University of Miami Law Review

Volume 38 | Number 5 Article 6

9-1-1984

City of Akron v. Akron Center for Reproductive Health, Inc.: Stare Decisis Prevails, but for How Long?

Peter Prieto

City of Akron v. Akron Center for Reproductive Health, Inc.: Stare Decisis Prevails, but for How Long?

I. INTRODUCTION

> "[The]right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."
> Roe v. Wade, 410 U.S. 113, 153 (1973).

Ever since the landmark but controversial decision in *Roe v. Wade*,[1] the Supreme Court of the United States has addressed several of the complex and sensitive issues surrounding abortion.[2] In *City of Akron v. Akron Center for Reproductive Health, Inc.*,[3] the Court for the first time decided whether an ordinance requiring that all second-trimester abortions be performed in a hospital was constitutionally permissible. The second-trimester hospitalization requirement at issue in *Akron* was part of an ordinance[4] enacted by the City Council of Akron, Ohio, to amend a previously enacted ordinance regulating the performance of abortions. Three corporations operating outpatient abortion clinics and a physician who had performed abortions in one of the clinics brought suit in the District Court for the Northern District of Ohio seeking to enjoin enforcement of virtually all of the ordinance's provisions.[5] The de-

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

2. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981) (parental notification); Harris v. McRae, 448 U.S. 297 (1980) (medicaid funding of abortions); Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent); Planned Parenthood v. Danforth, 428 U.S. 52 (1979) (reporting and recordkeeping requirement, patient's written consent, spousal consent, and use of saline amniocentesis as abortion technique); Doe v. Bolton, 410 U.S. 179 (1973) (first-trimester hospitalization requirement).

3. 103 S. Ct. 2481 (1983).

4. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870, § 1870.03 (1978).

5. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172

fendants were the City of Akron, its mayor, its director of public health, and its police prosecutor.[6] The plaintiffs argued that the ordinance's provisions violated a woman's constitutional right to terminate her pregnancy.[7] The district court held that the provision requiring that all second-trimester abortions be performed in a hospital was constitutional because the requirement "furthers the compelling state interest in the protection of maternal health."[8] The Court of Appeals for the Sixth Circuit affirmed the constitutionality of the hospitalization requirement provision.[9] The Supreme Court of the United States granted certiorari[10] and *held*, reversed: The provision requiring that all second-trimester abortions be performed in a hospital "has 'the effect of inhibiting the . . . vast majority of abortions after the first 12 weeks,' and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion."[11] *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983).

II. *Roe v. Wade* AND ITS PROGENY

The difficulties surrounding the abortion controversy stem from the different and competing interests that must be delicately weighed in order to accommodate all of the parties involved.[12]

(N.D. Ohio 1979).

6. *Id.* at 1181. The district court allowed two other defendants, Dr. Francois Seguin and Patricia K. Black to intervene, but these defendants were to participate "solely in their individual capacity as parents of unmarried minor daughters of child bearing age." *Id.*

7. *Id.* at 1198. The plaintiffs also based their challenge on the establishment clause, U.S. CONST. amend. I, and the equal protection clause, U.S. CONST. amend. XIV, § 1. The district court, however, dismissed these challenges. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1188-98 (N.D. Ohio 1979).

8. *Akron Center for Reproductive Health, Inc.*, 479 F. Supp. at 1215. The district court found the regulations regarding parental consent, § 1870.05, informed consent, § 1870.06(B), warrantless searches of clinics and hospitals in which abortions are performed, § 1870.09, and disposal of fetal remains, § 1870.16, unconstitutional. *Id.* at 1200-07. The court, however, found the regulations regarding a 24 hour waiting period, § 1870.07, informed consent, § 1870.06(C) & (D), recordkeeping requirement, § 1870.08, abortion reporting requirement, § 1870.10, and medical instructions, § 1870.17, constitutionally valid. *Id.* at 1207.

9. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981). The court of appeals also affirmed the constitutionality of the regulations regarding informed consent, § 1870.06(B), and disposal of fetal remains, § 1870.16. *Id.* at 1205-11. The court of appeals reversed as to the regulations regarding parental notice and consent, § 1870.05(A), 24 hour waiting period, § 1870.07, and informed consent, § 1870.06(C). *Id.* at 1205-08.

10. City of Akron v. Akron Center for Reproductive Health, Inc., 456 U.S. 988 (1982).

11. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2497 (1983) (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 79 (1976)).

