CONSTITUTIONAL LAW—RIGHT TO PRIVACY—MUNICIPAL ROADBLOCK TO ABORTION DENOUNCED—*City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983).

The United States Supreme Court decided in *Roe v. Wade*[1] that a woman has a constitutional right to choose to terminate her pregnancy.[2] In the eleven years since that landmark decision, state and local governments, in the guise of regulating the performance of abortions, have developed legislation aimed at undermining this freedom.[3] In *City of Akron v. Akron Center for Reproductive Health, Inc.*,[4] the Supreme Court swept aside several municipal regulations which obstructed a woman's right to procreative choice,[5] thus reaffirming the principles established in *Wade*.

In 1978, the City of Akron, Ohio, adopted an ordinance which regulated the performance of abortions.[6] Three abortion clinics and a physician who had performed abortions at one of the clinics brought suit in the District Court for the Northern District of Ohio challenging the constitutionality of the ordinance.[7] Plaintiffs claimed that the municipal regulations violated their patients' constitutional right to an abortion as established in *Wade*.[8] The dispute centered on the provisions requiring that: 1) all post-first trimester abortions be performed in a hospital;[9] 2) no abortions be performed upon an unmarried minor

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[1] 410 U.S. 113 (1973).

[2] *Id.* at 153.

[3] *See* Note, *Hospitalization Requirements For Second Trimester Abortions: For the Purpose of Health or Hindrance?*, 71 GEO. L.J. 991, 991-94 (1983). Some examples include legislation regarding spousal or parental consent, laws restricting the public funding of abortions, and provisions requiring the woman's informed consent to the abortion. *Id.*

[4] 103 S. Ct. 2481 (1983).

[5] *Id.* at 2495-504.

[6] *Id.* at 2487 (citing Akron, Ohio Ordinance 160-1978 (Feb. 28, 1978) (amending and supplementing AKRON, OHIO CODE ch. 1870 (1975))). The city council prefaced the ordinance with several statements, including expressions of concern for maternal health and fetal life, and an assertion that the physician has a responsibility to protect both during the abortion procedure. *See id.* 103 S. Ct. at 2488 n.2.

[7] Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1198 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983). The defendants were the City of Akron, its Director of Public Health, its Mayor, and its Public Prosecutor. *Id.* at 1181. Two parties were permitted to intervene as co-defendants "'in their individual capacity as parents of unmarried minor daughters of childbearing age.'" *Id.*

[8] *Id.* at 1198.

[9] *Akron Center*, 103 S. Ct. at 2488 & n.3. This section provides: "'[n]o person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her

under the age of fifteen unless the minor obtains either the written consent of a parent or a court order;[10] 3) there be "informed consent" on the part of the woman;[11] 4) there be a twenty-four hour waiting

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pregnancy, unless such abortion is performed in a hospital.'" *Id.* (quoting AKRON, OHIO CODE § 1870.03). The Code 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.'" *Id.* (quoting AKRON, OHIO CODE § 1870.1(B)).

[10] *Id.* at 2488 & n.4. Section 1870.05(B) states:

> "[n]o physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and
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> (1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or
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> (2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced."

Id. (quoting AKRON, OHIO CODE § 1870.05(B)).

[11] *Id.* at 2489 & n.5. Section 1870.06 reads:

> "(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.
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> "(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:
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> "(1) That according to the best judgment of the attending physician she is pregnant.
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> "(2) The number of weeks elapsed from the probable time of conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period and after a history and physical examination and appropriate laboratory test.
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> "(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 at the gestational point of development at which time the abortion is to be performed, 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.
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> "(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.
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> "(5) That 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

period after the woman's consent;[12] and 5) fetal remains be disposed of in a "humane and sanitary" manner.[13]

Judge Contie, author of the district court opinion, noted that the Federal Constitution's privacy guarantee protects a woman's abortion decision from unjustified state interference.[14] He applied a balancing test, weighing the degree to which each section of the ordinance interfered with a woman's right to an abortion against the valid state interests advanced by that section.[15] Because of the compelling state

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that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

"(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

"(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

"(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term."

Id. (quoting AKRON, OHIO CODE § 1870.05 [sic]).

[12] *Id.* at 2489 & n.7. This section reads as follows:

"No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed."

Id. (quoting AKRON, OHIO CODE § 1870.07).

[13] *Id.* at 2489 & n.8. Section 1870.16 states: "'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.'" *Id.* (quoting AKRON, OHIO CODE § 1870.16).

[14] *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1215 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

[15] *See id.* at 1200. Judge Contie reached this formulation after noting that while an absolute ban on first trimester abortions and regulations granting to third parties a veto power over the abortion decision could only be justified by a compelling state interest, regulations interfering with the woman's right to a lesser degree required a lesser demonstration of state interest to counter the constitutional attack. *Id.*

interest in the health of the mother during the second and third trimesters of pregnancy,[16] the court held the post-first trimester hospitalization requirement to be valid.[17] Judge Contie observed that a state also has an important interest in the health of the mother during the first trimester. On that basis, he upheld the validity of the section of the informed consent provision which required the attending physician to disclose the risks associated with the particular pregnancy and the abortion technique to be used (hereinafter referred to as the "specific risk section").[18] In addition, he held the twenty-four hour waiting period between consent and abortion to be valid, concluding that the state interest in assuring that the woman's decision was carefully made justified the added burden imposed on the woman.[19]

Three of the ordinance's requirements, however, were invalidated. The parental consent provision was held unconstitutional because it gave the parents or the court the right to veto, in all cases, a minor's informed consent to an abortion.[20] Judge Contie similarly invalidated that section of the informed consent provision which required the physician to advise the woman that life begins at conception and to disclose a detailed anatomical description of the unborn child (hereinafter referred to as the "general information section").[21]

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[16] *See Wade*, 410 U.S. at 163; *cf.* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1204 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983) (first trimester regulation of abortion for protection of maternal health an important state interest).

[17] Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1215 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983). This result was reached despite plaintiff's argument that advances in medical technology now made performance of early second trimester abortions as safe in clinics as in hospitals and that, therefore, the state's interests in protecting the mother's health should no longer be considered compelling for this stage of the pregnancy. *See id.*

[18] *Id.* at 1204. The court did recognize, however, the added financial burden imposed upon the woman by requiring that the information be provided by a physician rather than a counselor. *See id.*

[19] *Id.*

[20] *Id.* at 1201. The court noted that this provision was inconsistent with the guidelines established in Bellotti v. Baird, 443 U.S. 622 (1979). Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1201 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983). The Court in *Bellotti* stated that a parental consent provision would be valid if it provided an alternative procedure by which the minor could demonstrate the ability to give informed consent independent of her parents. *Bellotti*, 443 U.S. at 643-44; *see infra* notes 82-87 and accompanying text (discussing *Bellotti*); *see also* Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976) (blanket consent requirement invalid).

[21] *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1203 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

The court concluded that the effect of such a requirement was to severely restrict the physician's discretion by specifying exactly what each patient was to be told.[22] It additionally held the provision governing disposal of fetal remains void for vagueness because the city council had failed to detail which methods of disposal were acceptable.[23] All parties appealed to the Court of Appeals for the Sixth Circuit.[24]

The Sixth Circuit found that the balancing test applied by the district court was inappropriate.[25] Judge Lively, writing for the majority, observed that the relevant inquiry was whether a provision had a " 'legally significant impact or consequence' " on the pregnant woman's right to terminate her pregnancy.[26] He asserted that if the court had found that there was a legally significant impact, it should then have applied strict scrutiny to determine whether the provision was narrowly drawn to serve a compelling state interest.[27] Judge Lively agreed with the district court that the compelling state interest in the health of the mother subsequent to the first trimester of pregnancy justified the hospitalization requirement.[28] The Sixth Circuit also agreed with the lower court's finding that both the parental consent requirement and the general information section of the in-

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[22] *See id.*

[23] *Id.* at 1206.

