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STATE CONSTITUTIONAL REGULATION OF ABORTION

Michael R. Braude†

I. INTRODUCTION

Among the most divisive legal and social issues in contemporary American society is the existence of a woman's right to obtain an abortion, as counterbalanced by the authority of states and municipalities to regulate and restrict that right. Between 1973 and 1989, the basic rules concerning the power of the states to prohibit or significantly restrict the performance of abortions were those announced by the Supreme Court in *Roe v. Wade*.1 While the rules and analytic method adopted in *Roe* quickly became controversial, they nevertheless provided relatively clear guidance to women seeking abortions and to physicians willing to perform the procedure. Sixteen years after *Roe*, in *Webster v. Reproductive Health Services*,2 the Supreme Court, substantially altered by retirements and new appointments, served notice that the analytical basis of *Roe* is no longer acceptable to a majority of the Justices. It is a safe prediction that *Roe* will not long survive in its original form.3

The purpose of this Article is to explore in detail under the constitutions of the various states the regulation of abortion, a body of law that is already important and will become far more important if *Roe* is overruled or substantially modified. The Article begins with a description of the major developments in abortion-related issues decided by the Supreme Court during the period between *Roe* and *Webster*. The decisions of state courts recognizing some form of a

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3. For an interesting discussion on the political backlash following the *Webster* decision, see L. Tribe, *Abortion the Clash of Absolutes* 177-97 (1990).
"right to abortion" under the states' constitutions are then examined. Many of these decisions have involved the question whether states should provide funding and facilities which permit economically disadvantaged women to obtain abortions. The discussion then focuses on another major battleground in the abortion controversy which has led to state constitutional adjudication: the collision between the right of anti-abortion demonstrators to publicly express their views and the right of abortion clinics to be free from interference by such demonstrators. The discussion concludes with an examination of Maryland's newly adopted statutory scheme regulating abortion.

II. THE SUPREME COURT DECISIONS

In Roe v. Wade, a pregnant woman brought a class action suit challenging the validity of Texas's criminal abortion law. That law prohibited the procurement of an abortion at any stage of pregnancy except for the purpose of saving the life of the potential mother.

4. Tex. Penal Code Ann. §§ 1191-1194, 1196 (Vernon 1961). These statutes read as follows:

Article 1191. Abortion. If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192. Furnishing the means. Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193. Attempt at abortion. If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194. Murder in producing abortion. If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196. By medical advice. Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

See Roe, 410 U.S. at 118.

5. There exists a tendency among persons with strong opinions concerning the morality of abortion to attach significance to the label used to denominate a woman considering an abortion. The so-called "pro-life" faction finds it offensive to refer to this individual as "the woman," while calling her "the mother" is at times viewed as offensive to the so-called "pro-choice" faction. The purpose of this Article is to explore the law without offering any moral judgment. In an effort to maintain neutrality, the appellation "potential mother" shall be used herein.
The Court held that this statute violated the plaintiff's right to due process of law. The Court's method of analysis was to identify three important conflicting interests, to balance those interests against each other, and to determine at what point during the course of a pregnancy each interest becomes paramount. 6

Identifying in constitutional terms the interest of the potential mother, the Court found a "right of privacy" in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action." 7 Closely tied to the privacy right of the potential mother was the necessity that her physician be permitted the freedom to exercise his or her best medical judgment. The Court reasoned that proper medical judgment could under some circumstances take the form of aiding a potential mother in deciding whether to have an abortion.

The Court also identified two important governmental interests which could come into conflict with the potential mother's right to decide whether and when to undergo an abortion. First, the Court recognized an interest in safeguarding the potential mother's health which permits the state to enact regulations aimed at promoting health and maintaining appropriate medical standards. That interest does not, however, become constitutionally compelling until approximately the end of the first trimester of pregnancy. During the first trimester, the decision of potential mother and physician is immunized from governmental interference. 8

Second, the Court recognized a governmental interest in the potentiality of human life. That interest was found to become compelling at the point of viability—that is, when the fetus "has the

7. Id. at 153. The Court found support for this right of privacy in a series of earlier cases dealing with contraception and other aspects of family life. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (ban on distribution of contraceptives to unmarried adults violative of guarantee of equal protection under the fourteenth amendment); Loving v. Virginia, 388 U.S. 1 (1967) (statutory ban on interracial marriages invalid under the fourteenth amendment); Griswold v. Connecticut, 381 U.S. 479 (1965) (prohibition upon distribution of contraceptives to adults violates constitutional right of privacy within the penumbra of the Bill of Rights); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents' liberty interest in raising their children requires invalidation of requirement that children be sent to public as opposed to private schools under the fourteenth amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibition of teaching any language other than English to any child under the eighth grade violates the fourteenth amendment).
8. Roe, 410 U.S. at 163. In a subsequent case, the Court wrote: "Frequently, the first trimester is estimated as 12 weeks following conception, or 14 weeks following the last menstrual period." Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 431 n.15 (1983). In the same footnote, the Akron Court retained the conclusion of its predecessors in Roe that a trimester is not a precisely measurable period of time.
That point is generally reached between twenty-four and twenty-eight weeks into a pregnancy. At this stage, the state is free to heavily regulate abortions, including prohibiting the procedure altogether unless it is necessary to preserve the life of the potential mother.

During the remainder of the 1970s, the Court did not retreat from Roe in any substantial fashion. In fact, the Court often struck down attempts by state legislatures to place significant impediments in the path of a woman seeking an abortion. While the Court recognized that it had not established an absolute right to abortion, and that the states retained the freedom to regulate the procedure so long as those regulations were not unduly burdensome, the Justices regularly struck down state laws which ran afoul of the basic Roe framework.

For example, in Planned Parenthood of Central Missouri v. Danforth, the Court expressly reaffirmed Roe’s viability analysis, struck down an absolute requirement of spousal or parental consent, and invalidated a prohibition upon a commonly used technique for performing abortions. At the same time, the Court in Danforth upheld statutory requirements that a physician obtain written consent from the potential mother before performing the procedure and that he maintain certain records. The Court found that these measures were genuinely health related and did not interfere with the opportunity for physician and patient to consult and reach a decision.

Similarly, in Bellotti v. Baird, the Court held that a state may impose a parental or judicial consent requirement on an immature minor seeking an abortion, but only if the minor is granted an opportunity to establish that she is sufficiently mature to make the decision herself. In Colautti v. Franklin, the Court reaffirmed Roe’s viability criterion and its emphasis on the independent role of the physician, holding, inter alia, that certain restrictions on the physician’s options when a fetus “may” be viable were void for vagueness.

In 1980, the Supreme Court dealt a substantial, if indirect, setback to the qualified “right to abortion” it had announced in Roe. In

10. See Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 457 & n.5 (1983) (O’Connor, J., dissenting); see also Hendricks, The Limits of Life, JOHNS HOPKINS MAG., Oct. 1989, at 16 (noting that while a fetus twenty-two or fewer weeks old cannot survive because of insufficient lung capacity, survival rates at major hospitals are increasing in the twenty-four to twenty-six week range).
Harris v. McRae and its companion case, Williams v. Zbaraz, the Court considered the constitutional validity of the Hyde Amendment and similar state legislation. Under the Hyde Amendment, the federal government would no longer provide reimbursement to the states through the medicaid program for subsidization of medically necessary abortions. While the medicaid program would continue to subsidize the great majority of medically necessary procedures, nearly all abortions—including some that were medically necessary—would be excluded from coverage.

Two issues were before the Court in Harris. The first was statutory, and focused on whether the states were required to continue funding abortions under the medicaid program even after federal reimbursement had been removed. The Court examined the relevant legislative history, and concluded that the purpose of the medicaid program was to reduce the burden on the states through federal assistance. The Court found that Congress had never intended for the states to be forced to accept unilateral funding responsibility. Rather, it was intended that the states would administer the disbursement of federal funds. Therefore, the cutoff of federal funding effectively removed the medicaid subsidy for abortions in its entirety.

Having so concluded, the Court found that the constitutional issue was squarely presented. The petitioners asserted four separate arguments: (1) that the Hyde Amendment violated the substantive due process right recognized in Roe by reducing a potential mother’s right to terminate her pregnancy, (2) that the legislation violated the establishment of religion clause of the first amendment, (3) that it

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18. The Harris Court described the Hyde Amendment as follows:

Since September 1976, Congress has prohibited either by an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare or by a joint resolution—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the "Hyde Amendment," after its original congressional sponsor, Representative Hyde. The current version of the Hyde Amendment, applicable for the fiscal year 1980, provides:

"[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service."

