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## The 1983 Abortion Decisions: Clarification of the Permissible Limits of Abortion Regulation

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# THE 1983 ABORTION DECISIONS:<sup>1</sup> CLARIFICATION OF THE PERMISSIBLE LIMITS OF ABORTION REGULATION

## I. INTRODUCTION

On June 15, 1983, the United States Supreme Court once again addressed the abortion issue, handing down its decisions in *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>2</sup> *Planned Parenthood Ass'n v. Ashcroft*,<sup>3</sup> and *Simopoulos v. Virginia*.<sup>4</sup> The 1983 Abortion Decisions were an unequivocal reaffirmation of *Roe v. Wade*<sup>5</sup> and the principle that a woman has a fundamental right to an abortion. On a higher level of analysis, these decisions are significant because they clarify how the *Roe* doctrine applies to procedural restrictions on abortion.<sup>6</sup>

In the past ten years, the Supreme Court has addressed three general categories of statutory abortion restrictions: (1) funding restrictions;<sup>7</sup> (2) third-party consent and notification requirements;<sup>8</sup> and (3) procedural requirements.<sup>9</sup> The first two categories are beyond the scope of the present

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1. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517 (1983); *Simopoulos v. Virginia*, 103 S. Ct. 2532 (1983). For purposes of this comment, these three decisions will be referred to collectively as the 1983 Abortion Decisions.

2. 103 S. Ct. 2481 (1983).

3. 103 S. Ct. 2517 (1983).

4. 103 S. Ct. 2532 (1983).

5. 410 U.S. 113 (1973). The *Roe* decision was not without its critics. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). But see Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). This comment assumes the correctness of *Roe's* holding that the right to abortion is fundamental.

6. For purposes of this comment, "procedural restrictions, regulations, or requirements" shall refer to state-imposed mental and physical health-related regulations dictating procedures that must be followed before, during, and after an abortion. They include, but are not limited to, regulations with respect to informed consent, mandatory waiting periods, qualifications of the abortion facility, qualifications of the attending physician, and record-keeping. Procedural restrictions, regulations, or requirements do not include spousal or parental consent requirements, which involve interests of third parties and not simply a state's health related concerns.

7. *Williams v. Zbarez*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

8. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Belotti v. Baird*, 443 U.S. 622 (1979); *Belotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

9. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517 (1983); *Simopoulos v. Virginia*, 103 S. Ct. 2532 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410

comment. The remaining category, procedural requirements, is distinct in two respects. First, challenges to procedural requirements not only raise the general issue of the fundamental right to abortion, but they often require application of *Roe's* trimester framework,<sup>10</sup> the analytical basis for balancing the state's interest against the woman's fundamental right. Second, until the 1983 Abortion Decisions, the Supreme Court had examined the application of the trimester framework only once<sup>11</sup> since its articulation. Thus, lower courts have struggled to define its dimensions, often with conflicting results.<sup>12</sup> In light of these distinctions, the 1983 Abortion Decisions constitute an important step in the development of the abortion privacy doctrine.

The purpose of this comment is to highlight how the 1983 Abortion Decisions explain and expand upon the *Roe* doctrine as it applies to procedural restrictions. Particular emphasis will be placed on the Court's clarifications regarding the application of *Roe's* trimester framework. In addition, this comment will address the major questions that remain after, or spring from, the Supreme Court's latest pronouncements on abortion. Many of these questions are crystallized in Justice Blackmun's separate opinion in *Ashcroft*,<sup>13</sup> concurring in part and dissenting in part, and in Justice O'Connor's vehement dissent in *Akron*.<sup>14</sup>

## II. SEEDS SOWN IN *Roe*, *Doe*, AND *Danforth*

*Roe v. Wade* held that the fundamental right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>15</sup> As a fundamental right, the abortion decision is subject to state limitation only when the limitation is (1) supported by a compelling state interest, and (2) "narrowly drawn to express only the legitimate state interests at stake."<sup>16</sup> Having identified protection of maternal health and potential life as the two legitimate state interests underlying abortion regulation,<sup>17</sup> the *Roe* Court outlined the trimester framework to define the point at which these state interests become compelling.

The Court reasoned that a state's interests in protecting maternal health is not compelling until approximately the end of the first trimester of pregnancy, because the mortality rate from first-trimester abortions is

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U.S. 179 (1973).

10. See *infra* notes 15-22 and accompanying text.

11. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

12. See *infra* notes 48-81 and accompanying text.

13. 103 S. Ct. at 2526.

14. 103 S. Ct. at 2504.

15. 410 U.S. 113, 153 (1973).

16. *Id.* at 155.

17. *Id.* at 150.

as low as or lower than that for women in childbirth.<sup>18</sup> Thus, during the first trimester, the "physician, in consultation with his patient,"<sup>19</sup> must have the freedom to make the abortion decision and to effectuate that decision without interference by the state. Following this line of logic, the Court concluded that the state interest in maternal health is compelling during the second and third trimesters because the risks from abortion increase as the pregnancy approaches term. During the second and third trimesters the state may regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."<sup>20</sup>

The state's interest in potential life becomes compelling at the beginning of the third trimester because only at this stage of pregnancy is the fetus capable "of meaningful life outside the mother's womb."<sup>21</sup> During the third trimester the state's interest in potential life outweighs the pregnant woman's right to abortion, and the state "may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."<sup>22</sup> Under this framework of analysis, the *Roe* Court struck down the Texas abortion statute<sup>23</sup> which restricted lawful abortions only to those performed to save the life of the mother, because the statute made "no distinction between abortions performed early in pregnancy and those performed later . . ."<sup>24</sup> and limited the legal justification for an abortion to saving the life of the mother.<sup>25</sup>

In *Doe v. Bolton*,<sup>26</sup> the Court focused on three procedural requirements of Georgia's abortion statute:<sup>27</sup> (1) that all abortions be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH);<sup>28</sup> (2) that all abortions be approved in advance by an abor-

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18. *Id.* at 163. Because of the development of the dilation and evacuation (D & E) abortion procedure (see *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. at 2496), abortions performed in the first half of the second trimester are as safe as first-trimester abortions, but this development has not resulted in an abandonment of the trimester framework. See *infra* notes 108-16 and accompanying text.

19. *Roe v. Wade*, 410 U.S. at 163.

20. *Id.* The Court suggested that regulations regarding the performing physician's qualifications or the type of facility in which the abortion could be performed would be permissible at this stage. *Id.*

21. *Id.*

22. *Id.* at 163-64.

23. TEXAS STAT. ANN. arts. 1191 to 1194, 1196 (recodified as arts. 4512.1 to 4512.4 (Vernon 1973)).

24. 410 U.S. at 164.

25. *Id.*

26. 410 U.S. 179 (1973).

27. *Doe* also addresses challenges to portions of Georgia's abortion statute on grounds of unconstitutional vagueness, *id.* at 191; violation of the right to travel, *id.* at 200; and violation of equal protection, *id.* at 200-01. These challenges are beyond the scope of the abortion privacy doctrine.

