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Constitutional Law - Abortion - Statutory Interpretation - Void for Vagueness

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CONSTITUTIONAL LAW—ABORTION—STATUTORY INTERPRETATION—VOID FOR VAGUENESS—The United States Supreme Court has held that statutory provisions requiring a physician to exercise a high degree of care to preserve the life of a fetus which "may be viable" are unconstitutionally vague.

Colautti v. Franklin, 439 U.S. 379 (1979).

On September 20, 1974, John Franklin, M.D.,[1] and the Planned Parenthood Association[2] filed a complaint in federal district court against the District Attorney of Philadelphia[3] and the Secretary of Welfare of the Commonwealth of Pennsylvania.[4] In the complaint, plaintiffs challenged the constitutionality[5] of the Pennsylvania Abortion Control Act (the Act),[6] and sought a declaration[7] that the statute was

1. Dr. Franklin is a Board-certified obstetrician-gynecologist practicing in Pennsylvania. As a director of Planned Parenthood, he supervised the operation of a clinic, including such family planning services as birth control, pregnancy testing, counseling and referral. While serving as a medical director of Philadelphia Family Planning, Inc., Dr. Franklin performed approximately 10 to 12 abortions per week during 1971 and 1972. In 1974, he performed 21 abortions prior to November 20th. Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 560 (E.D. Pa. 1975).

2. Planned Parenthood Association of Southeastern Pennsylvania, Inc., is a voluntary, non-profit health and social service agency incorporated by the state of Pennsylvania. Presently, Planned Parenthood performs no abortions at its facilities, but plans to build and operate an abortion clinic in the future. *Id.* at 559-60.

3. F. Emmett Fitzpatrick, Jr., District Attorney of Philadelphia County, was sued in his official capacity since he was responsible for enforcement of the Abortion Control Act in Philadelphia. *Id.* at 560.

4. When the action was commenced, Helene Wohlgemuth was Secretary of Welfare of Pennsylvania. During the course of the litigation, she was replaced by Frank S. Beal who was subsequently replaced by Aldo Colautti, one of the designated appellants. Colautti v. Franklin 439 U.S. 379, 383 n.3 (1979); Brief for Appellants at 4 n.2.

5. 439 U.S. at 383. The plaintiffs alleged that enforcement of the Act would abridge their constitutionally protected rights to practice medicine consistent with professional standards; intrude into the physician-patient relationship in the decision making and treatment of pregnancy; and interfere with the rights of their patients to terminate their pregnancies under the conditions set forth in the Supreme Court decisions of Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). *Id.*

6. PA. STAT. ANN. tit. 35, §§ 6601-6608 (Purdon 1977 & Supp. 1979). The Act was passed over the veto of Governor Milton Shapp on September 10, 1974, to be effective in thirty days. *Id.* § 6601; 439 U.S. at 381. It should be noted that the complaint was filed prior to the effective date. 439 U.S. at 383.

7. The relief was sought pursuant to 42 U.S.C. § 1983 (1976) which authorizes civil actions at law, in equity, or other proper proceedings to redress deprivation under color of state law of any rights, privileges, or immunities secured by the Constitution. Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. at 559.

invalid in its entirety.[8] A three judge panel,[9] after hearing oral argument on the plaintiffs' application for a preliminary injunction, enjoined enforcement of numerous provisions of the Act.[10] The court also granted the plaintiffs' motion to certify the case as a class action.[11] After a full hearing on the merits, the court declared that various sections of the Act, as well as the related criminal sanctions[12] were unconstitutional.[13] Section 5(a),[14] which required physicians to exercise a

8. Despite the existence of a severability clause in § 9 of the Act, the plaintiffs claimed that the entire statute should be invalidated because the legislature's intent to unconstitutionally limit, deter, and regulate abortion was evident in the title and throughout the language and provisions of the Act. *Id.* at 564.

9. The three judge panel was convened in accordance with 28 U.S.C. § 2281 (1970). Although repealed by the Act of Aug. 12, 1976, Pub. L. 94-381, § 1, 90 Stat. 1119, the repeal did not apply to the instant action. 439 U.S. at 381, n.2.