12. *See* Paul & Schaap, *Abortion and the Law in 1980*, 25 N.Y.L. SCH. L. REV. 497, 500-

First, there is the woman's interest:[13] because it is the woman that carries the unborn in her womb, the decision of whether to abort is to a large extent her own decision. The woman's interest, however, is counterbalanced by two other important interests: the potential life she carries—the unborn child[14]—and the state's interest in protecting the general health and welfare of its citizens.[15]

A decade ago the Supreme Court of the United States sought to reconcile and accommodate all of these competing interests in the seminal case of *Roe v. Wade*.[16] The issue in *Roe* was whether a Texas statute that prohibited abortions except for the purpose of saving the mother's life was unconstitutional.[17] To decide the issue the Court first had to ascertain whether a woman's right to obtain an abortion was constitutionally protected. The Court afforded the right constitutional protection by holding that the right of privacy founded in the fourteenth amendment's concept of personal liberty "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[18]

The Court declared, however, that a woman's right to obtain an abortion was not absolute or unqualified—the right "must be considered against important state interests in regulation."[19] A state, the Court decided, has two compelling interests in regulating abortion, each of which becomes compelling at different stages in the pregnancy. The state's interest in protecting maternal health

---

04 (1980).

13. *Id.* at 502-03.

14. *See id.* at 500-02. When the interest of the unborn is considered, the primary issue is at what point a fetus ceases to be a mere potential life and becomes a human being that is afforded constitutional protection. One extreme contends that life begins at conception. *Id.* at 500. Adherents of this view would prohibit all abortions because an abortion during any stage of pregnancy would in effect be the killing of a human being. The other extreme holds that life begins at birth. *Id.* at 500-01. Adherents of this view would allow abortions to be performed during any stage of pregnancy because a "human being," as defined by the proponents of this view, is not involved in the abortion issue until birth.

15. *Id.* at 503-04.

16. 410 U.S. 113 (1973).

17. *Id.* at 129.

18. *Id.* at 153. The Court acknowledged:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas as zones of privacy, does exist under the Constitution.

Id. at 152. The Court first found a right of privacy in the concept of liberty as guaranteed by the due process clause of the fourteenth amendment in Meyer v. Nebraska, 262 U.S. 390 (1923).

19. *Roe*, 410 U.S. at 154.

becomes compelling at the end of the first trimester because until then the mortality rate for abortions is lower than the mortality rate for normal childbirth.[20] The state's interest in protecting potential life becomes compelling when a fetus reaches viability.[21]

During the course of its analysis, the Court specifically addressed the controversial issue of when life begins.[22] The Court, however, decided not to resolve the issue, reasoning that "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."[23] Notwithstanding this reluctance, the Court did find "that the word 'person', as used in the Fourteenth Amendment, does not include the unborn."[24]

As a result of its analysis, the Court adopted a standard of review, based on approximately each trimester of pregnancy, by which future abortion regulation could be constitutionally examined. Under the Court's standard, a state can neither regulate nor interfere with a woman's right to obtain an abortion during the first trimester of pregnancy.[25] During this period the decision to abort is solely the prerogative of the woman, who is assisted in her decision by the attending physician.[26]

During the second trimester, when the state's interest in protecting maternal health becomes compelling, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.[27] The *Roe* Court listed several examples of permissible state regula-

---

20. *Id.* at 163.

21. *Id.* The Court defined viability as the point in time in the pregnancy when the fetus "has the capability of meaningful life outside the mother's womb." *Id.* In *Roe*, the Court placed viability at seven months (28 weeks), but noted that it could occur earlier, even at 24 weeks. *Id.* at 160.

22. *Id.* at 156-62.

23. *Id.* at 159.

24. *Id.* at 158. The Court reached this conclusion by examining the word "person" as used in the due process clause and the equal protection clause of the fourteenth amendment and as used in other sections of the Constitution. *Id.* at 157. The Court concluded that "person," as used in the Constitution, has application only *postnatally*. *Id.*

25. *Id.* at 163. Despite the Court's broad language that *no* state interference is allowed during the first trimester, the Court has allowed some state interference during the first trimester. For example, in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court upheld a recordkeeping requirement and a written consent requirement imposed during the first trimester because the requirements had "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship." *Id.*

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

27. *Id.*

tions during this period, including a hospitalization requirement for second-trimester abortions.[28]

After the end of the second trimester, when the fetus is viable and the state's interest in protecting potential life becomes compelling, the state may prohibit all abortions, except those necessary to protect the mother's life.[29] Additionally, the Court noted that any legislation seeking to regulate the fundamental right of a woman to obtain an abortion must be "narrowly drawn to express only the compelling state interests at stake."[30]

After applying the facts of *Roe* to its newly articulated constitutional analysis, the Court concluded that because the Texas statute prohibited abortions during the first trimester of pregnancy, a period when the decision to abort must be free of state interference, the statute violated a woman's constitutionally-protected right to obtain an abortion.[31]

