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Abortion: From Roe to Akron, Changing Standards of Analysis

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COMMENT

ABORTION: FROM *ROE* TO *AKRON*, CHANGING STANDARDS OF ANALYSIS

In 1973 the United States Supreme Court articulated its perception of the fundamental constitutional right of a woman to choose to have an abortion.[1] Throughout the decade that followed, two intertwined factors have been of paramount concern in the abortion decisions: the health of the mother and the protection of potential life. Statutory provisions aimed at protecting these concerns have come before the Court with varying results. Although legislation interjecting third parties into the decisionmaking process has been consistently struck down,[2] attempts to regulate the effectuation of the abortion decision have met mixed results.[3] The Court has held unconstitutional some legislation for minor variations in syntax,[4] while other times markedly narrowing or broadening the application of a

1. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court first confronted a constitutional challenge to state abortion statutes. Previously, the Court had used the term privacy to cover a variety of values in personal, familial, marital, and sexual matters. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of habitual criminals); Meyer v. Nebraska, 262 U.S. 390 (1923) (child rearing and education). These cases had established privacy as a constitutional value, which the Court in *Roe* interpreted to cover the abortion right. *Roe*, 410 U.S. at 164-66. For a description of the evolution of the privacy right, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 921-34 (1978).

2. The Court has determined that the nature of the abortion right precludes the state from imposing any third party in the decisionmaking process. Although the Court acknowledges that some third parties have rights concerning the unborn child, the Court's analysis requires the state to deny those parties their rights. For example, a state may not require that a husband exercise his rights concerning the abortion or birth of his child. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

3. *See, e.g., infra* notes 50-68 and accompanying text.

4. *See* Colautti v. Franklin, 439 U.S. 379 (1979). At issue in *Colautti* was a Pennsylvania abortion statute that required the attending physician to preserve the life of the fetus with the same care he would use if the fetus had been intended to be born alive. This duty of care was imposed if the physician reached the conclusion that the fetus "may be viable." The Court concluded that "may be viable" was intended to expand the concept of viability set forth in *Roe*. *Id.* at 393. The Court has consistently held that the determination of fetal viability is strictly a matter of the attending physician's medical judgment. *Danforth*, 428 U.S. at 64; Doe v. Bolton, 410 U.S. 179, 191 (1973). *Colautti* held that the concept of viability may not be defined by the state and that neither the judiciary nor the state may single out any particular factor as dispositive in determining when "potential life" begins. 439 U.S. at 397. Furthermore, the Court held that an abortion statute that fails to afford the

law.[5] Standards of review have ranged from strict scrutiny to rational basis.[6] Consequently, the nature of the right has remained amorphous[7] and has been interpreted in different ways.[8] The Court's uncertainty in this area has left the states hard-pressed to legislate in furtherance of their legitimate interests.

The persistent theme throughout the abortion decisions is the characterization of abortion as a medical procedure.[9] Central to this theme is the constitutional protection afforded a woman's ability to make certain deci-

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attending physician broad latitude in determining viability and subjects him to criminal liability is unconstitutional as overly vague. *Id.* at 394, 401.

In *Roe*, the Court described the concept of viability in terms of that point in time when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. This is a compelling point because the fetus "has the capability of meaningful life . . . ." *Id.* at 163.

Commentators have criticized this concept because it is difficult to determine from a medical standpoint. *See, e.g.*, Comment, *Towards a Practical Implementation of the Abortion Decision: The Interests of the Physician, the Woman and the Fetus*, 25 DE PAUL L. REV. 676, 691 (1976).

5. H.L. v. Matheson, 450 U.S. 398 (1981) (construing a statute requiring notification of a minor's parents to apply only to unemancipated, immature minors, living at home and making no showing as to maturity); *Doe*, 410 U.S. at 192 (interpreting health to encompass physical, mental and emotional aspects).

6. *See, e.g., Roe*, 410 U.S. at 156-57 (concerning absolute prohibition of abortions); Maher v. Roe, 432 U.S. 464 (1977) (a state is not obligated to fund costs incident to obtaining an abortion even though it funds costs incident to childbirth; such a statute has a rational basis in the state's legitimate interests in fostering normal childbirth); *Matheson*, 450 U.S. at 413 (parental notification statute rationally related to a legitimate state end); *see also* Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to the Fundamental-Rights Analysis and to the Welfare Rights Thesis*, 81 COLUM. L. REV. 721 (1981) [hereinafter referred to as *Beyond the Limits*] (arguing that the abortion right must be impinged upon by the state before state legislation is subject to strict scrutiny).

7. *See generally* Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 MICH. L. REV. 1688 (1979); Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L.Q. 313, 316-17, 342 (1981); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980); Uddo, *Victory at a Snail's Pace*, 6 HUMAN LIFE REV. 27 (1980); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975).

8. Confusion as to the nature of the right is not limited to scholars; the justices themselves provide several widely differing interpretations. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 327-28 (1980) (White, J., concurring) (recognizing a right to be free from unreasonable official interference with private choice); *id.* at 314 (Stewart, J.) (the right protects women from unduly burdensome interference with the right); *Maher*, 432 U.S. at 481 (Burger, C.J., concurring) (*Roe v. Wade* forbids an absolute barrier to the freedom of choice); *id.* (Brennan, J., dissenting) (*Roe* creates an area of privacy invulnerable to the state intrusion with the protected right); Beal v. Doe, 432 U.S. 438 (1977) (Marshall, J., dissenting) (any state interest is wholly insufficient to justify state interference with the right).

9. *See infra* notes 37-60 and accompanying text.

sions affecting her health.[10] The woman's rights, however, are not absolute and must be considered against the interests that the state has in the abortion decision.[11] Despite broad rhetoric to the contrary, the Court has resolved the conflicts between a woman's rights and the state's interest through the application of a balancing test.[12] Recently, the Supreme Court addressed the issue of a state's ability to regulate the abortion procedure in *City of Akron v. Akron Center for Reproductive Health, Inc.*[13] The Court held that direct state interference in the physician-patient relationship is outside the ambit of state authority,[14] which is limited to legislation that comports with "accepted medical practice."[15] The Court's decision marks an abandonment of a balancing approach and adoption of limitations on state authority set by the medical community.

In *Akron* the Supreme Court confronted a municipal ordinance regulating various aspects of the abortion procedure.[16] This ordinance required that the attending physician make certain disclosures to his patient concerning the nature and consequences of an abortion in order that her consent to the operation be fully informed.[17] The *Akron* provisions also required that the abortion be performed no sooner than twenty-four hours after the woman signed the consent form.[18] In addition, the ordinance required that all post-first trimester abortions be performed in a hospital rather than a clinic.[19] Suit was brought challenging the ordinance as an unconstitutional infringement upon a woman's right to choose to have an abortion. The district court struck down certain detailed aspects of the

10. *See Beyond the Limits, supra* note 6, at 743 (reasoning that, under *Roe*, the state may never subordinate its interest in maternal health to its interest in fetal life).

11. Roe v. Wade, 410 U.S. at 154; *see infra* note 36.

12. 26 DRAKE L. REV. 716, 718 (1977); *see infra* note 30 and accompanying text; *see also infra* notes 182-85 and accompanying text.

13. 103 S. Ct. 2481 (1983), *aff'g in part, rev'g in part*, 651 F.2d 1198 (6th Cir. 1981).

14. 103 S. Ct. at 2486.

15. *Id.*

16. *See id.* at 2488-89. The Court confronted five provisions, two of which are not discussed in the text of this comment. Section 1870.05 required that a minor woman's parents be notified of the pending abortion. The Court held this provision invalid because it failed to expressly create an alternative consent procedure whereby the minor would be guaranteed an effective opportunity to obtain an abortion. However, in *Akron*'s companion case, Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517 (1983), the Court upheld a parental consent requirement that provided an express, alternative means of obtaining consent. *Akron* also struck down § 1870.16, providing for the humane and sanitary disposition of fetal remains, holding this provision void for vagueness. 103 S. Ct. at 2503-04.

17. *Id.* at 4769 n.5. The text of the informed consent provision is set forth *infra* note 113.

18. The language of the waiting period provision is set forth *infra* note 115.

19. The language of the hospitalization requirement is set forth *infra* note 112.

disclosure requirement, but upheld the remaining provisions.[20] The United States Court of Appeals for the Sixth Circuit affirmed with respect to the detailed disclosures, but with the exception of the hospitalization requirement, invalidated the remaining provisions. The court held that the invalid provisions encumbered the woman's right of privacy and were not supported by a compelling state interest.[21]

The Supreme Court affirmed in part and reversed in part, holding all of the provisions unconstitutional.[22] The majority opinion, authored by Justice Powell, held that restrictive state regulation of a woman's right to secure an abortion is subject to strict scrutiny and must be justified by a compelling state interest.[23] The Court further held that such legislation must be narrowly drawn to protect only that interest.

Justice Powell prefaced the Court's opinion with an expression of respect for the doctrine of *stare decisis* and asserted that the majority was adhering to it in analyzing the issues of the case.[24] Despite the Court's purported adherence to *stare decisis*, the *Akron* decision denotes a substantial departure from the precedent developed in prior abortion cases and related privacy decisions. Although employing the broad rhetoric of the landmark abortion case of *Roe v. Wade*, the Court substantially redefines both the application of the analysis used in privacy jurisprudence and the

20. 479 F. Supp. 1172, 1203-06 (N.D. Ohio 1979). The district court stated that although the state could constitutionally require counseling of abortion patients by either a qualified counselor or the attending physician, the state cannot specify what information must be given each patient. That determination, the court held, was left to the discretion of the counselor. Otherwise, the physician would be placed in an undesirable and uncomfortable "straight jacket." *Id.* at 1203.

21. 651 F.2d 1198 (6th Cir. 1981). The court of appeals upheld the hospitalization requirement, citing the Supreme Court's affirmance of a three-judge district court decision upholding a provision indentical to the *Akron* requirement. The court stated that "[t]he Supreme Court has now had an opportunity to retreat from the 'bright line' drawn in *Roe v. Wade* and has declined to do so." *Id.* at 1210. The case cited was Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd sub nom.* Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 931 (1981). *See infra* note 129 and accompanying text.

22. 103 S. Ct. at 2504.

