

Webster, however, exposed a split in the Court's approach to *Roe v. Wade*. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly critical of *Roe*, but found no occasion to overrule it. Instead, the plurality's approach sought to water down *Roe* by applying a less stringent standard of review. For instance, the plurality found the viability testing requirement valid because it "permissibly furthers the State's interest in protecting potential human life."⁵⁹⁵ Justice O'Connor, however, concurred in the result based on her view that the requirement did not impose "an undue burden" on a woman's right to an abortion, while Justice Scalia's concurrence urged that *Roe* be overruled outright. Thus, when a Court majority later invalidated a Minnesota procedure requiring notification of both parents without judicial bypass, it did so because it did "not reasonably further any legitimate state interest."⁵⁹⁶

Roe was not confronted more directly in *Webster* because the viability testing requirement, as characterized by the plurality, merely asserted a state interest in protecting potential human life after viability, and hence did not challenge *Roe*'s 'trimester framework.'⁵⁹⁷ Nonetheless, a majority of Justices appeared ready to reject a strict trimester approach. The plurality asserted a compelling state interest in protecting human life throughout pregnancy, rejecting the notion that the state interest "should come into existence only at the point of viability;"⁵⁹⁸ Justice O'Connor repeated her view that the trimester approach is "problematic;"⁵⁹⁹ and, as mentioned, Justice Scalia would have done away with *Roe* altogether.

497 U.S. 502 (1990). And, while the Court ruled that Minnesota's requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

⁵⁹⁵ 492 U.S. at 519–20. Dissenting Justice Blackmun, joined by Justices Brennan and Marshall, argued that this "permissibly furthers" standard "completely disregards the irreducible minimum of *Roe* . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy," and instead balances "a lead weight" (the State's interest in fetal life) against a "feather" (a woman's liberty interest). *Id.* at 555, 556 n.11.

⁵⁹⁶ *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990).

⁵⁹⁷ 492 U.S. at 521. Concurring Justice O'Connor agreed that "no decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible." *Id.* at 528.

⁵⁹⁸ 492 U.S. at 519.

⁵⁹⁹ 492 U.S. at 529. Previously, dissenting in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983), Justice O'Connor had suggested that the *Roe* trimester framework "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."