28. GA. CODE ANN. § 26-1202(b)(4) (1968) (current version at GA. CODE ANN. § 26-1202

tion committee composed of no fewer than three members of the hospital's staff;<sup>29</sup> and (3) that two other physicians concur in writing with the performing physician's medical judgment that an abortion is necessary.<sup>30</sup> The Court struck down the latter two provisions using vague language suggesting both substantive due process and equal protection grounds.<sup>31</sup> Essentially, the Court determined that neither provision served a legitimate state interest;<sup>32</sup> therefore, the higher level of scrutiny implicit in the trimester framework was unnecessary.

Addressing the hospitalization requirement of the statute, the *Doe* Court applied the first prong of the trimester framework and held, on narrow grounds, that the provision was unconstitutional because it did not exempt first-trimester abortions.<sup>33</sup> Georgia had no compelling interest in requiring first-trimester abortions to be performed in hospitals.

*Planned Parenthood v. Danforth*<sup>34</sup> provided ample opportunity for the Supreme Court to clarify the permissible limits of state regulation of abortion. The Court's examination of Missouri's abortion regulations proscribing saline abortions<sup>35</sup> and imposing informed consent<sup>36</sup> and reporting requirements<sup>37</sup> is of particular significance. In holding that the saline abortion proscription was unconstitutional, the *Danforth* Court expressed what had merely been implied in *Roe* and *Doe* — that a regulation burdening the abortion decision during the second trimester will be scrutinized by the Court even though it is supported by the compelling state interest in maternal health.<sup>38</sup> If the regulation is not narrowly tailored to serve this compelling interest, it violates due process. This portion of the decision also demonstrated the great deference the Court accords accepted medical practice in determining whether a second-trimester regu-

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(1973)).

29. GA. CODE ANN. § 26-1202(b)(5) (1968).

30. *Id.* § 26-1202(b)(3).

31. In striking down these provisions, the *Doe* Court noted that they were redundant measures to achieve the state's purported interest. This analysis suggests the substantive due process principle that the state, in regulating a fundamental right, must choose the narrowest means possible. In addition, the Court noted that no other medical procedure in Georgia was so regulated, thus suggesting an equal protection argument. 410 U.S. at 197, 199. See also Note, *Due Process and Equal Protection: Constitutional Implications of Abortion Notice and Reporting Requirements*, 56 B.U.L. REV. 522, 527-28 (1976).

32. 410 U.S. at 197, 199.

33. *Id.* at 195. In dictum, the Court suggested that the hospitalization requirement was not reasonably related to the state interest in maternal health and implied that the hospitalization requirement would not necessarily have been upheld even if it had excluded the first trimester. *Id.*

34. 428 U.S. 52 (1976).

35. MO. ANN. STAT. § 188.050 (Vernon 1974) (repealed 1979).

36. *Id.* § 188.020(2).

37. *Id.* §§ 188.050, 188.060.

38. 428 U.S. at 76-79.

lation is sufficiently related to the compelling state interest.<sup>39</sup>

The analysis of Missouri's informed consent and reporting requirements in *Danforth* is noteworthy because, although the provisions applied to all stages of pregnancy, the Court upheld the requirements without applying the trimester framework.<sup>40</sup> With respect to the informed consent requirement, the Court noted that the decision to have an abortion "is an important, and often a stressful one . . ."<sup>41</sup> and concluded that a state has the right to assure that a woman makes the decision with full awareness of its significance.<sup>42</sup> Thus, in some instances, an abortion regulation is permissible even though it is unsupported by a compelling interest in maternal health and potential life.

The Court's discussion of the reporting requirements<sup>43</sup> clarifies the circumstances in which a procedural regulation may be constitutional regardless of the stage of pregnancy it affects. The Court concluded that Missouri's reporting requirements were not constitutionally offensive because they were related to the state's interest in protecting maternal health, and because they resulted in "no legally significant impact or consequence on the abortion decision or on the physician-patient relationship."<sup>44</sup>

Taken together, *Roe*, *Doe*, and *Danforth* demonstrate three principles defining the constitutional limits on abortion procedural regulations. First, if the regulation promotes no legitimate state interest, it is unconstitutional<sup>45</sup> and no further scrutiny is required. Second, if the procedural regulation is supported by a legitimate state interest and has no "legally significant impact" on the abortion decision, it is constitutional on its face and requires no stricter scrutiny in order to be upheld.<sup>46</sup> Finally, if the regulation furthers a legitimate state interest but also burdens the abortion decision or its effectuation, the stricter standard of scrutiny applies.<sup>47</sup> Thus, in order for an abortion regulation to be valid, the state must show a compelling state interest, as defined by the trimester framework, and a reasonable relationship between this state interest and the regulation.

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39. *Id.* at 77-78. The Court noted that the saline procedure was used in 68% to 80% of all post-first-trimester abortions. It also observed that there was no evidence that the purportedly safer prostaglandin technique was available in Missouri. The prostaglandin technique, like the saline procedure, involves an intra-amniotic injection that induces abortion. *Id.* at 77.

40. *Id.* at 67, 80-81.

41. *Id.* at 67.

42. *Id.*

43. *Id.* at 79-81.

44. *Id.* at 81.

45. *Doe v. Bolton*, 410 U.S. 179 (1973).

46. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

47. *Id.*; *Roe v. Wade*, 410 U.S. 113 (1973).

### III. CONFUSION IN THE LOWER COURTS

The judicial principles of *Roe*, *Doe*, and *Danforth* did not deter the efforts of the pro-life movement to enact restrictive abortion legislation exploiting the ambiguities of these decisions.<sup>48</sup> In the years since *Danforth*, lower courts have struggled with due process challenges to such legislation, often with conflicting results.<sup>49</sup> Two key areas of confusion in the courts are identifiable.

The first arises with respect to second-trimester hospitalization requirements.<sup>50</sup> One source of this confusion derives from dictum in *Roe*, which specifically mentioned hospitalization requirements as an example of permissible regulation during the second trimester.<sup>51</sup> Some courts have interpreted this statement to mean that hospitalization requirements after the first trimester are per se constitutional.<sup>52</sup> Others have held that, while

48. See E. RUBIN, *ABORTION, POLITICS AND THE COURTS* 130-38 (1982). It has been suggested that one reason for the success in enacting such statutes is that some state legislators are more concerned with keeping their constituencies happy than with the constitutionality of a statute. See *id.* at 129. Janet Benshoof, Director of the Reproductive Freedom Project of the American Civil Liberties Union (ACLU) and leading advocate in the field of reproductive rights, supported this view, citing her own conversation with a legislator who indicated that legislators often rely on the judiciary to strike down questionable statutes that they have enacted. Address by Janet Benshoof, Reproductive Rights Luncheon and Second Annual Pro-Choice Awards sponsored by the Association of Virginia Planned Parenthood Affiliates and the ACLU of Virginia, in Richmond, Va. (Oct. 7, 1983).

