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Note

The Third Circuit's Virtual Abrogation of the Pennsylvania Abortion Control Act of 1982—Outmoded Standards Threaten the Abortion Right


On June 11, 1982, in an effort to provide comprehensive abortion regulation in Pennsylvania, Governor Richard Thornburgh signed Senate Bill 439, creating the Abortion Control Act of 1982 (Act). The Act regulates where and under what circumstances physicians can perform abortions, and requires physicians to file reports disclosing the basis


2. See Note, Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach, 87 Dick L. Rev. 373, 382 (1983). The bill was originally passed in 1981 and vetoed by Governor Thornburgh, who expressed his concern that it went "further than is necessary in protecting the state interest." Id. (citing Governor Thornburgh's Veto Message to the Senate (Dec. 23, 1981), COMMONWEALTH OF PENNSYLVANIA HISTORY OF SENATE BILLS V-2, V-4 (1981-82) (footnote omitted)). Extensive negotiation between the governor's office and the bill's sponsors yielded the legislation that the Governor eventually signed. Id. For a further discussion of the negotiations that resulted in the signing of the Abortion Control Act of 1982 (Act), see id. at 382 n.84.


All abortions subsequent to the first trimester of pregnancy shall be performed, induced and completed in a hospital. Except in cases of good faith judgment that a medical emergency exists, any physician who performs such an abortion in a place other than a hospital is guilty of "unprofessional conduct" and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of July 20, 1974 (P.L. 551, No. 190), known as the "Medical Practice Act of 1974."

Id.

5. 18 Pa. Cons. Stat. Ann. § 3210 (Purdon 1983). Section 3210(a) prohibits the knowing, intentional or reckless performance of an abortion upon a "viable" fetus. Id. § 3210(a). Section 3210(b) requires the physician to "exercise that degree of professional skill, care and diligence" that he would be required to exercise "in order to preserve the life and health of any unborn child intended to be born and not aborted." Id. § 3210(b). This provision also requires the physician to employ the abortion technique "which would provide the best
for their belief that an abortion was necessary to maternal health if there was a possibility of fetal survival. Additionally, the Act requires physicians to supply a patient with certain information about the risks of and alternatives to the procedure before performing an abortion. On re-

opportunity for the unborn child to be aborted alive,” unless, in the physician’s good faith judgment, that technique would present a significantly increased medical risk to the mother. Id. Finally, § 3210(c) requires the attending physician to arrange for the presence of a second physician in any operation that, in his good faith judgment, “does not preclude the possibility of” a live abortion. Id. § 3210(c). Violation of any of these subsections is a felony of the third degree. Id.

For a discussion of fetal viability see infra note 35 and accompanying text.

6. 18 Pa. Cons. Stat. Ann. § 3211 (Purdon 1983). Section 3211(a) requires the physician make a “good faith judgment” as to whether a fetus is “viable” prior to performing any abortion after the first trimester. Id. § 3211(a). If the physician determines that the child is “viable, he [must] report the basis for his determination that the abortion is necessary to preserve maternal life or health.” Id. If the physician determines that the child is not “viable,” the physician must report the basis for that determination. Id. Failure by the physician to conform with this section constitutes “unprofessional conduct.” Id. § 3211(b).

Upon a finding of “unprofessional conduct” by the State Board of Medical Education and Licensure, the Board must suspend the physician’s license for at least three months. Id. Moreover, the intentional, knowing, or reckless falsification of any required report is a misdemeanor of the third degree. Id. For a discussion of “viability,” see infra note 35 and accompanying text.

7. 18 Pa. Cons. Stat. Ann. § 3205 (Purdon 1983). Section 3205(a), the informed consent provision, provides in pertinent part:

(a) General rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) the woman is provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion or by the referring physician but not by the agent or representative of either.

(i) The name of the physician who will perform the abortion.

(ii) The fact that there may be detrimental physical and psychological effects which are not accurately foreseeable.

(iii) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility.

(iv) The probable gestational age of the unborn child at the time the abortion is to be performed.

(v) The medical risks associated with carrying her child to term.

(2) The woman is informed, by the physician or his agent, at least 24 hours before the abortion:

(i) [of the fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(ii) [of the fact that the father is liable to assist in the support of her child, even in instances where the father has offered to pay for the abortion.

(iii) That she has the right to review the printed materi-
cept of such information, the Act requires adult patients to wait at least twenty-four hours before rendering their consent to an abortion, and unemancipated minors are required to obtain parental or judicial consent to the abortion. Abortion facilities are required to supply the State Department of Health with detailed information about the patient as described in section 3208 (relating to printed information). The physician or his agent shall orally inform the woman that the materials describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to view the materials, copies of them shall be furnished to her. If the woman is unable to read the materials furnished her, the materials shall be read to her. If the woman seeks answers to questions concerning any of the information or materials, answers shall be provided her in her own language.

(3) The woman certifies in writing, prior to the abortion, that the information described in paragraphs (1) and (2) has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph (2).

(4) Prior to the performance of the abortion, the physician who is to perform or induce the abortion or his agent receives a copy of the written certification prescribed by paragraph (3).

Id. § 3205(a). Section 3205 further provides for a woman's consent in the emergency situation by requiring the physician to "inform the woman, prior to abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death." Id. § 3205(b) (emphasis added). A physician violating the provision is subject to the penalties set forth in § 3211. Id. § 3205(c). A physician who complies with the statute, however, is shielded from civil liability for failure to obtain the patient's informed consent. Id. § 3205(d).

For a discussion of the penalties set forth in § 3211, see supra note 6.


9. 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983). This section requires the attending physician of an "unemancipated" woman under the age of 18 to obtain the consent of the pregnant woman and one or both of her parents. Id. § 3206(a). If the woman has been adjudged an incompetent under 20 Pa. Cons. Stat. Ann. § 5511 (Purdon 1975), the physician is required to obtain the consent of her guardian. 18 Pa. Cons. Stat. Ann. § 3206(a) (Purdon 1983). In their determination of consent, the parents or guardian are to consider only the child's best interests. Id. If neither a parent nor a guardian is available to the physician within a reasonable time, consent of any person standing in loco parentis to the minor is sufficient. Id. § 3206(b). In the event of parental refusal, the section provides for a court order upon a determination that the minor in question is mature enough to render her informed consent or that the abortion would be in her best interests. Id. § 3206(c), (d). These proceedings are to be handled promptly and confidentially and are appealable to the Supreme Court of Pennsylvania. Id. § 3206(f), (h). The court must provide the minor with representation upon her request. Id. § 3206(e). Coercion to undergo an abortion by parents or guardians is prohibited. Id. § 3206(g). Any physician found violating the provisions of this section shall be found guilty of "unprofessional conduct." Id. § 3206(i). For a discussion of what constitutes unprofessional conduct, see supra notes 4 & 6.

10. 18 Pa. Cons. Stat. Ann. § 3214(a), (b) (Purdon 1983). The statute sets forth the manner in which such information must be reported:

(a) General rule.—A report of each abortion performed shall be made
to the department on forms prescribed by it. The report forms shall
not identify the individual patient by name and shall include the follow-
ing information:

(1) Identification of the physician who performed the abortion
and the facility where the abortion was performed and of the
referring physician, agency or service, if any.
(2) The political subdivision and state in which the woman
resides.
(3) The woman’s age, race and marital status.
(4) The number of prior pregnancies.
(5) The date of the woman’s last menstrual period and the
probable gestational age of the unborn child.
(6) The type of procedure performed or prescribed and the
date of the abortion.
(7) Complications, if any, including but not limited to, ru-
bella disease, hydatid mole, endocervical polyp and malignancies.
(8) The information required to be reported under section
3211(a) (relating to viability).
(9) The length and weight of the aborted unborn child when
measurable.
(10) Basis for any medical judgment that a medical emer-
gency existed as required by any part of this chapter.
(11) The date of the medical consultation required by section
3204(b) (relating to medical consultation and judgment).
(12) The date on which any determination of pregnancy was
made.
(13) The information required to be reported under section
3210(b) (relating to abortion viability).
(14) Whether the abortion was paid for by the patient, by
medical assistance, or by medical insurance coverage.
(b) Completion of report.—The reports shall be completed by the
hospital or other licensed facility, signed by the physician who per-
formed the abortion and transmitted to the department within 15 days
after each reporting month.

Id. Pursuant to § 3214(e), annual statistical reports are to be prepared by the
Pennsylvania Department of Health based upon information gathered from the
physicians’ reports. Id. § 3214(e). After steps are taken to ensure confiden-
tiality, the statistical reports are to be made available to the public. Id.

11. Id. § 3207(b). Section 3207(b) provides:

(b) Reports.—Within 30 days after the effective date of this chapter,
every facility at which abortions are performed shall file, and update
immediately upon any change, a report with the department, which
shall be open to public inspection and copying, containing the follow-
ing information:

(1) Name and address of the facility.
(2) Name and address of any parent, subsidiary or affiliated
organizations, corporations or associations.
(3) Name and address of any parent, subsidiary or affiliated
organizations, corporations or associations having contemporane-
ous commonality of ownership, beneficial interest, directorship or
officership with any other facility.

Any facility failing to comply with the provision of this subsection shall
be assessed by the department a fine of $500 for each day it is in viola-
tion thereof.

Id.
provisions implement the legislative intent to promote a general state public policy favoring childbirth over abortion.\(^\text{12}\)

Before the Act was to take effect, however, the Pennsylvania Section of the American College of Obstetricians and Gynecologists (ACOG) and others filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the Act was unconstitutional in its entirety.\(^\text{13}\) The district court granted the plaintiffs' motion for a preliminary injunction as to the provision requiring an adult patient to wait at least twenty-four hours before rendering consent to an abortion,\(^\text{14}\) but found that the plaintiffs had failed to establish a likelihood of successfully challenging the Act's remaining provisions, or the Act in its entirety.\(^\text{15}\) The plaintiffs appealed to the United States Court of Appeals.

\(^{12}\) See id. §§ 3202(c), 3208, 3215(e). "[T]he public policy of the Commonwealth" encourages "childbirth over abortion." Id. § 3202(c). The printed information requirements of § 3208, for example, encourage childbirth by requiring the following "easily comprehensible printed materials" to be published by the Pennsylvania Department of Health: (1) lists of local agencies and services available to assist a woman all the way from pregnancy through the child's minority, as well as information about available adoption agencies; (2) "materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term" and any relevant information on fetal survival. Id. § 3208.

Finally, childbirth is made financially more attractive by the Act. Id. § 3215(e). Section 3215(e) provides:

\(\text{e) Insurance policies.—All insurers who make available health care and disability insurance policies in this Commonwealth shall make available such policies which contain an express exclusion of coverage for abortion services not necessary to avert the death of the woman or to terminate pregnancies caused by rape or incest. Any such policy shall contain a premium which is lower than that which is contained in policies offering additional abortion coverage.}\)

\(^{13}\) See American College of Obstetricians and Gynecologists v. Thornburgh, 552 F. Supp. 791, 793 (E.D. Pa. 1982). Additional plaintiffs included individual physicians who performed abortions, abortion clinics, clergy, and a woman whose health insurance included comprehensive abortion coverage. Id. at 793-94. The district court held, inter alia, that the clergy lacked standing. Id. at 795. This ruling was not subsequently appealed.

\(^{14}\) Id. at 797-98 (citing 18 Pa. Cons. Stat. Ann. § 3205 (Purdon 1983)).

District Judge Huyett noted:

The weight of authority holds and I conclude that the 24-hour waiting period which imposes a mandatory, temporary denial of an abortion is a legally significant burden on a woman's right to seek an abortion. There is no state interest during the first trimester of pregnancy which justifies this burden. Further the 24-hour waiting period has a detrimental effect on the health interests of women seeking abortions. . . . I conclude that the plaintiffs have shown a likelihood of success on the merits of their claim that the 24-hour waiting period is unconstitutional.

\(^{15}\) 552 F. Supp. at 811. Judge Huyett noted:
for the Third Circuit, while the defendant, Pennsylvania, cross-appealed the district court’s granting of the preliminary injunction regarding the waiting period provision. After reargument, the Third Circuit held seven of the Act’s provisions to be unconstitutional and enjoined en-

I have applied the traditional criteria applicable to a motion for a preliminary injunction: likelihood of success on the merits, irreparable harm if the relief is not granted, possibility of harm to the non-moving party, and where relevant, harm to the public.

... I conclude that the only portion of the Act which the plaintiffs have demonstrated should be preliminarily enjoined is the 24-hour waiting period. In all other respects, the plaintiffs have failed to show a right to a preliminary injunction pending the outcome of the trial on the merits.

Id.

16. American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 290 (3d Cir. 1984). The defendants, Governor Thornburgh and six state and local officials, are referred to collectively as “Pennsylvania” in the court’s opinion and shall be for the purposes of this Note. Id. at 289.

17. Id. On December 9, 1982, the Third Circuit granted plaintiffs’ request for a stay of enforcement pending appeal. Id. Noting that “the district court relied in significant part on two decisions from other circuits which were then pending before the Supreme Court,” the Third Circuit ordered the matter held, pending Supreme Court disposition of those cases and a third case involving criminal sanctions for abortions. Id. (citing Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), aff’d in part and rev’d in part, 462 U.S. 416 (1983); Planned Parenthood Ass’n v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), aff’d in part and rev’d in part, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983)). Following the Supreme Court’s decisions in Akron, Ashcroft and Simopoulos, the Third Circuit directed the parties to file supplemental briefs and reargue the impact of those decisions upon the issues in the present case. Id. at 290. Noting the complete factual and legal record which the parties had provided, the court exercised its plenary scope of review and chose to address the important constitutional issues at stake. Id. (citing Apple Computer, Inc. v. Franklin Corp., 714 F.2d 1240, 1242 (3d Cir. 1983), cert. denied, 104 S. Ct. 690 (1984)).

For a discussion of Akron, see infra notes 85-95 and accompanying text. For a discussion of Ashcroft, see infra notes 96-103 and accompanying text. For a discussion of Simopoulos, see infra note 96.

18. 737 F.2d at 299-303. The court invalidated the definition of “physician” in § 3203 as violative of the equal protection clause of the fourteenth amendment, because it excluded osteopathic surgeons. Id. at 294-95. The court found the informed consent provision of § 3205 to be unconstitutional because it infringed upon the woman’s abortion decision and impeded the free exercise of the physician’s discretion. Id. at 296. The court invalidated the requirement of § 3208 that printed information be made available to effectuate the informed consent of the woman because it was inextricably intertwined with § 3205. Id. at 298. The court invalidated § 3210(b), which would require a physician to use the method most likely to result in a live abortion unless it posed a significantly greater health risk to the mother, and § 3210(c), which would provide for the presence of a second physician at any abortion not precluding the possibility of fetal survival, because these provisions impermissibly required the physician to “trade-off” the life of the mother for that of the fetus. Id. at 300-01 (citing Colautti v. Franklin, 439 U.S. 379 (1979)). The court struck down § 3211, which required the physician to “report the basis for his determination that the abortion is necessary to preserve maternal life or health,” because it did not further an important state interest. Id. at 301 (quoting 18 PA. CONS. STAT. ANN. § 3211
forcement of an eighth provision.\textsuperscript{19}

Modern judicial analysis of the issue of abortion begins with the landmark case of \textit{Roe v. Wade},\textsuperscript{20} which recognized as fundamental a woman’s right to decide whether to have an abortion.\textsuperscript{21} In \textit{Roe}, the plaintiff, a pregnant single woman, challenged the constitutionality of the Texas criminal abortion laws.\textsuperscript{22} The plaintiff alleged that she wanted to

(Purdon 1983). Similarly, the court found the complex reporting requirements of § 3214, which required detailed reports of the physical characteristics of the aborted fetus, chilled the willingness of physicians to perform abortions. \textit{Id.} at 302 (citing \textit{Colautti}, 439 U.S. at 396). Finally, the court invalidated § 3215(e), mandating the creation of insurance policies that exclude coverage of elective abortions. \textit{Id.} at 303. Section 3215(e) had required that these new policies cost less than those offering comprehensive abortion coverage. \textit{Id.} The court invalidated the provision because it added a barrier to a woman’s access to an abortion. \textit{Id.} For the text of § 3215(e), see \textit{supra} note 12.

\textsuperscript{19} 737 F.2d at 296. The court noted that the parental consent provision of § 3206 would have been stricken because of procedural inadequacies, but was saved from facial invalidity by a clause requiring the Supreme Court of Pennsylvania to promulgate rules assuring prompt, confidential determination of a minor’s ability to consent. \textit{Id.} Since the Supreme Court of Pennsylvania had not yet promulgated such rules, § 3206 was enjoined from operation in the interim. \textit{Id.}

\textsuperscript{20} 410 U.S. 113 (1973).

\textsuperscript{21} \textit{Id.} at 152-53.


\textsuperscript{22} 410 U.S. at 120. The plaintiff brought suit in the United States District Court for the Northern District of Texas. \textit{Roe v. Wade}, 314 F. Supp. 1217 (N.D. Tex. 1970). She challenged portions of the Texas Penal Code which made it a crime to “procure an abortion” or attempt one except with respect to “an abortion procured or attempted by medical advice for the purpose of saving the life
terminate her pregnancy but was unable to get a "legal" abortion in Texas because her life was not threatened by the continuation of her pregnancy.\textsuperscript{23} She sought declaratory and injunctive relief,\textsuperscript{24} asserting that the statutes were unconstitutionally vague and abridged her right to privacy.\textsuperscript{25} The district court found the statutes to be void on their face for vagueness and overbreadth, but dismissed the application for injunctive relief.\textsuperscript{26} On appeal, the Supreme Court invalidated the abortion statutes for their overly broad infringement upon plaintiff's constitutional rights, concluding that "[t]he right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."\textsuperscript{27} Justice Blackmun, writing for the majority, stated that the

of the mother." 410 U.S. at 117-18 (citing Tex. Civ. Code Ann. §§ 4512.1-4.6 (Vernon 1972)). Apparently, the Texas statutes under attack were "typical of those that have been in effect in many states for approximately a century," \textit{Id.} at 116. For a discussion of pre-\textit{Roe} abortion statutes, see \textit{ supra} note 21.

