Syllabus

SUPREME COURT OF THE UNITED STATES

492 U.S. 490

Webster v. Reproductive Health Services

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

No. 88-605 Argued: April 26, 1989 --- Decided: July 3, 1989

Appellees, state-employed health professionals and private nonprofit corporations providing abortion services, brought suit in the District Court for declaratory and injunctive relief challenging the constitutionality of a Missouri statute regulating the performance of abortions. The statute, inter alia: (1) sets forth "findings" in its preamble that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and wellbeing," §§ 1.205.1(1), (2), and requires that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents, § 1.205.2; (2) specifies that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing "such medical examinations and tests as are necessary to make a finding of [the fetus'] gestational age, weight, and lung maturity," § 188.029; (3) prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, §§ 188.210, 188.215; and (4) makes it unlawful to use public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life, §§ 188.205, 188.210, 188.215. The District Court struck down each of the above provisions, among others, and enjoined their enforcement. The Court of Appeals affirmed, ruling that the provisions in question violated this Court's decisions in Roe v. Wade, 410 U.S. 113, and subsequent cases.

Held: The judgment is reversed.

851 F.2d 1071, reversed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C, concluding that:

1. This Court need not pass on the constitutionality of the Missouri statute's preamble. In invalidating the preamble, the Court of Appeals misconceived the meaning of the dictum in Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444, that "a State may not adopt one theory of when life begins to justify its regulation of abortions." [p491] That statement means only that a State could not "justify" any abortion regulation otherwise invalid under Roe v. Wade on the ground that it embodied the State's view about when life begins. The preamble does not, by its terms, regulate abortions or any other aspect of appellees' medical practice, and § 1.205.2 can be interpreted to do no more than offer protections to unborn children in tort and probate law, which is permissible under Roe v. Wade, supra, at 161-162. This Court has emphasized that Roe implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, Maher v. Roe, 432 U.S. 464, 474, and the preamble can be read simply to express that sort of value judgment. The extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the state courts can definitively decide, and, until those courts have applied the preamble to restrict appellees' activities in some concrete way, it is inappropriate for federal courts to address its meaning. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 460. Pp. 504-507.

2. The restrictions in §§ 188.210 and 188.215 of the Missouri statute on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions do not contravene this Court's abortion decisions. The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189"]489 U.S. 189, 196. Thus, in Maher v. Roe, supra; Poelker v. Doe, 432 U.S. 519; and 489 U.S. 189, 196. Thus, in Maher v. Roe, supra; Poelker v. Doe, 432 U.S. 519; and Harris v. McRae, 448 U.S. 297, this Court upheld governmental regulations withholding public funds for nontherapeutic abortions but allowing payments for medical services related to childbirth, recognizing that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate Roe v. Wade. A State may implement that same value judgment through the allocation of other public resources, such as hospitals and medical staff. There is no merit to the claim that Maher, Poelker, and McRae must be distinguished on the grounds that preventing access to a public facility narrows or forecloses the availability of abortion. Just as in those cases, Missouri's decision to use public facilities and employees to encourage childbirth over abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but leaves her with the same choices as if the State had decided not to operate any hospitals at all. The challenged provisions restrict her ability to obtain an abortion only to the extent that she chooses to use a physician affiliated with a public hospital. Also without merit is the assertion that [p492] Maher, Poelker, and McRae must be distinguished on the ground that, since the

evidence shows that all of a public facility's costs in providing abortion services are recouped when the patient pays, such that no public funds are expended, the Missouri statute goes beyond expressing a preference for childbirth over abortion by creating an obstacle to the right to choose abortion that cannot stand absent a compelling state interest. Nothing in the Constitution requires States to enter or remain in the abortion business or entitles private physicians and their patients access to public facilities for the performance of abortions. Indeed, if the State does recoup all of its costs in performing abortions and no state subsidy, direct or indirect, is available, it is difficult to see how any procreational choice is burdened by the State's ban on the use of its facilities or employees for performing abortions. The cases in question all support the view that the State need not commit any resources to performing abortions, even if it can turn a profit by doing so. Pp. 507-511.

