Special Supplement:

The Supreme Court and the *Webster* Case

On January 9, the U.S. Supreme Court agreed to hear the so-called Webster *case, involving a statute passed by the Missouri legislature in 1986 which, among other things, declared that "life begins at conception" and prohibited public funding for abortions, or abortion counselling. It also required physicians to "determine if the unborn child is viable" before performing abortions at 20 or more weeks of gestation. The statute was challenged by abortionists in the case* Reproductive Health Services v. Webster *(William L. Webster is Missouri's Attorney General), and lower courts struck down key provisions, preventing the law from taking effect. The statute does* not *directly challenge the 1973* Roe v. Wade *abortion ruling, but rather attempts to assert the state's powers* within *the* Roe *framework. U.S. Attorney General Richard Thornburgh (late last year) asked the Supreme Court to hear an appeal on* Webster, *arguing that it would provide "an appropriate opportunity" for the Court to "reconsider"* Roe *itself. When the Court accepted the appeal, there was a wide-spread public perception that the Justices would indeed use* Webster *to reconsider* Roe. *Interested parties on both sides of the abortion issue bombarded the Court with* amicus curiae *briefs supporting their respective positions.*

As we write, the number of such briefs approaches four score: it is obviously impossible to summarize them here. But the controversy is of obvious interest to our readers, so we asked three authors of one brief to write an article outlining their arguments. Thus what follows is adapted from the amicus *brief filed with the Supreme Court on behalf of American Collegians for Life, Inc., and the Catholic League for Religious and Civil Rights, in support of the state of Missouri. Robert A. Destro is a professor of law at the Catholic University of America, and a member of the U.S. Civil Rights Commission; Joseph E. Schmitz is a practicing attorney in Washington, D.C., and Robert J. Crnkovich, who also practices in Washington, is general counsel of American Collegians for Life.—Ed.*

Federalism: Reconciling a 'Human Life' and 'States' Rights' Approach to the Legal Protection of the Unborn

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WHEN THE SUPREME COURT legalized abortion up to the time of birth in *Roe* v. *Wade* and *Doe* v. *Bolton*[1] ("the Abortion Cases"), the conventional wisdom was that the Court had conclusively settled an issue that was not only extremely controversial, but also unsuitable for resolution through the usual processes of representative democracy. For the Court, an unspecified constitutional "right to privacy" located in either the Ninth or Fourteenth Amendments (the Court was not certain

which) was enough to empower the judiciary—and the judiciary alone—to determine whether state and federal policies designed to protect the unborn are, as the Court stated in *Roe*, "consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day."[2]

Thus, in addition to legalizing abortion, the Court's decision in the Abortion Cases "federalized" the entire value-of-life debate. After *Roe*, it was no longer possible to predict with any degree of confidence that life-protective legislation adopted by either Congress or a State legislature would survive judicial scrutiny. As a consequence, there were, in addition to the life questions so central to the abortion controversy, two other important constitutional issues: federalism and separation of powers.

Ever since, the legal and scholarly debate has been concerned with two basic questions: first, the desirability of affording legal protection to the unborn; and second, the Court's right to decide such fundamental questions of public policy in the first place. At the legislative level, the pro-life movement has often viewed these questions as mutually exclusive: a "states' rights" approach versus one centered on the value of human life. At the judicial level, however, they are inextricably intertwined.

This article will summarize the relationship between the "human life" and federalism issues raised by the Missouri statute at issue in *Reproductive Health Services* v. *Webster*.[3] The case has attracted widespread attention because both the State of Missouri and the United States government have urged the Court to overrule *Roe*. It is currently scheduled for argument before the Court on April 26, 1989, and a decision will probably be handed down at the end of the Court's term in early July.

