

1989

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Recommended Citation

Farber, Daniel A., "Abortion After Webster" (1989). *Constitutional Commentary*. 183.
<https://scholarship.law.umn.edu/concomm/183>

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ABORTION AFTER *WEBSTER*

The most heralded decision of the 1988 Term was the abortion decision, *Webster v. Reproductive Health Services*.¹ After the decision came down on the last day of the Term, there was an avalanche of public reaction. Pro-life forces heralded the decision as the demise of *Roe v. Wade*, while pro-choice advocates lamented the return to the pre-*Roe* era of "back alley abortions." Both responses were exaggerated. *Webster* actually is notable as much for the Court's caution and indecision as anything else. Though it may be a sign of larger things to come, the decision itself actually made only small changes in existing abortion law.

In addition, advocates on both sides of the issue may have overestimated the ability of the legal system to suppress abortion. A recent study by a leading expert in criminal law suggests that, no matter what the Supreme Court does, the effect on the number of abortions is likely to be minimal.

Four provisions of the Missouri abortion statute were before the Supreme Court in *Webster*. The Court found it unnecessary to pass on two provisions—a preamble declaring that human life begins at conception and a prohibition on the use of public funds to encourage abortion. Two other provisions were reviewed on the merits and upheld. One of these barred abortions by public employees or at public hospitals. The other required viability testing for abortions after the twentieth week of pregnancy.

In assessing the impact of *Webster*, the starting place is obviously the opinions themselves. The lead opinion was written by Chief Justice Rehnquist, and was joined in its entirety by Justices White and Kennedy. He was also joined by O'Connor and Scalia, making his the majority opinion, on three points: First, the "human life" preamble might raise constitutional issues depending on how it was applied by the state courts, but since its future application was entirely speculative, the question was not ripe for decision. Second, limiting abortions by government employees or at government hospitals was constitutional. This provision did not place any new barrier in the way of a woman seeking an abortion, but rather denied her the affirmative assistance of the government in obtaining the abortion. Hence, this provision did not violate *Roe*,

1. 109 S. Ct. 3040 (1989).

which only prohibits the government from adding to the woman's burdens. Third, the dispute about the ban on the use of government funds for abortion counseling was moot, because the plaintiffs had essentially decided not to pursue it on appeal.

Chief Justice Rehnquist spoke only for a plurality on what turned out to be the crucial issue in the case, that of viability testing. The statute was somewhat ambiguous in its terms. The first sentence of the statute says that whenever a doctor has reason to believe that the fetus is older than nineteen weeks, "the physician shall first determine if the unborn child is viable "using . . . that degree of care . . . commonly exercised by the ordinarily skillful . . . physician." The second sentence goes on to say that "[i]n making this determination of viability, the physician shall perform" tests for fetal age, weight, and lung maturity. The ambiguity concerns whether the tests are mandatory. The second sentence seems to say that certain tests must always be performed. The first sentence can be read to leave the doctor discretion based on reasonable medical judgment.

Rehnquist adopted the less restrictive reading, under which the doctor does not need to test if he determines that the tests would be "irrelevant to determining viability or even dangerous to the mother and the fetus. . . ." Given this reading, Rehnquist found the statute to be reasonable. While a 20-week fetus is not viable, there is a four-week zone of uncertainty in determining the length of pregnancy, and a 24-week fetus might be viable. But even though it was reasonable, the statute conflicted with *Roe* in Rehnquist's view, because it frequently burdened abortions where in fact the fetus was not viable, thereby violating the *Roe* trimester system. (Under the trimester system, the state can regulate abortions to protect potential human life only in the third trimester of pregnancy.)

This brings us to the crucial portion of Rehnquist's opinion, his rejection of the *Roe* trimester system. He rejected the trimester system because it spawned "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." Also, the state's interest in preserving potential life does not spring into existence at the point of viability, but exists throughout pregnancy. The woman's right to abortion cannot be balanced against fetal life "once and for all by reference only to the calendar."

Does this mean that *Roe* is overruled? Clearly, no—or at least, not yet. In the penultimate paragraph of the opinion, Rehnquist pointed out that *Webster* is distinguishable from *Roe* because Missouri banned abortions only after viability. "This case therefore af-

fords us no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed.”

There is even some language in Rehnquist’s opinion that seems to reaffirm *Roe*, or at least the basic holding that the right to abortion enjoys some constitutional protection. Consider the following two passages:

The experience of the Court in applying *Roe v. Wade* in later cases suggests to us that there is wisdom in not necessarily attempting to elaborate the abstract differences between a “fundamental right” to abortion, as the Court described it in *Akron*, a “limited fundamental constitutional right,” which Justice Blackmun’s dissent today treats *Roe* as having established, or a *liberty interest protected by the Due Process Clause, which we believe it to be.*

* * *

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

Look again at what Rehnquist was saying. First, abortion is “a liberty interest protected by the Due Process Clause.” Second, allowing complete bans on abortion “misreads our views.” In short, it seems, Rehnquist recognized some sort of constitutional right to abortion.

Justice O’Connor’s concurring opinion did not go even as far as Rehnquist’s. She agreed with him that viability testing is required by the statute only where consistent with good medical practice. Given that reading, she found no conflict with the *Roe* trimester system, and therefore no reason to reevaluate that system. “No decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible. Quite the contrary.” In short, she said, “[i]t 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 woman’s abortion decision.”