3. The controversy over § 188.205's prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion is moot. The Court of Appeals did not consider § 188.205 separately from §§ 188.210 and 188.215 -- which respectively prohibit the use of public employees and facilities for such counseling -- in holding all three sections unconstitutionally vague and violative of a woman's right to choose an abortion. Missouri has appealed only the invalidation of § 188.205. In light of the State's claim, which this Court accepts for purposes of decision, that § 188.205 is not directed at the primary conduct of physicians or health care providers, but is simply an instruction to the State's fiscal officers not to allocate public funds for abortion counseling, appellees contend that they are not "adversely" affected by the section, and therefore that there is no longer a case or controversy before the Court on this question. Since plaintiffs are masters of their complaints even at the appellate stage, and since appellees no longer seek equitable relief on their § 188.205 claim, the Court of Appeals is directed to vacate the District Court's judgment with instructions to dismiss the relevant part of the complaint with prejudice. Deakins v. Monaghan, 484 U.S. 193, 200. Pp. 511-513.

THE CHIEF JUSTICE, joined by JUSTICE WHITE and JUSTICE KENNEDY, concluded in Parts II-D and III that:

1. Section 188.029 of the Missouri statute -- which specifies, in its first sentence, that a physician, before performing an abortion on a woman he has reason to believe is carrying an unborn child of 20 or more weeks gestational age, shall first determine if the unborn child is viable by using that degree of care, skill, and proficiency that is commonly exercised by practitioners in the field; but which then provides, in its second sentence, that, in making the viability determination, the physician shall [p493] perform such medical examinations and tests as are necessary to make a finding of the unborn child's gestational age, weight, and lung maturity -- is constitutional, since it permissibly furthers the State's interest in protecting potential human life. Pp. 513-521.

(a) The Court of Appeals committed plain error in reading § 188.029 as requiring that, after 20 weeks, the specified tests must be performed. That section makes sense only if its second sentence is read to require only those tests that are useful in making subsidiary viability findings. Reading the sentence to require the tests in all circumstances, including when the physician's reasonable professional judgment indicates that they would be irrelevant to determining viability or even dangerous to the mother and the fetus, would conflict with the first sentence's requirement that the physician apply his reasonable professional skill and judgment. It would also be incongruous to read the provision, especially the word "necessary," to require tests irrelevant to the expressed statutory purpose of determining viability. Pp. 514-515.

(b) Section 188.029 is reasonably designed to ensure that abortions are not performed where the fetus is viable. The section's tests are intended to determine viability, the State having chosen viability as the point at which its interest in potential human life must be safeguarded. The section creates what is essentially a presumption of viability at 20 weeks, which the physician, prior to performing an abortion, must rebut with tests -- including, if feasible, those for gestational age, fetal weight, and lung capacity -- indicating that the fetus is not viable. While the District Court found that uncontradicted medical evidence established that a 20-week fetus is not viable, and that 23 1/2 to 24 weeks' gestation is the earliest point at which a reasonable possibility of viability exists, it also found that there may be a 4-week error in estimating gestational age, which supports testing at 20 weeks. Pp. 515-516.

(c) Section 188.029 conflicts with Roe v. Wade and cases following it. Since the section's tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were, in fact, second-trimester abortions. While Roe, 410 U.S. at 162, recognized the State's interest in protecting potential human life as "important and legitimate," it also limited state involvement in second-trimester abortions to protecting maternal health, id. at 164, and allowed States to regulate or proscribe abortions to protect the unborn child only after viability, id. at 165. Since the tests in question regulate the physician's discretion in determining the viability of the fetus, § 188.029 conflicts with language in Colautti v. Franklin, 439 U.S. 379, 388-389, stating that the viability determination is, and must be, a matter for the responsible attending physician's judgment. And, in light of District Court findings that the tests increase the expenses of abortion, their validity [p494] may also be questioned under Akron, 462 U.S. at 434-435, which held that a requirement that second-trimester abortions be performed in hospitals was invalid because it substantially increased the expenses of those procedures. Pp. 516-517.

(d) The doubt cast on the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that Roe's rigid trimester analysis

has proved to be unsound in principle and unworkable in practice. In such circumstances, this Court does not refrain from reconsidering prior constitutional rulings, notwithstanding stare decisis. E.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528. The Roe framework is hardly consistent with the notion of a Constitution like ours that is cast in general terms and usually speaks in general principles. The framework's key elements -- trimesters and viability -- are not found in the Constitution's text, and, since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations, rather than a body of constitutional doctrine. There is also no reason why the State's compelling interest in protecting potential human life should not extend throughout pregnancy, rather than coming into existence only at the point of viability. Thus, the Roe trimester framework should be abandoned. Pp. 517-520.