49. See *infra* notes 50-81 and accompanying text.

50. Second-trimester hospitalization requirements refer to requirements that all abortions performed after the first trimester be performed in a hospital rather than a free-standing clinic. Compare *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1210 (6th Cir. 1981) (see *infra* note 53), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983); *Gary-Northwest Ind. Women's Servs., Inc. v. Bowen*, 496 F. Supp. 894, 899 (N.D. Ind. 1980) (see *infra* note 52), *aff'd mem. sub nom. Gary-Northwest Ind. Women's Servs., Inc. v. Orr*, 451 U.S. 934 (1981); and *Wynn v. Scott*, 449 F. Supp. 1302, 1318 (N.D. Ill. 1978) (see *infra* note 52), *aff'd sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979); with *Planned Parenthood Ass'n v. Ashcroft*, 664 F.2d 687, 688-90 (8th Cir. 1981) (see *infra* note 53), *aff'd in part, rev'd in part*, 103 S. Ct. 2517 (1983); *Wolfe v. Stumbo*, 519 F. Supp. 22, 26 (W.D. Ky. 1980) (see *infra* note 54); and *Margaret S. v. Edwards*, 488 F. Supp. 181, 196 (E.D. La. 1980) (see *infra* note 54).

51. [A] State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements . . . as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status . . . .  
410 U.S. 113, 163 (1973). See generally Note, *Hospitalization Requirements for Second Trimester Abortions: For the Purpose of Health or Hindrance?* 71 GEO. L.J. 991 (1983).

52. See, e.g., *Gary-Northwest Ind. Women's Servs., Inc. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980) (holding a second-trimester hospitalization requirement constitutional under *Roe* framework), *aff'd mem. sub nom. Gary-Northwest Ind. Women's Servs., Inc. v. Orr*, 451 U.S. 934 (1981); *Wynn v. Scott*, 449 F. Supp. 1302, 1318 (N.D. Ill. 1978) (holding a second-trimester hospitalization requirement constitutional under *Roe* framework), *aff'd sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979).

such requirements are not per se constitutional, the party challenging the requirement must show that the requirement is unduly burdensome in order to outweigh the state's compelling interest in protecting maternal health.<sup>53</sup> Still other courts have looked to accepted medical practice in order to determine whether the hospitalization requirement reasonably relates to the state's interest in protecting maternal health.<sup>54</sup>

Another source of confusion in the area of second-trimester hospitalization requirements is the mixed signals sent by the Supreme Court. While the Court's message in *Roe, Doe*, and *Danforth* is clear that the state must not needlessly burden the woman's decision to have an abortion, the Court's more recent decisions in *Beal v. Doe*,<sup>55</sup> *Maier v. Roe*,<sup>56</sup> and *Harris v. McRae*,<sup>57</sup> upholding government funding restrictions on abortion,<sup>58</sup> have led some lower courts to believe that the strict scrutiny of the trimester framework applies only if the procedural requirement creates a *direct* obstacle to the abortion decision.<sup>59</sup> For example, in *Gary-Northwest Indiana Women's Services v. Bowen*,<sup>60</sup> the federal district court upheld Indiana's hospitalization requirement on the theory that the burden it imposed was analogous to that imposed by the funding restrictions upheld in *Harris v. McRae*<sup>61</sup> and *Maier v. Roe*<sup>62</sup>: "The obstacle which the

53. See *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 857 (8th Cir.) (in striking down second-trimester hospitalization requirement, court held that plaintiff must show direct and substantial burden before state must show compelling state interest), *aff'd after remand*, 664 F.2d 687 (8th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2517 (1983); *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1204 (6th Cir. 1981) (in upholding second-trimester hospitalization requirement, court held that direct state interference must be shown before strict scrutiny will be applied), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983).

54. See *Wolfe v. Stumbo*, 519 F. Supp. 22, 24 (W.D. Ky. 1980) (striking down hospitalization requirement because it reduces accessibility to the "safest" second-trimester procedure, the D & E); *Margaret S. v. Edwards*, 488 F. Supp. 181, 194 (E.D. La. 1980) (second-trimester hospitalization requirement not reasonably related to maternal health; state interest not "compelling" prior to 18th week of pregnancy).

55. 432 U.S. 438 (1977).

56. 432 U.S. 464 (1977).

57. 448 U.S. 297 (1980).

58. These cases stand for the principle that a state may deny financial assistance for abortions, while granting it for childbirth. Such denial "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Harris v. McRae*, 448 U.S. 297, 315 (1980).

59. See, e.g., *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1204 (6th Cir. 1981) (citing *Maier v. Roe*, 432 U.S. 464, 475 (1977), and holding that regulation must amount to direct interference before strict scrutiny will apply), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983); *Gary-Northwest Ind. Women's Servs., Inc. v. Bowen*, 496 F. Supp. 894, 899 (N.D. Ind. 1980), *aff'd mem. sub nom. Gary-Northwest Ind. Women's Servs., Inc. v. Orr*, 451 U.S. 934 (1981).

60. 496 F. Supp. 894, 899 (N.D. Ind. 1980), *aff'd mem. sub nom. Gary-Northwest Ind. Women's Servs., Inc. v. Orr*, 451 U.S. 934 (1981).

61. 448 U.S. 297 (1980).



women face is not the hospitalization requirement, but the women's indigency.<sup>63</sup> The federal district court upheld the requirement without considering whether it was narrowly drawn to serve the state interest.<sup>64</sup> The fact that the Supreme Court summarily affirmed the district court's decision<sup>65</sup> added to the confusion in the lower courts.<sup>66</sup>

The second area producing conflicting results in the lower courts involves the permissible limits of first-trimester procedural regulations.<sup>67</sup> The conflict centers around determining how and when strict scrutiny of first-trimester regulations is appropriate.<sup>68</sup> Most frequently the issue has arisen with respect to informed consent requirements and mandatory waiting periods.<sup>69</sup> Again, several approaches to determining the constitutionality of such provisions have developed.

On the one hand, the Eighth Circuit Court of Appeals affirmed a district court decision<sup>70</sup> that an informed consent requirement and mandatory waiting period were unconstitutional because "the state's interest was not compelling during the first trimester of pregnancy."<sup>71</sup> On the other hand, the Federal District Court for Maine has rejected this approach.<sup>72</sup> That court upheld an informed consent statute requiring that the attending physician inform the woman of alternatives to abortion, such as offering the child for adoption.<sup>73</sup> Citing *Maher v. Roe*,<sup>74</sup> the court

62. 432 U.S. 464 (1977).

63. 496 F. Supp. at 901.

64. *Id.*

65. Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 934 (1981), *aff'g mem.* Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980).

66. In Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1210 (6th Cir. 1981), *aff'd in part, rev'd in part*, 103 S. Ct. 2481 (1983), the court relied on the Supreme Court's affirmance of *Gary-Northwest Ind. Women's Servs., Inc. v. Orr*, 451 U.S. 934 (1981), in upholding Akron's second-trimester hospitalization requirement.

