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Comments: The Viability of the Trimester Approach

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THE VIABILITY OF THE TRIMESTER APPROACH

The Supreme Court established in Roe v. Wade *a trimester test for determining the constitutionality of abortion regulations. In developing this test the Court relied upon contemporary medical knowledge. Because of recent advances in the medical field, it was unclear whether the trimester approach was in concert with these advances. This comment examines the development of the* Roe *test, discusses the present controversy concerning these medical advances, and analyzes three recent Supreme Court decisions dealing with the issue.*

I. INTRODUCTION

In *Roe v. Wade*,[1] the Supreme Court held that the fundamental right of privacy inherent in the fourteenth amendment concept of personal liberty encompassed a woman's decision to terminate her pregnancy. The Court specifically stated that this right to privacy is not absolute, however, but must give way to legitimate state interests when these interests become compelling. Legitimate state interests include the protection of maternal health, which becomes compelling at approximately the end of the first trimester, and the protection of potential life, which becomes compelling at fetal viability. Because advances in medical technology have increased the safety of abortion techniques, lower federal courts have differed as to the correct application of the *Roe* test to regulations affecting second trimester abortions.[2]

In the recent decisions of *City of Akron v. Akron Center for Reproductive Health, Inc.*,[3] *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*,[4] and *Simopoulos v. Virginia*,[5] the Supreme Court, while recognizing these medical advances, expressly reaffirmed the *Roe* test. This reaffirmation indicates that the *Roe* approach remains a viable constitutional test, flexible enough to accommodate legitimate state interests, personal liberties, and advancing medical technology.

Although the focus of the controversy concerned regulations requiring that all second trimester abortions be performed in a hospital,[6] the Supreme Court examined several other abortion regulations. This

1. 410 U.S. 113 (1973).
2. *Compare* Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978) (statute requiring all post-first trimester abortions to be performed in a hospital is rationally related to maternal health), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979) *with* Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980) (statute requiring post-first trimester abortions to be performed in hospitals is not rationally related to the protection of maternal health because it prohibits the safest alternative of post-first trimester abortions in a clinic).
3. 103 S. Ct. 2481 (1983).
4. 103 S. Ct. 2517 (1983).
5. 103 S. Ct. 2532 (1983).
6. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2496-97 (1983).

comment discusses the application of *Roe* to regulations requiring the informed consent of the patient, parental consent of minors seeking abortions, mandatory waiting periods, second physicians at the abortions of viable fetuses, disposal of fetal remains, and pathological reports, as well as the requirement of hospitalization for second trimester abortions. This analysis emphasizes the development of the *Roe* doctrine, the current division of the Court, and the validity and future applicability of *Roe*.

II. DEVELOPMENT OF THE *ROE* DOCTRINE

*A. Pre-*Roe v. Wade

The abortion dilemma is not a recent phenomenon.[7] Until the nineteenth century, the United States adopted the English common law rule that abortions performed before quickening[8] were not criminal offenses, and those abortions performed after quickening were only misdemeanors.[9] In the last half of the nineteenth century, states began to restrict their abortion statutes by making it a felony to commit an abortion and by increasing the penalties.[10] By the 1950's, many states had banned abortions altogether unless necessary to save the life of the woman.[11] A movement began in the 1960's to reform abortion regulations so as to bring the law in line with the actual frequency of abortions.[12]

7. *See generally* Special Project, *Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 70 (discussing history of abortion law).
8. Quickening is the first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy. BLACK'S LAW DICTIONARY 1122 (5th ed. 1979). The term was first used in this context by St. Thomas Aquinas. Special Project, *supra* note 7, at 89 (citing A. PEGIS, BASIC WRITINGS OF SAINT THOMAS AQUINAS 706 (1945)).
9. Roe v. Wade, 410 U.S. 113, 135-36 (1973); *see* Special Project, *supra* note 7, at 89 (citing 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1644)).
10. Roe v. Wade, 410 U.S. 113, 139 (1973); *see* Special Project, *supra* note 7, at 100-06 (discussing American abortion law during the period 1860-1967); *see also* Lamb v. State, 67 Md. 524, 10 A. 208 (1887) (interpreting 1868 Maryland law that proscribed the sale of any medicine for the purpose of producing an abortion, or to use or cause to be used any means whatsoever for that purpose).
11. Roe v. Wade, 410 U.S. 113, 139 (1973) (citing Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and Problems*, 1972 U. ILL. L.F. 177, 179); *see* MD. HEALTH GEN. CODE ANN. § 20-208 (Supp. 1983) (statute allowing abortions only under the following conditions: pregnancy threatens mother's life, physical, or mental health; substantial risk that child will be permanently deformed or retarded; or the pregnancy has resulted from rape); *see also* 62 OP. ATT'Y GEN. 3 (1977) (Maryland statute is unconstitutional).
12. *See* Special Project, *supra* note 7, at 106-11. Included in the movement were the drafters of the Model Penal Code, who proposed a less restrictive criminal abortion statute; numerous organizations committed to social reform, such as the American Civil Liberties Union; members of the medical profession who performed "therapeutic" abortions despite statutes prohibiting this type of abortion; and some organized religious groups. This movement favored liberalization of abortion statutes to allow abortions necessary to save the life or health of the woman, or when there was a likelihood of fetal abnormality, or when the pregnancy resulted from rape or incest. *Id.* at 109.

In 1965, this movement was bolstered by the landmark decision of *Griswold v. Connecticut*,[13] which established that the "penumbras" of the Bill of Rights included a fundamental right of privacy that encompassed certain sexual and reproductive matters.[14] In 1973,[15] Jane Roe, an unmarried pregnant woman, challenged a Texas criminal statute that prohibited abortions unless medically necessary to save the life of the mother.[16] Citing a list of cases,[17] including *Griswold*, the Court in *Roe v. Wade*[18] reaffirmed that the fundamental right of privacy is protected by the Constitution. The *Roe* Court stated that this privacy right is founded in the fourteenth amendment concept of personal liberty,[19] and "is broad enough to encompass a woman's decision to terminate her pregnancy."[20]

B. Roe v. Wade[21]

The *Roe* decision formulated the constitutional test for abortion regulations.[22] Although the Court reaffirmed the right of privacy, it cautioned that the right is not absolute and must be balanced against important state interests.[23] Regulation of the right of privacy, like that of other fundamental rights, must be justified by a compelling state interest,[24] and must be narrowly drawn to further that interest.[25]

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13. 381 U.S. 479 (1965).
14. *Id.* at 485.
15. Roe v. Wade, 410 U.S. 113, 124 (1973). Because of the social stigma associated with women seeking abortion, some suits were brought anonymously with the use of pseudonyms.
16. *Id.* at 117 n.1. The Texas statute made it a crime, punishable by two to five years imprisonment, to cause an abortion unless medically necessary to save the life of the mother. TEX. STAT. ANN. art. 1191 (Vernon 1925).
17. Roe v. Wade, 410 U.S. 113, 152-53 (1973) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception protected by right of personal privacy); Loving v. Virginia, 388 U.S. 1 (1967) (marriage is a matter of personal privacy); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships are protected by personal privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right of personal privacy extends to sexual matters); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing protected by personal privacy); Meyer v. Nebraska, 262 U.S. 390 (1923) (law prohibiting the teaching of a foreign language in school invaded liberty guaranteed by the fourteenth amendment)).
18. 410 U.S. 113 (1973).
19. *Id.* at 153. The *Roe* Court stated that the right may also be found in the ninth amendment's reservation of rights to the people. *Id.*
20. *Id.*
21. 410 U.S. 113 (1973).
22. *See* L.D. WARDLE, THE ABORTION PRIVACY DOCTRINE (1980).
23. *Roe*, 410 U.S. at 154.
24. *Id.* at 155 (citing Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right of interstate movement); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (freedom of religion)).
25. *Roe*, 410 U.S. at 155 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)). Although the *Roe* Court stated in its summary of its holding that the restriction must be tailored to meet the recognized state interest, *Roe*, 410 U.S. at 165, courts have relied on the language on page 155 and have required that the regulation be narrowly tailored to the state interest. H.L. v. Matheson, 450 U.S. 398, 413 (1981);