23. 410 U.S. at 120. Plaintiff wanted to obtain an abortion "performed by a competent, licensed physician, under safe, clinical conditions." \textit{Id.} She alleged that she could not afford to travel to another jurisdiction where elective abortions were recognized by law. \textit{Id.} For a discussion of the Texas provisions requiring maternal health to be in jeopardy before an abortion could be justified, see \textit{ supra} note 22.

24. 410 U.S. at 120. Plaintiff sought both a judgment that the Texas criminal statutes were unconstitutional and an order enjoining the District Attorney of Dallas County from enforcing them. \textit{Id.}

25. \textit{Id.} Plaintiff's claim that the statute was void for vagueness invokes what one commentator has described as three universally accepted principles for challenging the constitutionality of statutes which have emerged from a long line of Supreme Court cases:

First, a criminal statute must be couched in terms explicit enough to inform those to whom it applies of the conduct that is either required or forbidden. . . .

Second, laws must supply explicit standards to prevent arbitrary and discriminatory enforcement. . . .

Third, where a statute appears to intrude upon fundamental constitutional liberties, the vagueness of the statute may curb the exercise of those freedoms by causing citizens to "steer far wider of the lawful zone" than if precise boundaries are drawn between lawful and unlawful conduct.

Note, Constitutional Law—Abortion—Statutory Interpretation—Void for Vagueness—The United States Supreme Court has held that statutory provisions requiring a physician to exercise a high degree of care to preserve the life of a fetus which "may be viable" are unconstitutionally vague, 18 Duq. L. Rev. 161, 171 (1979).

In \textit{Roe v. Wade}, the plaintiff alleged that her right to personal privacy was guaranteed by the first, fourth, fifth, ninth and fourteenth amendments to the Constitution of the United States. 410 U.S. at 121. For a discussion of the right to privacy, see \textit{ infra} notes 27-30 and accompanying text.

26. 410 U.S. at 121-22 (citing Roe v. Wade, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970)). The district court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiff's ninth amendment rights. \textit{Id.}

27. \textit{Id.} at 153. A right of privacy in the home and family was articulated
right of privacy\textsuperscript{28} is a fundamental right\textsuperscript{29} which may only be limited by
early on in \textit{Meyer v. Nebraska}, where the Court struck down a state's attempt to
regulate what children could and could not learn in school. 262 U.S. 390, 399
(1923). The Court in \textit{Meyer} spoke of a fundamental liberty guaranteed by the
due process clause but was careful not "to define with exactness the liberty thus
 guaranteed." \textit{Id.} Thirty years later, Justice Harlan, in his dissent to \textit{Poe v. Ull-
 man}, found Connecticut's prohibition of the use of contraceptives in the marital
relationship to implicate a "basic liberty" falling within this same notion of pri-
 vacy. 367 U.S. 497, 545 (1961) (Harlan, J., dissenting). Finding the home to be
the seat of family life, Justice Harlan explained that the "integrity of that life is
something so fundamental that it has been found to draw to its protection the
principles of more than one explicitly granted constitutional right." \textit{Id.} at 551-
52. Similarly, Justice Douglas, in his now famous majority opinion in \textit{Griswold v. Con-
 necticut}, found that a Connecticut statute prohibiting the use of or counseling
with respect to the use of contraceptives by married persons to implicate the
"penumbras" of specific guarantees of privacy in the Bill of Rights. 381 U.S.
479, 481-84 (1964). Justice Douglas asserted that these "penumbras" helped to
animate those specific guarantees and to give them substance. \textit{Id.} at 484. Be-
cause he found that marriage lies within the zone of privacy created by these
"penumbras," he concluded that a law prohibiting the use rather than regulating
the sale of contraceptives achieved its goals "by means which sweep unneces-
sarily broadly and thereby invade the area of protected freedoms." \textit{Id.} at 485
citing NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

Finally, Justice Brennan's opinion in \textit{Eisenstadt v. Baird} extended the pro-
tection afforded married individuals to unmarried individuals as well. 405 U.S.
438, 453 (1971). While acknowledging that the right of privacy in question in
\textit{Griswold} had inhered in the marital relationship, Justice Brennan explained
that the marital couple is really an association of two individuals, each with a separate
intellectual and emotional makeup. \textit{Id.} Justice Brennan concluded that "[i]f the
right of privacy means anything, it is the right of the individual, married or single,
to be free from unwarranted governmental intrusion into matters so fundamen-
tally affecting a person as the decision whether to bear or beget a child." \textit{Id.}

28. 410 U.S. at 152-56. The Court first noted that "[t]he Constitution does not
explicitly mention any right of privacy." \textit{Id.} at 152. The Court explained
that it has, however, "recognized that a right of personal privacy, or a guarantee
certain areas of zones of privacy, does exist under the Constitution." \textit{Id.} (cit-
ing Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)). The Court (or at
least individual Justices) has found the roots of such a privacy right in the first,
fourth, fifth, ninth, and fourteenth amendments. \textit{Id.} (citing Stanley v. Georgia,
394 U.S. 557, 564 (1969) (first amendment); Terry v. Ohio, 392 U.S. 1, 8-9
(1968) (fourth amendment); Katz v. United States, 389 U.S. 347, 350 (1967)
(fourth amendment); Griswold v. Connecticut, 381 U.S. 479, 486 (1965)
(Goldberg, J., concurring) (ninth amendment); Meyer v. Nebraska, 262 U.S. 390,
399 (1923) (fourteenth amendment); Boyd v. United States, 116 U.S. 616 (1886)
(fourth and fifth amendments)). The Court recognized that whatever constitu-
tional foundation is employed, however, the "detriment that the State would
impose upon the pregnant woman by denying" her the choice whether or not to
abort is apparent, as medical, social, economic, and psychological harm may re-
result. 410 U.S. at 153. Having invalidated the statutes upon grounds of over-
breadth, the Court did not find it necessary to consider the vagueness challenge
nor the appeal of the denial of injunctive relief. \textit{Id.} at 164, 166.

29. \textit{Id.} at 152, 155 citing Kramer v. Union Free School Dist., 395 U.S. 621,
627 (1969)). The Court noted that "only personal rights . . . deemed 'funda-
mental' or 'implicit in the concept of ordered liberty' . . . are included in this
guarantee of personal privacy." \textit{Id.} at 152 (citing Palko v. Connecticut, 302 U.S.
319, 325 (1937)). The Court stated that personal privacy has "some extension
means narrowly tailored to further a compelling state interest.\textsuperscript{30} The Court then determined that the state has two important interests in the abortion area that may become compelling: (1) the life and health of the mother;\textsuperscript{31} and (2) the life and health of the fetus.\textsuperscript{32} Noting that an abortion may be as safe for the mother as childbirth until the end of the first trimester of pregnancy,\textsuperscript{33} the Court determined that the state's interest in the health of the mother does not become compelling until after the first three months of pregnancy.\textsuperscript{34} The Court further explained that the

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30. \textit{Id.} at 155 (citing Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969) (denial of fundamental right to vote must promote compelling state interest); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (classification scheme which serves to penalize right to move from state to state is justified only by compelling state interest); \textit{Sherbert v. Verner}, 374 U.S. 398, 406 (1963) (first amendment right to freedom of religion can only be limited by compelling state interest)).

The Court concluded that the personal privacy right, which includes the abortion decision, is not absolute but "must be considered against important state interests in regulation." \textit{Id.} at 154. The Court noted that "[a]t some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." \textit{Id.} As a result, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." \textit{Id.} at 155 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); \textit{Aptheker v. Secretary of State}, 378 U.S. 500, 508 (1964)).

31. \textit{Id.} at 162-63. This interest begins as a legitimate and important interest and grows in significance as the woman approaches term. \textit{Id.} Prior to the "compelling" point, however, the attending physician in consultation with his patient is free to conclude, without regulation by the state, that in his medical judgment the patient's pregnancy should be terminated. \textit{Id.} at 163. The abortion may then be performed free from state interference. \textit{Id.}

32. \textit{Id.} at 162-63. The Supreme Court explained that this interest also grows in significance as the woman approaches term. \textit{Id.} For a discussion of the historical criminal law notion that protection of the unborn fetus should increase as the stage of gestation advances, see Note, supra note 24, at 716-19. Prior to the compelling point, however, \textit{Roe} held that the state may not regulate the abortion decision in the fetal interest because unborn fetuses capable of life outside the womb are not recognized at law as persons in the whole sense. 410 U.S at 162. They represent at most potential life and do not acquire protected rights or interests until birth. \textit{Id.}

33. 410 U.S. at 149, 162-63. Since a normal pregnancy spans nine months, the "trimester" standard simply divides that period into three-month sections. Thus, the "first trimester" refers to the initial three months of pregnancy.

34. \textit{Id.} at 163. The court stated that "from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." \textit{Id.} Examples of permissible regulation cited by the Court include: (1) requirements as to qualifications of the person(s) performing abortions; (2) requirements as to the facility in which the procedure is to be performed, e.g., hospital or clinic; and (3) requirements as to licensing of the facility and of person(s) performing abortions. \textit{Id.}
state's interest in the health of the fetus becomes compelling at the end of the second trimester, the point at which the fetus is "viable," or capable of meaningful life outside the womb. The Court stated that these are the only two points in the pregnancy at which the state may begin to regulate a woman's right to an abortion, and that any such regulation must be narrowly tailored to further the compelling state interest associated with one or the other of these points.

Having thus established a broad outline of state authority to regulate the abortion decision, the Supreme Court more precisely defined the limits of that authority in ensuing cases. In Doe v. Bolton, the companion case to Roe, the Court addressed the question of permissible state regulation of the physician's role in abortion. The plaintiffs, Georgia physicians and an indigent unwed mother, challenged a Geor-

At least one commentator has suggested the stages of pregnancy themselves are irrelevant to the state's compelling interests; they are useful merely as a rough guide to when the compelling interests commence. Note, supra note 21, at 733 (emphasis added). For a discussion of the origin of the trimester standard, see id. at 718-24, 733.

55. 410 U.S. at 163-64. The Court noted that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160. The Court further noted that the state's interest in fetal life after viability becomes so strong that the state may proscribe abortions altogether, except where necessary to preserve the life of the mother. Id. at 164. Cf. Stedman's Medical Dictionary 1556 (5th unabr. law. ed. 1982) (viable fetus, medically defined, is usually "a fetus that has reached 500 grams in weight and 20 gestational weeks").

56. 410 U.S. at 164-65. For a discussion of the necessity of narrowly tailored means, see supra note 30.


38. Id. Since, after Roe, the physician determines whether the abortion is necessary to the mother's health, regulation of his discretion necessarily bears upon both the woman's fundamental right to choose an abortion and upon the state's interest in regulating that choice. See Roe, 410 U.S. at 163.
gian statute which limited a physician’s ability to perform an abortion to situations in which the abortion was necessary to preserve the health of the mother.\footnote{39} The plaintiffs argued that this standard of “health necessity” infringed upon the physician’s judgment and subjected him to criminal sanctions without adequate warning as to what conduct was being proscribed.\footnote{40} The Supreme Court, however, construed “necessary” abortions to include those required for emotional, psychological, and familial well-being as well as those required for physical well-being.\footnote{41}

\footnote{39} 410 U.S. at 185-86. The challenged criminal abortion statute provided in pertinent part:

Except as otherwise provided in section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26-1202. Exception. (a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

1. A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
2. The fetus would very likely be born with a grave permanent, and irremediable mental or physical defect; or
3. The pregnancy resulted from forcible or statutory rape.

26-1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

\textit{Id.} at 202-05 (quoting \textsc{Ga. Code} § 26-1202(b) (1933) (repealed and superseded 1968) (amended 1972)) (court’s emphasis omitted).

\footnote{40} \textit{Id.} at 191-92. At trial before the United States District Court for the Northern District of Georgia, plaintiffs obtained a ruling that the limitation of abortions to the three situations outlined in § 26-1202(a) was unconstitutional. \textit{Id.} at 186. The district court merely severed these provisions, however, and left the balance of the section standing. \textit{Id.} at 187. On appeal to the Supreme Court, plaintiffs alleged that they were entitled to broader relief since § 26-1203 would now subject the physician to up to ten years in prison based only upon a standard of the physician’s “best clinical judgment” that the abortion was necessary. \textit{Id.} at 191. For this reason, plaintiffs alleged that the statute was impermissibly vague, and would “chill and deter” physicians from practicing their profession since doctors would choose “to err on the side of caution.” \textit{Id.} at 186, 191.

\footnote{41} \textit{Id.} at 191-92 (citing United States v. Vuitch, 402 U.S. 62 (1971)). In \textit{Vuitch}, the Court rejected plaintiff’s constitutional challenge to the District of Columbia statute that made abortions criminal unless “done as necessary for the preservation of the mother’s life or health and under the direction of a competent licensed practitioner of medicine.” 402 U.S. at 71-72. The \textit{Vuitch} Court reasoned that its construction of the term “health” as including psychological as well as physical well-being comported with the “general usage and modern understanding of [that] word” and thus described a standard to which physicians were routinely subject. \textit{Id.} at 72. The \textit{Bolton} Court found such reasoning equally applicable to the words of the Georgia statute, “an abortion is necessary,” since
The Court concluded that the health necessity determination was merely routine and allowed the physician "the room he need[ed] to make his best medical judgment." Additional requirements of the Georgia statute calling for hospital committee approval and independent physician confirmation of the doctor's decision, however, were invalidated as infringing upon the very latitude that the standard of "health necessity" had provided.

Three years later, the Court again considered the state's interest in these too involved a professional standard familiar to physicians. 410 U.S. at 192.

42. 410 U.S. at 192. The Supreme Court explained: "Whether, in the words of the Georgia statute, 'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely." Id. The Court noted that such "judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." Id.

43. Id. at 192-200. The Court looked to the language of § 26-1202(b) of the Georgia statute which provided in pertinent part:

(b) no abortion is authorized or shall be performed under this section unless each of the following conditions is met:

   (3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons above [which the Court had already determined to be unconstitutional].

   (5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

Id. at 202 (quoting GA. CODE § 26-1202(b) (1933) (repealed and superseded 1968) (amended 1972)) (Court's emphasis omitted).

The Court found that these provisions had "no rational connection to the patient's needs and unduly infringe[d] upon the physician's right to practice." Id. at 197, 199. The Court noted that both provisions had effect only after the "health necessity" determination had already been made by the physician. Id. The Court stated that "[i]f a physician is licensed by the state, he is recognized by the state as capable of exercising acceptable clinical judgment." Id. at 199. Moreover, finding that the attending physician is the most aware of the needs of his patient, the Court found that such physician would know when a consultation is advisable. Id. at 196-97, 199. The Court concluded that statutorily imposed supervision substantially limits both "the woman's right to receive medical care [according to] her physician's best judgment, and the physician's right to administer it." Id. at 197.
preserving maternal health in Planned Parenthood v. Danforth,44 where it upheld limited regulation of abortion even in the first trimester of pregnancy.45 At issue in Danforth were the provisions of a Missouri abortion statute46 that required a woman to give her informed consent in writing before she could receive an abortion,47 and required both the physician performing the abortion and the facility in which it was performed to maintain reports and records.48 The plaintiffs, two Missouri physicians and a nonprofit abortion facility, alleged that these provisions were contrary to the Court's holdings in Roe and Bolton because they imposed "an extra layer and burden of regulation" upon the abortion decision,49 and because they sought, impermissibly, to regulate all abortions irrespective of the stage of pregnancy.50 In considering plaintiffs' contentions,

44. 428 U.S. 52 (1976).
45. Id. at 65-67, 79-81.
46. Id. at 56 (citing 1974 Mo. Laws §§ 1-16, at 808 (amended 1979) (recode-
ified at 12 Mo. Ann. Stat. § 188 (Vernon 1983)) [hereinafter cited as Missouri
Act]). The Missouri Act imposed "a structure for the control and regulation of
abortion in Missouri during all stages of pregnancy." Id.
47. Id. at 65 (citing Missouri Act § 3(2)). The statute provides in pertinent
part:
No abortion shall be performed prior to the end of the first twelve
weeks of pregnancy except:

(2) After the woman, prior to submitting to the abortion, cer-
tifies in writing her consent to the abortion and that her consent is
informed and freely given and is not the result of coercion.
Id. at 85-86 (quoting Missouri Act § 3(2)).
48. Id. at 79 (citing Missouri Act §§ 10-11). These provisions require in
pertinent part:
Section 10. 1. Every health facility and physician shall be supplied
with forms promulgated by the division of health, the purpose and
function of which shall be the preservation of maternal health and life
by adding to the sum of medical knowledge through the compilation of
relevant maternal health and life data and to monitor all abortions per-
formed to assure that they are done only under and in accordance with
the provisions of the law.

3. All information obtained by physician, hospital, clinic or other
health facility from a patient for the purpose of preparing reports to the
division of health under this section or reports received by the division
of health shall be confidential and shall be used only for statistical pur-
puses. Such records, however, may be inspected and health data ac-
quired by local, state, or national public health officers.