[24] Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1200 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

[25] *Id.* at 1203-04.

[26] *Id.* at 1204 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 81 (1976)). Judge Lively noted that the lower court had failed to consider the *nature* of the intrusion and instead had concentrated exclusively on the degree of interference each provision imposed on the abortion decision. *Id.* He observed that the district court therefore became involved in a balancing of state interest against the degree of intrusion, when the inquiry should have focused on whether the nature of the interference made it legally insignificant, thereby not requiring constitutional analysis. *See id.* at 1203-04.

[27] *See id.* at 1204. The court explained that the inquiry as to whether the provision is narrowly drawn involves determining whether it imposes an "undue burden" on the abortion decision. *Id.*

[28] *Id.* at 1210. The court observed that two district courts had determined that because of recent advances in medical procedures, the state interest in maternal health became compelling at the 18th rather than at the 12th week of pregnancy. *Id.* (citing Margaret S. v. Edwards, 488 F. Supp. 181, 194 (E.D. La. 1980), and Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 438 F. Supp. 679, 685-87 (W.D. Mo. 1980), *aff'd in part, rev'd in part*, 655 F.2d 848 (8th Cir.), *aff'd*, 664 F.2d 687 (8th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2517 (1983)). Judge Lively apparently agreed with this rationale but noted that a recent United States Supreme Court decision reaffirmed the "bright line" drawn in *Wade* that the state interest in maternal health becomes compelling subsequent to the first trimester. *See id.* (citing Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894, 896-902 (N.D. Ind. 1980), *aff'd mem. sub nom.* Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 934 (1981)).

formed consent provision imposed significant burdens on a woman's right to an abortion.[29] The court invalidated the regulations, concluding that they were not justified by a compelling state interest.[30] In addition, Judge Lively affirmed the district court's holding that the provision for the humane and sanitary disposal of fetal remains was unconstitutionally vague.[31]

Two elements of the district court's holding were reversed. Judge Lively noted that the specific risk section of the informed consent requirement interfered with the medical judgment of the physician in the same manner as the general information section.[32] As no compelling state interest was advanced to justify this interference,[33] the appellate court declared the specific risk section unconstitutional.[34] Judge Lively similarly reversed the district court's ruling with respect to the twenty-four hour waiting period, finding that the stipulation imposed impermissible financial, psychological, and physical burdens on a pregnant woman, and that the state interest in providing this "cooling-off period" was not compelling and therefore did not justify such burdens.[35] Both the plaintiffs and the City of Akron petitioned for certiorari to the United States Supreme Court.[36]

In *Akron Center*, the United States Supreme Court went beyond the Sixth Circuit's decision in reasserting a woman's unfettered right to an abortion. The Court, affirming all aspects of the circuit court's holding except one, declared the hospitalization requirement uncon-

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[29] *Id.* at 1205-07.

[30] *Id.*

[31] *Id.* at 1211.

[32] *Id.* at 1207.

[33] The district court had found that a valid state interest in maternal health was sufficient justification to uphold the constitutionality of this provision. *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1204 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

[34] Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1207 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

[35] *Id.* at 1208; *accord* Charles v. Carey, 627 F.2d 772, 785-86 (7th Cir. 1980) (24-hour waiting period unconstitutional); *cf.* Leigh v. Olson, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980) (48-hour waiting period unconstitutional). *Contra* Wolfe v. Schroering, 541 F.2d 523, 526 (6th Cir. 1976) (24-hour waiting period constitutional).

[36] *Akron Center*, 103 S. Ct. at 2490. The Court granted certiorari in light of conflicting decisions with regard to second trimester hospitalization requirements. *Id. Compare* Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 664 F.2d 687, 691 (8th Cir. 1981) (hospitalization requirement for all post-first trimester abortions invalid), *aff'd*, 103 S. Ct. 2517 (1983) *with* Simopoulos v. Virginia, 221 Va. 1059, 1076, 277 S.E.2d 194, 204 (1981) (hospitalization requirement for all post-first trimester abortions valid), *aff'd*, 103 S. Ct. 2532 (1983).

stitutional because it did not further a compelling state interest but served only to obstruct the path of a woman seeking an abortion.[37]

The right to privacy[38] is not expressly mentioned in the Federal Constitution.[39] Nevertheless, as early as 1891 the Supreme Court of the United States deemed it a principle worthy of protection.[40] In *Union Pacific Railway v. Botsford*,[41] the Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[42] Although the constitutional basis for this right was unsettled,[43] it was held to protect personal decisions relating to marriage,[44] education,[45] procreation,[46] and contraception.[47] In 1973, the Court held in *Roe v.*

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[37] *Akron Center*, 103 S. Ct. at 2496-97. The Court was persuaded that advances in medical technology had increased the safety of second trimester abortions and that they could be performed in appropriate nonhospital facilities. *Id.*

In a dissenting opinion, Justice O'Connor argued that the correct inquiry when examining the constitutionality of abortion legislation was whether a provision unduly burdened a woman's fundamental right to an abortion. *See id.* at 2511 (O'Connor, J., dissenting).

[38] *See generally* Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("the right to be let alone").

[39] *Wade*, 410 U.S. at 152.

[40] *See* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

[41] *Id.*

[42] *Id.* at 251.

[43] The Supreme Court derived a constitutional basis for the right of privacy from, alternatively, the "penumbras" of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("specific guarantees in the Bill of Rights have penumbras. . . [which] create zones of privacy"); the first amendment, Stanley v. Georgia, 394 U.S. 557, 568 (1969) (private possession of obscene material protected by first and 14th amendments); the fourth amendment, Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (fourth amendment protects individuals having reasonable "'expectation of privacy'" from unreasonable police intrusion) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)); the ninth amendment, *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring) (right of marital privacy protected by ninth amendment); and the 14th amendment, Loving v. Virginia, 388 U.S. 1, 12 (1967) (restrictions on freedom to marry based on racial classification violates both equal protection and due process clauses of 14th amendment).

[44] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (restrictions on freedom to marry based on racial classification unconstitutional).

[45] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (parents have right to send children to private school).

[46] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541-42 (1942) (statute providing for sterilization of habitual criminals invalid).

[47] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (Massachusetts statute prohibiting distribution of contraceptives to unmarried persons unconstitutional). In *Eisenstadt*, Justice Brennan observed "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis in original).

Wade[48] that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[49]

Wade concerned the constitutionality of Texas criminal abortion statutes which permitted abortion only to save the life of the mother.[50] The challenge was brought by an unmarried pregnant woman who claimed that the statutes violated her right to privacy.[51] Noting the physical and mental stress that a woman might be forced to endure if she were prohibited from obtaining an abortion,[52] the United States Supreme Court held that the right to privacy, founded in the "Fourteenth Amendment's concept of personal liberty," protected a woman's right to an abortion.[53] The Court held, however, that this right was not unqualified, but could be limited provided the limitation was justified by a compelling state interest.[54] Writing for the majority, Justice Blackmun identified two interests—the protection of maternal health and the protection of potential life—that would permit state regulation of abortion.[55] He observed that "[t]hese interests are separate and distinct . . . [e]ach grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "[56] He then established a framework, based on the stages of pregnancy, within which varying degrees of state regulation would be allowed.