On the same day that *Roe* was decided, the Supreme Court decided *Doe v. Bolton*.[32] At issue in *Bolton* was the constitutionality of a Georgia statute that required all abortions, including those in the first trimester, to be performed in a hospital.[33] The Court found the Georgia law unconstitutional because under *Roe*, a state may not interfere with a woman's right to obtain an abortion during the first trimester of pregnancy.[34] The Court indicated, however, that it would have invalidated the provision even if the statute had excluded the first trimester because the state had failed to show that only hospitals could satisfy the state's interest in protecting maternal health.[35]

Three years after *Bolton*, the Court again addressed and expounded on the constitutionality of a second-trimester regulation. In *Planned Parenthood v. Danforth*,[36] the Court invalidated several provisions of a Missouri statute regulating abortions. One of the provisions struck down prohibited the use of a certain method of abortion—saline amniocentesis—after the first trimester of pregnancy.[37] The State of Missouri argued that this method was

28. *Id.*
29. *Id.* at 163-64.
30. *Id.* at 155.
31. *Id.* at 164.
32. 410 U.S. 179 (1973).
33. *Id.* at 192.
34. *Id.* at 195.
35. *Id.*
36. 428 U.S. 52 (1976).
37. *Id.* at 79.

"deleterious to maternal health."[38]

The *Danforth* Court, disagreeing with Missouri's contention, stated several reasons why the regulation did not reasonably relate to the state's interest in maternal health. First, the Court noted that the use of saline amniocentesis was an accepted medical procedure.[39] At the time *Danforth* was decided, the saline amniocentesis procedure was used in a substantial majority of all second-trimester abortions.[40] Second, few physicians used or knew how to use the alternative technique proposed by Missouri—the prostaglandin technique.[41] Furthermore, Missouri had "offered no evidence that prostaglandin abortions were available in Missouri."[42] Finally, the Court perceived the ban on the saline amniocentesis technique as an anomaly because the Missouri statute did not prohibit other techniques that were many times more likely to result in maternal death.[43] The Court therefore concluded that the ban on the saline amniocentesis technique did not reasonably relate to the state's compelling interest in protecting maternal health.[44]

III. *Akron's* RATIONALE

Akron is one of the recent United States Supreme Court decisions concerning abortion, and it is significant for several reasons. First, by examining the second-trimester hospitalization requirement under the trimester analysis enunciated in *Roe*, the Supreme Court reaffirmed the principles of *Roe v. Wade*.[45] Second, *Akron* represents the first time that the Court has passed judgment on the constitutionality of a regulation requiring that all second-trimester abortions be performed in a hospital.[46] Third, because al-

---

38. *Id.* at 76.

39. *Id.* at 77.

40. *Id.* Based on the testimony of both sides, from 68% to 80% of all post-first-trimester abortions were performed by using the saline amniocentesis technique. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 78.

44. *Id.* at 79.

45. 103 S. Ct. at 2487.

46. *Id.* The majority and the dissent in *Akron* disagreed sharply on whether the Court's summary affirmance in Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd mem. sub nom.* Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 934 (1981), was binding precedent on the hospitalization requirement issue. The majority argued:

> Although the District Court in that case found that "*Roe* does not render the constitutionality of second trimester regulations subject to either the availability

most half the states in the country have a similar statutory requirement, the decision will have a nationwide impact.[47] Finally, in adjudicating the constitutionality of a second-trimester hospitalization requirement, the Court reconciled the inconsistent decisions of the lower federal courts and the state courts.[48]

A. *The Majority*

The majority in *Akron*[49] analyzed the second-trimester hospitalization requirement[50] under the trimester analysis established in *Roe*. The majority felt 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."[51] Furthermore, medical evidence suggests that, until approxi-

---

> of abortions or the improvements in medical techniques and skills," . . . it also *rested the decision on the alternative ground* that the plaintiffs had failed to provide evidence to support their theory that it was unreasonable to require hospitalization for dilatation and evacuation abortions performed early in the second trimester.

103 S. Ct. at 2494 n.18 (citation omitted) (emphasis added). As a result, the majority concluded that its summary affirmance in *Gary-Northwest* was not binding precedent on the hospitalization issue. *Id.*

The dissent, on the other hand, insisted that the summary affirmance in *Gary-Northwest* was binding precedent on the hospital requirement issue. *Id.* at 2506 n.3 (O'Connor, J., dissenting). The dissent argued that although the majority read *Gary-Northwest* as being decided on the alternate ground that the plaintiffs failed to prove the safety of second-trimester abortions, the Court ignored "the fact that the district court in *Gary-Northwest* held that '*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 [sic] concerned." *Id.* (quoting *Gary-Northwest*, 496 F. Supp. at 903).