23. *Id.*

24. Justice Powell stated that "the doctrine of *stare decisis* while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade." *Id. But see* Justice O'Connor's dissent, where she argued that although the Court should be mindful of the desirability of adhering to precedent, the Court has never felt constrained by it. This has been so, she argued, because "[i]n constitutional questions, when correction depends on amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Id.* at 2508 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

standard of reasonableness in order to achieve a desired result. As troubling as the majority's reasoning is, the practical implications of the *Akron* decision are even more problematic.

This comment will examine the validity of the *Akron* Court's claimed adherence to *stare decisis* in applying the principles of *Roe v. Wade*. Part I will examine the origins of the abortion right in *Roe* and then trace its development through *Roe*'s immediate progeny. Part II will analyze the *Akron* decision. Part III will formulate a picture of the right that *Akron* purports to protect and will compare it with the right as previously developed, concluding that the two rights are wholly incompatible.

I. LAYING THE GROUNDWORK

A. The Roe *Framework*

In the historic case of *Roe v. Wade*,[25] the United States Supreme Court first confronted the mutually antagonistic rights of the individual and interests of the state as they pertain to the abortion decision. In *Roe*, a Texas statute proscribed abortions for any purpose other than saving the life of the mother. A pregnant single woman instituted a class action challenging the constitutionality of the legislation. A three-judge district court struck down the statute, holding that it was overbroad and infringed upon the woman's right of privacy.[26]

On direct appeal the Supreme Court affirmed, holding the right of privacy sufficiently broad to encompass the decision by a woman whether or not to end her pregnancy by means of an abortion.[27] Writing for the majority, Justice Blackmun cautioned that the right was a limited one to be considered against important, countervailing state interests.[28] The majority viewed the woman's decision as a fundamental right. The Court therefore applied the principle that only a compelling state interest, pursued through narrowly tailored legislation, could survive the strict scrutiny invoked to assess a statute's constitutionality.[29]

Texas argued that its interest in preserving fetal life provided ample justification to uphold its restrictive legislation. The Court rejected this argu-

25. 410 U.S. 113 (1973). In *Roe*, three rights were asserted: (1) the mother's; (2) the state's; and (3) the child's. Although the Court squarely confronted the first two, it avoided any discussion of the rights of the unborn by classifying it as a "potential life." *Roe*, 410 U.S. at 162. For a discussion of the impact of classifying the fetus as potential life, see *infra* note 33.

26. 314 F. Supp. 1217 (N.D. Tex. 1970).

27. 410 U.S. at 153.

28. *Id.* at 155.

29. *Id.*

ment and proceeded to construct its now-famous analytical framework, expressly intended to balance the state's interest against the privacy right of the woman.[30] Justice Blackmun articulated two important state interests: the preservation of maternal health and the protection of fetal life. The Court's framework divided pregnancy into three trimesters. During the first trimester no compelling state interest was considered sufficient; therefore, the state had no authority to regulate abortions.[31] At the outset of the second trimester the state's interest in maternal health was determined to be compelling, and thus the state could regulate the procedure as long as such regulation was reasonably related to maternal health.[32] At the beginning of the third trimester, the point at which the fetus was presumably viable, the state had a compelling justification for regulation—protecting "potential" human life.[33] At this latter stage of pregnancy the state could regulate abortions to the extent of proscribing them, except where necessary to preserve maternal health.[34]

Under this framework, the Court determined that the Texas statute's absolute prohibition of abortion swept too broadly.[35] The Court noted that first trimester abortion was medically safer than the alternative of

30. The Court concluded that its analysis was "consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." *Id.* at 165.

31. *Id.* at 163.

32. The Court provided examples of regulations it considered permissible during the second trimester, including licensing requirements: as to the qualifications of the person performing the abortion; as to the licensing of the facility in which the abortion would be performed; and as to the nature of the facility in which the procedure would take place. *Id.*

33. While refusing to acknowledge the fetus as a human life, the Court adopted the term "potential life" to describe the status of the fetus. The Court disposed of the argument that fetal life constituted human life by an exercise in inverse logic. The majority stated that:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id. at 159.

As one scholar noted, the Court's classification of the fetus enabled it to define the conflicting rights and interests in terms of the state and the woman, leaving the rights of the unborn out of the analysis. This classification of life as "potential" suggested that these interests were somehow less than real. Relying upon "the concept of 'potential life' to define the existence of the prenatal human organism, and by assuming that an individual's life must be 'meaningful' before there is logical justification for protecting it, the Court was able to compromise the interest of the unborn by defining away their rights." *See* Destro, *supra* note 7, at 1253-54.

34. 410 U.S. at 163-64.

35. *Id.* at 164.

childbirth.[36] The Court concluded that the abortion procedure was in all aspects a medical one, the responsibility for which lies with the physician.[37]

In *Roe*'s companion case, *Doe v. Bolton*,[38] the Supreme Court confronted a Georgia criminal statute restricting abortions to those deemed necessary by the physician and imposing procedural requirements on their performance. These requirements mandated that all abortions be performed in hospitals licensed by the state and accredited by the Joint Commission on Accreditation of Hospitals; that the performance of the abortion be sanctioned by the hospital's abortion committee; and that two doctors concur in the attending physician's judgment as to the necessity of the abortion.[39] The district court found these requirements unconstitutional because they improperly restricted the woman's right to have an abortion.[40]

The Supreme Court modified and affirmed, construing the finding of necessity to include the physician's assessment of the pregnant woman's health. The Court defined health in terms of physical, emotional, psychological and familial factors, including considerations of the woman's age.[41] Thus interpreted, the Court upheld the necessity requirement but invalidated the procedural provisions.

The *Doe* Court held the accreditation provision unconstitutional, noting that no other type of surgery was limited to similarly accredited hospitals and that the provision had no particular concern with abortion as a medical procedure.[42] Although the majority acknowledged that some lower courts had held similar accreditation requirements invalid as an overbroad infringement of a fundamental right, Justice Blackmun avoided this rationale and employed a less stringent standard. The Court held the provision unconstitutional because it was not based upon differences reasonably related to the statute's purpose.[43] In addition, the majority struck down

36. The Court noted that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure *maximum safety* for the patient. This interest obviously extends at least to the performing physician and his staff . . . ." *Id.* at 150 (emphasis added).

37. *Id.* at 166. According to the Court, where a particular physician abuses the privilege of exercising "proper medical judgment, the usual remedies, judicial and intra-professional, are available." *Id.*

38. 410 U.S. 179 (1973).

39. *Id.* at 183-84.

40. 319 F. Supp. 1048, 1056 (N.D. Ga. 1970), *modified and aff'd*, 410 U.S. 179 (1973).

41. 410 U.S. at 192.

42. *Id.* at 193.

43. *Id.* at 194. The thrust of the Court's assertion that the provision was unconstitutional centered on the failure of the state to require comparable accreditation in other medi-

the hospitalization requirement because it applied to the first trimester. The *Doe* Court held that the state is required to demonstrate that such a requirement furthers its legitimate health interests.[44]

The Court then considered the committee approval and two-doctor concurrence requirements. It invalidated both provisions because of their substantial impairment of the woman's right to receive medical care according to her physician's best medical judgment.[45] The *Doe* Court rejected contentions that the statutory delay was unconstitutional. Rather, the Court found the consent requirements unconstitutional as they intruded upon the physician-patient relationship.[46] The Court reasoned that the interposition of a third party in the decisionmaking process was unnecessary. Justice Blackmun concluded that such impositions restricted the rights of the woman and her doctor, while serving no rational purpose concerned with the patient's health.[47] Furthermore, he indicated that the statute intruded upon a protected right of the doctor.[48]

Roe and *Doe* enunciated broad restrictions upon state powers to regulate abortions. These restrictions, however, were announced against a backdrop of expansive state legislation. Consequently, the majority opinions left a great deal of uncertainty with respect to the application of the analysis and the nature of the physician-patient relationship.[49]

B. The Application of the Framework: Danforth *and* Whalen

Three years later the Supreme Court refined the contours of *Roe* in

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cal procedures, suggesting that had the state required similar accreditation for other medical procedures, the requirement would have been upheld. This intimation was later made explicit in *Danforth. See infra* note 61. The Court's approach in this respect is in keeping with *Roe*'s definition of the abortion procedure as a medical one, since, under this approach, the state is free to regulate it in the same way it regulates other comparable medical procedures.

44. *Doe*, 410 U.S. at 195.

45. The Court applied varying terms in assessing the degree of interference, including: "unduly restrictive," "substantially limited," and "unduly infringes." *Id.* at 197-99.

46. Appellants had argued that the procedures required a discontinuance of the abortion process by a median time of fifteen days. The Court rejected this argument, stating that "[i]f higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system." *Id.* at 198-99.

47. In striking down the two-doctor concurrence, the Court again emphasized that no other voluntary medical or surgical procedure was subjected to this requirement. *Id.* at 199-200; *see supra* note 43 and accompanying text.

48. 410 U.S. at 197-99.

49. *See, e.g.*, Georgius, *Roe v. Wade: What Rights the Biological Father?*, 1 HASTINGS CONST. L.Q. 251 (1974) (attempting to identify the prospective father's rights); Comment, *An Analysis of the Constitutionality of the Nebraska Abortion Statute*, 7 CREIGHTON L. REV. 27 (1973).

Planned Parenthood of Central Missouri v. Danforth.[50] In *Danforth*, the Court analyzed the constitutionality of abortion legislation enacted by the State of Missouri. The statute required that a married woman obtain her husband's consent during the first trimester, that a minor woman obtain parental consent during the same period, that abortions during the second trimester be performed by a method other than saline amniocentesis, that facilities performing abortions keep certain records on the abortions that they performed, and that a woman attest in writing that her consent was freely given and was not the result of coercion.[51] Two physicians and a nonprofit corporation operating an abortion clinic challenged the constitutionality of the statute. A three-judge district court held all the provisions constitutional.[52]

On direct appeal, the Supreme Court reversed with respect to the spousal and parental consent provisions and the proscription of saline amniocentesis, holding these requirements unconstitutional. The Court affirmed, however, the recordkeeping and informed consent requirements, holding that they were reasonably related to maternal health. Writing for the majority, Justice Blackmun held that a state may not require the consent of either a married woman's spouse or a minor woman's parents. Missouri had propounded a legitimate interest in strengthening the marital relationship on the one hand and the protection of the welfare of minors on the other. The Court acknowledged the state's strong and legitimate interests, but reasoned that these interests were outweighed by the impact of an unwanted pregnancy.[53] It indicated that the state possessed more expansive authority to regulate the conduct of children, a discretion the Court observed was long recognized.[54] Nevertheless, the Court concluded that in neither case was the state justified in imposing what it described as an "absolute, and possibly arbitrary, veto" on the woman's right to decide.[55]

The Court also invalidated the prohibition of the saline amniocentesis

50. 428 U.S. 52 (1976).