67. "First-trimester procedural regulations" refer to regulations, such as informed consent requirements and mandatory waiting periods, which apply to all abortions, including those in the early stages of pregnancy.

68. See *infra* notes 70-81 and accompanying text.

69. See, e.g., Charles v. Carey, 627 F.2d 772, 784, 785 (7th Cir. 1980) (portions of informed consent struck down; mandatory waiting period struck down); Womens Servs., P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980) (informed consent and mandatory waiting period struck down), *vacated*, 452 U.S. 911 (1981), *aff'd*, 690 F.2d 667 (8th Cir. 1982), *vacated*, 103 S. Ct. 3102 (1983); Wolfe v. Schoering, 541 F.2d 523, 525, 526 (6th Cir. 1976) (informed consent and mandatory waiting period upheld); Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 548 (D. Me. 1979) (informed consent upheld; mandatory waiting period struck down).

70. Womens Servs., P.C. v. Thone, 636 F.2d 206, 210 (8th Cir. 1980), *vacated*, 452 U.S. 911 (1981), *aff'd*, 690 F.2d 667 (8th Cir. 1982), *vacated*, 103 S. Ct. 3102 (1983).

71. *Id.* at 209 (noting with approval the determination of the district court, 483 F. Supp. 1022, 1049 (D. Neb. 1979), that the provision was unconstitutional because unsupported by compelling state interest).

72. Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979).

73. ME. REV. STAT. tit. 22, § 1598 (1979).

determined that the provision served "the state's legitimate interest in encouraging childbirth and protecting a potential life."<sup>75</sup> The court concluded that the plaintiffs had not shown that the informed consent requirement "unduly burdened" the woman's constitutional right; therefore, a rational relationship test between the legitimate state interest and the abortion regulation was the appropriate level of scrutiny.<sup>76</sup> In the same decision, the court struck down a forty-eight hour mandatory waiting period because the waiting period, in contrast to the informed consent requirement, was clearly a "direct state interference" with the effectuation of an abortion.<sup>77</sup>

In *Charles v. Carey*,<sup>78</sup> in which an informed consent statute was again at issue, the Seventh Circuit Court of Appeals rejected an "undue burden" approach similar to that followed by the Federal District Court for Maine. The court held that "the term 'undue burden' defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny."<sup>79</sup> The court further stated that "[t]he threshold question whether there is a 'burden' or 'direct interference' in the pregnancy termination decision requires that the plaintiff merely show the requisite degree of interference."<sup>80</sup> Having enunciated these principles, the court determined that strict scrutiny was the appropriate standard of review.<sup>81</sup>

#### IV. THE 1983 ABORTION DECISIONS

Against this background of confusion, the United States Supreme Court decided *City of Akron v. Akron Center for Reproductive Health, Inc.*,<sup>82</sup> *Planned Parenthood Ass'n v. Ashcroft*,<sup>83</sup> and *Simopoulos v. Virginia*.<sup>84</sup> Because the Court's primary focus in this trilogy is on second-trimester hospitalization requirements and first-trimester procedural regulations, the decisions clarify the application of the trimester framework and further define the permissible limits of first-trimester regulations. A brief summary of the 1983 Abortion Decisions will provide the foundation for analyzing their impact on the abortion privacy doctrine.

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74. 432 U.S. 464, 473 (1977).

75. 477 F. Supp. at 550.

76. *Id.*

77. *Id.* at 550-51.

78. 627 F.2d 772 (7th Cir. 1980).

79. *Id.* at 777.

80. *Id.*

81. *Id.* at 784. The court struck down a portion of Illinois' informed consent statute, stating that it constituted "an unconstitutional 'straitjacket' on the physician's ability to counsel with his patient with her best medical interests in mind." *Id.*

82. 103 S. Ct. 2481 (1983).

83. 103 S. Ct. 2517 (1983).

84. 103 S. Ct. 2532 (1983).

A. *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>85</sup>

Three provisions of the controversial "Akron Ordinance"<sup>86</sup> came under the Supreme Court's scrutiny in *Akron*:<sup>87</sup> a second-trimester hospitalization requirement;<sup>88</sup> a detailed informed consent requirement;<sup>89</sup> and a

85. 103 S. Ct. 2481 (1983).

86. AKRON, OHIO, CODIFIED ORDINANCES ch. 1870 (1978). This ordinance, which is popularly known as the "Akron Ordinance," has served as a model of anti-abortion legislation for several states and localities. See E. RUBIN, *supra* note 48, at 137.

87. Two other provisions of the Akron Ordinance were also discussed by the Court. The first was a parental notification and consent requirement for minors. AKRON, OHIO, CODIFIED ORDINANCES § 1870.05. The Court's analysis of this provision is beyond the scope of this comment. The Court made no new pronouncements regarding a minor's right to an abortion either in *Akron*, 103 S. Ct. 2481, 2499, where it struck down the parental consent requirement, or in *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517, 2526 (1983), where it upheld Missouri's parental consent statute. See J. Benshoof, *The New Supreme Court Abortion Decisions* (July 18, 1983) (available from the American Civil Liberties Union Reproductive Freedom Project, New York, New York). See generally Comment, H.L. v. Matheson: *Can Parental Notification Be Required for Minors Seeking Abortions?* 16 U. RICH. L. REV. 429 (1982) (reviewing key Supreme Court decisions defining a minor's right to an abortion).

The second provision discussed by the Court was a requirement that fetal remains be "disposed of in a humane and sanitary manner." AKRON, OHIO, CODIFIED ORDINANCES § 1870.16. The Court struck down this provision on the ground that it was unconstitutionally vague, 103 S. Ct. 2481, 2504. Because it does not relate to the fundamental right to abortion, this part of the opinion is beyond the scope of this comment.

88. "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.

89. (A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.

(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

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

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

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external

mandatory twenty-four hour waiting period.<sup>90</sup> With a strong majority of six Justices, the Court affirmed the Sixth Circuit's holding that the last two provisions were unconstitutional but reversed the Sixth Circuit decision upholding the second-trimester hospitalization requirement.<sup>91</sup> In striking down all three provisions, the *Akron* decision emphatically reaffirms the Court's position that because a woman's decision to choose abortion is a fundamental right, any state regulation interfering with that

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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 Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her, and one of her parents or her legal guardian where applicable, in accordance with paragraph (B) of this Section.

*Id.* § 1870.06.

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

*Id.* § 1870.07.

91. 103 S. Ct. at 2481.

choice will be subject to strict judicial scrutiny.