1. The Constitutional Background: Amendments Nine, Ten and Fourteen

Since *Roe*, abortion has been held to be part and parcel of a more generalized constitutional "right to privacy." Though the right to privacy does receive explicit protection in several state constitutions,[4] the federal right to privacy is commonly understood in constitutional terms as referring to two distinct concepts: 1.) the inviolability of one's per-

son, home or things from unreasonable governmental intrusions; and 2) individual autonomy or liberty with respect to certain matters important to one's person or the course of one's life (e.g., marriage, sex, childbearing). The protection for the locational aspect of privacy is found in the Fourth Amendment,[5] whereas the Due Process Clause of the Fourteenth Amendment is generally held to be the source of the rights of individual autonomy which the United States Supreme Court has recognized over the years.[6] It is the latter sense—individual autonomy—that the term "right to privacy" is used in bioethics cases, including those involving abortion and euthanasia.

When the Supreme Court decided *Roe* it left open the question of where the right to abortion might be found in the Constitution:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[7]

The Ninth Amendment is simply worded: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Its meaning, however, is disputed. All agree that the Bill of Rights does not protect the entire range of human and civil rights, and that the Ninth Amendment was the primary means utilized by the Founding Fathers to make that point. The real controversy is over state power to define and protect human rights. While the Tenth Amendment is specifically addressed to the distribution of power between the federal government on the one hand, and the people and their representatives at the State level on the other, some commentators also argue that the Ninth Amendment was intended as an additional limit on the power of the federal government to restrict rights that the people would recognize under state constitutional or statutory law. Others see the Ninth Amendment as authorization for the federal judiciary to recognize rights not enumerated in the Constitution and to invalidate laws which conflict with them.

The primary difficulty with the latter argument in the abortion context is the language of the Tenth Amendment. While the Ninth Amendment declares that unenumerated *rights* are reserved by the people, the Tenth Amendment reserves *powers* not granted to the federal government for the States and the people: "The powers not dele-

gated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Since the federal constitution neither expressly prohibits the States from protecting the unborn, nor limits their authority to make abortion policy by delegating it to Congress or expressly prohibiting its exercise, the Abortion Cases represent a claim of federal judicial supremacy on both human life issues and regulatory policy touching abortion. By resting its decision on an expansive, pro-abortion view of liberty under the Fourteenth Amendment, the Court ignored the Ninth and Tenth Amendments which protect the right of the people to govern themselves.

II. The Ever-Expanding Right to Abortion

With the notable exception of its refusal to force either Congress or the States to pay for abortions, the Court's decisions until 1983 can best be described as a "mopping-up" operation, making clear what was implicit in *Roe*: state interference with either the mother's decision to abort or the means by which the abortionist performs the operation would not be tolerated. The Court has invalidated laws designed to require parental and spousal consent, parental and spousal notice, informed consent, a waiting period, protection of the fetus during late-term abortions and humane disposal of fetal remains, as well as regulations designed to ensure that abortions are performed under conditions that will maximize the safety of the mother.

Nevertheless, both Congress and the States have continued to legislate regarding abortion, making it equally clear that they do not share the Court's view of either the respective "weight" of the interests involved, or the judiciary's right to impose its views on everyone else. The result has been that the Court has been forced to consider nearly one abortion case per year since 1973.

The constant stream of cases has taken its toll on the Court. Though it continues to hold that it "settled" the abortion issue in 1973, there are signs that some of the Justices have had their doubts about the wisdom of trying to resolve a controversy which requires consideration of highly-charged moral issues in an ever-changing, high-technology setting. Justice Sandra Day O'Connor, for example, found the Court's "trimester" approach to be on a technological "collision course with itself."[8] Writing for the Court in the same case, former Justice Lewis

Powell acknowledged that "Legislative responses to the Court's decision [in *Roe*] have required us on several occasions, and again today, to define the limits of a State's authority to regulate the performance of abortions. And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution."[9] Notably, however, he did not directly address the arguments that *Roe* was wrong as a matter of constitutional law. He relied instead on the view that the rule of law requires adherence to settled precedent, even though "the doctrine of *stare decisis* [is] perhaps never entirely persuasive on a constitutional question."[10]

With the retirement of Justice Powell and the appointment of Justices Antonin Scalia and Anthony Kennedy, the stage was being set for a constitutional showdown, not between pro- and anti-abortion forces (as is today's conventional wisdom), but between those charged with the duty to *make* the law (legislators) and those whose job is merely to interpret it (the judiciary).

