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ABORTION: JUDICIAL CONTROL

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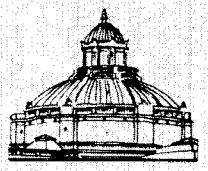

by

Karen J. Lewis

American Law Division

Congressional Research Service

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ABORTION: JUDICIAL CONTROL

SUMMARY

In 1973 the U.S. Supreme Court held that the Constitution protects a woman's decision whether or not to terminate her pregnancy, Roe v. Wade, 410 U.S. 113, and that a State may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, Doe v. Bolton, 410 U.S. 179. But rather than settling the issue, the Court's rulings have kindled heated debate and precipitated a variety of governmental actions at the national, State and local levels designed either to nullify the rulings or hinder their effectuation. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy. Thus, as the previous Congresses have been, the 100th continues to be a forum for proposed legislation and constitutional amendments aimed at limiting or prohibiting the practice of abortion.

The law with respect to abortion in mid-19th century America followed the pre-existing common law of England in all but a few States. By the time of the Civil War a number of States had begun to add to or revise their statutes in order to prohibit abortion at all levels of gestation. The States varied in their exceptions for therapeutic abortions.

1967 saw the first victory of an abortion reform movement with the passage of liberalizing legislation in Colorado. The legislation was based on the Model Penal Code. Between 1967 and 1973, approximately one-third of the States had adopted, either in whole or in part, the Model Penal Code's provisions allowing abortion in instances other than where only the mother's life was in danger.

Between 1968 and 1972 the constitutionality of restrictive abortion statutes of many States was challenged on the grounds of vagueness, violation of the fundamental right of privacy, and denial of equal protection under these laws. In 1973, the Supreme Court ruled, in Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179, that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term.

The Supreme Court's decisions in Roe v. Wade and Doe v. Bolton did not address a number of important abortion-related issues which have subsequently been raised by State actions seeking to restrict the scope of the Court's rulings. These include the issues of informed consent, spousal consent, parental consent, and reporting requirements. In addition, Roe and Doe never resolved the question of what, if any type, of abortion procedures may be required or prohibited by statute. The Court has heard a number of abortion-related cases since 1973 as attempts are made to clarify these issues.

ISSUE DEFINITION

In 1973 the U.S. Supreme Court held that the Constitution protects a woman's decision whether or not to terminate her pregnancy, Roe v. Wade, and that a State may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, Doe v. Bolton. The issue of a woman's right to an abortion, however, is far from settled. Since 1973, there have been Federal and State legislative efforts designed either to nullify the rulings or hinder their effectuation. Subsequent litigation challenging this legislation has led to further judicial refinements.

BACKGROUND AND ANALYSIS

Judicial History

Development and Status of the Law Prior to 1973

The law with respect to abortion in mid-19th century America followed the pre-existing common law of England in all but a few States. Thus, no indictment would occur for aborting a fetus for a consenting female prior to "quickening." But by the time of the Civil War, an influential anti-abortion movement began to affect legislation by inducing States to add to or revise their statutes in order to prohibit abortion at all stages of gestation. By 1910 every State had anti-abortion laws, except Kentucky whose courts judicially declared abortions to be illegal. In 1967, 49 of the States and the District of Columbia classified the crime of abortion as a felony. The concept of quickening was no longer used to determine criminal liability but was retained in some States to set punishment. Non-therapeutic abortions were essentially unlawful. The States varied in their exceptions for therapeutic abortions. Forty-two States permitted abortions only if necessary to save the life of the mother. Other States allowed abortion to save a woman from "serious and permanent bodily injury" or her "life and health." Three States allowed abortions that were not "unlawfully performed" or that were not "without lawful justification", leaving interpretation of those standards to the courts.

This, however, represented the highwater mark in restrictive abortion laws in the United States, for 1967 saw the first victory of an abortion reform movement with the passage of liberalizing legislation in Colorado. The legislation was based upon the Model Penal Code. The movement had started in the early 1950s and centered its efforts on a proposed criminal abortion statute developed by the American Law Institute that would allow abortions when childbirth posed grave danger to the physical or mental health of a woman, when there was high likelihood of fetal abnormality, or when pregnancy resulted from rape or incest.

