster* case itself, outlining first its procedural history, highlighting the degree of judicial second-guessing required by the Supreme Court's conflicting abortion precedents. The Court's various opinions in *Webster* will then be examined, especially the questionable construction given the Missouri statute by the plurality and Justice O'Connor and their troublesome conclusion that the decision of *Roe v. Wade* was not implicated and need not be reconsidered. Part III will present the case for the jurisprudential approach suggested above and what outcomes such an approach might have dictated in *Webster*. The claims of stare

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ment of this Court that so foments disregard for the law and for our standing decisions.

Id. at 3067 (Blackmun, J., concurring in part and dissenting in part).

12. *See id.* at 3058 (plurality opinion); *id.* at 3060-61 (O'Connor, J., concurring in part and concurring in judgment).

13. "Judicial restraint," as used in this Note, should be taken to refer to the predisposition toward restricting, wherever constitutionally permissible, judicial authority to overturn the considered views of the legislative branch.

decisis on the post-activist model of judicial restraint advocated in this Note will be considered in Part IV.

II. THE *WEBSTER* CASE

A. *Procedural History*

In 1986, the Missouri General Assembly passed, and the Governor signed into law, an act regulating the performance of abortions in the state.[14] The 1986 Act represented the latest in a series of attempts by the Missouri state legislature to discover a constitutionally permissible way it might adequately protect both the health of the pregnant woman and the "potential life" of the human fetus.[15] The legislative efforts, begun soon after the decision in *Roe*, met with varying success; and in that regard, the experience of Missouri was hardly unique.[16] The class action challenging the constitutionality of certain provisions[17]

14. MISSOURI SENATE COMMITTEE SUBSTITUTE FOR HOUSE BILL No. 1596, MO. ANN. STAT. §§ 1.205, 188.010-.220 (Vernon 1983 & 1989 Supp.).

15. *See* 109 S. Ct. at 3047 n.1. The Supreme Court had previously considered Missouri abortion regulations on three separate occasions, finding six different provisions constitutional, and another eight unconstitutional. *See id.*; *see also* Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476 (1983); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Danforth v. Rodgers, 414 U.S. 1035 (1973).

16. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 751-52 (1986) (history of judicial review of Pennsylvania abortion statutes).

17. Two provisions of the Act challenged at the district court level were not considered by the Supreme Court.

An "informed consent" provision, section 188.039 of the Act, required that the attending physician provide certain information before performing an abortion, including disclosure of whether or not, according to the physician's best judgment, the woman is in fact pregnant, information concerning risks involved in the particular abortion procedure to be followed, and any alternatives to abortion altogether. The district court judge found the provision facially unconstitutional, and the state did not appeal that judgment. *See* Reproductive Health Services v. Webster, 851 F.2d at 1073 n.2. For detailed criticism by Justices White and O'Connor of this type of analysis of informed consent provisions, see *Thornburgh*, 476 U.S. at 798-804 (White, J., dissenting); *id.* at 830-31 (O'Connor, J., dissenting).

Section 188.025 of the Act required that all abortions performed at or after sixteen weeks gestational age be performed in a hospital. "Gestational age" was defined by the Act as the "length of pregnancy as measured from the first day of the woman's last menstrual period." *Webster*, 109 S. Ct. at 3048 n.2 (quoting Mo. Rev. Stat. § 188.015(4) (1986)). The Eighth Circuit affirmed the district court's finding that this section was unconstitutional as well. According to the district court, the hospitalization requirement "unreasonably infringes upon a woman's constitutional right to obtain an abortion" by "plac[ing] a significant obstacle in the path of women seeking an abortion." Reproductive Health Services v. Webster, 662 F. Supp. at 416 (quoting City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439, 434 (1983)). The state did not appeal that judgment. *See Webster*, 109 S. Ct. at 3049.

For criticism of this type of scrutiny of hospitalization requirements, see *City of Akron*, 462 U.S. at 466 (O'Connor, J., dissenting).

of the 1986 Act was brought by two nonprofit corporations engaged in pregnancy counseling and abortion services,[18] along with five health care providers employed by the state.[19] The district court and Eighth Circuit attempted to interpret the provisions of the 1986 Act under the Supreme Court's abortion precedents. Their application of those cases to the various provisions is instructive as to the extreme degree of judicial micromanagement and second-guessing involved in the Supreme Court's abortion jurisprudence.

Further, a look at those precedents will reveal two competing lines of abortion statute review, making the permissible scope of legitimate state regulation all the more elusive. The first approach, applied by those hostile to the abortion right created in *Roe*, makes inroads into the woman's access to abortions by allowing some state regulation.[20] The second, championed by *Roe*'s staunchest defenders on the Court, generally strikes down any state legislation the effect of which may be to make abortion less accessible.[21] Although the statutes considered by the different approaches were theoretically distinguishable, the underlying views of the *Roe* right were fundamentally at odds, as the dissenters in every case made clear. The willingness of some members of the Court to serve as swing votes has had the result of enshrining as Supreme Court precedent some of each philosophy.

1. *Preamble*

Among the challenged provisions of the statute was the preamble declaring that "the life of each human being begins at conception" and that "unborn children have protectable interests in life, health and well-being."[22] These legislative findings were to be "construed to acknowledge on behalf of the unborn

18. The two nonprofit corporations are Reproductive Health Services, operating an outpatient clinic in St. Louis, Missouri, and providing abortion services up to twenty-two weeks gestational age; and Planned Parenthood of Kansas City, Missouri, which offers similar abortion services up to fourteen weeks gestational age. *See Webster*, 109 S. Ct. at 3047-48.

19. The health care providers included three doctors, one nurse, and a social worker, all meeting the definition of "public employees" under the Act, all working at "public facilities" as defined by the Act, and all of which are paid with "public funds" as defined by the Act. *See id.* (citing Mo. Rev. Stat. § 188.200 (1986)); *see also infra* note 34.

20. *See infra* note 26 and accompanying text.

21. *See infra* notes 28, 35, 61-63 and accompanying text.

22. Mo. Rev. Stat. § 1.205 (1986).

child at every stage of development, all the rights, privileges, and immunities available to other persons," subject only to limits imposed by the Constitution and Supreme Court precedent.[23]

Applying the relevant Supreme Court abortion precedents, the district court was confronted with conflicting signals. In *Maher v. Roe*,[24] the Court had held that the right to be free from unduly burdensome interference in the exercise of a woman's constitutional right to terminate her pregnancy[25] did not imply any "limitation on the authority of a State to make a value judgment favoring childbirth over abortion."[26] On the other hand, the Court had indicated first in *Roe*,[27] and more recently in *City of Akron v. Akron Reproductive Health, Inc.*,[28] that "a State may not adopt one theory of when life begins to justify its regulation of abortions."[29] Faced with competing court doctrines, the district court chose the latter and found the Act's preamble to be an impermissible legislative declaration of "one theory of when life begins to justify abortion regulation," at odds with "the essence of *Roe v. Wade*."[30]

On appeal, the Eighth Circuit affirmed the district court's ruling, rejecting a challenge by the state to plaintiff's standing to question the preamble, partially because "the Supreme Court has visibly relaxed its traditional standing principles in deciding abortion cases."[31] Substantively, the state defended

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23. *Id.*

24. 432 U.S. 464 (1977).

25. *See, e.g.*, Bellotti v. Baird, 428 U.S. 132, 147 (1976) (declining to rule on Massachusetts statute regulating minors' access to abortion); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (spousal consent requirement for abortions found to be "absolute obstacle"); Doe v. Bolton, 410 U.S. 179 (1973) (regulation "is not unconstitutional unless it unduly burdens right to seek an abortion").

26. *Maher*, 432 U.S. at 474; *see also*, Harris v. McRae, 448 U.S. 297, 314 (1980) (upholding Hyde Amendment restrictions on use of federal Medicare funds for abortion); Poelker v. Doe, 432 U.S. 519, 521 (1977) ("[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.").

27. Roe v. Wade, 410 U.S. at 159-162 (1973).

28. 462 U.S. 416 (1983).

29. *Id.* at 444.

30. *See* Reproductive Health Services v. Webster, 662 F. Supp. at 413 (citing *Roe*, 410 U.S. 113 (1973); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); *Thornburgh*, 476 U.S. 747 (1986)).

31. Reproductive Health Services v. Webster, 851 F.2d at 1075-76 (quoting Margaret v. Edwards, 794 F.2d 994, 997 (5th Cir. 1986)) (citing *Roe*, 410 U.S. at 123-29; Doe v. Bolton, 410 U.S. 179, 187-89 (1973); Singleton v. Wulff, 428 U.S. 106, 113 (1976)). The circuit court also rejected defendant's procedural challenge to standing. *See id.* at 1076.

the preamble as explicitly intended to affect laws other than the 1986 Act (for example, state tort and criminal laws),[32] and it was therefore "abortion-neutral" and within the state's prerogative to define life in a non-abortion context. The Eighth Circuit dismissed that claim, arguing that the declaration's inclusion in the 1986 Act has as its "*only plausible inference* . . . that the state intended its abortion regulations be understood against the backdrop of its theory of life."[33]

2. *Public Funding, Employees, and Facilities*

Three sections of the 1986 Act prohibited the use of public funds, public employees, and public facilities to assist or perform nontherapeutic abortions, or to encourage or counsel a woman to have a nontherapeutic abortion.[34] In the abstract,

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32. *See* MO. REV. STAT. § 1.205(2) of the statute ("Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge . . . .").

33. 851 F.2d at 1076 (emphasis added). The Eighth Circuit also rejected the state's claim that the preamble was saved by the qualifier that it was subject to the Constitution and Supreme Court precedents, arguing that "to accept the state's provision would be to hold that every state law is valid as long as it contains a clause subjecting the law to the supremacy clause." *Id.* at 1077.

34. MO. REV. STAT. §§ 188.205, 188.210, and 188.215 provide as follows:

> § 188.205. USE OF PUBLIC FUNDS PROHIBITED, WHEN
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> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.
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> § 188.210. PUBLIC EMPLOYEES, ACTIVITIES PROHIBITED, WHEN
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> It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother. It shall be unlawful for a doctor, nurse or other health care personnel, a social worker, a counselor or persons of similar occupation who is a public employee within the scope of his public employment to encourage or counsel a woman to have an abortion not necessary to save her life.
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> § 188.215. USE OF PUBLIC FACILITIES PROHIBITED, WHEN
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> It shall be unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

Reproductive Health Services v. Webster, 662 F. Supp. at 424 n.47.

The relevant definitions, provided in §§ 188.200 - 188.220, are as follows:

> (1) "Public employee," any person employed by this state or any agency or political subdivisions thereof;
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> (2) "Public facility," any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof;
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> (3) "Public funds," any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

Id.

the regulations relating to public employees and facilities seemed a hybrid of statutes restricting public funding for abortion activities and statutes restricting access to the abortion procedure itself. The two types of statutes have received markedly different treatment by the high Court. Public funding limitations have largely been upheld as within States' constitutional authority to use their own funds to express their policy preferences for childbirth over abortion.[35] Restrictions on the abortion process itself, on the other hand, have been considered with strict scrutiny and invalidated if they place burdens or obstacles on a woman's access to abortions.[36]

The district court relied on a novel argument to find all three sections "unconstitutionally vague" in their application to encouraging or counseling a woman to have an abortion not necessary to save her life. The court held that the provisions implicated the First Amendment rights of the persons regulated.[37] On more well-travelled territory, the district court, citing *Akron*, ruled that the prohibitions on encouragement and counseling "impose a significant barrier to a woman's right to consult with her physician and exercise her freedom of choice."[38] The section restricting use of public facilities for performing or assisting a nontherapeutic abortion, or encouraging or counseling a woman to have a nontherapeutic abortion was also found to block unconstitutionally a woman's ability to obtain an abortion.[39]

On the issue of public funding, which the Supreme Court had previously addressed directly,[40] the district court used a rather exotic argument to strike down as facially unconstitutional the provisions prohibiting the use of public funds or employees to assist in nontherapeutic abortions. The court ruled that the provisions violated the Eighth Amendment rights of pregnant Missouri inmates needing state-financed and oper-

35. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977).

36. *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating informed consent provision, medical reporting requirement, restrictions on legal abortion procedures of viable fetuses, and second-physician requirement).

37. Reproductive Health Services v. Webster, 662 F. Supp. at 426.

38. *Id.* at 427-28.

39. *See id.* at 428.

40. *See supra* note 35 and accompanying text.

ated transportation to facilities performing abortions.[41]

The Eighth Circuit separately considered the "encouraging or counseling" and the "assisting or performing" provisions, affirming the district court's finding that the "encouraging or counseling" provisions of each section were unconstitutionally vague[42] and "an unacceptable infringement of the woman's [F]ourteenth [A]mendment right to choose an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently."[43] The circuit court rejected as "completely inapt"[44] the state's suggestion that the "encouraging and counseling" provisions represent an exercise in the legislative prerogative of encouraging childbirth, recognized by Supreme Court precedent. According to the court, the provisions were nonetheless unconstitutional because "[t]he state's limitation on doctor-patient discussion reflects the state's choice for childbirth over abortion in a way that prevents the patient from making a fully informed and intelligent choice."[45] The state chose not to appeal the circuit court invalidation of the prohibition on the use of public employees and facilities to "encourage or counsel" nontherapeutic abortions.[46]

The circuit court also invalidated the section prohibiting the use of public facilities for the purpose of "performing or assisting" nontherapeutic abortions, distinguishing the Supreme Court's holding in *Poelker v. Doe*[47] that the city government of St. Louis could refuse to allow abortions to be performed in its city-owned hospital.[48] That case, according to the Eighth Cir-

41. *See* Reproductive Health Services v. Webster, 851 F.2d at 428.