Section 11. All medical reports and other documents required to
be kept shall be maintained in the permanent files of the health facility
in which the abortion was performed for a period of seven years.
Id. at 87 (quoting Missouri Act §§ 10-11).
49. Id. at 65-66, 79-80 (citing Roe, 410 U.S. 113; Bolton, 410 U.S. 179). For
a discussion of Roe, see supra notes 20-42 and accompanying text. For a discus-
sion of Bolton, see supra notes 37-43 and accompanying text.
50. 428 U.S. at 79-80.
Plaintiffs also challenged the Missouri Act's informed consent provision on
the Court, per Justice Blackmun, engaged in a balancing analysis in which it weighed the competing interests at stake.\(^{51}\) The Court acknowledged that its prior decisions prohibited state regulation of the decision to abort during the first trimester.\(^{52}\) On the other hand, the Court noted that the decision to abort is "an important and stressful one" which must be made with full knowledge of its nature and consequences.\(^{53}\) Finding the additional burden justified by a legitimate interest of the state, the Court permitted regulation to the extent of requiring the woman's prior written consent to an abortion even in the first trimester.\(^{54}\) Additionally, the Court found the reporting requirement to

vagueness grounds because no definition of what constituted "informed consent" appeared in the statute. \(^{Id.}\) at 66, 67 n.8. The Court noted that this issue had not concerned the district court, and then stated that it would construe "informed consent" to mean "the giving of information to the patient as to just what would be done and as to its consequences." \(^{Id.}\) at 67 n.8. The Court feared that "[t]o ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession." \(^{Id.}\)

51. \(^{Id.}\) at 66-67, 80-81. The Court never explicitly mentioned a balancing test, yet it indulged in a dual analysis that weighed the competing interests of the state against the fundamental right of the woman to decide whether to terminate her pregnancy. \(Cf.\) Note, Parental Notice Statutes: Permissible Regulation of a Minor's Abortion Decision, 49 FORDHAM L. REV. 81, 87-88 & n.23 (1980) (discussing balancing test employed by Court to determine constitutionality of parental notice statutes). The author notes that "'[u]ndue burden' analysis focuses on whether the increased difficulty of procuring an abortion is justified by state interests. If so, the burden is due and the statute is valid; if not, the burden is undue and the statute is invalid." \(^{Id.}\) at 87 n.23. Since Roe and Bolton prohibit any state-imposed burden of regulation in the first trimester, the burden of each of the provisions under attack in Danforth would have been deemed as "undue" if only this analysis had been employed. See Roe, 410 U.S. at 162-63; Bolton, 410 U.S. at 194-95, 198-99. The Danforth Court, however, employed a "three-tier" analysis as well. This type of analysis has been described as follows:

In three-tier analysis, certain burdens that are not undue and that further legitimate and important state interests merit some type of intermediate review. . . . Under three-tier analysis, a compelling state interest would justify an undue burden; a significant state interest would justify a burden; and a rationally-related state interest would justify statutes that impose no burden.

Note, supra, at 87-88 n.23. This "three-tier" type of balancing enabled the Court to find otherwise impermissible regulations (i.e., those regulating the abortion decision during the first trimester) valid as serving important, though not compelling, state interests. See 428 U.S. at 66-67, 79-81.

52. 428 U.S. at 66. According to Roe v. Wade, a woman's fundamental right to choose abortion may only be regulated pursuant to a compelling state interest and the state's interest in maternal health does not become compelling until the end of the first trimester. 410 U.S. at 163.

53. 428 U.S. at 67. The Court agreed with the district court's finding that the consent requirement was designed to ensure that the woman retains some control over the discretion of her consulting physician. \(^{Id.}\) at 66 (citing Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1368-69 (E.D. Mo. 1975)). The Court concluded that the requirement manifested a "legitimate interest of the state." \(^{Id.}\) at 66.

54. \(^{Id.}\) at 166-67. The Court determined that this interest was important
be "reasonably directed to the preservation of maternal health," and similarly upheld this provision for all stages of pregnancy.

Since the Court had been willing to extend the state's power to regulate the abortion decision in the interest of maternal health into the first trimester, it was not surprising that a plaintiff would attempt to have the scope of state regulation in the interest of fetal health altered as well. Such an attempt was made in Colautti v. Franklin, where the

enough to justify the added burden on the abortion decision, thus making it "due." Id. For further discussion of what constitutes a "due" burden, see supra note 51.

55. 428 U.S. at 80. The Court acknowledged that "there are important and perhaps conflicting interests affected by recordkeeping requirements." Id. The Court discussed the woman's interest in unregulated access to abortion during the first trimester and the state's interest, and determined that "recordkeeping of this kind, if not abused or overdone, can be useful . . . in protecting the health of its female citizens, and may be . . . relevant to decisions involving medical experience and judgment." Id. at 81.

56. Id. The Court concluded that the recordkeeping requirements approached "impermissible limits" but were not unconstitutional in themselves. Id. The Court noted that it assumed that the state would not interpret and enhance the provisions "in such a way as to accomplish, through the sheer burden of recordkeeping detail" what it had otherwise held unconstitutional on prior occasions. Id.

57. Another inroad upon the woman's abortion decision in the first trimester was made in 1977, when the Court considered whether attempts at economic regulation of abortion were permissible. See Beal v. Doe, 432 U.S. 438 (1977). At issue in Beal was title XIX of the Social Security Act, which established the Medicaid program. Id. at 440. See 42 U.S.C. § 1396a (1982). Under the Medicaid program, participating states may provide federally funded medical assistance to needy persons for certain categories of medical treatment such as inpatient and outpatient hospital services. 432 U.S. at 440. Title XIX does not require that all types of treatment within a category be funded, but does require the state to determine the extent of assistance under its plan based upon "reasonable standards." Id. at 441 (citing 42 U.S.C. § 1396a(a) (17) (1970 & Supp. V) (amended 1976)). In Beal, the Commonwealth of Pennsylvania denied Medicaid financial assistance for all abortions except those certified by physicians as medically necessary. Id. The plaintiffs, who were eligible for financial assistance for other types of treatment, were denied assistance for desired abortions not certified as medically necessary. Id. Plaintiffs asserted that the Commonwealth's requirement of medical necessity contravened title XIX and denied them equal protection of the laws under the fourteenth amendment. Id. at 442 (citing 42 U.S.C. § 1396a (1970 & Supp. V) (amended 1976)). The Court rejected plaintiffs' equal protection claim, finding that nothing in the language of title XIX requires a participating state to fund every permissible medical procedure, especially where the procedure—though desirable—is unnecessary. Id. at 444-45. The Court reasoned that the state has a strong interest in encouraging normal childbirth over abortion, which is present throughout the pregnancy. Id. at 445-46. The Court, therefore, held that Pennsylvania's refusal to extend medical coverage was permissible, whatever the stage of pregnancy. Id. at 447. See also Harris v. McRae, 448 U.S. 297, 306-11 (1980) (title XIX does not require participating state to fund medically necessary abortions for which federal reimbursement is unavailable); Maher v. Roe, 432 U.S. 464, 469-80 (1977) (equal protection does not require state participating in Medicaid program to pay expenses incident to abortions for indigent women simply because it has policy of paying expenses incident to childbirth).
Court considered a challenge to section 5(a) of the Pennsylvania Abortion Control Act of 1974 (1974 Act). Before the Court were provisions that set forth a viability determination requirement and the physician’s standard of care. Pursuant to these provisions, after a phy-

In a scathing dissent, Justice Brennan, joined by Justices Marshall and Blackmun, asserted that the legislative history of title XIX and the Court’s previous abortion cases “compel the conclusion that elective abortions constitute medically necessary treatment for the condition of pregnancy.” Beal, 432 U.S. at 449 (Brennan, J., dissenting) (emphasis added). Justice Brennan remarked that in reality, “abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy.” Id. (citations omitted). Brennan further asserted that Roe v. Wade and its progeny require noninterference with a woman’s abortion decision during the first trimester. Id. at 450 (Brennan, J., dissenting) (citing Roe, 410 U.S. at 163). Justice Brennan also remarked that “[f]or a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State’s refusal to fund an abortion is as effective an ‘interdiction’ of it as would ever be necessary.” Id. at 454 (Brennan, J., dissenting) (quoting Singelton v. Wulff, 428 U.S. 106, 118-19 n.7 (1976)). See also Harris, 448 U.S. at 329-37 (Brennan, J., dissenting) (regulation restricting use of federal funds to reimburse cost of abortions under Medicaid program plainly intrudes upon woman’s constitutional right to decide to have abortion); Maher, 432 U.S. at 482-90 (Brennan, J., dissenting) (majority holding’s limitation of Medicaid benefits to medically necessary abortions impinges upon privacy right by imposing financial pressures upon abortion decision); Comment, Refusal to Fund Constitutionally Protected Right Held Valid, 59 Wash. U.L.Q. 247, 259 (1981) (agreeing with Justice Brennan’s theory that governmental funding scheme can constitute effective denial of ability to decide to abort).


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


60. 439 U.S. at 389, 397. The appeal before the Court concerned issues composing merely one part of a protracted litigation involving most of the provisions of the 1974 Act. For an in-depth discussion of the procedural aspects of this case, see id. at 383-86; Note, supra note 25, at 161-64; Note, Constitutional Law—United States Supreme Court Abortion Decision Clarifies Concept of Fetal Viability and Scope of Physician’s Discretion When Viability is Reached—Colautti v. Franklin, 52 Temp. L.Q. 1240, 1242-44 nn.12-15 (1979).
sician determined that a fetus is or may be viable,\textsuperscript{61} he was to exercise the same degree of care as in the case of a fetus intended to be born alive, and to use the abortion technique providing the best chance that the fetus would be aborted alive.\textsuperscript{62}

The Supreme Court, with Justice Blackmun writing for the majority, invalidated both requirements.\textsuperscript{63} In finding that the viability determination requirement was void for vagueness,\textsuperscript{64} the Court explained that the terms "viable" and "may be viable" apparently referred to distinct conditions and that the difference was nowhere defined in the statute.\textsuperscript{65} Similarly, the Court determined that the standard of care provision was unclear as to whether the physician's duty was to the patient or the fetus.\textsuperscript{66} The Court found this provision unconstitutional because it ambiguously required the physician to make a "trade-off" between a life in being and the life of a fetus which had not yet clearly become viable.\textsuperscript{67}

\begin{itemize}
\item[61.] 439 U.S. at 391. The physician was to base his determination upon "his experience, judgment or professional competence." \textit{id}.
\item[62.] \textit{id}. at 397. The technique providing the best chance for fetal survival was to be employed unless a different technique would be necessary to preserve the mother's life or health. \textit{id}.
\item[63.] \textit{id}. at 401.
\item[64.] \textit{id}. at 390. The Court rejected defendant's argument that "may be viable" was synonymous with "viable" since such a construction would make one of the two conditions redundant. \textit{id}. at 392. The Court noted that a statute, according to an elementary canon of construction, should not be interpreted so as to render one of its parts inoperative. \textit{id}. Additionally, since "viable" was separately defined in \textsection 2 of the 1974 Act, the Court presumed it was to be the exclusive definition of "viable" throughout the 1974 Act. \textit{id}. As the Court noted, ""[a] definition which declares what a term "means", . . . excludes any meaning that is not stated." " \textit{id}. at 392-95 n.10 (quoting 2A C. Sand, STATUTES AND STATUTORY CONSTRUCTION \textsection 47.07 (4th ed. Supp. 1978)). See Note, supra note 25, at 164-65.
\item[65.] 439 U.S. at 391, 393. The Court recognized two possible meanings for the phrase "may be viable." \textit{id}. at 393. On one hand, the Court noted that "may be viable" could be an attempt to carve out "a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability." \textit{id}. On the other hand, the Court observed that "may be viable" could refer to viability as physicians understand it (i.e. when there is a reasonable likelihood of the fetus' sustained survival outside the womb) with "viable" referring to some undetermined stage later in pregnancy. \textit{id}. However, the Court declined to resolve the question of the correct interpretation of this phrase, instead finding it sufficiently ambiguous to void the section for vagueness. \textit{id}. at 390. See Note, supra note 25, at 165-66; Note, supra note 60, at 1241-42. For a discussion of the "void for vagueness" doctrine, see supra note 25 and accompanying text.
\item[66.] 439 U.S. at 397-401. The Court explained that "[t]he statute does not clearly specify, as [the Commonwealth of Pennsylvania, et al.] imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict." \textit{id}. at 400.
\item[67.] \textit{id}. The Court noted that the statutory standard of care directed the physician to employ the abortion technique best suited to fetal survival unless a different technique would be "necessary in order to preserve the life or health of the mother." \textit{id}. (citing Pennsylvania Abortion Control Act of 1974, No. 209,
The state's interest in the life and health of minors who seek abortions received attention in two Supreme Court cases considering challenges to a Massachusetts parental consent provision and to a Utah parental notification provision, respectively. In *Bellotti v. Baird*, the Court considered whether a Massachusetts abortion statute afforded a minor adequate protection of her right to privacy in an abortion decision. The statute in question required the consent of both parents of an unmarried minor, as well as the minor's own informed consent, before an abortion could be performed. In a plurality opinion, Justice

1974 Pa. Laws 639 (codified at *Pa. Stat. Ann.* tit. 35, § 6605(a) (Purdon 1979) (amended 1978, repealed 1982)) (emphasis supplied by Court). The Court felt that this suggested that a particular abortion technique would have to be "indispensable to the woman's life or health—not merely desirable—before it could be adopted." *Id.* The Court thus held that the provision's imprecision rendered it void for vagueness since § 5(a) imposed criminal sanctions upon the physician for failing to adhere to the care standard. *Id.* at 401. See supra note 25.


69. 443 U.S. 622 (1979) (plurality). The appeal in this case marked its second time before the Court. *Id.* at 628-31. Four years earlier, the Court had ruled that the federal district court improperly failed to apply the "abstention principle" and certify the case to the Supreme Judicial Court of Massachusetts, because the Massachusetts statute was susceptible of a constitutional construction. *Id.* at 628 (citing *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*). On remand the district court certified specific questions concerning the procedural provisions of the statute. *Id.* at 629. Following consideration of these questions by the Supreme Judicial Court of Massachusetts, the district court again determined that the statute was unconstitutional. *Id.* at 631. Thereupon, defendants, the Attorney General of Massachusetts, et al., again sought review before the Court. *Id.* at 633. For a detailed discussion of the procedural posture of the case, see Note, Constitutional Law—Supreme Court is Undecided on Parental Notification Requirement for Minor's Abortion, *Bellotti v. Baird*, 31 S.C.L. REV. 604, 605-07 (1980).


71. 443 U.S. at 625. The Massachusetts statute provided in pertinent part: If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents . . . is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person
Powell noted that the right to choose an abortion is fundamental to an adult woman, but emphasized that the Court has never considered the rights of minors to be equivalent to those of adults. The Court, he noted, has allowed the state considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice. Justice Powell distinguished the typical unemancipated minor, however, from a mature, unemancipated minor, whose heightened sense of responsibility renders her capable of giving her own informed consent for an abortion. Justice Powell further noted that because the

having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Mass. Gen. Laws Ann. ch. 112, § 12S (West Supp. 1979) (amended 1980). After construction by the Supreme Judicial Court of Massachusetts, the district court found the statute unconstitutional for three reasons: (1) § 12S required parental notice in virtually every case where the parent is available; (2) § 12S permitted a judge to veto the decision of a minor capable of rendering informed consent; and (3) § 12S was overbroad because it failed to require parents to consider only the minor’s best interests in determining whether to grant consent. 443 U.S. at 631-32.

72. Id. at 634. The Powell plurality explained: “We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.” Id. For a discussion of the development of minors’ rights, see Dembritz, The Supreme Court and a Minor’s Abortion Decision, 80 Colum. L. Rev. 1251, 1252-53 (1980); Note, Restrictions on the Abortion Rights of Minors: Bellotti v. Baird, 3 Harv. Women’s L.J. 119, 122-25 (1980).

73. 443 U.S. at 636-37 & n.15 (citing Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)). Justice Powell cautioned, however, that the state may not arbitrarily deprive minors of their freedom of action altogether, but may only act pursuant to important state interests. Id. Thus, the Court will apply intermediate scrutiny to statutes limiting the abortion right where minors are involved. See id.

74. Id. at 642. Justice Powell noted that the very fact of having a child brings with it adult legal responsibility, “for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority.” Id. See Dembritz, supra note 72, at 1255-56 & nn.27-28. Justice Powell cautioned, however, that the parental interest in monitoring and nurturing the growth of one’s child is important, and will continue to be so for varying lengths of time in the development of each respective minor. 443 U.S. at 643-44 n.23. Thus, according to Justice Powell, the extent of the fundamental right of a given minor must depend on the factual circumstances surrounding his or her own development. Id. Noting the Court’s traditional concern over the inability of children to make mature choices, Justice Powell conceded that the mere ability to involve oneself in adult problems is not proof of maturity. Id. at 635-36. He concluded, however, that consideration of extrinsic evidence concerning each minor’s maturity is important, because “there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.” Id. at 642.
interests of her parents are not always identical to her own best interests, even an immature, unemancipated minor may be in need of certain safeguards of her interests. Justice Powell then noted the Court's decision in Danforth, in which it had also considered a parental consent provision and had held that the state "may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy." On the basis of these conclusions, the Bellotti plurality held that a state that requires the consent of one or both parents must also provide for a clearly defined alternative procedure whereby the minor is entitled to show that she is mature enough to make the decision whether to bear her child or that even if she lacks sufficient maturity, the decision to abort is in her best interests.

The problem of parental notification surfaced two years later in

75. 443 U.S. at 647. Justice Powell noted that "many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion." Id. Indeed, as one commentator has noted, a minor in fear of "expulsion from her home, or of scorn, degradation, physical abuse or punishment if her parents learn of her abortion decision" may be "impelled to resort to a back-alley abortion" that may subject her to increased physical and emotional risks. Dembritz, supra note 72, at 1257. Justice Powell also recognized that an abortion may not always be "the best choice" for the minor, noting that alternatives, "such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood . . . may be feasible and relevant to the minor's best interests." 443 U.S. at 642-43. Presumably, parental efforts to force an abortion on an unwilling minor may impose serious burdens upon her constitutional rights as well. See Note, supra note 51, at 105 n.128. For a discussion of the deterrent effect of notification requirements in the abortion area, see Dembritz, supra note 72 at 1255-58. But see Note, supra note 51 at 91-95.