Harris, 448 U.S. at 302.
19. Id. at 309-11.
interfered with the free exercise of religion, and (4) that its discrimi-
nation between medically necessary abortions and other necessary
medical procedures violated the guarantee of equal protection.20

The Court turned first to the heart of the matter—that is, whether
the Hyde Amendment was at odds with the liberty interest recognized
in Roe. Holding that it was not, the majority borrowed heavily from
the reasoning of Maher v. Roe,21 where the Court had rejected the
less compelling contention that medicaid funding was constitutionally
required for purely elective, medically unnecessary abortions. The
majority in Harris reasoned that a state is perfectly free to make a
value judgment favoring childbirth over abortions and to implement
that judgment through its allocation of funds. Similarly, the Court
noted that if the Hyde Amendment left intact an impediment to the
availability of abortions, that impediment was poverty—a condition
which the state has not caused.22

Finding that Roe imposed no affirmative obligation on the states
to assist in the obtaining of an abortion but only a negative obligation
to refrain from unnecessary interference, the majority in Harris found
the existence of medical necessity for an abortion constitutionally
irrelevant. In effect, it reasoned that government has no obligation
to eliminate all of the consequences of indigency, but instead may
constitutionally make social policy by concentrating its resources in
areas that it finds most deserving, so long as it does not erect obstacles
to the exercise of fundamental rights. Since the Hyde Amendment

20. Id. at 311.
22. The Court adopted the following language from Maher:
The Connecticut regulation before us is different in kind from the
laws invalidated in our previous abortion decisions. The Connecticut
regulation places no obstacles—absolute or otherwise—in the pregnant
woman's path to an abortion. An indigent woman who desires an
abortion suffers no disadvantage as a consequence of Connecticut's
decision to fund childbirth; she continues as before to be dependent
on private sources for the service she desires. The State may have
made childbirth a more attractive alternative, thereby influencing the
woman's decision, but it has imposed no restriction on access to
abortions that was not already there. The indigency that may make
it difficult—and in some cases, perhaps, impossible—for some women
to have abortions is neither created nor in any way affected by the
Connecticut regulation.

Harris, 448 U.S. at 314 (quoting Maher, 432 U.S. at 474). The Harris Court
went on to add: "The Hyde Amendment, like the Connecticut welfare regu-
lation at issue in Maher, places no governmental obstacle in the path of a
woman who chooses to terminate her pregnancy, but rather, by means of
unequal subsidization of abortion and other medical services, encourages al-
ternative activity deemed in the public interest." Harris, 448 U.S. at 315.
had erected no obstacle that was not already present, it did not violate the due process right announced in \textit{Roe}.\textsuperscript{23}

The Court then proceeded to briefly analyze, and reject, the remaining constitutional challenges. With respect to the establishment clause, the majority concluded that the Hyde Amendment merely coincided with the views of certain religions; it did not actively favor one religion over another. The free exercise contention was rejected because the plaintiffs lacked standing to raise it.\textsuperscript{24}

Somewhat greater attention was devoted to the equal protection assertion. The Court reiterated that no substantive right had been infringed because financial need does not alone define a suspect class. Therefore, the distinction between abortion and other medical procedures need only be rationally related to a legitimate governmental objective. That objective was ironically found in the text of \textit{Roe}, where the Court had recognized the legitimacy of the state’s interest in the potentiality of human life.\textsuperscript{25}

The holding in \textit{Harris} commanded a majority of five Justices. Each of the four dissenting Justices filed a separate opinion, which later proved to be influential when state courts considered similar issues under their own constitutions. Justice Brennan concluded that the challenged legislation was inconsistent with the right of choice protected by \textit{Roe}.\textsuperscript{26} Justice Marshall was particularly concerned with the risk to life and health that dangerous pregnancies could impose on women unable to afford an abortion.\textsuperscript{27}

\textsuperscript{23} \textit{Id.} at 316-18.
\textsuperscript{24} \textit{Id.} at 320-21.
\textsuperscript{25} \textit{Id.} at 324-25.
\textsuperscript{26} Justice Brennan wrote in part:

\begin{quote}
The Hyde Amendment’s denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision, for both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have.

When viewed in the context of the Medicaid program to which it is appended, it is obvious that the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what \textit{Roe v. Wade} said it could not do directly.
\end{quote}

\textit{Id.} at 330-31 (Brennan, J., dissenting) (footnotes omitted).

\textsuperscript{27} Justice Marshall wrote in part:

\begin{quote}
Numerous conditions—such as cancer, rheumatic fever, diabetes, malnutrition, phlebitis, sickle cell anemia, and heart disease—substantially increase the risks associated with pregnancy or are themselves aggravated by pregnancy. Such conditions may make an abortion medically necessary in the judgment of a physician, but cannot be funded under the Hyde Amendment. Further, the health risks of undergoing an abortion increase dramatically as pregnancy becomes more advanced. By the time a pregnancy has progressed to the point where a physician
Justice Blackmun joined the other dissenting opinions, writing only to express his outrage at what he perceived to be the majority's callousness to the poor. Justice Stevens, stressing Roe's holding that the right to abortion is always protected when the life or health of the potential mother is endangered, concluded that Congress had abandoned the neutral principle of medical need and was simply punishing women who needed abortions but could not afford them. Justice Stevens would have struck down the Hyde Amendment, and the similar state statute at issue in Zbaraz, as "an unjustifiable, and indeed blatant violation of the sovereign's duty to govern impartially." Three years after the decisions in Harris and Zbaraz, the Court, by a vote of six to three, resoundingly reaffirmed the principles announced ten years earlier in Roe. In Akron v. Akron Center for Reproductive Health, Inc., the issue presented was the validity of five provisions of an ordinance enacted by the city of Akron, Ohio. The ordinance in question provided the following: (1) that all abortions after the first trimester were to be performed in a hospital, rather than in an outpatient clinic; (2) that parental consent was to be obtained prior to the performance of an abortion upon an unmarried minor; (3) that before consent to an abortion will be deemed "informed," a physician was required to recite a lengthy litany of information designed to inform the potential mother that a fetus is very close to being a human being and that an abortion is a dangerous procedure; (4) that a twenty-four hour waiting period was required between consent to an abortion and performance of the procedure; and (5) that an aborted fetus had to be disposed of in a "humane and sanitary" manner.

Prior to analyzing the ordinance before it, the Court deemed its first order of business to be a forceful reaffirmation of the correctness and continuing validity of Roe's reasoning. The Court proceeded by

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is able to certify that it endangers the life of the mother, it is in many cases too late to prevent her death because abortion is no longer safe. There are also instances in which a woman's life will not be immediately threatened by carrying the pregnancy to term, but aggravation of another medical condition will significantly shorten her life expectancy. These cases as well are not fundable under the Hyde Amendment.

Id. at 339-40 (Marshall, J., dissenting).
28. Id. at 348-49 (Blackmun, J., dissenting).
29. Id. at 356-57 (Stevens, J., dissenting).
31. Id. at 422-24.
32. The Akron Court posited:
   [T]he doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a
applying the *Roe* holding to the Akron ordinance and found all five of the challenged provisions to be invalid. With respect to the requirement that second trimester abortions be performed in a hospital, the Court acknowledged the state's interest in the health of the potential mother, but concluded that the requirement imposed substantial and unnecessary obstacles to obtaining an abortion.

The key obstacle noted by the Court was that of cost—an abortion performed in a hospital cost $850 to $900, while an outpatient clinic offered the same service for $350 to $400 in the same geographic region. The Court also relied on evidence of the increasing safety of abortions performed in clinics and the scarcity of Akron hospitals willing to perform the procedure after the first trimester. The Court thus concluded that the ordinance impermissibly curtailed the right recognized in *Roe*.\(^{33}\)

The Court next turned to the requirement that a patient under the age of fifteen provide a written waiver signed by a parent. Citing *Danforth* and *Bellotti*, the majority concluded that Akron's regulation was invalid because it made no exception for the possibility that the female minor would be sufficiently mature to make the decision for herself.\(^{34}\) Next the Court struck down the required informed consent litany.\(^{35}\) The majority reasoned that such a requirement intruded on society governed by the rule of law.

\[\ldots\]

There are especially compelling reasons for adhering to stare decisis in applying the principles of *Roe v. Wade*. That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by The Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

*Id.* at 419-20, 420 n.1 (citations omitted).

\(^{33}\) *Id.* at 434-39.

\(^{34}\) *Id.* at 439-42.

\(^{35}\) That litany read as follows:

1. That according to the best judgment of her attending physician she is pregnant.

2. The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

3. That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart
the function of the physician and was designed to influence the potential mother to withhold her consent. The Court added that while it is perfectly legitimate for a state to assure that the woman be apprised of the risks of pregnancy and the abortion technique to be used, there is no justification for requiring that the physician who will perform the procedure (as opposed to some other individual) be the person who provides the information.36

The requirement of a twenty-four hour waiting period between consent and performance of the procedure met a similar fate. The Court perceived no medical benefit resulting from this mandate. It emphasized the costs of two separate hospital admissions and the possibility that facilities for the operation would be unavailable at the end of the waiting period.37 Finally, the Court summarily invalidated the “humane disposal” of the fetus requirement, holding that the concept of “humane” is impermissibly vague where a criminal conviction is the result of a violation.38

Justice O'Connor, joined by Justices White and Rehnquist, dissented. The dissenters disagreed with the majority on every aspect of its analysis of the Akron ordinance, and would have found each of the five provisions to be valid. Of greater importance, the dissent

function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

*Id.* at 423 n.5.