42. *See id.* at 1079.

43. *Id.* (citing *City of Akron*, 462 U.S. at 427, 429-30).

44. *See* Reproductive Health Services v. Webster, 851 F.2d at 1080.

45. Reproductive Health Services v. Webster, 851 F.2d at 1080. The circuit court argued that in doing so, the provisions fell into an exception for policy preferences that work to "place obstacles in the path of a woman's exercise of her freedom of choice." *Id.* (citing Harris v. McRae, 448 U.S. at 316).

46. *See Webster*, 109 S. Ct. at 3049. With the Eighth Circuit's finding that the public funding prohibition of abortion performance or assistance, three aspects of sections 188.205, 188.210, and 188.215 remained for consideration by the Supreme Court: prohibition on public funding for encouragement or counseling of abortions not necessary to save the mother's life (section 188.205); prohibition against public employee assistance or performance of nontherapeutic abortions (section 188.210); and prohibition on use of public facilities to assist or perform a nontherapeutic abortion (section 188.215).

The Supreme Court would also consider the preamble (section 1.205) and the viability testing provision (§ 188.029).

47. 432 U.S. 519 (1977).

48. *See* Reproductive Health Services v. Webster, 851 F.2d at 1081.

cuit, stood only for the proposition that a state could constitutionally refuse to provide subsidies for abortion while simultaneously providing them for childbirth.[49] The Missouri statute, on the other hand, created an undue burden on the abortion right: "To 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."[50] The court was, in effect, finding a constitutionally significant difference between states refusing to provide funding for abortions and states refusing to provide public resources to assist in the performance of abortions; clearly the denial of abortion funding for an indigent pregnant woman "narrows and in some cases forecloses the availability of abortion."[51] The section prohibiting use of public employees was invalidated on similar reasoning.

The Eighth Circuit reversed the district court's ruling that the section prohibiting use of public funds to "assist or perform" nontherapeutic abortions violated the Eighth Amendment's ban against cruel and unusual punishment.[52] The circuit court held that the district court could not declare the section *facially* unconstitutional simply because the district court had interpreted the section to prevent the use of state money to transport pregnant inmates to a facility providing nontherapeutic abortions, thereby violating the Eighth Amendment guarantee of medical care for prisoners.[53] The court concluded that under the Supreme Court decisions in *Maher*,[54] *Poelker*,[55] and *Harris*,[56] a state could constitutionally withhold funding for the performance of nontherapeutic abortions.

3. *Viability Testing*

In perhaps its most controversial provision, the Act also re-

49. *Id.*

50. *Id.* (relying on Nyberg v. City of Virginia (Nyberg II), 667 F.2d 754 (8th Cir. 1982)). Interestingly on this point, the district court had acknowledged that the public hospital prohibited from performing abortions in *Poelker* was the *only one* previously providing abortion services in the area. *See* Reproductive Health Services v. Webster, 662 F. Supp. at 428.

51. *Id.* at 1083. The circuit court declined to reach the district court's determination that the section relating to public employees also violated the Eighth Amendment.

52. *See id.* at 1084; *see also supra* note 41 and accompanying text.

53. *Id.*

54. 432 U.S. 464 (1977).

55. 432 U.S. 519 (1977).

56. 448 U.S. 297 (1980).

quired, in section 188.029, that a physician having reason to believe a fetus is twenty or more weeks gestational age[57] must, before performing an abortion, determine whether the fetus is viable "by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician."[58] In its second sentence, the section provided that in making his determination, the physician should perform a series of tests "to make a finding of the gestational age, weight, and lung maturity" of the fetus.[59]

The timing of viability was made a crucial issue by the majority's decision in *Roe* to make the moment when the fetus can survive outside the mother's womb the first instance a state may legitimately regulate abortion with the "compelling" interest of protecting the fetus.[60] Even after the point of viability, however, *Roe* and its progeny require that any state regulation be narrowly tailored to the state's interest[61] and pose no additional health risk for the woman.[62] Because the determination of viability is such a determinative factor in the tests outlined by *Roe* and its progeny, the Court has left the decision solely to the pregnant woman's doctor.[63]

The district court found the latter portion of section 188.029 an unconstitutional imposition on the physician's determination of whether the fetus has reached viability: "[N]either the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of ges-

57. "Gestational age" was defined in section 188.015(4) of the statute. *See supra* note 17 (concerning hospitalization requirement).

58. Mo. Rev. Stat. § 188.029 provides as follows:

> § 188.029. Physician, determination of viability, duties
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> 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 ordinarily 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 as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

Reproductive Health Services v. Webster, 662 F. Supp. at 420 n.36 (emphasis in original).

59. Mo. Rev. Stat. § 188.029 (1986).

60. *Roe*, 410 U.S. at 163.

61. *See City of Akron*, 462 U.S. at 428.

62. *See Thornburgh*, 476 U.S. at 769.

63. *See* Colautti v. Franklin, 439 U.S. 379, 388-89 (1979).

tation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus."[64] In addition, the district court found that the required tests posed significant limitations on abortion availability, along with actual health risks to the mother.[65] The district court left in place the first sentence of the section, as it found the second sentence not "essentially and inseparably connected with, and . . . dependent upon" the remainder of the section.[66]

The circuit court affirmed, rejecting the state's claim that the second sentence, read in context with the first requiring the physician be reasonable and prudent, mandates only those tests the physician deems necessary according to his best medical judgment.[67] According to the court's opinion, "[t]he state's argument appears premised on an entirely different statute[]: the *Missouri* statute does not require doctors to make those tests necessary to determine viability. Rather, the statute plainly declares that in determining viability, doctors *must* perform tests to find gestational age, fetal weight and lung maturity."[68]

B. *The Supreme Court and* Webster

Though limited to consideration of five provisions of the Missouri statute,[69] the Supreme Court managed in *Webster* to produce five separate opinions, with an eight-to-one majority on one issue, a plurality on another, and a five-to-four majority on the rest. This confusing outcome represents well in microcosm the shifting alliances and varying approaches to abortion cases since *Roe*. In its handling of the provisions relating to the use of public facilities and public employees, a majority of the Court furthered the inroads into *Roe* begun in *Maher*, *Poelker*, and *Harris*. On the subject of viability testing, a plurality at-

64. Reproductive Health Services v. Webster, 662 F. Supp. at 423 (quoting Colautti v. Franklin, 439 U.S. 379, 388 (1979)).

65. *See id.* at 422. The court found that tests to determine fetal weight are unreliable, inaccurate, medically inappropriate, and add $125 to $250 to the cost of abortion. Amniocentesis, the only test available to determine fetal lung maturity, added an estimated $200 to $250 to the total medical bill, and posed a risk to the mother of infection and could actually result in the loss of the fetus.

66. *Id.*

67. *See* Reproductive Health Services v. Webster, 851 F.2d at 1074-75 & n.5.

68. *Id.* at 1075 n.5 (emphasis in original).

69. *See Webster*, 109 S. Ct. at 3047; *see also supra* note 46.

tempted to advance a second prong of the attack against *Roe:* limiting the Court's decisions in *Colautti*, *Akron*, *Thornburgh*, and *Roe* itself. Because they were unwilling to confront their underlying qualms about the right created in *Roe*, the Chief Justice and Justices White, Kennedy, and O'Connor were forced to engage in many of the same practices they found so offensive when accomplished by the backers of *Roe*. The Justices urged a far-fetched construction of the statute's viability-testing provision, and in so doing bypassed a longstanding legal doctrine of deferring to lower court statutory interpretation. Even as the members of the plurality and Justice O'Connor had criticized the intrusive, micro-level second-guessing of legislative judgment required by *Roe* and its progeny, they adopted much the same role.

To support their unwillingness to reconsider *Roe*, Chief Justice Rehnquist (for the plurality) and Justice O'Connor offered the powerful claims of stare decisis and prudent rules for Supreme Court decisionmaking. Sensing that even in their decisions not to decide the plurality and Justice O'Connor had signalled *Roe*'s demise, Justices Scalia and Blackmun wrote highly impassioned responses; the former disappointed because *Roe* was not explicitly overruled, the latter angered that *Roe*'s legitimacy was not directly addressed.

1. *Preamble*

The Eighth Circuit's invalidation of the Missouri statute's preamble declaring life begins at conception[70] provided the issue on which the members of the *Webster* majority acted most consistently with their prior positions. As previously noted, the Eighth Circuit had recognized plaintiffs' standing to challenge the preamble on the ground that the Supreme Court had largely relaxed standing requirements in abortion cases.[71] That general tendency to look past incidental aspects of procedural and substantive law when dealing with the issue of abortion has drawn especially pointed criticism in the past from Justice O'Connor, who in her *Thornburgh* dissent wrote that it was "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its applica-

70. *See supra* note 33 and accompanying text.
71. *See supra* note 31.

tion arises in a case involving state regulation of abortion."[72] Although the Court did not dismiss the challenge to the preamble on grounds of standing, it did refuse to pass prematurely on its merits. The Court argued that because the legislative declaration that its theory of life be used "to interpret all laws" is not self-executing, the Court was powerless to rule on its constitutionality until the preamble's language is given a definitive interpretation by Missouri state courts.[73]

Even in declining to rule on the preamble, the majority managed to make yet another distinction in the competing approaches of the Court to abortion regulation.[74] Chief Justice Rehnquist relied upon the decision in *Maher,* an opinion in the tradition hostile to *Roe,* to reaffirm that "*Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.' "[75] The Chief Justice then disposed of the constitutional objections to the preamble raised by the Eighth Circuit,[76] which had relied on *Akron*, by limiting that pro-*Roe* opinion, labeling the relevant language "dictum" that meant "only 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."[77]

2. *Public Funding, Employees, and Facilities*

In the continuing battle over which strain of abortion cases should be controlling, the Eighth Circuit chose to limit the reach of the decisions in *Maher*, *Poelker*, and *Harris* to restrictions on public funding, finding that the ban on the use of facilities and employees placed undue obstacles in the path of a woman's access to abortion services.[78] In that sense, it at-

72. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting) (criticizing majority's willingness to relax procedural rules to consider constitutional question without final ruling by lower court).

73. *See Webster*, 109 S. Ct. at 3050.

74. *See* In addition to discussing the substantive constitutionality of the preamble under *Akron* and *Maher*, members of the Court also debated its effect on the use of certain contraceptives, 109 S. Ct. at 3080-82 (Stevens, J., concurring in part and dissenting in part); *see id.* at 3058 (O'Connor, J., concurring in part and concurring in judgment); and on the Establishment Clause, *id.* at 3082-85.

75. *Webster*, 109 S. Ct. at 3050 ("The preamble could be read simply to express that sort of value judgment.").

76. *See supra* note 33 and accompanying text.

77. *Webster*, 109 S. Ct. at 3050 (emphasis added).

78. *See supra* notes 50-51 and accompanying text.

tempted to apply the approach of the *Thornburgh-Akron* line of cases to the provision in question. Chief Justice Rehnquist, again with four other votes supporting him, chose instead to extend the decisions of *Maher*, *Poelker*, and *Harris* to include prohibitions on the use of public employees and facilities: "Having held that the State's refusal to fund abortions does not violate *Roe v. Wade*, it strains logic to reach a contrary result for the use of public facilities and employees. . . . Nothing in the Constitution requires States to enter or remain in the business of performing abortions."[79]

Justice Blackmun in dissent did not quarrel with the application of *Maher*, *Poelker*, and *Harris* to the ban on public facilities but rather indicated he would not follow those cases because he disagrees with them.[80] Further, he found the statutory language defining "public facilities"[81] broad enough to encompass a sufficient number of abortions performed by private physicians at private facilities to make it an "aggressive and shameful infringement on the right of women to obtain abortions."[82] Justice O'Connor responded in her concurrence that although such applications of the provision may be unconstitutional, plaintiff's *facial* challenge to the statute must fall when the most straightforward applications are constitutional under *Maher*, *Poelker*, and *Harris*.[83]

Notably, Justice Scalia joined without comment the reasoning of Chief Justice Rehnquist with respect to the prohibition on use of public employees and facilities,[84] providing a crucial fifth vote allowing the extension of *Maher*, *Poelker*, and *Harris* to receive the full authority of Supreme Court precedent. Justice Scalia voted with Chief Justice Rehnquist despite the clear indi-

79. *Webster*, 109 S. Ct. at 3052.

80. *See id.* at 3068 (Blackmun, J., concurring in part and dissenting in part) ("The plurality . . . follows . . . our holdings in *Maher v. Roe*, *Poelker v. Doe*, and *Harris v. McRae*. There were strong dissents in all those cases." (citations omitted)).

81. *See supra* note 34. "Public facility" includes, among other things, "any physical asset, owned, leased, or controlled by this state or any agency or political subdivision thereof." MO. REV. STAT. § 188.210. Justice Blackmun argued that this definition encompasses "institutions that in all pertinent respects are private, yet are located on property owned, leased, or controlled by the government." *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., concurring in part and dissenting in part).

82. *Webster*, 109 S. Ct. at 3068 n.1 (Blackmun, J., concurring in part and dissenting in part); *see also id.* at 3079 (Stevens, J., concurring in part and dissenting in part) ("[T]he record identifies a sufficient number of unconstitutional applications to support the Court of Appeals' judgment invalidating those provisions.").

83. *See id.* at 3059 (O'Connor, J., concurring in part and concurring in judgment).