There are two valid state interests in abortion regulations: protecting maternal health and preserving potential life.[26] These interests are separate and distinct, and each becomes more substantial as the pregnancy progresses.[27] The interest in protecting maternal health becomes compelling at approximately the end of the first trimester of pregnancy.[28] The Court selected this point because, until that stage of the pregnancy, mortality rates for women undergoing abortions were less than the mortality rates for women carrying full-term.[29] By contrast, the interest in preserving potential life becomes compelling at the point of fetal viability.[30] Concluding that a fetus is not a person for fourteenth amendment purposes,[31] the *Roe* Court selected viability as the point when this interest becomes compelling because the fetus "presumably has the capability of meaningful life outside the mother's womb."[32]

Roe left the states free to regulate abortion provided that the regulation did not significantly burden the fundamental right of privacy without furthering a compelling state interest. During the first trimester, or before the state's interests become compelling, the decision to abort rests entirely with the pregnant woman and her physician.[33] Any regulation may be reasonable when justified by important state health objectives, such as requiring abortions to be performed by licensed physicians.[34] At approximately the end of the first trimester, when the state interest in protecting maternal health becomes compelling, the state may promote this interest by regulating the abortion decision in

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Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980); Frieman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978), *aff'd mem.*, 440 U.S. 941 (1979); Wynn v. Scott, 499 F. Supp. 1302, 1307 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

26. *Roe*, 410 U.S. at 159, 162-63.
27. *Id.* at 162-63.
28. *Id.* at 163.
29. *Id.*
30. *Id.* Viability is the point when, as determined by the physician, there is a reasonable likelihood that the fetus will survive outside the womb with or without artificial aid. Colautti v. Franklin, 439 U.S. 379, 388 (1979).
31. *Roe*, 410 U.S. at 158.
32. *Id.* at 163. The *Roe* definition of viability differs from that of *Colautti*. *See supra* note 30. The *Colautti* definition includes the possibility of life with artificial aid. Colautti v. Franklin, 439 U.S. 379, 388 (1979).
33. *Roe*, 410 U.S. at 164.
34. *Id.* at 150, 164-65; *see* Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam) (statute forbidding abortions performed by any person is constitutional as applied to non-physicians). The *Menillo* Court remarked: "The insufficiency of the state's interest in maternal health is predicated upon the first trimester abortion's being safe . . . and that predicate holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety." *Id.* at 11; *see also* State v. Ingel, 18 Md. App. 514, 519, 308 A.2d 223, 226 (1973) (statute requiring abortions to be performed by licensed physicians is constitutional); Lashley v. State, 10 Md. App. 136, 142-43, 268 A.2d 502, 506 (1970) (although it dismissed action for lack of standing, court concluded it was within police power of the state to proscribe abortions not performed by qualified physicians).

ways that are reasonably related to protecting maternal health.[35] When the fetus becomes viable, the state may promote its interest in preserving potential life by proscribing abortions except when medical judgment indicates that an abortion is necessary to preserve the life or health of the pregnant woman.[36] The *Roe* Court cautioned the states that any regulation must be tailored to further legitimate state interests,[37] and those regulations that unduly burden a fundamental right will be subjected to strict scrutiny analysis.[38]

The *Roe* test was applied in the companion case of *Doe v. Bolton*.[39] In *Doe*, the Court invalidated a statute that required all abortions to be performed in an accredited hospital because the state failed to prove that *only* hospitals further the state interest in protecting the quality of the operation and the health of the patient.[40] Therefore, the regulation was not reasonably related[41] to the protection of maternal health. The Court did not prohibit state regulation in this area; states may adopt licensing requirements for facilities that provide abortions after the end of the first trimester provided these regulations are legitimately related to a state objective.[42]

C. Planned Parenthood of Central Missouri v. Danforth[43]

The Supreme Court first examined a statute affecting second trimester abortions in *Planned Parenthood of Central Missouri v. Danforth*.[44] The *Danforth* Court invalidated a statute prohibiting the use of saline amniocentesis[45] for abortions performed after the first trimester. The United States District Court for the District of Missouri had upheld the statute as reasonably related to protecting maternal health

35. *Roe*, 410 U.S. at 164.
36. *Id.* at 164-65.
37. *Id.* at 165; *see supra* note 25 (some courts have interpreted *Roe* to require "narrowly tailored").
38. San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973); Bauza v. Morales Carrion, 578 F.2d 447 (1st Cir. 1978); Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973).
39. 410 U.S. 179 (1973).
40. *Id.* at 195. In addition, the statute violated *Roe* since it applied to all stages of pregnancy. *See also* Arnold v. Sendak, 416 F. Supp. 22, 24 (S.D. Ind.) (discussing hospital requirements of *Roe* and *Doe*), *aff'd mem.*, 429 U.S. 968 (1976).
41. *Doe*, 410 U.S. at 194. "It is a requirement that simply is not 'based on differences that are reasonably related to the purposes of the Act in which it is found.' " *Id.* (citing Morey v. Dodd, 354 U.S. 457, 465 (1957)).
42. *Doe*, 410 U.S. at 195.
43. 428 U.S. 52 (1976).
44. *Id.*
45. This method requires injecting saline into the amniotic sac of the woman to induce labor. "While it generally results in fetal death, it has been associated with harmful side effects in women and doctors have increasingly turned to the use of prostaglandin in late abortions." Kleiman, *When Abortion Becomes Birth: A Dilemma of Medical Ethics Shaken by New Advances*, N.Y. Times, Feb. 15, 1984, at B1, col. 1.

based on evidence that alternative procedures were safer for women.[46] In reversing the lower court, the Supreme Court called attention to several factors ignored by the district court. The lower court failed to recognize that most second trimester abortions used the saline amniocentesis method[47] and that alternative methods, although safer, were not readily available.[48] In addition, the statute prohibited the use of "saline or other fluid(s)," and therefore prohibited the use of the most common alternative methods.[49] The Supreme Court noted the inconsistency that would have resulted had the statute been upheld: the state prohibited the use of saline amniocentesis to protect maternal health, yet allowed the use of techniques far more hazardous to the health of the pregnant woman.[50]

The *Roe*, *Doe*, and *Danforth* decisions indicate that courts must carefully examine a regulation justified by the interest in protecting maternal health. *Danforth* demonstrates that this examination must include the availability of alternatives allowed by the regulation. *Doe*[51] and *Danforth*[52] establish that a regulation meets the *Roe* requirements for post-first trimester abortions when, after an examination of all the evidence and alternatives, the regulation protects women from procedures more dangerous than childbirth and preserves access to safe abortion procedures.[53] Fulfilling these conditions also satisfies the *Roe* requirement that the regulation reasonably relate to the protection of maternal health and be specifically tailored to further that interest.