So, when the Supreme Court agreed to decide the constitutionality of a Missouri statute which, among other things, requires abortionists to test for viability before any abortion at twenty weeks or later, declares that "The life of each human being begins at conception," and states that "unborn children have protectable interests in life, health and well-being," it was widely reported in the press as though the long-awaited "high-noon" of the judicial activism phase of the abortion controversy had arrived. Whether it has remains to be seen.

What makes the *Webster* case significant is that it raises—for the first time since 1973—the constitutionality of legislation which seeks explicitly to protect the unborn "to the full extent permitted by the Constitution of the United States [and] decisions of United States Supreme Court."[11] Thus *Webster* is the first case in many years to pit the Ninth and the Tenth Amendment powers of the people to regulate abortion against the lower court's contrary claim of judicial authority under the Fourteenth.

A. Protection for the Viable Fetus: Illusion or Reality?

While most pro-life arguments focus on the humanity of the unborn and the necessity to protect their lives at every stage of pregnancy, the standards established by the Court in *Roe* do appear to recognize that the States have some important and legitimate interests in protecting

fetal life from conception until birth. It is only at viability, however, that the States are said to have a "compelling" (i.e., important enough) interest in its preservation to forbid abortion under some circumstances.

Because the Court held in *Roe* that a State "may go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother" after viability,[12] Missouri's viability testing statute is a critical test of whether a State really does have any authority to protect the viable unborn.

If the State's interest in the protection of fetal life becomes compelling at viability, it necessarily follows that a State should have the power to require that the point of viability be determined. Without that determination, the State would be unable to ascertain the point at which it could regulate or proscribe abortion, and the protection of its compelling interest would rest with the unfettered discretion of an abortionist whose fee depends upon the performance of the abortion. It is arguable that *Roe* does not require this result, and it is equally arguable that the Tenth Amendment does not permit it.

If the compelling nature of the State's interest in unborn human life—not to mention the undeniable interest of an unborn child in the preservation of its own life—is to be anything more than illusory, then *Roe* and the cases which followed it should be read to permit States desiring to protect fetal life to require that a physician determine whether the fetus is viable. The Court itself has stated that "because the [viable] fetus presumably has the capability of meaningful life outside the mother's womb . . . regulation protective of fetal life after viability thus has both logical and biological justification."[13]

Nonetheless, the Court has consistently rejected attempts by States to determine legislatively the point at which viability occurs. Even though the States' compelling interest in the life of the unborn under *Roe* ripens at that point, the Court requires that the determination of viability be made by the abortionist:

> It is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be a matter for the judgment of the responsible attending physician.[14]

In keeping with what the Court has held, the first sentence of Missouri's fetal viability testing statute provides that "before a physician

performs a abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician will first determine if the unborn child is viable . . ."[15] by using such skills and tests as are necessary in his or her professional judgment to reach a conclusion.

If, as the Court held in *Roe*, viability is *the* relevant criterion to be examined in weighing the power of the State to regulate or prohibit abortion, it logically follows that a State wishing to protect fetal life by regulating or prohibiting abortion must proceed through the following two-step process. First, there must be a determination as to whether the fetus is viable. If viability has not been reached, the State's interest is not compelling and it may take no steps to protect the child. If, however, the fetus is viable, then the need for the second step arises: a determination of whether the abortion is necessary to preserve the life or the health of the mother.

By enacting its viability testing statue, Missouri attempted to require abortionists to perform the first step of the *Roe* two-step process. Nevertheless, the United States Court of Appeals for the eighth Circuit invalidated the statue because viability tests entail additional cost and there are "risks" inherent in amniocentesis to determine lung maturity.[16] The appeals court's approach suggests that even if the child were viable, cost and risk factors (however minimal) would outweigh the State's interest in determining whether the time had come when it could protect the child.