36. *Id.* at 448-49.
37. *Id.* at 450.
38. *Id.* at 451.
attacked Roe head-on, arguing that the entire concept of dividing a pregnancy into stages is unsound both as a matter of scientific reality and as a matter of sound constitutional adjudication. With respect to Roe's legal analysis, Justice O'Connor agreed that the state has a compelling interest in the potentiality of human life and in safeguarding maternal health. She differed from the Roe majority, however, in her view that those "interests are present throughout pregnancy." Thus, the dissenters disagreed with the notion that abortions are constitutionally more acceptable during the first trimester than later in pregnancy. In their view, "potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life." In addition, the dissenters in Akron, citing recent medical studies, argued strenuously that advances in medical technology had eroded the scientific underpinnings of the Roe analysis.

39. Id. at 459 (O'Connor, J., dissenting) (emphasis in original).
40. Id. at 461 (O'Connor, J., dissenting) (emphasis in original).
41. Justice O'Connor wrote in part:

The Roe framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that 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. . . ." The Roe framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

The Court adheres to the Roe framework because the doctrine of stare decisis "demands respect in a society governed by the rule of law." Although respect for stare decisis cannot be challenged, "this Court's considered practice [is] not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases." Although we must be mindful of the "desirability of continuity of decision in constitutional questions . . . when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."

Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic
The Akron dissenters ultimately obtained much of what they wanted in *Webster v. Reproductive Health Services*. By the time of the *Webster* decision, Justices Kennedy and Scalia had replaced Chief Justice Burger and Justice Powell—two members of the *Roe* and *Akron* majorities. This change on the Court led to a combination of viewpoints in *Webster* which suggests that *Roe* may not long survive.

Challenged in *Webster* was the constitutional validity of four provisions of a Missouri statute which was anti-abortion in tone and content. The statute provided the following: (1) a preamble announcing that life begins at conception and that unborn children have a protectable interest in life, health, and well-being; (2) a prohibition on the use of public funds and facilities for the performance of abortions; (3) a prohibition on public funding for the counselling and encouragement of abortions; and (4) a requirement that a physician perform a test for viability before performing an abortion, if the pregnancy is twenty or more weeks along.

The alignment of views in *Webster* is complex, and an overview will be helpful before providing detailed analysis. Chief Justice Rehnquist wrote the majority opinion of the Court and addressed all of the issues. Joined by Justices White, Scalia, O'Connor, and Kennedy, the Chief Justice found no constitutional flaw in the preamble or the prohibition on public funding or facilities for abortions. Joined by the entire Court, he found the challenge to the "encouraging or counselling" of abortions to be moot. Joined by Justices White and Kennedy to form a plurality, the Chief Justice upheld the viability testing provision as he believed it must be construed, and used the analysis of that issue as the basis for a thorough attack on *Roe*, which fell short of a vote to overrule only because *Roe* was found to be factually distinguishable. Justice O'Connor concurred, disagreeing only with the decision to discuss *Roe* at all. Justice Scalia believed that the Court should overrule *Roe* outright. Justices Blackmun, Marshall, Brennan and Stevens were of the view that *Roe* should remain intact.

In Justice Rehnquist's majority-plurality opinion, the initial question presented was the validity of the preamble to the Missouri statute. The Court found that the preamble simply expressed a value judgment,

for the trimester framework adopted in *Roe* and employed by the Court today on the basis of *stare decisis*. For the reasons stated above, that framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated.

*Id.* at 458-59 (O'Connor, J., dissenting) (citations omitted).

42. 492 U.S. 490 (1989).


44. *Webster*, 492 U.S. at 501.
and did not have any operative effect. The majority concluded that unless and until Missouri somehow gave effect to the challenged clauses, there was nothing for the Court to review.\(^{45}\)

The majority's analysis of the statutory prohibition on the use of public facilities or employees in the performance of abortions paralleled the Court's reasoning in *Harris*. Citing *Harris*, *Maher*, and *Poelker v. Doe*,\(^ {46}\) the Court held that this prohibition erected no obstacle to the performance of abortions that would not have been present had the state declined to provide any public health services. Since the state has no affirmative obligation to provide for abortions even during the first trimester and only a negative obligation to refrain from undue interference, the Court found no constitutional problem present.\(^ {47}\)

It was in the course of analyzing the requirement that a physician test for viability before performing an abortion that the Chief Justice—now expressing the views of a plurality (Justices Scalia and O'Connor expressed their own views on this point)—took aim at *Roe*. The plurality reasoned that any doubt cast on the validity of the statute was not caused by a flaw in the statute, but rather by the flawed reasoning of *Roe*.\(^ {48}\) That flaw was found to be inherent in the trimester viability approach, which effectively promulgated a complex body of regulations foreign to the appropriate province of a court. Instead, the plurality maintained, the proper role of the Supreme Court is to formulate and apply general rules; detailed regulations are the province of legislatures.

Echoing Justice O'Connor's dissenting opinion in *Akron*, the Chief Justice went on to question the *Roe* holding that the state's interest in the potentiality of life becomes compelling at the point of viability. Chief Justice Rehnquist saw no reason why that interest, like the governmental interest in maternal health, should not become compelling from the moment of conception.

The plurality's actual holding was that Missouri's requirement of viability testing furthered the state's interest in the potentiality of life, a conclusion which was not directly at odds with *Roe*. Since *Roe* had struck down a statute absolutely prohibiting abortions prior to viability, the plurality found *Roe* distinguishable and saw no necessity to overrule it.\(^ {49}\) Instead, the *Webster* decision only required the Court to modify and narrow *Roe*.

The separate opinions of the remaining Justices are remarkable for their apparent bitterness and personal attack—the Justices accused

\(^{45}\) *Id.* at 506-07.


\(^{47}\) *Webster*, 492 U.S. at 407-11.

\(^{48}\) *Id.* at 517.

\(^{49}\) *Id.* at 521.
each other of cowardice, deception, and gross misunderstanding of the fundamentals of American government. While Justice O'Connor limited her remarks to an unremarkable analysis of the Court's tradition of self-restraint and its preference for not unnecessarily breaking new constitutional ground, Justice Scalia went much further.

Writing that Justice O'Connor's call for restraint "cannot be taken seriously," Justice Scalia argued vigorously for the explicit overruling of *Roe*. His contention was fundamentally an institutional one. Abortion, Justice Scalia reasoned, is a political issue. Specific regulations should be formulated by elected officials, not life-tenured judges who are, or should be, beyond the political process. He called for *Roe* to be overruled swiftly, and implied that aborted fetuses are in the unique position of never having a day in court or an opportunity to convince judges to change the law. He further argued that a better opportunity to dispatch *Roe* might never come along, as no state could be expected to enact the sort of legislation that would squarely contravene the *Roe* holding.

The dissenters were equally firm in their view that *Roe*, which should have been reaffirmed, was instead in desperate trouble because the majority, without justification, had misconstrued the Missouri statute to create an unnecessary constitutional controversy. In resolving that constitutional controversy, the dissenters believed, the majority had ignored fundamental principles recognized sixteen years earlier in *Roe*. Justice Stevens joined Justice Blackmun's dissenting

50. Id. at 532 (Scalia, J., concurring).
51. Id. at 535-37 (Scalia, J., concurring).
52. Justice Blackmun wrote in pertinent part:

Today, *Roe* v. *Wade*, and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and Justice Scalia would overrule *Roe* (the first silently, the other explicitly) and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term. Although today, no less than yesterday, the Constitution and the decisions of this Court prohibit a State from enacting laws that inhibit women from the meaningful exercise of that right, 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, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973. Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions.

Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, from its effort
opinion and added his belief that the Missouri statute invaded the sphere of personal privacy in the area of contraception, which had been safeguarded by *Griswold v. Connecticut*\(^5\) and its progeny.\(^4\)

### III. THE "RIGHT TO ABORTION" UNDER THE STATE CONSTITUTIONS

#### A. A Response to the Supreme Court's Funding Decisions

*Webster* indicates that *Roe* may soon be overruled or substantially modified. If the regulation of abortion is returned to the states, state constitutions and constitutional jurisprudence will play a crucial role in what will undoubtedly be a continuing controversy.

Immediately after the *Roe* decision, there was little need for state courts to struggle with the existence, source, and contours of a "constitutional right to abortion." That state of affairs came to an abrupt end, however, when the Supreme Court ruled that government funding for virtually all abortions could constitutionally be curtailed.

The holding in *Harris v. McRae* that medicaid funding for the poor need not even include medically necessary abortions spurred some state courts to find within their own constitutions a protected interest in obtaining an abortion, and to construe rights under state law as broad enough to compel the government to fund at least medically necessary abortions. Some state courts and individual judges went so far as to express the view that even elective abortions must

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\(5\) 381 U.S. 479 (1965).