51. Saline amniocentesis was described by the Court as a method or technique of abortion "whereby the amniotic fluid is withdrawn and 'a saline or other fluid' is inserted into the amniotic sac." *Id.* at 76. This procedure then induces labor and the abortion occurs in the form of a miscarriage.

52. Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975), *aff'd and rev'd in part*, 428 U.S. 52 (1976).

53. 428 U.S. at 71, 75.

54. "[A] State's permitting a child to obtain an abortion without the counsel of an adult 'who has responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors.' " *Id.* at 72-73 (citing Brief for Appellee Danforth at 44).

55. *Danforth*, 428 U.S. at 74.

abortion technique, framing its analysis in terms of whether or not the restriction reasonably related to maternal health.[56] It assessed four significant considerations: first, the widespread use of the proscribed method; second, the limited availability of an allegedly safer alternative method; third, the apparent prohibition of that alternative method under the statute; and, fourth, the fact that the remaining techniques were more dangerous to the woman's health than the one proscribed.[57] After evaluating these factors, the majority determined that the provision was unreasonable as a means of protecting maternal health because it both required abortion by a more dangerous technique than the one proscribed and had the effect of inhibiting the bulk of post-first trimester abortions.[58]

The *Danforth* Court demonstrated, however, that the sanctity of the first trimester was not so absolute as *Roe* seemed to suggest. The Court upheld the recordkeeping requirements despite the fact that they failed to exclude the first trimester. Justice Blackmun's majority opinion deemed recordkeeping reasonably related to the protection of maternal health and concluded that it was not legally significant in its impact on the abortion decision.[59] Blackmun also upheld the requirement that a woman certify in writing that her consent was informed and freely given, reasoning that the abortion decision was both an important and stressful one and should be made with full awareness of its nature and consequences.[60] The Court acknowledged that it was within the state's power to ensure that the consent was informed and concluded that because a state may require such consent in other surgical procedures there was no constitutional defect in requiring it for abortions.[61]

Roe, Doe and *Danforth* laid the groundwork for abortion jurisprudence. *Roe* and *Doe* construct the basic analytical framework and identify particularly sensitive areas of the privacy right in the abortion context. *Danforth* demonstrates the scope of the framework and more clearly articulates the

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56. *Id.* at 76.

57. *Id.* at 77-78.

58. *Id.* at 79.

59. *Id.* at 81.

60. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent.

Id. at 67.

61. "We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it for only some types of surgery . . . or, for that matter, for abortions." *Id.*

reasoning behind the Court's varying dispositions of statutory provisions. Under *Roe*, the state is absolutely prohibited from interfering with the abortion decision or its effectuation. *Danforth* holds that certain regulations affecting the first trimester are permissible. The confusion surrounding the state's authority in this area arises from the *Danforth* Court's application of the reasonableness standard, instead of strict scrutiny, in upholding the informed consent and recordkeeping requirements. The concept of reasonableness in abortion regulation, then, becomes crucial in attempting to reconcile these two opinions. In order to ascertain what constitutes reasonable regulation of abortions, it is first necessary to define the nature of the right involved.

The central focus of the early abortion cases was the right of the woman to choose whether or not to terminate her pregnancy.[62] This concern is manifest in the refusal of the Court to permit either the state or third parties to possess a potential veto on that decision. *Roe*'s primary objection to such interference was the adverse impact it placed on the woman's health.[63] Even in those instances where the protection of fetal life constitutes a compelling state interest, the state may not forbid abortions necessary to preserve the mother's health.[64] Health considerations provide the underlying rationale for the holding in *Roe* that the state may not proscribe abortions during the first trimester, the time during which mortality rates for abortions are below those of normal childbirth.[65] *Doe* made clear, however, that the concept of health applied by the Court was broader than mere physical health. Instead, the Court held that a physician may consider the psychological and emotional factors as well.[66]

It is the distinction between the different aspects of health that reconciles the conflicting holdings in *Roe* and *Danforth* concerning the state's ability to regulate the abortion decision in the first trimester. The *Roe* Court was concerned with the woman's freedom to make the decision. The rationale offered by the Court in forbidding first trimester regulation was the physical detriment imposed on the woman if denied the opportunity to secure an abortion.[67] The *Danforth* decision, however, looks to the emotional and psychological impact of the decision on the woman. The *Danforth* Court, therefore, permits greater latitude in state action where the state is

62. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 (1978) (*Roe* does not favor abortion; rather it prefers leaving the woman free to decide).

63. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

64. *Id.* at 164.

65. *Id.* at 149.

66. *See Doe*, 410 U.S. at 192.

67. *See Roe*, 410 U.S. at 153.

concerned with the quality of the decision. In protecting this aspect of the decision, the *Danforth* majority recognized that the state's interest in a woman's welfare will support regulations which, at a minimum, treat abortions in the same manner as other comparable medical procedures.[68]

The *Danforth* informed consent provision was an incident of direct state regulation of the physician-patient relationship. Thus *Danforth* marks a retreat from the language in *Doe* that purported to recognize an independent right of the physician to practice medicine. Shortly after *Danforth*, the Court expressly denied the existence of such a right in *Whalen v. Roe*.[69]

In *Whalen v. Roe*, the Supreme Court confronted a challenge to a New York statute requiring a physician dispensing dangerous drugs to complete, in triplicate, official forms identifying the prescribing physician, the name, age, and address of the patient, as well as the drug and dosage prescribed.[70] Under the statute the required information was then stored for a period of five years in governmental computers.

Suit was brought on behalf of a group of patients and physicians, challenging the application of the act as an infringement on their constitutionally protected right of privacy. A three-judge district court enjoined the application of the challenged statute. It held that as a zone of privacy, the doctor-patient relationship is accorded constitutional protection. The district court further held that the statute had a "needlessly broad sweep."[71]

The Supreme Court reversed, holding that the statute did not invade any protected right or liberty protected by the fourteenth amendment.[72] Addressing the assertions of the statute's challengers that it invaded a protected zone of privacy, the Court stated that the privacy right encompasses two distinct interests. One is an individual's interest in independently making certain types of important decisions and the other is an interest in avoiding disclosure of personal matters.[73] The group of patients challenging the statute argued that both of these interests would be impaired under its provisions. The Court rejected the first argument, noting that there was

68. *Danforth*, 428 U.S. at 65-67.

69. 429 U.S. 589 (1977).

70. *Id.* at 593. *Whalen* demonstrated that the Court was unwilling to recognize any independent right in physicians to practice medicine. Indeed, the Court recognized that the state had a legitimate concern in preventing physicians from overprescribing certain drugs or giving one patient multiple prescriptions. *Id.* at 592. Thus, *Whalen* stands in stark contrast to *Akron*'s presumption that physicians are competent, conscientious and ethical. *See Akron*, 103 S. Ct. at 2502 n.39.

71. Roe v. Ingraham, 403 F. Supp. 931, 937 (S.D.N.Y. 1975), *rev'd sub nom.* Whalen v. Roe, 429 U.S. 589 (1977).

72. *Whalen*, 429 U.S. at 603-04.

73. *Id.* at 599-600.

no support in the record to provide an assumption that the statute would be improperly administered. Instead, the Court indicated that there were adequate safeguards to protect the integrity of the required information.[74]

The Court also rejected the patients' contention that the recordkeeping requirement would deter some individuals from seeking adequate information. The Court reasoned that access to needed drugs was not deprived under the statute, nor was it conditioned on the consent of any third party.[75]

The physicians argued separately that the statute constituted unwarranted interference with their right to practice medicine.[76] In support of this right they relied on the opinion in *Doe*, where the Court indicated approval of such a right. The Court determined, however, that disposition of the patients' claims likewise disposed of that of the doctor. The Court reasoned that the physician's right was merely derivative and, therefore, no stronger than the patient's right. In a footnote, the Court explained that the right protected in *Doe* was that of the woman. The restrictions were invalid because they burdened the woman's right to decide and to rely on her physician in making that decision. The Court stated that if the regulations "had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution."[77]

Consistent with *Danforth*, *Whalen* recognizes that the physician's role in the abortion procedure, as in other medical procedures, does not constitute an independent right. Rather, the extent of constitutional protection afforded the physician is purely derivative. It does not exist, therefore, above or beyond that necessary to ensure the woman's freedom to exercise her right. More importantly, the state is justified in intervening and regulating the relationship so as to protect its legitimate interests.

C. Ensuring a Quality Decision: Bellotti *and* Matheson

In *Bellotti v. Baird* (*Bellotti I*),[78] the Supreme Court addressed the question of what kind of consent an unmarried minor woman could be required to obtain prior to an abortion. A 1974 Massachusetts statute required women under eighteen years of age to obtain the consent of both

74. *Id.* at 601.
75. *Id.* at 603; *accord* H.L. v. Matheson, 450 U.S. 398 (1981).
76. 429 U.S. at 604.
77. *Id.* at 604 n.33.
78. 428 U.S. 132 (1976). *Bellotti I* was a companion case to *Danforth*.

parents before obtaining an abortion.[79] Suit was brought challenging the statute's constitutionality on due process and equal protection grounds. A three-judge district court held the statute unconstitutionally created a parental veto on the abortion decision of a minor woman.[80] In the Supreme Court the statute's challengers raised an additional argument that the consent requirement impermissibly distinguished between minors seeking abortions and those seeking other medical procedures.[81]

The Supreme Court vacated and remanded, determining abstention appropriate because the statute was unconstrued by the state judiciary and, therefore, susceptible to a construction that would render it constitutional.[82] But the Court did not avoid all discussion of abortion legislation. The majority focused on the appropriate analysis to apply in assessing the constitutionality of abortion legislation. The Court stated that the central issue in *Danforth* was whether or not the statute in question unduly burdened a woman's right to seek an abortion.[83] In making this assessment the Court concluded that the constitutionality of distinctions made between abortions and other medical procedures will depend upon the degree of the distinction and the justification for it.[84] In short, the Court expressly adopted a balancing approach to the abortion analysis.