10. 401 F. Supp. at 559. The Commonwealth was temporarily enjoined from enforcing § 2 (definition of "viable" and "informed consent"); § 3(b)(i) (spousal consent requirement); § 3(b)(ii) (parental consent requirement for minors); § 3(e) (criminal sanctions for violation of consent provisions); § 5(a) (standard of care required of physicians determining viability); § 5(d) (criminal penalties for violation of § 5(a)); § 6(b) (prohibition of post-viability abortions unless necessary to preserve maternal life or health); § 6(c) (licensing requirements); § 6(d) (record-keeping requirements); § 6(i) (criminal penalties for violation of § 6(a)-(e), (g)-(h)); and § 7 (prohibiting state subsidy of abortion). *Id.*

11. 401 F. Supp. at 559. The class was composed of all physicians who either performed abortions, or who might be called upon to counsel patients contemplating abortions. The district court then granted leave for the Obstetrical Society of Philadelphia to intervene as a party plaintiff and for the Attorney General of Pennsylvania and the Commonwealth of Pennsylvania to intervene as parties defendant. *Id.* Robert P. Kane, then Attorney General of Pennsylvania, was sued in his official capacity as legal advisor to the Governor and as chief law enforcement officer of the Commonwealth. *Id.* at 561. At a later date the court granted the defendant's motion to dismiss the case as to the referral agencies, based on Article III of the United States Constitution which limits federal court jurisdiction to "cases and controversies." The court stated that no justiciable controversy was presented by the referral agencies since there was no evidence that they might be prosecuted as counsel-conspirators or accessories under the Act. *Id.* at 562.

12. *Id.* at 583. The court enjoined the enforcement of §§ 2, 3(b)(ii), 6(b), 6(d) (in part), 6(f), and 7. *See* note 10 *supra.*

13. 401 F. Supp. at 561.

14. This section provides:

> Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable . . . or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1977).

high degree of care to preserve the life of a fetus which "may be viable," was among those sections declared to be unconstitutional. In light of *Roe v. Wade*,[15] the district court interpreted the language of section 5(a) as carving out a third new time period concerning fetal life which extended into the second trimester during which the state was attempting to regulate abortions.[16] Although *Roe* had indicated that second trimester abortions may be regulated in the interest of maternal health,[17] no such claim was applicable to this case. Thus, the district court found that the regulations were an attempt to protect fetal life during the "may be viable" period, and as such were unlawful.[18] Both parties appealed to the United States Supreme Court[19] which vacated that portion of the judgment which was the subject of the defendants' appeal[20] and remanded the case for consideration in light of recent Court decisions.[21] On remand, the parties resolved all issues by stipulation except the constitutionality of section 5(a) and section 7 of the Act.[22] The district court adhered to its original decision that section

15. 410 U.S. 113 (1973). *Roe* established that women have a fundamental right to have an abortion provided that the fetus is not viable. This right is based upon the right to privacy embodied in the various constitutional amendments. *Id.* at 152-53. In *Roe*, the Supreme Court recognized only two periods concerning fetuses: the period prior to viability when the state may not regulate abortion in the interest of fetal life, and the period after viability when the state may regulate or prohibit abortions as it sees fit. *Id.* at 163.

16. Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. at 552. *See also* note 15 *supra*.

17. Roe v. Wade, 410 U.S. at 163.

18. 401 F. Supp. at 572.

19. The Supreme Court had jurisdiction over the appeals pursuant to 28 U.S.C. § 1253 (1976) which provides for direct appeals from decisions of three-judge courts. 439 U.S. at 381.

20. Beal v. Franklin, 428 U.S. 901 (1976).

21. *Id.* The Court remanded the defendant's appeal to the district court for further consideration in light of Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (upheld state statute defining viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems"); Singleton v. Wulff, 428 U.S. 106 (1976) (physicians have standing to maintain a federal action challenging their licensing state's denial of Medicaid funds for abortions which are not medically indicated provided they show sufficient interest in the outcome of the challenge); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (recipients of advertisements for prescription drugs enjoy first amendment protection of that information). Based on these decisions, the Court disposed of plaintiffs' appeal by summarily affirming the lower court's judgment. Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

22. 439 U.S. at 385-86. Section 7 of the Act prohibited the use of public funds for an abortion that was not certified by a physician to be medically necessary to preserve the life or health of the mother. It was not challenged by plaintiffs on final appeal. *Id.* at 383, 386.