Justice Blackmun determined that, in the first trimester of pregnancy, neither the state's interest in maternal health nor its interest in potential life was compelling.[57] Therefore, both the abortion decision

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[48] 410 U.S. at 113. For a general discussion of *Wade*, see Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U.L. REV. 765 (1973), and Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[49] *Wade*, 410 U.S. at 153.

[50] *Id.* at 120.

[51] *Id.* The District Court for the Northern District of Texas held that the right to an abortion was protected by the ninth amendment and that the statutes infringed upon that right and were therefore unconstitutional. Roe v. Wade, 314 F. Supp. 1217, 1222 (1970), *aff'd*, 410 U.S. 113 (1973). The district court derived support for its ninth amendment position from Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965). *See Wade*, 314 F. Supp. at 1221-22.

[52] *Wade*, 410 U.S. at 153. The Court observed that, in addition to the stress imposed on the mother, there was also a negative effect on the mother's family. *Id.*

[53] *Id.*

[54] *Id.* at 154.

[55] *Id.* at 162-63.

[56] *Id.*

[57] *Id.* With respect to maternal health, the Court observed that the mortality rate for abortions performed prior to the end of the first trimester "appear[ed] to be as low or lower than the rates for normal childbirth." *Id.* at 149 (footnote omitted).

and its implementation "must be left to the medical judgment of the pregnant woman's attending physician."[58] He concluded, however, that in view of current medical knowledge, a state's interest in the health of the mother becomes compelling at approximately the end of the first trimester.[59] Subsequent to that stage, the state could regulate the abortion decision to the extent that the regulation related to the protection of maternal health.[60] Justice Blackmun also decided that the state's interest in protecting potential life becomes compelling at "viability,"[61] and that a state could prohibit or otherwise regulate abortions subsequent to that point, except where they were necessary to preserve the health or life of the mother.[62]

In the companion case to *Wade*, *Doe v. Bolton*,[63] the Supreme Court invalidated a Georgia regulation which required that all abortions be performed in accredited hospitals.[64] Justice Blackmun determined that the provision was inconsistent with the guidelines established in *Wade* because it applied to abortions performed during the first trimester of pregnancy, at which time the state does not have a compelling interest in the health of the mother.[65] Justice Blackmun also indicated that due to Georgia's failure to demonstrate that the full resources of a licensed hospital were necessary to satisfy the state's

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[58] *Id.* at 164; *see also* Cane, *Whose Right to Life? Implications of* Roe v. Wade, 7 FAM. L.Q. 413, 431 (1973) (a woman's abortion right "vouchsafed to her physician").

[59] *Wade*, 410 U.S. at 163.

[60] *Id.* Requirements governing the qualifications and licensing of physicians performing the abortions as well as the type of facility in which they were to be performed were noted as examples of permissible state maternal health regulations. *Id.*

[61] The Court defined viability as the point at which the fetus is capable of meaningful life outside the womb. *See id.* Viability is usually placed at 28 weeks, although it can occur as early as 24 weeks. *Id.* at 160.

[62] *Id.* at 165. For a discussion of potential problems with using viability as a guideline for allowing unlimited state abortion regulation, see Comment, *Technological Advances and* Roe v. Wade: *The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194, 1202-03 (1982).

The *Wade* Court declined to address the issue of "when life begins" and acknowledged that if a fetus was a "person" within the context of the 14th amendment, then its right to life would be guaranteed specifically by that amendment. *Wade*, 410 U.S. at 156-57. Upon examination of the term "person" as used in the Constitution, the Court observed that it had no "possible pre-natal application." *Id. But see* Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 1979 S. ILL. U.L.J. 1, 3 ("concept of 'person' in the fifth and fourteenth amendments includes unborn human life").

[63] 410 U.S. 179 (1973).

[64] *Id.* at 184, 195. The Georgia statute required the "performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals." *Id.* at 184.

[65] *See id.* at 195.

legitimate second trimester health interest,[66] the hospitalization requirement would be invalid even if it applied only to post-first trimester abortions.[67] He acknowledged, however, that a state could adopt licensing standards for post-first trimester abortion facilities,[68] provided those standards were legitimately related to safeguarding maternal health.[69]

Three years later, the constitutionality of several state roadblocks to abortion which had not been addressed in either *Wade* or *Bolton* were decided in *Planned Parenthood v. Danforth*.[70] At issue were Missouri regulations containing provisions which, *inter alia*, governed informed and parental consent and prohibited the use of a particular abortion technique.[71] The Supreme Court upheld the validity of the informed consent provision which required that a woman certify her consent to a first trimester abortion in writing.[72] The Court recognized that the state has an interest in assuring that a woman's abortion decision is made with full knowledge of the consequences.[73] Justice Blackmun, writing for the Court, observed that a regulation affecting the first trimester of pregnancy was not unconstitutional per se and that Missouri's informed consent provision had no significant impact upon a woman's decision to abort.[74]

The parental consent provision required unmarried women under the age of eighteen to obtain the written consent of a parent before

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[66] *Id.* Justice Blackmun agreed with appellants' argument that other facilities besides hospitals were qualified to perform second trimester abortions. *See id.* He also observed that Georgia permitted nonabortion surgery in nonaccredited facilities provided that the other licensing requirements were met. *See id.* at 193.

[67] *See id.* at 195.

[68] *Id.* The Court used the term facilities to refer to both hospitals and clinics. *Id.*

[69] *Id.*

[70] 428 U.S. 52 (1976). Justice Blackmun, author of the decision, observed that *Danforth* was a "logical and anticipated corollary" to *Wade* and *Bolton*. *Danforth*, 428 U.S. at 55. *See generally* Note, Planned Parenthood v. Danforth: *Resolving the Antinomy*, 4 OHIO N.U.L. REV. 425 (1977).

[71] *Danforth*, 428 U.S. at 58-59.

[72] *Id.* at 65. The provision required that the "woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and 'that her consent is informed and freely given and is not the result of coercion.'" *Id.* (quoting H.R. 1211, 77th Leg., 2d Sess. § 3(2)). For a general discussion of the issue of informed consent, see Note, *Abortion Regulation: The Circumscription of State Intervention by the Doctrine of Informed Consent*, 15 GA. L. REV. 681 (1981).

[73] *See Danforth*, 428 U.S. at 67. The Court noted that the stressful nature of the abortion decision made such knowledge imperative. *Id.*

[74] *See id.* For similar reasons, the Court upheld another section of the statute that required the physician to keep records of first trimester abortions. *See id.* at 81. Justice Blackmun noted that the records requirement was related to the state's interest in protecting maternal health, and

a first trimester abortion could be performed.[75] In holding this provision unconstitutional, the *Danforth* Court concluded that the state did not have the authority to delegate to a third party an "absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's [first trimester] pregnancy. . . ."[76] Although Justice Blackmun recognized the state's authority to regulate the activities of minors as distinguished from adults, he nevertheless felt that there was insufficient justification to support Missouri's blanket restriction.[77]

Missouri's legislation also prohibited the use of saline amniocentesis[78] as a technique for abortions performed after the first trimester of pregnancy.[79] Justice Blackmun noted the popularity and safety of the banned method and observed that other techniques of comparable safety were generally unavailable.[80] He concluded that since the restriction was arbitrary and served only to inhibit the vast majority of post-first trimester abortions, it was not reasonably related to the protection of maternal health and was therefore unconstitutional.[81]

In *Bellotti v. Baird*,[82] decided in 1979, the Court struck down a Massachusetts first trimester parental consent provision which allowed minors who were denied their parents' consent the right to obtain court orders for abortions.[83] Justice Powell, who authored the

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he concluded that the provision imposed no legally significant impact upon either the physician-patient relationship or the abortion decision. *Id.*

[75] *Id.* at 72. The district court had decided that the provision was constitutional because of the state's interest in protecting parental authority. *See* Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1370 (E.D. Mo. 1975), *aff'd in part, rev'd in part*, 428 U.S. 52 (1976).