Bellotti (Bellotti II)[85] came before the Court again in 1979, after the district court had certified several questions to the Supreme Judicial Court of Massachusetts.[86] As construed by that court the statute did not permit minors, whether mature or immature, to obtain judicial consent in place of parental. Rather, the Massachusetts court held that parental consent was a prerequisite for every nonemergency abortion performed on a minor. Additionally, the court read the statute to require notice of any judicial consent proceeding brought by a minor. Hence, the court allowed that either the minor's parents or a court could override a judicial determination that the abortion is in the child's best interest.[87] Thus interpreted, a three-judge district court held the statute unconstitutional.[88]

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79. *Id.* at 134-35.
80. Baird v. Bellotti, 393 F. Supp. 847, 857 (D. Mass. 1975).
81. 428 U.S. at 149.
82. *Id.* at 146.
83. *Id.* at 147.
84. *Id.* at 150.
85. 443 U.S. 622 (1979).
86. Certification is a "[p]rocedure by which a federal court abstains from deciding a state law question until the highest court of the state has had an opportunity to rule on the question so certified by the federal court." BLACK'S LAW DICTIONARY 206 (rev. 5th ed. 1979).
87. Baird v. Attorney General, 371 Mass. 741, 360 N.E.2d 288 (1977).
88. 450 F. Supp. 997 (D. Mass. 1978).

The Supreme Court affirmed, holding that the statute unconstitutionally burdened the minor's right to secure an abortion.[89] Eight justices concurred in the judgment, but were divided in their reasoning. Justice Powell authored a plurality opinion that proceeded beyond the judgment to discuss the relative weights of the minor's rights and the state's interests.[90] He recognized that the state's interest in the protection of its minor citizens was a strong one and distinguished the rights of children from those of adults. The plurality listed three factors they deemed determinative in reaching their conclusion: the particular vulnerability of children; their inability to make crucial decisions in a mature, informed manner; and the central role of parents in child rearing.[91] Powell articulated the plurality's inquiry as being whether the Massachusetts statute unduly burdened the right of a minor to seek an abortion.[92]

The plurality observed that because circumstances vary widely, an abortion may not always be in a minor's best interest.[93] Justice Powell stated that although an absolute, potentially arbitrary veto is never permissible, a state may require parental consent only if it provides an alternative, judicial means of obtaining the necessary authorization.[94] The plurality outlined the contours of this alternative procedure, requiring that a minor be given the opportunity to show either that she is sufficiently mature to make the abortion decision or that the abortion would be in her best interest.[95] Justice Powell concluded that the procedure must ensure anonymity and be sufficiently expeditious to ensure that the minor would have an effective opportunity to obtain an abortion.[96]

The plurality's opinion in *Bellotti II* effectively recognized the balancing process begun in *Roe*, applied in *Danforth* and articulated in *Bellotti I*. This process weighed the traditional interest of the state in protecting minors on the one hand against the privacy right of the woman on the other. Despite the fact that the abortion decision was still seen as an essentially medical one, the plurality's opinion recognized a particularly important aspect of an abortion decision—that the exercise of the right assumes the ability to make the decision.[97] The complex regulatory scheme envisioned

89. 443 U.S. at 651.

90. *Id.* at 625-51.

91. *Id.* at 634-37.

92. The plurality noted that the alternatives of marriage, arranging adoption or assuming motherhood may be in the minor's best interest. *Id.* at 642-43.

93. *Id.* at 643.

94. *Id.* at 643-44.

95. *Id.* at 644.

96. *See id.* at 642-43.

97. *Cf. infra* note 105 and accompanying text.

by the plurality is the logical corollary of the informed consent provision in *Danforth*: both requirements centered on the quality of the decision made. In *Danforth* the state's authority to ensure that a woman's consent is informed is supported by the state's interest in promoting her ability to independently make the abortion decision by requiring that all necessary material information is provided to her. Similarly the immaturity of minors brings into question their ability to act in their own best interest. The *Bellotti II* plurality indicates that, in this circumstance, it is the province of the state rather than the physician to ensure that the decision made is the best one for the individual involved.

The *Danforth* rationale and the *Bellotti* corollary demonstrate that the right of a woman to decide is not so much her freedom to decide affirmatively as it is her freedom to have the opportunity to make the ultimate choice.[98] Both opinions recognize that the protection of the woman's health is within the ambit of state authority. These determinations, however, are in marked conflict with the authority of the physician as outlined in *Roe*. The conclusion to be drawn from these cases is that the state, not the physician, stands next in line after the woman in making certain that the abortion decision will not endanger the woman's mental or emotional health.

The discretion of the state in regulating the abortions of minors arose again in *H.L. v. Matheson*.[99] In that case, the Court examined a Utah statute requiring a pregnant minor's attending physician to notify, when possible, the woman's parents or guardians of the pending abortion.[100] A minor female, whose physician had advised her that an abortion was in her best interest, was unable to secure an abortion because the physician refused to perform it without notifying her parents. She brought a class

98. *Compare Bellotti II* and *Danforth with* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 (1978) ("Roe v. Wade represents less a decision in favor of abortion than a decision in favor of leaving the matter, however it might come out in particular cases, to women").

99. 450 U.S. 398 (1981).

100. UTAH CODE ANN. § 76-7-304 (1978) provides:

> To enable the physician to exercise his best medical judgment [concerning the abortion], he shall:
>
> 1. Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
>
> (b) Her age,
>
> (c) Her familial situation,
>
> (d) *Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor* or the husband of the woman, if she is married.

Id. (emphasis added.)

action on behalf of unmarried minors who desired to terminate their pregnancies without notifying their parents, but who were unable to do so because of the statute requiring such notice. The Supreme Court of Utah affirmed the trial court, holding that the statute restricted neither the minor's right to obtain an abortion nor her right to enter into a physician-patient relationship.[101]

The United States Supreme Court affirmed, holding that the plaintiff had neither alleged nor offered evidence to support her standing as a mature, emancipated minor.[102] The Court held the statute constitutional as applied to an unemancipated minor, living at home and making no showing of maturity.[103] It distinguished the requirement of notification from the requirement of consent. Writing for the majority, Chief Justice Burger rejected the contention that the statute was unconstitutional because the state failed to require notification of a minor's parents in other medical procedures.[104]

The *Matheson* Court reasoned that a state's interest in full-term pregnancies was sufficient to justify the distinction made between abortion and childbirth. It noted that the decision to carry a child to term entails few or none of the grave psychological consequences of the decision to abort.[105] In protecting its citizens from such harms and promoting its own interest, the majority emphasized that the state was not required under the Constitution either to encourage or facilitate abortions.[106] Furthermore, the majority determined that the provision promoted a valid state interest in affording parents the opportunity to provide essential medical information to attending physicians.[107] The Court concluded, therefore, that the statute was reasonably related to the preservation of maternal health and that its validity was not undercut by the possibility that its mandates might

101. H.L. v. Matheson, 604 P.2d 907 (Utah 1979).

102. *Matheson*, 450 U.S. at 406.

103. *Id.* at 413.

104. *Id.* The Court cited Maher v. Roe, 432 U.S. 464 (1977) in support of this statement. In *Maher*, the Court reasoned that unequal treatment of abortion and other medical procedures is justified because the latter "do not involve the termination of potential life." *Maher*, 432 U.S. at 480. *But see* Beal v. Doe, 432 U.S. 281, 449 (1976) (Brennan, J., dissenting) (maintaining that abortion and childbirth are merely two alternative medical options available to a pregnant woman).

105. 450 U.S. at 412-13.

106. "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life.' " *Id.* at 413 (quoting Harris v. McRae, 448 U.S. 297, 325 (1979)).

107. 450 U.S. at 411.

inhibit some minors from seeking an abortion.[108]

Matheson demonstrates that the state's interest in regulating the abortions of minors is particularly strong. Legislation aimed at protecting that interest may restrict that right to the extent of requiring parental notice. As the dissent notes, however, a parental notification provision may constitute a de facto impediment to a minor's abortion.[109] Therefore, the state's regulations, although they may neither prohibit abortions altogether nor restrict the options ultimately available to a woman, may make the woman's decision more difficult. This result is consistent with the traditional role of the state in other areas of fundamental rights jurisprudence.[110] The *Matheson* Court demonstrates that a certain amount of latitude must be granted states seeking to protect their legitimate interests. Where these interests are particularly strong, as in the state's desire to protect minors, greater degrees of regulation are permissible. Perhaps most striking is that the *Matheson* Court upheld the contested statute using a reasonableness standard without invoking strict scrutiny or deeming the encouragement of parental involvement to be a compelling state interest.

II. ALTERING THE ANALYSIS: *CITY OF AKRON V. AKRON CENTER FOR REPRODUCTIVE HEALTH*

In 1978 the City Council of Akron enacted a municipal ordinance entitled *Regulation of Abortions*, containing seventeen provisions regulating the performance of abortions.[111] Among its requirements, the ordinance restricted all post-first trimester abortions to hospital, as opposed to clinical, facilities.[112] Additionally, the city sought to ensure that the woman's consent was informed and mandated that the attending physician provide her with detailed information, including: anatomical and physiological descriptions of the unborn fetus at different stages of development;

108. *Id.* at 413.

109. *See id.* at 437.

110. For a discussion of the traditional analysis of state action regulating fundamental rights, see *infra* note 173 and accompanying text.

111. AKRON, OHIO, CODIFIED ORDINANCES § 1870 (1978) (cited in part in Akron v. Akron Center for Reprod. Health, 103 S. Ct. 3481 (1983)).

112. In a footnote, the Court cites the relevant portion of the Akron, Ohio city ordinance:

> 1870.03 ABORTION IN HOSPITAL
>
> No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed in a hospital.
>
> Section 1870.1(B) 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.