By relying on maternal cost and potentially minor health risks as the basis for holding the viability certification procedure unconstitutional, the Court of Appeals eliminated the linchpin of then-Chief Justice Burger's assertion in *Roe* that the Court had not accepted "abortion on demand."[17] If cost and potential risk to maternal health are sufficient justification to snuff out the life of a viable unborn child, there are no limits on abortion in this country. Unless the States "compelling" interest in post-viability fetal life is really an illusion manufactured by the Court for public consumption, *Webster* should be reversed. If it is not reversed, abortion on demand for all nine months of pregnancy really is, as *Roe*'s critics have charged, the law of the land and honesty requires that the Court simply admit it.

Webster thus places the Court on the horns of a dilemma. If a majority puts teeth in *Roe*'s trimester approach without overruling it, they

will ensure that some States will put strict limits on all post-viability abortions except those necessary to save the life of the mother. In short order, the Court would be faced with the hardest-to-defend abortion case of all: one that seeks the court's constitutional blessing for the right to kill a viable child for a reason other than to save the life of its mother (e.g., the gender of the child or the financial burden of raising it). That hypothetical case would be even harder to defend than *Roe*. If, on the other hand, the Court refuses to permit viability testing, *Roe*, as so interpreted, would stand as naked authorization for abortion-on-demand at any time until birth.

B. Human Rights for the Unborn and the Ninth Amendment

The Supreme Court's opinion in *Roe* rests on a view of the abortion controversy as a clash between State regulatory authority and individual liberty. The right of "privacy" (better understood as "personal autonomy") on which *Roe* rests was said to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"[18] only because the unborn were not "persons" under the Fourteenth Amendment. The Court itself admitted that "if [the] suggestion of personhood is established, the . . . case [for legal abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[19]

Thus, even though the Court's opinion in *Roe* holds that the humanity of the unborn is constitutionally irrelevant to the question of whether an unborn child should be considered a "person" under the Fourteenth Amendment, the Court has never held that the point at which life begins and the human nature of the child are irrelevant to the manner in which the State formulates and executes policy not directed at prohibiting abortion.[20] In fact, the Court's willingness to recognize only what it considered to be "the less rigid claim that . . . at least potential life is involved,"[21] should not prevent the States from recognizing the more substantial claim that an *actual* human life is involved.

So why then was the statute held to be unconstitutional? The preamble in *Webster* does nothing more than state Missouri's public philosophy that the unborn should be protected to the extent possible under federal and state constitutional law. There are no rights of pregnant women at stake because "preambles to statutes do not impose substantive rights, duties or obligations."[22] To answer the question, one must

compare the actual holding in *Roe* with the reading (arguably proper) it was given in *Webster* by the lower courts.

In *Roe*, the Supreme Court argued that the judiciary should not take a position on "the difficult question of when life begins."

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[23]

As unequivocal as this statement appears, it is disingenuous. The "essence" of *Roe* is that the humanity of the unborn is constitutionally irrelevant. Whether human life has begun or whether it has not, the Court held that a State may not, "adopting one theory of life, . . . override the rights of the pregnant woman that are at stake."[24]

The rationale employed by the federal district court to strike the preamble was that "this legislative pronouncement by the Missouri General Assembly clearly conflicts with the essence of *Roe* v. *Wade*."[25] Under this view, Missouri's statutory proclamation that life begins before birth is an affront to the power of the Supreme Court to "settle" such questions, and should not be tolerated. The United States Court of Appeals in St. Louis invalidated the preamble, not because it violates anyone's rights, but because "the statute is simply an impermissible state adoption of a theory of when life begins . . . ."[26]

Though the lower courts are quite correct in their belief that the "essence" of *Roe* is inconsistent with Missouri's preamble, their holdings that it is unconstitutional for that reason alone are evidence of a serious political imbalance at the heart of the American constitutional system. Since there can be no injury to the rights or interests of pregnant women by a mere statement that a State respects the rights of the unborn, the lower courts' holdings represent a bold assertion that the federal judiciary has the power to police not only actions which are alleged to interfere with abortion, but societal *attitudes* as well. Such a claim is, by any standard of constitutional analysis, an extraordinary one; for if the elected representatives of the people of Missouri may not even *proclaim* that their constituents are in fundamental disagreement with the Court's views on the beginning of human life or the interests of the unborn, what powers of self-government remain?