[76] *Danforth*, 428 U.S. at 74.

[77] *See id.* at 74-75. The Court did recognize, however, that not every minor was capable of giving informed consent. *See id.* at 75; *see also* Bellotti v. Baird, 428 U.S. 132, 147 (1976) (minors are less likely to be capable of informed consent).

[78] Saline amniocentesis involves the replacing of the amniotic fluid with a saline or other solution, thereby inducing labor. *See Danforth*, 428 U.S. at 76.

[79] *Id.* at 75-76.

[80] *Id.* at 77-78. The appellants had asserted that the other abortion techniques available were significantly more dangerous than saline amniocentesis and that the one safe alternative was not widely used. *Id.* Appellants also pointed out that approximately 70% of post-first trimester abortions in the United States were effected through saline amniocentesis. *Id.* at 76.

[81] *Id.* at 79.

[82] 443 U.S. 622 (1979). For a general discussion of *Bellotti*, see Note, *Where for Art Thou* Danforth: Bellotti v. Baird, 7 PEPPERDINE L. REV. 965 (1980).

[83] *Bellotti*, 443 U.S. at 624. The provision provided that:

> "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown. . . ."

Id. at 625 (quoting MASS. GEN. LAWS ANN., ch. 112, § 125 (West Supp. 1979)). The provision

plurality opinion, acknowledged that since the Constitution protected minors to a lesser degree than adults, the state had the authority to more closely regulate the activities of minors.[84] He noted, however, that under *Danforth* a state could not justify parental consent requirements which granted third parties an arbitrary power to veto the minor's abortion decision.[85] Balancing these positions, Justice Powell reasoned that the state could, without requiring parental notification of pregnancy, restrict the abortion right of immature minors if it provided a judicial proceeding at which a minor could demonstrate either that she was mature enough to make an independent abortion decision or that the abortion would be in her best interest.[86] Since the challenged provision was inconsistent with these guidelines, it was declared unconstitutional.[87]

The Supreme Court reaffirmed the physician's central role in a woman's abortion decision[88] in *Colautti v. Franklin*,[89] decided the same year as *Bellotti*. The dispute in *Colautti* concerned a Pennsylvania law which required a physician to determine whether a fetus was viable and, if so, to use an abortion method reasonably calculated to protect the life and health of the fetus.[90] The statute subjected physi-

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differed from the one held unconstitutional in *Danforth* in that it allowed the minor to obtain a court order for an abortion if her parents denied their consent. *Compare id. with Danforth*, 428 U.S. at 72.

[84] *See Bellotti*, 443 U.S. at 634. Justice Powell stated three reasons for this conclusion, including the vulnerability of children, the importance of parental authority in childrearing, and the inability of children to make critical decisions having potentially serious consequences. *Id.*

[85] *Id.* at 643. Although the Court acknowledged that the statute permitted a minor to obtain a court order for an abortion if her parents denied their consent, the Court noted that it was unrealistic to believe that this provided an effective avenue of relief since the minor's parents would now be aware of her pregnancy and could obstruct her access to a court. *See id.* at 646-47.

[86] *Id.* at 647-48. Justice Powell further commented that if it was determined that the minor was immature and that the abortion was not in her best interests, the court could either deny permission for the abortion or defer decision until a parental consultation with court participation had occurred. *Id.* at 648.

[87] *See id.* at 651.

[88] Colautti v. Franklin, 439 U.S. 379 (1979); *cf. Danforth*, 428 U.S. at 67 n.8 (attending physician should not be placed in "undesired and uncomfortable straitjacket"); *Bolton*, 410 U.S. at 192 (physician should be given "the room he needs to make his best medical judgment").

[89] 439 U.S. 379 (1979).

[90] *Id.* at 380-81, 380 n.1. The Pennsylvania statute reads as follows:

> "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, and if the determination is that the fetus is 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

cians to civil or criminal liability if the viability determination was not made, the proper degree of care was not exercised, or the wrong abortion technique was chosen.[91] Justice Blackmun, writing for the majority, underscored the important role of the physician in the abortion decision[92] and emphasized that the decision to terminate a pregnancy was inherently a medical one.[93] Noting that the viability determination was subjective and based on imprecise variables,[94] the Court reasoned that a determination of viability could vary among physicians and that therefore, the Pennsylvania statute was void for vagueness.[95] Justice Blackmun further affirmed the physician's significance to the abortion process by stating that any state regulation would be unconstitutional if it did not furnish the attending physician with " 'the room he needs to make his best medical judgment.' "[96]

In *Akron Center*, the Supreme Court strongly reaffirmed the validity of *Wade* and its progeny. After acknowledging that the *Wade* decision's protection of a woman's fundamental right to an abortion had been criticized,[97] Justice Powell, writing for the majority, followed the doctrine of *stare decisis* and applied *Wade*'s trimester analysis as a foundation against which to evaluate each of the disputed Akron provisions.[98]

In holding that Akron's second trimester hospitalization requirement was unconstitutional, Justice Powell relied on the state of medi-

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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."

Id. at 380 n.1 (quoting PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1977)). Viability was defined as "'the capability of a fetus to live outside the mother's womb albeit with artificial aid.'" *Id.* at 381-82 (quoting *Wade*, 410 U.S. at 160).

[91] *Id.* at 381 & n.1.

[92] *See id.* at 396-97.

[93] *Id.* at 387 (citing *Wade*, 410 U.S. at 166).

[94] *Id.* at 395-96. The Court listed several variables, including age of the fetus, fetal weight, the woman's health and nutrition, and the quality of medical facilities available. *Id.*

[95] *See id.* at 396. Justice Blackmun also observed that the combination of disagreement by experts over whether a fetus had attained viability and the strict imposition of civil and criminal liability for an erroneous determination would make physicians reluctant to perform abortions when viability was approaching. *Id.*

[96] *Id.* at 397 (quoting *Bolton*, 410 U.S. at 192).

[97] *Akron Center*, 103 S. Ct. at 2487. Justice Powell also mentioned that the Court had been called upon several times in the past to define limits of the state's power to regulate abortions. *Id.*

[98] *See id.* Justice Powell observed that the care with which *Wade* was originally considered and decided and the consistency with which it has subsequently been applied were especially compelling reasons to adhere to *stare decisis* in the present case. *Id.* at 2487 n.1.

cal technology at the time of the dispute.[99] The Court observed that, since the *Wade* decision a decade earlier, the safety of second trimester abortions had dramatically increased, due in large part to the wide use of the dilatation and evacuation (D&E) procedure.[100] The D&E procedure, Justice Powell noted, was utilized in the early stages of the second trimester (twelve to sixteen weeks), a period during which other second trimester abortion techniques could not be used.[101] The Court further observed that the American College of Obstetricians and Gynecologists (ACOG) and the American Public Health Association (APHA) had determined that it was no longer necessary for all second trimester abortions to be performed in hospitals because experience had indicated that the D&E procedure could be performed safely in suitable nonhospital facilities on an outpatient basis.[102]

Justice Powell reaffirmed that the state's interest in protecting maternal health became compelling at the beginning of the second trimester, but he insisted that the state tailor its maternal health legislation to the period in the trimester during which its interest would reasonably be furthered.[103] He determined that such regulation should not apply if it required a "depart[ure] from accepted medical practice."[104] In light of the safety of the D&E method in the early weeks of the second trimester, Justice Powell concluded that Akron's hospitalization requirement "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessi-

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[99] *See id.* at 2496; *cf. Wade*, 410 U.S. at 163 ("present medical knowledge" sets the end of the first trimester as the point at which the state's health interest in the mother becomes compelling). For the full text of the provision, see *supra* note 9.