103 S. Ct. 2481, 2488 n.3 (citing Akron, Ohio, Codified Ordinances §§ 1870.03 1(B) (1978).

the complications and risks incident to an abortion procedure; and the availability of several agencies providing birth control and adoption information.[113] The ordinance also required the woman's physician to inform her of the circumstances of her own pregnancy and the risks involved in

113. In a footnote the Court cites the relevant portion of Akron, Ohio's city ordinance entitled *Regulation of Abortion*:

1870.06 INFORMED CONSENT

(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.

(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:

(1) That according to the best judgment of the attending physician she is pregnant.

(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.

(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*.

(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*.

(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 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.

Id. at 2489 n.5 (citing ARKON, OHIO, CODIFIED ORDINANCES §§ 1870.50(A), (B) (1978)) (emphasis added).

the abortion technique to be employed.[114] Finally, the ordinance imposed a mandatory twenty-four hour waiting period between the signing of the consent form and the performance of the abortion, applicable in all non-emergency situations.[115] Noncompliance with any of the provisions was punishable as a criminal misdemeanor.

Three corporations operating abortion clinics in Akron, as well as a physician who had performed abortions in one of those clinics brought suit against the city. The district court held the detailed disclosure provision invalid, but upheld the remaining requirements.[116] The United States Court of Appeals for the Sixth Circuit affirmed in part and reversed in part, holding all provisions unconstitutional, with the exception of a requirement that all abortions be performed in a hospital as defined by the statute.[117]

The Supreme Court affirmed in part and reversed in part, holding that all of the provisions unduly burdened a woman's right to an abortion.[118] The Court reasoned that the scope of the abortion right was determined by its nature as a medical procedure. Justice Powell, writing for the majority, stated that full protection of a woman's right requires that the attending physician be given substantial freedom in the decisionmaking process and in the performance of the abortion.[119] The Court retraced the three-stage

114. The Court again cites the relevant section of Akron's city ordinance in a footnote:

> (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. at 2489 n.5 (citing AKRON, OHIO, CODIFIED ORDINANCES § 1870.05(C) (1978)).

115. The Court quotes an additional relevant section of the Akron, Ohio city ordinances:

> 1870.07 WAITING PERIOD
>
> 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. at 2489 n.6 (citing AKRON, OHIO CODIFIED ORDINANCES § 1870.07 (1978)).

116. Akron Center for Reprod. Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979), *aff'd in part and rev'd in part*, 651 F.2d 1198 (6th Cir. 1981).

117. 651 F.2d 1198 (6th Cir. 1981), *aff'd in part and rev'd in part*, 103 S. Ct. 2481 (1983).

118. *Akron*, 103 S. Ct. at 2504.

119. *Id.* at 2491. The Court cited the case of Whalen v. Roe, 429 U.S. 589, 604-05 n.33

framework outlined in *Roe*[120] and determined that restrictive regulation affecting the first trimester must be justified by a compelling state interest. Although the Court acknowledged that certain regulations having no significant impact on the exercise of a woman's right are permissible,[121] it indicated that in no instance may a state interfere in the physician-patient consultation.[122] The majority concluded that, although a state may reasonably regulate second-trimester abortions to preserve maternal health, this discretion does not permit it to enact regulations that depart from "accepted medical practice."[123]

The Court began its examination of the ordinance by focusing on the hospitalization requirement. Justice Powell noted that *Roe* had expressly listed a second-trimester hospitalization requirement among those it deemed reasonably related to maternal health.[124] Justice Powell stated, however, that although this requirement was reasonable at the time *Roe* was announced, dramatic increases in the safety of abortion procedures and evidence that they are safely performed in clinical facilities undercut the justification for a hospitalization requirement during the entire second trimester.[125] Instead, Powell asserted that new techniques made clinical abortions safe through the sixteenth, and perhaps even the eighteenth week of pregnancy.[126] Powell reasoned that the greater cost of hospitalization

(1977), in support of this determination. In *Whalen*, the Court upheld New York legislation requiring the use of official forms as a means of controlling drug traffic. Justice White's majority opinion rejected arguments that forms were unnecessary in whole or in part to control drug traffic. Justice White asserted that states have broad latitude in dealing with problems of local concern and that the statute was not unconstitutional because it had the effect of inhibiting some patients from seeking needed medical treatment. *Whalen*, 429 U.S. at 603. He reasoned that the statute neither denied access to nor deprived any individual of the right to decide, nor denied him the benefit of his physician's advice to acquire or use needed medical treatment. *Id.* Additionally, the majority noted that the statute did not impose third-party consent on the physician-patient relationship. *Id.* Consequently, the Court concluded that the impact was insufficient to constitute unconstitutional interference with any right or liberty granted by the fourteenth amendment. *Id.* at 603-04.

120. *See supra* notes 30-34 and accompanying text.

121. *Akron*, 103 S. Ct. at 2492-93.

122. *Id.* at 2493.

123. *Id.; see infra* notes 198-205 and accompanying text.

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

125. *Id.* at 2496. The Court referred to the relatively recent procedure of dilation and evacuation (D & E), which involves the insertion of a device through the vagina into the uterus. The fetus and placental tissue are then removed from the womb by suction.

The Court contrasted this procedure with instillation methods, such as saline amniocentesis, noting that the D & E procedure could be performed up to and through the eighteenth week of pregnancy, while instillation procedures cannot generally be performed until the sixteenth week because the amniotic sac is too small. *Id.* at 2496 n.24.

126. *Id.* at 2496 n.24. The Court's conclusions as to the safety of a clinical D & E leave the authority of the state uncertain. The American College of Obstetricians and Gynecolo-

posed a substantial, unjustifiable burden on a woman's access to a safe, inexpensive, and otherwise accessible abortion.[127] He stated that this requirement effectively inhibited the bulk of abortions after the first twelve weeks of pregnancy and, therefore, unreasonably infringed on a woman's right to an abortion.[128] The Court concluded that a state is obligated to make a reasonable attempt to limit its regulations' effects to that part of the second trimester when its legitimate interest in health will be promoted.[129]

The Court next considered the informed consent provisions. Although acknowledging that it had upheld an informed consent provision in *Danforth*, the Court struck down the detailed disclosure requirement of the *Akron* ordinance.[130] The Court noted that a state may ensure that a wo-

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gists (ACOG) standards recommend that abortions after fourteen weeks be limited to hospitals. But the Court's suggestion that the D & E procedure is safe through the eighteenth week of pregnancy leaves the point at which a state may require hospitalization uncertain. If the ACOG standards are considered accepted medical practice, then fourteen weeks is the benchmark.

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

128. *Id.*

129. *Id.* at 2495. *Roe* held only that from approximately the end of the first trimester of pregnancy, the state may reasonably regulate abortions in order to protect the health of the mother. Furthermore, the Court set the benchmark for the beginning of the second trimester in accordance with the then prevailing medical knowledge. Arguably, therefore, *Akron* is consistent with *Roe*. However, prior to *Akron* the Court had indicated that the trimesters in *Roe* were bright lines. In Gary-Northwest Ind. Women's Servs. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980) (three-judge court), *aff'd sub nom.* Gary-Northwest Ind. Women's Servs. v. Orr, 451 U.S. 934 (1981), the Court summarily affirmed a district court holding that "*Roe* does not render the constitutionality of second trimester regulations subject to either the availability of abortions or improvements in medical techniques and skills." *Gary-Northwest*, 496 F. Supp. at 901-02.

The Supreme Court in *Akron*, however, noted that the *Gary* court had rested its decision on an alternative ground as well. *Akron*, 103 S. Ct. at 2494 n.18. The Court concluded that it was not, therefore, bound by precedent on the hospitalization issue. *Id.* In support of this conclusion the Court cited Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81 (1979) ("a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions"). *But see Akron*, 103 S. Ct. at 2506 n.3 (O'Connor, J., dissenting) ("the Court simply ignores the fact that the district court in *Gary-Northwest* held *'even if* the plaintiffs could prove birth more dangerous than early second trimester D & E abortions,' that would *not* matter insofar as the constitutionality of the regulations were concerned"). *Id.* (quoting *Gary-Northwest*, 496 F. Supp. 894, 903 (N.D. Ind. 1980)) (emphasis by Justice O'Connor). For a discussion of whether a summary affirmance is a decision on the merits, see R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, 321-25 (5th ed. 1978). The authors conclude that "[i]n determining whether or not to dispose of an appeal summarily, the Court must . . . consider . . . the merits . . . ." *Id.* at 325.

130. *Akron*, 103 S. Ct. at 2502. The Court's holding in this respect is confusing since, in *Matheson*, it indicated that identical requirements were permissible:

> Utah also provides by statute that no abortion may be performed unless a "voluntary and informed written consent" is first obtained by the attending physician from the patient. In order for such a consent to be "voluntary and informed," the patient must be advised at a minimum about available adoption services, about

man's consent to an abortion is made with full knowledge of its nature and consequences.[131] This freedom, however, does not allow the state unfettered discretion to decide what information should be disclosed. Instead, the Court construed *Danforth* to vest the physician with ultimate authority in this determination.[132] The majority distinguished the *Akron* provision from the one in *Danforth*, contending that the information required was designed to dissuade the woman from granting consent, rather than ensuring that her consent was informed.[133] Justice Powell concluded that the mandated disclosures posed unreasonable obstacles in the path of the physician upon whom the woman relied for advice.[134] The Court then assessed another aspect of informed consent—the identity of the individual required to make the disclosure.

The Akron ordinance required the physician to disclose, in addition to the detailed information, the risks peculiar to the woman's own pregnancy.[135] The Court determined that the mandated disclosures under this provision allowed the physician constitutionally adequate discretion in treating his patient.[136] Nonetheless, the Court struck down the provision because it constrained the physician's practice of medicine in another aspect—it required that he make the disclosure in person.[137] Although the Court expressly acknowledged its past emphasis on the physician's role in consulting with his patient, it stated that there was no convincing reason for requiring him to make the disclosure personally. The Court reasoned that the critical factor was whether or not the patient obtained the necessary information.[138] Justice Powell identified only one objection to the requirements, and that was potentially increased cost.[139] Justice Powell

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fetal development, and about foreseeable complications and risks of an abortion. *See* UTAH CODE ANN. § 76-7-305 (1978). In PLANNED PARENTHOOD OF CENTRAL MO. V. DANFORTH . . . we rejected a constitutional attack on written consent provisions.