B. *Planned Parenthood Ass'n v. Ashcroft*<sup>92</sup>

The abortion provisions under scrutiny in *Ashcroft* were not so clearly biased against abortion as those addressed in *Akron*, and thus *Ashcroft* provides a good basis for comparison. Here the Court focused on four provisions of Missouri's abortion statute:<sup>93</sup> a second-trimester hospitalization requirement;<sup>94</sup> a parental consent requirement for minors;<sup>95</sup> a requirement that a pathology report be made after every abortion;<sup>96</sup> and a requirement that a second physician be present during an abortion performed on a viable fetus.<sup>97</sup> The same majority that struck down *Akron*'s hospitalization requirement found Missouri's hospitalization requirement to be unconstitutional as well.<sup>98</sup> However, the other three provisions of the Missouri act were upheld by a plurality composed of Justices O'Connor, White, and Rehnquist (the dissenting Justices in *Akron*) and Justice Powell and Chief Justice Burger, who had formed part of the majority in *Akron*.<sup>99</sup>

C. *Simopoulos v. Virginia*<sup>100</sup>

In *Simopoulos* the Court affirmed the criminal conviction of a doctor who performed a saline abortion in violation of the Virginia abortion stat-

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92. 103 S. Ct. 2517 (1983).

93. Regulation of Abortions, MO. ANN. STAT. §§ 188.010-.085 (Vernon 1983).

94. "Every abortion performed subsequent to the first twelve weeks of pregnancy shall be performed in a hospital." *Id.* § 188.025.

95. *Id.* § 188.028.

96. 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.

*Id.* § 188.047.

97. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or adducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child; provided that it does not pose an increased risk to the life or health of the woman.

*Id.* § 188.030.3.

98. 103 S. Ct. 2517, 2520.

99. *Id.*

100. 103 S. Ct. 2532 (1983).

ute's requirement of second-trimester hospitalization.<sup>101</sup> Five Justices<sup>102</sup> upheld the hospitalization requirement because the definition of "hospital" in the Virginia Code,<sup>103</sup> as interpreted by the Supreme Court of Virginia,<sup>104</sup> includes licensed outpatient surgical hospitals. The three dissenting Justices in *Akron*<sup>105</sup> concurred in the judgment but wrote a separate opinion in line with the reasoning of the *Akron* dissent.<sup>106</sup> Justice Stevens dissented, believing that it was not clear how the Virginia Supreme Court would interpret "hospital."<sup>107</sup>

## V. QUESTIONS ANSWERED; QUESTIONS REMAINING

An analysis of the 1983 Abortion Decisions shows how the majority opinion in *Akron* clearly expresses several of the underlying themes in *Roe, Doe, and Danforth*. The *Ashcroft* and *Simopoulos* decisions, in contrast, provide ample material for future controversy. The following discussion examines the impact of these decisions according to the issues they address rather than through a case-by-case analysis.

### A. *Second-Trimester Hospitalization Requirements: Questions Answered in Akron; Questions Raised in Simopoulos*

In *Akron*, the Court noted that the district court and the court of appeals upheld Akron's hospitalization requirement in the belief that *Roe*

101. [I]t shall be lawful for any physician licensed by the Virginia Board of Medicine to practice medicine and surgery, to terminate or attempt to terminate a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the second trimester of pregnancy and prior to the third trimester of pregnancy provided such procedure is performed in a hospital licensed by the State Department of Health or under the control of the State Board of Mental Health and Mental Retardation.

VA. CODE ANN. § 18.2-73 (Repl. Vol. 1982).

102. Justice Powell was joined in his opinion by Chief Justice Burger and Justices Brennan, Marshall, and Blackmun. 103 S. Ct. at 2534.

103. VA. CODE ANN. § 32.1-123(1) (Repl. Vol. 1979). See *infra* note 104.

104. The Court cited the opinion of the Supreme Court of Virginia in *Simopoulos v. Virginia*, 221 Va. 1059, 1075, 277 S.E.2d 194, 204 (1981), which clearly interpreted "hospital" as defined in VA. CODE ANN. § 32.1-123(1) (Repl. Vol. 1979), to include outpatient hospitals. 103 S. Ct. at 2537 nn.4-5. Specifically that definitional statute provides that:

"Hospital" means any facility in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, short-term, long-term, outpatient and maternity hospitals. . . .

VA. CODE ANN. § 32.1-123(1) (Repl. Vol. 1979).

105. Justices O'Connor, Rehnquist, and White. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2504 (1983) (O'Connor, J., dissenting).

106. 103 S. Ct. at 2540.

107. *Id.* at 2540-41.

established a brightline test authorizing such requirements after the first trimester of pregnancy.<sup>108</sup> The Court reaffirmed the applicability of *Roe's* trimester framework but rejected the brightline test interpretation, stating that "the Court in *Roe* did not hold that it always is reasonable for a State to adopt an abortion regulation that applies to the entire second trimester."<sup>109</sup> Thus, the Court focused on the reasonableness of the relationship between the requirement that all second-trimester abortions be performed in full-service, acute-care hospitals and the state's compelling interest in maternal health.

After recognizing the burdens that a hospitalization requirement imposes in terms of increased costs<sup>110</sup> and difficulty of access,<sup>111</sup> the Court evaluated the reasonableness of the requirement in light of *Danforth*, relying heavily on currently accepted medical practice.<sup>112</sup> Noting the desirability of making the dilation and evacuation (D & E) abortion procedure available because of its low risk,<sup>113</sup> the Court looked to recent recommendations of the American Public Health Association and the American College of Obstetricians and Gynecologists.<sup>114</sup> Both organizations endorsed the view that hospitalization for second-trimester D & E abortions does not contribute to the patients' safety.<sup>115</sup> Consequently, the Court concluded that "present medical knowledge" . . . convincingly undercuts Akron's justification for requiring that *all* second-trimester abortions be performed in a hospital."<sup>116</sup>

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108. 103 S. Ct. at 2494. *See supra* note 51.

109. 103 S. Ct. at 2495.

110. An in-hospital abortion costs \$850-\$900, whereas a D & E performed in a clinic costs \$350-\$400. *Id.*

111. *Id.* The Court noted that the unavailability of second-trimester abortions in hospitals was not unique to Akron, citing *Wolfe v. Stumbo*, 519 F. Supp. 22, 23 (W.D. Ky. 1980), and *Margaret S. v. Edwards*, 488 F. Supp. 181, 191 (E.D. La. 1980). 103 S. Ct. at 2495 n.21. *See also* S. Henshaw, J. Forest, E. Sullivan, C. Tietze, *Abortion 1977-1979, Need & Services in the United States, Each State & Metropolitan Area*, Report of the Alan Guttmacher Inst. (1980).

112. 103 S. Ct. at 2494-95.

113. *Id.* at 2496. Before the development of the D & E procedure, an instillation procedure was the safest abortion technique available during the second trimester. This method consists of an injection of either a saline solution or prostaglandin, which induces labor.

The risk associated with the instillation method is much greater than that from a D & E procedure because not only must the woman go through labor, but she must also wait until approximately her 16th week of pregnancy to have the procedure performed because until that time the amniotic sac is too small. The net result of using the D & E procedure is that a woman may have an abortion at very low risk between the 12th and 18th weeks of pregnancy. *See* Grimes, Hulk, & McCutchen, *Midtrimester Abortion by Dilation and Evacuation Versus Intraamniotic Instillation of Prostaglandin: A Randomized Clinical Trial*, *NEW ENG. L.J.*, Sept. 27, 1979, at 720.