5(a) was unconstitutional, in part because the definition of "viable" incorporated into section 5(a) was void for vagueness, and in part because the phrase "may be viable" was overbroad in its potential scope.[23] The defendants again appealed to the United States Supreme Court[24] which affirmed the judgment of the district court.

Justice Blackmun, writing for the majority,[25] held that the portion of section 5(a) of the Act which required a physician to observe a prescribed standard of care if that physician determined "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable"[26] contained two ambiguities which made that portion of the statute unconstitutionally vague.[27] First, the Court noted the inability to determine whether the statute fixed a totally subjective standard for physicians, or whether the standard was both objective and subjective.[28] Justice Blackmun read the statute as creating two conditions which could trigger the duty of care. He stated that the first condition, which required a physician to determine if the fetus "is viable," imposed a subjective standard based upon the individual physician's "experience, judgment, or professional competence."[29] However, the second condition, which required the physician to determine "if there is sufficient reason to believe that the fetus may be viable," created an ambiguous standard. Justice Blackmun reasoned that it was unclear under the standard whether "sufficient reason" would be judged in light of the physician's own experience and capabilities, or whether "sufficient reason" would be judged by the standards of the whole medical community, or by experts in the field.[30]

Appellants urged that no distinction was intended between the phrase "is viable" and the phrase "may be viable," and that the latter

23. *Id.* at 386.

24. 28 U.S.C. § 1253 (1976) confers jurisdiction upon the Supreme Court to review by direct appeal an order of a statutorily mandated three-judge court restraining state officials from enforcing a state statute.

25. 439 U.S. 379. Justices Brennan, Stewart, Marshall, Powell and Stevens joined the majority opinion. *Id.* at 380.

26. See note 14 *supra* for text of § 5(a).

27. 439 U.S. at 390. Because the Court found the statute void for vagueness, it was unnecessary to consider the argument that the challenged section restricted abortions prior to the point of viability and was, therefore, overbroad. *See also* Brief for Appellants at 11.

28. 439 U.S. at 391.

29. *Id.*

30. *Id.* at 391-92. The Court stated that this ambiguity could be a serious hazard for the typical private practitioner without access to the skills and facilities available to other physicians at large medical centers and teaching hospitals. *Id.*

phrase was merely an explanation of the former phrase.[31] The majority rejected this contention and noted that because the phrases were not synonymous a second ambiguity existed in that "may be viable" might refer to viability as physicians understood it, and "viable" might refer to some later undetermined stage in the pregnancy.[32] Further, Justice Blackmun reasoned that if the phrases were intended to be synonymous, the inclusion of both was redundant and contrary to elementary canons of statutory construction.[33] Since "may be viable" was used in no other section of the statute to define "viable," the Court concluded that the definition of "viable" in section 2 of the Act[34] was the exclusive definition[35] to be used throughout the Act. Therefore, the incorporation of the phrase "may be viable" into section 5(a) referred to a separate stage of pregnancy.[36] Justice Blackmun held that this reference to an indeterminable phase of the pregnancy differed from the definition of viability put forth by the Court in *Roe v. Wade*.[37] The *Colautti* Court also utilized the *Roe* Court's conclusion that the state has a compelling interest in the protection of fetal life only if the fetus is viable.[38] Thus, it was unnecessary to determine *what* stages were referred to by the phrases "viable" and may be viable," or whether one of them actually extended into the "gray"

31. *Id.* The appellants argued that "may be viable" described the statistical probability of viability rather than actual viability. Therefore, the statutory phrase "may be viable" incorporated the medical knowledge that a fetus is viable if it has the statistical chance of survival recognized by the medical profession. The appellants relied upon the Supreme Court's decision in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See* Brief for Appellants at 28. In *Planned Parenthood*, the Supreme Court defined viability as "the stage of fetal development when the life of the unborn child *may be* continued indefinitely outside the womb by natural or artificial life-supportive systems." 428 U.S. at 52 (emphasis added).

32. 439 U.S. at 393.

33. *Id.* One of the elementary canons of statutory construction is that all parts of a statute should be given meaning if possible. It is the Court's duty "to give effect, if possible, to every clause and word in a statute," rather than to emasculate an entire section. United States v. Menasche, 348 U.S. 528, 538-39 (1955); *accord*, Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

34. PA. STAT. ANN. tit. 35, § 6602 (Purdon 1977), defined viability as "the capability of a fetus to live outside the mother's womb albeit with artificial aid."