450 U.S. at 400 n.1 (emphasis added) (citation omitted).

131. 103 S. Ct. at 2499.

132. *Id.*

133. *Id.* The Court noted that detailed descriptions of the anatomical development of the fetus would involve, at best, speculation, but failed to explain why a physician's determination of viability is any less speculative.

134. *Id.* at 2501.

135. *See supra* note 104.

136. 103 S. Ct. at 2501.

137. *Id.* at 2502.

138. *Id.*

139. Despite the Court's repeated references to accepted medical practices, Justice Powell states that:

> [r]equiring physicians personally to discuss the abortion decision, its health risks, and consequences with each patient *may in some cases* add to the cost of providing

concluded that the state's legitimate interest that a woman's consent be informed is limited to the ability to require the attending physician to verify that adequate counseling has taken place.[140]

Regarding the validity of the twenty-four hour waiting period, Justice Powell noted that there had been no evidence at trial suggesting that this provision would enhance the safety of the abortion procedure.[141] He also expressed doubts that the waiting period would render the woman's decision any more informed.[142] Instead, Justice Powell propounded the view that the decision to delay an abortion belongs to the physician in the exercise of his medical judgment.[143] The Court concluded that after the appropriate counseling a woman who is prepared to consent to an abortion cannot be required to wait to obtain it.[144]

Justice O'Connor, joined by Justices White and Rehnquist, dissented, arguing that the Court's analysis comported neither with previous abortion decisions nor with the Court's approach in other areas of fundamental rights.[145] Justice O'Connor began her dissent with sharp criticism of the trimester approach to abortion jurisprudence, labeling it unworkable and unable to accommodate mutually antagonistic rights and interests.[146] She rejected the Court's holding that advancements in medical technology had decreased the state's discretion in confining second trimester abortions to

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abortions, though the record here does not suggest that ethical physicians will charge more for adhering to this *typical element of the physician-patient relationship*. *Id.* (emphasis added).

140. *Id.* at 2502. The Court acknowledged that the state may set reasonable minimum qualifications for clinical counseling staffs. For a discussion of problems related to clinical counseling staff, see *infra* note 197 and accompanying text.

141. 103 S. Ct. at 2503. At trial the arguments offered in support of this provision were not aimed at physical safety. The Court, however, sidestepped the issue of psychological benefits inherent in this provision. Compare the Court's holding here with the ACOG standards mentioned at *infra* note 162.

142. *Akron*, 103 S. Ct. at 2503.

143. *Id.*

144. *Id.*

145. *Id.* at 2504. Justice O'Connor cited various Supreme Court decisions to support the proposition that the level of state interference must be substantial before the Court will apply heightened scrutiny in fundamental rights analysis. *Id.* at 2510; *see, e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678, 688 n.5 (1977) (strict scrutiny appropriate only where the state law interferes with "an individual's right to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating [the] decision"); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (legislation subject to strict scrutiny only when it deprives, infringes or interferes with the exercise of a fundamental right or personal liberty); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 545 (1963) (concerning first amendment rights, legislation must "infringe substantially" on the protected conduct); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("significant encroachment upon personal liberty" is required).

146. *Akron*, 103 S. Ct. at 2505.

hospitals. O'Connor asserted that despite the majority's claimed adherence to the *Roe* framework it had blurred the bright lines drawn by that decision.[147] The dissent noted that advancements in medical technology will inexorably delay the point at which the state's interest in maternal health becomes compelling. Conversely, science increasingly would advance that point of viability and, consequently, the point at which the state may proscribe nontherapeutic abortions to preserve fetal life. Thus perceived, the dissent concluded that the *Roe* framework was "on a collision course with itself."[148] The dissent underscored its criticism of the majority in maintaining that the *Roe* framework was not built upon a foundation of neutral principles that could either withstand the test of time or command the respect of *stare decisis*.[149]

The critical flaw in the Court's analysis, according to the dissent, was the absolute negation of any state interest prior to a compelling point.[150] To illustrate her point, Justice O'Connor emphasized that potential life is no less potential in the early weeks of pregnancy than it is from viability onwards.[151] She insisted that a state's interests in maternal health and fetal life were compelling throughout the entire pregnancy. Consequently, the inquiry of the Court should be limited to determining whether or not legislation constituted an undue burden or an absolute obstacle to a woman's freedom to decide.[152] Justice O'Connor maintained that only substantial state interference such as an absolute prohibition or a severe restraint on a woman's access to an abortion,[153] has been deemed significant enough to trigger heightened constitutional scrutiny.[154]

Justice O'Connor rejected the Court's conclusion that increased cost alone constituted an undue burden on the abortion right. The dissent noted that any regulation, including licensing requirements, involves increased costs.[155] The dissent asserted that the hospitalization requirement was justified by the state's interest in the woman's health, including "all

147. *Id.* at 2506.

148. *Id.* at 2507. Justice O'Connor determined that, under the majority's opinion, "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." *Id.* at 2506.

149. *Id.* at 2508.

150. *Id.*

151. *Id.* at 2509.

152. *Id.*

153. *Id.* at 2510; *see supra* note 145.

154. *Akron*, 103 S. Ct. at 2511.

155. *Id.* at 2512. The dissent claimed that the Court's holding in a companion case to *Akron*, Simopoulos v. Virginia, 103 S. Ct. at 2532, 2536 (1983), which upheld stringent li-

factors—physical, emotional, psychological, familial, and the woman's age—[that are] relevant to the well being of the patient."[156] They concluded that the hospitalization requirement was rationally related to a legitimate state interest.[157]

Justice O'Connor also rejected the Court's disposition of the informed consent provisions. Observing that the detailed disclosure provision was not before the Court, the dissenting justices criticized the majority for striking down the requirement that the attending physician make the disclosure personally.[158] The dissent contended that this ruling was contrary to the Court's upholding of the informed consent provision in *Danforth*.[159] Justice O'Connor concluded that no undue burden or drastic limitation was imposed by the requirement and that it did not significantly affect any privacy right under the fourteenth amendment.[160]

The majority opinion was also criticized for failing to uphold the twenty-four hour waiting period. Justice O'Connor stated that the Court's determination that the decision to delay should remain within the confines of the physician-patient relationship was difficult to understand since the trial record demonstrated that none existed.[161] She also emphasized that the expert medical standards relied upon heavily by the Court recommended sufficient time for reflection in order to make an informed consent that explores all options and risks.[162] The dissent contended that no increased risk factor was created by this requirement as it specifically excepted situations involving medical emergencies.[163] Justice O'Connor concluded that increased cost neither unduly burdened nor absolutely precluded an abortion. Even assuming an undue burden, she maintained, the waiting provision was justified by compelling state interests in maternal

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censing requirements for facilities performing abortions, would also entail additional costs. Thus, the dissent indicated that *Simopoulos* and *Akron* are inconsistent.

156. *Akron*, 103 S. Ct. at 2512 (citing Doe v. Bolton, 410 U.S. 179, 192 (1973).

157. 103 S. Ct. at 2512-13.

158. *Id.* at 2513-14.

159. *Id.*

160. Justice O'Connor maintained that the undue burden requirement represented the threshold inquiry into the justification for the exacting "compelling state interest" standard. *Id.* at 2512-13. *But see supra* notes 118-23 and accompanying text.

161. *See Akron*, 103 S. Ct. at 2515-16.

162. The ACOG standards, upon which the Court relied so heavily, recommend that "[p]rior to abortion, the woman should have access to special counseling that explores options for the management of unwanted pregnancy, examines the risks, and *allows sufficient time for reflection prior to making an informed decision.*" *Id.* at 2516 (emphasis added) (citing AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICES 54 (5th ed. 1982) [hereinafter cited as ACOG Standards]).

163. *Id.* The majority acknowledged this exception as well. *Akron*, 103 S. Ct. at 2502 n.42.

health, including its physical and emotional aspects, as well as in the protection of fetal life.[164]

III. *AKRON*'S NEW ANALYSIS: FURTHER RETRENCHMENT ON STATE AUTHORITY

The *Akron* Court stated that legislative responses to the Court's decision in *Roe* and a consequent need to refine the limits of state regulation of abortions prompted its decision.[165] The *Akron* Court considered the statement in *Roe* that a woman may choose and obtain an abortion "free of interference by the state." The Court held that even minor regulation of the abortion procedure during the first trimester must not interfere with either the woman's choice between abortion and childbirth or the physician-patient consultation.[166] Furthermore, with respect to the second trimester, the Court in *Akron* observed that the ability of the state to impose regulations reasonably designed to protect maternal health did not grant it the discretion to depart from accepted medical practice.[167] Thus the *Akron* holding indicates that the medical community, at least in the context of first- and second-trimester abortions, has broad discretion to determine the limits of its own authority. This holding, however, raises the question of what authority remains in the state to regulate the performance of abortions. If the majority intended to define state authority solely in terms of accepted medical practice in the second trimester, while forbidding all regulations in the first trimester which relate to the abortion procedure or the physician-patient consultation, then the dissent is correct in stating that *Akron* constitutes a departure from precedent.

In *Danforth, Bellotti II* and *Matheson* the Court confronted permissible distinctions between abortions and other medical procedures. *Danforth* upheld the informed consent provision in recognition of the stressful nature involved in a medical procedure that terminates a potential life and the detrimental impact which that stress exerts on a woman's ability to make an aware, deliberate decision.[168] *Bellotti II* confronted the state's interest vis-a-vis minors, with the plurality indicating that a minor's immaturity brings substantially into question his ability to make a quality deci-

164. *Id.* at 2516.

165. *Id.* at 2493.

166. *Id.* at 2491-92.