84. *See id.* at 3064 (Scalia, J., concurring in part and concurring in judgment).

cation that the balance of his reasoning would lead him to overrule *Roe* and scrutinize the provisions according to a deferential standard, most likely the "rational basis" test.[85]

Although the effect of the Chief Justice's opinion is to expand the scope of state authority to regulate abortions, it by no means withdraws the Court from the type of judicial fine-tuning that *Roe* and its progeny demand. Four members of the Court (with Justice Scalia as a silent fifth) have moved outward the line of permissible state involvement, but the line is no clearer than before. At the same time the Chief Justice validated state prohibition on the use of public facilities and employees, he hinted that a state could not prohibit a private physician who performs abortions from using public facilities for other procedures, and he suggested that a state providing universal health care might not be able to successfully copy Missouri's restrictions.[86] Moreover, four members of the Court rejected not only the extension of *Maher*, *Poelker*, and *Harris*, but the reasoning and outcome of those decisions themselves.[87]

3. *Viability Testing*

It is in considering the viability testing provision, section 188.029, that the plurality and Justice O'Connor strayed furthest from the guidelines they themselves set for the Court. They strained to accept an interpretation contrary to the literal meaning of the provision and in the process discarded traditional rules of statutory construction. The statute as interpreted was then subjected to a standardless evaluation, the goal of which appeared to be to undermine as much as possible the Court's decisions in *Colautti*, *Akron*, *Thornburgh*, and *Roe* itself. Rather than improve upon those cases, the plurality succeeded only in supplanting one form of unprincipled judicial review for another.

A plurality of the Court and Justice O'Connor rejected the interpretation of the Act's viability testing provision given by

85. *See id.* This discrepancy in his voting may explain why Justice Blackmun refers to this section of Chief Justice Rehnquist's opinion as "the plurality" and acknowledges only that Justice O'Connor joined. *See id.* at 3068 n.1 (Blackmun, J., concurring in part and dissenting in part) ("The plurality (again joined by Justice O'Connor) upholds §§ 188.210 and .215 . . . .").

86. *See id.* at 3052 n.8 (presumably because a prohibition on use of public facilities in this context would effectively eliminate abortion availability in the state).

87. *See supra* note 80 and accompanying text.

both the district court and the Eighth Circuit.[88] They accepted the state's claim that the first sentence of the section, requiring the physician to "us[e] and exercis[e] that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent physician,"[89] acted as a limitation on the second sentence, which required "such medical examinations as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child."[90] The Chief Justice argued that the provision "makes sense" only if the requirement that the physician exercise his reasonable professional judgment is read to exclude those tests that "would be irrelevant to determining viability or even dangerous to the mother and the fetus,"[91] as the district court had found many of the section's required tests to be.[92] The Chief Justice also found the state's construction of the statute to accord with the "expressed statutory purpose of determining viability."[93]

Justice Stevens, in dissent, convincingly argued that in straining to accept the state's interpretation of section 188.029, the plurality and Justice O'Connor ignored the "plain meaning" of the provision.[94] Both Justice Stevens and Justice Blackmun point out that the literal language of the second sentence of section 188.029 includes the term "shall" with no limiting language and requires the tests, not to determine viability, but "to make a finding of the gestational age, weight, and lung maturity."[95] Given that the first sentence only refers to the physician's judgment in determining viability, the provision by no means necessarily defers to the physician's judgment in performing the tests "as are necessary to make a finding of the gestational age, weight, and lung maturity." Justice Stevens made the point that if the state and the plurality were correct in interpreting the first sentence as only requiring "reasonable" tests before performing the abortion, then the second sentence "adds nothing to the requirement imposed by the preceding

88. *See Webster*, 109 S. Ct. at 3054-55 (plurality opinion); *id.* at 3060 (O'Connor, J., concurring in part and concurring in judgment).

89. Mo. Rev. Stat. § 188.029.

90. *Id.*

91. *Webster*, 109 S. Ct. at 3054-55 (plurality opinion).

92. *See supra* note 65 and accompanying text.

93. *See Webster*, 109 S. Ct. at 3055 (plurality opinion) (citing cases establishing "well accepted canons of statutory interpretation used in the Missouri courts").

94. *Id.* at 3080 (Stevens, J., concurring in part and dissenting in part).

95. *See id.* (Stevens, J., concurring in part and dissenting in part); *id.* at 3070 (Blackmun, J., concurring in part and dissenting in part).

sentence" and thereby serves no purpose at all.[96] The clearer implication, then, is that the second sentence contains the particular tests the Missouri legislature considered the minimum necessary for the physician to discharge his duty under the law in reasonably determining whether the fetus is viable. As for supporting legislative intent, Justice Stevens directed his search for the true motivation to the declaration of the statute's preamble that life begins at conception. "[I]t is not 'incongruous,' " he wrote, "to assume that the Missouri Legislature was trying to protect the potential human life of nonviable fetuses by making the abortion decision more costly."[97]

To the extent that Justice O'Connor and the members of the plurality ignored the "plain meaning" of the second sentence, and thereby rewrote section 188.029, they engaged in much the same type of questionable statutory construction that they found objectionable in cases like *Thornburgh*. In that case, Justice White took the majority to task for construing a Pennsylvania abortion law in ways inconsistent with normal rules of statutory interpretation solely because it "[p]erceiv[ed] in [the] statute . . . a threat to or criticism of the decision in *Roe v. Wade*."[98] The far-fetched statutory interpretations of the plurality (including Justice White) and Justice O'Connor leave them open to similar criticism, with the only operative difference that they would perform interpretive acrobatics to find a statute criticizing *Roe* constitutionally *acceptable*.[99]

Even accepting the friendly interpretation of the statute as plausible, it is problematic to find, as the plurality did, that the usual deference to lower court interpretation should be abandoned because those courts were in "plain error" in reaching the contrary interpretation.[100] In support of this exceptional

96. *Id.* (Stevens, J., concurring in part and dissenting in part).

97. *Id.* at 3080 (Stevens, J., concurring in part and dissenting in part).

98. *Thornburgh*, 476 U.S. at 814 (White, J., dissenting).

99. It is true that the interpretation of the *Webster* plurality and Justice O'Connor adopts a saving construction of the statute, and in that sense it holds true to "the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Webster* 109 S. Ct. at 3054 (plurality opinion) (quoting Frisby v. Schultz, 108 S. Ct. 2495, 2501 (1988)).

100. *Webster*, 109 S. Ct. at 3054 (plurality opinion) (quoting Frisby v. Schultz, 108 S. Ct. 2495, 2501 (1988)).

As Justice Blackmun pointed out, the Court in *Frisby* acknowledged the "settled view" that "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Webster*, 109 S. Ct. at 3069 (Blackmun, J., concurring in part and dissenting in part) (quoting Frisby v. Schultz, 108 S. Ct. at 2500 (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 (1985))).

approach, the Chief Justice argued that the district court and Eighth Circuit had "run[] 'afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.' "[101] However, the interpretation adopted by the Chief Justice was similarly unsuccessful in avoiding constitutional difficulty, as the section was ultimately found by the plurality to conflict with as many as three established Supreme Court precedents.[102] The willingness of the plurality and Justice O'Connor to ignore their duty to defer to a plausible interpretation of the lower courts also smacks of the same type of "incidental-legal-rules-be-damned" approach that Justices O'Connor and White and the Chief Justice found so irresponsible in *Thornburgh*.[103]

Why go to so much trouble to accept the questionable interpretation of section 188.029 and reverse as plainly in error the more plausible construction of the Eighth Circuit and the district court? Justice Blackmun alleged that the plurality was deviously attempting to contrive a conflict between the viability testing provision and *Roe*'s trimester framework:

> Evidently, from the plurality's perspective, the real problem with the Court of Appeals' construction of [section] 188.029 is not that it raised a constitutional difficulty, but that it raised the wrong constitutional difficulty—one not implicating *Roe*. The plurality has remedied that, traditional canons of construction and judicial forbearance notwithstanding.[104]

Justice Blackmun argued that, under the plurality's construction of the viability-testing provision, there was no conflict with *Roe* and its progeny[105] and there was no reason to reconsider *Roe* or its trimester framework. Justice O'Connor parted ways

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101. *Id.* at 3054 (plurality opinion) (quoting *Frisby*, 108 S. Ct. at 2501)).

102. *See id.* at 3058 (plurality opinion) (section 188.029 found to conflict with *Colautti*, 439 U.S. 379 (1979); *City of Akron*, 462 U.S. 416 (1983); *Roe*, 410 U.S. 113 (1973)). Of course, the Chief Justice dealt with those conflicts by limiting the previous holdings to the extent necessary to accommodate the Missouri statute. *See id.* (plurality opinion).

103. *See supra* note 72 and accompanying text.

104. *Webster*, 109 S. Ct. at 3071 (Blackmun, J., concurring in part and dissenting in part).

105. *See id.* at 3070-71 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun claimed that had the plurality accepted the interpretation of the lower courts, it would have been forced to find the statute unconstitutional even under the highly deferential "rational basis" test, leaving no opportunity to attack *Roe*'s trimester framework. *See id.* (Blackmun, J., concurring in part and dissenting in part).

with the plurality on this same point.[106]

In support of its decision to reconsider the legitimacy of *Roe*'s trimester framework, the plurality suggested two ways in which the viability-testing provision, even under its interpretation, conflicted with existing Supreme Court abortion doctrine. The first difficulty arose with the principle, laid out in *Colautti v. Franklin*, that "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 single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus."[107] Despite the fact that it had found the section requires the physician to conduct only those viability tests reasonable in her professional judgment, the plurality held that, "[t]o the extent that [section] 188.029 regulates the method for determining viability, it undoubtedly does superimpose state regulation on the medical determination of whether a particular fetus is viable."[108] The second problem arose from the fact that many of the fetuses tested under the provision would be found not yet viable and then aborted; as a result, the tests required by the provision will have added costs and delays to second-trimester abortions.[109] According to the plurality, this extra expense raised constitutional concerns under the Court's holding in *Akron* that a second-trimester hospitalization requirement was unconstitutional because it made abortions significantly more expensive.[110]

Faced with a conflict between the Missouri statute and Court precedent, the plurality chose not to finesse further the conflict with *Colautti* and *Akron* by reaffirming these holdings and finding factual distinctions of constitutional significance between the statutes at issue in those cases and the Missouri Act. Instead, it decided to discard the *Roe* trimester framework that underlies those cases and prohibits state regulation in the in-

106. *See id.* at 3060-64 (O'Connor, J., concurring in part and concurring in judgment).

107. *Id.* at 3056 (plurality opinion) (quoting *Colautti*, 439 U.S. at 388-89).

108. *Id.* at 3056 (plurality opinion) (citing *Colautti*, 439 U.S. at 388-89; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 64 (1976)). The plurality pointed out that this was the same ground relied upon by the lower courts, *see id.* (plurality opinion), but did not explain why that fact supported its claim, considering the wholly different meaning given the section by those courts.

109. *See id.* at 3056 (plurality opinion).

110. *Id.* (plurality opinion) (citing *City of Akron*, 462 U.S. at 434-35).

terest of potential life until viability.[111] The plurality offered two justifications for its decision to reject the trimester framework as "unsound in principle and unworkable in practice."[112] First, it argued that the framework had proven exceedingly rigid, "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."[113] As a result, the Court was left "to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices."[114] Second, the plurality rejected viability as the point at which a state's interest in protecting the potential life first becomes compelling, finding instead that "the State's interest, if compelling after viability, is equally compelling before viability."[115]

Taking the plurality's opinion at face value, it purported to adopt, in the place of *Roe*'s trimester framework, the analysis suggested by the dissenters in *Thornburgh*, which would "posit[] against the 'fundamental right' recognized in *Roe* the State's 'compelling interest' in protecting potential human life throughout pregnancy."[116] The plurality ruled that the viability testing provision was constitutional under its new approach because it was "satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life."[117] No other justification or elaboration was offered.

Given its criticism of the *Roe* trimester framework and its willingness to discard it as "unsound in principle and unworkable in practice," it is all the more striking that the plurality chose to apply its replacement test in such a way as to avoid few, if any, of the former's difficulties. The plurality recognized that "there is no doubt that our holding will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti* and *Akron*,"[118] but its newly

111. *See id.* at 3057 (plurality opinion).

112. *Id.* at 3056 (plurality opinion) (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)).

113. *Id.* (plurality opinion).

114. *Id.* (plurality opinion) (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 99 (White, J., concurring in part and dissenting in part)).

115. *Id.* (plurality opinion) (quoting *Thornburgh*, 476 U.S. at 795 (White, J., dissenting)).

116. *Id.* (plurality opinion) (citing *Thornburgh*, 476 U.S. at 795 (White, J., dissenting); 476 U.S. at 828 (O'Connor, J., dissenting)).

117. *Id.* (plurality opinion).

118. *Id.* at 3058 (plurality opinion) (citations omitted).

adopted standard offered no better guidance as to what regulation would be acceptable under the Constitution. Because the plurality failed to outline on what basis it would find that a challenged statute "permissibly furthers the State's interest in protecting potential human life," state legislatures are left with even *less* guidance than before as to what regulation meets the plurality's scrutiny. Judicial authority, in this context, does not correspond solely to the degree of scrutiny purportedly applied, but depends as much on the degree of manipulability that such scrutiny retains for the Court. To the extent a highly deferential standard depends purely on the whim of five justices' application of the phrase "permissibly furthers," it allows for a greater judicial role than a well-defined, easily applied, nondeferential standard.