Fortunately, the answer to that question lies in the Constitution itself. The Founding Fathers wisely anticipated that there would be times

when federal willingness to protect fundamental human rights would be narrower than that of the States, and provided in the Ninth Amendment that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Since the Constitution says *nothing* about either the right of an unborn child to life or the rights of a woman to have an abortion, the real question for decision in *Webster* is not whether one takes precedence over the other, but whether the federal judiciary's opinion that the humanity of fetal life is irrelevent to law-making takes precedence over Missouri's right to state that it is not.

While most of the recent scholarly commentary on the Ninth Amendment focuses on the degree to which—if at all—the Ninth Amendment supports judicial review of legislative decisions,[27] it would be impossible to conclude from the language of the Amendment, its history, or the holdings of the Court (including all the abortion cases since *Roe*), that the people, acting through their elected representatives at the State and federal levels, are not free to declare the existence of unenumerated or judicially "unrecognized" or unprotected interests.[28]

The Ninth Amendment expressly provides that the States may go farther than the federal government in the recognition of legal rights and interests,[29] and the Court has already held, in another context, that "when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."[30] The fact that the Court has not construed the Constitution to protect the interests of the unborn in the abortion context is therefore irrelevant to a decision concerning the validity of Missouri's attempt to do so within the boundaries set out in *Roe*.

Because Missouri expressly stated that its law was designed to protect the unborn "to the full extent permitted by the Constitution of the United States [and] decisions of the United States Supreme Court,"[31] the *Webster* case does indeed present a constitutional showdown of sorts. Unless it overturns *Roe*, the Court will find itself between Scylla and Charybdis; for it stated in *Roe* that its "task . . . [was] to resolve the issue by constitutional measurement, free of emotion and of predilection."[32]

If the Court upholds the Missouri declaration without overruling *Roe*, it will have been true to its word, but at the expense of demon-

strating the constitutional and intellectual bankruptcy of the central holding of *Roe* itself: that an unborn human child is not entitled to constitutional protection. If it does not, the Court will preserve what the district court called the "essence" of *Roe* at the expense of demonstrating that it is intolerant of principled democratic dissent from its rulings. The choice will not be an easy one.

III. The Abortion Controversy: Study in Judicial Usurpation of Self-Government

At the heart of the controversy over the continued validity of the Abortion Cases is the federal judiciary's usurpation of legislative power "reserved to the States respectively, or to the people" by the Tenth Amendment. The Tenth Amendment will not save a statute that otherwise violates the subsequently enacted Fourteenth Amendment,[33] but since neither Missouri's preamble nor its viability testing statute, properly construed, violates the Fourteenth Amendment, the Tenth Amendment requires federal judicial deference to Missouri's legislative judgment.

The American system of government is based upon the consent of the governed. The Declaration of Independence proclaims that "Governments . . . deriv[e] their just powers from the consent of the governed," the opening words of the Constitution are "We the people," and Article V requires the consent of three-fourths of the States for amendments to the Constitution. The Tenth Amendment simply formalizes a principle otherwise implicit in the language and structure of the Constitution: unless a power retained by the States or the people has been delegated to the federal government, relinquished in its entirety, or forbidden, the federal government may not prevent its exercise.[34]

The substantive content of the Constitution and its amendments is derived from the consent of the governed; if the people have not consensually abdicated the power to make certain policy choices which do not otherwise violate the federal constitution, such as Missouri's moral pronouncement concerning the value of unborn human life, the Court cannot constitutionally deprive the people of their sovereign right of self-government to take such action.