114. 103 S. Ct. at 2496.

115. *Id.*

116. *Id.*

Before reaching its holding that Akron's hospitalization requirement was unconstitutional,<sup>117</sup> the Court indicated how its decision should be interpreted. The opinion stated that a perfect fit between an abortion regulation and the asserted state interest is not required in order for a regulation to withstand constitutional scrutiny.<sup>118</sup> The Akron hospitalization requirement was unconstitutional because it burdened a woman's access to an extremely safe abortion procedure.<sup>119</sup>

The *Akron* decision firmly establishes that the dictum in *Roe* regarding "permissible" second-trimester regulations<sup>120</sup> is not controlling. The Court also implies that, contrary to the understanding of some lower courts,<sup>121</sup> increased cost can have sufficient impact on the abortion decision to invoke strict scrutiny of the trimester framework.<sup>122</sup> The critical factor with regard to a second-trimester regulation is whether it reasonably relates to the promotion of maternal health, and that relation in turn will be determined according to accepted medical practice of the day. But what the Court has granted with the right hand in terms of promoting a woman's freedom to choose abortion, it may have taken away with the left. This, at least, is how the Virginia Attorney General's Office has chosen to interpret *Simopoulos*.<sup>123</sup>

In *Simopoulos*, the Court determined that since Virginia's definition of "hospital" includes outpatient surgical hospitals,<sup>124</sup> and since Virginia's regulations governing outpatient surgical hospitals<sup>125</sup> "[o]n their face . . . appear to be generally compatible with accepted medical standards . . . .,"<sup>126</sup> Virginia's hospitalization requirement is not unconstitutional.<sup>127</sup> This decision is significant in light of the facts that presently in Virginia there are only four licensed outpatient surgical hospitals<sup>128</sup> and

117. *Id.* at 2497.

118. *Id.*

119. *Id.*

120. 410 U.S. 113, 163 (1973). See *supra* note 51 and accompanying text.

121. See *supra* text accompanying notes 60-63.

122. See *supra* notes 110 and accompanying text. The Court, however, is not clear as to how great a cost differential will invoke strict scrutiny. See *infra* notes 166-69 and accompanying text.

123. 103 S. Ct. 2532 (1983). See *infra* note 134 and accompanying text.

124. See *supra* note 104.

125. Dept. of Health, Rules and Regs. for the Licensure of Hospitals in Va. pt. II (1979) (superseded by pt. IV (1982)). The Court noted that the regulations in effect when *Simopoulos* was prosecuted had been superseded at the time of its decision but noted no significant difference. 103 S. Ct. at 2537 n.6.

126. 103 S. Ct. at 2539.

127. *Id.* at 2540.

128. Ambulatory Surgical Center, Norfolk, Virginia; Fairfax Surgery Center, Fairfax, Virginia; Hampton General Outpatient Emergency Center, Hampton, Virginia; and Virginia Heart Institute, Richmond, Virginia. Telephone call to administrator's office at each institution (Oct. 5, 1983).



that none of those facilities performs second-trimester abortions.<sup>129</sup> While Virginia's regulations governing the licensure of first-trimester abortion clinics<sup>130</sup> do not differ significantly from those governing outpatient surgical hospitals<sup>131</sup> insofar as health-related matters are concerned,<sup>132</sup> presently existing first-trimester abortion clinics would have to incur significant conversion expenses in order to meet the physical requirements for outpatient surgical hospitals.<sup>133</sup>

The Virginia Attorney General's Office has expressed the view that, under the 1983 Abortion Decisions, Virginia's regulations governing the licensure of outpatient surgical hospitals do not impose an unconstitutional burden on a woman's right to a second-trimester abortion.<sup>134</sup> In essence, this stance means that first-trimester abortion clinics in Virginia may not perform second-trimester D & E abortions and that to date the qualified outpatient facilities will not do so. Thus, the net effect of the *Simopoulos* decision in Virginia could well be the same as if Virginia's abortion statute restricted second-trimester abortions to acute-care hospitals, i.e., a woman's ability to obtain a second-trimester abortion is severely restricted.<sup>135</sup>

Whether the interpretation of the Attorney General's Office is correct is subject to debate. On this point, two observations with respect to *Simopoulos* are noteworthy. First, the decision is in line with the Court's statement in *Akron* that "a state abortion regulation is not unconstitutional simply because it does not correspond perfectly in all cases to the as-

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129. *Id.* Ambulatory Surgical Center and Fairfax Surgery Center do perform first-trimester abortions. *Id.*

130. Dept. of Health, Rules and Regs. for Licensure of Hospitals in Va. pt. V (1983). Because many of the regulations governing first-trimester abortions are as restrictive as those governing the out-patient surgical hospitals, they are very likely unconstitutional as unduly restrictive of first-trimester abortions. Consequently, on November 11, 1983, the Virginia Board of Health, on the advice of counsel, gave its preliminary approval to rescind some of the regulations. This approval is only the first step in the procedure to effect such rescission. This preliminary approval must be followed by a public hearing; then the Board must take final action. Richmond Times-Dispatch, Nov. 17, 1983, at B-1, col. 2.

131. Dept. of Health, Rules and Regs. for Licensure of Hospitals in Va. pt. IV (1982).

132. Compare *id.* pt. IV, §§ 702.0-703.10.2 (health-related regulations for outpatient surgical hospitals) with *id.* pt. V, §§ 902.0-904.5.3 (health-related regulations for first-trimester abortions). The health-related regulations for the first-trimester abortion clinics are more tailored to the specific health concerns raised by abortions. See *id.* pt. V, §§ 903.3.1-5, 904.1.3-3.8.

133. Telephone interview with Sally Camp, Staff Assistant, Va. Dept. of Health (Oct. 17, 1983).

134. The Attorney General's Office has not issued a formal opinion on this matter, but it has indicated to the Department of Health that this is its official position. *Id.*

135. It is too early to be certain of the net effect of *Simopoulos*, because the licensed outpatient surgical hospitals that perform first-trimester abortions may expand their services to include second-trimester abortions. See *supra* note 128. So too, new abortion clinics may be constructed in compliance with the regulations governing outpatient surgical hospitals.

served state interest."<sup>136</sup> Patently, the Supreme Court does not want to give a "hands off" message to the states that would deter them from taking legitimate measures to protect maternal health. On the other hand, of obvious concern to the Court is any regulation that has "the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks."<sup>137</sup>

Second, the Court emphasizes at various points in the *Simopoulos* opinion that its decision rests on the fact that Virginia's hospitalization requirement *appears* to comport with accepted medical practice.<sup>138</sup> The Court specifically stated that it was not required to "consider whether Virginia's regulations [governing the licensure of outpatient surgical hospitals] are constitutional in every particular,"<sup>139</sup> because the appellant had not specifically challenged the regulations as insufficiently related to maternal health.<sup>140</sup> The Court's indications are clear: If Virginia's regulations governing outpatient hospitals have the effect of inhibiting "the vast majority of abortions after the first 12 weeks,"<sup>141</sup> and do not contribute to the safety of the abortion procedure,<sup>142</sup> they are unconstitutional insofar as they dictate where second-trimester abortions must be performed.