D. City of Akron v. Akron Center for Reproductive Health, Inc.[54]

The Supreme Court expressly reaffirmed *Roe* in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[55] where the Court refined and clarified the constitutional test to be applied to regulations affecting second trimester abortions. The Court adhered to *Roe*'s determination that the beginning of the second trimester is the approximate time when the state's interest in protecting maternal health becomes compelling.[56] The *Akron* Court explained that the determinative question for judging a regulation affecting second trimester abortions is "whether there is a reasonable medical basis for the regulation."[57] The state is

46. *Danforth*, 392 F. Supp. 1362, 1374 (E.D. Mo. 1975), *rev'd*, 428 U.S. 52 (1976).
47. *Danforth*, 428 U.S. at 77.
48. *Id.*
49. *Id.* at 77-78.
50. *Id.* at 78.
51. Doe v. Bolton, 410 U.S. 179 (1973).
52. *Danforth*, 428 U.S. 52.
53. *See* Note, *Hospitalization Requirement for Second Trimester Abortions: For the Purpose of Health or Hindrance?*, 71 GEO. L.J. 991, 1000 (1983) (analyzing *Roe*, *Doe*, and *Danforth*).
54. 103 S. Ct. 2481 (1983).
55. *Id.* at 2487.
56. *Id.* at 2492 n.11.
57. *Id.*

not allowed to regulate these abortions in a manner that departs from accepted medical practice.[58] The *Roe* Court compared mortality rates for women undergoing abortions and women carrying to full-term to determine when the interest in protecting maternal health becomes compelling.[59] The *Akron* Court maintained that this comparison is relevant only when the state uses the maternal health rationale to prohibit completely abortions in certain circumstances, such as the ban on abortions by saline amniocentesis in *Danforth*.[60] The saline amniocentesis method was "safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth."[61]

Concerning second trimester abortions, the *Akron* Court noted that *Roe* did not hold that it is always reasonable to adopt a regulation that affects the entire second trimester.[62] Rather, *Roe* held that the state must tailor the regulation to meet the compelling state interest at the time that interest will be furthered.[63] As the *Akron* Court explained, "[t]he State is obligated to make a reasonable effort to limit the effect of its regulation to the period in the trimester during which its health interest will be furthered."[64]

Thus, *Akron* did not alter the *Roe* test. Approximately after the end of the first trimester, according to *Roe*, states are free to regulate in a manner reasonably related to the protection of maternal health.[65] *Akron* interpreted this to require that the regulation not depart from accepted medical practice.[66]

The development of the *Roe* doctrine indicates that the Court has consistently required the states to meet a demanding test to justify a regulation affecting post-first trimester abortions. Although *Roe* used the phrase "reasonably relate" to describe the nexus between the state interest and the regulation, decisions such as *Danforth* and *Akron* require a stronger relationship.[67]

III. APPLICATION OF THE *ROE* DOCTRINE

A. Informed Consent Provisions

One of the five regulations at issue in *Akron* required the attending physician to inform the patient of the status of her pregnancy prior to

58. *Id.* at 2493.
59. *Roe*, 410 U.S. at 163.
60. *Akron*, 103 S. Ct. at 2492 n.11 (citing *Danforth*, 428 U.S. at 78-79).
61. *Akron*, 103 S. Ct. at 2492 n.11.
62. *Id.* at 2495.
63. *Id.*
64. *Id.*
65. *Roe*, 410 U.S. at 164.
66. *Akron*, 103 S. Ct. at 2493.
67. *See* Note, *supra* note 53 (analyzing second trimester abortion regulations).

the abortion procedure.[68] *Danforth*[69] upheld the requirement that a woman give her informed consent before undergoing an abortion because the requirement does not unduly burden her right of privacy and is justified by legitimate state health objectives.[70] The regulation in *Danforth* required a woman to certify, in writing, that her consent to a first trimester abortion is "informed and freely given and is not the result of coercion."[71] The *Danforth* Court found no constitutional defect in requiring informed consent only for certain procedures, such as abortion, because this kind of statute would be upheld if applied to any surgical procedure.[72] Lower courts have held that the requirement of informed consent must not interfere with the medical judgment of the physician.[73] Many courts analyzing this issue have interpreted *Danforth* to require that all relevant medical knowledge be disclosed and all moral and philosophical statements be avoided because they may interfere with the physician-patient relationship.[74] A few courts sup-

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68. *Akron*, 103 S. Ct. at 2489 n.5. An abortion could not proceed until the attending physician informed the patient:

> . . . .
>
> (2) [The] number of weeks elapsed from the probable time of conception . . . .
>
> (3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child . . . including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.
>
> (4) That her unborn child may be viable, and thus capable of surviving outside of her womb . . . .
>
> (5) That the abortion is a major surgical procedure, which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

AKRON CODIFIED ORDINANCES § 1870.06(b)(2)-(5) (1978), *noted in Akron*, 103 S. Ct. at 2489 n.5.

69. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).
70. *Id.* at 65-67. *Contra* Women's Services P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980) (regulation requiring woman to be informed of reasonably possible medical and mental consequences is unduly burdensome and not justified by state interests).
71. *Danforth*, 428 U.S. at 65.
72. *Id.* at 67.
73. Frieman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978) (regulation invades "delicate and private" physician-patient relationship), *aff'd mem.*, 440 U.S. 941 (1979); Women's Medical Center of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1151 (D.R.I. 1982) (regulation burdens physician-patient relationship); Margaret S. v. Edwards, 488 F. Supp. 181, 209 (E.D. La. 1980) (regulation impedes physician's right and ability to practice medicine freely).
74. Women's Services P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980); Charles v. Carey, 627 F.2d 772, 784 (7th Cir. 1980); Birth Control Centers, Inc. v. Reizen, 508 F. Supp. 1366, 1377 (E.D. Mich. 1981); Leigh v. Olson, 497 F. Supp. 1340, 1345 (D.N.D. 1980); Wynn v. Scott, 449 F. Supp. 1302, 1316-17 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979); *see* Wolfe v. Schroer-

ported the proposition that the information required by statute to be related to the patient must vary with the individual and the stage of pregnancy,[75] and that the information can be adequately related to the patient by someone other than the attending physician.[76]

The *Akron* ordinance required the attending physician to delineate to the patient the development of the fetus, the date of possible viability, the physical and emotional consequences of an abortion, the risks associated with the pregnancy and the abortion technique to be used, and the availability of agencies to provide information about and assistance with birth control, childbirth, and adoption.[77] The Court stated that the validity of the informed consent regulation depended upon the state's interest in protecting maternal health,[78] and it is primarily the physician's role to determine what information the patient needs before consenting to the procedure.[79] There is a difference between requiring that the patient be informed, as recognized and supported by *Danforth*, and mandating that specific information be communicated to the patient. Therefore, although a state may constitutionally require that a woman's consent be informed, this rationale will not allow a regulation detailing specific factual information designed to influence a woman's decision.[80] The *Akron* Court found the ordinance unconstitutional because it unduly burdened the physician-patient relationship by interfering with the physician's medical judgment and discretion.[81] In addition, the ordinance impermissibly extended the state's interest in ensuring informed consent by providing information designed to persuade a woman not to abort,[82] thereby interfering with a physician's independence of judgment relied upon by a woman when making her abortion decision.[83]

The *Akron* Court also found no legitimate state interest requiring the attending physician to inform the patient.[84] Since the state's interest is in ensuring that the woman be informed before she consents to an abortion, any qualified person, regardless of identity, may counsel the woman.[85] The state may, however, legitimately require a physician to verify that adequate counseling has been given, and that the consent is informed.[86] The state may also require reasonable minimum qualifica-

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ing, 541 F.2d 523, 526 (6th Cir. 1976) (statute allowing physician to inform woman of reasonably possible physical and mental consequences is constitutional).