The Chief Justice did offer, in self-professed dictum, a better idea of the test the plurality would prefer. He indicated that the plurality considered the "right to abortion" to be "a liberty interest protected by the Due Process Clause," rather than a "fundamental right" as the *Akron* Court described it, or a "limited fundamental right," as it was termed in Justice Blackmun's dissent in *Webster*.[119] Given that determination, one would expect the test of a law implicating a "liberty interest" to be the highly deferential "rational basis" test. Indeed, the Chief Justice, in the very next sentence, applied the test in seemingly classic fashion, finding that "[t]he Missouri testing requirement here is *reasonably* designed to ensure that abortions are not performed where the fetus is viable—*an end which all concede is legitimate*—and that is sufficient to sustain its constitutionality."[120]

Whatever the advantages a rational-basis test might provide, it cannot be taken as the holding of the plurality. The Chief Justice introduced the preceding language with a warning that "[t]he experience of the Court in applying *Roe v. Wade* in later cases suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between" fundamental rights, limited fundamental rights, and liberty interests.[121] Indeed, were it the plurality's holding that the right to an abortion is but a "liberty interest under the Due Process

119. *Id.* (plurality opinion) (quoting *City of Akron*, 462 U.S. at 420 n.1; *Webster*, 109 S. Ct. at 3076 (Blackmun, J., concurring in part and dissenting in part)).

120. *Id.* (plurality opinion) (emphasis added).

121. *Id.* (plurality opinion).

Clause," the most basic aspect of *Roe* would be overruled, something the plurality specifically insisted it was choosing not to do.[122]

Justice O'Connor criticized the plurality for using the viability-testing provision to revisit *Roe*'s trimester framework, arguing that the provision could be upheld under the Court's existing precedent. In the process, she engaged in exactly the type of constitutional analysis she condemned in her dissent in *Akron*. Justice O'Connor first argued that section 188.029 was an attempt to regulate abortion "when viability was possible" and therefore did not conflict with the requirements of the *Roe* trimester framework.[123] Logically, the concept of "possible viability" would appear problematic,[124] but even beyond that, Justice O'Connor's analysis only adds to the fine distinctions of the *Roe* trimester framework and the overarching importance it places on the elusive concept of viability. If the trimester approach "violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time,' "[125] as she claimed in *Akron*, then Justice O'Connor's opinion in *Webster* only exacerbated that unprincipled process by affirming it and adding to its intricacy.

Justice O'Connor also found that the added cost imposed on the abortion procedure by the viability-testing requirement was not of the nearly cost-doubling dimensions of the hospitalization requirement in *Akron* and therefore did not pose the same "heavy, and unnecessary, burden" on access to "a relatively inexpensive, otherwise accessible, and safe abortion procedure."[126] In so finding, she examined what medical tests were

122. *See id.* (plurality opinion) ("This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause.").

123. *Id.* at 3062 (O'Connor, J., concurring in part and concurring in judgment) (citing *Thornburgh*, 476 U.S. at 769-70).

124. Justice Scalia pointed out that because "viability" itself means the "mere *possibility* (not the certainty) of survivability outside the womb," Justice O'Connor's concept of "possibility of viability" is irrational. He added, "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.' " *Id.* at 3066 n.* (Scalia, J., concurring in part and concurring in judgment) (emphasis from original).

125. *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting) (quoting A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976)).

126. *Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring in part and concurring in judgment) (citing *City of Akron*, 462 U.S. at 438).

appropriate to make the required findings and what costs they would impose. She cited support from a number of amicus briefs that claimed the provision's limited requirement of only "reasonable" tests could be satisfied by the inexpensive process of ultrasound examination.[127] Justice O'Connor's analysis, in this instance, vindicated the approach of the state legislature in question. But that fact does not alter the reality that by applying it in the first place she violated the better judgment of her *Akron* dissent, where she argued that,

> [L]egislatures are better suited to make the necessary factual judgments in this area[. T]he Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes 'acceptable 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.[128]

Like the plurality, Justice O'Connor also provided an alternative test in language that was purely dictum; but unlike the plurality, her alternative test did not even hold out any promise as a clearer constitutional guideline. Justice O'Connor's suggested alternative is not new; it was the same one she offered in her dissent in *Akron*.[129] Accepting for the moment the right recognized in *Roe*, Justice O'Connor had argued that when a "fundamental right" is at issue, judicial review should still be limited to consideration of whether the state law bears a rational relation to a legitimate state interest, applying heightened scrutiny only on those occasions when the statute poses an "undue burden" on the fundamental right—in this case, the right to an abortion.[130] Applying this alternative test to the Missouri viability testing provision, Justice O'Connor wrote, "It is clear to me 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

127. *See id.* (O'Connor, J., concurring in part and concurring in judgment).

128. *City of Akron*, 462 U.S. at 458 (O'Connor, J., concurring in part and concurring in judgment).

129. *See Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring in part and concurring in judgment) (quoting *City of Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)).

130. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (citing *City of Akron*, 462 U.S. at 459-66 (O'Connor, J., dissenting)).

woman's abortion decision."[131] Like the "permissibly furthered state interest" test actually adopted by the plurality, Justice O'Connor's "undue burden" test proves wholly standardless. As Justice Scalia observed,

> The fact that the challenged regulation [in *Webster*] 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." One could with equal justification conclude that it is not.[132]

Although clearly more deferential toward state ability to regulate abortion, Justice O'Connor's "undue burden" test subjects abortion legislation to an equally unpredictable judicial standard. Judicial competence is also by no means furthered under an "undue burden" approach. And if a series of state abortion regulations were subjected to the "undue burden" approach—even as it claims to avoid highly technical, medical analysis, there is no guarantee that the factual holdings would not result in many of the same fine distinctions being elevated to constitutional significance, a problem she claimed was endemic in the *Roe* framework.[133]

4. *Reconsideration of* Roe

If the plurality and Justice O'Connor had, waiting in the wings, alternative constitutional standards that they at least felt would more fairly satisfy the competing interests that abortion regulation involves, then one would expect some compelling reason for their not having applied them. The only apparent obstacle was the Supreme Court's opinion in *Roe v. Wade*. Justice White and Chief Justice Rehnquist had dissented in the case of *Roe* itself[134] and had reaffirmed their desire to overrule it in *Thornburgh* just three years ago.[135] To the extent the plu-

131. *Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring in part and concurring in judgment).

132. *Webster*, 109 S. Ct. at 3066 n.* (Scalia, J., concurring in part, concurring in judgment).

133. *See City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting).

134. Then-Associate Justice Rehnquist wrote a dissent joined by Justice White. *See Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting).

135. Justice White wrote in dissent and was joined by then-Associate Justice Rehnquist. *See Thornburgh*, 476 U.S. at 785, 788 (White, J., dissenting).

rality opinion in *Webster* indicated their belief that a woman's right to abortion was a mere "liberty interest under the Due Process Clause," the two justices—along with Justice Kennedy—announced again their belief that *Roe* wrongly posited a fundamental constitutional right.[136] But if the members of the plurality believed *Roe* was wrongly decided and further that abortion regulation, implicating only a "liberty interest" in untrammelled access to abortions, should be scrutinized under a rational-basis standard,[137] why did they not overrule *Roe*? Why indeed, when doing so would have avoided (1) the questionable construction of the viability-testing provision, (2) the problematic handling of the settled legal principle of deference to lower court statutory interpretation, and most importantly, (3) the continued judicial intrusion into the legislative ambit, all involved in *Webster*?

Unfortunately, the plurality was stingy in its inclusion of supporting argument. Chief Justice Rehnquist did claim that in throwing out the *Roe* trimester framework, the plurality was under no obligation to indicate whether it would similarly discard the underlying premise of "an 'unenumerated' general right to privacy."[138] Because cases recognizing such a right, including *Griswold v. Connecticut*,[139] did not adopt regulatory frameworks like the trimester scheme outlined in *Roe*, their underlying holdings were apparently not undercut by the plurality's treatment of *Roe*'s framework.[140] As discussed earlier, the Chief Justice also held that it was prudent for the plurality to "not unnecessarily attempt[] to elaborate" distinctions between the underlying holdings of *Roe*, *Akron*, and others, and that of the *Webster* plurality.[141] Apparently, this unwillingness to discuss the nature of the right at stake stemmed from a fear that if it did so, the Court would be forced to apply the resulting right in a fashion that would draw fine factual distinctions like those required by *Roe*, ultimately replacing one regulatory framework with another.[142] More specifically, Chief Justice

136. *See Webster*, 109 S. Ct. at 3058 (plurality opinion).
137. *See Thornburgh*, 476 U.S. at 789 (White, J., dissenting).
138. *Webster*, 109 S. Ct. at 3057 (plurality opinion) (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
139. 381 U.S. 479 (1965).
140. *See Webster*, 109 S. Ct. at 3057-58 (plurality opinion).
141. *Id.* at 3058 (plurality opinion).
142. *See id.* (plurality opinion) (referring to *id.* at 3057 n.1, outlining the close factual questions decided differently in Supreme Court abortion cases).

Rehnquist held that the *Webster* case "afford[ed] no occasion to revisit the holding of *Roe*" because of differences between the Missouri statute challenged in *Webster* and the Texas law struck down in *Roe*.[143] The crucial distinction, according to the Chief Justice, was that the Missouri legislature asserted an interest in potential life only at the point of viability, but the Texas statute prohibited all nontherapeutic abortions.[144]

Justice O'Connor was more willing to name the concerns that led her to avoid reconsideration of *Roe*.[145] Although she believed the Missouri Act's viability-testing provision did not conflict with even *Roe*'s trimester framework, her reasons for declining to revisit *Roe* would appear to be premised on the same analysis as that of the plurality, which based its reticence on its claim that section 188.029 did not conflict with *Roe*'s underlying holding. Justice O'Connor outlined three long-standing, "fundamental rule[s] of judicial restraint" followed by the Supreme Court in constitutional adjudication.[146] First, "[w]here there is no need to decide a constitutional question, it is a venerable principle of [the] Court's adjudicatory processes not to do so for 'the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.' "[147] Presumably, under this guideline, the Court should not have reconsidered the question of the nature of the right at issue in *Roe* because the Missouri statute could be upheld even assuming the existence of a fundamental right to an abortion. Second, she pointed out, the Court generally avoids "formu-

143. *Id.* (plurality opinion).

144. *See id.* (plurality opinion).

145. Justice O'Connor, unlike Justice White and Chief Justice Rehnquist, has assiduously avoided any specific mention of her position on the fundamental constitutional right outlined in *Roe*. In *Thornburgh*, she declined to join those two justices in calling for *Roe*'s overrule because she believed the procedural posture of the case required the Court to rule only on the likelihood of success of a constitutional challenge. *See Thornburgh*, 476 U.S. at 827-28 (O'Connor, J., dissenting). "In addition," she wrote, "because Pennsylvania has not asked the Court to reconsider or overrule *Roe v. Wade*, I do not address that question." *Id.* (O'Connor, dissenting) (citation omitted).

146. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring in part and concurring in judgment).

147. *Id.* (O'Connor, J., concurring in part and concurring in judgment) (quoting Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (quoting Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885))).

Although the question of a woman's right to an abortion has already been addressed in *Roe* and its progeny, and in that sense cannot be "anticipated," Justice O'Connor's invocation of this guideline could be understood to mean that the question of whether *this* case should be used to overrule *Roe* is the relevant constitutional issue.

lat[ing] a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[148] According to this approach, the Missouri statute at issue in *Webster* required only for the Court to announce the most narrow rule disposing of the issues involved. For the plurality, this meant according states a compelling interest in potential life throughout pregnancy; for Justice O'Connor, this meant allowing state regulation earlier in the second trimester, when "viability is possible." Finally, Justice O'Connor relied upon the caveat that "it is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[149] This last rule of decisionmaking, however, seems less appropriate in *Webster*, when no member of the Court offered nonconstitutional grounds on which to uphold the statute.[150]

One more concern also would appear to animate both the plurality and Justice O'Connor, although it admittedly remained implicit. The "broader constitutional issue" that was being avoided in *Webster*, the "broader constitutional rule" that the plurality and Justice O'Connor declined to make, was that the Supreme Court in 1973 incorrectly formulated the nature of a woman's right to terminate her pregnancy and the States' right to regulate that decision. In short, the powerful constraints of stare decisis surely played a major role in the willingness of the plurality and Justice O'Connor to reconsider and overrule *Roe*.

III. Toward A Post-Activist Model of Judicial Restraint

The paradox that the *Webster* plurality played into, by criticizing the expansive judicial role the Court usurped in *Roe* and its progeny and then in the end only perpetuating and enlarging it, could prove an all too regular occurrence in the next decade. As a new, conservative (and presumably growing) majority takes hold of the Court, it is faced with the task of dealing with a series of precedents with which it has fundamental disagree-

148. *Id.* (O'Connor, J., concurring in part and concurring in judgment) (quoting *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring)).

149. *Id.* (O'Connor, J., concurring in part and concurring in judgment) (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

150. *See id.* at 3064 (Scalia, J., concurring in part and concurring in judgment) ("We have not disposed of this case on some statutory or procedural ground, but have decided, and could not avoid deciding, whether the Missouri statute meets the requirements of the United States Constitution.").

ments. Each such encounter would appear to pose at least two basic dilemmas: First, should the precedent be overruled, or should the Court accept in the name of stare decisis the activist role the previous decisions defined in the area? Second, if the precedent is to be overruled, should the Court be aggressive, use the first available opportunity, and in the process borrow the decisionmaking techniques of its activist precedents? Or should the Court hold true to the means of the model of judicial restraint, as well as to its ends, and in the process prolong the activist role it means to discredit? The *Webster* plurality, as well as Justice O'Connor, clearly answered the second dilemma by choosing the latter route, while Justice Scalia vehemently argued the former. The view of those justices (with the exception of Justice Scalia) on the continued validity of *Roe*, remains for now unanswered.