\(4\) *Webster*, 492 U.S. at 564-66.
be funded if the government is going to provide medical care for the indigent in other areas.

Typical of the range of views on this issue are the three opinions filed in *Right to Choose v. Byrne*.

At issue there was the validity under the New Jersey Constitution of a statute which prohibited medicaid funding of abortions unless it was necessary to save the life of the potential mother. The statute, like the most restrictive version of the Hyde Amendment, barred funding even for medically necessary abortions if the potential mother's life was not at stake. A lower court had invalidated the statute under both the state and federal constitutions.

The Supreme Court of New Jersey held that the statute violated the right of pregnant women to equal protection under the New Jersey Constitution insofar as it denied funding for medically necessary abortions. The court began its analysis by noting the independence of state courts from the holdings of the Supreme Court where rights protected by state constitutions are involved, particularly where the state is one of the original thirteen and its constitution predated the federal constitution.

Reaching the merits, the court in *Byrne* analyzed the issue by first applying the traditional equal protection framework developed by the United States Supreme Court, and then applying the somewhat different rules previously applied in the construction of the New Jersey Constitution. In its traditional equal protection analysis, the court first concluded that it was dealing with a right to procreational choice that was fundamental under both state and federal law.

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55. 91 N.J. 287, 450 A.2d 925 (1982).
56. "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, § 1.
57. *Byrne*, 91 N.J. at 299, 450 A.2d at 931. On this point, the court in *Byrne* wrote: "Indeed, the United States Supreme Court itself has long proclaimed that state Constitutions may provide more expansive protection of individual liberties than the United States Constitution. In addition, this Court has recognized that our state Constitution may provide greater protection than the federal Constitution." *Id.* at 300, 450 A.2d at 932 (citations omitted).
58. The court in *Byrne* stated the following:

The right of privacy has been found to extend to a variety of areas, including sexual conduct between consenting adults; the right to sterilization; and even the right to terminate life itself. These cases establish that "under some circumstances, an individual's personal right to control her own body and life overrides the State's general interest in preserving life."

In recent years, moreover, a body of law has developed in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion. Even before *Roe*
Explicitly recognizing that "[t]he right to choose whether to have an abortion . . . is a fundamental right of all pregnant women,"59 the court in Byrne proceeded to weigh that right against the asserted state interest of preserving potential life. Citing Roe and Justice Marshall's dissent in Harris, the court rejected the views of the Harris majority, and found that the state's interest was insufficient to uphold the statute in question.60

The court then went on to hold that the legislation also ran afoul of New Jersey's equal protection analysis. Under that test, when an "important personal right" is implicated, the state must establish a greater "public need" than the federal cases require. Applying this test, the court found the state's asserted interest was inadequate where the health of the potential mother was at risk.

The majority refused, however, to extend this reasoning to elective abortions where there is no immediate health risk. The court thus accepted Maher and rejected Harris. It was with this conclusion that Justice Pashman, concurring in most of the court's reasoning but writing separately, disagreed. Justice Pashman perceived no constitutional distinction between funding for medically necessary abortions and elective ones. He argued that forcing a woman to bear a child against her will inflicts physical as well as psychological injury. Further, Justice Pashman echoed the views of the Harris dissenters that the withholding of funds coerces women to forego exercising a fundamental right.61

In dissent, Justice O'Hern argued that the issue of abortion is one of national concern, and that on such issues the states should

v. Wade, this Court intimated that a woman who had contracted rubella during her pregnancy had a right to choose whether to give birth to a defective child or undergo an abortion. That intimation became a reality in Berman v. Allen, in which the Court held that a woman had a cause of action for deprivation of the right to decide whether to bear a child with Down's Syndrome. We reaffirmed that right last year in Schroeder v. Perkel, holding that a mother, after giving birth to a child with cystic fibrosis, had a right to choose whether to conceive a second child who might suffer from the same genetic defect.

59. Id. at 305, 450 A.2d at 934 (citation omitted).
60. The court wrote in pertinent part:
Concededly, the Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy; conversely, it could include in its Medicaid plan medically necessary abortions for which federal reimbursement is not available. . . . Nor is it neutral to provide one woman with the means to protect her life at the expense of a fetus and to force another woman to sacrifice her health to protect a potential life.

61. Id. at 318-33, 450 A.2d at 941-49 (Pashman, J., concurring).
yield to the Supreme Court. On the merits, the dissent agreed with \textit{Harris}'s holding that the government's obligation not to interfere with a particular course of conduct does not impose an obligation to actively support conduct tending in the opposite direction.\footnote{Id. at 334-35, 450 A.2d at 949-51 (O'Hern, J., dissenting).}

Other state courts have relied on different constitutional theories to reach the same result as \textit{Byrne} with respect to medically necessary abortions. In \textit{Moe v. Secretary of Administration \& Finance},\footnote{382 Mass. 629, 417 N.E.2d 387 (1981).} the controversy centered on a Massachusetts statute which limited medicaid payments for abortions to those required to prevent the death of the potential mother. These restrictions were challenged by three individual plaintiffs, each of whom was a pregnant woman whose physician believed that an abortion was medically needed, but could not certify that the procedure was necessary to prevent death. A fourth plaintiff, a physician who provided gynecological care under the medical assistance program, sued on behalf of both himself and similarly situated physicians who were willing to perform abortions not necessary to prevent imminent death.\footnote{Id. at 638, 417 N.E.2d at 393.}

After disposing of a number of technical defenses, the Supreme Judicial Court of Massachusetts reached the merits and found that the statute contravened the guarantee of due process secured by the Massachusetts Constitution. In reaching this decision, the court in \textit{Moe} noted that, in a series of cases, the Massachusetts courts had recognized a constitutionally protected guarantee of privacy that went beyond federal precedent.\footnote{The court in \textit{Moe} said: "In sum, we deal in this case with the application of principles to which this court is no stranger, and in an area in which our constitutional guarantee of due process has sometimes impelled us to go further than the United States Supreme Court." Id. at 649, 417 N.E.2d at 399.}

After summarizing the reasoning of the \textit{Harris} majority, the court in \textit{Moe} rejected the \textit{Harris} analysis. Recognizing that a state may be selective in the benefits it dispenses, the court stressed that such selectivity may not constitutionally burden a fundamental right. Moreover, the court in \textit{Moe} added that such a burden is no more permissible because it is indirect than it would be if direct, and in determining whether an improper burden has been imposed, a court should be sensitive to the practical realities of the situation.\footnote{Id. at 652, 417 N.E.2d at 401 (citing Healey v. James, 408 U.S. 169 (1972) (indirect interference with freedom of speech contravenes the first amendment)).
pressed, is discouraging abortion."  

The court found persuasive Justice Brennan's reasoning from his dissenting opinion in *Harris*—that is, a statute similar to the Hyde Amendment unconstitutionally acts to coerce indigent women into maternity, thus depriving them of their option to choose an abortion protected by *Roe*.

Finding that the statute restricted a fundamental right, the court in *Moe* turned next to the government's justification for this restriction—the potential for human life. The court rejected the argument that this interest does not become compelling until the fetus is viable, and sought guidance from its own precedents. Discussing in detail a case in which a prison inmate wished to forego medical treatment necessary to preserve his life, the court reviewed the relevant criteria for intrusiveness of medical procedures and the integrity of the medical profession—factors which had led the court to require the inmate to undergo the procedure.

In the abortion context, the court in *Moe* found it decisive that a woman deprived of a medically necessary abortion would be forced against her will to carry a child for nine months, to bear it, and to accept all of the physical and psychological consequences of having given birth. The court in *Moe* found this intrusion to be constitutionally unsupportable, and as a result, ordered the funding of medically necessary abortions.

Chief Justice Hennessey dissented, finding that the majority had perceived constitutional obstacles to the acceptance of abortions where none had existed. Citing *Harris*, the dissent concluded that the majority was intruding on what is fundamentally a legislative determination.

Elements of both *Moe* and *Byrne* can be found in the Superior Court of Connecticut's decision in *Doe v. Maher*. At issue there was a state regulation which restricted medicaid funding for abortions to those procedures necessary to preserve the life of the potential mother. In a sweeping opinion, the intermediate appellate court held that the restriction violated the due process, equal protection, and equal rights guarantees under the state's constitution.

The facts before the court warranted sympathy and may have been given in detail to provide support for the court's decision. The

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70. *Id.* at 664, 417 N.E.2d at 406-07 (Hennessey, C.J., dissenting).


72. This holding was limited to medically necessary abortions; purely elective procedures were not before the court.
plaintiff described by the court was a welfare mother who needed an abortion to reduce the risks of a diagnostic procedure designed to disclose the presence of cervical cancer. The class that she represented was characterized by the court as “the poorest of the poor.” The court described in dramatic detail both the living conditions and health problems of the members of the plaintiff’s class, clearly foreshadowing a result in favor of the plaintiff on the merits.