75. Frieman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978), *aff'd mem.*, 440 U.S. 941 (1979); Margaret S. v. Edwards, 488 F. Supp. 181, 208-09 (E.D. La. 1980).
76. Women's Medical Center of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1147-49 (D.R.I. 1982).
77. *Akron*, 103 S. Ct. at 2489 n.5; *see supra* note 68.
78. *Id.* at 2499-500.
79. *Id.* at 2500.
80. *Id.*
81. *Id.* at 2501.
82. *Id.* at 2500.
83. *Id.* at 2501 (citing Whalen v. Roe, 429 U.S. 589, 604 n.33 (1977)).
84. *Akron*, 103 S. Ct. at 2502.
85. *Id.*
86. *Id.*

tions for abortion counselors.[87]

B. Parental Consent Requirements

In addition to the informed consent provisions, the *Akron* ordinance also prohibited physicians from performing an abortion on an unmarried minor under age fifteen unless the physician obtained the consent of one of the minor's parents, or unless the minor obtained a court order that the abortion be performed.[88]

Danforth was the first Supreme Court case to analyze the issue of third party consent to an abortion. The *Danforth* Court held that the state lacked constitutional authority to give a third party absolute veto power over the decision to abort.[89] The state argued that its interest in safeguarding the family unit and parental authority justified the requirement of parental consent before the abortion could proceed.[90] The Court disagreed, holding that any parental interest is "no more weighty than the right of privacy of the competent minor,"[91] and since there was no valid state interest justifying the requirements, the consent provision was unconstitutional.[92]

Subsequently, in *Bellotti v. Baird*,[93] the Court noted that the con-

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87. *Id.* at 2502-503.

88. *Id.* at 2488 n.4. The ordinance provided:

> (B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of (15) years without first having obtained the informed written consent of the minor pregnant woman . . . , and
>
> (1) First having obtained the informed written consent of one of her parents or her legal guardian . . . , or
>
> (2) The minor pregnant woman having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

AKRON CODIFIED ORDINANCES § 1870.05(B)(1)-(2) (1978), *noted in Akron*, 103 S. Ct. at 2488 n.4. The provisions requiring 24 hour actual notice or 72 hours constructive notice to the parents of an unmarried pregnant minor under the age of 18 were upheld by the United States Court of Appeals for the Sixth Circuit, Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1206 (6th Cir. 1981), and were not challenged in the Supreme Court. *Akron*, 103 S. Ct. at 2497 n.29.

89. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976); *see also* Poe v. Gerstein, 517 F.2d 787, 794 (5th Cir. 1975) (none of the asserted justifications for parental consent requirement met the *Roe* standard); Leigh v. Olson, 497 F. Supp. 1340, 1349 (D.N.D. 1980) (requirement of parental notification regardless of minor's maturity unduly burdens minor's privacy right); Wynn v. Scott, 449 F. Supp. 1302, 1317 (N.D. Ill. 1978) (provision unconstitutional because substantially similar to parental consent requirement in *Danforth*), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 567 (1975) (requirement destroys fundamental right of competent minors; when best interests of parent and child conflict, the state cannot mandate that the parents always prevail).

90. *Danforth*, 428 U.S. at 75.

91. *Id.*

92. *Id.*

93. 443 U.S. 622 (1979) (plurality opinion) (*Bellotti II*). In Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*), the Court did not decide the constitutionality of the statute,

stitutional rights of children could not be equated with those of adults for three reasons: not all children are able to make informed, competent decisions; children are peculiarly vulnerable; and the parental role is important in child rearing.[94] Although judicial deference to parents may be permissible with respect to other choices facing a minor, the uniqueness of the abortion decision makes it inappropriate to give a third party possible veto power.[95] Consequently, if a state mandates parental consent, it must also provide an alternative statutory procedure whereby a minor can judicially establish either her competency to make the decision to abort, or that the abortion is nevertheless in her best interests.[96]

The fault with the *Akron* ordinance was that it did not expressly provide for the alternative procedure recommended by *Bellotti II*.[97] The Court noted that the City of Akron could not determine that all minors under fifteen are too immature to make this decision, or that the abortion may never be in the minor's best interests without parental approval.[98] The city argued that the state juvenile court qualified as a court having jurisdiction over the minor within the meaning of the ordinance, and that presumably the juvenile court would adhere to recognized constitutional principles.[99] Therefore, the city urged that Court to abstain from deciding this issue until it was fully resolved in the state.[100] The Court refused, noting that the Akron ordinance created no procedures for making the necessary determinations, and that the ordinance did not specifically refer to the state juvenile court.[101]

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holding instead that "abstention is appropriate when an unconstrued state statute is susceptible of a construction by the state judiciary" that might avoid the constitutional issues. *Id.* at 146-47. On remand, the Supreme Judicial Court of Massachusetts held that as a general rule, a minor may not seek judicial consent to an abortion without first obtaining the consent of both parents. The United States District Court for the District of Massachusetts held this interpretation unconstitutional, and the state appealed to the Supreme Court in *Bellotti II*.

94. *Bellotti II*, 443 U.S. at 634.

95. *Id.* at 643; *see also In re* Cindy Lou Smith, 16 Md. App. 209, 224, 295 A.2d 238, 245 (1972) (when the General Assembly enacted a state law (MD. ANN. CODE art. 43, § 135 (1957) that allowed a minor to have the same capacity as an adult to consent to treatment for pregnancy, the legislature did not intend to allow the parent(s) to have the power to compel a minor to have an abortion. A minor in these circumstances is emancipated from her parents. This statute was recodified verbatim in MD. HEALTH GEN. CODE ANN. § 20-102 (1982)).

96. *Bellotti II*, 443 U.S. at 643-44. *See generally* Green, *Parents, Judges and a Minor's Abortion Decision: Third Party Participation and the Education of a Judicial Alternative*, 17 AKRON L. REV. 87 (1983) (discussing parental consent requirements).

97. *Akron*, 103 S. Ct. at 2498-99.

98. *Id.* at 2498 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).

99. *Akron*, 103 S. Ct. at 2498.

100. *Id.*

101. *Id.* at 2498-99.

Ashcroft[102] also involved a statute that required minors to secure either parental or judicial consent for an abortion.[103] The *Ashcroft* Court upheld the statute on its face because it allowed the juvenile court, after a showing of good cause, to either grant the juvenile majority rights to consent to the abortion or to allow the abortion to proceed because of the best interests of the minor. The juvenile court could also deny the minor's petition for good cause; therefore, the court could not deny a petition for good cause unless it first found that the minor was not sufficiently mature to make her own decision. Because the statute expressly provided for a judicial decision maker and a procedure to determine competency, the Court upheld this statute as in accord with *Bellotti* and *Akron*.[104]

C. *Mandatory Waiting Period Requirements*

Another important issue involved in the abortion controversy is whether a mandatory waiting period is constitutionally permissible. The City of Akron attempted to impose a mandatory twenty-four hour waiting period before an abortion could be performed.[105] Federal courts that had previously analyzed this issue agreed that these waiting periods are unduly burdensome on the fundamental right of privacy.[106] The district court in *Akron* upheld the ordinance because it furthered the state interest in ensuring informed consent.[107] The United States Court of Appeals for the Sixth Circuit reversed, finding no medical basis for the ordinance and that the ordinance exceeded the scope of state

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102. 103 S. Ct. 2517 (1983).

103. *Id.* at 2525-26. The statute provided:

> . . . .
> (4) In the decree, the court shall for good cause:
> (a) Grant the petition for majority rights for the purpose of consenting to an abortion; or
> (b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or
> (c) Deny the petition, setting forth the grounds on which the petition is denied.

MO. ANN. STAT. § 188.028.2 (4)(a)-(c) (Vernon 1982).

104. *Ashcroft*, 103 S. Ct. at 2525-26.

105. The 24 hour period elapsed between the time of the consent and the time of the operation. *Id.* at 2489 n.6. The ordinance does not apply if the physician certifies in writing that there is an emergency need for the abortion. AKRON CODIFIED ORDINANCES § 1870.12 (1978), *noted in* City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2503 n.42 (1983).