Between 1967 and the Supreme Court's 1973 decisions in Roe and Doe, approximately one-third of the States had adopted, either in whole or in part, the Model Penal Code's provisions allowing abortions in instances other than where only the mother's life was in danger. Also, by the end

of 1970, 4 States (Alaska, Hawaii, New York, and Washington) had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements.

The first U.S. Supreme Court decision dealing with abortion was rendered in 1971 (U.S. v. Vuitch, 402 U.S. 62). In Vuitch, the Court denied a vagueness challenge to the District of Columbia abortion statute. The net effect of the Vuitch decision was to expand the availability of abortions under the D.C. law's provision allowing abortions where "necessary for the preservation of the mother's ...health."

The Supreme Court's 1973 Abortion Rulings

Between 1968 and 1972 the constitutionality of restrictive abortion statutes of many States was challenged on the grounds of vagueness, violation of the fundamental right of privacy, and denial of equal protection under these laws. These challenges met with mixed success in the lower courts. However, on Jan. 22, 1973, the Supreme Court issued its rulings in Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179. In those cases the Court found that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The Texas statute forbade all abortions not necessary "for the purpose of saving the life of the mother." The Georgia enactment permitted abortions when continued pregnancy seriously threatened the woman's life or health, when the fetus was very likely to have severe birth defects, or when the pregnancy resulted from rape. The Georgia statute required, however, that abortions be performed only at accredited hospitals and only after approval by a hospital committee and two consulting physicians.

The Court's decisions were delivered by Mr. Justice Blackmun for himself and six other Justices. Justices White and Rehnquist dissented. The Court ruled that States may not categorically proscribe abortions by making their performance a crime, and that States may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term. The Court noted that its prior decisions had "found at least the roots of ...[a] guarantee of personal privacy" in various amendments to the Constitution or their penumbras (i.e., protected offshoots) and characterized the right to privacy as grounded in "the Fourteenth Amendment's concept of personal liberty and restrictions upon State action." (Roe v. Wade, 410 U.S. 113, 152, 153 (1973).) Regarding the scope of that right, the Court stated that it included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and "bears some extension to activities related to marriage, procreation, contraception, family relationship, and child rearing and education." (Id. at 152-153.) Such a right, the Court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (Id. at 153.)

With respect to protection of the right against State interference, the Court held that since the right of personal privacy is a fundamental right, only a "compelling State interest" could justify its limitation by a State. Thus while it recognized the legitimacy of the State interest in protecting maternal health and the preservation of the fetus' potential life (Id. at 148-150), and the existence of a rational connection between these two interests and the State's anti-abortion law, the Court held these interests insufficient to justify an absolute ban on abortions. Instead, the Court emphasized the durational nature of pregnancy and held the State's interests to be sufficiently compelling to permit curtailment or prohibition of abortion only during specified stages of pregnancy. The High Court concluded that until the end of the first trimester an abortion is no more dangerous to maternal health than childbirth itself, and found that:

> [W]ith respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. (Id. at 163.)

Only after the first trimester does the State's interest in protecting maternal health provide a sufficient basis to justify State regulation of abortion, and then only to protect this interest. (Id. at 163-164.)

The "compelling" point with respect to the State's interest in the potential life of the fetus "is at viability." Following viability, the State's interest permits it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. (Id. at 163-164.) The Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." (Id. at 160.) The Court summarized its holding as follows:

> (a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. (410 U.S. at 164-165)

In Doe v. Bolton, 410 U.S. 179 (1973), the Court reiterated its holding in Roe v. Wade that the basic decision of when an abortion is proper rests with the pregnant mother and her physician, but extended Roe by warning that just as States may not prevent abortion by making the performance a crime, States may not make abortions unreasonably difficult

to obtain by prescribing elaborate procedural barriers. In Doe, therefore, the Court struck down State requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision. (Id. at 196-199.) The Court appeared to note, however, that this would not apply to a statute that protected the religious or moral beliefs of denominational hospitals and their employees. (Id. at 197-98.)

The Court in Roe also dealt with the question whether a fetus is a person under the Fourteenth Amendment and other provisions of the Constitution. The Court indicated that the Constitution never specifically defines "person," but added that in nearly all the sections where the word person appears, "...the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application." (410 U.S. at 157.) The Court emphasized that given the fact that in the major part of the 19th century prevailing legal abortion practices were far freer than today, the Court was persuaded "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." (Id. at 158.)