76. 443 U.S. at 643 (quoting Danforth, 428 U.S. at 74). Justice Powell noted that the Danforth Court had determined that to impose such a blanket provision would be "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent." Id. (quoting Danforth, 428 U.S. at 74). For a discussion of other aspects of Danforth, see supra notes 44-57 and accompanying text.

77. 443 U.S. at 643. Justice Powell noted that an alternative procedure would "assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Id. at 644.

78. Id. at 643. Justice Powell opined that the mature or well-informed minor should be able to make this decision in consultation with her physician but independent of her parents' wishes. Id. See Note, supra note 51, at 108 ("If capable of informed consent, the decision to abort should be hers alone, and judicial recognition of her capacity to decide should be required.").

79. 443 U.S. at 644. Justice Powell asserted that "the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary veto' that was found impermissible in Danforth." Id. (quoting Danforth, 428 U.S. at 74). For a discussion of this aspect of Danforth, see supra note 76 and accompanying text.

Although the law presumes that parents will act in a child's best interests, "courts will terminate parental rights if the parents cannot or will not act in the
H.L. v. Matheson. The issue before the Court was whether the provision of a Utah statute requiring a physician to "notify, if possible, the parents of a dependent minor girl prior to performing an abortion upon her" violated her federal constitutional guarantee of privacy. Distinguishing both Danforth and Bellotti, the Court determined that the Utah statute set forth a "mere requirement of parental notice," which "does not violate the constitutional rights of an immature, dependent minor." The Court noted that the fact the notice requirement might in-

81. Id. at 399-400, 407 (citing Utah Code Ann. § 76-7-304 (1974 & Supp. 1978)). The Utah statute provides in pertinent part:
To enable the physician to exercise his best medical judgment, 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.
(2) 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.
Appellant, an unmarried, dependent 15 year-old, was denied an abortion by the very physician who counseled her that it would be in her best interest to obtain one. Id. The physician refused to perform the abortion without first notifying the girl's parents. Id. Appellant filed an action alleging she represented all minors suffering unwanted pregnancies who were unable to terminate their pregnancies because of their physician's insistence on complying with the Utah statute. Id. at 401. Appellant challenged the statute as unconstitutional on its face and overbroad because it could be construed to apply to all unmarried minor females, including those who are mature and emancipated. Id. at 405. The Court did not reach the question of applicability to emancipated minors, since the United States District Court for the District of Utah had previously held that the statute did not apply to emancipated minors. Id. at 406 (citing L.R. v. Hansen, No. C-80-0078 (D. Utah Feb. 8, 1980)). Since no appeal was taken from the district court's ruling, the Supreme Court considered it to be controlling. Id. at 406.
82. Id. at 408-09. Both Danforth and Bellotti concerned parental consent requirements that threatened to give a third party an absolute veto over the minor's abortion decision. Id. (citing Bellotti II, 443 U.S. at 651). The Matheson Court, however, concluded that the Utah statute was distinguishable since it "gives neither parents nor judges a veto power over the minor's abortion decision." Id. at 411. The Court also noted that "[a]s applied to immature and dependent minors" the statute serves the interest of parental authority and fam-

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hibit some minors from seeking an abortion was not a valid basis upon which to void the statute. 83

Decisions in two recent cases highlight the discordance among members of the Court as to the continued efficacy of the Court's past abortion cases. 84 In Akron v. Akron Center for Reproductive Health, Inc., 85 the Court addressed challenges to the provisions of an Akron, Ohio, city ordinance that imposed a mandatory hospitalization requirement for all abortions performed after the first trimester, 86 a twenty-four-hour waiting period before a woman's informed consent became operative, 87 and an extensive informed consent requirement. 88 At the outset, the Court

83. 450 U.S. at 413. The Court noted that the "Constitution does not compel a state to finetune its statutes so as to encourage or facilitate abortions." Id. The Court determined that with respect to immature, dependent minors, "the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any of the guarantees of the Constitution." Id.


86. Id. at 422 & n.3 (citing AKRON, OHIO, CODIFIED ORDINANCES § 1870.03 (1978)). Section 1870.03 provides: "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." AKRON, OHIO, CODIFIED ORDINANCES § 1870.03 (1978). 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. 462 U.S. at 422 n.3 (citing AKRON, OHIO, CODIFIED ORDINANCES § 1870.1(B) (1978)).

87. 462 U.S. at 427 & n.6 (citing AKRON, OHIO, CODIFIED ORDINANCES § 1870.07 (1978)). Section 1870.07 provides:

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 [the parental notice and consent requirement] 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.

AKRON, OHIO, CODIFIED ORDINANCES § 1870.07 (1978).

88. 422 U.S. at 423 & n.5 (citing AKRON, OHIO, CODIFIED ORDINANCES § 1870.06 (1978)). Section 1870.06 provides:

(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
reaffirmed the compelling interest of the state in maternal health after
required in accordance with [the parental notice and consent requirement] 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 [the parental notice and consent requirement] 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 her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(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.

(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 [the parental notice and consent requirement] 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.
the first trimester,\textsuperscript{89} but noted that technological advancements since that interest was first articulated\textsuperscript{90} have rendered the abortion procedure infinitely more safe.\textsuperscript{91} The Court accordingly held the hospitalization requirement to be unconstitutional, explaining that it placed a significant obstacle in the path of a women seeking an abortion without a demonstration by the state as to why hospital abortions should be preferred.\textsuperscript{92} Similarly, the Court determined the statute offered no compel-

to her decision as to whether to have an abortion or carry her pregnancy to term.

\textbf{Akron, Ohio, Codified Ordinances} § 1870.06 (1978).

\textsuperscript{89} 462 U.S. at 429 n.11, 433-34 (citing Roe v. Wade, 410 U.S. at 163). The Court noted that the existence of a compelling state interest in maternal health is only the beginning of the inquiry, and that the state's regulation may be upheld only if it is reasonably designed to further that interest. \textit{Id.} at 434 (citing Bolton, 410 U.S. at 195). The Court also noted that Roe did not hold that it is always reasonable for a state to adopt an abortion regulation that applies to the entire second trimester. \textit{Id.} (citing Roe, 410 U.S. at 163). See Note, City of Akron v. Akron Center for Reproductive Health, Inc.: A Weakening Approach to Abortion Regulation, 11 Ohio N.U.L. REV. 181, 188 & n.56 (1984) (concluding that Roe has been misinterpreted to mean that all second trimester regulation is permissible). The Court concluded that if it appears that during a substantial portion of the second trimester the state's regulation "depart[s] from accepted medical practice," ... the regulation may not be upheld simply because it is reasonable for the remaining portion of the trimester." 462 U.S. at 434 (citation omitted).

For a discussion of Roe, see \textit{supra} notes 20-36 and accompanying text. For a discussion of Bolton, see \textit{supra} notes 37-43 and accompanying text.

\textsuperscript{90} 462 U.S. at 416. Roe had actually designated state requirement of the performance of abortions in hospitals as permissible regulation in light of then-existing technology. 410 U.S. at 163. See \textit{supra} note 34.

\textsuperscript{91} 462 U.S. at 435-37. The Court noted that the advent of the dilation and evacuation (D & E) method has dramatically increased the safety of second-trimester abortions. \textit{Id.} at 436. The D & E method involved the insertion of a vacuum device through the vagina and into the uterus, causing the fetus and placental tissue to be removed from the womb by suction. See Comment, Abortion: From Roe to Akron, Changing Standards of Analysis, 33 CATH. U.L. REV. 393, 413 n.125 (1984). The Court contrasted D & E with traditional instillation methods of abortion that cannot be performed \textit{until} the 16th week of pregnancy. 462 U.S. at 436 n.24.

\textsuperscript{92} 462 U.S. at 436-39. The Court noted that based upon the evidence adduced at trial, abortions performed in a hospital cost more than twice as much as a D & E abortion performed in a clinic, and that second-trimester abortions are rarely performed in Akron hospitals. \textit{Id.} at 434-35. Finally, the Court noted that both the American College of Obstetricians and Gynecologists and the American Public Health Association no longer recommend hospitalization for all second-trimester abortions. \textit{Id.} at 435. See Note, \textit{supra} note 89, at 189 & n.64. For a discussion of other developments in abortion technology, see Dellapenna, \textit{supra} note 21, at 411-16.

The Court concluded that the second-trimester hospitalization requirement imposed financial and health risks in potentially forcing the woman to travel, perhaps significant distances, to find available full-service facilities, and an added financial burden in the expense of the hospital procedure. 462 U.S. at 434-35. The Court determined that the burden was unnecessary, despite the state's compelling interest in the health of the mother, because the regulation was not reasonably designed to further maternal health. \textit{Id.} at 438-39. The Court declared that § 1870.03 has "the effect of inhibiting ... the vast majority of abor-
The same day that it handed down the decision in Akron, the Court had an opportunity to reaffirm part of that holding in Planned Parenthood Association v. Ashcroft, where a challenge to a Missouri abortion statute

93. 462 U.S. at 450-51. The Court found the waiting period provision to be "arbitrary and inflexible," and found no evidence suggesting that such a provision would result in safer abortions. Id. at 450. Citing Colautti, the Court further noted the impropriety of requiring a mandatory waiting period, since this infringes upon the physician's discretion and ignores the particular situation of each woman. Id (citing 439 U.S. at 387). The Court explained that "in accordance with the standards of the profession, a physician will advise the patient to defer the abortion when he thinks this will be beneficial to her." Id. at 450 & n.43 (citations omitted). The Court concluded that "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a state may not demand that she delay the effectuation of that decision." Id. at 450-51. For an excellent discussion of the Court's holding regarding the informed consent provision, see Comment, supra note 91, at 416.

94. 462 U.S. at 450 (citing Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1204 (1979)). Still further difficulties may arise, as plaintiffs asserted, where scheduling problems cause the delay to be longer than 24 hours. Id. See Note, supra note 89, at 193-94 nn.93 & 94.

95. 462 U.S. at 444-45. Because the statute required the physician to make certain factual disclosures to the woman regardless of whether the information was relevant to her situation, the Court found that certain of its requirements infringed upon the discretion of the physician. Id. at 445. Although the Court did not find the entire statute to be unobjectionable, the Court invalidated it in toto because it required that the physician personally make the disclosure of information to the woman, when disclosure by any qualified person should be sufficient. Id. at 446-49.

96. 462 U.S. 476 (1983). Ashcroft, and Simopoulos v. Virginia, 462 U.S. 506 (1983), were companion decisions to Akron. Simopoulos involved a physician's appeal from a conviction under a Virginia statute that prohibited the performance of a second-trimester abortion outside a licensed clinic. Simopoulos, 462 U.S. at 508-510. See Va. Code § 18.2-71 (1982). The Court upheld the statute, finding that such a requirement was "not an unreasonable means of furthering the State's compelling interest in protecting the woman's own health and safety." Id. at 519 (citing Roe v. Wade, 410 U.S. at 150). Justice O'Connor, joined by Justices White and Rehnquist, concurred in the judgment but would not have made the constitutionality of the statute contingent in any way upon the trimester in which it is imposed. Id. at 520 (O'Connor, J., concurring). Jus-
again raised the issue of mandatory second-trimester hospitalization.\textsuperscript{97} In the only part of his opinion gaining a majority vote, Justice Powell invalidated the provision on the same grounds advanced in \textit{Akron}.\textsuperscript{98} The Court also considered\textsuperscript{99} the constitutionality of a provision requir-

tice Stevens dissented because he felt that the Court's decision constituted an interpretation of state law that was not endorsed by the court whose judgment it was reviewing. \textit{Id.} at 521 (Stevens, J., dissenting).

\textsuperscript{97} 462 U.S. at 481-82 (citing Mo. Ann. Stat. § 188.025 (Vernon 1983)). Section 188.025 provided that "[e]very abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital." Mo. Ann. Stat. § 188.025 (Vernon 1983).

\textsuperscript{98} 462 U.S. at 481-82. Five Justices concurred in Justice Powell's opinion with respect to this issue. \textit{Id.} at 477. The Court found the hospitalization requirement substantially similar to the one in \textit{Akron}, and invalidated it on the basis of the holding in that case, i.e., that the requirement placed a significant obstacle in the path of a woman seeking an abortion without demonstration by the state as to why hospital abortions should be preferred. \textit{Id.} at 481-82 (citing \textit{Akron}, 462 U.S. at 439). For a discussion of this aspect of \textit{Akron}, see supra notes 86 & 89-92 and accompanying text.

\textsuperscript{99} The Court also considered whether the procedures set forth in Mo. Ann. Stat. § 188.028 (Vernon 1983) for the judicial alternative to parental consent were adequate under \textit{Bellotti II}. 462 U.S. at 490-92 (citing \textit{Bellotti II}, 443 U.S. at 643-44). Justice Powell, joined by the Chief Justice and Justice O'Connor's concurrence, found the provision constitutional. \textit{Id.} at 493; \textit{Id.} at 505 (O'Connor, J., concurring). Section 188.028.2 provides:

2. The right of a minor to self-consent to an abortion under subdivision (3) of subsection 1 of this section or court consent under subdivision (4) of subsection 1 of this section may be granted by a court pursuant to the following procedures:

1) The minor or next friend shall make an application to the juvenile court which shall assist the minor or next friend in preparing the petition and notices required pursuant to this section. The minor or the next friend of the minor shall thereafter file a petition setting forth the initials of the minor; the age of the minor; the names and addresses of each parent, guardian, or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor; that the minor has been fully informed of the risks and consequences of the abortion; that the minor is of sound mind and has sufficient intellectual capacity to consent to the abortion; that, if the court does not grant the minor majority rights for the purpose of consent to the abortion, the court should find that the abortion is in the best interest of the minor and give judicial consent to the abortion; that the court should appoint a guardian ad litem of the child; and if the minor does not have private counsel, that the court should appoint counsel, that the court should appoint counsel. The petition shall be signed by the minor or the next friend;

2) Copies of the petition and a notice of the date, time, and place of the hearing shall be personally served upon each parent, guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis of the minor listed in the petition by the sheriff or his deputy. If a parent or guardian or, if the minor's parents are deceased and no guardian has been appointed, any other person standing in loco parentis cannot be personally served within two days after reasonable effort, the sheriff or his deputy shall give constructive notice to them by certified mail to their last known address, and the hearing shall not be held for at least forty-eight hours
ing a pathology report for every abortion performed, and a provision for the presence of a second physician at all abortions involving viable fetuses. By balancing the added financial burden against the poten-

from the time of the mailing. In any case where there exists the potential or appearance of conflict of interests between the parents or guardian or next friend of the child and the child, the court shall appoint a guardian ad litem to defend the minor's interest. The court shall set forth, for the record, the ground for such appointment;

(3) A hearing on the merits of the petition, to be held on the record, shall be held as soon as possible within five days of the filing of the petition. If any party is unable to afford counsel, the court shall appoint counsel at least twenty-four hours before the time of the hearing. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor;

(4) In the decree, the court shall for good cause:
(a) Grant the petition for majority rights for the purpose of consenting to the abortion; or
(b) Find the abortion to be in the best interests of the minor and give judicial consent to the abortion, setting forth the grounds for so finding; or
(c) Deny the petition, setting forth the grounds on which the petition is denied;

(5) If the petition is allowed, the informed consent of the minor, pursuant to a court grant of majority rights, or the judicial consent, shall be given by the parents or guardian of the minor on the grounds of battery of the minor by those performing the abortion. The immunity granted shall only extend to the performance of the abortion in accordance herewith and any necessary accompanying services which are performed in a competent manner. The costs of the action shall be borne by the parties;

(6) An appeal from an order issued under the provisions of this section may be taken to the court of appeals of this state by the minor or by a parent or guardian of the minor. The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.


100. 462 U.S. at 486-87 (citing Mo. Ann. Stat. § 188.047 (Vernon 1983)).

Section 188.047 provides:

A representative sample of tissue removed at the time of abortion shall be submitted to a board eligible or certified pathologist, who shall file a copy of the tissue report with the state division of health, and who shall provide a copy of the report to the abortion facility or hospital in which the abortion was performed or induced and the pathologist's report shall be made a part of the patient's permanent record.


101. 462 U.S. at 482-86 (citing Mo. Ann. Stat. § 188.030.3 (Vernon 1983)). Section 188.030.3 "requires that the second physician take all reason-

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tial for increased health protection technology, Justice Powell, writing for only two Justices, upheld the requirement of a pathology report as furthering important health-related concerns.\textsuperscript{102} Finally, Justice Powell determined that the requirement that a second physician attend to fetal health at all “post-viability” abortions furthered the compelling state interest in a viable fetus.\textsuperscript{103}

Writing separately in both \textit{Akron} and \textit{Ashcroft}, Justice O'Connor attacked the Court's analysis in both cases as inconsistent with precedent.\textsuperscript{104} Justice O'Connor asserted that the Court had abandoned the

able steps in keeping with good medical practice . . . to preserve the life and health of the viable unborn child; provided it does not pose an increased risk to the life and health of the woman.” \textit{Id.} at 483 (citing Mo. ANN. STAT. § 188.030.3 (Vernon 1983)). The provision also requires the physician to “take control of and provide immediate medical care for a child born as a result of the abortion.” \textit{Id.}

\textbf{102.} \textit{Id.} at 489-90. The Court explained that “[a] pathological examination is designed to assist in the detection of fatal ectopic pregnancies, hydatidiform moles or other precancerous growths, and a variety of other problems . . . .” \textit{Id.} at 487 n.10 (citing American College of Obstetricians and Gynecologists, \textsc{Standards for Obstetric-Gynecologic Services} 52 (5th ed. 1982)) [hereinafter cited as \textsc{ACOG, Standards}]. The Court noted that although medical opinion differs widely on the question, certain doctors testifying at trial considered such reports to be “absolutely necessary.” \textit{Id.} at 489. Justice Powell, noting the comparatively small increase in abortion cost necessitated by the pathologist’s examination, concluded that it did not significantly burden the woman’s abortion decision in light of the substantial benefits the examination may provide. \textit{Id.} at 489-90 (citing Danforth, 428 U.S. at 80-81). For a discussion of this aspect of Danforth, see supra note 55 and accompanying text. \textit{See also} Comment, supra note 91, at 426-27 n.206.