Part III will address the above-posed concerns in reverse order: (1) the go-slow-with-a-cost approach of the *Webster* plurality and Justice O'Connor; (2) the go-fast-with-a-cost approach of Justice Scalia; and (3) the claim of stare decisis on the legitimacy of either as a model of judicial restraint.

A. *The Plurality-O'Connor Model*

The analysis offered by the *Webster* plurality and the names given that analysis by Justice O'Connor in concurrence are helpful in determining the types of concerns that would lead as many as four members of the Court to leave in place (for the time being, at least) a ruling with which they fundamentally disagree, even though their deference affirms the "expansive role" for which they feel "the Court is not suited."[151] The prudential guidelines that Justice O'Connor outlined and that the plurality implicitly followed are grounded in a vision of limited authority for the Court in passing on the constitutionality of legislation—in short, a model of judicial restraint. As Justice Brandeis wrote in the opinion relied upon by Justice O'Connor,

> It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the

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

responsibility.[152]

Judicial restraint is manifested principally in the amount of deference to legislative judgment allowed by the legal standard the Court chooses to apply.[153] However, courts have adopted a number of additional techniques through which they attempt to maintain the proper balance of power between the judicial and legislative branches. These techniques of adjudication avoidance, termed "passive virtues" by Professor Bickel,[154] allow a court to avoid deciding questions that it believes might disturb that balance or would be otherwise imprudent.[155]

The "fundamental rules of judicial restraint" relied upon by Justice O'Connor in *Webster* are (1) that the Court should not anticipate a question of constitutional law in advance of the necessity of deciding it and (2) that the Court should avoid formulating a rule of constitutional law broader than is required by the facts of the case before it. These principles rest on a view of the judicial branch as primarily an institution for dispute resolution rather than exposition or policymaking.[156] In his classic work, *The Study of Cases*,[157] Professor Wambaugh offered three reasons that "the court making the decision is under a duty to decide the very case presented and has no authority to decide any other."[158] For Professor Wambaugh, reaching beyond the dispute presented by the facts of the case wastes judicial re-

152. *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring) (quoting 1 COOLEY, CONSTITUTIONAL LIMITATIONS 332 (2d ed. 1871)).

153. Indeed, it is the violation of this primary expression of judicial restraint that those disagreeing with *Roe* have found most faulty. *See supra* notes 134-37.

154. A. BICKEL, THE LEAST DANGEROUS BRANCH 200-01 (1962). Professsor Bickel was referring specifically to those occasions when a court might decline to exercise discretionary jurisdiction when it believes accepting a case would be imprudent. The general principles relied upon by Justice O'Connor, while not jurisdictional, are used in much the same way.

155. In theory, the various branches of government are coequal; however, when the Court strikes down a legislative enactment as unconstitutional, it asserts a superior authority over the other branches. Such an assertion of necessity generates a certain amount of friction between the Court and the legislature. The theory is that by limiting the scope of the rationales of its constitutional decisions, the Court will avoid implicitly passing on the validity of enactments which have not yet been challenged, and thus limit the scope of conflict between the judicial and political branches.

Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 U. WIS. L. REV. 467, 490.

156. *See generally* Spann, *Expository Justice*, 131 U. PA. L. REV. 585 (1983).

157. E. WAMBAUGH, THE STUDY OF CASES (2d ed. 1894). For a general discussion of Professor Wambaugh's principles of judicial restraint, see Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 773-78.

158. E. WAMBAUGH, *supra* note 157, at 8.

sources, threatens the adversary system, and undercuts the separation of powers by usurping a legislative role.[159] Each of these justifications, however, would appear not to apply in the context of *Webster*, or in any other case in which the Supreme Court is casting off an expansive judicial role.

Any extra expense of judicial resources, in the case of *Webster*, would be purely short-term, considering the benefit of resolving (for at least the tenure of the existing Court majority) the degree of allowable state regulation of abortion under the Constitution. Similarly, whenever the Court chooses to extricate itself from an activist role of judicial review, the likely result will be fewer constitutional challenges: First, far more legislative action would not be under a shadow of unconstitutionality. Second, if the Court is true to the goals of judicial restraint, it will not create a new rule that allows for such fine factual distinctions that encourage over-litigation.

Professor Wambaugh also argued that deciding questions unnecessary to resolution of the case threatens the adversarial system by not providing affected parties the opportunity to fully argue their position to the court. In *Webster*, however, the issues of *Roe*'s continued legitimacy, the nature of a woman's right to an abortion, and even the existence of an unenumerated right of privacy, were briefed and argued by both parties, and amicus briefs were offered on the subject by the Solicitor General's office and a record number of other commentators. In addition, the questions involved have been the subject of a huge body of legal scholarship and court adjudication. It is very difficult to see how a question could be more thoroughly subjected to the adversarial process than has the decision in *Roe v. Wade*, both in the *Webster* case itself and more generally. Likewise, in any situation where the Court is rejecting a previous activist role in favor of a more limited one, the issues involved will most probably have been similarly rehashed, as they necessarily relate to previous controversial Supreme Court opinions. Even in those circumstances when the question involved has not been as thoroughly discussed and argued as the issue of abortion, the force of Professor Wambaugh's reasoning would seem to be limited to justifying an order for reargument of the issue, rather than to avoiding it entirely.[160] The Court has been

159. *See* Collier, *supra* note 157, at 774-75.

160. Indeed, the Court has on many occasions chosen to decide constitutional ques-

willing to use the technique of reargument for just such situations.[161]

Finally, Professor Wambaugh claimed that a court that decides cases not before it, or answers questions more broadly than necessary, is usurping an essentially legislative function by making policy rather than by merely resolving disputes. As a result, he argued, the court's legitimacy is called into question.[162] It is on this point that Professor Wambaugh and the principles of judicial restraint—in the context of *Webster* and its ilk—are not only inapposite but downright contradictory. As applied in *Webster*, this rule of adjudicatory avoidance had the effect of leaving in place the decision of *Roe v. Wade* and the judicial scrutiny of abortion regulation imposed by its progeny. As discussed earlier, the central objection to *Roe* has been its usurpation of legislative authority, both in its establishment of a fundamental constitutional right with no basis in the Constitution, and in its post-*Roe* formulation of complex distinctions between acceptable and unacceptable state regulation affecting that right. The effect of the plurality-O'Connor rule of judicial restraint in *Webster* was to exercise again an essentially legislative, policymaking function, while at the same time making Supreme Court reconsideration of its activist role virtually impossible. If Justice O'Connor and the plurality believed that the *Roe* framework or *Roe* itself requires an unduly expansive judicial role, they only guaranteed the Court would continue to play that role by following a rule intended to prevent just such

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tions broader than presented by the facts of the case, even when it involved overturning Court precedent. *See Webster*, 109 S. Ct. at 3065 (Scalia, J., concurring in part and concurring in judgment) (citing Daniels v. Williams, 474 U.S. 327 (1986); Illinois v. Gates, 462 U.S. 213 (1983); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); Perez v. Campbell, 402 U.S. 637 (1971); Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); Pointer v. Texas, 380 U.S. 400 (1965); Mapp v. Ohio, 367 U.S. 643 (1961)); *see also* Swift & Co. v. Wickham, 382 U.S. 111 (1965), in which the Court argued as follows:

> It might suffice to dispose of the . . . issue for us to hold [that the Supreme Court precedent is distinguishable on its facts]. . . . We think, however, that such a disposition of this important jurisdictional question would be less than satisfactory, that candor compels us to say that we find the application of [the precedent] as elusive as did the District Court, and that we should fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem.

Id. at 116.

161. *See, e.g.*, *Roe*, 410 U.S. 113 (1973); Board of Education v. Barnette, 319 U.S. 624 (1943); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 421 (1837).

162. *See* Collier, *supra* note 157, at 774-75.

activism. "Ordinarily, speaking no more broadly than is absolutely required avoids throwing settled law into confusion," Justice Scalia wrote in *Webster*. "Doing so today preserves a chaos that is evident to anyone who can read and count."[163] If the members of the plurality felt that *Roe* wrongly prohibited state abortion regulation in the interest of protecting fetal life, their decision in *Webster* only guaranteed that this legitimate state interest would continue unprotected. "In most cases," Justice Scalia wrote in concurrence, "[a]nyone affected by the conduct that [an] avoided holding would have prohibited will be able to challenge it himself . . . . Not so with respect to the harm that many States believed, pre-*Roe*, and many may continue to believe, is caused by largely unrestricted abortion."[164]

Moreover, the adjudicatory rules adopted by the plurality and Justice O'Connor in *Webster*, rather than preserving the Court's image, actually undermine it. Under the approach outlined by the plurality and Justice O'Connor, only state regulation that prohibits abortion during all stages of pregnancy (or at least substantially before viability) would call the holding of *Roe* itself into question. It is this requirement that reveals the more disturbing side of the plurality opinion and the concurrence by Justice O'Connor. For the Court to reconsider its holding in *Roe*, a state legislature must pass a statute that it *knows* to be unconstitutional under Supreme Court precedent (that is, *Roe* and its progeny).[165] Whatever damage to "the rule of law" that may be claimed when a court chooses to decide a question of constitutional law broader than is necessary, or in advance of the necessity of doing so, it is dwarfed by the damage occasioned by members of the Court requiring state legislatures to disregard constitutional precedent before they can win legitimation for actions those Justices believe in the first place to be within the proper scope of legislative power.

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163. *Webster*, 109 S. Ct. at 3065 (Scalia, J., concurring in part and concurring in judgment).

164. *Id.* at 3066 (Scalia, J., concurring in part and concurring in judgment).

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> The result of our vote today is that we will not reconsider that prior opinion [*Roe*], even if most of the Justices think it is wrong, unless we have before us a statute that in fact contradicts it—and even then (under our newly discovered "no-broader-than-necessary" requirement) only minor problematical aspects of *Roe* will be reconsidered, unless one expects State legislatures to adopt provisions whose compliance with *Roe* cannot even by argued with a straight face.

Webster, 109 S. Ct. at 3066-67 (Scalia, J., concurring in part and concurring in judgment).

Justice Scalia pointed out an additional manner in which the approach of the plurality and Justice O'Connor harms the Court's institutional interests. He argued that by preserving its activist role, the Court also preserved the distorted public perception that it is an entity entitled to resolve political questions like abortion.[166] The result, as related by Justice Scalia, is devastating for the Court's image as an objective, principled body:

> We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.[167]

As means to an end, then, the techniques outlined by Justice Brandeis in *Ashwander*, and as applied by Justice O'Connor and the plurality in *Webster*, hold no intrinsic sway over the Court. It is only in their ability to accomplish a limited role for the Court that these "passive virtues" command obedience.

B. *The Scalia Model*

Traditional rules of prudent decisionmaking, then, prove far more valuable when the Court is attempting to *maintain* a limited judicial role than when it is struggling to *return* the Court to that status after a troubled experiment in judicial activism. Would borrowing the jurisprudential tools of the judicial activist better accomplish the goal of returning the proper balance between the judicial branch and the political branches? Under such an approach, the Court would move more quickly when it is extricating itself from a previously activist role than it might if it were maintaining a limited role or even expanding an existing constitutional right. On some occasions, when by chance the case before the Court adequately presents (even under plurality-O'Connor standards) the disputed constitutional issue, the short-term approach advocated here would be unnecessary. But for those situations when the statute under scrutiny clearly implicates the issue, yet not directly, this aggressive, post-activist model would more effectively hold true to the idea behind judicial restraint.

Webster v. Reproductive Health Services provides an excellent ex-

166. *Id.* at 3065 (Scalia, J., concurring in part and concurring in judgment).
167. *Id.* at 3065-66 (Scalia, J., concurring in part and concurring in judgment).

ample of this new model of judicial restraint. Under traditional, prudential guidelines, the Missouri statute at issue in *Webster* would not have necessarily required reconsideration of the holding of *Roe v. Wade*. The constitutionality of the Missouri Act arguably did not turn on whether a woman's right to an abortion is a "fundamental constitutional right" or a mere "liberty interest." For that reason, and relying on long-standing jurisprudential guidelines, eight members of the Court held that *Roe* should not be reconsidered.[168] Only Justice Scalia would have reconsidered (and then overruled) the holding of *Roe*.[169] In reaching this conclusion, he acknowledged the general validity of the traditional jurisprudential limitations relied upon by Justice O'Connor and the plurality, but he found numerous circumstances in the *Webster* case justifying exercise of a "good faith exception" to those guidelines.[170] Thus unconstrained by traditional rules of limiting constitutional holdings, it is fair to ask what result this "judicial restraint with teeth" would have reached in *Webster*.

Because the post-activist model would allow the Court to deal with the real underlying issues involved, it saves the Court from having to make the questionable statutory interpretation and from other pitfalls that confronted the plurality and Justice O'Connor. As written, the viability testing provision places state controls on the physician's determination of viability by requiring that certain tests be performed before a physician can legally abort a nonviable fetus; and under the Supreme Court's decisions in *Colautti v. Franklin* and *Akron*, the section thereby imposes an unconstitutional infringement on the physician's independent judgment and arguably an impermissible burden on a woman's right to an abortion.[171] Those decisions require the

168. The eight justices included the three members of the plurality, holding that only *Roe*'s framework was violated by the statute, *see Webster*, 109 S. Ct. at 3058; Justice O'Connor, who held that even the framework was not implicated, *see id.* at 3060-61 (O'Connor, J., concurring in part and concurring in judgment); and the four members in dissent, who argued that interpreted properly, the viability testing provision could not withstand even a "rational basis scrutiny," and therefore there would be no cause to reconsider *Roe* or its framework, *see id.* at 3070 (Blackmun, J., concurring in part and dissenting in part). Even accepting the plurality's interpretation of the viability testing provision, the dissenters agreed with Justice O'Connor that the section did not implicate the underlying holding of *Roe* or the trimester framework. *See id.* at 3070-71 (Blackmun, J., concurring in part and dissenting in part).

