WEBSTER v. REPRODUCTIVE HEALTH SERVICES

ABORTION DECISION IS INDECISIVE

SUMMARY

In a decision that produced a number of separate opinions and no clear result, the Supreme Court, by a 5-4 vote, upheld a Missouri statute that placed restrictions on the right to undergo an abortion. The decision was announced on July 3, 1989 in the case of *Webster v. Reproductive Health Services*.

BACKGROUND

In 1986 the state of Missouri enacted a law that limited the right to abortion in a number of ways. First, the statute contained a preamble that announced the state's conclusion that life begins at conception. Second, the statue required that, before performing an abortion after 20 weeks of pregnancy, the physician must determine whether the fetus is viable (able to live outside the womb). Such a finding requires tests on the woman and the fetus. Some argued that those tests were expensive and, perhaps, dangerous and that requiring them placed an undue burden on the right to an abortion guaranteed in *Roe v. Wade*. Third, the statute also barred the use of public funds, employees or facilities to assist in or encourage abortions. Reproductive Health Services challenged the constitutionality of the statute in light of the Supreme Court's opinion in *Roe v. Wade*, which held that the constitutional right to privacy protected a woman's right to have an abortion.

The trial court found the sections described above unconstitutional. The Court of Appeals affirmed the judgment of the trial court and the Supreme Court agreed to hear the case.

ANALYSIS

The *Webster* opinion is difficult to analyze because its importance lies as much in what the Court did not say as in what it did say. The majority of the Court refused, at this time, to overrule *Roe v. Wade*. It is clear, though, that at least four justices (Rehnquist, White, Scalia, and Kennedy) are willing to do so. It is equally clear that at least four justices (Brennan, Blackmun, Marshall, and Stevens) are unwilling to do so. It is believed now more than ever that Justice O'Connor holds the key to this deadlock.

The Chief Justice and Justices Kennedy and White voted to uphold the restrictions in the Missouri statute based on their interpretation of *Roe*. Under that interpretation, the Missouri restrictions as actually applied did not impose an undue burden on women seeking abortions. For instance, the preamble language finding that human life began at conception was held to be of no effect; just a legislative statement of opinion. Justice Scalia found this interpretation of *Roe* to be incredibly strained. He argued that these three justices had hesitated to overturn *Roe* when they should have moved decisively to do so, a step he was willing to take.

Justice O'Connor was more guarded in her views and it is not clear how she will vote when the Court is finally forced to come to a clear-cut decision. She certainly found some aspects of the *Roe* decision to be troublesome but was not yet prepared to vote to overturn it. Justices Blackmun, Brennan, Marshall, and Stevens all continue to support the conclusion in *Roe*.

In summary, the *Webster* decision can fairly be described as a compromise. The majority voted to uphold the Missouri statute, with three different sets of reasons. Yet only Justice Scalia was openly willing to go all the way and overturn *Roe*. Thus, anti-abortion proponents gained a victory in *Webster*, but the victory was far short of being final. The Court will hear at least three more abortion issues this term and one of those may provide the clear-cut decision that many had expected in *Webster*. One case deals with statutory restrictions on the equipment that abortion clinics must have on hand, and the other two deal with notification of the parents of minors seeking abortions.

EXCERPTS FROM THE CHIEF JUSTICE'S OPINION

"We do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that therefore there should be a rigid line allowing state regulation after viability but prohibiting it before viability. . ."

"Both appellants and the United States . . . have urged that we overrule our decision in *Roe v. Wade* . . . The facts of this case, however, differ from those at issue in *Roe*. Here, Missouri has determined that viability is the point at which the interest in potential human life must be safeguarded. In *Roe*, on the other hand, the Texas statute criminalized all abortions, except when the mother's life was at stake. This case, therefore, affords us no occasion to revisit the holding in *Roe*."

EXCERPTS FROM JUSTICE O'CONNOR'S OPINION

"Nothing in the record before us indicates that . . . the preamble of Missouri's abortion regulation statute will affect a woman's decision to have an abortion . . . (or) affect a woman's decision to practice contraception."

EXCERPTS FROM JUSTICE SCALIA'S OPINION

"The outcome of today's case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike to needlessly prolong the Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not judicial."

"It was an arguable question today whether . . . the Missouri law contravened *Roe v. Wade* and would have examined *Roe* rather than examining the contravention. . . .(W)hat will it take, one must wonder, to permit us to reach that fundamental question? . . . Of the four courses that we might have chosen today — to reaffirm *Roe*, to overrule it, to overrule it <u>sub silentio</u> (silently), or to avoid the question — that last is the lease responsible . . . I concur in the judgment of the Court and strongly dissent from the manner in which it has been reached."

EXCERPTS FROM JUSTICE BLACKMUN'S OPINION

"Today. . . the fundamental constitutional right of women to decide whether to terminate a pregnancy survives but is not secure . . . (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 (*Roe*)."

"I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this court."