106. *See, e.g.*, Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1015 (1st Cir. 1981); Women's Services P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980); Charles v. Carey, 627 F.2d 772, 780 (7th Cir. 1980); Women's Medical Center of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1147 (D.R.I. 1982); Wolfe v. Stumbo, 519 F. Supp. 22, 26 (W.D. Ky. 1980); Leigh v. Olson, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980). *But see* Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976) (24 hour waiting period constitutional).

107. *Akron*, 479 F. Supp. 1172, 1204-05 (N.D. Ohio 1979), *rev'd*, 651 F.2d 1198 (6th Cir. 1981), *aff'd*, 103 S. Ct. 2481 (1983).

authority.[108] The Supreme Court affirmed the Sixth Circuit's finding[109] and, moreover, found no legitimate state interest was furthered by this "arbitrary and inflexible" waiting period.[110]

D. Disposal of Fetal Remains

The *Akron* Court also examined the portion of the ordinance that required physicians to ensure the humane and sanitary disposal of fetal remains.[111] The city contended that the ordinance was designed to prevent "mindless dumping of aborted fetuses."[112] Although the Court acknowledged that the language could be interpreted to suggest a "decent burial" of the fetus,[113] it found the ordinance unconstitutional because it failed to give fair warning to a physician of the type of conduct proscribed by the ordinance.[114] In particular, the term "humane" was held unconstitutionally vague.[115]

E. Second Physician Requirements

Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft[116] involved a Missouri statute requiring the attendance of a second physician at the abortion of a viable fetus.[117] The second physician was required to use reasonable measures to preserve the life and health of a fetus provided it did not pose an increased risk to the life or health of the mother.[118] The Court previously invalidated a regulation

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108. *Akron*, 651 F.2d 1198, 1208 (6th Cir. 1981), *rev'g* 479 F. Supp. 1172 (N.D. Ohio 1979).
109. *Akron*, 103 S. Ct. at 2503, *aff'g* 651 F.2d 1198 (6th Cir. 1981).
110. *Akron*, 103 S. Ct. at 2503. The Court found no evidence that the waiting period enhanced the safety of the abortion, or that it contributed to acquiring informed consent. *Id.* at 2503-04.
111. The statute provided: "Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner." AKRON CODIFIED ORDINANCES § 1870.16 (1978), *noted in Akron*, 103 S. Ct. at 2489 n.7.
112. *Akron*, 103 S. Ct. at 2504.
113. *Id.*
114. *Id.*
115. *Id.* The Court affirmed the decision by the court of appeals to invalidate the whole regulation rather than sever the word "humane." *Id.*
116. 103 S. Ct. 2517 (1983).
117. *Id.* at 2521. The state statute provided:

> An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing [sic] the abortion who shall take control of and provide immediate medical care for a child born as result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required . . . to be in attendance shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

MO. REV. STAT. § 188.030.3 (Supp. 1982).
118. *Ashcroft*, 103 S. Ct. at 2521.

in *Doe v. Bolton*[119] that required two physicians to agree with the attending physician prior to performing an abortion.[120] The *Doe* Court could not find a "justifiable pertinence" behind the statute.[121] In addition, the Court in *Doe* found the statute unduly restrictive of the patient's rights.[122]

Subsequent lower federal court decisions have been inconsistent on this issue. For example, one federal district court held that a regulation requiring the attending physician to consult with two other physicians for post-viability abortions was unconstitutional because it was not narrowly drawn to further legitimate state interests.[123] Another federal district court, however, upheld this type of regulation because the approval of the other two physicians would help further the legitimate state interest in preserving potential life.[124] In so doing, this court interpreted *Roe* to allow more latitude in regulating post-viability abortions.[125]

The Supreme Court upheld the second physician requirement in *Ashcroft* on the basis that since abortions of viable fetuses are allowed only when the mother's life or health is in jeopardy, the first physician must necessarily concentrate on protecting maternal health. The second physician, because of his duty to use reasonable means to protect the viable fetus, is in a better position than the first physician to ensure that the state's interest in protecting potential life is furthered. As a result, the Court concluded that this statute reasonably furthered a compelling state interest in protecting potential life.[126]

The four Justices[127] who found the second physician requirement unconstitutional reasoned that the statute related to protecting potential life only when the physician used a technique that results in a live birth.[128] Although the state requires the physician performing a post-

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119. 410 U.S. 179 (1973).
120. *Id.* at 198.
121. *Id.* at 197-98.
122. *Id.*
123. Wynn v. Scott, 449 F. Supp. 1302, 1320 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).
124. Doe v. Deschamps, 461 F. Supp. 682, 688 (D. Mont. 1976).
125. *Id.*
126. *Ashcroft*, 103 S. Ct. at 2522.
127. *Id.* at 2526 (Blackmun, Brennan, Marshall & Stevens, JJ., dissenting in part) (second physician requirement unconstitutional). The *Ashcroft* majority consisted of the members of the *Akron* dissent (O'Connor, White & Rehnquist, JJ., dissenting), and the remaining Justices (Burger, C.J., & Powell, J.). Although Justices Blackmun, Brennan, Marshall, and Stevens agreed with the constitutional test applied in *Ashcroft*, they disagreed with the result. *Ashcroft*, 103 S. Ct. at 2527 (Blackmun, J., concurring in part, dissenting in part) (Justices joined that part of the majority opinion accepting *Akron*). In contrast, the *Akron* dissent upheld the regulations in *Ashcroft* not because they agreed with the test applied, but because they agreed with the result. *Id.* at 2532 (O'Connor, White & Rehnquist, JJ., dissenting).
128. *Ashcroft*, 103 S. Ct. at 2529-31 (Blackmun, J., dissenting in part).

viability abortion to use a method to preserve potential life, this requirement does not apply when that method would impose increased risks to maternal health. The dilation and evacuation (D&E) technique precludes a live birth, and may be necessary to preserve the life and health of the woman.[129] In this case, the second physician's presence would be superfluous since no viable fetus can survive a D&E procedure. These Justices stated that because of instances such as this, the statute unduly burdens the woman's rights, and is not tailored to further state interests.[130] These Justices also maintained that the statute makes no clear exception for emergency operations.[131]

F. Pathology Reports

The *Ashcroft* Court upheld a second statute that required a pathology report for tissue removed during an abortion.[132] The Court held that the small additional cost of the report was not unduly burdensome,[133] and noted that the regulation was in accordance with accepted medical practice because a similar requirement existed for most other types of surgery performed in hospitals.[134] The majority stated that it was not unreasonable to apply this statute to abortions performed in clinics as well.[135] The dissent[136] in *Ashcroft* maintained that the small additional cost was unduly burdensome[137] and that the requirement conflicts with current medical standards, which allow a cursory examination of the tissue by the naked eye of the attending physician.[138] In addition, the dissent found that the statute was not justified by any important state health interests.[139] The dissent further noted that a similar requirement was not imposed for other minor surgery performed in clinics.[140]

G. Hospitalization Requirements

A significant portion of the *Akron* opinion involved an ordinance

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129. Kleiman, *supra* note 45.
130. *Ashcroft*, 103 S. Ct. at 2530 (Blackmun, J., dissenting in part).
131. *Id.* at 2529-31.
132. *Id.* at 2519 n.2. The Missouri statute provided:

> A representative sample of tissue removed at the time of the abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.