35. 439 U.S. at 392. The Court noted that the statute says viable "means," not "includes," the capability for fetal survival outside the womb. *Id.* at 392-93 n.10. A definition which declares what a term "means" generally excludes any meaning not stated. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION, § 47.07 (Supp. 1978).

36. 439 U.S. at 392-93.

37. *Id.* at 393. The definition approved in *Roe* is that a fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid." Roe v. Wade, 410 U.S. at 160.

38. See note 15 *supra* for a brief discussion of *Roe v. Wade*.

penumbral area prior to the time of viability.[39] The mere presence of such ambiguous criteria was sufficient reason to void the section for vagueness.[40]

According to the majority, the physician's dilemma was compounded by potential criminal penalties under the Act which could be imposed even if the physician lacked scienter in failing to preserve the life of a fetus which "may be viable."[41] Although the Pennsylvania law of criminal homicide[42] conditions guilt upon a showing of scienter, no equivalent showing of scienter was required when a physician failed to find "sufficient reason to believe that the fetus may be viable." Justice Blackmun stated that the difficulties inherent to a viability determination,[43] when coupled with strict liability for an erroneous determination, would "chill" the willingness of physicians to perform abortions at a point of near viability.[44]

The Court then examined the "standard of care" provision of section 5(a),[45] which required the physician to choose the abortion technique with the best chance of saving the fetus, provided a different technique was not necessary to preserve the life or health of the mother.[46] Blackmun could not determine if the statute permitted the physician to view the duty to the patient as being the same as the duty to the

39. 439 U.S. at 388-89, 391, 393.

40. *Id.* at 390.

41. *Id.* at 394.

42. *See* PA. STAT. ANN. tit. 18, §§ 2501-2504 (Purdon 1973 & Supp. 1979).

43. 439 U.S. at 395-96. See Brief for Appellants at 6-8 and Brief for Appellees at 5-6 for a summary of the testimony given by various medical experts on the determination of viability. Estimates of the gestation age at which viability occurs ranged from a possible 21 weeks gestation age that a neonatologist might consider viable to a 50% to 60% chance of survival at 28 weeks gestation age. Witnesses on both sides acknowledged a three to four week margin of error in computing gestation age.

44. 439 U.S. at 396. The Court refrained from deciding whether scienter was required before criminal penalties could be imposed under a statute clearly drafted. *Id.*

45. See note 14 *supra* for the text of § 5(a).

46. 439 U.S. at 397-98. Testimony indicated that although physicians for both sides preferred saline-amnioinfusion (the removal of some amniotic fluid which is replaced within the amniotic sac by a saline solution) for second trimester abortions because that method nearly always results in fetal death, they also assumed that use of saline—amnioinfusion would be prohibited by § 5(a) for post-viability abortions. Opinions on methods that satisfied § 5(a) varied widely. Preferences ranged from no abortion, to prostaglandin infusion (the injection of prostaglandins into the uterus to stimulate uterine contractions and induce labor, resulting in expulsion of the fetus via the cervix in approximately 30 hours), to hysterotomy (a caesarian section-type operation), to oxytosin induction (intravenous injection resulting in a shorter injection-abortion interval than the 17 to 35 hours in saline-amnioinfusions). All methods produce some side effects in women. See Brief for Appellants at 10-12, 20-25 and Brief for Appellees at 6-8 for a more detailed discussion of the preferred abortion methods.

fetus, or whether it forced the physician to jeopardize the woman's health for an increased chance of fetal survival. Moreover, since criminal liability could be imposed for the choice of abortive technique regardless of the lack of scienter, Justice Blackmun concluded that the "standard of care" provision was also unconstitutionally vague.[47]

The dissenters,[48] speaking through Justice White, viewed the majority's decision as withdrawing from the states the substantial power to protect fetal life reserved to them by *Roe v. Wade*[49] and reaffirmed in *Planned Parenthood v. Danforth.*[50] Justice White compared the "may be viable" language in the Pennsylvania law to the definition of viability in *Roe v. Wade*, where the Court approved the prohibition of abortions when a fetus was "potentially able to live outside the mother's womb."[51] He stated that the Pennsylvania law did not go as far as was permissible in forbidding abortions since, under the *Roe* standard, a state can proscribe abortions when the fetus is "potentially able" to survive outside the mother's womb. Instead, Pennsylvania proscribed abortions only when the fetus was actually capable of survival, and merely regulated abortions when the fetus "may be viable."[52]