#### B. *First-Trimester Regulations: When and How Does Strict Scrutiny Apply?*

In defining the permissible limits of first-trimester abortion regulations, *Akron* again is the key decision. The decision reiterates the principle derived from *Danforth* that a first-trimester abortion regulation is not unconstitutional so long as it is supported by "important health-related State concerns"<sup>143</sup> and does not interfere with "physician-patient consultation or with the woman's choice between abortion and childbirth."<sup>144</sup> More importantly, the Court's examination of Akron's detailed informed consent requirements clarifies what constitutes an "important" state interest justifying a first-trimester regulation.<sup>145</sup> Unfortunately, the Court does not reach a clear consensus as to when a regulation's impact is sufficient to invoke strict scrutiny.<sup>146</sup>

Akron's informed consent requirement contained two features that dis-

136. 103 S. Ct. at 2497.

137. *Id.* (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 79 (1976)).

138. 103 S. Ct. at 2539-40.

139. *Id.* at 2539.

140. *Id.*

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

142. 103 S. Ct. at 2496.

143. *Id.* at 2493.

144. *Id.*

145. See *infra* notes 147-61 and accompanying text.

146. See *infra* notes 162-73 and accompanying text.

tinguish it from the requirement upheld in *Danforth*.<sup>147</sup> Akron specified a litany of information to be given to the woman, including undeterminable data, such as the fetus' sensitivity to pain and dubious statements with regard to the physical and psychological consequences of abortion,<sup>148</sup> which the Court termed a "parade of horrors."<sup>149</sup> In addition, the ordinance required that the attending physician give the informed consent consultation.<sup>150</sup> The Court acknowledged that the state's legitimate interest in maternal health supports the validity of an informed consent requirement as a general rule, but qualified this rule as follows:

This does not mean . . . that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion . . . . [T]he State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.<sup>151</sup>

The Court thus rejected the interpretation of some lower courts that a state may legitimately use informed consent statutes to promote its own "pro-life" policies.<sup>152</sup>

The informational requirement of Akron's informed consent provision failed judicial scrutiny because the Court determined that it not only interfered with the woman's abortion decision,<sup>153</sup> but also placed the physician in an "undesired and uncomfortable straitjacket."<sup>154</sup> Clearly, the Court rejects the view expressed in *Woman's Community Health Center, Inc. v. Cohen*<sup>155</sup> that a state's interest in promoting its pro-life policy will support a first-trimester regulation so long as it does not constitute a direct obstacle to the abortion decision.

Addressing the "attending physician" provision,<sup>156</sup> the *Akron* Court rejected the Sixth Circuit's determination that the provision interfered with the physician-patient relationship in exactly the same way as that of the informational requirement.<sup>157</sup> The Court noted that the provision required the physician to disclose general information about the abortion procedure to be used and medical instructions to be followed after the procedure, "properly leav[ing] the precise nature and amount of this disclosure to the physician's discretion and 'medical judgment.'"<sup>158</sup> The

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147. *Planned Parenthood v. Danforth*, 428 U.S. 52, 65 (1976).

148. AKRON, OHIO, CODIFIED ORDINANCES §§ 1870.06(B)(3)-(5) (1978). *See supra* note 89.  
149. 103 S. Ct. at 2500.

150. AKRON, OHIO, CODIFIED ORDINANCES § 1870.06(C) (1978). *See supra* note 89.

151. 103 S. Ct. at 2500.

152. *See supra* notes 72-75 and accompanying text.

153. 103 S. Ct. at 2500.

154. *Id.* (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67, n.8 (1976)).

155. 477 F. Supp. 542, 549-50 (D. Me. 1979).

156. AKRON, OHIO, CODIFIED ORDINANCES § 1870.06(C) (1978). *See supra* note 89.

157. 103 S. Ct. at 2501.

158. *Id.*

Court affirmed the Sixth Circuit's decision that the "attending physician" requirement was unconstitutional, however, because there was no evidence that a woman's consent would be less informed if such information were given by someone other than the attending physician.<sup>159</sup>

It is unclear whether the Court struck down the provision because it recognized no legitimate state interest or because it could not find a reasonable relationship between the state interest and the abortion regulation.<sup>160</sup> One explanation for this vagueness may be that, with respect to first-trimester regulations where there is no recognized "compelling" state interest, the legitimacy of the state interest promoted is interdependent with the reasonableness of the regulation. Ultimately, the Court's holding may mean that a modified version of "strict scrutiny" applies to first-trimester regulations when there is a state interest but no apparent impact on the abortion decision.<sup>161</sup> The inquiry, however, is somewhat different from that applied to second- and third-trimester abortion regulations. Instead of focusing on the reasonableness of the relation between the restrictions and the promotion of a compelling state interest, the focus is on the legitimacy of the state interest promoted by the regulation.

The question remains as to how great an impact a first-trimester regulation must have to invoke the trimester framework.<sup>162</sup> The 1983 Abortion Decisions provide no answer, although not for lack of opportunity. One of the Missouri regulations at issue in *Ashcroft* was the requirement that tissue from an aborted fetus be submitted to a pathologist for examination.<sup>163</sup> Justice Powell, in an opinion joined only by Chief Justice Burger,<sup>164</sup> expressed the view that the pathology report requirement was sup-

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159. *Id.* at 2502.

160. *Id.* at 2502-03. On the one hand, the Court implies that the state has no legitimate interest:

We are not convinced, however, that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request. The State's interest is in ensuring that the woman's consent is informed and unpressured . . . .

*Id.* at 2502. On the other hand, the Court implies that the state does have a legitimate interest in ensuring that the physician does not abdicate his role as the person responsible for the medical aspects of the abortion decision but determined that the specific requirement at issue was "unreasonable." *Id.* at 2502-03.

161. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 67, 81 (1976), which implied that, where a first-trimester regulation is supported by a legitimate state interest and has no significant impact on the abortion decision, a rational relationship between the state interest and the regulation is sufficient. See *supra* notes 40-44 and accompanying text.

162. Application of the trimester framework to first-trimester regulations is essentially the same as saying they are unconstitutional on their face because first-trimester regulation is unconstitutional. See *supra* notes 18-19 and accompanying text.