Mo. Rev. Stat. § 188.047 (Supp. 1982).
133. *Ashcroft*, 103 S. Ct. at 2524.
134. *Id.* at 2523.
135. *Id.*
136. *Id.* at 2528 (Blackmun, Brennan, Marshall & Stevens, JJ., dissenting in part).
137. *Id.*
138. *Id.* at 2527.
139. *Id.*
140. *Id.* at 2528.

that required all abortions after the first trimester be performed in a hospital.[141] In *Roe*, the Court stated that hospitalization requirements are one type of permissible post-first trimester abortion regulation.[142] Some courts have interpreted this language to mean that these requirements are always reasonably related to maternal health.[143] *Roe*'s statement, however, was qualified by the Court's holding in *Doe*.[144] In *Doe*, the statute required that all abortions be performed in hospitals.[145] The Court invalidated this statute, noting that the state failed to prove that only hospitals meet the acknowledged state interest in ensuring the quality of the operation.[146]

Other courts applying *Roe*, *Doe*, and *Danforth* have held that when there is considerable evidence that facilities other than hospitals can perform abortions with little risk to maternal health, a statute is unconstitutional if it requires that post-first trimester abortions be performed only in hospitals.[147] The Supreme Court of New Jersey upheld, as reasonably related to maternal health, a regulation that allowed licensed outpatient clinics to perform safe abortions during the second trimester, and that required all other abortions to be performed in a

141. *Akron*, 103 S. Ct. at 2488 n.3. The Akron statute provided that "[n]o person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital." AKRON CODIFIED ORDINANCES § 1870.03 (1978), *noted in Akron*, 103 S. Ct. at 2488 n.3. In turn, the statute defines "hospital" as "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association." AKRON CODIFIED ORDINANCES § 1870.1(B) (1978), *noted in Akron*, 103 S. Ct. at 2488 n.3.

142. *Roe*, 410 U.S. at 163.

143. Hodgson v. Lawson, 542 F.2d 1350, 1354 (8th Cir. 1976); Gary-Northwest Ind. Women's Servs. v. Bowen, 496 F. Supp. 894, 902 (N.D. Ind. 1980), *aff'd sub nom.* Gary-Northwest Ind. Women's Servs. v. Orr, 451 U.S. 934 (1981); Wynn v. Scott, 449 F. Supp. 1302, 1318 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979).

144. *See Akron*, 103 S. Ct. at 2494-95.

145. *Doe*, 410 U.S. at 184.

146. *Id.* at 195. The Court held that the statute was invalid because it did not differentiate between first and post-first trimester abortions in accordance with *Roe*. *Id.*; *see* Smith v. Bentley, 493 F. Supp. 916, 928-29 (E.D. Ark. 1980) (invalidating statute similar to one in *Doe*); Emma G. v. Edwards, 434 F. Supp. 1048, 1051 (E.D. La. 1977) (invalidating statute requiring first trimester abortions be performed in a hospital); Arnold v. Sendak, 416 F. Supp. 22, 24 (S.D. Ind.) (invalidating statute requiring first trimester abortions be performed in licensed hospital), *aff'd mem.*, 429 U.S. 968 (1976). Maryland subsequently invalidated a portion of MD. ANN. CODE art. 43, § 139 (1957), which required that all abortions be performed in an accredited hospital. State v. Ingel, 18 Md. App. 514, 520, 308 A.2d 223, 226 (1973).

147. Wolfe v. Stumbo, 519 F. Supp. 22, 24-25 (W.D. Ky. 1980) (noting that the D&E abortion method is one of the safest and most available procedures that can be performed in non-hospital settings); Margaret S. v. Edwards, 488 F. Supp. 181, 195-96 (E.D. La. 1980) (noting that the safety of D&E abortions has increased since *Roe*).

hospital.[148]

Under the ordinance in *Akron*, all post-first trimester abortions must be performed in a hospital.[149] In finding this requirement unconstitutional, the Court noted that *Roe* did not hold that it is always reasonable to adopt a regulation that affects the entire second trimester.[150] Instead, the *Akron* Court interpreted *Roe* to mean that the state must narrowly tailor its statute so as to "limit the effect of its regulations to the period in the trimester during which its health interest will be furthered."[151]

The Court invalidated the ordinance for two reasons. The requirement involved an additional cost to women, depending upon the proximity of the woman to a hospital, and it limited their ability to obtain an abortion.[152] In addition, present medical knowledge indicates that the D&E procedure is a widely and successfully used method of second trimester abortions,[153] and can be performed safely in appropriate non-hospital facilities. The Court found that these factors placed a "heavy and unnecessary" burden on the woman's decision to obtain a second trimester abortion.[154] The City of Akron did not meet its burden of proving that all second trimester abortions must be performed in hospitals to protect maternal health, and the Court found this requirement unreasonable.[155] For the same reasons, the Court invalidated a similar regulation in *Ashcroft*.[156]

In *Simopoulos v. Virginia*,[157] the only issue before the Court was the validity of a state statute requiring that all second trimester abortions be performed in a licensed hospital.[158] The notable difference be-

148. Livingston v. New Jersey State Bd. of Medical Examiners, 168 N.J. Super. 259, 402 A.2d 967 (1979).

149. For the text of this ordinance, see *supra* note 141.

150. *Akron*, 103 S. Ct. at 2495.

151. *Id.*

152. *Id.* at 2496.

153. *Id.*; *see* Wolfe v. Stumbo, 519 F. Supp. 22, 24-25 (W.D. Ky. 1980) (D&E is one of the safest and most available procedures that can be performed in non-hospital facilities); Margaret S. v. Edwards, 488 F. Supp. 181, 195-96 (E.D. La. 1980) (noting that the safety of D&E abortions has increased since *Roe*).

154. *Akron*, 103 S. Ct. at 2497.

155. *Id.* The regulation was comparable to that in *Danforth* because it would preclude access to the safest and most available abortion technique. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 78 (1976); *see* Margaret S. v. Edwards, 488 F. Supp. 181, 193 (E.D. La. 1980) (Louisiana regulation restricting post-first trimester abortions to hospitals was comparable to regulation in *Danforth* prohibiting use of saline amniocentesis).

156. *Ashcroft*, 103 S. Ct. at 2520.

157. 103 S. Ct. 2532 (1983).

158. Simopoulos v. Virginia, 103 S. Ct. 2532, 2536 (1983). Performing abortions is a felony in Virginia unless: (1) performed within the first trimester; (2) performed in a licensed hospital in the second trimester; (3) performed during the third trimester under certain circumstances; or (4) is necessary to save the woman's life. *See* VA. CODE § 18.2-71 to -74.1 (1982), *noted in Simopoulos*, 103 S. Ct. at 2535 n.2.

tween this regulation and the one invalidated in *Akron* is that the Virginia statutory definition of "hospital" included outpatient hospitals such as abortion clinics.[159] Applying *Akron*, the Court stated that a state's discretion in licensing facilities would not permit it to adopt abortion regulations that depart from accepted medical practice, but it could establish minimum standards for abortion facilities.[160] Since requiring that second trimester abortions be performed in a licensed facility is a reasonable means for the state to further its compelling interest in protecting maternal health, the Court upheld the statute.[161]

IV. ANALYSIS

A. Division on the Court

A basic disagreement exists on the Court as to the appropriate constitutional test to apply to abortion regulations. Five of the Justices on the *Akron* Court were members of the 1973 *Roe* majority,[162] and again supported the proposition that the fundamental right of privacy includes the right to decide to have an abortion. Justice Stevens, who joined the Court in 1975, sided with these five Justices to form the *Akron* majority. The original *Roe* dissenters,[163] however, increased their ranks by one with the addition of the newest member of the Court, Justice O'Connor.[164] Justice O'Connor drafted the strong *Akron* dissent, which questioned the existence of a "fundamental right to terminate a pregnancy."[165]

All members of the Court agree that when a fundamental right is involved, the initial inquiry is whether the regulation unduly burdens that right. The present test, supported by a majority of the Court, requires a statute that unduly burdens the fundamental right of privacy involved in the abortion decision be analyzed with strict scrutiny. The unduly burdensome regulation can only be justified by a compelling state interest, and it must be reasonably related to the compelling interest involved. In the abortion context, the compelling state interests are the protection of maternal health, which becomes compelling at the ap-

159. *Simopoulos*, 103 S. Ct. at 2538-39. The statute provided:

> '*Hospital*' means any facility in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, short-term, long-term, outpatient and maternity hospitals.