The legal analysis focused first on the statutory validity of the challenged regulation, and resulted in a holding that the restriction was illegal as a matter of state statutory law. Nevertheless, the court wrote that the “real issue” in the case was the constitutional challenge—a challenge that “should be answered.” In providing that answer, the court in Doe first declared its independence from the Supreme Court’s funding decisions. Turning to the validity of the restriction on abortion funding under the Connecticut Constitution, the court found three separate violations. Discussing the right to substantive due process, the court praised Roe, rejected Harris, and found a fundamental right to procreative choice in the privacy guarantee of the Connecticut Constitution.

73. Doe, 40 Conn. Supp. at 406, 515 A.2d at 140.
74. Id. at 417-18, 515 A.2d at 146.
75. The court in Doe discussed its state’s constitutional independence as follows: The plaintiffs raise only state constitutional grounds to invalidate the regulation. In making these determinations, the court must interpret our state constitution independently of the United States constitution when required by its text, history, tradition and intent. It is clear that the federal constitution merely establishes a minimum national standard for the exercise of individual liberties and rights. Nevertheless, the underpinnings of any such decision must rest on independent and adequate state grounds.
76. The court discussed the right to procreative choice in the following passage:

It is absolutely clear that the right of privacy is implicit in Connecticut’s ordered liberty. The Connecticut Supreme Court has recognized that aspect of privacy which includes procreative choice as a fundamental right. And more recently, the Supreme Court of Connecticut again recognized the right of privacy in Ochs v. Borrelli.

Surely, the state constitutional right to privacy includes a woman’s guaranty of freedom of procreative choice. The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives ... and most prominently vindicated in recent years in the context of contraception ... and abortion. This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among
Citing Moe and the Supreme Court of California's decision in Committee to Defend Reproductive Rights v. Myers,77 the court in Doe held that as a matter of due process, once the state began to confer assistance for medically necessary procedures, it could not do so in a manner which discriminated against abortions.78 The court also ruled for the plaintiffs under the equal protection clause and equal rights amendment of the Connecticut Constitution.79 With respect to traditional equal protection analysis, the court's reasoning echoes that of the cases discussed earlier in this section—the state's discrimination between medically necessary abortions and all other medically necessary procedures infringes on a fundamental right to choose an abortion, and is not justified by any compelling state interest.

Doe was novel in its additional reliance on the Connecticut equal rights amendment in striking down the funding restriction. Thus, the Doe court found the funding restriction to be invalid under three separate guarantees of the state constitution. Noting that the existence of the Connecticut equal rights amendment lent strength to the case for the plaintiff, the court offered three reasons why restrictions on abortion funding discriminates against women. First, all medical expenses necessary to restore a male to health are covered by the program, while medically necessary abortions are denied to women who need them. Second, all of a male's expenses relating to reproductive health and family planning are reimbursed. Third, “[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them.”80

79. “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex, or physical or mental disability.” CONN. CONST. art. I, § 20. Article I, § 20 was amended in 1974 by adding the words “her” and “sex,” and in 1984 by adding the phrase “[or physical or mental disability.” Doe, 40 Conn. Supp. at 440-41 n.51, 515 A.2d at 158 n.51.
80. The Doe court went on to describe the third reason:

Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination. “Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy
Somewhat different reasoning led the Supreme Court of California to a similar result in *Committee to Defend Reproductive Rights v. Myers,* where the court expressly addressed the social consequences resulting from the birth of unwanted children into welfare families. At issue in *Myers* was the validity of California statutory budget provisions analogous to the Hyde Amendment. After emphasizing that the morality of abortion was not an issue before the court, the court proceeded to find the reasoning of *Harris* contrary to California law.

Reviewing state court precedent, the court concluded that once the state has elected to make benefits available, it bears a heavy burden of justifying the withholding of benefits from persons choosing to exercise a constitutional right. For example, in *People v. Belous,* the Supreme Court of California, even before *Roe,* had struck down a criminal abortion statute in part because a state constitutional right of privacy was found to safeguard a woman's right to procreative choice. The court in *Belous* also found that a therapeutic abortion is a perfectly legitimate medical procedure. Since the funding restriction prevented an indigent woman from undergoing that procedure, the court in *Myers* found that it ran afoul of the California Constitution.

Unlike the cases previously cited, the court in *Myers* openly discussed the social cost of "unwanted" children, and rejected the state's argument that the government has a right to favor childbirth. In addition, the court confronted the specter of an increase in the population of indigent children, and in rejecting the state's asserted justification, effectively made a value judgment that provisions analogous to the Hyde Amendment are socially dangerous.

Still another theory for reaching the same result was adopted by the Court of Appeals of Oregon in *Planned Parenthood Association v. Department of Human Resources.* There, a funding restriction as the determinative criterion is a distinction based on sex." Professor Tribe put it well when he wrote: "If one were . . . to recognize, as the Supreme Court sometimes has, that 'the grossest discrimination can lie in treating things that are different as though they were exactly alike,' then it might be possible to discern an invidious discrimination against women, or at least a constitutionally problematic subordination of women, in the law's very indifference to the biological reality that sometimes requires them, but never requires their male counterparts, to resort to abortion procedures if they are to avoid pregnancy and childbearing."

*Doe,* 40 Conn. Supp. at 444-45, 515 A.2d at 159-60 (citations omitted).

83. *Myers,* 29 Cal. 3d at 278, 625 P.2d at 795, 172 Cal. Rptr. at 881-82.
similar to the Hyde Amendment was struck down as violative of the privileges and immunities clause of the Oregon Constitution. The intermediate appellate court balanced the detriment to a cognizable class of citizens against the state's asserted justification. The class of citizens recognized by the court was those women for whom an abortion is medically necessary.

The court in Planned Parenthood considered the arguments that the funding restriction saved the government money and that the state has a compelling interest in the potential for human life. The court rejected both of these arguments. With respect to the fiscal argument the court simply held that the government had failed to carry its burden of proof, and noted that no rebuttal had been offered to the counterargument that the expenses of childbirth and raising a child in a welfare family far outweigh the costs of medically necessary abortions. With regard to the potentiality for life justification, the court found in Roe at least an equally compelling interest in national health—an interest defeated by the administrative rule at issue. The court, therefore, held that the funding restriction contravened the state's constitution.

Recently, in In re T.W., the Supreme Court of Florida recognized a right of abortion under its state's constitution. At issue in T.W. was the validity of a state statute requiring parental consent or a judicial substitute before a minor could obtain an abortion. Basing its holding firmly on Florida law, the court found the statute invalid under article I, section 23 of the Florida Constitution, which provides that "every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." The court held that this provision mandates a right of privacy broader and stronger than that provided by the federal constitution. As a result, any intrusion into personal privacy must satisfy two tests: first, it must be justified by a compelling state interest, and second, it must accomplish its purpose through the least intrusive means possible.

Applying this analytical framework to the matter before it, the court found that the decision whether or not to bear a child is at the core of a constitutional right of privacy. Moreover, this constitutionally protected choice is possessed by both minors and adults, since both groups fall within the class of "natural persons" under the

85. "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.
86. Planned Parenthood, 63 Or. App. at 62, 663 P.2d at 1259-61.
87. 551 So. 2d 1186 (Fla. 1989).
88. FLA. CONST. art. I, § 23.
89. T.W., 551 So. 2d at 1192.
involved constitutional provision. Turning to the asserted governmental interests, the court, which earlier in its opinion had brushed Webster aside in a single sentence, essentially adopted Roe as the law of Florida. Thus, the health of the mother was found not to become a compelling state interest until at least the close of the first trimester. The state's other important interest, the potentiality of life, does not become compelling until viability—approximately at the end of the second trimester.90

Turning its focus to the parental consent law, the court in T.W. agreed that the state could legitimately give weight to the protection of an immature potential mother and to the preservation of the family unit. Nevertheless, in order to save the funding restriction, the court said that these considerations must be compelling under the Florida framework. Given the fundamental nature of the right to procreative choice, the court held that these interests did not sustain sufficient weight. Thus, the court struck down the parental consent requirement.91

It is important to note that not all state courts have accepted the argument that funding restrictions are incompatible with rights secured by state constitutions. In Fischer v. Department of Public Welfare,92 for example, plaintiffs challenged two Pennsylvania statutes which essentially paralleled the most restrictive version of the Hyde Amendment. The Commonwealth Court of Pennsylvania recognized its authority under the Pennsylvania Constitution to depart from Harris and Maher, but found those precedents persuasive and elected to follow them. Reasoning that Roe established only a qualified right of abortion, which need not be financially supported by the government, the court wrote: "A woman's freedom of choice does not carry with it a constitutional entitlement to every financial resource with which to avail herself of the full range of protected choices."93 The Supreme

90. Id. at 1193.
91. The court noted as well that the statute failed the "least intrusive measures" test, in that its provision of judicial bypass of parental consent afforded the minor neither a right to counsel nor an on-the-record hearing. Id. at 1196.
93. Id. at 256, 482 A.2d at 1157. The court went on to hold:

[A] citizen has a constitutional right to travel but is not entitled to travel at the public expense. One has a constitutional right to freedom of expression but is not entitled to the use of public funds to finance the expounding of personal views. The economic constraints on the woman who would terminate her pregnancy are not caused by the Commonwealth. Her financial problems exist and continue to exist whether she elects to choose one or the other alternative. These problems are not the consequence of any action or legislation on the part of the Commonwealth.