\textbf{103.} 462 U.S. at 486. Justice Powell noted that since it is not unreasonable to assume that the first physician will be concentrating his attention and skills upon preserving the woman’s health, a viable fetus surviving the abortion may be in grave danger. \textit{Id.} at 485. Justice Powell further explained that even though post-viability abortions are rarely permissible under Missouri law, the state may choose to provide safeguards for the few instances of live birth that do occur. \textit{Id.} at 486 & n.9 (citations omitted). Justice Powell, who was joined by Chief Justice Burger, agreed with the four Justices dissenting to this portion of his opinion, however, that the validity of such a requirement depends upon the existence of an adequate exception for medical emergencies where the delay occasioned by a second physician requirement could endanger the woman’s health. \textit{Id.} at 485 n.8; see \textit{id.} at 500-03 (Blackmun, J., concurring and dissenting in part). While Justice Powell found such an exception in the language of the statute to the effect that the provision would only apply “provided that it does not pose an increased risk to the life or health of the woman,” the dissenters did not. \textit{Compare id.} at 485 n.8 \textit{with id.} at 500-03 (Blackmun, J., concurring and dissenting in part). For application of this aspect of \textit{Ashcroft} to the principal case, see infra note 132-34 and accompanying text.

\textbf{104.} Akron, 462 U.S. at 452-53 (O’Connor, J., dissenting); \textit{Ashcroft}, 462 U.S. at 505 (O’Connor, J., dissenting and concurring in part). Justices Rehnquist and White joined in each of Justice O’Connor’s opinions. Akron, 462 U.S. at 452 (O’Connor, J., dissenting); \textit{Ashcroft}, 462 U.S. at 505 (O’Connor, J., dissenting and concurring in part). Justice O’Connor noted that the same reasons for her dissent in \textit{Akron} applied to her dissent in part in \textit{Ashcroft}. 462 U.S. at 505 (O’Connor, J., dissenting and concurring in part).
“undue burden” analysis (applied since Danforth)\textsuperscript{105} and erroneously subjected every provision in these statutes to strict scrutiny.\textsuperscript{106} Also noting that the Court relied on the increased safety, with respect to the woman’s health, of new abortion technology, Justice O’Connor saw the decisions as blurring the “bright lines” which the Roe Court presumably had intended the trimester standards to provide for courts and legislatures.\textsuperscript{107} Corresponding technology in childbirth, O’Connor asserted, is moving viability to a point earlier in the pregnancy, so that the compelling interests of the state in the woman’s and the fetus’ health are on a collision course with each other.\textsuperscript{108} On this basis, Justice O’Connor found Roe to be an unworkable method of balancing fundamental rights

\textsuperscript{105} Akron, 462 U.S. at 453 (O’Connor, J., dissenting). Justice O’Connor contended that the Court’s recent decisions indicate that a regulation imposed on “a lawful abortion ‘is not unconstitutional unless it unduly burdens the right to seek an abortion.’” \textit{Id.} (citations omitted). \textit{See Danforth,} 428 U.S. at 66-67, 80-81. For a discussion of undue burden analysis, see \textit{supra} note 51 and accompanying text. \textit{See also Casenote, supra} note 92, at 165-66 n.47.

\textsuperscript{106} 462 U.S. at 453 (O’Connor, J., dissenting). Justice O’Connor would have applied the “undue burden” standard to the challenged regulations throughout the entire pregnancy. \textit{Id.} Accordingly, since she would not have found that any of the statutes “unduly” burdened the abortion right, she would have upheld all regulations as rationally related to a legitimate state interest. \textit{Id.} at 466-75 (O’Connor J., dissenting).

For a discussion suggesting that the Court has abandoned the undue burden analysis for a focus concerned with ensuring the mother’s interest in easy access to abortion, see Comment, \textit{supra} note 91, at 428.

\textsuperscript{107} 462 U.S. at 455-56 (O’Connor, J., dissenting). Because the Court’s opinion in \textit{Akron} recognizes that the state’s compelling interest in maternal health changes with advances in medical technology, Justice O’Connor was concerned that courts and legislatures will no longer be able to rely on a “bright line” separating permissible from impermissible regulation. \textit{Id.} at 455 (O’Connor, J., dissenting). Instead, she maintained that they will have to “continuously and conscientiously” study contemporary medical and scientific literature in order to determine whether particular regulations depart from accepted medical practice. \textit{Id.} at 456 (O’Connor, J., dissenting). Similarly, because technological improvements will advance the point of viability to an earlier point of the pregnancy, the courts and legislatures will no longer have discrete trimester units, as they did under Roe, to guide their analysis. \textit{Id.} at 456-58 (O’Connor, J., dissenting) (citing Roe, 410 U.S. at 163). Justice O’Connor felt that the task of determining whether regulations conform with accepted medical practice should be left to legislatures alone since they are more familiar with and better equipped to deal with constant revision. \textit{Id.} at 456 & n.4 (O’Connor, J., dissenting). \textit{See Casenote, supra} note 92, at 166.

For a discussion of the difficulties that the \textit{Akron} decision may pose for the courts and legislatures, see Note, \textit{supra} note 89, at 201 n.153. For a discussion of a legislative attempt to overrule Roe, see Comment, \textit{Recent Efforts to Limit Federal Court Jurisdiction and Remedies: A Circumvention of the Amendment Process?}, 21 Duq. L. REV. 449, 468-71 (1983).

against compelling interests.\textsuperscript{109} Justice O'Connor would have upheld the regulations in \textit{Ashcroft} and \textit{Akron} because, in her opinion, the compelling state interest in regulating abortion is extant throughout pregnancy.\textsuperscript{110}

Against this background, the Third Circuit in \textit{American College of Obstetricians and Gynecologists v. Thornburgh}\textsuperscript{111} considered the constitutionality of the Pennsylvania Abortion Control Act of 1982.\textsuperscript{112} The court initially noted that the Commonwealth conceded that several of the Act's provisions were unconstitutional in light of the Supreme Court's decisions in \textit{Akron} and \textit{Ashcroft}.\textsuperscript{113} The court then turned to the Act's

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\textsuperscript{109} 462 U.S. at 459 (O'Connor, J., dissenting). According to Justice O'Connor, the critical flaw in \textit{Roe} that has been perpetuated by the present Court is the absolute negation of any state interest in maternal or fetal health before the compelling point. \textit{Id.} at 458-59 (O'Connor, J., dissenting). Justice O'Connor argued that viability is a completely arbitrary point because potential life is no less potential in the early weeks of pregnancy than it is from viability onward. \textit{Id.} at 461 (O'Connor, J., dissenting). For further discussion of Justice O'Connor's view of the trimester approach, see Comment, \textit{supra} note 91, at 416-17; Casenote, \textit{supra} note 92, at 166.

\textsuperscript{110} \textit{Akron}, 462 U.S. at 468-75 (O'Connor, J., dissenting); \textit{Ashcroft}, 462 U.S. at 505 (O'Connor, J., dissenting and concurring in part).

Even assuming the Court in \textit{Akron} was justified in its criticism of the parental notification provision, Justice O'Connor would not have the federal courts interfere with "proper and validly administered state concerns." 462 U.S. at 470 (O'Connor, J., dissenting). In light of the Court's "complete lack of knowledge about how the Akron ordinance will operate" and about Akron's local procedure, she would have allowed the state government to deal with the question of an adequate procedurally defined judicial alternative to parental consent. \textit{Id.} See Casenote, \textit{supra} note 92, at 166 & n.50. For a discussion of the "abstention principle," see \textit{supra} note 69 and accompanying text.

\textsuperscript{111} 737 F.2d 283 (3d Cir. 1984).


\textsuperscript{113} 737 F.2d at 295 (citing \textit{Akron}, 462 U.S. 416 (1983); \textit{Ashcroft}, 462 U.S. 476 (1983)). The Commonwealth raised no challenge, for example, to the enjoining of 18 Pa. Cons. Stat. Ann. § 3205(a)(1)-(2), which imposes a 24-hour waiting period before a woman's informed consent becomes operative. 737 F.2d at 293. The Commonwealth conceded that a similar provision in \textit{Akron} was found to impermissibly infringe on the physician's discretion in the exercise of medical judgment and to increase the cost and risk in delay of abortions by requiring two trips to the hospital. \textit{Id.} (citing \textit{Akron}, 462 U.S. at 450). The Commonwealth also conceded that the provision in § 3205(a)(1) requiring a physician to provide the information and counseling relevant to informed consent is unconstitutional, since the state's interest is limited to ensuring that the information comes from a qualified individual. \textit{Id.} (citing \textit{Akron}, 462 U.S. at 449). Finally, the Commonwealth conceded that § 3209, which imposes mandatory hospitalization for all nonemergency abortions after the first trimester, is unconstitutional because such a provision places a "significant burden in the path of a woman seeking an abortion" by inhibiting the vast majority of abortions after the first twelve weeks. \textit{Id.} at 293 (citing \textit{Akron}, 462 U.S. at 438-39). For a discussion of the relevant portions of the \textit{Akron} decision, see \textit{supra} notes 86-95 & 104-108 and accompanying text. For a discussion of the relevant portions of the \textit{Ashcroft} decision, see \textit{supra} notes 97-98 & 104-108.
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informed consent provision and explained that it paralleled an informed consent requirement invalidated in Akron. First, the Third Circuit stated that, as in Akron, the statute violated the principle of deference to the physician's medical judgment by specifically prescribing the information that a physician was to provide to the pregnant woman, and requiring the physician to provide it regardless of whether he considered it necessary in a given case. Second, the court noted that this prescribed information emphasized both the unforeseeable risks associated with the abortion, and the funding available from the state and the father should the woman decide to keep the child. The court concluded that the statute was designed "not to inform the woman's consent . . . but to persuade her to withhold it altogether." Although finding that some of the prescribed information would be unobjectionable standing alone, the Third Circuit determined that it was part of an invalid scheme and, therefore, struck the provision in its entirety.

The court then turned to the Act's parental consent provision.

114. Id. at 295-96 & n.13 (citing Akron, 462 U.S. at 444). The Court noted, inter alia, that both the Pennsylvania Abortion Control Act and the Akron ordinance require that women be informed of the risks associated with abortion, and specifically, the psychological and physical effects including hemmorhage, risks to subsequent pregnancies and sterility. Id. at 295 n.13 (citing Akron, Ohio, CODIFIED ORDINANCES § 1870.05(B)(5), .05(C) (1978); 18 PA. CONS. STAT. ANN. § 3205(a)(1)(ii)-(iii) (Purdon 1983)). The Court also noted that both provisions require information as to agencies that offer alternatives to abortion. Id. (citing Akron, Ohio, CODIFIED ORDINANCES § 1870.05(B)(7) (1978); 18 PA. CONS. STAT. ANN. §§ 3205(a)(2)(iii), 3208(a)(1) (Purdon 1983)). The Court stated that both also require information as to the fetus' probable gestational age and the availability of detailed information as to the characteristics of the fetus. Id. (citing Akron, Ohio, CODIFIED ORDINANCES § 1870.05(B)(2)-(3) (1978); 18 PA. CONS. STAT. ANN. §§ 3205(a)(1)(iv)-(a)(2)(iii), 3208(a)(2) (Purdon 1983)).

The court noted that no Supreme Court opinion has sustained a statutory provision prescribing in such specific terms the types of information to be provided to a pregnant woman seeking an abortion. Id. at 295. For the requirements of the Act's informed consent provision, see supra note 7. For the requirements of the Akron Ordinance's provision, see supra note 88.

115. 737 F.2d at 296 (citing Akron, 462 U.S. at 445). The court noted that Akron reaffirmed the principle that a physician counselor must be given the opportunity to tailor the information given a patient to the exigencies of the case. Id. For a discussion of the principle of deference to the physician's judgment, see supra notes 42 & 43 and accompanying text.

116. 737 F.2d at 295.

117. Id. at 296 (quoting Akron, 462 U.S. at 444). See supra note 7.

118. 737 F.2d at 296 (citing 18 PA. CONS. STAT. ANN. § 3205(a)(1)(i) (Purdon 1983)). The court did not delineate which provisions were unobjectionable except to offer as an example § 3205(a)(1)(i), which requires a woman to know the name of the physician who will perform the abortion. Id. However, the court noted that the state may require in general terms that the woman be provided with information needed to secure her consent. Id.

119. Id. The court cited Akron for the proposition that a scheme defining the woman's voluntariness in terms of specific information to be provided to her is invalid and cannot be enforced. Id. (citing Akron, 462 U.S. at 445-46 n.37).

120. Id. at 296-97 (citing 18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983)).
Citing Matheson, which had upheld a requirement of parental notice prior to abortion, the court rejected the plaintiffs' equal protection challenge that no other pregnancy-related procedure required third-party consent. The court further noted that the nature of the abortion decision and the state's ability to regulate the exercise of a minor's constitutional rights have been held to justify increased restrictions upon minors in abortion statutes. However, the Third Circuit was most concerned by plaintiffs' challenge that this provision contained an inadequate judicial alternative to parental consent. Citing Ashcroft, the

For the requirements of the Act's parental consent provision, see supra note 9 and accompanying text.

121. 737 F.2d at 296 (citing Matheson, 450 U.S. at 412-13). Plaintiffs had argued that § 3206 deprives minors who choose abortion of equal protection of the laws because it singles out abortion as the only pregnancy-related medical procedure requiring third-party consent. Id. (citing 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983)). The Third Circuit cited Matheson, Harris v. McRae, and Danforth to demonstrate that the Supreme Court has rejected challenges to abortion statutes based on different treatment in other contexts. Id. (citing Matheson, 450 U.S. at 412-13) (parental notice statute); Harris v. McRae, 448 U.S. 297, 325 (1980) (abortion funding); Danforth, 428 U.S. at 66-67 (written consent to abortion). For a discussion of relevant aspects of Matheson, see supra note 82. For a discussion of relevant aspects of Danforth, see supra notes 45-54.

122. 737 F.2d at 296 (citing Bellotti, 443 U.S. at 640-41 (plurality); Akron, 462 U.S. at 427-28 n.10). The court noted that the Supreme Court "has held that consent or notice provisions are important protections for minors who, because of stress or ignorance of alternatives, may not be able intelligently to decide whether to have an abortion." Id. For a discussion of the state's ability to regulate minors' rights, see supra notes 72-74 and accompanying text. For a general discussion of the special interest of the state in abortion, see supra notes 53-54 and accompanying text.

Plaintiffs also contended that the parental consent section was void for vagueness because the Act does not define "emancipation." 737 F.2d at 296. The Third Circuit noted that the same defect was alleged in Ashcroft but was rejected by the Supreme Court on the ground that the term had a clear meaning in Missouri common law. Id. (citing Ashcroft, 462 U.S. at 492 n.18). The court concluded that since in Pennsylvania, as in Missouri, "the question whether a minor is emancipated turns upon the facts of each individual case," the section was not void for vagueness as a matter of law. Id. at 296-97 (citation omitted). For a discussion of relevant aspects of Ashcroft, see supra notes 96-110 and accompanying text. For a discussion of the void for vagueness doctrine, see supra note 25 and accompanying text.

123. 737 F.2d at 297 (citing Bellotti II, 443 U.S. at 649-50). The court noted that the state cannot impose a parental veto on the decision of the minor to undergo an abortion. Id. The court further noted that the state must provide "an alternative procedure whereby a pregnant mother may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." Id. (quoting Akron, 462 U.S. at 439-40). The court stated that the alternative procedure is particularly important because "there are few [other] situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Id. (quoting Bellotti II, 443 U.S. at 642). For a discussion of relevant aspects of Bellotti II, see supra note 77 and accompanying text. See also Dembritz, supra note 72 at 1261-63 (discussing alternative procedure for obtaining parental consent outlined above).
court suggested that an acceptable statute must provide the minor with a clearly defined and simple procedure that will ensure confidentiality, dispatch, and the assistance of court personnel where necessary.\textsuperscript{124} Pointing out the absence of any such provisions in the Pennsylvania Act, the court enjoined the operation of section 3206, pending fulfillment of its clause requiring the Pennsylvania Supreme Court to formulate adequate procedural rules.\textsuperscript{125}

The Third Circuit next considered the Act's general prohibition, in section 3210(a), of the knowing, intentional, or reckless performance of an abortion upon a viable fetus.\textsuperscript{126} The court explained that section 3210(a) allowed the physician two "complete defense[s]" to its threatened sanction of a felony of the third degree: the physician's good faith conclusion, in his or her best medical judgment, that (1) the fetus was not viable at the time the abortion was performed, or that (2) the abortion was necessary to preserve maternal life or health.\textsuperscript{127} The court proceeded to consider plaintiffs' challenge that section 3210(a) was unconstitutional because it places the burden on defendant physicians to prove medical necessity.\textsuperscript{128} Noting that two Supreme Court cases had construed similar statutes as placing the ultimate burden of proof on the prosecution, the court determined that it could not declare the provision unconstitutional on its face.\textsuperscript{129}

\textsuperscript{124} 737 F.2d at 297 (citing Ashcroft, 476 U.S. at 479-80 n.4, 492). The court stated that "[t]o pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form." \textit{Id.} For a discussion of relevant aspects of Ashcroft, see supra note 99.