[100] *Akron Center*, 103 S. Ct. at 2495-96. Dilatation and evacuation is a procedure by which a woman's cervix and the opening to the uterus are dilated and the fetus is removed by means of suction and instruments. Note, *supra* note 3, at 1000 n.52. The D&E procedure was utilized only in the performance of first trimester abortions at the time that *Wade* was decided. *Akron Center*, 103 S. Ct. at 2496 n.23.

[101] *Akron Center*, 103 S. Ct. at 2496. The Court observed that the other primary second trimester abortion techniques were instillation procedures which could not be performed prior to approximately the 16th week of pregnancy because the amniotic sac was too small. *Id.* at 2496 n.24.

[102] *Id.* at 2496. The ACOG indicated that abortions could "be performed safely in 'a hospital-based or in a free-standing ambulatory surgical facility, or in an out-patient clinic meeting the criteria required for a free-standing surgical facility'" up until the 18th week of pregnancy. *Id.* (quoting AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 54 (5th ed. 1982)). At the time of *Wade*, both the ACOG and APHA had recommended that post-first trimester abortions be performed in hospitals. *Id.* at 2495; *see Wade*, 410 U.S. at 144-46.

[103] *See Akron Center*, 103 S. Ct. at 2497 & n.27.

[104] *See id.* at 2493, 2496-97.

ble, and safe abortion procedure."[105] Therefore, he held that the provision was an unreasonable infringement upon a woman's right to an abortion.[106]

Justice Powell next examined the provision which prohibited the performance of abortions on minors under age fifteen absent parental consent or court order. He commented that, as worded, the provision assumed that no such minor was sufficiently mature to make an independent abortion decision, thereby leading to the conclusion that, without parental approval, an abortion could never be in the minor's best interests.[107] Justice Powell agreed with both the district and circuit courts that the unavailability of a procedure by which a minor under age fifteen could demonstrate that she was mature enough to make an abortion decision independent of both the court and her parents rendered Akron's provision unconstitutional under *Bellotti* and *Danforth*.[108]

The Court acknowledged that the state had an interest in ensuring that a pregnant woman's consent to an abortion was informed.[109]

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[105] *Id.* at 2497. Justice Powell noted that the disputed provision had "'the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks.'" *Id.* (quoting *Danforth*, 428 U.S. at 79).

[106] *Id.* Justice Powell noted that the Court's holding did not mean that there were no circumstances under which a state could require the full services of a hospital in the performance of abortions, but that the Court was concerned only with hospitalization during the early weeks of the second trimester. *Id.* at 2497 n.27. He also observed that a state could still, after the first trimester, "'adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish.'" *Id.* at 2496-97 n.26 (quoting *Bolton*, 410 U.S. at 194-95).

The Court also invalidated a second trimester hospitalization requirement in one of two companion cases to *Akron Center*, Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 103 S. Ct. 2517 (1983). As in *Akron Center*, Missouri's legislation did not take cognizance of outpatient facilities, *id.* at 2520 & n.6, and this proved to be the critical distinction from Simopoulos v. Virginia, 103 S. Ct. 2532 (1983) in which a hospitalization requirement was upheld. *Simopoulos*, 103 S. Ct. at 2540. In *Simopoulos*, Justice Powell noted:

> Unlike the provisions at issue in *City of Akron* and *Ashcroft*, Virginia's statute and regulations do not require that the patient be hospitalized as an inpatient or that the abortion be performed in a full-service, acute-care hospital. Rather, the State's requirement that second-trimester abortions be performed in licensed clinics appears to comport with accepted medical practice, and leaves the method and timing of the abortion precisely where they belong—with the physician and the patient.

Id.

[107] *Akron Center*, 103 S. Ct. at 2498.

[108] *See id.* at 2497-98; *Bellotti*, 443 U.S. at 647-48; *see also Danforth*, 428 U.S. at 74-75 (blanket provision requiring parental consent prior to performance of abortion unconstitutional). Justice Powell resolved that the ordinance did not imply that a state court had the authority to make an inquiry into the maturity or emancipation of a minor. *See Akron Center*, 103 S. Ct. at 2498.

[109] *See Akron Center*, 103 S. Ct. at 2498; *see also Danforth*, 428 U.S. at 85 (upholding informed consent provision).

Nevertheless, Justice Powell set forth two reasons for invalidating the general information section of Akron's informed consent provision.[110] First, he observed that much of the required information, including the portrayal of a fetus as a human life, clearly was designed not to inform the patient but rather to convince her to forego the abortion.[111] Second, Justice Powell insisted that the responsibility for ensuring informed consent rested with the physician, not the state, and that accordingly, the physician should be permitted to determine, on a case by case basis, what information is necessary to guarantee that the decision be made with an appreciation of the consequences.[112] The Akron provision was unreasonable in that it delineated the information to be conveyed to the pregnant mother, thus removing the doctor's discretion as to what information was appropriate to relay.[113]

In considering the specific risk section of the informed consent provision, Justice Powell disagreed with the Sixth Circuit's determination that this section infringed upon the physician's discretion in the same manner as the general information section.[114] He decided that the specific risk section properly allowed the physician to determine the precise nature and scope of the information to be relayed and consequently was not an unconstitutional infringement upon the physician's medical judgment.[115] Justice Powell took exception, however, to the section's requirement that the information be disclosed only by the attending physician.[116] He concluded that the regulation should have focused on whether the woman received the information from a qualified counselor rather than on the counselor's identity.[117] He noted that it was within the state's authority to place upon the physician the ultimate responsibility for ensuring that adequate counseling had been provided either by the attending physician himself or by a competent party; further, he indicated that the state could establish minimum standards for those individuals who act as counselors.[118] Since the section precluded information from being disclosed by any

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[110] *Akron Center*, 103 S. Ct. at 2501.

[111] *Id.* at 2500.

[112] *Id.* at 2500-01.

[113] *See id.*; *see also Danforth*, 428 U.S. at 67 n.8 (physician should not be placed in "undesired and uncomfortable straitjacket").

[114] *Akron Center*, 103 S. Ct. at 2501.

[115] *Id.*

[116] *Id.* In this respect Justice Powell agreed with the Sixth Circuit. *Id.* at 2501-02.

[117] *See id.* at 2502. *But cf. Colautti*, 439 U.S. at 387 (physician plays central role in counseling women about whether to have abortion).

[118] *Akron Center*, 103 S. Ct. at 2502.

person other than a doctor, regardless of such person's qualifications, Justice Powell found the requirement unreasonable and therefore unconstitutional.[119]

Justice Powell affirmed the Sixth Circuit's decision that Akron's mandatory twenty-four hour waiting period between the time of consent and the performance of the abortion was unconstitutional.[120] He determined that the state did not have a legitimate interest in assuring that the woman carefully consider her decision to have an abortion.[121] Justice Powell asserted that once the decision to have an abortion had been made, based on consultation between the physician and patient, it was the physician's responsibility to advise the patient as to whether it would be in her best interests to delay the abortion.[122] The Court refused to uphold the mandatory waiting period because it interfered with the physician-patient relationship.[123]

Justice Powell also agreed with the lower courts that the Akron provision governing the disposal of fetal remains was void for vagueness.[124] He reasoned that, in view of the imposition of criminal liability, the uncertainty surrounding the terms "humane" and "sanitary" was fatal because it failed to give a physician " 'fair notice that his contemplated conduct is forbidden.' "[125] Justice Powell noted that Akron was free to draft more carefully worded regulations that furthered the legitimate state interest in the appropriate disposal of aborted fetuses.[126]

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[119] *Id.* at 2503.