Justice White observed that the district court held that section 5(a) was invalid because that section carved out a period of *potential* viability during which the state could not regulate abortions in the interest of protecting fetal life. He contended that the Supreme Court had rejected the same argument in *Danforth.* There, a statute which defined viability as "that stage of fetal development when the life of the unborn child *may be continued indefinitely* outside the womb," was upheld as consistent with the definition in *Roe* that a fetus is viable if "potentially able to live outside the mother's womb."[53] Thus, Justice White viewed the majority's affirmance of the district court's misinterpretation of *Danforth* as an abandonment of the flexible definition of viability developed in *Roe* and *Danforth.*[54]

Justice White also criticized the majority's interpretation of section 5(a) that criminal penalties could be imposed upon physicians who violated that section without proof of scienter.[55] He stated that reading

47. 439 U.S. 400-01.

48. *Id.* at 401-09 (White, J., dissenting). Chief Justice Burger and Justice Rehnquist joined the dissenting opinion.

49. 410 U.S. 113 (1973). *See* note 15 *supra.*

50. 428 U.S. 52 (1976). *See* note 31 *supra* and text accompanying note 53 *infra.*

51. Roe v. Wade, 410 U.S. at 160, 163.

52. 439 U.S. at 402-03 (White, J., dissenting).

53. Planned Parenthood v. Danforth, 428 U.S. at 63.

54. 439 U.S. at 404-06 (White, J., dissenting).

55. *Id.* at 407-09 (White, J., dissenting).

section 5(a) in conjunction with the Pennsylvania criminal homicide laws[56] makes scienter as well as the defenses of ignorance and mistake of fact applicable to prosecutions under the Abortion Control Act.[57]

Finally, the dissenters disagreed that the "standard of care" provision in section 5(a) was impermissibly vague for lack of a mens rea requirement. Because the complaint did not attack section 5(a) on that ground, and because the district court neither considered nor invalidated the section on that basis, Justice White questioned the appellants' right to have the "standard of care" provision invalidated by the Supreme Court, thus expanding the relief obtained in the district court.[58]

Three cases challenging the validity of abortion statutes are of particular relevance in assessing *Colautti*. The most significant is *Roe v. Wade*,[59] in which the Court found that the right of privacy[60] included the fundamental right of a woman to terminate her pregnancy.[61] That right was not absolute, but subject to limitation if justified by a "compelling state interest."[62] *Roe* articulated two permissible state interests. First, a state has a compelling interest in preserving and protecting the health of a pregnant woman. This interest may be furthered by abortion regulations related to maternal health for the period following the end of the first trimester of the pregnancy. Second, and most important in regard to *Colautti*, a state has a compelling interest in the "potentiality of human life." This interest becomes compelling only at viability,[63] since not until then is the fetus capable of life outside the mother's womb.[64] The *Roe* decision adopted a flexible

56. *See* notes 43 & 44 and accompanying text *supra*.

57. 439 U.S. at 407-09 (White, J., dissenting). PA. STAT. ANN. tit. 18, § 304 (Purdon 1973) provides that ignorance as to a matter of fact negates the specific intent necessary for criminal homicide.

58. 439 U.S. at 408-09 (White, J., dissenting).

59. 410 U.S. 113 (1973). *See* note 15 *supra*.

60. The United States Constitution does not specifically mention a right of privacy, but the Court has recognized that such a right exists. The sources of the right are found in the first amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the fourth and fifth amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); in the penumbra of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); in the ninth amendment, *id.* at 486-87 (Goldberg, J., concurring); and in the concept of liberty guaranteed by the fourteenth amendment, Myer v. Nebraska, 262 U.S. 390, 399 (1923).

61. Roe v. Wade, 410 U.S. at 153. A woman's right to privacy is embodied in fourteenth amendment concepts of liberty. *Id. See also* note 60 *supra*.