VA. CODE. § 32.1-123.1 (1982), *noted in Simopoulos*, 103 S. Ct. at 2536 n.5.

160. *Simopoulos*, 103 S. Ct. at 2539.

161. Virginia has since lessened its regulation of abortion clinics. *See Virginia to Ease Regulations on Abortion Clinics*, Washington Post, Nov. 18, 1983, B3, col. 6.

162. Chief Justice Burger, Justices Blackmun, Brennan, Marshall, and Powell. Justices Douglas and Stewart constituted the remainder of the *Roe* majority.

163. Justices Rehnquist and White.

164. Justice O'Connor replaced Justice Stewart in 1981.

165. *Akron*, 103 S. Ct. at 2508 (O'Connor, J., dissenting).

proximate end of the first trimester, and the protection of potential life, which becomes compelling at viability. In addition, the regulation must be narrowly tailored to effect the compelling interest. The regulation is narrowly tailored when its effect is limited to the period of the pregnancy when the compelling interest is furthered. When protecting maternal health is the compelling interest, the regulation cannot depart from accepted medical standards. If the regulation does not unduly burden a fundamental right, strict scrutiny analysis does not apply, and the regulation need only rationally relate to a legitimate state interest.

The *Akron* dissent stops short of expressly indicating a desire to overrule *Roe*, but instead adopts an approach that would achieve this result.[166] The dissent is unlikely to find any regulation unduly burdensome, as evidenced by its determination that none of the regulations in *Akron*,[167] *Ashcroft*,[168] or *Simopoulos*[169] was unduly burdensome.[170] The *Akron* dissent diverges from the present test on the issue of compelling state interests. Both the majority and the dissent agree that the compelling state interests in the abortion context are the protection of maternal health and the preservation of potential life.[171] The present position of the Court is that neither of these interests is compelling before the approximate end of the first trimester, at which time the interest in protecting maternal health becomes compelling, and that the interest in preserving potential life becomes compelling at viability. By contrast, the dissent maintains that both of these interests are compelling throughout pregnancy.[172]

This divisiveness indicates that a majority of the Court is more

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166. *See Akron*, 103 S. Ct. at 2481 n.1 (majority opinion demonstrates how *Akron* dissent's approach negates *Roe*).

167. *Akron*, 103 S. Ct. 2481 (1983).

168. Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 103 S. Ct. 2517 (1983).

169. Simopoulos v. Virginia, 103 S. Ct. 2532 (1983).

170. For example, the *Akron* majority found informed consent provisions unduly burdensome because they interfere with the woman's right to decide to have an abortion. *See supra* notes 68-87 and accompanying text. The dissent would hold this regulation not unduly burdensome. *Akron*, 103 S. Ct. at 2515 (O'Connor, J., dissenting). Although the *Akron* majority also found the second physician requirement in *Ashcroft* unduly burdensome, they split as to whether the regulation was reasonably related to a compelling state interest. *Compare Ashcroft*, 103 S. Ct. at 2522 (regulation reasonably related to compelling state interest) *with id.* at 2530 (Blackmun, J., dissenting) (regulation not tailored to compelling interest). The members of the *Akron* dissent did not find this requirement unduly burdensome. *Id.* at 2532 (O'Connor, J., concurring in part, dissenting in part).

The dissenting Justices in *Akron* joined with two members of the *Akron* majority to hold that the pathology requirement in *Ashcroft* was not unduly burdensome. *Id.* at 2532. The *Akron* majority concluded that the second trimester hospitalization requirement was a "significant obstacle in the path of a woman seeking an abortion." *Akron*, 103 S. Ct. at 2495. The dissent maintained that the regulation was not unduly burdensome. *Id.* at 2512. (O'Connor, J., dissenting).

171. *Akron*, 103 S. Ct. at 2508 (O'Connor, J., dissenting).

172. *Id.*

concerned with individual rights while the dissent is more supportive of state rights. The majority, which would apply a strict scrutiny analysis more often than the dissent, requires the state to show a compelling interest, that the regulation reasonably relates to that interest and does not depart from accepted medical practice, and that the effect of its regulation is limited to the period of the pregnancy when its interest is furthered. The majority requires the state to make this showing before it restricts individual freedoms. In those instances where the dissent would apply a strict scrutiny analysis, the state need only show that the regulation is reasonably related to compelling state interests that are present throughout pregnancy. The dissent practically eliminates the requirement that the regulation be limited in its effect because under the dissent's test, the state may regulate abortions throughout the entire pregnancy.

B. Viability of the Roe *Framework*

A majority of the Court is committed to the soundness of the *Roe* analytical framework and to the principles underlying the *Roe* opinion. The three recent decisions of *Akron*,[173] *Ashcroft*,[174] and *Simopoulos*[175] indicate that this framework is sufficiently flexible to accommodate changes in medical technology that result in the increased safety of abortion techniques.

Presently, after the approximate end of the first trimester, the state may regulate only to further its compelling interest in protecting maternal health, and the regulation must be narrowly tailored to further this interest. Accordingly, the state's abortion regulations may not depart from accepted medical practice. The recent decisions emphasize that the regulation must be specifically tailored because *Roe* did not hold that it is always reasonable for a state to adopt a regulation that applies to the entire second trimester. Instead, as *Akron* demonstrates, the state has to prove that its regulation reasonably relates to protecting maternal health throughout the entire second trimester.[176] If a regulation departs from accepted medical practice for part of the second trimester, it is not constitutional merely because it is reasonable for the remainder of the second trimester. As a consequence, the state must limit the effect of the regulation to the period of the trimester when the maternal health interest will be furthered by the regulation. This is consistent with the *Roe* requirement that the regulation be narrowly tailored to further the compelling state interest. The hospitalization re-

173. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983).

174. Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 103 S. Ct. 2517 (1983).

175. Simopoulos v. Virginia, 103 S. Ct. 2532 (1983).

176. *See supra* notes 54-69 and accompanying text.

quirements in *Akron*[177] and *Ashcroft*[178] failed to meet this test, while the statute in *Simopoulos*[179] reasonably furthered a compelling state interest throughout the second trimester.

The dissent in *Akron* claimed that the majority's approach "blurs the bright lines" of the *Roe* framework,[180] and therefore the state cannot consider the second trimester as one unit and regulate second trimester abortions on the basis of the risks posed by all procedures.[181] This contention is misplaced because the majority did not alter any of the points at which the state interests become compelling. Instead, the *Akron* majority indicated that depending upon the abortion methods used and present medical knowledge, risks to maternal health will vary, and the state's regulation must be narrowly and specifically drawn to meet this interest. The state may consider the second trimester as a unit, but its regulation must further maternal health by addressing these various risks throughout the second trimester.

The dissent also contended that the majority abandoned *Roe*'s comparison of mortality rates for women who undergo abortion and those who proceed to childbirth as a test for whether a regulation is reasonably related to protecting maternal health.[182] The *Roe* Court only used this comparison to fix a point in time when the state's interest in protecting maternal health becomes compelling because the state's interest in maternal health cannot become compelling until abortion procedures pose a risk to maternal health.[183] Accordingly, had the *Akron* majority relied on this comparison it would have indicated a willingness to move the compelling point and thus "blur the bright lines" of *Roe*, which the Court expressly did not do.[184]

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177. *Akron*, 103 S. Ct. 2481 (1983) (invalidating an ordinance requiring all post-first trimester abortions to be performed in a hospital as not narrowly tailored to further compelling governmental interest in protecting maternal health).

178. *Ashcroft*, 103 S. Ct. 2517 (1983) (invalidating a hospitalization requirement substantially equivalent to the one invalidated in *Akron*, 103 S. Ct. 2481 (1983)).