[120] *See id.*

[121] *See id.* The Court thus disagreed with the district court which had found a legitimate state interest in ensuring "that a woman's abortion decision is made after careful consideration of all facts applicable to her particular situation." *See* Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1204 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983). Justice Powell additionally noted that the requirement neither served a health interest, *see Akron Center*, 103 S. Ct. at 2503; *accord* Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1208 (6th Cir. 1981) (no "medical basis" in mandatory waiting period), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983), nor furthered the legitimate state interest in ensuring a woman's informed consent. *Akron Center*, 103 S. Ct. at 2503.

[122] *Akron Center*, 103 S. Ct. at 2503 (citing *Colautti*, 439 U.S. at 387).

[123] *See id.* Justice Powell apparently agreed, however, with the ACOG's recommendation that a clinic grant an appropriate amount of time for the woman to reflect prior to an informed decision. *Id.* at 2503 n.43. He observed that, contrary to Akron's requirement, the ACOG standard was flexible and allowed for a variation in the time depending upon the particular circumstances of an individual patient. *Id.*

[124] *Id.* at 2504.

[125] *Id.* (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

[126] *Id.* at 2504 & n.45. Justice Powell noted that proper disposal of fetal remains regulations avoid placing criminal liability on the physician for improper compliance. *See id.* at 2504 n.44;

In a dissenting opinion,[127] Justice O'Connor virtually rejected *Wade*'s trimester framework.[128] The dissent argued that the majority's examination and acceptance of technological advancements "blurred" the lines between permissible and impermissible maternal health regulation.[129] She reasoned that, as a result, "the State must continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to 'depart from accepted medical practice' insofar as particular procedures and particular periods within the trimester are concerned."[130] Justice O'Connor additionally enunciated her view of the danger inherent in relying upon "viability" as the point at which the state's interest in the protection of potential life became compelling,[131] reasoning that advances in medical technology would result, over time, in viability occurring at an increasingly earlier point in the pregnancy.[132] Justice O'Connor thus anticipated a problem resulting from medical improvements that would push forward the point at which the protection of maternal health would become compelling, and conversely, improvements that would push back the point of viability, at which stage abortions could be prohibited.[133]

Contrary to the *Wade* holding that the state's interest in the protection of maternal health and fetal life becomes compelling at different stages of pregnancy, Justice O'Connor urged that these interests are compelling throughout pregnancy.[134] She cautioned, however, that strict scrutiny should not immediately apply to all abortion legislation.[135] Justice O'Connor determined that before legislation could be

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see also Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 572-73 (E.D. Pa. 1975) (Pennsylvania fetal remains disposal statute which did not impose criminal liability held constitutional), *aff'd mem. sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

[127] Justices Rehnquist and White joined in the dissent. They were the only dissenters in *Wade*. *Wade*, 410 U.S. at 113.

[128] *See Akron Center*, 103 S. Ct. at 2505-06 (O'Connor, J., dissenting).

[129] *Id.* at 2506 (O'Connor, J., dissenting).

[130] *Id.* Justice O'Connor noted the difficulty inherent in this type of legislative inquiry. *Id.* She observed, however, that even with these difficulties, the legislature, with its greater resources, was better equipped to make the examination than the Court. *Id.* at 2506 & n.4 (O'Connor, J., dissenting).

[131] *Id.* at 2506 (O'Connor, J., dissenting).

[132] *Id.* at 2507 (O'Connor, J., dissenting). Justice O'Connor found it reasonable that fetal viability may soon occur during the first trimester. *Id.*; *see also id.* at 2507 n.5 (O'Connor, J., dissenting) (citing several references supporting this view).

[133] *Id.* at 2507 (O'Connor, J., dissenting). *See generally* Comment, *supra* note 62.

[134] *Akron Center*, 103 S. Ct. at 2507 (O'Connor, J., dissenting).

[135] *Id.* at 2508-09 (O'Connor, J., dissenting).

subjected to a compelling state interest analysis, the legislation first had to be shown to be an "'*unduly burdensome interference*'" with a woman's freedom to have an abortion.[136] Based upon her review of several of the Court's decisions, Justice O'Connor observed that an undue burden generally involved "absolute obstacles or severe limitations on the abortion decision."[137]

Utilizing this standard, Justice O'Connor found none of the Akron provisions to be unconstitutional. She asserted that the post-first trimester hospitalization requirement was valid because it was reasonably related to the state's legitimate interest in the health and welfare of its citizens and did not unduly burden a woman's access to an abortion.[138] In deciding that the requirement protected a legitimate state interest, Justice O'Connor relied on *Bolton*'s consideration of all medical factors pertinent to the patient's well-being—psychological and emotional as well as physical[139]—and the ACOG's opinion that

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[136] *Id.* at 2509 (O'Connor, J., dissenting) (quoting Maher v. Roe, 432 U.S. 464, 473-74 (1977) (emphasis added)). Justice O'Connor observed that Justice Powell, author of the *Akron Center* majority opinion, had previously expressed the view that the compelling state interest test be applied with deliberate restraint. *Id.* at 2510 (O'Connor, J., dissenting) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 705 (1977) (Powell, J., concurring)).

Justice O'Connor reasoned that because of the nature and scope of the right to an abortion, the unduly burdensome standard was particularly appropriate. *Id.* She contended that *Wade* did not intend an unqualified right to an abortion, but rather a protection against state action that drastically limited or restrained the abortion decision. *Id.* at 2510-11 (O'Connor, J., dissenting) (citing Harris v. McRae, 448 U.S. 297, 328 (1980) (White, J., concurring) (legislation invalid if it imposed "coercive restraint" on abortion decision); Maher v. Roe, 432 U.S. 464, 473 (1977) (legislation invalid if it drastically limits availability of abortions); and *Danforth*, 428 U.S. at 71 n.11 (legislation invalid if it imposes "absolute obstacle" to abortion)). She concluded that a regulation was not automatically invalid simply because it inhibited abortions. *Id.* at 2511 (O'Connor, J., dissenting) (citing H.L. v. Matheson, 450 U.S. 398, 413 (1981)).

[137] *Id.* Justice O'Connor cited the parental consent statute of *Bellotti*, 443 U.S. at 622, as an example of a regulation which posed an absolute obstacle to abortions. *Akron Center*, 103 S. Ct. at 2511 (O'Connor, J., dissenting). She also argued that the only example of the Court striking down abortion legislation which was not unduly burdensome was in *Bolton*, 410 U.S. at 179. *Akron Center*, 103 S. Ct. at 2511 n.9 (O'Connor, J., dissenting). Justice O'Connor contended that the first-trimester hospitalization requirement in *Bolton* was not unduly burdensome and that the Court invalidated the legislation only because of the differential treatment of abortions as opposed to other medical procedures. *Id.*; *see also Bolton*, 410 U.S. at 193. She also expressed the opinion that decisions subsequent to *Bolton* rejected such differential treatment of abortions as a ground for invalidating abortion legislation. *Akron Center*, 103 S. Ct. at 2511 n.9 (O'Connor, J., dissenting) (citing Harris v. McRae, 448 U.S. 297, 325 (1980); Maher v. Roe, 432 U.S. 464, 480 (1977); and *Danforth*, 428 U.S. at 67, 80-81).