Id. (citation omitted).
State Regulation of Abortion

Court of Pennsylvania affirmed by simply offering a series of quotations from 
_Harris_ and _Maher_.

**B. Challenges to Abortion Funding Predicated on State Constitutional Provisions**

State constitutional provisions have been used to challenge state funding of abortion. For example, in _Starn v. State_, a taxpayer filed a declaratory judgment action, challenging the appropriation of state funds for elective abortions for indigent women. The plaintiff theorized, _inter alia_, that a fetus is a "person" for purposes of North Carolina's guarantees of due process and equal protection.

The court of appeals rejected this argument and upheld the appropriation. Noting that the Supreme Court in _Roe_ had rejected an analogous contention under the federal constitution, the court explored the state's criminal laws concerning the homicide of a fetus and its civil laws respecting the capacity of an unborn child to hold and inherit property. In each context, the court found that North Carolina law did not confer upon an unborn child the same legal status as after live birth.

The court went on to note that the plaintiff's position was burdened by practical problems. For example, recognition of fetal rights might cast doubt on the state's authority to fund any abortion, no matter how medically necessary. Also, in the absence of state funding for elective abortions, indigent women might nevertheless undergo the procedure without the medical safeguards that state funding promotes. The court thus rejected all of the appellant's challenges and upheld the appropriation.

**C. Direct Regulation of Abortion Funding in the Text of State Constitutions**

In some states, efforts have been made to directly amend the state constitution to restrict or prohibit abortion funding. In Colorado, the effort to amend that state's constitution to prohibit state funding of abortions succeeded. Similarly, in Rhode Island the text of the state

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95. See, e.g., McKee v. County of Ramsey, 316 N.W.2d 555 (Minn.), cert. denied, 459 U.S. 860 (1982).
97. The Colorado Constitution now provides in part:
No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly
constitution governs the right to and the funding of abortions. The Rhode Island Declaration of Rights contains the phrase: “Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.” Efforts to enact similar provisions have also been made in other states, but have not as yet surmounted all of the various obstacles necessary to amend a state’s constitution. As a result, it is reasonable to anticipate that for the foreseeable future, the more frequent focus of the constitutional battle will probably be on the established constitutional theories of due process and equal protection.

IV. CONSTITUTIONAL REGULATION OF ANTI-ABORTION DEMONSTRATIONS

After the question of funding, the most bitterly contested battle in the war over abortion focuses on the efforts of anti-abortion demonstrators to use their rights of freedom of speech and assembly to apply pressure to women considering an abortion and the physicians willing to perform the procedure. Although on the surface the regulation of anti-abortion demonstrations may seem to be only

or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.


98. R.I. Const. art. I, § 2. Article I, § 2, of the Rhode Island Constitution reads as follows:

All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.

Id. (emphasis added).

99. See, e.g., Arkansas Women’s Political Caucus v. Riviere, 283 Ark. 463, 677 S.W.2d 846 (1984) (concerning a dispute over the language of the ballot title of proposed constitutional amendment restricting abortion funding); accord Binninger v. Paulus, 297 Or. 179, 681 P.2d 129 (1984). The lesson of these cases is that attempts to enact such amendments will be bitterly litigated every step of the way.
tangentially related to the right to obtain an abortion, in actuality, the right to obtain an abortion is often contingent upon one having access to a facility willing to perform the procedure. And, as will be shown, anti-abortion activists frequently attempt and are often successful in making access to abortion facilities difficult.

In numerous cases, the clash between demonstrators and clinics or physicians performing abortions have been resolved in the appellate courts. Typically, the question is how far the demonstrators may intrude upon and interfere with the normal use of private property in the course of disseminating their message. Under state and federal constitutions, courts have been called on to balance guarantees of freedom of expression with the right of autonomy in the operation of a business on private property.

The United States Supreme Court was called on to render its opinion in *Frisby v. Schultz.* \(^{100}\) *Frisby* involved the validity, under the First Amendment to the United States Constitution, of an ordinance of the town of Brookfield, Wisconsin, which provided that it was “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.” \(^{101}\) The genesis of this ordinance was clear. Anti-abortion activists had begun to regularly picket on the public streets surrounding the home of a physician who performed abortions in two neighboring towns. In addition to carrying signs, the picketers shouted slogans, warned neighborhood children to stay away from the home of the “baby killer,” and trespassed onto the physician’s property. \(^{102}\) In response, the town government enacted the disputed ordinance.

Justice O’Connor, writing for the majority, viewed the case as involving a traditional first amendment issue, and was of the opinion that the ordinance was a proper exercise of governmental authority. The Court first found that streets, even in a residential neighborhood, comprise a traditional public forum. That being the case, even a facially content-neutral restriction on speech must permit alternative means of communication and must be narrowly drawn to serve a significant governmental interest.

The Court found numerous alternative means for the protesters to get their message across—marches, door-to-door proselytizing, the mails, and telephone contact were all deemed to be available substitutes. What gave the majority greater pause was the existence of a governmental interest sufficient to overcome the restriction on speech

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\(^{100}\) 487 U.S. 474 (1988).

\(^{101}\) *Id.* at 477.

\(^{102}\) *Id.* at 494. Ironically, these facts are supplied by the dissenters, who would have struck down the ordinance. The majority, which found the restriction on speech to be valid, painted a much more sedate picture of the protesters’ activities.
imposed by the town law. This interest was ultimately found in the protection of residential privacy. The Court concluded that an individual has a right to avoid unwanted speech in the privacy of his home, and that the ordinance was designed to effectuate that right. Finding the focus of the protesters on a single residence offensive, the Court held that the ordinance properly regulated that form of protest. 103

State courts have recently grappled with similar issues under their own constitutions. In *Chico Feminist Women's Health Center v. Scully*, 104 an abortion clinic sought an injunction preventing demonstrators from obtaining a vantage point from which they could observe prospective patients of the clinic closely enough to identify them. This request developed as a result of the demonstrators informing relatives of prospective patients that a member of their family was contemplating an abortion, thus generating pressure on the potential mother to abandon her plans. The clinic relied on the right to privacy secured by the California Constitution as construed in *Myers*. 105

The Supreme Court of California in *Scully* held that the clinic was not entitled to the requested relief. It reasoned that a privacy right only existed if the clinic's clients could reasonably expect privacy in light of the common habits of the community. A significant possibility of being recognized on the street is simply part of life in a small town. 106 The court went on to note that even if a limited

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103. *Id.* at 482-88. A further irony in *Frisby* (or perhaps evidence of doctrinal consistency and intellectual honesty) is that the majority was primarily comprised of abortion opponents (O'Connor, Rehnquist, Scalia and Kennedy, who were joined by Blackmun) while the dissenters Brennan, Marshall and Stevens—all adherents to *Roe*—found that first amendment principles favored the anti-abortion protesters.


105. *See supra* notes 81-83 and accompanying text.

106. The *Scully* court pointed out the following:
The very "small-town" characteristics that prompted the Center to request its injunctive relief are the very characteristics that make the relief inappropriate. Because Chico is a small city, the clients are more likely to be recognized. But that increased chance of recognition on a public street is a "common habit" of Chico. We have no doubt that Chico's smaller size makes it a most attractive place to live in many respects. But the clients who are residents of Chico must accept the limitations of small-city life along with its amenities. One of those limitations is a greater chance of recognition in public places by other citizens. Having chosen to live in the environment of a small city, the residents of Chico cannot expect the courts, by way of injunctive relief, to guarantee them the kind of anonymity they might find in a "large metropolitan community" such as New York City. We are confident that, judged by the "common habits" of Chico as described
privacy interest could exist on the public streets surrounding an abortion clinic, additional considerations nevertheless militated against the requested relief. Central to the court’s reasoning was the protection of the demonstrators’ right to freedom of speech. Citing Frisby and other authorities, the court held that picketing was the only effective way for the protesters to get their message across—no reasonable alternative existed. Therefore, the requested injunctive relief was not appropriate.

In other cases, private property rights have prevailed. For example, in Brown v. Davis, the Superior Court of New Jersey held that private citizens may not “enter upon the common areas of a multi-business office complex to espouse an anti-abortion thesis directed to prospective patients of one of the tenants without the consent of the landlord-owner.”

In Brown, a landowner had erected three multiple-tenant structures on a two-acre plot. In one of those buildings, the defendant clinic offered a range of gynecological services, including abortions. The plaintiffs were anti-abortion protesters who carried placards espousing a right-to-life theme. Standing forty-five to one hundred feet from the building, the plaintiffs called or shouted to patients in an effort to dissuade them from obtaining an abortion. Not wishing to limit their picketing to public streets, the plaintiffs filed suit to establish their right to enter the sidewalks and parking lots adjacent to the building housing the clinic. Among their goals was to confront prospective patients on a one-to-one basis.