47. *See id.* at 2490 n.9 (citing Brief for Americans United for Life as Amicus Curiae (listing 23 states)).

48. *See, e.g.*, Planned Parenthood Ass'n v. Ashcroft, 664 F.2d 687 (8th Cir. 1981) (holding second-trimester hospitalization requirement unconstitutional), *aff'd in part*, 103 S. Ct. 2517 (1983); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979) (holding second-trimester hospitalization requirement constitutional); Livingston v. New Jersey Bd. of Medical Examiners, 168 N.J. Super. 259, 402 A.2d 967 (1979) (holding second-trimester hospitalization requirement constitutional); Simopoulos v. Virginia, 221 Va. 1059, 277 S.E.2d 194 (1981) (holding second-trimester hospitalization requirement that included in its definition of hospital licensed outpatient clinics constitutional), *aff'd*, 103 S. Ct. 2532 (1983).

49. 103 S. Ct. 2481 (1983) (Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Brennan, Marshall, Blackmun and Stevens, J.J., joined).

50. The regulation in *Akron* defined hospital as "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association." *Id.* at 2493. "The ordinance thus prevents the performance of abortions in outpatient facilities that are not part of an acute-care, full-service hospital." *Id.* at 2494.

51. *Id.* at 2487.

mately the end of the first trimester, regulations that restrict the manner in which abortions are performed would not serve the state's interest in maternal health.[52] The majority concluded that "the *Roe* trimester standard thus continues to provide a reasonable legal framework for limiting a State's authority to regulate abortions."[53] Under the *Roe* analysis, the second-trimester hospitalization requirement would withstand strict judicial scrutiny only if it "reasonably related" to the state's interest in protecting maternal health.[54]

Before applying the *Roe* trimester analysis, however, the majority found that the second-trimester hospital requirement placed "a significant obstacle in the path of women seeking an abortion."[55] The Court noted the court of appeals' finding that hospitalized abortions cost twice as much as clinical abortions[56] and that second-trimester abortions were rarely performed in Akron hospitals.[57] As a result, "a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expense and additional health risk."[58] It was therefore apparent to the *Akron* majority that a second-trimester hospitalization requirement could significantly restrict a woman's ability to obtain an abortion.[59]

After this initial finding, the majority proceeded to examine, under the *Roe* trimester analysis, Akron's contention that the second-trimester hospitalization requirement reasonably related to the protection of maternal health.[60] The majority conceded that

---

52. *Id.* at 2492 n.11.

53. *Id.*

54. *Id.* at 2493. The majority failed to address the fact that the *Roe* Court had listed a second-trimester hospitalization requirement as an example of a permissible state regulation during the second trimester. *See* Roe v. Wade, 410 U.S. 113, 163 (1973). However, it is apparent from the cases decided after *Roe* that second-trimester regulation is not per se constitutional, but that any second-trimester regulation must reasonably relate to the state's interest in preserving maternal health. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (ban on saline amniocentesis technique as an abortion procedure for second-trimester abortions must reasonably relate to state's interest in preserving maternal health); Doe v. Bolton, 410 U.S. 179 (1973) (regulation requiring two doctors to concur with attending physician's decision regarding abortion had no rational connection with a patient's needs and unduly infringes on the physician's right to practice).

55. 103 S. Ct. at 2495.

56. *Id.* An in-hospital abortion costs from $850-$900, while a D & E abortion performed in a clinic costs from $350-$400. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 2495-97.

Akron's contention had strong support at the time of the *Roe* decision.[61] Subsequently, however, "the safety of second-trimester abortions has increased dramatically. The principal reason is that the D & E procedure is now widely and successfully used for second-trimester abortions."[62] The D & E procedure, the Court noted, can be performed safely during the early weeks of the second trimester on an outpatient basis in nonhospital facilities.[63] The *Akron* majority concluded that the Akron ordinance requiring that *all* second-trimester abortions be performed in a hospital did not reasonably relate to the state's compelling interest in protecting maternal health.[64] The Court, therefore, found the ordinance unconstitutional.[65]

B. *The Dissent*

The *Akron* dissent, on the other hand,[66] forcefully argued for the abolition of the *Roe* trimester approach:

> [N]either sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to stages of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs.[67]

The dissent proceeded to note, as the majority's analysis had conceded, that "the State's compelling interest in maternal health changes as medical technology changes."[68] Furthermore, a state's compelling interest in protecting potential life, which becomes compelling at fetal viability, also depends on medical technology.[69] For example, at the time of *Roe* in 1973, viability before twenty-

---

61. *Id.*

62. *Id.* at 2496. The dilatation and evacuation technique (D & E) is the most common procedure used for abortions. The technique "consists of dilating the woman's cervix and the opening to the uterus and removing the fetus by means of suction and instruments." Note, *Hospitalization Requirements For Second Trimester Abortions: For the Purpose of Health or Hindrance?*, 71 GEO. L.J. 991, 1000 n.52 (1983).