167. *Id.*

168. *Cf. Danforth*, 428 U.S. at 66. *Danforth* indicates that the Court places an extremely high value on the ability of women to make their own choices concerning abortion. Note, *Due Process Privacy and the Path of Progress*, 1979 U. ILL. L.F. 469, 504.

sion.[169] The plurality concluded that in regard to a minor, the state is justified in intervening and constructing an elaborate mechanism that balances expediency against a concern that the abortion decision be well made.[170] Given the *Bellotti II* decision that the state's concern with a woman's psychological health justified intrusion into the decision making process, it was foreseeable that, given the appropriate justification, a state may intervene in the implementation of the abortion decision. This was the situation in *Matheson*.[171] Throughout these opinions the Court has recognized that the woman's right does not exist to the exclusion of all state interests.[172] In *Akron*, however, the Court denotes a significant retreat from this position by curtailing the authority of a state to further its legitimate interests and placing broad discretion in the hands of the medical community. This shift in approach can be understood by the differing standards of review employed in *Akron* and in the decisions preceding it.

Much of *Akron*'s rhetoric comports with that found in prior abortion decisions, as well as other areas of fundamental rights analysis. Specifically, the analysis applied in the privacy rights cases requires that state action interfere significantly with the exercise of the protected right before the Court will subject it to strict scrutiny.[173] Similarly, the *Akron* decision purports to recognize that regulations having no significant impact need not be supported by a compelling state interest.[174] Rather, these actions may be upheld on a showing of only an important state interest in the woman's health. Yet *Akron* further holds that even minor abortion regula-

169. The *Bellotti II* Court was particularly concerned that "[t]he abortion decision has implications far broader than those associated with most other kinds of medical treatment." 443 U.S. 622, 649.

170. For a discussion of the *Bellotti II* opinion, see *supra* notes 78-96 and accompanying text. The concern of states in enacting parental notice statutes is that the decision to abort be well made:

> Because many minors lack the capacity to make intelligent, informed decisions, the minor may not be able to give effective consent. The right to decide presupposes capacity to decide, and absent capacity, the right to decide is meaningless, and perhaps harmful. . . . Abortion clinics are unlikely to discourage the minor's decision to abort or in other ways act contrary to their financial interest.

Note, *Parental Notice Statutes: Permissible State Regulation of a Minor's Abortion Decision*, 49 FORDHAM L. REV. 81, 99-100 (1980).

171. For a discussion of *Matheson*, see *supra* notes 99-110 and accompanying text.

172. "The privacy right involved . . . cannot be said to be absolute." Roe v. Wade, 410 U.S. 113, 154 (1973).

173. *Cf.* Zablocki v. Redhail, 434 U.S. 374 (1978). In *Zablocki*, Justice Marshall, writing for the majority stated: "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." *Id.* at 386. Compare *Zablocki*'s holding requiring significant interference with the determination in *Akron* that even minor regulations are impermissible.

174. 103 S. Ct. at 2492-93.

tions may interfere with neither the physician-patient consultation, nor the woman's choice.[175] A particularly perplexing question raised by *Akron* then becomes how a state distinguishes between a constitutionally insignificant regulation and an unconstitutional minor one. Realistically, the fact that a minor regulation can be unconstitutional suggests that the Court has discarded the traditional requirement of significant interference, thereby elevating the abortion right to a preferred status among other consitutional rights.[176]

The *Akron* Court's determination that even minor first-trimester regulations of abortions are unconstitutional indicates that certain aspects of the right are, by their nature, immune to any state action. The Court in *Akron* claimed that it merely reaffirmed the principles of *Roe* and its progeny.[177] Under *Roe*, however, the state may reasonably regulate abortions in order to protect maternal health.[178] Moreover, *Doe* refined the concept of health to include physical, emotional and familial factors, as well as considerations of the woman's age,[179] thereby granting a broad definition of the state's interests. Finally, the *Danforth* Court expressly recognized that the state's interest would support legislation applied to the first trimester, even where such legislation related to the physician-patient consultation.[180] Thus the Court's claim in *Akron* that even minor regulations in this area are impermissible is not accurate. Moreover, the indication in *Akron* that certain aspects of the abortion right are immune to state action is not consistent with the analysis applied in previous cases.[181]

Danforth upheld first-trimester regulation where there was "no legally significant impact or consequence on the abortion decision or the physician-patient relationship."[182] Although the phraseology varies between

175. *Id.*

176. Strict judicial scrutiny will not be imposed where state action is not restrictive of protected conduct. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (purchase of contraceptives); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (right to travel); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (right to an education); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539 (1963) (rights under first amendment).

177. 103 S. Ct. at 2487.

178. *Id.* at 2492.

179. 410 U.S. at 192.

180. *See* § 161.2, 26 DRAKE L. REV. 716 (1977) (*Danforth* establishes the principle that the balancing test must be applied to statutes affecting the the woman's right in the first trimester).

181. *See, e.g.*, the Court's statement in *Roe* that "it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions." *Roe*, 410 U.S. at 153.

182. 428 U.S. at 81.

significant impact and undue burden,[183] the import of this analysis is clear: the constitutional validity of abortion legislation depends on the degree of its impact and the justification for it.[184] In *Danforth* the Court was able to uphold concededly minor regulations applied to adults, even in the first trimester. Where applied to minors, the Court has found that even a restrictive regulation may be justified by less then a compelling state interest, as demonstrated in both *Bellotti II* and *Matheson*.[185] Thus, prior to *Akron* the Court engaged in balancing between a state's interference with a woman's right to have an abortion and the state's interest in safeguarding the woman's health.[186] Had the Court continued this analysis in *Akron*, it is likely that certain aspects of this case would have been decided differently.

Although the requirement that a physician disclose a set list of detailed information may have gone beyond the state's authority envisioned under *Danforth*,[187] precedent supported the provision mandating that he person-

183. *Compare id. with Bellotti I*, 428 U.S. at 147. The Court in *Danforth* upheld the recordkeeping requirement because it did not significantly interfere with the woman's right. In *Bellotti I*, however, the Court stated that *Danforth* upheld the informed consent provision because it did not unduly burden the protected right.

184. *Bellotti I*, 428 U.S. at 150.

185. For a discussion of the justification for the regulations in *Matheson*, see *supra* note 110 and accompanying text. The *Bellotti II* Court included among its reasons for endorsing abortion regulations for minors the "profound moral and religious concerns." 443 U.S. at 640.

186. *See supra* note 30 and accompanying text.

187. The Court noted that in *Danforth* it had construed informed consent to mean "the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straight jacket in the practice of his profession." *Akron*, 103 S. Ct. at 2499 (quoting *Danforth*, 428 U.S. at 67). The Court did not deny the state authority to ensure the decision is made "in light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient," *Akron*, 103 S. Ct. at 2499-500 (quoting Colantti v. Franklin, 439 U.S. 379, 394 (1979)), but concluded that the state's interest does not provide it with unreviewable authority to determine the precise information a woman must be given prior to the abortion.

It is possible to construe the Court's language as an admonition to states that they not "straightjacket" a physician by legislating details required to be disclosed. If such is the Court's intention, then its authority in the area of informed consent may be as narrow as it is in the determination of fetal viability. For a discussion of the limitations on state authority in determining the point at which the fetus is viable, see *supra* note 4.

However, the key element that rendered the *Akron* statute unconstitutional was the inflexible, mandatory nature of the disclosures. The Court determined that the disclosure constituted obstacles placed in the path of the physician on whom the woman is entitled to rely for advice. *Akron*, 103 S. Ct. at 2499-501. However, the Court did recognize that adequate counseling does not consist merely of a recital of pertinent medical facts. In addition, it recognized that the needs of each patient will vary considerably. Thus, the Court stated that individual counseling "should be available for those persons who desire or need it." *Id.* at 2502 n.38.

In light of this language, it is possible to read *Akron* to permit states to require facilities to

ally counsel his patient. In *Whalen*, the Court stated that the physician's right is merely derivative and that regulations making his work more laborious and less independent with no impact on the patient are not unconstitutional.[188] This determination suggests that *Akron* has misconstrued the privacy right as previously articulated. Arguably, personal counseling by the physician does not impact at all on the woman's right to decide. Although personal counseling requires more effort on the physician's part and makes him somewhat less independent, it does not interfere with the physician-patient relationship. Rather it merely seeks to ensure that one exists.[189] Although the *Akron* Court indicated that an ethical physician would not charge more for this "typical element of the physician-patient relationship," the majority stated that such a requirement might increase the cost of an abortion.[190] Thus, the *Akron* Court subordinates the state's effort to ensure the existence of a physician-patient relationship on the possibility that some incremental cost may be involved. Similarly, the Court in *Akron* invalidates the twenty-four hour waiting period because of a possibility that some health risks may be involved.[191] The Court's concern here, however, is not easily understandable since the physician could waive the requirement upon determining that the woman would be subject to additional health risk.[192] Therefore, the aspect of the delay itself remains the only impact on the woman. In *Doe*, however, the Court ex-

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inquire of a woman whether or not she desires more extensive counseling. A state might even require the counselor to inform a woman what information is available to her in general terms, so long as the woman retains the discretion of refusing such information. Thus a state might require, for example, that the counselor inform the woman that information concerning fetal development is available if she desires it to be disclosed.

188. *See supra* note 77 and accompanying text.

189. *See Akron*, 651 F.2d 1198, 1217 (6th Cir. 1981) (Kennedy, J., concurring in part and dissenting in part).

> The requirement that the information specified in .06(C) be given by a physician does no more than seek to ensure that there is in fact a true physician-patient relationship even for the woman who goes to an abortion clinic. The evidence presented at trial showed that the decision to terminate a pregnancy was made not by the woman in conjunction with her physician, but by the woman and lay employees of the abortion clinic, the income of which is dependent upon the woman's choosing to have an abortion. The testimony disclosed that the doctors at Akron Center's clinic did little, if any, counseling before seeing the patient in the procedure room. Akron's ordinance simply takes into account these realities of the "physician-patient" relationship at an abortion clinic.

190. 103 S. Ct. at 2502.

191. *Id.* at 2503.

192. *Id.* at 2503 n.42. "This provision does not apply if the physician certifies in writing that 'there is an emergency need for an abortion to be performed or induced such that continuation of the pregnancy poses an immediate threat and grave risk to the life or physical health of the pregnant woman.' "

pressly rejected the contention that delay alone was not an unconstitutional restraint: "If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system."[193] This statement indicates that a regulation causing delay, which by itself, does not increase risk to the woman is constitutional. Because the waiting period provision does not create risks, it is likely that under *Danforth* it would have been upheld.