(e) There is no merit to JUSTICE BLACKMUN's contention that the Court should join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as Griswold v. Connecticut, 381 U.S. 479. Unlike Roe, Griswold did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. The Roe framework sought to deal with areas of medical practice traditionally left to the States, and to balance once and for all, by reference only to the calendar, the State's interest in protecting potential human life against the claims of a pregnant woman to decide whether or not to abort. The Court's experience in applying Roe in later cases suggests that there is wisdom in not necessarily attempting to elaborate the differences between a "fundamental right" to an abortion, Akron, supra, at 420, n. 1, a "limited fundamental constitutional right," post at 555, or a liberty interest protected by the Due Process Clause. Moreover, although this decision will undoubtedly allow more governmental regulation of abortion than was permissible before, the goal of constitutional adjudication is not to remove inexorably "politically devisive" issues from the ambit of the legislative process, but is, rather, to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. Furthermore, the suggestion that legislative bodies, in a Nation [p495] where more than half the population is female, will treat this decision as an invitation to enact abortion laws reminiscent of the dark ages misreads the decision and does scant justice to those who serve in such bodies and the people who elect them. Pp. 520-521.

2. This case affords no occasion to disturb Roe's holding that a Texas statute which criminalized all nontherapeutic abortions unconstitutionally infringed the right to an abortion derived from the Due Process Clause. Roe is distinguishable on its facts, since Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. P. 521.

JUSTICE O'CONNOR, agreeing that it was plain error for the Court of Appeals to interpret the second sentence of § 188.029 as meaning that doctors must perform tests to find gestational age, fetal weight, and lung maturity, concluded that the section was constitutional as properly interpreted by the plurality, and that the plurality should therefore not have proceeded to reconsider Roe v. Wade. This Court refrains from deciding constitutional questions where there is no need to do so, and generally does not formulate a constitutional rule broader than the precise facts to which it is to be applied. Ashwander v. TVA, 297 U.S. 288, 346, 347. Since appellees did not appeal the District Court's ruling that the first sentence of § 188.029 is constitutional, there is no dispute between the parties over the presumption of viability at 20 weeks created by that first sentence. Moreover, as properly interpreted by the plurality, the section's second sentence does nothing more than delineate means by which the unchallenged 20-week presumption may be overcome if those means are useful in determining viability and can be prudently employed. As so interpreted, the viability testing requirements do not conflict with any of the Court's abortion decisions. As the plurality recognizes, under its interpretation of § 188.029's second sentence, the viability testing requirements promote the State's interest in potential life. This Court has recognized that a State may promote that interest when viability is possible. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 770-771. Similarly, the basis for reliance by the lower courts on Colautti v. Franklin, 439 U.S. 379, 388-389, disappears when § 188.029 is properly interpreted to require only subsidiary viability findings, since the State has not attempted to substitute its judgment for the physician's ascertainment of viability, which therefore remains "the critical point." Nor does the marginal increase in the cost of an abortion created by § 188.029's viability testing provision, as interpreted, conflict with Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434-439, since, here, such costs do not place a "heavy, and unnecessary burden" on a woman's abortion decision, whereas the statutory requirement in Akron, which related to [p496] previablity abortions, more than doubled a woman's costs. Moreover, the statutory requirement in Akron involved second-trimester abortions generally; § 188.029 concerns only tests and examinations to determine viability when viability is possible. The State's compelling interest in potential life postviability renders its interest in determining the critical point of viability equally compelling. Thornburgh, supra, at 770-771. When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of Roe, there will be time enough to reexamine Roe, and to do so carefully. Pp. 525-531.

JUSTICE SCALIA would reconsider and explicitly overrule Roe v. Wade. Avoiding the Roe question by deciding this case in as narrow a manner as possible is not required by precedent and not justified by policy. To do so is needlessly to prolong this Court's involvement in a field where the answers to the central questions are political, rather than juridical, and thus to make the Court the object of the sort of organized pressure that political institutions in

a democracy ought to receive. It is particularly perverse to decide this case as narrowly as possible in order to avoid reading the inexpressibly "broader than was required by the precise facts" structure established by Roe v. Wade. The question of Roe's validity is presented here, inasmuch as § 188.029 constitutes a legislative imposition on the judgment of the physician concerning the point of viability and increases the cost of an abortion. It does palpable harm, if the States can and would eliminate largely unrestricted abortion, skillfully to refrain from telling them so. Pp. 532-537.

REHNQUIST, C.J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part II-C, the opinion of the Court with respect to Parts I, II-A, and II-B, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts II-D and III, in which WHITE and KENNEDY, JJ., joined. O'CONNOR, J., post, p. 522, and SCALIA, J., post, p. 532, filed opinions concurring in part and concurring in the judgment. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 537. STEVENS, J., filed an opinion concurring in part and dissenting in part, post, p. 560. [p498]