The plaintiff protesters relied on both the First Amendment to the United States Constitution and a similar provision in the New Jersey Constitution. The superior court found it necessary to address both claims. With respect to the first amendment claim, the court reasoned that a protester’s right to enter upon private property is measured by the extent to which that property is devoted to public use. Here, the court found no such dedication, and therefore, rejected the federal constitutional claim.

by the Center’s own administrator, the clients had no reasonable expectation of anonymity on Chico’s public sidewalks and streets between 8 a.m. and 5 p.m. on Saturdays.

Scully, 208 Cal. App. 3d at 242, 256 Cal. Rptr. at 200.


109. Id.

110. “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press . . . .” N.J. Const. art. I, § 6.
The court in *Brown* next turned to the state constitution, and began its analysis by noting that "[t]he New Jersey State Constitution has been interpreted more broadly than the Federal Constitution to permit the exercise of expressional rights on private property in certain circumstances."\(^{111}\) In support of this premise, the superior court relied on the Supreme Court of New Jersey's decision in *State v. Schmid.*\(^{112}\) In that case, the court had developed a three-pronged test designed to strike a fair balance between expressional rights and the security of private property. The relevant criteria were held to be: (1) the normal use and purpose of the property involved; (2) the extent and nature of the public's invitation to use the property; and (3) the relationship between the purpose of the expressional activity and the use of the property. In addition, the supreme court in *Schmid* had found it relevant whether or not alternative means existed for the desired dissemination of views.\(^{113}\)

Applying these criteria, the court in *Brown* had no difficulty in ruling against the protesters. Central to the court's reasoning was the essentially private nature of the operation of the clinic. Unlike a shopping center, it provided no facilities for the gathering of the general public. Its "invitation" to the community at-large took the form of advertisement of specific services for those who needed them; not an offering of any service to the public at-large. Finally, the expressional activity was incompatible with many services of the clinic which had nothing to do with abortion—the facility was forced to provide escorts for its patients to guide them through the protesters, even if the patients sought general gynecological care unrelated to an abortion.\(^{114}\) On the basis of this reasoning, the court in *Brown* ruled that the protesters had no right to enter upon the property of the defendants.

A year after *Brown* was decided, a separate panel of the Superior Court of New Jersey reviewed *Planned Parenthood of Monmouth County, Inc. v. Cannizzaro.*\(^{115}\) There, Planned Parenthood, which offered gynecological services including first trimester abortions, filed suit to enjoin picketers from trespassing upon its property. The defendants had picketed the property for years, shouting a variety of insults including comparison of the clinic's operators to concentration camp personnel and murderers. On one occasion, the defendants entered the building, engaged in a "shoving match," and were forcibly ejected.\(^{116}\)

\(^{111}\) *Brown*, 203 N.J. Super. at 46, 495 A.2d at 903.


\(^{113}\) *Id.* at 563, 423 A.2d at 630.


\(^{116}\) *Id.* at 535, 499 A.2d at 537.
The court analyzed under the state constitution the competing contentions that the plaintiffs operated a private enterprise, and that the defendants possessed a right of freedom of expression. The defendants also asserted that, as a recipient of public funds, Planned Parenthood was not truly operating a private concern.

The Cannizzaro court applied a "sliding scale" rule—the greater the devotion of the picketed entity to a public use, the greater its obligation to accommodate expressional activity.¹¹⁷ In finding that the clinic was essentially private despite its acceptance of public funds, the court quoted extensively from Byrne,¹¹⁸ and reasoned that it is difficult to imagine an activity more private than the gynecological services rendered by the plaintiffs. The court also found that the tactics of the picketers went beyond mere speech and had been properly categorized by the trial court as "intimidating and harassing" conduct.¹¹⁹ The court in Cannizzaro thus affirmed the injunctive relief granted by the trial court which barred the picketers from the clinic property and limited them to nonobstructive activity on the surrounding public sidewalks.

The reasoning of these New Jersey cases was followed by the Supreme Court of Delaware in State v. Elliott.¹²⁰ In Elliott, defendants challenged their convictions for criminal trespass arising out of an anti-abortion demonstration on the grounds of the Delaware Women's Health Organization. The demonstrators had insisted on entering the property of the clinic, which provided a range of gynecological services including abortions, even though they were able to get the same message across from the grounds of a neighboring grocery store. As in Brown, the demonstrators shouted epithets that the clinic's physician was a murderer. This created an atmosphere characterized by the court as "volatile."¹²¹

Applying both the Delaware and United States constitutions, the court held that the defendants' convictions did not contravene their right of freedom of assembly. In so holding, the court found persuasive and applied the analysis of the New Jersey cases cited above. The court emphasized the fact that the clinic was private, with no dedication to public use. The clinic had been housed in a single structure set apart from others, with no general invitation for the public to use its facilities. Finally, the expressional activity of the demonstrators interfered with services unrelated to abortion. Weigh-

¹¹⁷ Id. at 538, 499 A.2d at 538.
¹¹⁸ See supra notes 55-62 and accompanying text.
¹¹⁹ Cannizzaro, 204 N.J. Super. at 543, 499 A.2d at 542.
¹²⁰ 548 A.2d 28 (Del. 1988).
¹²¹ Id. at 31.
ing these factors, the court found no constitutional obstacle to the defendants' convictions. In each of these cases the appellate court held that anti-abortion demonstrators are free to picket along public streets and roads surrounding an abortion clinic to express their disapproval of abortions. Anti-abortion protesters may not, however, come onto the property of the clinic itself to harass and intimidate prospective patients. This is particularly true if the clinic provides services other than abortions, or if an alternative method is available for the protesters to convey their message.

V. THE LAW OF ABORTION IN MARYLAND

In the 1991 legislative session, the Maryland General Assembly significantly changed the state's statutes concerning abortion. Prior to July 1, 1991, section 20-208 of the Health-General article of the Maryland Code forbade the performance of any abortion except where the abortion is performed before the twenty-seventh week of gestation in an accredited hospital by a licensed physician and: (1) the pregnancy would likely result in the death of the mother; (2) there is a substantial risk that the pregnancy would impair the physical or mental health of the mother; (3) there is a substantial risk that the child will have "grave permanent physical deformity or mental retardation;" or (4) the pregnancy resulted from rape. In addition, a hospital abortion review committee must authorize in writing the performance of each abortion and must "keep written records of all requests for authorization and its action thereon."

122. Id. at 32-33. A similar scenario was before the Court of Criminal Appeals in Crabb v. State, 754 S.W.2d 742 (Tex. Crim. App. 1988), cert. denied, 493 U.S. 815 (1989). In Crabb, trespass convictions were returned when demonstrators entered the lobby of an abortion clinic, pounding the walls and shouting "abortion is murder" in defiance of a police officer's order that they leave. Defendants were placed on probation, one condition of which was that they stay away from the clinic. Among the many contentions relied on by the defendants was an assertion that this condition violated the United States and Texas Constitutions in various respects. The court responded that a curtailment of constitutional rights is valid if tailored to the circumstances of a particular crime. Here, the restriction on the defendants' freedom was limited, protected the victim, and reduced the likelihood that the conditions of probation would be violated. It was therefore upheld.

123. The "[n]ot more than twenty-six weeks of gestation" requirement does not apply in the case where the fetus is dead or where the pregnancy would likely result in the death of the potential mother. Md. HEALTH-GEN. CODE ANN. § 20-208(b)(1) (1990).

124. Id. § 20-208(a)-(b).

125. Id. § 20-208(b)(2)-(c).
Two opinions of the Maryland Attorney General\textsuperscript{126} and a case decided by the court of special appeals\textsuperscript{127} have all held section 20-208 to be unconstitutional in light of \textit{Roe} and its progeny.\textsuperscript{128} Earlier this year, the General Assembly decided to repeal sections 20-201 to -206, -208, -210, and -211 of the Health-General article and replace those provisions with a much less restrictive scheme. Therefore, as of July 1, 1991, most of Maryland’s abortion statutes were replaced by much different provisions.\textsuperscript{129}