The Court did not, however, resolve the question of when life actually begins. While noting the divergence of thinking on this issue, it, instead, articulated the legal concept of "viability," which is defined as the point at which the fetus is potentially able to live outside the womb, although the fetus may require artificial aid. (Id. at 160.)

The Supreme Court's decisions in Roe v. Wade, and Doe v. Bolton did not address a number of important abortion-related issues which have subsequently been raised by State actions seeking to restrict the scope of the Court's rulings. These include the issues of informed consent, spousal consent, parental consent, and reporting requirements. In addition, Roe and Doe never resolved the question of what, if any, type of abortion procedures may be required or prohibited by statute. Moreover, there remained the matter of whether fetal protection statutes were constitutional. Unanswered by the 1973 cases as well was the constitutionality of three other types of statutes affecting access to abortion: (1) those proscribing the advertising regarding the availability of an abortion or abortion-related services in another State; (2) those prohibiting abortions by non-physicians; and (3) those allowing private hospitals to refuse to perform abortions. In addition, since Roe and Doe, questions have arisen with respect to the constitutionality of: (1) the experimental use of fetuses; (2) waiting period requirements; (3) termination of parental rights; (4) the right of a physician to refuse to participate in an abortion; and (5) notice requirements. Finally, the entire matter of Government funding of abortions was not dealt with in Roe and Doe, since public funding was not available at that time.

The Public Funding of Abortions

Two categories of public funding cases have been heard and decided by the Supreme Court: (1) those involving funding restrictions for nontherapeutic (elective) abortions, and (2) those involving funding limitations for therapeutic (medically necessary) abortions.

The 1977 Trilogy -- Restrictions on Public Funding of Nontherapeutic or Elective Abortions

On June 20, 1977, the Supreme Court, in three related decisions, ruled on the question whether the Medicaid statute or the Constitution requires public funding of nontherapeutic (elective) abortions for indigent women or access to public facilities for the performance of such abortions. The Court held that the States have neither a statutory nor a constitutional obligation in this regard. (Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); and Poelker v. Doe, 432 U.S. 519 (1977) (per curiam).)

In Beal v. Doe, the Supreme Court dealt with the question of whether Title XIX of the Social Security Act required the funding of non-therapeutic abortion as a condition of participation in the Medicaid program established by the Act. The Court held that nothing in the language or legislative history of Title XIX requires a participating State to fund every medical procedure falling within the delineated categories of medical care. The Court ruled that it was not inconsistent with the Act's goals to refuse to fund unnecessary medical services. However, the Court did indicate that Title XIX left a State free to include coverage for non-therapeutic abortions should it choose to do so.

In Maher v. Roe, the Supreme Court resolved a constitutional challenge to Connecticut's refusal to reimburse Medicaid recipients for abortion expenses except where the attending physician certifies the abortion to have been medically or psychiatrically necessary. The Court held that the Equal Protection Clause does not require a State participating in the Medicaid program to pay expenses incident to non-therapeutic abortions simply because the State has made a policy choice to pay expenses incident to childbirth. More particularly, Connecticut's policy of favoring childbirth over abortion was held not to impinge upon the fundamental right of privacy recognized in Roe v. Wade, which protects a woman from undue interference in her decision to terminate a pregnancy.

In Poelker v. Doe, the Court upheld a regulation of the municipalities of St. Louis that denied indigent pregnant women non-therapeutic abortions at public hospitals.

The Public Funding of Therapeutic or Medically Necessary Abortions -- The Supreme Court's Decisions in McRae and Zbaraz

The 1977 Supreme Court decisions left open the question whether Federal law, such as the Hyde Amendment, or similar State laws, could validly prohibit governmental funding of therapeutic abortions.

On June 30, 1980, in a 5-4 decision, the U.S. Supreme Court ruled that the Hyde Amendment's abortion funding restrictions were constitutional. The Court's majority found that the Hyde Amendment neither violated the due process or equal protection guarantees of the Fifth Amendment nor the Establishment Clause of the First Amendment. The Court also upheld the right of a State participating in the Medicaid program to fund only those medically necessary abortions for which it received Federal reimbursement. Harris v. McRae, 448 U.S. 297 (1980). In companion cases raising similar issues, the Court held that a State of Illinois statutory funding restriction comparable to the Federal Hyde Amendment also did not contravene the constitutional restrictions of the equal protection clause of the Fourteenth Amendment. Williams v. Zbaraz; Miller v. Zbaraz; U.S. v. Zbaraz, 448 U.S. 358 (1980). The Court's rulings in McRae and Zbaraz mean there is no statutory or constitutional obligation of the States or the Federal Government to fund all medically necessary abortions.