63. 103 S. Ct. at 2496.

64. *Id.*

65. The Court also found that the regulations concerning parental consent, § 1870.05(B), informed consent, § 1870.06(B) & (C), a 24 hour waiting period, § 1870.07, and the disposal of fetal remains were all unconstitutional. 103 S. Ct. at 2487-2504.

66. 103 S. Ct. at 2504 (1983) (O'Connor, J., dissenting).

67. *Id.*

68. *See id.* at 2505.

69. *Id.* at 2507.

eight weeks was considered unusual.[70] Recent studies, however, "have demonstrated increasingly earlier fetal viability."[71] The *Roe* framework, the dissent concluded, "is clearly on a collision course with itself:"[72]

> As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward, to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.[73]

The dissent in *Akron* also stated that the state's interest concerning abortion did not become compelling at certain stages in the pregnancy as established in *Roe* but that this interest was compelling *throughout* the pregnancy.[74] Consequently, the dissent would allow a state to impose restrictions on the abortion decision during the first trimester of pregnancy, a period that according to *Roe* and its progeny must remain free from state interference.

The dissent's criticism did not end with its attack on the *Roe* trimester framework. The dissent also contended that the proper standard of review in the context of abortion cases was the "unduly burdensome" standard:[75] "[t]he undue burden required in the abortion cases represents the required *threshold inquiry* that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest standard.' "[76]

Applying its undue burden standard, the dissent found that the second-trimester hospitalization requirement did not impose an undue burden on the abortion decision. The dissent argued that the majority's "reliance on increased abortion costs and decreased availability was misplaced," because there was no evidence "to show that the two Akron hospitals that performed second-trimester abortions denied an abortion to any woman."[77] Additionally, the dissent pointed out that "there was no evidence presented that other hospitals in nearby areas did not provide second-trimester

---

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2508.
75. *Id.* at 2509-12.
76. *Id.* at 2510 (emphasis added).
77. *Id.* at 2512.

abortions. Further, almost *any* state regulation . . . inevitably and necessarily entails increased costs for *any* abortion."[78] The dissent then found that because the hospitalization requirement did not impose an undue burden, it was not necessary to apply the compelling interest standard of review and examine the requirement under strict judicial scrutiny.[79] Finally, applying its less stringent standard of review, the dissent concluded that the hospitalization requirement regulation had a "rational relation" to the valid state objective of ensuring the health and welfare of its citizens.[80] Accordingly, the dissent would have upheld the provision as constitutional.[81]

IV. A COMMENTARY ON *Akron*

A close examination of the *Akron* decision and of prior case law buttresses the conclusion that the majority in *Akron* applied the appropriate standard of review and reached the correct result. The principles of *Roe v. Wade*, and the subsequent decisions of *Bolton* and *Danforth*, require not only that all abortion regulation during the second trimester reasonably relate to the state's compelling interest in maternal health, but also that the regulations be narrowly drawn to protect that restricted interest.[82] Additionally, because the right to obtain an abortion is a fundamental right, any regulation of the abortion decision must be examined under strict judicial scrutiny.[83] Because abortions in the early weeks of the second trimester may now be performed as safely in an outpatient clinic as in a hospital, the majority correctly concluded that the Akron ordinance requiring that *all* second-trimester abortions be performed in hospitals did not reasonably relate to the state's compelling interest in maternal health. Therefore, because the ordinance prohibited *all* second-trimester abortions from being performed in nonhospital facilities, the ordinance was not narrowly drafted to express and protect only the state's interest in maternal health.

---

78. *Id.*

79. *Id.* at 2512-13.

80. *Id.* at 2513.

81. The dissent also found the remaining challenged regulations constitutional because none of them placed an "undue burden" on a woman's right to obtain an abortion. *Id.* at 2513-17.

82. *See* Note, *supra* note 62, at 1004.

83. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 499 (1977); *Roe*, 410 U.S. at 164-65.