The *Danforth* Court conceded that the abortion decision is a stressful one and that it is imperative that it be made with the full knowledge of its nature and consequences.[194] As a corollary to that right, the Court has stated that a woman has at least an equal right to decide to carry her pregnancy to term as to end it by abortion.[195] Under the ethical standards of the profession a physician is charged with advising a woman to delay an abortion if he deems it to be in her best interests. The question of whether the abortion counseling staff at a clinic will adhere to such professional standards is problematic. Evidence presented at trial demonstrated that the income of these counselors was dependent upon the woman choosing to have an abortion.[196]

With this concern in mind, it is easier to understand why the ordinance in *Akron* included the informed consent and the waiting period provisions. These requirements manifest a concern that the woman make the decision free of any coercive influences brought to bear upon her by either the professional biases of the medical community or the economic incentives of the clinics and their counselors. What the *Akron* Court suggests is that such concerns are beyond the purview of state authority. Therefore, although the clinical setting may compel a woman in an already stressful situation toward an inappropriate decision, the state may exert no countervailing influence on the woman's informed choice between childbirth and abortion.[197] As a consequence *Akron* leaves the medical community with

193. 410 U.S. at 198-99; *see also supra* note 46 and accompanying text.

194. 428 U.S. at 67.

195. Maher v. Roe, 432 U.S. 464, 472 n.7 (1976) (quoting Skinner v. *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

196. *See supra* note 189.

197. *See, e.g., Proposed Constitutional Amendments, Hearings on S.J. Res. 119 and S.J. Res. 130 Before Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary*, 93d Cong., 2d Sess. pt. 2, at 468-72 (1974) (abortion clinics not likely to act against their own self interests); Note, *Parent, Child, and The Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird*, 52 S. CAL. L. REV. 1869, 1905 n.241 (1979) ("abortion clinics do not profit by decisions not to abort, so little incentive exists for discouraging abortions"); Wood & Durham, *Counseling, Consulting and Consent: Abortion and the*

broad discretion during the first trimester. *Akron*'s analysis of second-trimester regulation seemingly accomplishes much the same result.

Under *Roe* the state is permitted to enact abortion regulations that reasonably relate to the protection of maternal health. *Akron*'s holding that a state's discretion in this respect does not permit it to depart from accepted medical practice in essence defines reasonableness in those terms. Throughout all of the abortion decisions the Court has consistently adhered to the three-trimester approach. *Akron*'s attempt to carve out an exception to this approach, while continuing to propound that it has left it intact, is unconvincing. The majority distinguishes *Akron* from the holding in *Roe* by examining the standards set for clinical abortions by medical associations. As modern standards permit clinical abortions at the fourteenth or sixteenth week, the state is now prohibited from restricting those abortions after the twelfth week.[198] Nonetheless, the *Akron* Court purportedly maintains that a state need not fine tune its legislation and that the trimester analysis is still in full force.[199] Whatever validity this reasoning may have depends upon the meaning of accepted medical practice.

Since as "accepted medical practice" has never before appeared in any abortion decision, its meaning is uncertain. Furthermore, *Akron* does not explicitly define the term. By implication, however, the standards set by the various medical associations so frequently referred to in *Akron* are determinative.[200] With respect to the hospitalization of women having abortions performed after a particular point in a pregnancy, the *Akron* Court

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Doctor Patient Relationship, 1978 B.Y.U. L. REV. 783-84. *See Danforth*, 428 U.S. at 91 n.2 (Stewart, J., concurring); *see also supra* note 189.

198. The Court concluded that requiring hospitalization for all post-first trimester abortions had "the effect of inhibiting . . . the vast majority of abortions after the first twelve weeks." *Akron*, 103 S. Ct. at 2497 (quoting *Danforth*, 428 U.S. at 79). However, the Court in *Danforth* used this language in objecting to an abortion regulation that required abortions to be performed by methods more dangerous than the one forbidden. *See supra* notes 56-58 and accompanying text.

199. The Court continues to maintain that the state's interest in maternal health becomes compelling at "approximately the end of the first trimester." *Akron*, 103 S. Ct. at 2492 n.11. The Court stated:

> We think it prudent, however, to retain *Roe*'s identification of the beginning of the second trimester as the approximate time at which the State's interest in maternal health becomes sufficiently compelling to justify significant regulation of abortion. . . .
>
> The *Roe* trimester standard thus continues to provide a reasonable legal framework for limiting a State's authority to regulate abortions. Where the State adopts a health regulation governing the performance of abortions during the second trimester, the determinative question should be whether there is a reasonable medical basis for the regulation.

Id. at 2492 n.11.

200. *See, e.g.*, ACOG Standards, *supra* note 162; American Public Health Association

adhered to determinations made by those organizations that clinical abortions were safe after either fourteen or sixteen weeks.[201] The concept of safety in these standards, however, was related to the physical aspect only. Thus, *Akron* suggests a retreat from the broader definition underlying the *Danforth, Bellotti II*, and *Matheson* decisions.[202] Moreover, the standards of the American College of Obstetricians and Gynecologists state that "[r]egardless of advances in abortion technology, midtrimester terminations will likely remain more hazardous, expensive, and emotionally disturbing for a woman than early abortions."[203] This suggests another shift in the Court's standards. Under *Roe* "[t]he State has a legitimate interest in seeing that abortion, like any other medical procedure, is performed under circumstances that insure *maximum safety* for the patient."[204]

In addition to disregarding the emotional aspects of abortion so carefully examined in *Danforth, Bellotti II*, and *Matheson, Akron* suggests that states may never require more than the minimum standards set by medical associations. The only apparent limit on the discretion of these medical association standards is that they may not be dispositive where the mortality rate for abortions exceeds that of normal childbirth.[205]

Ultimately, the majority, while claiming to preserve the practical consequences of *Doe*, creates its own set of practical problems and uncertainty as to the continued validity of the *Roe* framework. As *Akron* does not permit state action designed to set minimum standards for the integrity of the physician-patient relationship, it suggests that only the physical aspects of the woman's health are relevant to the state's interest. This state interest is defined in terms of accepted medical practice as determined in the second trimester by the medical association standards. These standards, in turn, are set in accordance with concerns of physical health and the relative mortality rates of abortion and childbirth.[206] Thus, as medical science

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Recommended Program Guide for Abortion Services (Revised 1979), AM. J. PUB. HEALTH 652 (1980).

201. *Akron* leaves unclear the point at which the state's interest becomes compelling (citing ACOG Standards, the Court notes that they recommend abortions be limited to fourteen weeks where performed in an outpatient clinic or a physician's office). The Court also notes, however, that those same standards indicate that such abortions may be safe as late as the eighteenth week of pregnancy. 103 S. Ct. at 2496.

202. *See supra* note 66 and accompanying text.

203. *Akron*, 103 S. Ct. at 2506-09 (O'Connor, J., dissenting) (quoting AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, TECHNICAL BULLETIN NO. 56: METHODS OF MIDTRIMESTER ABORTION (Dec. 1979)).

204. *Roe*, 410 U.S. at 150 (emphasis added).

205. Connecticut v. Menillo, 423 U.S. 9, 11 (1975) (per curiam).

206. *But see* Planned Parenthood Ass'n v. Ashcroft, 103 S. Ct. 2517 (1983). In *Ashcroft* the Court confronted a Missouri statute requiring a microscopic pathology report on aborted

advances to the point in pregnancy where abortion is safer than childbirth, the state will be unable to regulate. The compelling interest of the state will be increasingly diminished. Faced with an altered analysis affected by accepted medical practice, Justice O'Connor concluded that the *Roe* framework was "on a collision course with itself."[207] *Akron*, according to Justice O'Connor, does not explain why a state's concern with a woman's emotional, mental, and physical health will no longer adequately justify abortion regulation. This is of special note since the standards so heavily relied upon indicate that midtrimester abortions are more hazardous.[208] The *Akron* Court also fails to explain why the abortion right deserves special constitutional treatment. Specifically, *Akron* does not explain why the traditional requirement of "significant interference" is discarded in the abortion analysis. The distinctions drawn by the Court in *Akron* undercut the conclusion in *Roe* that abortion is in all aspects a medical procedure. Now, abortion is not treated as other medical procedures because the state may not ensure the maximum safety it can in other medical procedures. Moreover, abortion is subject to a preferred constitutional analysis.

IV. CONCLUSION

Akron uses the privacy right to restrict state regulation of the medical community involved in performing abortions. The standards *Akron* applies, however, are inappropriate under prior constitutional analysis. The Court applies strict scrutiny to even minor state regulations of the abortion procedure and the physician-patient consultation. This suggests that the Constitution affords abortion special protection over and above that given other constitutional rights. In addition, *Akron*'s determination that accepted medical practice sets the bounds of state authority in the second trimester marks the decline of the trimester approach adopted under *Roe*.

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tissue for each abortion performed at an abortion clinic. Despite the fact that ACOG standards made pathological examinations of abortion tissue permissive rather than mandatory, the Court upheld the judgment. Writing a separate opinion, Justice Powell noted that it was accepted medical practice to submit surgically removed tissue to an examination by a pathologist. *Id.* at 2523. In a footnote, Justice Powell explained the rationale behind his opinion by noting that the ACOG's standard had been subject to a recent policy change. He examined the history of the recommendation and discovered that an ACOG survey of twenty-nine abortion clinics disclosed that a majority performed microscopic pathology reports in all cases. *Id.* at 2523 n.11. Thus Justice Powell's opinion suggests that accepted medical practice may be determined by the norms prevailing at abortion clinics. That portion of Justice Powell's opinion is not binding precedent, however, because, although five Justices concurred in the judgment, only Chief Justice Burger joined in that part of the opinion.

207. *Akron*, 103 S. Ct. at 2507.

208. *See supra* note 202 and accompanying text.

As accepted medical practice relates primarily to factors concerning physical health only, *Akron* eliminates state interest in regulating the conduct of both physicians and abortion clinics in a stressful abortion situation.

The shift in focus evidenced by *Akron* suggests that the right is no longer that of the woman in consultation with her physician to choose whether or not to have an abortion. Instead, *Akron* emphasizes a right pertaining to "women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."[209] Ease in access, therefore, has replaced the concern that the decision be made freely and without coercive influences on the woman.

Paul Wm. Bridenhagen

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