179. *Simopoulos*, 103 S. Ct. 2532 (1983) (upholding a statute requiring all post-first trimester abortions to be performed in hospitals when the statutory definition of hospital included out-patient clinics, and therefore the regulation was reasonably related to protecting maternal health).

180. *Akron*, 103 S. Ct. at 2506 (O'Connor, J., dissenting).

181. *Id.*

182. *Id.* at 2505 n.2.

183. *Roe*, 410 U.S. at 163.

184. *Akron*, 103 S. Ct. at 2494; *see* Margaret S. v. Edwards, 418 F. Supp. 181, 195-96 (E.D La. 1980) (court moved the point when the interest in protecting maternal health becomes compelling); *see also* Gary-Northwest Ind. Women's Servs. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), which stated:

> If the constitutionality of the regulation depended on whether, as a matter of fact, an abortion was more dangerous than childbirth, then it must be remembered that each individual pregnancy raises its own set of facts. The safety of a given abortion, the safety of a given childbirth, and the relative safety of an abortion *vis a vis* [sic] childbirth in a given pregnancy, all depend on a multitude of medical factors which vary with each and every pregnancy. Such a rule would have the potential of mak-

The *Akron* dissent argued that the Court has become an ex officio medical board with the power to approve or disapprove medical procedures.[185] This contention lacks merit since the Court has merely attempted to ensure that the state does not infringe upon constitutional rights by restricting access to those medical procedures.

C. *Future Applicability of* Roe

The *Akron* dissent maintained that the majority blurred *Roe*'s bright lines by advancing the point when the state's interest in protecting maternal health becomes compelling.[186] Referring to inevitable advances in medical technology, the dissent asserted that abortions will increasingly pose less threat to maternal health, while at the same time the point of viability will move closer to conception.[187] Therefore, "the *Roe* framework is on a collision course with itself."[188] The *Akron* majority did not, however, move any of the compelling points,[189] and the *Roe* test was carefully formulated to avoid this result.

Roe allows abortions of viable fetuses when, in appropriate medical judgment, it is necessary to preserve the life or health of the woman.[190] The Court has never analyzed the issue of whether the physician's duty to the woman outweighs his duty to a viable fetus, i.e., whether a physician is allowed to make a trade-off between protecting maternal health and preserving potential life. The Court has held that should these circumstances arise, the state must meet a strict requirement of precision in its regulation before it may hold the physician criminally liable.[191] Therefore, any decision resolving this conflict will most likely be left to the physician because the determination of viabil-

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ing the constitutionality of each specific application of a regulation depend to a large degree on the factors present in that specific case. If the Supreme Court had intended that complicated medical judgment be decisive on whether specific regulations were reasonably related to maternal health, then the Supreme Court would surely have instead adopted the more rational rule that the abortion's effectuation must be left to the medical judgment of the pregnant woman's attending physician.

Id. at 900, *aff'd sub nom.* Gary-Northwest Ind. Women's Servs. v. Orr, 451 U.S. 934 (1981).

185. *Akron*, 103 S. Ct. at 2506-07 (O'Connor, J., dissenting); *see* Livingston v. New Jersey Bd. of Medical Examiners, 168 N.J. Super. 259, 402 A.2d 967 (1979) (board accepted evidence of present medical knowledge concerning the safety of performing D&E abortions in non-hospital facilities before drafting a regulation requiring that these abortions be performed before the midpoint of the second trimester in either a hospital or a clinic, and those performed after the midpoint in a hospital).

186. *Akron*, 103 S. Ct. at 2506 (O'Connor, J., dissenting).

187. *Id.* at 2507.

188. *Id.*

189. *See supra* notes 182-84 and accompanying text.

190. *Roe*, 410 U.S. at 164-65.

191. Colautti v. Franklin, 439 U.S. 379, 400-01 (1979).

ity and what is necessary to protect the life and health of the woman are medical judgments.

One possible resolution of this issue was examined in *Ashcroft*.[192] The Court held that Missouri could constitutionally require the presence of a second physician at the abortion of a viable fetus to ensure that the interests in maternal health and potential life were accommodated.[193] The state imposed a duty upon the physician to perform an abortion of a viable fetus with the technique most likely to preserve fetal life, unless that procedure increased the risks to maternal life or health. Therefore, should the dissent's predictions materialize, the *Roe* framework should not collapse since it has the inherent protection that the state may proscribe abortions of viable fetuses except when necessary to preserve the life or health of the woman. If the life of the woman is threatened, and the abortion of a viable fetus is necessary, the Missouri statute represents a workable solution to this ethical and moral problem.[194]

V. CONCLUSION

The *Akron* decision represents a strong reaffirmation of *Roe v. Wade*.[195] Not only are a majority of Justices committed to the existence of a fundamental right of privacy sufficiently broad to encompass the right to decide to terminate a pregnancy, they also agree that the *Roe* trimester approach remains a valid constitutional test in light of advances in medical technology that have resulted in the increased safety of abortion techniques. Over the past ten years, beginning with *Roe*, and most recently in *Akron*,[196] *Ashcroft*,[197] and *Simopoulos*,[198] the

192. 103 S. Ct. 2481 (1983).
193. *Ashcroft*, 103 S. Ct. at 2522; *see supra* notes 116-26 and accompanying text.
194. There are other threats to the continuing viability of *Roe*. The five oldest Justices joined in the *Roe* majority. Although abortion proponents have one of the youngest Justices on their side (Justice Stevens), abortion opponents have increased their Supreme Court support with the most recent appointee, Justice O'Connor. Some observers speculate that between two and four Court vacancies will occur by 1988. Therefore, the presidential candidate elected in 1984 may have the opportunity to appoint several Justices, thereby affecting the viability of *Roe*. *Election Also Could Determine Future Course of Supreme Court*, Washington Post, July 15, 1984, at A3, col. 1; N.Y. Times, Mar. 13, 1983, at E21, col. 6; Washington Post, Oct. 5, 1983, at A16 col. 1. In addition, Congress has acted to negate the *Roe* doctrine. Abortion opponents have supported a bill that would provide that life begins at conception, and from that moment has "legal value." S. 26, 98th Cong., 1st Sess. (1983). Congress has also proposed a constitutional amendment that would declare that the right of life is the most fundamental of all rights, and that this right vests in the "human being" from the moment of conception. S.J. Res. 8, 98th Cong., 1st Sess. (1983). Although both of these measures have failed, they have consistently been reintroduced in an effort to eliminate the controlling effect of the *Roe* decision. 129 CONG. REC. 4,225-36, 509-14 (1983).
195. 410 U.S. 113 (1973).
196. 103 S. Ct. 2481 (1983).
197. 103 S. Ct. 2517 (1983).
198. 103 S. Ct. 2532 (1983).

Supreme Court has warned the states that if they decide to regulate the sensitive area of abortion, they must be prepared to meet an exacting test.

City of Akron v. Akron Center for Reproductive Health, Inc., adhered to the *Roe* test and did not result in any changes in abortion law. Contrary to the dissent's protestations, the Court did not depart from its trimester approach announced in *Roe*. Instead, the Court clarified its constitutional requirements for regulations concerning second trimester abortions in light of advances in medical technology resulting in the increased safety of abortion techniques. The state, when regulating second trimester abortions, must consider the availability and safety of the technique, and must allow access to safe abortion methods. The state's compelling interest is furthered only when the regulation prohibits unsafe abortions during the part of the pregnancy when they are unsafe.

These recent decisions indicate that the *Roe* framework is sufficiently flexible to accommodate advancing medical technology that results in safer abortion techniques. This attribute, combined with the strict standard that states must meet to justify an abortion regulation, indicates that the *Roe* decision should withstand the test of time.

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