In *Marbury* v. *Madison*,[35] the bedrock case for American judicial review, Chief Justice John Marshall wrote that "the framers of the constitution contemplated . . . [it] as a rule for the government of

courts, as well as of the legislature. . . . Courts, as well as other departments, are bound by that instrument."[36] Since the federal judiciary is a department of the United States government, it is bound by the federalism principles incorporated in the Tenth Amendment.[37]

Although the Court has never expressly invalidated a federal judicial decision on Tenth Amendment grounds, it has recognized that its own powers are limited by the federalism principles inherent in the Tenth Amendment. In *Garcia* v. *San Antonio Metro. Transit Authority*,[38] for instance, the Court refused to invalidate Congressional restriction on state-run transit operations because the method it had used in the past for deciding such cases was to classify governmental functions as "'traditional,' 'integral,' or 'necessary'." The Court expessly rejected its prior approach and deferred to the Congressional judgment because to do otherwise "inevitably invites an unelected federal judiciary to make decisions about what state policies it favors and which ones it dislikes."[39] The Court explained that "the essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—*including the judiciary*—deems state involvement to be."[40]

To the extent that *Garcia* mandates federal judicial deference to otherwise proper state or federal legislation, it supports the Missouri legislature's enactment of the preamble and the viability testing statute. Even if *Garcia* can be read to limit the responsibility of the Court to enforce the Tenth Amendment against arguably unconstitutional federal legislative encroachments on otherwise proper state policy-making functions, it should not be read to limit the responsibility of the Court to enforce the Tenth Amendment against encroachment by the federal judiciary which seeks to do the same thing. What Missouri has done constitutes a legitimate exercise of its legislative powers.

Conclusion

The distinction between a Supreme Court case and a legislative debate is an important one, and the failure of many commentators to appreciate the difference lies at the heart of the current hysteria over the Supreme Court's decision to review the Missouri statute at issue in *Webster*. The wailing from the pro-abortion side was predictable, but

some pro-life activists have encouraged them by wishing aloud (and unrealistically, in our view) that the Court might "settle" the abortion controversy on pro-life terms by simply inverting the *Roe* holding and declaring that unborn children are "persons" protected by the Constitution. In our view, such a result is unrealistic and ill-advised.

As pernicious as it is, *Roe* is only a symptom of a deeper problem affecting American democracy: judicial distrust of the good will and common sense of the American people. If pro-life forces want to *win* the value-of-life controversy which is currently raging over abortion, euthanasia, fetal experimentation and other bioethics issues, they cannot rely on the shifting sands of judicial opinion. They will have to achieve their goal the old fashioned way—they will have to earn it by convincing a majority of their elected representatives that respect for human rights permits no other conclusion.

If the continuing controversy over abortion since *Roe* demonstrates anything, it is that judges cannot settle political controversies. Victory comes through the political process at the federal, state and local political levels. Judicial short cuts don't work. They don't last, either.

NOTES

1. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973).
2. *Roe*, 410 U.S. at 165 (1973).
3. *Reproductive Health Services* v. *Webster*, 662 F. Supp. 407, 413 (W.D. Mo., 1987), *att'd*851 F.2d 1076 (8th Cir. 1988), *prob. Juris. noted* 109 S.Ct. 780 (1989) (No. 88-605).
4. E.g., Ariz. Const. art. 2, section 8; Fla. Const. art. 1, section 23; Wash. Const. art. 1, section 7.
5. U.S. Const. Amend. IV (1791): "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
6. See, e.g., *Lochner* v. *New York*, 198 U.S. 45 (1905) (autonomy of contract in the employment setting; invalidating state law regulating bakers' hours); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (autonomy to make educational decisions; invalidating state law which forbade teaching any language other than English); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (autonomy of married persons to use contraceptives; invalidating state laws prohibiting the use of birth control devices); *Roe* v. *Wade*, 410 U.S. 113 (1973) (autonomy to choose abortion; invalidating state laws protecting the life of the unborn child). But see *Bowers* v. *Hardwick*, 478 U.S. 186 (1986) (refusing to recognize autonomy of homosexuals to engage in consensual sodomy, but reserving decision with respect to sodomy by married couples).
7. *Roe*, 410 U.S. at 153.
8. *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 458 (O'Connor, J. dissenting).
9. *Id.*, 462 U.S. at 419 (majority opinion).
10. *Id.*, 462 U.S. at 419-20 & n.1.
11. Mo. Rev. Stat. section 1.205.2.
12. *Roe*, 410 U.S. at 163-64.
13. *Roe*, 410 U.S. at 164.
14. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 64 (1976).
15. Mo. Ann. Stat. section 188.029.
16. 851 F.2d at 1075 n.5.