169. *See id.* at 3064 (Scalia, J., concurring in part and concurring in judgment).

170. *See supra* notes 163-67 and accompanying text.

171. *See supra* notes 63-64 and accompanying text.

Court to subject any state regulation on abortion to different levels of strict scrutiny, depending upon which stage of pregnancy is implicated. This heightened scrutiny was founded on the holding in *Roe v. Wade* that a woman's unenumerated constitutional right of privacy includes the fundamental constitutional right, under the Due Process Clause of the Fourteenth Amendment, to terminate a pregnancy in abortion.[172] The *Roe* choice of elevating a woman's abortion decision to the status of a fundamental constitutional right, then, is the only basis for holding the Missouri statute's viability testing provision to such heightened scrutiny. Believing a woman's decision to terminate a pregnancy to be a "liberty interest" under the Fourteenth Amendment rather than a fundamental constitutional right,[173] the Court would overrule the holding of *Roe* and subject the Missouri statute to the standard of scrutiny applied to any state regulation implicating a liberty interest: rational-basis review.[174]

Considering the charges of insensitivity and callousness that would inevitably come from the dissenting justices if the Court were to permit all state regulation of abortion meeting this deferential standard, the facts of *Webster* provided the advocates of judicial restraint the unique opportunity to show that the rational-basis test is in fact a meaningful standard and would not allow a return to harsh and excessive abortion regulation. As Justice Blackmun indicated, the viability-testing provision (properly construed) violates rational-basis scrutiny:

> By mandating tests to determine fetal weight and lung maturity for every fetus thought to be more than [twenty] weeks gestational age, the statute requires physicians to undertake

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172. *Roe*, 410 U.S. at 164.

173. Little could be added to the series of dissents in abortion regulation cases to explain why *Roe* was wrongly decided. *See Webster*, 109 S. Ct. at 3064 (Scalia, J., concurring in part and concurring in judgment) (citing *Thornburgh*, 476 U.S. at 786-97 (White, J., dissenting); *Akron*, 462 U.S. at 453-59 (O'Connor, J., dissenting); *Roe*, 410 U.S. at 172-78 (Rehnquist, J., dissenting); Doe v. Bolton, 410 U.S. at 221-23 (White, J., dissenting)); *see also* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

174. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

> Of course a woman's freedom to choose an abortion is part of the 'liberty' the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But 'due process' generally guarantees only that the inhibition be procedurally fair and that it have some 'rational' connection—though plausible is probably a better word—with a permissible governmental goal.

Ely, *supra* note 173, at 935.

> procedures, such as amniocentesis, that, in the situation presented, have no medical justification, impose significant additional health risks on both the pregnant woman and the fetus, and bear no rational relation to the State's interest in protecting fetal life.[175]

In almost *Marbury v. Madison* style, the *Webster* Court could have returned the judicial branch to its appropriately limited role in reviewing regulation of abortion, while at the same time it showed that this standard of review does impose some legitimate judicial oversight.[176]

A woman's right to an abortion would be recognized as a liberty interest under the Fourteenth Amendment, and a state's interest in protecting fetal life would be recognized as a legitimate statutory motive, compelling at all stages of pregnancy.[177] As such, the Missouri statute's preamble declaring life begins at conception would still be unreviewable until applied by Missouri courts, and to the extent it then implicates a woman's interest in terminating a pregnancy, it would be subject to rational-basis review. The provisions of the Act prohibiting the use of public employees or facilities in the assistance or performance of nontherapeutic abortions would be upheld as rational ways of furthering the state's legitimate interest in not subsidizing the destruction of potential life. As indicated above, the viability-testing provision, by requiring unnecessary, expensive, and dangerous medical procedures, violates the rational basis standard and would be struck down as an unconsti-

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175. *Webster*, 109 S. Ct. at 3070 (Blackmun, J., concurring in part and concurring in judgment).

176. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In that landmark case, the Court issued a broader-than-necessary holding (that is, that the Supreme Court could strike down laws inconsistent with the Constitution), while at the same time avoided power-aggrandizement charges by denying itself authority (finding the statute giving it jurisdiction over the case to be unconstitutional). In *Webster*, the Court could have reached the broader-than-necessary holding (that *Roe* was wrongly decided), while at the same time giving content to a woman's liberty interest in abortion by striking down the viability-testing provision.

177. Of course, it is possible that a state could attempt to justify prohibition of certain types of contraceptives by its interest in protecting fetal life from the point of conception. *See Webster*, 109 S. Ct. at 3059 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 3080-85 (Stevens, J., concurring in part and dissenting in part). It was claimed in oral argument in *Webster* that for this reason, overturning *Roe* would necessarily involve overturning *Griswold v. Connecticut*, 381 U.S. 479 (1965), which struck down state prohibition of contraceptives. Even putting aside the scant likelihood of such state regulation, its constitutionality clearly need not be decided at the time the Court overrules *Roe*. Indeed, it was the Court's attempt to establish once and for all every contour to state abortion regulation that led it into trouble in the first place. *See also infra* notes 212-16 and accompanying text.

tutional and "arbitrary imposition of discomfort, risk, and expense, furthering no discernible interest except to make the procurement of abortion as arduous and difficult as possible."[178] It is not true, as Justice Blackmun suggested in dissent, that any regulation limiting a woman's access to abortion would be found constitutional, including "a requirement that a pregnant woman memorize and recite today's plurality opinion before seeking an abortion."[179] Such a requirement would, of course, be struck down, along with Missouri's viability testing provision, if it were not procedurally fair and rationally related to the legitimate state interests of protecting fetal life and maternal health.

This post-activist model of judicial restraint would operate similarly in other contexts where a majority believes the Court should return to a more limited role but is presented with a case not necessarily violating the underlying individual right at issue. In doing so, the traditional rules of prudent decisionmaking would not be applied, or a "good faith exception" would be argued. But with that small sacrifice, the goal of those very rules would be accomplished, and the legislative branch of state governments would again be free to act responsibly in furtherance of the legitimate interests of the people.

IV. Stare Decisis Concerns

A. *Stare Decisis Claims on the Post-Activist Model of Judicial Restraint*

The post-activist approach outlined above is by definition appropriate only on those occasions where a majority has come to the conclusion that the Court has in the past overstepped the proper bounds of judicial review. Because of its corrective nature, the post-activist model of judicial restraint will usually result in the overturning of existing Supreme Court precedent. Although universal adherence to the principle of stare decisis is by no means a prerequisite to a legitimate model of judicial

178. *Webster*, 109 S. Ct. at 3070 (Blackmun, J., concurring in part and dissenting in part).

179. *Id.* at 3076 (Blackmun, J., concurring in part and dissenting in part). Although Justice Blackmun was actually referring to the plurality's "permissibly furthers" standard, he indicated that in his opinion this test is "nothing more than a dressed-up version of rational-basis review." *Id.* (Blackmun, J., concurring in part and dissenting in part).

restraint,[180] any such model must effectively address the concerns implicated by stare decisis before it can be considered a responsible one. At first blush, the post-activist model appears to be directly at odds with the command of stare decisis. By advocating aggressive reversal of certain types of existing precedent, the model cuts directly against the powerful predisposition toward accepting prior decisions.[181] The legitimacy of the post-activist model, in the face of stare decisis, rests upon whether, in the situations in which it is intended to apply, the decision to overrule will not too strongly implicate the bases for justifying stare decisis. Like the prudential rules discussed earlier, the rule of stare decisis is only as effective as the cases to which it is being applied allow it to be.[182]

The more general justifications behind stare decisis are by now familiar and powerful, and some more novel aspects to the value of letting precedent stand would appear to apply with special force against the post-activist model of judicial restraint. Justice Harlan has identified in one well-regarded opinion the basic concerns animating the doctine of stare decisis:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are [1] the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[183]

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180. *See* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 408 (1988).

181. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

182. Clearly, the doctrine of stare decisis is not entirely inflexible. Increasingly over time, the Court has discarded existing precedent on a number of grounds. One study indicated that the Supreme Court has reversed itself on as many as 184 occasions. *See* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 2115-27 (1987); *see also* Maltz, *supra* note 155; Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, nn.1-2, 4 (1932) (Brandeis, J., dissenting).

As Judge Patrick Higginbotham said after outlining the justifications behind stare decisis, "There is little to quarrel with here [in the values themselves]. It is in applying the doctrine that its strengths and weaknesses take definition." Higginbotham, *Text and Precedent in Constitutional Adjudication*, 73 CORNELL L. REV. 411, 412 (1988).

183. Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970). Professor Wasser-

Each time a majority considers overruling a precedent in which it believes the Court usurped too expansive a role, it must consider each of these factors.

In the context of *Roe*, *Webster*, and a woman's access to abortion, these considerations would appear to become very real. The first factor suggested by Justice Harlan leads the Court to consider whether in overturning the pre-existing rule it will in the process upset the settled understandings of the law, upon which individuals base life choices. The holding of the Court in *Roe v. Wade* has been in place for more than a decade and a half. As a result, according to Justice Blackmun's dissent in *Webster*, "millions of women, and their families, have ordered their lives around the right to reproductive choice, and . . . this right has become vital to the full participation of women in the economic and political walks of American life."[184] Further, he pointed out, the inevitable result of any severe restrictions allowed by *Webster* on abortions "would be that every year hundreds of thousands of women, in desperation, would defy the law, and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists, or they would attempt to perform abortions upon themselves, with disastrous results."[185]

Such an analysis of reliance, while compelling, proves inapposite. By its nature as a highly contested Supreme Court decision, *Roe v. Wade* could not have provided *settled* expectations, and as a result, widespread reliance of the type Justice Harlan intended is unlikely. Justice Blackmun correctly points out potentially tragic consequences of returning state authority to regulate abortion, among them the disruption of millions of lives ordered around the "right to reproductive choice," and the risk to women seeking back-alley abortions if the state again criminalizes the procedure. Whatever one may say about the right recognized by *Roe* and applied in its progeny, it is difficult to argue that it has, in Justice Harlan's words, "furnish[ed] a clear guide for the conduct of individuals, . . . enabl[ing] them to plan their affairs with assurance against untoward sur-

strom similarly indicated four major justifications behind stare decisis: certainty, reliance, equality, and efficiency. *See* R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 60-74 (1961) (quoted in Higginbotham, *supra* note 182, at 412).

184. *Webster*, 109 S. Ct. at 3077 (Blackmun, J., concurring in part and dissenting in part).

185. *Id.* at 3078 (Blackmun, J., concurring in part and dissenting in part).

prise."[186] As outlined in detail in parts II and III of this Note, the Court's often-conflicting abortion precedents have not provided a clear guide for what state regulation is acceptable and what abortion-related activity is constitutionally protected. In addition, while millions of women have accepted and agree with the holding of *Roe* and have to some degree tailored their sexual behavior around its protections, public opinion polls have consistently shown that at least an equal number of women have believed that case was wrongly decided, and many more have chosen personally not to rely on the protected access to abortions.[187]

As for those women who have relied and continue to rely on a constitutional right to abortion—presumably the same women who would most likely take the drastic step of a back-alley abortion—their degree of confidence in the future longevity of the decision, rather than their degree of reliance on its holding, is the factor to which stare decisis looks. When the Court held in 1972 that the imposition of the death penalty was an unconstitutionally cruel and unusual punishment,[188] a number of death row inmates (and presumably murderers, for that matter) relied very heavily on its holding. Yet the unstable nature of the Court majority, along with a consistently intense controversy over the issue, prevented these individuals from feeling any real confidence about that holding. For that reason, it was rather easy for the Court to find the death penalty constitutional just four years later.[189] That same unsettled quality to the issue of capital punishment could also provide some justification for the subsequent behavior of Justices Brennan and Marshall, who have dissented in more than 1,000 death penalty cases citing only their continued belief that the punishment is unconstitutional.[190] The concern over back-alley abortions, while very real, must confront the concern over the survival of the fetus, which many view as an enormously compelling coun-

186. *See supra* note 183 and accompanying text.

187. *See* L.A. Times, Jan. 1, 1990, at 1, col. 2 (nationwide survey indicating that "[a]bortion is opposed across America by [a ratio] of five to four, with women much more opposed than men").

188. *See* Furman v. Georgia, 408 U.S. 238 (1972).

189. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

190. *See* Brief Amici Curiae of Hon. Christopher H. Smith, Hon. Alan B. Mollohan, Hon. John C. Danforth, and other United States Senators and Members of Congress, In Support of Appellants, at n.7, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

terweight. Although balancing these competing interests is unavoidably an agonizing and highly emotional task, arguing that it should be left to the Court begs the question of *Roe*'s legitimacy, rather than arguing for the application of stare decisis.

The second factor of stare decisis outlined by Justice Harlan is grounded in concern for efficient use of judicial resources. Continually revisiting a prior holding of the Court, as the Court has done with *Roe*,[191] would appear to be just such a waste of valuable time and energy on the part of the litigants and the Court.[192] Yet if judicial economy is of concern, reversal of *Roe* and the withdrawal of the judicial branch from its expansive, activist role in overseeing abortion regulation will by its nature involve less judicial time, energy, and expense. As indicated earlier, downgrading judicial scrutiny in a particular area of constitutional law will likely decrease the amount of future litigation by removing the cloud of unconstitutionality over a greater range of statutes, and by providing a greater degree of clarity concerning what level of state regulation is constitutionally permissible.