The majority's analysis regarding the appropriate standard of review, however, was flawed to a certain extent. Before correctly applying the reasonably related standard, the majority first analyzed the second-trimester hospitalization requirement under an unduly burdensome standard.[84] By initially applying the latter standard of analysis, the majority obfuscated the correct reasonably related standard established in *Roe* and added fuel to the dissent's argument that the unduly burdensome test was the appropriate standard of review.[85]

Under the standard enunciated in *Roe*, a court first analyzes the regulation to ascertain whether it imposes *any* burden on the right to obtain an abortion.[86] "The question . . . is not one of degree but simply whether the regulation affirmatively imposes any legally cognizable burden."[87] If any affirmative burden is imposed, strict judicial scrutiny is applied and the state must justify the burden by showing a compelling state interest in a regulation narrowly drawn to protect such an interest.[88] Alternatively, if no affirmative burden is placed on the abortion decision, strict judicial scrutiny will not be applied and the regulation will be upheld if the legislature had a rational basis for enacting the regulation.[89] The

---

84. 103 S. Ct. at 2495.

85. The unduly burdensome standard so fervently propounded in the *Akron* dissent is inappropriate for constitutionally examining second-trimester abortion regulations; it represents an ingenious, subtle, and ultra-conservative position that would result in courts upholding virtually any regulation imposed on the abortion decision. The dissent applying its unduly burdensome standard, for example, found that none of the regulations at issue in *Akron* imposed a significant burden on the abortion decision. As a result, according to the dissent's standard of review, the threshold inquiry had not been met and strict judicial scrutiny need not be applied. The dissent eventually found all the contested regulations to be constitutional because they satisfied the rational basis test.

The unduly burdensome standard, apart from being the incorrect standard in the abortion area, also has several flaws. First, by requiring a plaintiff to prove an undue burden at the outset of a case, a court is essentially requiring the plaintiff to address the ultimate constitutional issue. Note, *supra* note 62, at 1011-12. Therefore, "a determination that a burden is substantial is the final result of the case and not a threshold burden for the plaintiff." *Id.* at 1012. Second, the unduly burdensome standard "fails to recognize that it is the character of the right infringed, not the degree of infringement, that determines the constitutional standard of review." *Id.* A final flaw of the unduly burdensome standard is the inability of courts to apply the substantial burden test in a principled fashion because the standard "fails to define either the degree of burden a plaintiff must show or the elements, such as cost, access, or safety, that courts should consider in making the determination." *Id.*

86. Brief Amici Curiae of Certain Law Professors at 32, Simopoulos v. Virginia, *cert. granted*, 102 S. Ct. 2265 (1982).

87. *Id.*

88. *Id.* at 33.

89. *Id.* at 32; *see, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (the Hyde Amendment, which severely limits the use of any federal funds to reimburse the cost of abortions under

Akron majority, therefore, only needed to inquire whether *any* affirmative burden, as opposed to an undue burden, had been placed on the abortion decision. Having found such an affirmative burden, the Court then should have strictly scrutinized the regulation. Consequently, by analyzing the second-trimester hospitalization requirement under an unduly burdensome standard before applying the correct reasonably related standard, the majority has increased the confusion already present in the area of abortion law.[90] Lower courts interpreting the majority's decision will struggle to ascertain the appropriate standard of review.

On a policy level, the *Akron* decision undoubtedly will have positive ramifications. As the majority noted, abortions performed in hospitals cost twice as much as those performed in outpatient facilities.[91] The effect of such a difference in cost would be to place second-trimester abortions well beyond the financial reach of most indigent women. By striking down the second-trimester hospitalization requirement, the majority reserved for indigent women the opportunity to have their second-trimester abortions performed in adequate health care facilities instead of having them performed in the illegal and dangerous "backrooms" of the pre-*Roe* era.

Although the *Akron* decision appears to invalidate every second-trimester hospitalization requirement in the country, its holding is narrower than it appears. To truly ascertain the breadth of the majority's holding, it is necessary to examine *Simopoulos v.*

---

the medicaid program, places no government obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest); Maher v. Roe, 432 U.S. 464 (1977) (Connecticut regulation does not impinge upon a woman's fundamental right to terminate her pregnancy because that right implies no limitation on a state's authority to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds).

90. 103 S. Ct. at 2495. Lower state and federal courts have analyzed second-trimester hospitalization requirements under various standards of review. *See, e.g.*, Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848 (8th Cir.), *aff'd*, 664 F.2d 687 (8th Cir. 1981) (invalidating second-trimester hospitalization requirement after applying undue burden standard), *aff'd in part*, 103 S. Ct. 2517 (1983); Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980) (holding second-trimester hospitalization requirement per se constitutional because *Roe* listed such a requirement as an example of a permissible state regulation during the second trimester), *aff'd mem. sub nom.* Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 934 (1981); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979) (holding second-trimester hospitalization requirement constitutional under a rational basis standard of review); *see also* Note, *supra* note 62, at 1004-19 (discussing in depth the different standards of review lower courts have applied to second-trimester hospitalization requirements).