\textsuperscript{125} \textit{Id.} See 18 Pa. Cons. Stat. Ann. § 3206(h) (Purdon 1983). Section 3206(h) provides in pertinent part: "The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to insure promptness of disposition." \textit{Id.}

\textsuperscript{126} 737 F.2d at 298-300 (citing 18 Pa. Cons. Stat. Ann. § 3210(a) (Purdon 1983)). For the requirements of this provision, see supra note 5 and accompanying text.

\textsuperscript{127} 737 F.2d at 298. Because of the uncertainty of the viability determination, the court noted that statutes imposing strict civil and criminal liability upon a physician may create a profound chilling effect on the willingness of physicians to perform abortions. \textit{Id.} The court noted that it had to be particularly cautious in its scrutiny of such a provision to ensure that no restriction on constitutional acts have been imposed. \textit{Id.} See Colautti, 439 U.S. at 396. For a discussion of this aspect of Colautti, see supra notes 64-66 and accompanying text.

\textsuperscript{128} 737 F.2d at 299. Plaintiffs argued that the Pennsylvania Act does not squarely place the burden of proving medical necessity on the state. \textit{Id.} Plaintiffs also challenged the adequacy of the defenses, claiming that they are too narrow. \textit{Id.}

\textsuperscript{129} \textit{Id.} at 299-300 (citing Simopoulos v. Virginia, 462 U.S. 506 (1983); United States v. Vuitch, 402 U.S. 62 (1971)). The court noted that in Vuitch, the Supreme Court undertook to construe the District of Columbia abortion ordinance, which also failed to explicitly place upon the state the burden of proving the necessity of the abortion. \textit{Id.} (citing 402 U.S. at 70-71). The Third Circuit
Judicial construction could not save the Act’s requirement that the physician use the method most likely to result in a live abortion, however, as the physician’s only defense to that provision was if the live abortion method posed "a significantly greater risk to the mother’s health." Relying on Colautti, the court held this provision impermissibly required the physician to make a trade-off between the lives of mother and fetus.

The requirement of a second physician at all abortions of fetuses that are arguably viable did not survive scrutiny by the Third Circuit despite the fact that the Supreme Court in Ashcroft had upheld a similar provision. The Third Circuit distinguished Ashcroft because the Missouri statute at issue in that case was capable of the construction that a second physician is only required in nonemergency situations. Be-

explained that the Supreme Court upheld the statute by reasoning that Congress could not have intended that a physician be required to prove his or her innocence, and thus construing the ordinance to place the burden on the prosecution to plead and prove lack of necessity. Id.

The Third Circuit also discussed the holding in Simopoulos, where the Court found that it was permissible to place the burden on the defendant to invoke medical necessity as a defense, if the burden of proof as to lack of necessity then shifted to the prosecution. Id. (citing Simopoulos, 462 U.S. at 510). For a discussion of other aspects of Simopoulos, see supra note 96.

In addition, the Third Circuit determined that the defense of necessity of the abortion to preserve maternal health was adequate in light of Bolton’s definition of maternal health. 737 F.2d at 299 (citing Bolton, 410 U.S. at 192 (factors relating to maternal health include those that are "physical, emotional, psychological, familial, [as well as] the woman’s age"). For a discussion of Bolton’s definition of maternal health, see supra note 42 and accompanying text.

130. 737 F.2d at 300 (quoting 18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983)). For the requirements of this provision, see supra note 5 and accompanying text.

131. 737 F.2d at 300 (citing Colautti, 439 U.S. at 400). The court noted that in Colautti, the Supreme Court had held that the 1974 Pennsylvania Abortion Control Act impermissibly required the physician to make the same sort of trade-off. Id. The court stated that both the old and new Pennsylvania statutes failed to recognize that maternal health should be the paramount consideration. Id. For a discussion of relevant aspects of Colautti, see supra notes 64-67.

The court noted that the district court had "attempted to save the provision [in the principal case] by construing 'significantly' to mean 'medically cognizable.' " 737 F.2d at 300. The court conceded that such a construction would require the use of the abortion procedure safest for the mother even if a less safe procedure would preserve the fetus. Id. The court determined, however, that such a reading was inconsistent with the statutory language and the intent reflected in that language. Id. The court concluded that § 3210(b) is not reasonably susceptible to a construction that does not require the mother to bear an increased risk in order to save her viable fetus. Id. (citing 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1972)).

132. 737 F.2d at 301 (citing 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1983)). For a discussion of § 3210(c), see supra note 5 and accompanying text.

133. 737 F.2d at 300-01 (citing Ashcroft, 462 U.S. at 485-86; id. at 505 (O’Connor, J., concurring and dissenting in part)). The Third Circuit noted that the statute upheld in Ashcroft required a second physician to be present whenever an abortion was to be performed upon a viable fetus. Id. at 300. The court
cause the Pennsylvania Act did not contain a clear preference for mater-

nal health over fetal health, but perpetuated the Act’s unconstitutionally

restrictive “trade-off” standard of care, the Third Circuit felt that no

such emergency exception was intended.\textsuperscript{134}

The court invalidated two other provisions bearing upon the phy-

sician’s discretion as well. The first of these required the physician to re-

port his basis for determining that a fetus is not viable, or if he con-

cludes that it is viable, his basis for determining that the abortion is

medically necessary.\textsuperscript{135} The court found that this requirement served

no important state interest that could justify its intrusion upon the phy-

sician-patient relationship.\textsuperscript{136} Specifically, the court noted that the stat-

ute required reports as to abortions of nonviable fetuses in the second

trimester, yet the Commonwealth had failed to adduce any evidence that

there is a significant chance of viability throughout this stage of preg-

nancy.\textsuperscript{137} The court also struck much of the physician’s reporting re-

quirement calling for detailed data about the patient and her abortion to

be filed with the Pennsylvania Department of Health.\textsuperscript{138} The court

explained, however, that the existence of a clause in that statute requiring a phy-

sician to preserve the life of the fetus “provided that it does not pose an in-

creased risk to the life and health of the woman” was construed by Justice Powell
to provide a medical emergency exception to the second-physician requirement.

\textit{Id.} (citing \textit{Ashcroft}, 462 U.S. at 485 n.8).

\textsuperscript{134} \textit{Id.} at 301. The court stated:

We cannot with any confidence assume the legislature intended the

clause in section 3210(a), providing a defense for abortions necessary

to preserve maternal life or health, to be equally applicable to section

3210(c), the second physician requirement. The two provisions are se-

parated by the intervening provision, section 3210(b) on degree of

care, which on its face evinces the Pennsylvania legislature’s unconsti-

tutionally restrictive view of maternal health, a view not apparent in the

parallel Missouri provision.

\textit{Id.} For a discussion of § 3210(b), see \textit{supra} note 5 and accompanying text.

\textsuperscript{135} 737 F.2d at 301 (citing 18 Pa. Cons. Stat. Ann. § 3211 (Purdon

1983)). For the requirements of this provision, see \textit{supra} note 6 and accompanying

text.

\textsuperscript{136} 737 F.2d at 301. The court also noted that § 3211 failed to expressly

limit the requirement of reports to abortions performed subsequent to the first

trimester of pregnancy. \textit{Id.}

\textsuperscript{137} \textit{Id.} For a discussion asserting that such evidence does exist, see \textit{supra}

note 108 and accompanying text.

The court noted that the evaluation and reporting requirements of

§ 3211(a) were substantially indistinguishable from those of § 3214, and that it

would invalidate those portions of § 3214 for the same reasons. 737 F.2d at 301


evaluation and reporting requirements of § 3211(a), see \textit{supra} note 6 and accompa-

nying text.

\textsuperscript{138} \textit{Id.} at 301-02 (citing 18 Pa. Cons. Stat. Ann. § 3214 (Purdon 1983)).

Subsections (a), (b), and (h) of this statute required detailed reporting with

guard to each abortion performed irrespective of the stage of pregnancy. \textit{Id.} at

301. The physician had to sign a report to be filed the following month, which

included information covering fourteen categories of data. \textit{Id.} Among the

information required was the identity of the involved physicians and facilities; de-
stated that these regulations went beyond the scope permitted in Danforth because the detail and complexity of the requirements would significantly burden the abortion decision through increased costs and the abridgement of the physician’s discretion.

Next, the Third Circuit considered the Act’s special provision requiring Pennsylvania insurers to offer policies excluding elective abortions at lower rates than their policies including elective coverage. Relying on prior Supreme Court decisions, the court noted that while a state may generally advance a public policy favoring childbirth over abortion, it may not restrict access to abortion that already exists.

tailed biographical information about the woman, including her number of prior pregnancies and the date of her last menstrual period; detailed information about the aborted fetus; the basis of any medical judgment that an emergency existed; the viability report of § 3211(a); and the method of payment for the abortion. Id. at 301-02. A separate detailed report was to be filed for any woman who experienced “complications” from an abortion. Id. at 302. For a more complete catalogue of the requirements of this provision, see supra note 10 and accompanying text.

139. 737 F.2d at 302 (citing Danforth, 428 U.S. at 80, 81). The court noted that the Missouri statute challenged in Danforth merely provided generally for recordkeeping by health facilities and physicians. Id. (citing Danforth, 428 U.S. at 87). The court stated, moreover, that the Danforth recordkeeping was to be accomplished on forms to be supplied for the purpose of gaining knowledge about the preservation of maternal life and health and monitoring abortions to assure that their performance was in accordance with the law. Id. The court observed that the statute in Danforth required “no recordkeeping close to the extent imposed by the Pennsylvania Act.” Id. The court decreed the use of recordkeeping provisions “in such a way as to accomplish, through the sheer burden of recordkeeping detail, what . . . [the Supreme Court has] held to be an otherwise unconstitutional restriction.” Id. (citing Danforth, 428 U.S. at 81). For a discussion of this aspect of Danforth, see supra notes 53-56 and accompanying text.

The court ruled that the district court, in upholding the provision at bar, erroneously employed the standard of reasonable relation to the state’s interest in protecting the health of its citizens. 737 F.2d at 302 (citing 552 F. Supp. at 804). The court noted that the appropriate test is whether the detailed reporting requirements have a significant impact on the woman’s abortion decision. Id. Since the parties had stipulated that the reporting requirements would increase the cost of abortions, and the court found that requiring the physician to report the basis of his medical judgment could have a profound chilling effect on the willingness of physicians to perform abortions, the court apparently concluded that the requirements could have a significant impact on the abortion decision. Id. (citations omitted).

Additionally, the Third Circuit invalidated § 3214(e), which required compilation and disclosure of the data gathered under § 3214, as not severable from that provision. Id.

For a criticism of the court’s analysis, see infra notes 168-71 and accompanying text.

140. 737 F.2d at 302-03 (citing 18 Pa. Cons. Stat. Ann. § 3215(e) (Purdon 1983)). For the requirements of this provision, see supra note 12.

141. 737 F.2d at 303 (citing Harris v. McRae, 448 U.S. 297, 316-17 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977)). In Maher, the Supreme Court had noted that “[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” 432 U.S. at 475.
The court viewed the insurance requirement as attempting to create an economic barrier to abortion and invalidated the provision.\textsuperscript{143}

Finally, it is important to note that the court found that the recent decisions in Akron and Ashcroft rendered the Act’s hospitalization and waiting period requirements, as well as its provision requiring the physician to personally inform a woman’s consent, unconstitutional.\textsuperscript{144}

Then Chief Judge Seitz, while concurring in most of the majority’s opinion,\textsuperscript{145} found it necessary to dissent to several of its conclusions.\textsuperscript{146}

The dissenters in Maher, however, noted that the Court had “repeatedly found that infringements of fundamental rights are not limited to outright denials of those rights.” Id. at 487 (Brennan, J., dissenting). Cf. Beal v. Doe, 432 U.S. 438, 449 (1977) (Brennan, J., dissenting). For a discussion of Beal, see supra note 57.

\textsuperscript{142} 737 F.2d at 303 (citing Akron, 462 U.S. at 444 n.33 (citations omitted)).

The court noted that such a policy decision was only permissible in Harris and Maher “because it did not add any ‘restriction on access to abortion that was not already there.’” Id. (quoting Akron, 462 U.S. at 444 n.33 (citations omitted)).

\textsuperscript{143} Id. at 308. The court noted the parties had stipulated that the real or actuarial cost of “nonelective only” abortion coverage may be higher or lower than that of comprehensive coverage. Id. The court observed that insurance costs for women who desire abortions could in fact increase. Id. Noting that the right to an abortion is fundamental, the court concluded that the state’s uncertain assertion that the legislature could find costs to be lower for “nonelective only” policies was insufficient to withstand scrutiny. Id.

\textsuperscript{144} 737 F.2d at 293. See Akron, 462 U.S. at 438-39 (hospitalization imposes a “heavy, and unnecessary, burden on women’s access to a relatively inexpensive, otherwise accessible, safe abortion procedure”); id. at 450-51 (“[I]f a woman . . . is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.”); id. at 449 (“[W]e believe it is unreasonable for the State to insist that only a physician is competent to provide information and counseling relevant to informed consent”); Ashcroft, 462 U.S. at 482 (hospitalization requirement “unreasonably infringes upon a woman’s constitutional right to obtain an abortion”). The court noted that the Supreme Court in Akron found that a 24-hour waiting period similar to that embodied in § 3205(a)(1)-(2) of the Act furth ered no interest in maternal health, infringed upon the physician’s discretion, and increased the cost and risk of delay of the abortion by requiring a woman to make two trips to the abortion facility. 737 F.2d at 293 (citing Akron, 462 U.S. at 450). For a discussion of relevant portions of the Akron decision, see supra note 93-94 and accompanying text.

The court also pointed out that the provision requiring counseling of the patient to be executed by the physician was unconstitutional in light of Akron’s finding that it is “unreasonable for a state to insist that only a physician is competent to provide the information and counseling relevant to informed consent.” 737 F.2d at 293 (citing Akron, 462 U.S. at 449). For a discussion of the Akron Court’s holding with respect to this issue, see supra note 95 and accompanying text.

Finally, the court found § 3209, which requires all nonemergency abortions to be performed in a hospital, to be unconstitutional as placing a significant obstacle in the path of a woman seeking an abortion. 737 F.2d at 293 (citing Akron, 462 U.S. at 434-39). For a discussion of the Akron Court’s holding with respect to the hospitalization issue, see supra notes 91-92 & 101 and accompanying text.

\textsuperscript{145} 737 F.2d at 312-16 (Seitz, C.J., dissenting in part). Chief Judge Seitz joined the majority in striking the 24-hour waiting period and physician-only
He asserted that section 3205(a)(2), requiring information to be provided to the woman before she renders her consent, should have been sustained.\(^{147}\) Chief Judge Seitz asserted that the parallel provision in Akron had been invalidated solely because it required that the physician personally provide the information—not because the information itself was objectionable.\(^{148}\) Chief Judge Seitz also noted that the second-physician requirement of section 3210(a) should have been sustained because the Act stated a clear exception for emergencies involving an intentional abortion upon a viable fetus.\(^{149}\) Finally, the Chief Judge would have sustained the physician's reporting requirements of section 3214 as "reasonably directed to the preservation of maternal health" in accordance with Danforth.\(^{150}\)

counseling requirements of \(\S\) 3205(a)(1) because Akron and Ashcroft, he believed, required this result. \(\text{id.}\) at 313 (Seitz, C.J., dissenting in part) (citing Akron, 462 U.S. 410; Ashcroft, 462 U.S. 476). He also joined in the majority's opinion with respect to the parental consent requirement of \(\S\) 3206, the reporting requirements of \(\S\) 3207, the hospitalization requirement of \(\S\) 3209, the degree of care provision of \(\S\) 3210(b), and the insurance provision of \(\S\) 3215(e). \(\text{id.}\) at 313-16 (Seitz, C.J., dissenting in part). Additionally, the Chief Judge noted his concurrence with the majority's finding that \(\S\) 3210(a) places the burden of proving lack of medical necessity in a post-viability abortion upon the prosecution. \(\text{id.}\) at 314 (Seitz, C.J., dissenting in part). For a discussion of the majority opinion, see supra notes 111-44 and accompanying text.

146. 737 F.2d at 312-16 (Seitz, C.J., dissenting in part). The Chief Judge stated that he wrote separately for two principal reasons: first, because the majority struck provisions of the Act which he believed were constitutional; and second, because the majority reached two issues involving \(\S\) 3210(a) and \(\S\) 3211 that he believed were not raised by the plaintiffs on appeal. \(\text{id.}\) at 312 (Seitz, C.J., dissenting in part).

147. \(\text{id.}\) at 313 (Seitz, C.J., dissenting in part).

148. \(\text{id.}\) (citing Akron, 462 U.S. at 445-46 n.37). Judge Seitz explained: "In Pennsylvania, the information may be given by a nonphysician counselor, so the objection the Supreme Court had to the Akron decision does not apply here." \(\text{id.}\) For a discussion of the Akron Court's holding with respect to this issue, see supra note 95 and accompanying text.