U.S. Supreme Court Decisions Subsequent to Roe and Doe Involving the Substantive Right to Abortion

Informed Consent, Spousal Consent, Parental Consent, and Reporting Requirements

In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court held that informed consent statutes, which require a doctor to obtain the written consent of a woman after informing her of the dangers of abortion and possible alternatives, are constitutional if the requirements are related to maternal health and are not overbearing. (428 U.S. 52, 65-66.) The fact that the informed consent laws must define their requirements very narrowly in order to be constitutional was later confirmed by the Supreme Court in 1979. Freiman v. Ashcroft, 584 F.2d 247, 251 (8th Cir. 1978) aff'd mem., 440 U.S. 941 (1979). The requirements of an informed consent statute must also be narrowly drawn so as not to unduly interfere with the physician-patient relationship, although the type of information required to be given to a woman of necessity may vary according to the trimester of her pregnancy.

In addition to informed consent, the Danforth decision dealt with the issue of spousal consent. The Supreme Court found that spousal consent statutes, which require a written statement by the father of the fetus affirming his consent to the abortion, are unconstitutional if the statutes allow the husband to unilaterally prohibit the abortion in the first trimester. (428 U.S. 52, 69.) It should be noted that on the same day that the Supreme Court decided Danforth, it also summarily affirmed the lower court decision in Coe v. Gerstein, 376 F.Supp. 695 (S.D. Fla. 1974), aff'd, 428 U.S. 901 (1976), which held unconstitutional a spousal consent law regardless of the stage of the woman's pregnancy.

With respect to parental consent statutes, the Supreme Court held in Danforth that those statutes that allow a parent or guardian to absolutely prohibit an abortion to be performed on a minor child were unconstitutional. Subsequently, in Belotti v. Baird, 443 U.S. 622 (1979), the Court ruled that while a State may require a minor to obtain parental

consent, the State must also provide an alternative procedure to procure authorization if parental consent is denied or the minor does not want to seek it. From the reasoning used in Belotti, it appears that the Court felt a minor is entitled to some proceeding which allows her to prove her ability to make an informed decision independent of her parents, or that even if she is incapable of making the decision, at least showing that the abortion would be in her best interests.

The Court in Danforth also ruled that reporting requirements in statutes requiring doctors and health facilities to provide information to States regarding each abortion performed, are constitutional. The Court specified, however, that these reporting requirements must relate to maternal health, remain confidential, and may not be overbearing. (428 U.S. 52, 80-81.)

Finally, another significant ruling made by the Court in Danforth was that fetal protection statutes were generally overbroad and unconstitutional if they pertained to pre-viable fetuses. Such statutes require a doctor performing an abortion to use available means and medical skills to save the life of the fetus. In a subsequent decision, Colautti v. Franklin, 439 U.S. 379 (1979), the Supreme Court held that such fetal protection statutes could only apply to viable fetuses and that the statute must be precise in setting forth the standard for determining viability. In addition, the Court in Colautti stressed that in order to meet the constitutional test of sufficient certainty, fetal protection laws had to define whether a doctor's paramount duty was to the patient or whether the physician had to balance the possible danger to the patient against the increased odds of fetal survival. (439 U.S. at 379, 397-401.)

Parental Notice

The Supreme Court did attempt to provide further clarification of the parental consent and notification issues in its decision in Bellotti v. Baird, 443 U.S. 622 (1979). There the Court held unconstitutional a Massachusetts statute that required **parental consultation or notification** in every instance without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that the abortion would be in her best interests. The Court also found unconstitutional a statutory provision that permitted judicial authorization for an abortion to be withheld from a minor who is found by the court to be mature and fully competent to make the decision whether or not to terminate her pregnancy independently. However, in an effort to provide some future guidelines, the Court, in dicta, suggested that if a State wished to use parental notification, it must afford the minor the option of proceeding directly to court, without parental notification, where she must show that she is a mature minor or that, if she is found not able to make the decision independently, the desired abortion is in her best interests. Four of the eight justices objected to this suggestion on the ground that it was an advisory opinion.