91. 103 S. Ct. at 2495.

Virginia,[92] which was decided on the same day as *Akron*. In *Simopoulos*, the Court upheld a second-trimester hospitalization requirement almost identical to the one struck down in *Akron*.[93] The regulation at issue in *Simopoulos*, however, included outpatient clinics in its definition of "hospital."[94] As a result, the hospitalization requirement in *Simopoulos*, unlike the one in *Akron*, did not require second-trimester abortions to be performed in general acute-care facilities.[95] Because of this difference, the Court found that the decision in *Akron* was not controlling.[96] The Court's emphasis on the difference between abortions performed in acute-care facilities and those performed in outpatient clinics further underscores the Court's concern with the potentially dangerous ramifications of high cost abortions.

The most troubling aspect of the *Akron* decision, however, concerns not what the majority decided, but what the majority failed to address.[97] Under *Roe*, a state's interest in potential life becomes compelling when a fetus reaches viability.[98] At this stage of pregnancy the state may, if it wishes, prohibit abortions.[99] Viability, as defined by *Roe*, is the stage in its development when a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[100] In 1973, when *Roe* was decided, viability was placed at twenty-eight weeks; however, the *Roe* Court noted that it could occur earlier, even at twenty-four weeks.[101] The danger with this definition and the standard of review based on this definition is that both are dependent on medical technology.[102] The *Akron* dissent, for example, noted that "fetal viability in the first trimester of pregnancy may be possible in the not too distant future."[103]

---

92. 103 S. Ct. 2532 (1983).

93. *Id.* at 2540.

94. *Id.* at 2536-37.

95. *Id.* at 2538.

96. *Id.* at 2539.

97. In all fairness to the *Akron* majority it should be noted that the validity of *Roe's* trimester analysis was not at issue in *Akron*. As the dissent itself pointed out, the validity of *Roe* had not been argued by the parties or addressed by the lower courts. 103 S. Ct. at 2504 (O'Connor, J., dissenting).

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

99. *Id.* at 163-64.

100. *Id.* at 160.

101. *Id.*

102. *See* 103 S. Ct. at 2507 (O'Connor, J., dissenting); *see also* Note, *Technological Advances and* Roe v. Wade: *The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194 (1982) (arguing for abolition of *Roe's* trimester approach and advocating an alternative based on a standard to determine the beginning of life).

103. 103 S. Ct. at 2507 (O'Connor, J., dissenting). The dissent noted that "[a]n infant

Consequently, it is plausible that as medical technology progresses and pushes fetal viability back toward conception, states may attempt to prohibit abortions performed during the second trimester, and perhaps even those performed during the first trimester of pregnancy.

The state's interest in protecting maternal health, which becomes compelling during the beginning of the second trimester, is also dependent on medical technology. As medical technology progresses and abortion procedures become increasingly safer, the state's right to regulate in order to protect maternal health is diminished.[104] The *Akron* majority, for example, noted that although a second-trimester hospitalization requirement had strong support at the time of *Roe* as a reasonable health regulation, such a regulation no longer reasonably related to the state's interest in maternal health because the D & E procedure "is *now* widely and successfully used for second trimester abortions."[105]

The eventual advances in medical technology therefore will diminish a woman's right to obtain an abortion and concomitantly enlarge that same right: a state will be able to prohibit abortions at an earlier stage, as viability occurs earlier during pregnancy, but it will be forced to regulate the abortion decision less as abortion procedures become increasingly safer. Accordingly, the *Akron* dissent's admonition that the *Roe* trimester analysis is on a "collision-course" with itself might prove prophetic.

By reaffirming *Roe's* trimester analysis with its evident ties to medical technology, the Supreme Court in *Akron* failed to address an issue that in the near future undoubtedly will be back before the Court. Eventually, when that issue is presented to the Court, several alternatives—although by no means the only ones—might be more feasible than *Roe's* trimester analysis.

A first alternative would be for the Court to hold that *Roe's* trimester analysis is not dependent on medical progress.[106] This alternative would preserve the "bright line" dichotomy the *Roe* decision supposedly established and the compromise the *Roe* Court

---

weighing 484 grams and having a gestational age of 22 weeks at birth is now thriving in a Los Angeles hospital, and the attending physician has stated that the infant has a '95% chance of survival.' " *Id.* at 2507 n.5 (citing Wash. Post, Mar. 31, 1983, at A2, col. 2).