\textsuperscript{128} For example, in Coleman, the court said in dicta:
Any reading of Health-General Art. § 20-208(a) discloses that it conflicts with the decisions of the Supreme Court in Doe v. Bolton, 410 U.S. 179 (1973), as well as Roe v. Wade and City of Akron in that the Maryland statute fails to delineate between terminating the pregnancy during the first trimester and any subsequent time. Because of that failure, Health-General Art. § 20-208(a) is unconstitutional insofar as it conflicts with the decisions of the Supreme Court of the United States.
\textit{Id.} at 760, 471 A.2d at 1118 (citations omitted).
\textsuperscript{129} See Act of Feb. 18, 1991, ch. 1, 1991 Md. Laws 5. The preamble to this law reads as follows:
AN ACT concerning Abortion
FOR the purpose of revising certain statutory provisions relating to abortion; authorizing a physician to perform an abortion on an unmarried minor without notice to a parent or guardian of the minor if, in the professional judgment of the physician, the minor is mature and capable of giving informed consent or notice would not be in the best interest of the minor; prohibiting a physician from giving notice to a parent or guardian if the minor decides not to have the abortion; repealing a certain provision of law related to certain information that must be provided prior to an abortion; repealing certain provisions of law related to abortion referral services; clarifying a provision of law related to referral services; requiring that an abortion be performed by a licensed physician; providing that the State may not interfere with the decision of a woman to terminate a pregnancy if certain conditions exist and under certain circumstances; specifying that the State may not interfere with a woman’s decision to terminate a pregnancy at any time if certain circumstances exist; providing a certain immunity for a physician under certain circumstances; authorizing the Department of Health and Mental Hygiene to adopt certain regulations related to the termination of a human pregnancy; repealing a provision of law related to the imposition of certain penalties against certain persons who violate certain provisions of law related to the termination of a human pregnancy; repealing a provision of law related to certain disciplinary actions against a licensed physician for performing an abortion outside a licensed hospital; defining certain terms; making provisions of this Act severable; specifying that if a certain provision of this Act is petitioned to referendum and rejected by the voters, such rejection does not affect other provisions of the Act unless the other provisions are also petitioned to referendum and
The new section 20-208 simply requires that an abortion be performed by a licensed physician.\textsuperscript{130} The new section 20-209 codifies the Supreme Court's holding in \textit{Roe}.\textsuperscript{131} The state may not interfere with the potential mother's right to choose before the fetus is viable. Viability is defined under section 20-209(a) as "that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside of the womb."\textsuperscript{132} Even after viability, the state may not interfere with a woman's right to terminate the pregnancy if (1) the abortion is necessary to protect the life or health of the woman, or (2) the fetus has a genetic defect, or a serious deformity or abnormality.\textsuperscript{133}

The new section 20-209 also authorizes the Maryland Department of Health and Mental Hygiene to adopt regulations which are necessary and "least intrusive" to protect the health and life of the potential mother, and which are consistent with established medical practices. Finally, the new section 20-209 grants immunity from civil liability or criminal penalties to physicians who perform abortions in accordance with section 20-209, so long as the decision to perform the abortion is made in good faith, in the "physician's best medical rejected by the voters; and generally relating to abortion.

\textit{Id.} at 5.

130. \textit{Id.} at 8 (to be codified at \textsc{Md. Health-Gen. Code Ann.} \textsection 20-208).

131. \textit{Id.} at 9 (to be codified at \textsc{Md. Health-Gen. Code Ann.} \textsection 20-209). The new \textsection 20-209 will read as follows:

(a) In this section, "viable" means that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb.

(b) Except as otherwise provided in this subtitle, the state may not interfere with the decision of a woman to terminate a pregnancy:

1. Before the fetus is viable; or
2. At any time during the woman's pregnancy, if: (i) The termination procedure is necessary to protect the life or health of the woman; or (ii) The fetus is affected by genetic defect or serious deformity or abnormality.

(c) The Department may adopt regulations that:

1. Are both necessary and the least intrusive method to protect the life or health of the woman; and
2. Are not inconsistent with established medical practice.

(d) The physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion under this section made in good faith and in the physician's best medical judgment in accordance with accepted standards of medical practice.

\textit{Id.}

132. \textit{Id.}

133. \textit{Id.}
The 1991 General Assembly also modified the parental notification requirement for minors who seek abortions. Under the prior version of section 20-103 of the Health-General article, a physician generally cannot perform an abortion on an unmarried minor unless the physician first notifies the minor’s parent or guardian. There were formerly two exceptions to this general rule. First, a physician may perform an abortion on an unmarried minor if the minor does not live with a parent or guardian, and a “reasonable effort” to give notice is unsuccessful. Second, a physician can perform such an abortion “if, in the professional judgment of the physician, notice to the parent or guardian may lead to physical or emotional abuse of the minor.”

Under the newly adopted version of section 20-103, the general rule and the current exceptions have remained the same, however, two additional exceptions have been added. Under the new section 20-103, a physician can perform an abortion on a minor without notice to the minor’s parent or guardian if, in the professional judgment of the physician, (1) “[t]he minor is mature and capable of giving informed consent to an abortion,” or (2) “[n]otification would not be in the best interest of the minor.”

Although the Maryland courts have not had the occasion to consider whether funding for abortions for the poor is protected by the Constitution, the court of appeals has held that a broadly worded statute required funding for abortions. In Kindley v. Governor of Maryland, the court considered whether and to what extent a state

134. Id.
135. Md. Health-Gen. Code Ann. § 20-103(a) (1990) (“Except as provided in subsections (b) and (c) of this section, a physician may not perform an abortion on an unmarried minor unless the physician first gives notice to a parent or guardian of the minor.”).
136. Id. § 20-103(b).
137. Id. § 20-103(c).
138. See Act of Feb. 18, 1991, ch. 1, 1991 Md. Laws 6-7 (to be codified as Md. Health-Gen. Code Ann. § 20-103(c)). The new § 20-103(c) reads as follows:

(1) The physician may perform the abortion, without notice to a parent or guardian of a minor if, in the professional judgment of the physician: (i) Notice to the parent or guardian may lead to physical or emotional abuse of the minor; (ii) The minor is mature and capable of giving informed consent to an abortion; or (iii) Notification would not be in the best interest of the minor.

(2) The physician is not liable for civil damages or subject to a criminal penalty for a decision under this subsection not to give notice.

139. Id. § 20-103(c)(1)(ii)-(iii).
statute, which simply required the Secretary of Health and Mental Hygiene to "administer a program of comprehensive medical and other care in the State for indigent and medically indigent persons," authorized the appropriation of public funds for abortions. The appellants, a group of residents and taxpayers seeking declaratory and injunctive relief to prevent state funding of abortions, argued first that the term "comprehensive medical and other care" could not be read to include "nontherapeutic abortions." Second, the appellants argued that at the time of the enactment of the statute nearly all abortions were illegal. The court of appeals in Kindley found no merit in either of the appellants' arguments. The court held that since the statute was phrased in broad and general terms, the statute was "designed to permit indigent persons to receive the advantages of whatever health care may be presently accepted as appropriate in the medical community." The court found that the statute was enacted to "alleviate some of the hardships of poverty by providing medical care to those who could not afford it," and that "an abortion is certainly one of the medical alternatives for dealing with pregnancy." The court of appeals went on to point out that even in light of Harris v. McRae, federal and state governments were still free to fund abortions, including nontherapeutic abortions. However, the court clearly indicated that nothing in the decision suggested that the State of Maryland was constitutionally required to fund any abortions.

The Kindley decision indicates that the court of appeals would not be willing to read a "comprehensive medical" statute to exclude abortion funding for indigent women. The decision also indicates that the court of appeals would prefer that the General Assembly legislate on the controversial issue of abortion rather than the court.

142. Kindley, 289 Md. at 623, 426 A.2d at 910.
143. Id. at 622, 426 A.2d at 910.
144. Id. at 623, 426 A.2d at 911.
145. Id. at 624, 426 A.2d at 911 ("At the time of the 1967 amendments to § 42, any abortion, even by a licensed physician, was a criminal offense, except where the fetus was dead or the physician, after consultation with one or more physicians, was 'satisfied . . . that no other method [would] secure the safety of the mother.'")
146. Id. The Kindley court added: "Where, as here, a statute is phrased in broad general terms, it suggests that the legislature intended the provision to be capable of encompassing circumstances and situations which did not exist at the time of the enactment." Id. at 625, 426 A.2d at 911.
147. Id. at 626, 426 A.2d at 912.
148. Id. at 628, 426 A.2d at 913.
149. Id. at 629, 426 A.2d at 914.
150. Id. at 630, 426 A.2d at 914 ("the General Assembly is free to limit the conditions under which public funds may be expended for abortions").
having to decide whether the Maryland Constitution contains rights relating to abortion. The General Assembly has done just that in the most recent legislative session. Now, regardless of whether the Supreme Court overrules Roe in a future case, the holding of Roe will be the law in Maryland unless or until the General Assembly decides otherwise.

VI. CONCLUSION

The Supreme Court’s decision in Webster v. Reproductive Health Services indicates that Roe v. Wade may be either overruled or further substantially modified in the very near future. State courts and legislative bodies have responded to the Supreme Court’s holdings in Harris v. McRae and Webster in various ways. Some states have held that indigent women have the right under their state constitution to receive funds for an abortion. Other states have held that their state constitutions provide no such guarantees. In some states, most recently in Florida, the courts have determined that under their state constitution, a woman has the right to determine whether to terminate or carry a pregnancy to term. In other states, such as Maryland, the state’s legislative branch has statutorily established a woman’s right to choose. Though the state courts and legislative bodies have varied greatly in their holdings and statutes, one thing remains clear—if Roe is overruled, the state legislative and judicial battles are bound to intensify.