On Mar. 23, 1981, the Court upheld a Utah State law making it a crime for doctors to perform an abortion on an unemancipated, dependent minor without notifying her parents. In H.L. v. Matheson, 450 U.S. 398 (1981), a 6-3 decision, the Court examined the narrow question of the facial

constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relationship with her parents. The Supreme Court cited the interest in preserving family integrity and protecting adolescents in allowing States to require that parents be informed that their daughter is seeking an abortion, and emphasized that the statute in question did not give a veto power over the minor's abortion decision. The Court rejected the minor woman's contention that abortion was being singled out for special treatment in contrast to other surgical procedures, like childbirth, which do not require parental notice. Thus, the Court found the Utah law to be constitutional.

Advertisement of Abortion Services

The Supreme Court held in Bigelow v. Virginia, 421 U.S. 809 (1975), that a State may not proscribe advertising regarding the availability of an abortion or abortion-related services in another State. The Court found that the statute in question was unconstitutional because the State of Virginia, where the advertisement appeared, had only a minimal interest in the health and medical practices of New York, the State in which the legal abortion services were located.

Abortions by Non-Physicians

In Connecticut v. Menillo, 423 U.S. 9 (1975), the Supreme Court ruled that State statutes similar to the Texas law challenged in Roe were constitutional to the extent that the statutes forbid non-physicians from performing abortions. The Roe decision made it clear that a State could not interfere with a woman's decision, made in consultation with and upon the advice of her doctor, to have an abortion in the first trimester of her pregnancy. The Menillo Court found that pre-Roe restrictive abortion laws were still enforceable against non-physicians. (423 U.S. at 9, 11.)

Abortions in Public and Private Hospitals

In Poelker v. Doe, 432 U.S. 519 (1977) (per curiam), the Supreme Court held that the policy of the City of St. Louis in refusing to allow the performance of non-therapeutic abortions in its public hospitals, and of staffing those hospitals with personnel opposed to the performance of abortions, did not violate the equal protection clause of the Constitution. Poelker, however, did not deal with the question of private hospitals and their authority to prohibit abortion services. In Poelker, the Court dealt with the right of a municipality to elect to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions. The Court approved this practice.

The Definition of Viability

The Supreme Court's articulation of the concept of viability has required further elaboration, particularly with regard to the critical

question of who defines at what point a fetus has reached viability. In Roe the Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." (410 U.S. at 160.) Such potentiality, however, must be for "meaningful life" and this cannot encompass simply momentary survival. (410 U.S. at 163.) The Court also noted that while viability is usually placed at about 28 weeks, it can occur earlier and essentially left the point flexible for anticipated advances in medical skill. Finally, Roe stressed the central role of the pregnant woman's doctor, emphasizing that "the abortion decision in all its aspects is inherently, and primarily, a medical decision." (410 U.S. at 160.) Similar themes were stressed in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), in which a Missouri law, which defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems", was attacked as an attempt to advance the point of viability to an earlier stage of gestation. The Court disagreed, finding the statutory definition consistent with Roe. It re-emphasized that viability is "a matter of medical judgment, skill, and technical ability" and that Roe meant to preserve the flexibility of the term. (428 U.S. at 64) Moreover, the Danforth Court held that "it is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the attending physician." (428 U.S. at 64.) The physician's central role in determining viability, and the lack of such definitional authority in the legislatures and courts, was reaffirmed by the Court in Colautti v. Franklin, 439 U.S. 379 (1979).

U.S. Supreme Court Decisions -- 1983 - 1987

On June 15, 1983, the U.S. Supreme Court decided three cases involving several different abortion questions.

In City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, (hereinafter referred to as City of Akron), the Supreme Court in a 6-3 vote declared that five sections of the Akron ordinance restricting the right of a woman to an abortion were unconstitutional.

They provided:

(1) that after the first trimester of pregnancy, all abortions be performed in a hospital;
(2) that there be notification of consent by parents before abortions may be performed on unmarried minors;
(3) that the attending physician make certain specified statements to the patient so that the resulting consent for an abortion would amount to informed consent;
(4) that there be a 24-hour waiting period between the time the patient signs the consent form and when the physician performs the abortion; and
(5) that fetal remains be disposed of in a "humane and sanitary manner."

