

**A Documentary History of the
Legal Aspects of Abortion
in the United States**
Webster v. Reproductive Health Services

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Volume I

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Preface

The event that motivated this compilation of materials was the filing of a record-setting 78 *amicus curiae* briefs in last term's abortion case in the U.S. Supreme Court, *Webster v. Reproductive Health Services, Inc.*¹ As indicated by that deluge of *amicus* briefs, no legal issue has aroused greater public interest and controversy since the school desegregation case, *Brown v. Board of Education*,² over a quarter of a century ago. The *Webster* briefs—submitted by organizations and interest groups on both sides of the abortion question; by members of Congress; and by other individuals, including hundreds of law professors—urged the Court to adhere to or to overturn the landmark decision in *Roe v. Wade*³ (31 briefs were filed in support of appellees and 47 briefs in support of appellants). Because the Court's decision in *Webster*⁴ upheld the Missouri statute's significant restric-

¹109 S. Ct. 3040 (1989).

²349 U.S. 294 (1954).

³410 U.S. 113 (1973).

⁴There were five separate opinions. Chief Justice Rehnquist wrote the plurality opinion for himself and Justices Kennedy and White. Justices O'Connor and Scalia wrote separate opinions concurring in part and in the judgment: (1) that there was no need to rule on the constitutionality of the statute's preamble, as the preamble does not actually regulate abortion; and (2) that Missouri's ban on the use of public facilities and public employees in performing abortions is constitutionally permissible. The plurality further found that the statute's mandate to physicians to conduct fetal viability tests during the second trimester of pregnancy is permissible in accordance with the state's interest in protecting potential human life. O'Connor agreed with the latter point but, unlike Rehnquist, found it unnecessary to reexamine the trimester

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tions on the right to abortion but did not overturn *Roe v. Wade*, the issue of abortion is likely to remain live and contentious in the courts, Congress, and the state legislatures for years to come.

Indeed, three abortion cases are pending on the Supreme Court's calendar as of this writing,⁵ and legislative initiatives to place further restrictions on access to abortion are underway in many states. With *Webster's* suggestion that the Court will look favorably on state efforts to regulate abortion to some degree, abortion promises to be an important issue in local and state-wide elections. The ubiquitous nature of the issue is illustrated by its effects on the legal profession. In February 1990, the American Bar Association's House of Delegates endorsed abortion rights by a vote of 238 to 106.⁶ Among the immediate reactions were objections by Notre Dame Law School, whose faculty voted to oppose the ABA's action,⁷ and the State Bar of Texas, whose president threatened to withdraw its participation in the ABA.⁸

In light of this continuing vitality of abortion as a legal, social, and political question, we have assembled these volumes on *Webster* as a convenient source for researchers. Re-

framework established in *Roe*. Scalia agreed that the testing provision is valid but strongly criticized the plurality's reasoning, clearly suggesting that he would reject *Roe*. Justices Blackmun and Stevens wrote separate opinions concurring in part and dissenting in part. Joined by Justices Brennan and Marshall, Blackmun argued for the continuing validity of *Roe's* trimester approach. Finally, Stevens argued that the preamble's finding that life begins at conception violates the First Amendment's Establishment Clause.

⁵*Turnock v. Ragsdale*, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, 57 U.S.L.W. 3859 (U.S. June 27, 1989) (No. 88-790); *Hodgson v. Minnesota*, 58 U.S.L.W. 3034 (U.S. July 3, 1989) (Nos. 88-1125, 88-1309); and *Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3859 (U.S. June 27, 1989) (No. 88-805).

⁶N.Y. Times, Mar. 2, 1990, at B10, col. 1 (national ed.).

⁷Wall Street J., Feb. 22, 1990, at B5 (southwest ed.).

⁸Wall Street J., Feb. 20, 1990, at B8 (southwest ed.).

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presenting a broad spectrum of opinion, the *amicus* briefs contain a vast array of current legal and factual analysis. In addition to all of the *amicus* briefs, we have collected the briefs of the parties, the oral arguments, the opinions of the Supreme Court and of the two lower courts, and the Missouri statute in question.

To bring a variety of perspectives to the primary source materials, original introductory essays have been written by Sarah Weddington, Sidney Callahan, and John Robertson. The final introductory piece by Ronald Dworkin is reprinted with the permission of the author and the *New York Review of Books*, where the essay first appeared. We gratefully acknowledge the contributions of these experts.

Subsequent volumes in this series of documentary history will extend coverage retrospectively to *Griswold v. Connecticut*,⁹ the progenitor of the Supreme Court's abortion decisions that established the constitutional right to reproductive privacy; *Roe v. Wade*; and the other Supreme Court abortion decisions prior to *Webster*. Future decisions will be included as warranted.

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March 1990

⁹381 U.S. 479 (1965).