149. 737 F.2d at 314-15 (Seitz, C.J., dissenting in part). Chief Judge Seitz pointed out that \(\S\) 3210(a) provides in pertinent part: "It shall be a complete defense to any charge brought against a physician for violating the requirements of this section . . . that the abortion was necessary to preserve maternal life or health." \(\text{id.}\) at 315 (Seitz, C.J., dissenting in part) (citing 18 Pa. Cons. Stat. Ann. \(\S\) 3210(a) (Purdon 1983)) (emphasis supplied by Chief Judge Seitz). Chief Judge Seitz noted that the statute's reference to this "section" is significant because the Pennsylvania legislature used the term "subsections" when referring to \(\S\) 3210(b) and \(\S\) 3210(c) and the matters limited to each. \(\text{id.}\) The Chief Judge opined that had the legislature intended to limit the applicability of the medical emergency defense to subsection (a), it would have referred to "this subsection" rather than "this section." \(\text{id.}\)

150. \(\text{id.}\) (citing Danforth, 428 U.S. at 80). Chief Judge Seitz noted that "the Missouri statute sustained in Danforth provided for "the compilation of relevant maternal health and life data" without specifying what this means." \(\text{id.}\) (quoting Danforth, 428 U.S. at 87). He was "unable to determine," on this basis, "that the Missouri reporting requirements are more or less onerous than Pennsylvania's." \(\text{id.}\) Chief Judge Seitz also asserted that the requirements in subsections (a)
Reviewing the opinion of the court, it is submitted that the Third Circuit properly invalidated the hospitalization, waiting period, and mandatory physician-informed consent provisions of the Pennsylvania Act pursuant to 

(name, age and general medical condition and history of patient) and (h) (complications arising from her abortion) of § 3214 required the physician to report information which he would obtain as a matter of course, and so were not constitutionally burdensome. Id. The Chief Judge found the possibility that the cost of an abortion would be increased by an unspecified amount to be "an insufficient basis on which to conclude that a legally significant burden is imposed." Id. He noted that the parties' stipulation regarding cost increases due to reporting requirements refers to § 3214 as a whole, not simply to the three subsections which the majority struck down. Id. He stated that there is no way of knowing what cost increase would be attributable to these three subsections alone. Id. at 315-16 (Seitz, C.J., dissenting in part). Chief Judge Seitz added, however, that it is not unreasonable to infer that much of the cost increase complained of in the stipulation would be caused by subsection (c) of § 3214, the constitutionality of which had been conceded by plaintiff. Id. at 316 n.1 (Seitz, C.J., dissenting in part).

Finally, because he would have found these subsections to be constitutionally permissible, the Chief Judge reached the other ground advanced by plaintiffs: that the reporting requirements infringe upon physicians' and patients' privacy. Id. at 316 (Seitz, C.J., dissenting in part). He rejected this argument, however, since subsections (e)(1) and (e)(2) of § 3214 ensure that the identities of physician and patient will not be available to the public. Id. In fact, he noted that both subsections (a) and (h) of § 3214 prohibit the inclusion of the patient's name in the reports. Id. The Judge concluded that because the reporting requirement in § 3214(a) is constitutional, the requirement of § 3210(b) that the report be transmitted, should be sustained. Id. For a discussion of relevant aspects of Danforth, see supra notes 53-56 and accompanying text.

151. See 737 F.2d at 293 (citing Akron, 462 U.S. 416; Ashcroft, 462 U.S. 476). For a discussion of these aspects of the court's holding, see supra note 144 and accompanying text.

The increased difficulty in obtaining an abortion that is occasioned by the delays engendered by the waiting period and mandatory physician consent information are not justified by any legitimate state interests. See Akron, 462 U.S. at 449-51. The hospitalization requirement is no longer justified by any state interest in light of technological advancements. See id. at 434-39. Accordingly, the burden imposed by such provisions upon the woman's ability to obtain an abortion is "undue" and requires their invalidation. See Danforth, 428 U.S. at 66-67, 80-81. For a discussion of "undue burden" analysis, see supra note 51.

Additionally, the waiting period provision is inconsistent with one of the basic tenets of Roe v. Wade, which stated that abortion is included in the right of personal autonomy. See 410 U.S. at 154. The right of personal autonomy, according to Justice Brennan in Eisenstadt v. Baird, is "the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1971) (emphasis in original). Waiting period provisions such as those struck down in Akron and Ashcroft, and that advanced by the Commonwealth in the principal case, patently ignore this notion of individuality inherent in the abortion decision. By requiring mandatory delay of the effectuation of the woman's abortion decision, regardless of her desire and ability to render fully informed consent for the abortion, such provisions interpose the state between the woman and the choice she makes in the exercise of her fundamental constitutional rights. For a discussion of personal autonomy and the Roe and Eisenstadt decisions, see supra note 27 and accompanying text.
properly enjoined enforcement of the Act’s parental consent provision.\textsuperscript{152} Although the provision’s total lack of procedural guidelines clearly violated \textit{Bellotti}, a clause in the provision calling for state supreme court rule formulation saves it from facial invalidity.\textsuperscript{153} It is further submitted that the court properly upheld section 3210(a)’s prohibition of post-viability abortions.\textsuperscript{154} The court correctly determined that the good faith and necessity defenses to the sanctions imposed by that sec-

It is proposed that the Commonwealth adopt a waiting period provision modeled upon the American College of Obstetricians and Gynecologists’ recommendations noted in \textit{Akron}, which recognize that the time needed for consideration of the abortion decision will vary depending upon the particular situation of the patient and how much prior counseling she has had. \textit{See Akron}, 462 U.S. at 450-51 n.43 (citing ACOG, \textit{Standards}, supra note 102, at 54).

\textsuperscript{152} \textit{See} 737 F.2d at 297. For a discussion of this aspect of the court’s holding, see supra notes 120-24 and accompanying text.

\textsuperscript{153} \textit{See} \textit{Bellotti II}, 443 U.S. at 640-41, 642, 649-50. In \textit{Bellotti}, the Powell plurality required an alternate procedure that is both clear and simple to assure that the issue of a minor’s maturity for the purposes of obtaining an abortion is resolved in an anonymous and expedient manner. \textit{See id.} at 644. In \textit{Ashcroft}, a majority of the court found the alternate procedure in that case passed muster. \textit{Ashcroft}, 462 U.S. at 490-93. Although the Pennsylvania Act in the principal case was completely devoid of any such provision, it is submitted that the court properly sustained it, since “where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality.” \textit{See id.} at 493.

It should be noted that the Supreme Court of Pennsylvania has since enacted Orphan’s Court Rule 16, entitled \textit{Proceedings Pursuant to Section 3206 of the Abortion Control Act}, which provides an alternate procedure for determining the issue of a minor’s maturity. \textit{See PA. ORPHAN’S CT. R. 16.1-8}. This rule is comprehensive and clearly laid out; it delineates filing procedures, the contents of a petition, particulars as to representation in proceedings, relevant evidence, and the right to appeal. \textit{PA. ORPHAN’S CT. R. 16.1-3.8}. The rule also directs that the proceedings and recordkeeping conducted at them be kept confidential, that the proceedings be conducted within three business days of filing, and that a decision be rendered promptly. \textit{PA. ORPHAN’S CT. R. 16.4.6-7}.

It is submitted that Orphan’s Court Rule 16, like the statute upheld in \textit{Ashcroft}, constitutes a sufficiently clear and simple alternative procedure to pass muster. \textit{Compare PA. ORPHAN’S CT. R. 16 with MO. ANN. STAT. § 188.028.2} (Vernon 1983).

For a discussion of \textit{Bellotti}, see supra note 69-79 and accompanying text. For a discussion of \textit{Ashcroft}, see supra notes 96-106 and accompanying text.

\textsuperscript{154} \textit{See} 737 F.2d at 300. For a discussion of the Third Circuit’s holding with respect to § 3210(a), which prohibits the intentional abortion of a viable fetus unless the abortion is necessary to preserve maternal health, see supra notes 126-29 and accompanying text. Courts should construe a statute, whenever possible, in such a manner as to render it constitutional. \textit{See 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.11} (4th ed. 1972).

Faced with statutes that similarly appeared to place the burden of proving the necessity of the abortion upon the physician, the Supreme Court has on two prior occasions issued a saving construction. \textit{See Simopoulos}, 462 U.S. at 510; \textit{Vuitch}, 402 U.S. at 70-71. For a discussion of the Court’s treatment of this issue in these cases, see supra note 129 and accompanying text. Moreover, the Court has noted that merely placing the burden of “going forward” upon a defendant is normally permissible in an affirmative defense situation. \textit{See, e.g.}, \textit{Engle v. Isaac}, 456 U.S. 107, 120-21 & n.20 (1982) (placement of burden of production on defendant is permissible so long as ultimate burden of persuasion remains...
tion adequately ensure that ethical conduct will not be punished.\textsuperscript{155} A statute which merely chills the exercise of certain unprofessional conduct cannot therefore be unconstitutional.\textsuperscript{156}

It is also submitted that the Third Circuit properly invalidated the elective abortion insurance impediments in § 3215(e) of the Act.\textsuperscript{157} The Third Circuit's objection to the economic disparity between elective and nonelective coverage, however, may be inconsistent with the Supreme Court's position on this issue.\textsuperscript{158} Since the Supreme Court has dismissed claims of denial of equal protection based solely on differ-

with prosecution); Mullany v. Wilbur, 421 U.S. 684, 701-03 nn.28 & 30-31 (1975) (same).

It is further submitted that, under the same principle of statutory construction, the Third Circuit was correct in giving a comprehensive construction to the term "maternal health" in the post-viability medical defense to § 3210(a). The court construed the term to include the factors relating to health that were outlined in the Bolton decision: "physical, emotional, psychological, [as well as] the woman's age." See 737 F.2d at 299 (citing Bolton, 410 U.S. at 192). For a discussion of this aspect of Bolton, see supra notes 41-43 and accompanying text.

\textsuperscript{155} See 737 F.2d at 299. As yet, the court's fear that such provisions might chill physicians from practicing their profession is ungrounded. See id. at 314 (Seitz, C.J., dissenting in part). One commentator even suggests that such provisions, because of the Supreme Court's indefinite standard of viability, may actually increase a physician's willingness to perform abortions as long as a good faith defense is available. See Note, supra note 60, at 1256. The commentator reasons that immunity from prosecution for a diagnosis made in good faith may make these provisions attractive to physicians, since each would be judged by the criteria that he believed proper for diagnosis. See id.

In any case, it is submitted that Chief Judge Seitz properly noted that in incorporating an intent requirement into the definition of "abortion" found in § 3203, and in construing subsection (a) of § 3210 as placing the burden of disproving medical necessity on the prosecution, the Third Circuit had adequately addressed the specific sources of chilling identified by the plaintiffs. See 737 F.2d at 314 (Seitz, C.J., dissenting in part). The Chief Judge cautioned that once the provision had been so cured, it was within the scope of permissible regulation. \textit{Id.} It was therefore inappropriate for the court to discuss its fears of the possible chilling effect on physicians, where the statute in question was facially constitutional. See \textit{id}.

For a discussion of Chief Judge Seitz's view of the majority's holding with respect to this provision, see supra note 149 and accompanying text.

\textsuperscript{156} See 737 F.2d at 314 (Seitz, C.J., dissenting in part). As Chief Judge Seitz pointed out, criminal statutes are \textit{supposed} to chill certain conduct, and the court cannot worry about situations where the physician, "through his own over-reacting, is chilled by regulations" that are constitutional. See \textit{id}.

\textsuperscript{157} See 737 F.2d at 303. For a discussion of this aspect of the court's holding, see supra notes 142-43 and accompanying text.

\textsuperscript{158} See 737 F.2d at 303. The Third Circuit based its holding regarding § 3215(e) on the Court's decisions in \textit{Harris} and \textit{Maher}. See id. (citing \textit{Harris}, 448 U.S. at 316-17; \textit{Maher}, 432 U.S. at 474). These cases would allow such an insurance provision if it could be shown that the provision did not add any restriction on existing access to abortion. See \textit{Harris}, 448 U.S. at 316-17; \textit{Maher}, 432 U.S. at 474. Yet, on its face the Pennsylvania Act calls for the creation of separate standards of insurance coverage for two types of abortion that were formerly of equal access under the law. The court thus properly relied on these cases, in general, to conclude that the Pennsylvania Act's creation of insurance policies
ing costs of medical procedures, the better view may be to treat elective abortion as medically "necessary" treatment that should be protected from undue restriction.

On the other hand, it is submitted that the Third Circuit improperly invalidated section 3210(b)'s degree of care provision and section 3210(c)'s second-physician requirement. It is contended that an emergency situation exception applicable to all provisions of section 3210 is inherent in the good faith and necessity defenses of section 3210(a), which the court upheld. Since such an emergency exception that do not cover elective abortions adds a restriction on existing access to abortion and is therefore invalid. See 737 F.2d at 303.

However, the court then inappropriately cited the source of the invalidity of § 3215(e) as the indefinite impact that the provision would have upon the cost of an abortion. Id. The Harris Court, it should be remembered, specifically rejected the notion that cost could be the basis of a successful due process or equal protection challenge to the constitutionality of an abortion funding decision, since the underlying cause of the restriction on access to abortion is poverty, an obstacle which the government did not create. 448 U.S. at 316-20. The Harris Court decided that the provision needed only to satisfy a rationality test. Id. at 322. The Court concluded that the state's legitimate interest in protecting the potentiality of human life was rationally furthered by the provision. Id. at 324. For an excellent discussion of this aspect of the Harris decision, see Comment, supra note 57, at 256-60.

Accordingly, it is submitted that the Third Circuit's characterization of the uncertainty of the cost of abortions under § 3215(e) as "insufficient to withstand constitutional scrutiny" is a weak foundation upon which to base its otherwise sound conclusion that the provision is invalid. For a discussion of the court's holding with respect to § 3215(e), see supra notes 142-43 and accompanying text.

159. See, e.g., Poelker v. Doe, 432 U.S. 519, 521 (1977) (Missouri's provision of publicly financed hospital services for childbirth but not for non-therapeutic abortion does not violate any constitutional rights). Cf. Connecticut v. Menillo, 423 U.S. 9 (1975) (requirement that only licensed physicians perform abortions was not invalid even though likely to result in increased costs and thus discriminate against poor). For a discussion of other cases dealing with this issue, see supra notes 57, 142 & 157-58 and accompanying text.

160. It is submitted that this view, which is set forth in Justice Brennan's dissents to Beal and Maher, provides a stronger argument for the invalidity of statutory provisions such as § 3215(e). See Beal, 432 U.S. at 449 (Brennan, J., dissenting) (elective abortions constitute medically necessary treatment for condition of pregnancy); Maher, 492 U.S. at 487 (Brennan, J., dissenting) (same). For a discussion of Justice Brennan's dissents, see supra notes 57 & 142. For a discussion applauding Brennan's dissent to Harris and suggesting that the majority opinion in that case inadequately protects medically necessary treatment, see Comment, supra note 57, at 260.

161. See 737 F.2d at 300-01. For a discussion of the majority's holding with respect to the validity of § 3210(b) and § 3210(c), see supra notes 126-29.

162. See 737 F.2d at 315 (Seitz, C.J., dissenting). Chief Judge Seitz contended that the defense provided in § 3210(a) applied to § 3210 in its entirety and thus could be raised against an alleged § 3210(b) violation as well. Id. Since the "probable intent" of the legislature as to the scope of the § 3210(a) defenses was unclear; see id. at 303; id. at 314-15 (Seitz, C.J., dissenting in part); and the statute was reasonably susceptible to a constitutional construction; see id. at 315 (Seitz, C.J., dissenting in part); it is submitted that the court should have applied
effectively prevents a physician from having to make a trade-off between the life of mother and fetus when performing an abortion involving a viable fetus, it is submitted that these sections would not deter physicians from performing abortions. Additionally, it is submitted that the use of the method most likely to result in a live abortion and the requirement of a second physician further the state's interest in a possibly viable fetus without unduly infringing upon the rights of the physician and patient.

The "abstention principle" and afforded the Supreme Court of Pennsylvania an opportunity to avoid the invalidation. See Bellotti I, 428 U.S. 132 (1976). For a discussion of Chief Judge Seitz' dissent with respect to § 3210(b) and § 3210(c) see supra note 149 and accompanying text. For a discussion of the "abstention principle," see supra note 69.

The "probable intent" of the legislature is indeed ambiguous with regard to the applicability of § 3210(a) defenses to § 3210(b), since little mention of the latter statute is made in the legislative history of the Act. See S. 742, [PA.] LEGISLATIVE JOURNAL—SENATE III 1558-71 (1981); S. 742, [PA.] LEGISLATIVE JOURNAL—SENATE III 2477-78 (1982); S. 742, [PA.] LEGISLATIVE JOURNAL—HOUSE III 2233-85, 2312-98 (1981). However, it is interesting to note the parliamentary inquiry made into a proposed amendment to § 3209 of the Act, which requires hospitalization for all abortions performed after the first trimester and imposes criminal sanctions for violations of this requirement. See S. 742, [PA.] LEGISLATIVE JOURNAL—HOUSE III 2371-72 (remarks of Rep. Freind in response to parliamentary inquiry regarding his proposed amendment to § 3209, which reduced the criminal sanctions imposed from first to third degree misdemeanors but included no express medical emergency exception). Representative Freind noted that an express medical emergency exception was not necessary since, inter alia, "in a medical emergency there is no opportunity . . . to take the test as to whether or not it is the first or second trimester anyway." Id. at 2371. When asked whether the physician acting in response to a medical emergency would be exempt from the penalties imposed by § 3209, Freind stated: "Absolutely, Mr. Speaker. You see, what you have to remember here . . . [is that] what we are talking about is a crime, and a crime requires intent, a mens rea, a guilty mind." Id. at 2372. Notwithstanding Freind's commentary, however, his amendment was not adopted. Id. Moreover, the version that eventually became law included an express medical emergency exception. See 18 PA. CONS. STAT. ANN. § 3209 (Purdon 1983). For the text of § 3209, see supra note 4.