62. Roe v. Wade, 410 U.S. at 154.

63. *Id.* at 160. The Court defined "viable" as potentially able to survive outside the mother's womb, albeit with artificial aid. *Id.*

64. *Id.*

viability standard in order to accommodate professional medical judgment and advances in medical skill.[65] According to *Roe*, once the fetus is viable, a state may further its interest in protecting fetal life through the regulation or proscription of abortions except when an abortion is necessary to preserve the life or health of the mother.[66] The Pennsylvania Abortion Control Act may have overstepped the *Roe* guidelines, which delineated only two stages in a pregnancy—the previability period and the post-viability period—by creating a third stage during which a fetus "may be viable," and then attempting to regulate abortions during that time for reasons unrelated to maternal health.[67]

In *Roe's* companion case, *Doe v. Bolton*,[68] the Court held that a physician's best medical judgment provides an adequate standard for the determination of whether an abortion is necessary to preserve the life or health of a woman during the post-viability stage of her pregnancy.[69] The *Doe* decision emphasized that physicians must be allowed the discretion to exercise their best clinical judgment in light of all factors relevant to maternal health.[70]

In the third case, *Planned Parenthood v. Danforth*,[71] the Court passed upon a statutory definition of "viable" which differed from the definition put forth by the *Roe* Court. The challenged statute defined viability as occurring when the life of the fetus "may be continued indefinitely outside the womb." This definition was held to comply with the standards in *Roe*.[72] To support this conclusion, the Court conceptualized the point at which fetal life "may be indefinitely continued" outside the womb as occurring at a point later in time than when the fetus was merely "potentially able" to survive outside the womb.[73] Although the *Danforth* Court indicated that the state was not limited to defining viability exactly as did the *Roe* Court, it spoke of the determination of viability as being a matter for the physician's judgment,[74] and preserved

65. *Id.* Viability usually occurs at about 7 months, but may occur as early as 24 weeks gestation age. *Id.*

66. *Id.* at 163-64.

67. The mere possibility that the Act created an ambiguous third stage was sufficient reason for the *Colautti* Court to invalidate the statute. *See* text accompanying note 40 *supra*.

68. 410 U.S. 179 (1973). *Doe* was decided by the Supreme Court the same day as Roe v. Wade, 410 U.S. 113 (1973). *See* note 15 *supra*.

69. 410 U.S. at 191.

70. *Id.* at 192.

71. 428 U.S. 52 (1976). *See also* note 21 and accompanying text *supra*.

72. *Id.* at 64.

73. *Id.* at 64-65.

74. *Id.* at 64. The Court stated that "[t]he determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Id.*

the flexibility of the term.[75]

In general, case law has indicated that it is not for legislatures or courts to place viability at a precise gestation age[76] because it is essentially a medical concept, which is subject to variation from fetus to fetus, and therefore, must be a matter for professional judgment by a responsible physician.[77] Although the dissenters claimed that the Court in *Colautti* had "disowned" the previous definition of viability in *Roe* and *Danforth*,[78] Justice Blackmun clearly stated that the majority's decision adhered to and reaffirmed the definition established in *Roe* and confirmed in *Doe* and *Danforth*.[79]

With this prior case law as background, *Colautti* examined the language of the Pennsylvania statute in light of the standards evolved by previous cases interpreting vague statutes. Although the language expressing the rule of the doctrine of void for vagueness[80] varies from case to case,[81] three basic and universally accepted principles have

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75. *Id.*

76. *See* Hodgson v. Lawson, 542 F.2d 1350, 1355 (1976) (presumption of viability during second half of gestation period, or at end of the twentieth week, is unconstitutional); Leigh v. Olson, 385 F. Supp. 255, 261 (D. Minn. 1974) (statute prohibiting the abortion of a "quick child" unconstitutional since the period of quickening is from 16 to 18 weeks gestation age); Hodgson v. Anderson, 378 F. Supp. 1008, 1016 (D. Minn. 1974) (statute setting viability at 20 weeks held to be an unreasonable interference with fundamental right).

77. *See* note 74 *supra*. The professional judgment of a qualified physician acting under stress is generally protected from post hoc review by his peers as well as by lay juries. In *Doe*, the Supreme Court struck down a statutory scheme for advance review of the attending physician's judgment by other physicians. Doe v. Bolton, 410 U.S. at 195-200. Similarly, in Commonwealth v. Edelin, 359 N.E.2d 4 (Mass. 1976), the manslaughter conviction of the attending physician was reversed and acquittal ordered because it amounted to "an attempted post hoc review of the attending physician's judgments through a battle of experts before a lay jury with a threat of criminal conviction and professional disgrace." *Id.* at 14.