Justice O'Connor further reasoned that "'[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions,'" and that, to the contrary, the state's interest in encouraging childbirth is rationally related to the proper state goal of protecting potential life. *Id.* at 2512 (O'Connor, J., dissenting) (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).

[138] *Akron Center*, 103 S. Ct. at 2512-13 (O'Connor, J., dissenting).

[139] *See Bolton*, 410 U.S. at 192.

midtrimester abortions would remain more hazardous despite advances in medical technology.[140] In addition, she concluded that the increased cost resulting from this regulation was not unduly burdensome after observing that any regulation that the Court would allow, including licensing procedures, would necessitate an increase in cost.[141]

Asserting that Akron's informed consent provision was constitutional, Justice O'Connor noted that previous Court decisions had upheld the validity of informed consent requirements,[142] and concluded that since the sections in issue[143] imposed no drastic limitation or undue burden on the abortion decision, they were valid.[144] Similarly, Justice O'Connor would have upheld the mandatory twenty-four hour waiting period, reasoning that the additional cost neither "unduly burden[ed] the availability of abortions [n]or impose[d] an absolute obstacle to access to abortions."[145] After referring to the ACOG recommendation, cited by Justice Powell, that there be sufficient reflection time before the abortion decision was made, Justice O'Connor observed that, since Akron's requirement did not apply to medical emergencies, the physician was permitted to override the waiting period if he determined that such a measure was necessary.[146] Justice O'Connor also concluded that even if the requirement was unduly burdensome, the state's compelling interest in maternal health

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[140] *Akron Center*, 103 S. Ct. at 2512-13 (O'Connor, J., dissenting). Justice O'Connor also took exception to the majority's application of "reasonably relates" as applied to the state's compelling interest in maternal health. *Id.* at 2513 n.11 (O'Connor, J., dissenting). She reasoned that under a normal interpretation of the phrase, Akron's hospitalization requirement obviously related to maternal health. *Id.*

[141] *Id.* at 2512 (O'Connor, J., dissenting). Justice O'Connor noted that in the companion case to *Akron Center*, Simopoulos v. Virginia, 103 S. Ct. 2532 (1983), the Court upheld stringent licensing requirements that would clearly increase the cost of an abortion. *Akron Center*, 103 S. Ct. at 2512 (O'Connor, J., dissenting) (citing *Simopoulos*, 103 S. Ct. at 2540).

Justice O'Connor also observed that the majority's reliance on the decreased availability of abortions because of the post-first trimester hospitalization requirement was misplaced, since there was no evidence introduced that the two Akron hospitals denied second trimester abortions to any woman or that hospitals in nearby areas would not perform second trimester abortions. *Id.*

[142] *Akron Center*, 103 S. Ct. at 2515 (O'Connor, J., dissenting) (citing *Danforth*, 428 U.S. at 65-67).

[143] Justice O'Connor severed three subsections of the informed consent provision which had been conceded as unconstitutional by Akron. *Id. But cf. id.* at 2501 n.37 (majority's refusal to sever subsections because information had to be given by attending physician, making all sections unconstitutional regardless of severance).

[144] *Id.* at 2515 (O'Connor, J., dissenting).

[145] *Id.* at 2516 (O'Connor, J., dissenting).

[146] *Id.*

and potential life justified the regulation.[147] She noted that the waiting period was a minor cost to impose to ensure that a woman's decision be "well-considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own."[148]

The dissent additionally reasoned that the Court should have abstained from holding the parental consent provision unconstitutional.[149] Justice O'Connor noted that abstention is proper "'where an unconstrued state statute is susceptible of a construction by the state judiciary "which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem." ' "[150] She noted that Ohio courts might construe the statute in such a way that it would meet constitutional standards. Accordingly the majority's adoption of an unconstitutional interpretation was an improper intrusion into state matters.[151]

Finally, Justice O'Connor disagreed with the majority's determination that the provision governing the disposal of fetal remains was void for vagueness,[152] noting that a similar provision had been upheld[153] in *Planned Parenthood Association v. Fitzpatrick*.[154] In *Fitzpatrick*, the state had indicated that the intent of its "humane disposal" provision was "to preclude the mindless dumping of aborted fetuses on to garbage piles."[155] Since Akron had insisted that the intent of its provision was the same as that upheld in *Fitzpatrick*, Justice O'Connor would have held this provision to be valid.[156]

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[147] *Id.*

[148] *Id.* Justice O'Connor found the majority's reliance on the sanctity of the physician-patient relationship difficult to understand. *Id.* at 2515-16 (O'Connor, J., dissenting). She apparently agreed with the circuit court's observation that "the doctors at Akron Center's clinic did little, if any, counseling before seeing the patient in the procedure room" and that Akron's ordinance merely took those realities into account. *Compare id. with* Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1217 (6th Cir. 1981) (Kennedy, J., concurring in part, dissenting in part), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

[149] *Akron Center*, 103 S. Ct. at 2513 (O'Connor, J., dissenting).

[150] *Id.* (quoting Bellotti v. Baird, 428 U.S. 132, 147 (1977) (quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959))). Justice Powell had refused to apply the abstention principle to the parental consent provision because the section created no procedures by which a state court interpretation of the provision could be made. *Id.* at 2498. *But see id.* at 2513-14 & n.12 (O'Connor, J., dissenting) (state juvenile court might have authority to make proper determinations).

[151] *See id.* at 2514 (O'Connor, J., dissenting).

[152] *Id.* at 2517 (O'Connor, J., dissenting).

[153] *Id.* at 2516 (O'Connor, J., dissenting).

[154] 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd mem. sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

[155] *Fitzpatrick*, 401 F. Supp. at 573.

[156] *Akron Center*, 103 S. Ct. at 2517 (O'Connor, J., dissenting).

Abortion has always been an emotionally charged and highly controversial issue,[157] and the Court has been called on repeatedly to weigh and balance the competing interests of a woman's right to exercise control over her own body and the state's authority to regulate the performance of abortions.[158] The majority's decision in *Akron Center* is a reasonable application of the principles established in *Wade* and its progeny. The Court appropriately has reaffirmed that a woman's qualified right to choose to terminate her pregnancy is constitutionally protected and that efforts by the state to infringe unreasonably upon the exercise of that right will be rebuffed.

Justice O'Connor's sharp criticism of the foundation on which Justice Powell based his holding warrants closer examination. Justice Powell adopted a limited interpretation of *Wade* by indicating that maternal health restrictions should not arbitrarily be applied to the entire second trimester, but that the state should limit the regulation's effect to that point in the trimester where its interest is served.[159] Justice O'Connor argued that the majority's reliance on medical technology to determine when the maternal health interest is advanced blurs the lines developed by *Wade* to guide the state's determination of permissible regulation.[160] As a result, Justice O'Connor contended that states are "no longer free to consider the second trimester as a unit and weigh the risks posed by all abortion procedures throughout that trimester."[161]

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[157] *See generally Wade*, 410 U.S. at 129-52 (discussing history of abortion); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Wardle, *The Gap Between Law and Moral Order: An Examination of The Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. REV. 811.