Justice Harlan's third factor is a more general one, and looks to the Court's institutional image and principled function. As Justice Blackmun indicated in his dissent in *Webster*, "[t]he doctrine of stare decisis 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.' "[193] If the Court is continually reversing itself, and if those reversals are seen as the result of politics, the Court's image as an objective, principled, independent entity would be damaged. Given the publicity surrounding President Ronald Reagan's three nominees to replace Justice Powell, and the media emphasis on the swing vote that replacement might well cast on the abortion question, any five-to-four reversal of *Roe* might thus hold the Court out as a purely political animal. On this same issue, one commentator has made the point that

191. *See City of Akron*, 462 U.S. at 419 (1983); *Thornburgh*, 476 U.S. at 759 (1986).

192. *See* Johnson v. Transportation Agency, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) (declining to vote to overturn precedent with which he disagreed because of the "undoubted public interest in 'stability and orderly development of the law' " and because the precedent to be overruled was "now an important part of the fabric of our law").

193. *Webster*, 109 S. Ct. at 3078-79 (Blackmun, J., concurring in part and dissenting in part) (quoting Vasquez v. Hillery, 474 U.S. 254 (1986)).

"when two-thirds of a prior decision disappears slowly in half a dozen small bites, the public's perception of the Supreme Court may not change very much."[194] Such appeared to be the idea behind the approach of the plurality in *Webster*. "Were the Court to swallow the disfavored precedent in a gulp," on the other hand, "the impression that constitutional law is no more than the preference of five justices might grow stronger."[195]

Again, however, to vindicate the principles behind stare decisis, one must look at the effect of applying it in the area at issue. The Supreme Court's holding and continued application of an unenumerated right to an abortion contributes far more to a public perception that "bedrock principles" are founded in "the proclivities of individuals" than would a five-to-four reversal of that decision. In some cases, reversal by a bare majority of a well-known Supreme Court precedent might be seen as subjective and political in nature. But in the case of abortion, and most other areas in which the Court has awarded itself an expansive, intrusive role, the more dangerous perception is that the members of the Court decide the constitutionality of laws based upon their view of the wisdom of the social policy underlying them.[196] Therefore, the Court should accept short-term criticism that its decision to overrule an activist precedent was the product of politics in favor of the long-term benefit of a society that expects policy decisions to be made by state legislatures rather than the judiciary. As Justice Frankfurther has noted,

> Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency to focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all

194. Alschuler, *Commentary: Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1453 (1987).

195. *Id.*

196. Undoubtedly, many people would view a decision by the Court to overturn *Roe* as just such an example of votes based on personal views on the wisdom of the legislation at issue. But such a decision leaves open to each state the option of providing statutory protections to the mother and fetus as it sees fit. In that sense, it is more difficult to see it as an imposition of social policy by the Justices.

The same is true with any Court decision *not* to strike down a particular statute. For example, the decision by the Court in the 1930s no longer to invalidate (based on a problematic reading of the Contract Clause) New Deal programs was not an imposition by the Court of a policy position favoring social welfare legislation. The Congress remained free to alter its position at any time.

> right if it is constitutional.[197]

The public discussion touched off by the Court's decision to correct itself and adopt again an approach of judicial restraint would arguably be to the betterment of the Republic. Discussing a number of ill-advised statutes found nonetheless constitutional by the Courts of his day, J.B. Thayer pointed out that despite the costs involved in judicial non-interference,

> the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.[198]

Moreover, it is somewhat paternalistic and elitist to assume the public does not already appreciate the role which politics and court majorities play in Supreme Court adjudication. As Professor Shapiro has pointed out, "lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect, than the speaker."[199]

This paternalism often breeds results worse than the result providing initial cause for concern. If fear of damaging the Court's institutional image leads the Court to avoid overturning a contested precedent, and in the process it resorts to untenable factual distinctions and questionable legal conclusions, its prestige may be damaged even more. As one commentator noted, "The open disapproval of past precedents might in fact undermine the Court's position in American life less than the repeated invocation of disingenuous distinctions."[200] Such was the trap into which the plurality in *Webster* fell; by reading the holding of *Roe* so narrowly, by limiting *Roe* and its progeny in such an unworkable manner, and by violating its own principles of judicial restraint, the plurality fell short of its constitutional duty in much the same way critics of the Burger Court found it

197. Board of Education v. Barnette, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting).

198. J.B. THAYER, JOHN MARSHALL 107 (1904) (quoted in *Barnette*, 319 U.S. at 669 (Frankfurter, J., dissenting)).

199. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-37 (1987).

200. Alschuler, *supra* note 194, at 1453-54.

lacking.[201] If there is one lesson the experience of that Court has left us in this area, it is that "[w]hen a court must choose either to abandon a prior ruling or to limit this ruling in a way that makes the law an ass, the time usually has come for abandonment."[202]

In addition to these general principles of stare decisis that apply to almost all choices to overrule existing precedent, there are additional factors that apply with special emphasis in situations like abortion regulation when the Court is extracting itself from an activist role. In their brief to the Court in *Webster*, the pro-choice plaintiffs argued that, "in overruling *Roe*, this court would, for the first time in its history, withdraw from constitutional protection a previously recognized fundamental personal liberty."[203] In doing so, it was argued that the Court would allow state prohibition of previously "protected conduct undertaken daily by literally thousands of citizens."[204] It is, of course, the case that every time the Court decides to relax the standard of scrutiny applied to a particular type of governmental action, it is at the same time withdrawing constitutional protection from a previously recognized individual right. Each time, then, that the post-activist model calls upon the Court to withdraw from a particular area of constitutional law, the Court will also be removing constitutional protection of the individual activity involved. For example, were the Court to decide it should no longer second-guess whether police adequately inform arrest suspects of their constitutional rights, thereby overruling *Miranda v. Arizona*;[205] it would be concomitantly withdrawing a previously granted constitutional right.

To claim, however, that overturning *Roe* (or any decision to remove the Court from an area of previous judicial involvement) would be the first instance in which the Court "withdr[e]w from constitutional protection a previously recog-

201. *See id.* at 1452.

202. *Id.*; *see also* Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 424 (1988) (discussing the benefit in precedent manipulation, in that it provides a good indication that the prior holding is not working out).

203. Brief for Appellees at 3, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).

204. *Id.* Such a claim may ultimately prove too much. On its face at least, it would have counselled the Supreme Court, in the infamous case of Dred Scott v. Sanford, 60 U.S. 393 (1856), not to withdraw Fifth Amendment protection from a slaveholder's property claim over his slaves.

205. 384 U.S. 436 (1966).

nized fundamental personal liberty"[206] is misleading. To the extent the *Webster* plaintiffs in making that claim were referring to "fundamental rights" created out of the Court's troubled experiment in substantive due process, the novelty results from the relatively recent adoption of such a role for the Court and thereby militates toward rejecting the holding of *Roe* as an experiment gone wrong. If the concern is aimed at "fundamental" constitutional rights in general, the uniqueness of the *nontextual* right in *Roe* is again highlighted as the cause of the novelty. The Court has on numerous occasions removed previously granted judicial protection[207]; in fact, Justice Frankfurter claimed in his *Barnette* dissent that "never before these Jehovah's Witnesses cases . . . has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied."[208]

Not only has the Court exercised before its prerogative to correct itself and withdraw from an area of previous involvement, the claim of stare decisis on such a move is arguably *less* than when it is reversing itself to adopt a more expansive role. In the oft-quoted passage from his dissent in *Burnet*, Justice Brandeis argued that stare decisis applied with less force in cases involving constitutional issues because in such cases "correction through legislative action is practically impossible."[209] It is true, however, as commentators have since noted, that this claim is inapposite and stare decisis should remain a powerful concern in those constitutional cases *denying* individual rights protection because the legislatures can still give statutory protection where once it was constitutional.[210] Given the availabil-

206. *See supra* note 203 and accompanying text.

207. *See, e.g.*, U.S. v. Scott, 437 U.S. 82 (1978) (reversing previous holding that granted a defendant double jeopardy protection in cases where the defendant himself seeks to have the trial terminated before final determination of guilt); New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (rejecting expanded equal protection analysis adopted by previous Court as "needlessly intrusive judicial infringement on the State's legislative powers"); Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976) (reversing previous holding that striking union workers had First Amendment right to picket inside shopping center); Miller v. California, 413 U.S. 15 (1973) (reversing previous test granting greater First Amendment protection to sexually explicit material).

208. *Barnette*, 319 U.S. at 665-66 (Frankfurter, J., dissenting).

209. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

210. As with activist decisions, the political branches of government may not overrule the Court's judgment that the aggrieved citizen is not entitled to the claimed right as a matter of *constitutional* law. However, the legislature can pro-

ity of alternative, statutory protection, the Supreme Court is *not* the only recourse short of constitutional amendment, and stare decisis should apply as it would in other contexts.

On the other hand, where the existing precedent has *granted* an individual right, and thus precluded legislative action in the area, correction by legislation is, in fact, practically impossible, and the claim of stare decisis is legitimately lessened. With these activist precedents, the judicial system *is* the only recourse for protection of the state interests that the activist precedent found insufficient to overwhelm the asserted individual right. In the context of abortion, *Roe v. Wade* denies the States a legitimate interest in protecting fetal life before viability. Nothing short of *Roe*'s reversal could protect pre-viability fetal life from abortion; and even overturning *Roe* will not guarantee pre-viability protection, but only allow States to legislate its protection. As a result, the force of stare decisis as a reason for protecting activist precedents like *Roe* is significantly lessened.

Another claim of stare decisis against the reversal of *Roe* argues that, given the bare majority likely to overrule *Roe* should it happen, there is a danger that *Roe*'s reversal would be " 'like a restricted railroad ticket, good for this day and train only.' "[211] The plaintiffs in *Webster* argued that *Roe* was the "necessary outgrowth of the sixty years of constitutional evolution delineating the right to privacy," and as a result, any attempt to overrule it would threaten to unravel the entire constitutional order protecting decisions of personal autonomy.[212] In argument before the Supreme Court, the *Webster* plaintiffs claimed that because of new forms of post-conception birth control, "there no longer exists any bright line between the fundamental right that was established in *Griswold*[213] and the fundamental right of abortion that was established in *Roe*" and that overruling *Roe* necessarily would mean upsetting the basic right to privacy established in *Griswold.*[214] Taken more

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vide the citizen with the right by *statute*, thus putting persons in the same position as if the Court had held the right to be constitutionally guaranteed.

Maltz, *supra* note 155, at 471.

211. Brief for Appellees, at 4, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (quoting County of Washington v. Gunther, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting))).

212. *Id.*

213. 381 U.S. 479 (1965).

214. N.Y. Times, Apr. 27, 1989, at B12, col. 1.

generally, this stare decisis concern worries that in overturning activist precedents, the Court may risk a whole series of coordinate constitutional rights that it may desire remain protected.

It is in the light of this particular claim of stare decisis that the slower, methodical method illustrated by the *Webster* plurality has its greatest appeal. The *Webster* plurality chose to allow for a greater degree of state regulation of abortion rather than withdraw heightened judicial scrutiny of abortion regulation entirely in one decision. By chipping away at activist precedents like *Roe* over a series of cases, the Court might indeed be better able to ensure that it does not undercut broader constitutional protections that it may still wish to uphold. Under this approach, the passage of time between decisions to step back from an activist role arguably allows the Court a better opportunity to judge the effect of each decision on the area of jurisprudence in question. In fact, had the Court used *Webster* as an opportunity to overrule *Roe v. Wade*, it would have adopted only a more aggressive version of that same go-slow approach. A decision in *Webster* to overturn *Roe* could be seen as a well-defined withdrawal of some degree of constitutional protection for the unenumerated "right to privacy," rather than a wholesale withdrawal of heightened constitutional protection for abortion.

But as mentioned earlier, the plaintiffs in *Webster* argued that if *Roe* were overruled, States would be free to prohibit the use of certain post-conception birth control devices, and their ability to do so would threaten the entire collapse of the unenumerated right of privacy. It is, however, entirely conceivable that a holding that overruled *Roe* and thereby posited a compelling state interest in protecting fetal life *throughout* pregnancy could be reconciled with the holding in *Griswold* that state regulation of contraceptive use violates an individual's right of privacy. Those forms of contraception, like the IUD, the "morning-after pill," and even the French pill RU 486, which work after conception, could be seen as falling under the holding of *Griswold* that—whatever the legitimate state interest behind the regulation—the state cannot violate "the sacred precincts of the marital bedroom."[215] Abortion performed by surgical procedure, on the other hand, is much more clearly

215. *Griswold*, 381 U.S. at 484.

within the realm of legitimate state enforcement of its interests. In other words, in cases involving post-conception forms of birth control, an individual's constitutional right of privacy could overwhelm the state's legitimate and compelling interest in protecting fetal life throughout pregnancy, without requiring a constitutional right to terminate pregnancy, or even a constitutional right to procreative choice.[216]

Assuming, then, that *Roe* could be overturned as a part of an incremental reduction in the scope of the unenumerated right to privacy, which approach—that of the *Webster* plurality or Justice Scalia—would the go-slow approach required by stare decisis prefer? Although the go-slow method might seem to recommend the smaller withdrawal of rights accomplished by the *Webster* plurality,[217] the sole aim cannot be to make the smallest incremental changes possible. To be acceptable as a model of judicial restraint, it must require that any change in judicial scrutiny (whatever the direction) be a principled one.