78. 439 U.S. at 405-06 (White, J., dissenting).

79. *Id.* at 393 n.11.

80. For a thorough analysis of the void for vagueness doctrine, see Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1969). In present day jurisprudence the void for vagueness principle is treated almost exclusively as a dictate of constitutional due process. Historically, however, the doctrine is traceable to the common law practice of refusing enforcement of legislative enactments considered too indefinite to be fairly applied. *See, e.g.*, Bowers v. State, 283 Md. 115, 120 n.5, 389 A.2d 341, 344 n.5 (1978).

81. *See, e.g.*, United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (void for vagueness means that criminal responsibility should not attach where one could not reasonably understand that contemplated conduct is proscribed); Raley v. Ohio, 360 U.S. 423, 438 (1959) (state may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress the commands); Scull v. Virginia, 359 U.S. 344, 353 (1959) (fundamental fairness requires that a person not be sent to jail "for a crime he could not be reasonably

emerged from a long line of Supreme Court cases. First, a criminal statute must be couched in terms explicit enough to inform those to whom it applies of the conduct that is either required or forbidden. A cardinal requirement of penal statutes, that of fair warning, was lacking in the Pennsylvania Abortion Control Act, thereby exposing physicians to criminal sanctions based upon unknown standards under section 5(a).[82]

Second, laws must supply explicit standards to prevent arbitrary and discriminatory enforcement.[83] The Pennsylvania Abortion Control Act was flawed in this regard—its failure to clearly specify criminal standards enabled enforcement officers and triers of fact to make ad hoc decisions based upon their individual standards and prejudices.[84]

Third, where a statute appears to intrude upon fundamental constitutional liberties, the vagueness of the statute may curb the exercise of those freedoms by causing citizens to "steer far wider of the lawful zone" than if precise boundaries are drawn between lawful and unlawful conduct.[85] The problem with the Pennsylvania Act was its use of the general disagreement among physicians as to when a second trimester fetus becomes viable to impose criminal liability upon the physician faced with making a specific determination of viability. This prospect might have caused physicians to be excessively cautious in determining viability, which would have severely affected a woman's right to have an abortion at a point near viability.

Because *Colautti* involved the sensitive human right to terminate a pre-viability pregnancy, the Supreme Court's close scrutiny of section 5(a) was proper. Although the *Danforth* decision exemplifies the Court's willingness to examine definitions of viability differing from the definition approved in *Roe*,[86] *Colautti* reaffirms that the Court is

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certain to know he was committing").

82. *See* notes 30 & 47 and accompanying text *supra*.

83. *See* Smith v. Goguen, 415 U.S. 566, 578 (1974) (state statute prohibiting public contemptuous treatment of the United States flag held unconstitutional because it permitted selective law enforcement); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (anti-noise statute prohibiting willful noise or disturbance near schools in session upheld against argument of arbitrary application).

84. *See* notes 44 & 47 and accompanying text *supra*.

85. *See* Smith v. Gougen, 415 U.S. 566, 573 n.7 (1974) (the chilling effect upon the exercise of constitutional rights caused by vague statutes mandates that such statutes specifically describe the prohibited behavior); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961) (statute requiring written oath that state employees had never lent their aid, support, advice or counsel to the Communist party impermissibly vague); Winters v. New York, 333 U.S. 507, 509 (1948) (facial challenge is proper if statute is vague and affects fundamental rights).

86. *See* text accompanying note 72 *supra*.

determined to adhere to the central concept of *Roe* that viability is a fluid medical and legal concept and shall remain so. *Colautti* stresses *Danforth's* designation of viability as a matter for medical judgment, skill and technical ability and makes a strong statement for the use of subjective standards in judging the liability of a physician charged with having made an incorrect viability determination.[87] Through the *Colautti* decision, the Court has issued a warning that it stands firmly by the limitations already placed upon the police power of the states. The *Colautti* decision is a reminder that attempts to circumvent the guidelines enunciated in *Roe* by placing restraints upon a physician's discretion are intolerable and unlikely to succeed.

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87. 439 U.S. at 387-88. The Court held that "[v]iability is reached when, *in the judgment of the attending physician* on the facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." *Id.* at 388 (emphasis added).