17. *Roe*, 410 U.S. at 208 (Burger, C.J., concurring).

18. *Roe*, 410 U.S. at 153.

19. *Roe*, 410 U.S. at 156-57.

20. See e.g., *Planned Parenthood* v. *Ashcroft*, 462 U.S. 476, 483 (1983) (recognizing the State's compelling interest in preserving life during post-viability abortions); *Harris* v. *McRae*, 448 U.S. 297 (1980) ("Abortion is different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.").

21. *Roe*, 410 U.S. at 150.

22. *National Wildlife Fed'n* v. *Marsh*, 721 F.2d 767, 773 (11th Cir. 1983). *Yazoo & M.V.R. Co.* v. *Thomas*, 132 U.S. 174, 188 (1889) ("the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous"); *Association of American Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (Preamble "is not an operative part of the statute and it does not enlarge or confer powers.").

23. *Roe*, 410 U.S. at 159.

24. *Id.*, 410 U.S. at 161.

25. *Reproductive Health Services* v. *Webster*, 662 F. Supp. 407, 413 (W.D. Mo., 1987).

26. *Reproductive Health Services* v. *Webster*, 851 F.2d 1071, 1076 (8th Cir. 1988).

27. See e.g., *Symposium on Interpreting the Ninth Amendment*, 64 Chi.-Kent L. Rev. 37-268 (1988).

28. See e.g., National Defense Authorization Act or Fiscal years 1988 & 1989, 101 Stat. 1086, Pub. L. No. 100-180, title V, section 508 (passed in response to the Supreme Court's holding in *Goldman* v. *Weinberger*, 475 U.S. 503 [1986] that a soldier had no constitutional right to wear a visible religious symbol—a yarmulke—with his uniform); *Katzenbach* v. *Morgan*, 384 U.S. 641, 651-52 n.10 (1966).

29. Compare Levinson, *Constitutional Rhetoric and the Ninth Amendment*, Chi.-Kent L. Rev. 131, 154-171 (1988) with Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do With the Ninth Amendment?*, 64 Chi.-Kent L. Rev. 239, 237-251 (1988).

30. *Maher* v. *Roe*, 432 U.S. 464, 479-80 (1977).

31. Mo. Rev. Stat. section 1.205.2.

32. *Roe*, 410 U.S. at 116.

33. *Hunter* v. *Underwood*, 471 U.S. 222, 233 (1985).

34. See *The Federalist* No. 22, at 58 (A. Hamilton) (R. Fairfield ed. 1981): "The fabric of American empire ought to rest on the solid basis of *the consent of the people*. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority" (emphasis in original).

35. 5. U.S. (1 Cranch) 137, 179-80 (1803).

36. *Id.*, 5 U.S. (1 Cranch) at 179-80 (1803) (emphasis added).

37. See *The Federalist* No. 82, at 252 (A. Hamilton) (R. Fairfield ed. 1981); Exec. Order No. 12, 612, 52 Fed. Reg. 41,685-6 (1987).

38. 469 U.S. 547 (1985).

39. *Id.*, at 546.

40. *Id.*, (emphasis added).