[158] *See supra* notes 70-96 and accompanying text. Emphasis on either of those two interests leads to rather intriguing arguments. For example, one issue which has not yet been judicially addressed is a woman's right to secure an abortion without consulting her physician (i.e., abortion on demand). Cane, *supra* note 58, at 431. The author observes that the woman's rights "are vouchsafed to her physician. The abortion decision is not hers, really. She now has the right to request an abortion; the physician, in what the Court perceives to be infinite wisdom, may comply with that request or refuse it." *Id.* At the other extreme, there is the state's potential authority to compel abortion in an effort to protect its legitimate interests. Swan, *Compulsory Abortion: Next Challenge to Liberated Women?*, 3 OHIO N.U.L. REV. 152 (1975). The author reasoned:

> If the state has the right to intervene in a mother's body for state interests . . . and if a valid health definition includes psychological and familial health . . . the state seems potentially empowered to demand abortion of sickly women threatened by childbirth. The state may possibly be empowered to demand abortion of even physically strong mothers for the greater welfare of society. . . .

Id. at 158.

[159] *See Akron Center*, 103 S. Ct. at 2495.

[160] *Id.* at 2506 (O'Connor, J., dissenting).

[161] *Id.* (footnote omitted).

It is clear, however, that the "lines" drawn in *Wade* were never as precise as Justice O'Connor implied. Justice Blackman remarked in *Wade* that the state was free to regulate second trimester abortions "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[162] Two subsequent Supreme Court decisions, *Danforth* and *Bolton*, asserted that states could not apply restrictions to the performance of post-first trimester abortions under the guise of protecting maternal health without a sufficient showing that the statutes were narrowly drawn to support that interest.[163] Accordingly, Justice O'Connor should not have been surprised at the Court's willingness to require that states apply these regulations only to those segments of the trimester in which their interest is advanced.[164]

Whether the guidelines for permissible regulation drawn in *Wade* were inherently flexible or have been softened through subsequent interpretations, it is now clear that these guidelines do not constitute a precise mandate. The relevant inquiry, therefore, goes to the effect of their flexibility. Justice O'Connor argued that it is now impossible for a state to determine what constitutes a legitimate assertion of its compelling interest without thoroughly investigating current medical literature.[165] She accurately stated the impact of *Akron Center*. The "blurring" of the lines drawn in *Wade* is the result of a judicial readiness to rely on the recommendations of leading medical authorities and to effectuate necessary modification. But that willingness to change does not unduly burden states' rights. *Akron Center*'s reaffirmation of *Wade* not only includes the constitutional protection of a woman's right to choose to abort, but, because of Justice Powell's refusal to retreat from the trimester framework, it also assures the continued validity of a state's compelling interest in maternal health.[166] Justice O'Connor should not have looked upon the majority's position as an intrusion upon state power, but rather as a clarification of the means by which the state's interest can be asserted.

That is not to say that the *Wade* framework is the perfect vehicle for addressing the validity of abortion legislation. Justice O'Connor's

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[162] *See Wade*, 410 U.S. at 163.

[163] *See supra* notes 78-81 and accompanying text (discussing *Danforth*); *supra* notes 66-69 and accompanying text (discussing *Bolton*).

[164] Additionally, the difficulties that courts have had in applying *Wade*'s second trimester framework with any consistency, *see* Note, *supra* note 3, at 998-99, indicate that the lines could not have been as clearly drawn prior to *Akron Center* as Justice O'Connor apparently thinks.

[165] *See Akron Center*, 103 S. Ct. at 2506 (O'Connor, J., dissenting).

[166] *See id.* at 2495.

observation that *Wade* is on a "collision course" with itself is valid. Technological improvements, in all probability, will advance, on one hand, the point at which maternal health regulation will be upheld, and push back, on the other hand, the point of viability, at which the state may proscribe abortions altogether. This potential problem underscores the fact that although both women's and states' interests are presently protected, the means by which they are evaluated may have to change to accommodate future medical advancements.[167]

Even though there may be difficulties with continued application of the *Wade* framework, Justice O'Connor's proposed alternative, the undue burden test, is unsatisfactory in terms of affording judicial protection to a woman's fundamental right. It is evident from her opinion that regulations falling short of a complete prohibition of abortion would not constitute an undue burden.[168] Justice O'Connor is apparently not convinced that a woman's right to choose to terminate her pregnancy is fundamental. She argues that *Wade*'s stipulation that that right is not absolute leads to the conclusion that it is something less.[169] Justice O'Connor noted that "[t]he 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard."[170] Under this two-step approach, the plaintiff must first convince a court that the burden imposed is substantial. If she is unsuccessful, the state need only justify its regulation on a rational basis standard.[171]

The support for the application of an undue burden analysis to abortion legislation is derived substantially from abortion funding cases.[172] Regulations restricting the funding of abortions were held not

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[167] *See generally* Comment, *supra* note 62, at 1215 (focus should not be on fetal viability, but rather on fetal brain waves as beginning of human life); Comment, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, 27 UCLA L. REV. 1340, 1342 (1980) (suggests Supreme Court limit definition of viability to exclude survival with artificial aid and that state legislatures "prescribe objective scientific criteria" by which viability determination can be made consistent with Court's revised definition).

[168] This view is in accordance with that expressed by Justice Powell. *See Akron Center*, 103 S. Ct. at 2487 n.1. Justice Powell also asserts that, under the dissent's approach, even if a regulation is found to be unduly burdensome, it would be upheld as appropriate because of the state's compelling interest in the protection of fetal life. *Id.*

[169] *See id.* at 2509-11 (O'Connor, J., dissenting).

[170] *Id.* at 2510 (O'Connor, J., dissenting).

[171] *See generally* Note, *supra* note 3, at 1008-14 (discussing and criticizing two-step approach).

[172] *See Akron Center*, 103 S. Ct. at 2509 (O'Connor, J., dissenting) (citing Maher v. Roe, 432 U.S. 464, 473-74 (1977)); Wynn v. Scott, 449 F. Supp. 1302, 1307-08 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979). *But see Akron Center*, 103 S. Ct. at 2509 &

to infringe upon a fundamental right because the woman's access to abortion is neither helped nor hindered by the financial restraints.[173] The Court therefore concluded that the right to abortion funding is subject to less demanding scrutiny than a fundamental right.[174] In contrast, the challenged provisions in *Akron Center* clearly hinder or severely restrict a woman's access to an abortion. Justice O'Connor incorrectly argues that the lessened scrutiny applied in the abortion funding cases should be applied to Akron's legislation.[175] Justice Powell properly determined that the legislative interference affected a fundamental right and was therefore subject to strict scrutiny.

There is little dispute that a regulation which imposes an absolute restriction on abortions cannot withstand constitutional scrutiny under either the compelling state interest or the undue burden test. The analytical framework becomes pivotal when the regulation is something less than a complete prohibition. Depending upon the analysis selected and the Court's perception of whether the right infringed is fundamental, states would have greater or lesser freedom to draft legislation designed to protect their interests. There is a corresponding decrease or increase in the freedom with which pregnant women can exercise their constitutional rights. In *Akron Center*, the majority has reasserted its belief that a woman's right to terminate her pregnancy is worth the utmost protection the judiciary can provide.

Carla J. Crusius

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n.8 (O'Connor, J., dissenting) (citing several Supreme Court decisions that did not involve abortion funding which utilized language "undue burden").

[173] *See* Harris v. McRae, 448 U.S. 297, 315-18 (1980); Maher v. Roe, 432 U.S. 464, 474-76 (1977).

[174] *See* Harris v. McRae, 448 U.S. 297, 317-18 (1980); Maher v. Roe, 432 U.S. 464, 478 (1977).

[175] *Cf.* Note, *supra* note 3, at 1011-12 (criticizing undue burden test).