In striking down all of these sections of the Akron ordinance as being violative of the U.S. Constitution, the Court at the very outset reaffirmed its 1973 decision, Roe v. Wade, 410 U.S. 113, and proceeded to analyze each section of the Akron ordinance within the trimester framework established by that ruling. During the first trimester, a woman must be free in consultation with her doctor to reach a decision to have an abortion absent governmental interference. In City of Akron, the Court does point out that a State may enact some regulation applicable to the first trimester of pregnancy, but it cannot have a significant impact on the woman's right to decide to terminate her pregnancy and must be justified by important State health objectives. The important point concerning State regulation in the first trimester is that there be no interference with (1) doctor-patient consultation, or (2) the woman's choice between abortion and childbirth. (City of Akron, 462 U.S. at 429-430.)

The challenged Akron ordinance provision relating to where abortions can be performed pertains specifically to second trimester abortions. The requirement stated that any second trimester abortion had to be performed in a full-service hospital. The accreditation of these facilities required compliance with comprehensive standards governing an extensive variety of health and surgical services. The result was that abortions under this section of the Akron ordinance could not be performed in outpatient entities that were not part of an acute-care, full service hospital. The Court found this restriction unconstitutional. The Court noted that the possibility of having to travel to find facilities could result in both financial expense and added risk to a woman's health. (Id. at 435.) The Court also cited changed medical circumstances, and the availability of safer procedures for performing second trimester abortions since Roe, for its conclusion that the Akron hospitalization requirement imposed an unreasonable burden on a woman's right to an abortion.

The Court also invalidated the provision in the Akron ordinance which prohibited a doctor from performing an abortion on an unemancipated minor unless the doctor obtained "the informed written consent of one of her parents or her legal guardian" or unless the minor herself obtained "an order from a court having jurisdiction over her that her abortion be performed or induced." (Id. at 439.) The Court relied on its earlier rulings in Danforth and Bellotti II to conclude that the City of Akron could "not make a blanket determination that all minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval." (Id. at 440.) (Emphasis in original text). Moreover, the Akron ordinance's provision concerning parental approval did not create expressly the alternative judicial procedure required by Bellotti II. Thus, the Akron ordinance's consent provision had to fall because it foreclosed any possibility for "case-by-case evaluations of the maturity of pregnant minors." (Id. at 441, quoting Bellotti II, 443 U.S., at 643, n. 23 (plurality opinion).)

In City of Akron, the Supreme Court also struck down the informed written consent section of the ordinance. This provision required that the attending doctor inform the woman "of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the

availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth." (Id. at 442.) The attending physician was also required to tell the patient of the risks involved and any other information which in the physician's medical judgment would be critical to her decision of whether to terminate the pregnancy. The Court found this informed consent requirement to be constitutionally unacceptable because it essentially gave the government unreviewable authority over what information was to be given a woman before she decided whether to have an abortion. In City of Akron, the Court found that the city's regulation concerning informed consent exceeded permissible limits. (Id. at 444-445.) In addition, it was also objectionable because it intruded upon the discretion of the pregnant woman's doctor. (Id. at 445.)

In City of Akron, the Supreme Court also chose to invalidate the 24-hour waiting period. (Id. at 449.) The Court found that the City of Akron had not shown that any legitimate state interest was being served "by an arbitrary and inflexible waiting period." (Id. at 450.)

Finally, the Court ruled that the portion of the Akron ordinance requiring that physicians performing abortions see to it that the remains of the unborn child be disposed "in a humane and sanitary" way was void for vagueness. The level of uncertainty present was unacceptable in a situation such as this where there was the prospect of criminal liability being imposed. (Id. at 451.) This provision violated the Due Process Clause.

Justice O'Connor wrote a dissent in which she was joined by Justices White and Rehnquist. The dissenting opinion basically took issue with the trimester framework in Roe v. Wade.

In Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476, (hereinafter referred to as Ashcroft), the Supreme Court invalidated Missouri's second trimester hospitalization requirement by the same 6-3 vote as in City of Akron; however, the Court voted 5-4 to uphold three other sections of that Missouri law. The statutory provisions challenged on constitutional grounds:

(1) required that after 12 weeks of pregnancy, abortions be performed in a hospital;
(2) mandated that there be a pathology report for each abortion performed;
(3) required the presence of a second physician during abortions that are performed after viability; and
(4) required that minors obtain parental consent or consent from the juvenile court for an abortion.