163. See 737 F.2d at 300-01. The majority in the principal case in fact suggests that the presence of such an exception would, as in Ashcroft, cure the provision by preventing a trade-off of maternal health for the possibility of fetal survival. Id. (citing Ashcroft, 462 U.S. 485 n.8 (Opinion of Powell, J.).)

164. See id. at 300. Pursuant to Roe v. Wade, the state's compelling interest in fetal health after the point of viability permits it to regulate abortion even to the point of prohibition. See 410 U.S. at 163. As Justice Powell noted in Ashcroft: "Preserving the life of a fetus that is aborted may not always be possible, but the State legitimately may choose to provide safeguards for the comparatively few instances of live birth that occur." 462 U.S. at 486 (footnote omitted). For a discussion of Roe, see supra notes 20-36 and accompanying text. For a discussion of Ashcroft, see supra notes 96-110 and accompanying text.

The Pennsylvania Act's requirement of the use of the abortion technique most favorable to the fetus is specifically conditioned on the physician's judgment that such technique does not endanger the mother. See 18 PA. CONS. STAT. ANN. § 3210(b) (Purdon 1983). Since the provision favors maternal health over fetal health whenever the two are in conflict, the physician is not significantly
It is further suggested that the court improperly invalidated in its entirety the informed consent provision of section 3205 as designed to influence and discourage the abortion decision.\footnote{165} Suspicion about the probable intent of the legislature should not be determinative of the validity of an entire statutory section where other provisions of the section appear constitutional.\footnote{166} The language of section 3205 that the court found unobjectionable standing alone should have been severed and sustained.\footnote{167}

Similarly, it is submitted that the court misapplied the "permissible scope of regulation" standard from Danforth in invalidating the detailed constrained in the exercise of professional judgment in the best interests of his patient. \textit{See Note, supra note 2, at 401.}

Since the second physician required by § 3210(c) has no duty of care until the "complete expulsion or extraction of the child," it is difficult to see how the mere requirement of his presence constrains the first physician. \textit{See 18 PA. CONS. STAT. ANN. § 3210(c) (Purdon 1983).} Indeed, because each physician's attention will be directed wholly to his own patient, the requirement seems to alleviate rather than magnify the pressure on the physician to "trade-off" between the lives of mother and fetus. \textit{See Note, supra note 2, at 403.}

\footnote{165} \textit{See 737 F.2d at 296.} For a discussion of the majority's holding with respect to the validity of § 3205, see \textit{supra} notes 114-19 and accompanying text.

\footnote{166} \textit{See 737 F.2d at 296.} The legislative history to § 3205 does in fact indicate that the Pennsylvania House of Representatives, at least, was more concerned with deterring than providing an objective basis for the abortion decision through the extensive information requirements of the section. \textit{See S. 742, [PA.] LEGISLATIVE JOURNAL—HOUSE III 2312-15 (1981).} The House overwhelmingly rejected an amendment to § 3205, proposed by Representative Itkin, which was designed to inform the woman of the concomitant costs and liabilities of bringing the pregnancy to term. \textit{Id.} For the information requirements of § 3205, see \textit{supra} note 7.

In \textit{Akron}, the Court found many of the provisions of the Akron ordinance's informed consent requirement to be wholly objectionable. \textit{See 462 U.S. at 442-49.} Yet the Court distinguished certain provisions requiring that the patient be informed by the attending physician of (1) the fact that she is pregnant; (2) the gestational age of the fetus; (3) the availability of information on birth control and adoption; and (4) the availability of assistance during pregnancy and after childbirth. \textit{Id. at 445-46 n.37 (citing \textit{Akron, Ohio, CODIFIED ORDINANCES § 1870.06(B)(1), (2), (6), (7)} (1978)).} The Court stated that these types of provisions were certainly not objectionable and probably routinely made. \textit{Id.}

It is submitted that the value or necessity of provisions that do provide the woman with information relevant to an informed choice remain undiminished by the presence of severable invalid provisions or the absence of other desirable provisions.

\footnote{167} \textit{See 737 F.2d at 313 (Seitz, C.J., dissenting in part).} It is submitted that Chief Judge Seitz correctly noted that the unobjectionable provisions in \textit{Akron} were not severed only because they required the physician personally to administer the information. \textit{See id.} \textit{(citing \textit{Akron}, 462 U.S. at 445-46 & n.37).} Section 3205(a)(2) of the Pennsylvania statute, however, allows the physician or his "agent" to provide the information. \textit{See id.} \textit{(citing 18 PA. CONS. STAT. ANN. § 3205 (Purdon 1983)).} Thus the Pennsylvania statute is sustainable under the analysis in \textit{Akron}. \textit{See id.} \textit{(citing \textit{Akron}, 462 U.S. at 445-46 & n.37).}

For a discussion of the majority's holding with respect to the validity of § 3205, see \textit{supra} note 114. For a discussion of Chief Judge Seitz's dissent with respect to the issue, see \textit{supra} notes 146-48 and accompanying text.
reporting requirements of section 3214 of the Act. It would seem that "detail" is an insufficient ground on which to invalidate a reporting provision, unless such detail unduly burdens the abortion decision. In addition, it is submitted that the Pennsylvania Act's reporting requirements require nothing of the physician that he would not ordinarily be expected to do. Accordingly, since the provision furthers the important state interest in maternal and fetal health by advancing health and safety research, it should have been upheld.

168. See 737 F.2d at 302. The Third Circuit characterized the statute in Danforth as merely providing for recordkeeping of relevant material life data by health facilities and physicians. Id. (citing Danforth, 428 U.S. at 87). The court said that the statute in Danforth required recordkeeping far less extensive than that imposed by the Pennsylvania Act. Id. The Danforth Court, however, was never very clear about what the permissible scope of regulation entailed. See Danforth, 428 U.S. at 80-81. Despite this lack of clarity as to the parameters of valid recordkeeping regulation, the Third Circuit purported to be able to clearly discern that the requirements in § 3214 had "crossed the permissible threshold." See 737 F.2d at 302. For a discussion asserting that the requirements of § 3214 are in fact consistent with the standards articulated in Danforth, see infra notes 169-71 and accompanying text.

For a discussion of the majority's holding with respect to the validity of § 3214, see supra notes 138-39 and accompanying text. For a discussion of relevant aspects of Danforth, see supra notes 55-56 and accompanying text.

169. See 737 F.2d at 302. The court, in fact, stated that "[t]he appropriate test is whether these detailed reporting requirements have a significant impact on the woman's abortion decision." Id.

An "undue burden" analysis focuses on whether the increased difficulty of procuring an abortion is justified by state interests. See Note, supra note 51, at 87 n.23. It would require a compelling state interest to justify an "undue burden." Id. However, "[t]he abortion cases demonstrate that an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion decision." Akron, 462 U.S. at 464 (O'Connor, J., dissenting) (citing Roe, 410 U.S. 113; Bellotti II, 463 U.S. 443; Bellotti I, 442 U.S. 622; Danforth, 428 U.S. at 79). The requirements of § 3214 simply do not amount to an absolute obstacle to or severe limitation of the abortion decision. See 737 F.2d at 315-16 (Seitz, C.J., dissenting in part). For a discussion of undue burden analysis, see supra note 51.

170. See 737 F.2d at 315 (Seitz, C.J., dissenting in part). Chief Judge Seitz asserted that "to constitute an unconstitutional restriction [on access to abortion] a reporting statute would have to compel the physician to go out of his way to collect data that he would not otherwise need to make an informed medical judgment." Id. The information required by § 3214 is admittedly detailed, but involves purely routine observations on the part of the physician. See 18 Pa. Cons. Stat. Ann. § 3214(a), (h) (Purdon 1983). For a discussion of relevant aspects of Chief Judge Seitz' dissent, see supra note 150.

171. See 737 F.2d at 315 (Seitz, C.J., dissenting in part). A statute that imposes a burden is justified if it furthers a significant state interest, while a statute that imposes no burden is justified if it is merely rationally related to a legitimate state interest. See Note, supra note 51, at 87 n.23. In either case, Chief Judge Seitz properly observed that § 3214, like the similar statute sustained in Danforth, merely asks for "relevant maternal health and life data" and is "reasonably directed to the preservation of maternal health." 737 F.2d at 315 (Seitz, C.J., dissenting in part) (citing Danforth, 428 U.S. at 80, 87).

For a discussion of relevant aspects of Danforth, see supra notes 55-56 and accompanying text.
Finally, it is submitted that the Third Circuit should have more strongly considered increasing evidence of a chance of fetal viability throughout the second trimester. 172 The majority and dissent in Akron devoted considerable effort to discussion of new medical technology affecting abortion legislation. 173 Increasingly sophisticated medical technology advances the point of viability to an earlier point in the pregnancy; at the same time it pushes back to a later point in the pregnancy the point at which the state’s interest in maternal health becomes compelling. 174 It is submitted that because the corresponding Roe v. Wade trimester standards were tied to the state of medical technology existing at the time that case was brought, these standards no longer provide reliable indicia of permissible regulation. 175 Accordingly, it is

172. See Akron, 462 U.S. at 453-62 & n.5 (O’Connor, J., dissenting). At the time of Roe v. Wade, the medical authority relied upon by the Court stated that: “[a]ttainment of a [fetal] weight of 1,000 g [or a fetal gestational age of 28 weeks] is . . . widely used as the criterion of viability.” Id. at 457 (O’Connor, J., dissenting) (quoting L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971)). Recent studies indicate that infants born alive at a gestational age of between 22 and 25 weeks and weighing as little as 480-500 grams show a remarkable chance of survival. See Kopelman, The Smallest Preterm Infants: Reasons for Optimism and New Dilemmas, 13 AM. J. DISEASES CHILDREN 461 (1978) (32-week-gestational-age infants weighing 1000 grams or less had 42% chance of survival); Phillip, Little, Lucey & Polivy, Neonatal Mortality Risk for the Eighties: The Importance of Birth Weight/Gestational Age Groups, 68 PEDIATRICS 122 (1981) (25-week-gestational-age infants weighing 500-1249 grams had 20% chance of survival). See also Wash. Post, Mar. 31, 1988, § A, at 2, col. 2 (physician attending 22-week-gestational-age infant that weighed 484 grams predicted 95% chance of survival).

Additionally, recent advances in childbirth technology that eliminate many of the hazards associated with the development of “pre-viable foeti” foreshadow even more significant developments in the viability area. See Beddis, Collins, Godfrey, Levy & Silverman, New Technique for Servo-Control of Arterial Oxygen Tension in Preterm Infants, 54 ARCHIVES DISEASE CHILDHOOD 276 (1979); Dellapenna, supra note 21, at 360 & n.10.

For a discussion of the developments in abortion and childbirth technology, see Dellapenna, supra note 21, at 411-16. See also Reaves, supra note 108, at 27 (discussing developments in childbirth technology).

173. See 462 U.S. at 434-37; id. at 453-58 (O’Connor, J., dissenting). For a discussion of the Akron majority’s position on the effect of new technology upon abortion legislation, see supra notes 91-92 and accompanying text. For a discussion of the Akron dissent’s opposing position on this issue, see supra notes 104-10.

174. See Akron, 462 U.S. at 456-57 (O’Connor, J., dissenting).

175. See id. at 458 (O’Connor, J., dissenting). See also Casenote, supra note 97, at 166 n.50 (explaining Justice O’Connor’s dissent). For a discussion of the O’Connor dissent, see supra notes 104-10 and accompanying text.

As one writer has observed: “[T]he Roe [Court] apparently did not anticipate the very real possibility that the compelling point of viability eventually will overtake the compelling point at the end of the first trimester.” Note, supra note 2, at 999 n.185. The analytical guideline to be provided by these two points of compelling state interest “was made to depend upon highly debatable medical conclusions—debatable in part precisely because the relevant medical technology changes continuously.” Dellapenna, supra note 21, at 360 (footnotes omitted). Indeed, the Roe Court’s approach “seems to freeze law in a pattern
submitted that the court’s conclusion that no important state interest is furthered in requiring physician reports as to abortions of nonviable fetuses (i.e., pre-third trimester fetuses) is no longer supportable.176

In conclusion, it is suggested that the Third Circuit’s holding perpetuates a judicial attitude toward abortion that should no longer be extant.177 The application of strict scrutiny to even minor regulation evidences a hostility toward state interests in the health of its citizens and potential citizens.178 Abortion standards have too centrally focused on ensuring maximum access to abortion without affording sufficient weight to information and safety considerations.179 The implications of such a focus may have grave consequences for the abortion right in the face of growing political conservatism.180 The Akron dissenters threat-

perhaps appropriate to a given point of technological development, but a point which has been passed by the time the case has reached the Supreme Court.” Id. at 360 n.10. But see Note, supra note 21, at 738 (author, writing shortly after Roe decision was handed down noted: “By focusing on compelling state interests rather than the traditional trimesters of pregnancy, Roe has achieved a flexibility which will allow it to survive in a world of rapidly changing medical technology.”).

176. See 737 F.2d at 301-02. Since viability may now occur at some point earlier than 24-28 weeks—the standard set forth in Roe—the requirement of physicians’ reports concerning fetuses considered non-viable under Roe is justified by the state’s compelling interest in preserving fetal health at viability. See supra note 172 and accompanying text.

177. See Akron, 462 U.S. at 453-59 (O’Connor, J., dissenting). For a discussion of the efficacy of continued application of Roe’s trimester standard, see supra notes 104-10 & 172-76 and accompanying text.

178. For a discussion criticising the Third Circuit’s application of strict scrutiny analysis in the principal case, see supra notes 146-50 & 161-71 and accompanying text. For Justice O’Connor’s objection to the apparent disappearance of the “unduly burdensome” standard, see Akron, 462 U.S. at 461-66 (O’Connor, J., dissenting). For a discussion of this aspect of Justice O’Connor’s dissent, see supra notes 104-10 and accompanying text.

179. As one commentator has noted: “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’.” Comment, supra note 91, at 426 (quoting Roe, 410 U.S. at 150) (emphasis supplied by Comment author). Yet the courts tie the hands of the state in regulating abortions for health purposes by applying strict scrutiny even absent a “significant interference” with the abortion decision. Id. at 427.

For a discussion of the impact of such excessive scrutiny with respect to the principal case and the Abortion Control Act of 1982, see supra notes 146-50, 164-78 and accompanying text. For a discussion of past abortion cases, see supra notes 23-103 and accompanying text. For relevant criticisms of these cases, see supra notes 104-10, 151-78 and accompanying text.

180. See supra note 107 and accompanying text. Repeated invalidation of nearly every abortion safety regulation tendered by a state could cause state courts and state and federal legislatures to rely upon potentially more effective means of implementing such policies. See Comment, supra note 107, at 473-76. These means are already at their disposal. Id. Legislative redefinition of certain terms and rights, such as the point at which “human life” begins, could result in new standards for abortion substantially insulated from Supreme Court review. Id. Were the state or federal legislatures to set this point at conception, for
ens to become a majority, and the Court as a result may well overrule rather than simply modify Roe. Applying the Akron dissent's view that abortion regulation is better left to the state legislatures will put the fate of the abortion right in diverse and often less amicable hands. A need for compromise has been evidenced. The Supreme Court must act to develop new standards which take account of both privacy and maternal and fetal safety to ensure that the right to abortion is not severely abrogated. To withstand the test of time, the Court must formulate these standards with an eye toward existing technological realities, yet not to such a degree that the standards become tied to the technology of a specific time period. The principal case provides the perfect opportunity for such action. It is hoped that when the Supreme Court considers an instance, any fetus would become a "human life" and the state could balance the lives of mother and fetus on a more equal basis. Id. If state courts were then to construe the legislative definition like the one mentioned above and shield such decision on the basis of their own state constitutions, the Supreme Court might find its hands tied on the issue since it is the prerogative of states to afford greater protection to fundamental rights under their own constitutions than that which is afforded by the federal constitution. See id. Moreover, the effect of political pressures on state judges is not a force to be trifled with since "state judges are not protected by federal constitutional guarantees of tenure and compensation and many hold their position through periodic elections...[and] they will be subject to the unenviable choice between oaths and careers." Id. at 475 n.148 (citing Meserve, Limiting Jurisdiction and Remedies of Federal Courts, 68 A.B.A. J. 159, 161 (1982)).

181. See Akron, 462 U.S. at 453-54 (O'Connor, J., dissenting). Three justices stand prepared to overrule Roe, unless fundamental changes are made in abortion analysis. See id. In light of the conservative abortion platform espoused by President Reagan in the 1984 presidential campaign, a shift in the balance of power on the abortion issue would appear imminent, since a number of Supreme Court vacancies requiring presidential appointment may present themselves in the next few years.

182. See id. Such an attempt has already been made by members of Congress in the form of legislation dubbed the "Human Life Bill." See Comment, supra note 107, at 468-71.

183. See supra notes 161-82 and accompanying text.

184. It is submitted that courts and legislatures applying present abortion standards will be forced to keep constantly abreast of developments in abortion and childbirth technology. Legislation that is valid one year may be invalid the next. The ability of courts to formulate lasting abortion safety regulations will be diminished by the frequency of these technological advances, since the crowded dockets and inadequate resources of the courts do not allow for the amount and depth of the research that would be required. Legislatures on the other hand, with their committees and subcommittees, have superior fact-finding and research capability and can address such issues without interrupting the flow of their regular business. Such facts suggest the likelihood of successful legislative intervention in what has traditionally been the role of the courts, if judicial review of abortion continues to insist upon overly technological standards. See, e.g., Dellapenna, supra note 21, at 360 n.10 (citing Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221, 299 (1973) ("The role of [the] Supreme [Court as] Medical Review Board is ill-suited to a body which has no institutional competence for questions of health.")).
ers the Third Circuit's invalidation of much of the Pennsylvania Abortion Control Act of 1982, it will articulate standards which can effect a lasting compromise.

Randall J. Zakreski