Of all the Justices, only Scalia spoke in favor of a direct overruling of *Roe*. He lambasted his fellow conservatives for avoiding the issue. He agreed with the dissent that Rehnquist’s opinion “effectively would overrule *Roe v. Wade*.” He added: “I think that should be done, but would do it more explicitly. Since today we contrive to avoid doing it, and indeed to avoid almost any decision of national import, I need not set forth my reasons. . . .” The tone of Scalia’s concurrence is harsh—as harsh as one might have expected from a dissenting, not concurring, opinion. He said that O’Connor’s views in her concurring opinion “cannot be taken seri-

ously." He was only slightly gentler about Rehnquist's approach. "The result of our vote today is that 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." He closed by saying that the Court had taken the "least responsible" possible approach to the case.

Justice Blackmun's dissent begins by saying that *Roe* and "the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure." "Never in my memory," he said, "has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions." And so, he said, "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court." Justice Blackmun then criticized the Court's handling of the viability issue and defended at length the approach adopted by the Court in *Roe*. He was joined by Justices Brennan and Marshall.

Justice Stevens wrote a separate dissent. He rejected Rehnquist's reading of the viability provision, and argued instead that it required viability testing even where testing would be pointless or dangerous. He also argued that the "human life" declaration violated the establishment clause of the Constitution, because it was only based on a theological view about the beginning of life.

At this point, perhaps it is worth "counting heads" with respect to the current status of *Roe*. Four Justices (the dissenters) would uphold *Roe*. Justice O'Connor is silent on the issue. Three Justices (the plurality) want to modify the trimester system but seem to recognize some possible constitutional right to an abortion. Only one Justice (Scalia) wants to throw *Roe* on the scrap heap.

As to the specific issues in the case, the direct impact of the decision is minor. The Court did not make much new law in its ruling about abortions by public facilities and employees. The Court had previously held that public financing could be denied for abortions; *Webster* merely took that holding one step further in a predictable direction. The viability-testing provision may well be consistent with *Roe*, as Justice O'Connor argued. Even if it is not, it has little practical importance. Less than one percent of all abortions are performed after the twentieth week, and even then, the statute requires viability testing only when the physician finds it to be medically justifiable.

Although the press billed *Webster* as a tremendous victory for pro-life sources, it could equally well have been called a startling

defeat. They obtained precisely one vote to overrule *Roe* outright. Justice O'Connor, whose vote is clearly necessary if *Roe* is to be overruled, seemed to be very anxious indeed to avoid that step. Rehnquist, White, and Kennedy seemed surprisingly gingerly in their handling of the issue, and even—as I noted earlier—can be read to be reaffirming some aspects of *Roe*. Indeed, as a technical matter, *Roe* is completely unmodified. Since there were only four votes to modify it in any respect, it remains binding on lower court judges.

How did this get to be a “big win” for the pro-life movement? Everyone outside the Court had an interest in exaggerating the effect of the case. Pro-life advocates wanted to be able to claim a big victory. Pro-choice advocates wanted to rally the troops. And the press wanted the decision to be as exciting as possible. These interests all converged in the direction of “hyping” the impact of *Webster*.

This is not to say that the future of *Roe* is secure. After announcing the decision in *Webster*, the Court granted cert. in three cases involving other aspects of abortion regulation. These cases give the Court another opportunity to whittle away at abortion rights. They also give Justice Scalia another opportunity to try to sell his colleagues on more drastic action. If anything, however, his jabs at O'Connor may well backfire, making her less likely to move in his direction.

My crystal ball is no better than yours, but I see no reason to expect the Court to abolish the constitutional right to abortion in these cases. What I do expect—and what almost everyone has expected for at least the past three years—is that the Court will allow greater state regulation (not including complete bans on abortion). If President Bush gets to make some additional appointments, perhaps the balance of power will shift in Scalia's direction. Or perhaps not. A Bush appointee might well share some of the qualms that Kennedy and O'Connor seem to feel about a total overruling of *Roe*. Stevens and Blackmun, let us recall, were also Republican appointees.

Even if *Roe* is overruled someday, abortions—for better or worse—will not come to a halt. According to a *Newsweek* poll, only 17 percent of the public favors a complete ban on abortion. *Newsweek* also counted at least ten states that are unlikely to restrict abortion in the near future, so women who can afford a bus ride to those states will still be able to get abortions.

Moreover, even a total ban on abortions might be relatively ineffective. John Kaplan is one of the nation's leading criminal law

experts. In a recent article, he contends that abortion bans can be expected to have minimal effects, even apart from the likelihood of interstate travel to get abortions. The most reliable studies show that the number of illegal abortions before *Roe* was about 75 percent of the number of legal abortions now. Today, illegal abortions would be much safer and cheaper, because the technology for performing abortions has improved greatly since *Roe*. Criminal enforcement of abortion laws was always very difficult, and would be more difficult today because of broad public support for abortion. For these reasons, Professor Kaplan contends, bans on abortion would be largely a symbolic victory for the pro-life groups, but would have limited practical effects.²

Restrictive abortion laws would prevent some abortions, and they would place a heavy psychological (and sometimes economic) burden on women who obtain abortions despite those laws. The importance of symbolism on such fundamental issues also should not be underestimated. But the true stakes are less than both sides of the dispute claim.

In any event, we are a long way from a constitutional regime in which complete bans on abortion will be allowed. Apart from Justice Scalia, no one on the Supreme Court seems to be in any hurry to get there.

D.A.F.³

2. For those of you who would like to read his fascinating article in full, the citation is Kaplan, "Abortion as a Vice Crime: A 'What If' Story," 51 *LAW AND CONTEMP. PROB.* 151 (1988).

3. An earlier version of this essay appeared in *Trial* magazine. Reprinted with the permission of *Trial*. Copyright 1989 Ass'n of Trial Lawyers of America.