With respect to the requirement that all second trimester abortions be performed in a full service hospital, the Supreme Court held that its decision and rationale for invalidating such requirement in City of Akron was controlling. (Ashcroft, 462 U.S. at 481-482.)

The Court, however, found that the second-physician requirement during the third trimester in Ashcroft was permissible under the Constitution because it "reasonably furthers the State's compelling interest in protecting the lives of viable fetuses..." (Id. at 486.)

The Court also upheld the pathology report requirement. This provision was "related to generally accepted medical standards" and "further(s) important health-related State concerns." (Ashcroft at 487, quoting City of Akron at 430.) The Court further found that the cost of the tissue examination "does not significantly burden a pregnant women's abortion decision." (Id. at 490.)

The Court also upheld Missouri's parental consent requirement. (Id. at 490-493.) It distinguished the provision involved here from that challenged in the City of Akron case. The Missouri requirement, unlike the Akron one, did provide an alternative procedure by which a pregnant immature minor could show in court that she was sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.

In Ashcroft, Justice Blackmun wrote a separate opinion concurring in the judgment invalidating the hospital requirement for all second trimester abortions but dissenting with respect to the Court's other findings upholding the remaining provisions in question in the Missouri law. He was joined by Justices Brennan, Marshall and Stevens.

Justice O'Connor, joined by Justices White and Rehnquist, concurred in part and dissented in part. Justice O'Connor emphasized that for the same reasons she dissented in City of Akron regarding the hospital requirement for second trimester abortions, she dissented here. They concurred with respect to the Court's upholding the other sections of the Missouri law: the second-physician requirement, pathology report requirement, and parental consent provision. However, they used a different rationale, one that did not utilize the trimester framework of Roe v. Wade.

In Simopoulos v. Virginia, 462 U.S. 506, (hereinafter referred to as Simopoulos), the Supreme Court in an 8-1 decision ruled that Virginia's mandatory hospitalization requirement for second trimester abortions is constitutional. As in City of Akron and Ashcroft, Justice Powell wrote the opinion for the Court. Justice Stevens dissented. The Court distinguished the requirement in question in Virginia from those it invalidated in City of Akron and Ashcroft. The determination upholding the Virginia provision actually turned on the definition of "hospital."

Justice O'Connor wrote a separate concurrence joined by Justices Rehnquist and White. Her reasoning, however, was not based on the trimester framework of Roe v. Wade. She stated: "Rather, I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion." (O'Connor, Concurrence, at 520.)

In summary, the 1983 Supreme Court decisions in City of Akron, Ashcroft, and Simopoulos settled questions relating to hospital requirements for second trimester abortions, informed consent

requirements, waiting periods, parental notification and consent, and disposal of fetal remains. The Supreme Court reaffirmed its decision in Roe v. Wade and its intention to continue to follow the trimester framework balancing a woman's constitutional right to decide whether to terminate a pregnancy with the State's interest in protecting potential life. The State's interest in protecting potential life becomes "compelling" at the point of viability, i.e., when the fetus can exist outside of a woman's womb either on its own or through artificial means. The definition of viability is the one used by the Court in its Roe v. Wade decision in 1973.

For the Court's most recent reaffirmation of Roe v. Wade, see also Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986). In Diamond v. Charles, 106 S.Ct. 1697 (1986), the Court avoided ruling on the substantive issues involved by finding that the appellant pediatrician lacked standing to bring the action.

On Dec. 14, 1987, an equally divided Supreme Court, without opinion, let stand a 7th Circuit court of appeals decision invalidating an Illinois law that would have restricted the right of teenagers to have abortions by requiring them to notify their parents (Hartigan v. Zbaraz, 56 U.S.L.W. 4053). The tie vote means that the ruling sets no nationwide precedent. There are other States with parental notification laws similar to the one in Illinois. Thus, the Supreme Court may have another opportunity to review the issue in the future.

FOR ADDITIONAL READING

U.S. Library of Congress. Congressional Research Service. Abortion: Legislative control [by] Thomas P. Carr. [Washington] 1988. (Updated regularly)
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