With this added concern in mind, the dispute between Justice Scalia and the plurality in *Webster* is not one pitting a reactionary ready to dismantle huge portions of existing constitutional precedent against a cautious plurality unwilling to risk an overbroad decision. Instead, the complaint against the plurality is that although its intentions were good—attempting to make only an incremental change from which it could better judge what further constitutional change is necessary—it failed to find a principled point at which to rest constitutional protection. Unlike the *Webster* plurality's failed attempt to orchestrate a well-defined retreat of constitutional protection, overruling *Roe* would have allowed for a more principled guideline for future state abortion regulation, while still providing a point at which to pause before considering whether further inroads should be made into the unenumerated right to

216. Former Solicitor General Charles Fried made much the same argument before the Court in *Webster*. Asked by Justice Kennedy to define the right involved in *Griswold*, Fried replied, "The right involved in *Griswold*, as the Court clearly stated, was the right not to have the state intrude into, in a very violent way . . . the details of marital intimacy." Justice O'Connor then asked, "Do you say there is no fundamental right to decide whether to have a child or not?" Fried responded, "I would hestitate to formulate the right in such abstract terms, and I think the Court prior to *Roe v. Wade* quite prudently avoided such sweeping generalities. That was the wisdom of *Griswold*." N.Y. Times, Apr. 27, 1989, at B12, col. 1.

217. Ostensibly, if stare decisis encourages the Court to move slowly in order to gauge the effects of each withdrawal, the smaller the step taken, the more opportunities to gauge effects.

privacy. The plurality placed too much emphasis on the claim of stare decisis, and in doing so failed to recognize that the abortion issue is not one which allows for a principled, step-by-step retreat. At the most, then, stare decisis requires that adherents to the post-activist model of judicial restraint—which would overrule rather than chip away at activist precedents—to consider whether there are principled steps short of overruling the precedent that might provide the Court with the opportunity to better consider the effects of its decision.

B. *Professor Monaghan's Post-Activist Model*

A wholly different solution to the dilemma facing a conservative majority succeeding an activist Court was offered by Professor Monaghan in a recent article on stare decisis.[218] He argued that because no unifying, originalist approach could explain the activist judicial role inherent in the existing constitutional order and because systematically overruling that order is impossible, the originalist must admit defeat on the constitutional issues already decided and hope only to limit any further damage.[219]

As part of his analysis, Professor Monaghan divided Supreme Court precedents into two categories, which are accorded different types of stare decisis protection: (1) those decisions once controversial but no longer so, such as *Brown v. Board of Education*[220] and the *Legal Tender Cases*;[221] and (2) those still contested, such as *Garcia v. San Antonio Metropolitan Transit Authority*[222] and *Roe v. Wade*.[223] Professor Monaghan argued that stare decisis has served the very important function of making the constitutional questions addressed in the first category of cases "so far settled that they are simply off the agenda."[224] Professor Monaghan claimed that for these cases at least, the doctrine performs the vital function of what he termed "system legitimation"—that is, making their continued existence integral to the legitimacy of the current constitutional

218. *See* Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).
219. *See id.* at 723-24, 739-40.
220. 347 U.S. 483 (1954).
221. *See* Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).
222. 469 U.S. 528 (1985).
223. *See* Monaghan, *supra* note 218, at 744-48.
224. *Id.* at 744.

order. "Such issues are too central to our society to overrule, if not simply to question," according to Professor Monaghan. "To permit or vindicate challenges to these traditions would incite radical and even revolutionary attacks on the legal status quo."[225]

As for the second category of precedents, those still contested, Professor Monaghan argued that the system legitimation role applies only to some, including *Roe v. Wade*. "[E]ven when expectations or practices are not deeply entrenched," he posited, "if serious public debate still surrounds an issue, departure from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided: *Roe* provides a ready example."[226] Most contested cases will not implicate stability to the degree *Roe* does, however, and Professor Monaghan claimed the rest should be protected by the Court's need continually to legitimize its right of judicial review. When confronted with these precedents, the Court must accept the activist role because, according to Professor Monaghan, it must guard against the danger that educated "elites" in American society will become disenchanted with the concept of judicial review itself.[227]

Professor Monaghan's theory, at least as it relates to cases no longer contested, provides an important check on the scope of any post-activist approach to constitutional precedent.[228] To the extent such activist decisions have become embedded in our constitutional order, no claim of originalism, judicial restraint, or other theory of constitutional adjudication can claim sufficient authority to overrule them. The values underlying stare decisis—certainty, reliance, equality, and efficiency—would argue strongly against reconsideration of such entrenched precedents. In addition, the special stare decisis concern against withdrawing constitutional protection of certain rights for fear of unraveling broader rights underlying them also militates strongly against overruling such *long-accepted* holdings. To the extent such decisions have become vital

225. *Id.* at 750 (citations omitted).

226. *Id.* at 751.

227. *See id.* at 752.

228. Even here, however, Professor Monaghan's argument is somewhat unsatisfying. Stare decisis is given credit for removing some cases from the agenda of contested constitutional issues, and yet it is not clear whether it is stare decisis, the passage of time, or some other factor that is truly responsible for eventual wide acceptance.

threads in the fabric of the existing law, overruling them could prove too destructive and destabilizing. Given that these traditional factors of stare decisis command such strong respect in this category of cases, the need for returning to a more limited role cannot match their force. In addition, if an activist precedent[229] has become entrenched and is widely accepted, then many of the complaints the advocates of judicial restraint would make about inconsistent application and unpredictability simply do not apply.

As for those cases that remain contested, including *Roe v. Wade*, the Monaghan argument that some have become indelibly entrenched holds little sway. If a particular precedent remains the subject of wide public debate and has been the target of persistent criticism, it is difficult to see how discarding the precedent in favor of a rule advocated by another portion of society should prove any more destabilizing than retaining it. In addition, if one approach to a controversial issue has failed over time to win widespread acceptance, as has been the case with the pro-choice position of *Roe*, the alternative approach, no matter how controversial at the time, may well prove more acceptable over the long run.[230]

Professor Monaghan's claim that other contested, activist precedents should be accepted to preserve the legitimacy of judicial review appears similarly to exaggerate the effect of overruling precedent. If any issue of constitutional adjudication has been removed from the agenda of contested constitutional issues, it is surely the concept of judicial review. Even if Professor Monaghan is unable, as he claimed, to rely upon the continued support from the "elites" of society to protect judicial review, he should be reassured by the fact that the decision

229. There is, of course, a difference between an activist precedent, which this Note suggests that the Court reconsider, and the non-originalist precedent, which Professor Monaghan decries. For example, a Court could reject an original understanding that its role in reviewing a certain statutory area was to be broad, and instead choose a more limited role. In doing so, it would be adopting a non-originalist position while not assuming an activist role. The significance of the distinction is not necessarily great, however, as it is typically the original understanding of the Constitution that leads one to believe the Court should adopt a more limited role.

230. The history of the Court's jurisprudence in the area of school segregation provides an excellent example.

This argument is not meant to suggest that the anti-abortion position would likely enjoy widespread acceptance if *Roe* were overturned, but rather that the majority of Americans might more readily accept placing the authority to regulate abortion in the state legislature rather than the judicial system.

in *Marbury v. Madison* outlining the power of judicial review has clearly undergone the process of system legitimation he advocated as a byproduct of stare decisis.

Finally, Professor Monaghan might criticize the post-activist model advocated here as yet another approach to constitutional adjudication that lacks any unifying theory of stare decisis. It is his opinion that "[b]ecause a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations."[231] Feeling that "a satisfactory theory of constitutional adjudication requires more than that,"[232] he goes on to sketch his version of a theory of stare decisis that plays the functions of legitimating our system of constitutional government and its concept of judicial review.

What Professor Monaghan failed to recognize, however, is that stare decisis is a judicial *predisposition,* not a coherent theory of judicial interpretation. Stare decisis has always consisted of a series of factors the Court considers when deciding whether to overrule an existing precedent. Its only consistent command has been that something more than disagreement with a prior holding is required to overrule it.[233] As Justice Brandeis has indicated, "The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question *entirely within the discretion of the court.*"[234]

The resulting application of stare decisis need not be wholly unprincipled, however. Common-law and public-law cases throughout modern judicial history, along with an enormous volume of legal scholarship, have offered a remarkably consistent series of factors the Court must consider before departing from the general predisposition stare decisis commands.[235] Although the discretion allowed by these balancing factors is large, their mere existence and the need for the Court to justify its application of them provide a means of judging the legitimacy of the Court's action. Like the prudential guidelines of decisionmaking discussed earlier, the factors making up stare decisis compose a judicial technique useful in fulfilling a partic-

231. Monaghan, *supra* note 218, at 743.
232. *Id.*
233. *See* Brown v. Board of Education, 349 U.S. 294, 300 (1955).
234. *Burnet*, 285 U.S. 393, 405-06 (Brandeis, J., dissenting) (emphasis added).
235. *See, e.g.*, sources cited *supra* note 183.

ular role for the Court. The role envisioned by the prudential guidelines is that of a limited judicial review of legislative action. The role encouraged by stare decisis is a judiciary applying law with as high a degree of certainty, consistency, equality, and efficiency as possible.

C. *The Need to Build Coalitions*

One final argument, a practical one, challenges the post-activist model of judicial restraint. Such a model, the argument would go, fails to take account of the need for members of the Court to build majorities and maintain collegiality. In the context of *Webster*, it is not clear the members of the plurality and Justice Scalia could count on Justice O'Connor as a fifth vote to overturn *Roe v. Wade*. Faced with her unwillingness even to reconsider (much less overrule) *Roe*, it could be argued that the plurality was merely attempting to limit *Roe* as much as possible, and, by not explicitly joining Justice Scalia's call for its rejection, removing the pressure (and spotlight) from Justice O'Connor as the all-important swing vote on *Roe*'s future. Although these practical concerns are no doubt factors considered by the members of the Court, they do not excuse the Justices from some minimum level of candor in their holdings. Professor Shapiro has argued that while acknowledging the practical concern of coalition-building, "the sticking point can and should be an unwillingness to make or join in a statement that does not represent the judge's views and that will mislead the opinion's readers as to what those views are."[236] The plurality opinion in *Webster* most clearly violates this tenet by allowing *Roe* to remain standing while indicating in its reasoning that the statute had led it to overrule the holding of that case.[237] Justice O'Connor, while managing to avoid any outward indication of her opinion of *Roe*, still was disingenuous if, in fact, she believed it should be overruled. By applying the holdings of cases like *Akron* and *Thornburgh*, Justice O'Connor was applying a heightened judicial standard grounded in a woman's fundamental constitutional right to abortion outlined in *Roe*. If she does believe a woman's right to an abortion is less

236. Shapiro, *supra* note 199, at 743.

237. This same complaint applies with even more force to the decisions of Justices White and Rehnquist in *Maher*, *Poelker*, and *Harris*, where they accepted for the moment *Roe*'s legitimacy in order to win enough votes to limit its holding as much as possible.

than fundamental, and given that she has held that the state has a compelling interest in protecting fetal life throughout pregnancy,[238] Justice O'Connor was applying a right and a framework with which she had fundamental disagreement.

V. Conclusion

Two basic dilemmas confront Supreme Court Justices who advocate judicial restraint when facing a series of activist constitutional precedents.[239] The post-activist model of judicial restraint, outlined and advocated here, would offer viable solutions to those problems.

First, when faced with a precedent requiring the Court take an activist role in second-guessing the legitimacy of legislation, the post-activist model calls for a decision whether to overrule the precedent or to accept it in the name of stare decisis. In most cases, the post-activist model would be predisposed toward overruling the precedent. As discussed earlier, most activist precedents cannot be corrected by the legislature, except by constitutional amendment, and the sole recourse to the courts necessarily lessens the force of stare decisis. In addition, overturning most activist precedents will not present the concerns that underlie the doctrine of stare decisis itself. As the previous discussion illustrated, however, there are occasions when despite fundamental disagreement with the precedent, overturning it would not be advisable. These precedents, through widespread acceptance inside and outside the judicial system, have become embedded in the current legal order, and overturning them would create far greater difficulties for the Court than accepting the activist role mandated by the precedent.

Second, if the precedent is to be overruled, the Court must decide whether to do so at the first available opportunity, or whether to opt instead to chip away at the existing constitutional right, spreading its elimination over a series of cases. The post-activist model argues that because the goal of judicial restraint is to achieve a more limited role for the courts in second-guessing legislation, the advocates of judicial restraint on

238. *See Thornburgh*, 476 U.S. at 2214 (O'Connor, J., dissenting) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy.' ").

239. *See supra* pp. 290-91.

the Court must be willing to adopt temporarily the tools of the judicial activist in order to return the Court to its proper function. On the first opportunity in which the facts of a case fairly implicate the constitutional right at issue, the advocates of judicial restraint should determine whether the Constitution as they interpret it includes that right. If it does not, or if the activist precedent at issue overprotects that right by mandating a higher level of judicial scrutiny than is appropriate for the right's vindication, then the necessary alterations in Court precedent should be made.

On some occasions, the activist precedent might be susceptible to a more measured withdrawal from judicial activism, rather than wholesale reversal of existing law. If several principled stages of withdrawal are possible, then moving more slowly has the advantage of allowing the Court an opportunity to reconsider at each stage whether eliminating the constitutional right at issue will endanger broader constitutional protections it might want to retain. Although this was presumably the idea behind the approach of the plurality in *Webster*, it was inappropriate in the context of a woman's right to an abortion, which does not lend itself to a principled middle ground. In addition, acceptance of a step-by-step withdrawal necessarily involves some sacrifice in judicial candor, as the advocates of judicial restraint accept temporarily a more activist role than they ultimately intend. Most seriously, however, adopting a measured withdrawal prevents the democratically elected legislature from protecting the legitimate state interest that the activist precedent refused to recognize. Nowhere is that more compelling than in the context of abortion, where the Supreme Court's opinion in *Webster* withheld from state legislatures the constitutional validation of the legitimate and compelling state interest in protecting fetal life throughout pregnancy.