104. *See* 103 S. Ct. at 2507 (O'Connor, J., dissenting).

105. 103 S. Ct. at 2496 (emphasis added).

106. *See* Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980) (advocating that the *Roe* trimester analysis is not dependent on medical technology), *aff'd mem. sub nom.* Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 934 (1981).

sought to reach between the abortion and antiabortion factions. In addition, if the Court eventually divorces medical technology from *Roe's* trimester analysis, courts would no longer be required to make in-depth examinations of complex medical facts.[107]

Modifying *Roe's* trimester analysis by severing its ties to medical technology, however, might destroy *Roe's* underlying rationale. The *Roe* Court did not establish its trimester analysis arbitrarily; it justified its trimester standard by using evidence of the medical technology present at the time. The Court specifically found that the state's interest in maternal health became compelling at the end of the first trimester "because . . . until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth."[108] With respect to the state's compelling interest in protecting potential life, the Court found that interest compelling at the end of the first trimester because at that time the fetus becomes viable and, therefore, "has the capability of meaningful life outside the mother's womb."[109] Accordingly, if the Court eventually severs the ties that the *Roe* trimester analysis has with medical technology, the Court will be destroying the policy underpinnings of the constitutional doctrine enunciated in *Roe v. Wade*.

A second alternative would be for the Court to hold that abortion is strictly a woman's private and moral decision.[110] Because there is no legal, social, or religious consensus on when life begins, the Court can decide that the dilemma of the abortion decision should be left to each individual woman.[111]

The consequences of this alternative seem obvious. First, the decision in *Roe v. Wade* would have to be overruled because the right established in *Roe*, although fundamental, was nevertheless limited by the state's interest in protecting maternal health and potential life. Moreover, if the Court were to hold that the decision to abort is solely in the hands of the woman, the Court in effect would be upholding one right, but eradicating another—the unascertainable right of the individual fetus.

A third alternative, a total prohibition of abortion, would force the Court to afford a fetus constitutional protection.[112] In other

---

107. *Id.* at 900.

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

109. *Id.*

110. Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFFALO L. REV. 107, 126 (1982).

111. *Id.*

112. *Id.* at 111.

words, the Court would be required to modify its definition of "human life" and "persons" to include fetuses during early pregnancy[113] or define the beginning of life at conception. This alternative would be consistent with the current trend in medical technology recognizing the fetus as a separate entity:[114]

> There is so much new science and technology pertaining to fetal treatment and diagnosis that the traditional manner of viewing pregnancy has changed. The mother is no longer seen as the sole patient. The fetus is no longer a mere organ of the mother; it is capable of being treated and diagnosed and is considered a patient itself.[115]

The total prohibition of abortion would also ensure that the fetus, who until now has not had a voice in the abortion decision, is constitutionally protected.

The antiabortion alternative, as do the other alternatives, presents problems. A ban on abortion, based on the premise that a fetus is a human life, will prohibit states from discriminating "against persons who are fetuses by offering them less protection than the other individuals in society."[116] As a result, not only would statutes that allow abortions on demand be constitutionally impermissible, but even restrictive statutes, such as those permitting abortion in a case of rape or incest, would be unconstitutional.[117]

Additionally, if fetuses are treated as persons "there is no legal basis for punishing abortion differently than homicide."[118] Historically, however, abortion has not been punished as a homicide; punishment for criminal abortion has been less severe than punishment for homicide.[119]

Finally, if the Court were to hold that fetuses are constitutionally protected persons, "[t]he standard of prenatal care could be defined by the government."[120] It is, therefore, quite conceivable that individuals wishing to protect the fetus would bring tort ac-

---

113. *Id.*

114. Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. SCH. L. REV. 1221, 1241 (1982).

115. *Id.*

116. Chemerinsky, *supra* note 110, at 112-13 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 929 (1978)).

117. Chemerinsky, *supra* note 110, at 113.

118. *Id.* (citation omitted).

119. *Id.*

120. Hudson-Nicholas, *Is Abortion a Women's Issue*? Pro-Choice, 5 UPDATE, Fall 1981, at 6, 8.

tions against the mother for negligently exposing the fetus to illnesses.[121]

V. CONCLUSION

In conclusion, although the *Akron* majority's decision reaffirmed the principles of *Roe v. Wade* and reached the correct legal result, the decision has left several troubling problems unresolved. Ironically, these problems might eventually erode the right that *Roe v. Wade* sought to establish and preserve: a woman's right to terminate her pregnancy. For the time being, however, stare decisis prevails. A more intriguing issue is for how long?

PETER PRIETO

121. *Id.*