163. MO. ANN. STAT. § 188.047 (Vernon 1983). See *supra* note 96.

164. Justices Blackmun, Brennan, Marshall, and Stevens dissented from this portion of Justice Powell's opinion. 103 S. Ct. at 2526-28. Justices O'Connor, White, and Rehnquist concurred in the judgment. 103 S. Ct. at 2532.

ported by important health objectives,<sup>165</sup> that the additional cost imposed did not significantly burden the abortion decision,<sup>166</sup> and therefore, that the requirement did not violate the right to an abortion.<sup>167</sup>

In Justice Blackmun's dissenting view,<sup>168</sup> the added cost of the pathology report did constitute a legally significant impact and therefore exceeded the constitutional limits of first-trimester regulation.<sup>169</sup> Implicit in this view is the application of the trimester framework. Blackmun further concluded that the pathology report requirement was invalid because it did not further "important health-related state concerns."<sup>170</sup>

The split of the Court on the pathology report requirement illustrates the Court's division into three factions on the abortion issue. The liberal faction, led by Justice Blackmun, the author of the *Roe* decision, would strictly scrutinize any first-trimester regulation with a negative impact on the abortion decision.<sup>171</sup> The middle view, adopted by Justice Powell and Chief Justice Burger, holds that perhaps overly-cautious first-trimester regulations promulgated in furtherance of *health* concerns should be permissible so long as they do not constitute an apparent departure from accepted medical practice and do not inhibit the decision to have an abortion.<sup>172</sup> Finally, the youngest members of the Court, Justices O'Connor and Rehnquist, joined by Justice White, would permit all abortion regulations that are "rationally" related to a legitimate state interest and do not impose an "undue burden" on the abortion decision.<sup>173</sup> Because of these divisions, it is difficult to speculate how the Court may ultimately define what constitutes a "legally significant impact." The liberal faction needs to sway only one other Justice in order to form a majority. But three of the four Justices comprising this faction (Blackmun, Brennan, and Marshall)<sup>174</sup> are among the oldest on the Court. At the other extreme, the conservative wing must sway at least two votes to gain

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165. 103 S. Ct. at 2523-24. The Court noted that recorded pathology reports, combined with abortion complication records, could provide a statistical basis for studying the cause of complications. *Id.* at 2523.

166. *Id.* at 2524.

167. *Id.* at 2524-25.

168. Justice Blackmun was joined in his dissent by Justices Brennan, Marshall, and Stevens. *Id.* at 2526.

169. *Id.* at 2528-29.

170. *Id.* at 2528 (quoting *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2493 (1983)). In reaching this conclusion, Blackmun appears to apply "modified strict scrutiny," and examines the legitimacy of the purported state interest. *See supra* notes 160-61 and accompanying text.

171. 103 S. Ct. at 2528.

172. *Id.* at 2523-25.

173. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2510 (1983) (O'Connor, J., dissenting).

174. Justice Stevens is the fourth member of the liberal faction. *See, e.g.*, *Planned Parenthood Ass'n v. Ashcroft*, 103 S. Ct. 2517, 2526 (1983).

the majority, but Justices O'Connor and Rehnquist, as the youngest members of the Court, may well have time on their side.

## VI. CONCLUSION: THE SPECTRE OF JUSTICE O'CONNOR'S DISSENT

That the 1983 Abortion Decisions constitute a major victory for pro-choice advocates is undebatable. In and of themselves, the decisions invalidate or throw into question second-trimester hospitalization requirements in at least twenty states.<sup>175</sup> The Court stands firm on the principle that a woman's right to choose abortion is protected by the Constitution as a fundamental right. And yet no one expects the 1983 Abortion Decisions to lay the abortion issue to rest. To the contrary, most expect the decisions to galvanize the efforts of the pro-life movement.<sup>176</sup> In light of this prediction, Justice O'Connor's forceful dissent in *Akron*<sup>177</sup> must be considered.

This dissent stops just short of calling for a reversal of *Roe v. Wade*.<sup>178</sup> Justice O'Connor convincingly argues that the trimester framework is a completely unworkable basis for analyzing abortion restrictions because medical technology, while moving to a later stage in the pregnancy the point at which the state may regulate in the interest of maternal health, is simultaneously moving to an earlier stage the moment of viability,<sup>179</sup> which triggers the state's interest in protecting potential life. "The *Roe* framework, then, is clearly on a collision course with itself."<sup>180</sup>

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175. See J. Benshoof, *The New Supreme Court Abortion Decisions*, Appendix A (July 18, 1983) (available from the American Civil Liberties Union Reproductive Freedom Project, New York, New York) (listing states that have second-trimester hospitalization requirements, either by criminal statute or by health code regulation, and including indications of how each state defines the term "hospital").

176. See *The Court Stands by Abortion*, NEWSWEEK, June 27, 1983, at 62; *Holding Firm on Abortion*, TIME, June 27, 1983, at 14.

177. 103 S. Ct. 2481, 2504 (1983).

178. Justice O'Connor appears to question the validity of *Roe* when she states:

The parties in these cases have not asked the Court to reexamine the validity of that holding and the court below did not address it. Accordingly, the Court does not reexamine its previous holding. Nonetheless, it is apparent from the Court's opinion that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the "stages" of pregnancy . . . .

103 S. Ct. at 2504.

179. For interesting commentary and proposed solutions to this dilemma see generally Note, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 UCLA L. REV. 1194 (1982) (suggesting that viability should mean the point at which the fetus has consciousness, as determined by an electroencephalogram); Note, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, 27 UCLA L. REV. 1340 (1980) (viability should mean the point at which the fetus can survive outside the womb without artificial support).

180. 103 S. Ct. at 2507.

Justice O'Connor proposes that the better standard for review of abortion regulations is simply a test of "undue burden," and contends that this standard is the one more strongly supported by recent abortion decisions.<sup>181</sup> She maintains that the state's interests in protecting maternal health and potential life are compelling at all stages of pregnancy<sup>182</sup> and concludes that, so long as the impact of an abortion regulation is not "unduly burdensome," strict scrutiny is inappropriate.<sup>183</sup> It is sufficient that the regulation is "rationally related to the legitimate government objective of protecting potential life."<sup>184</sup> Applying this standard of review, the dissenting Justices would have upheld all the regulations under challenge in the 1983 Abortion Decisions, except possibly portions of Akron's informed consent requirement.<sup>185</sup>

Noticeably absent from O'Connor's proposal of an "undue burden" standard is any substantive justification for not applying strict scrutiny when a regulation has a legally significant impact on the abortion decision.<sup>186</sup> Future cases may well require the Court to adapt the trimester framework, or even to change it to conform to advances in medical technology, but this possibility should not pose a problem. The Court has already recognized that the trimester framework is not a brightline test,<sup>187</sup> and has made clear its position that the principles of *Roe* are to be applied in light of the current state of medical art.<sup>188</sup> The trimester framework is not the essence of *Roe*. Rather, the resounding theme of *Roe* and its progeny, including most recently the 1983 Abortion Decisions, is that a woman's freedom to choose abortion is a fundamental right. As such, the choice must be free from state interference, except to the extent that state interests in maternal health and potential life outweigh this right. Even then, any state regulation impinging on the abortion decision "must be narrowly drawn to express only the legitimate state interests at

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181. *Id.* at 2505. Justice O'Connor agrees with the line of thinking in some lower courts that the holdings in the abortion funding restriction cases (*i.e.*, *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977)) are directly applicable to cases involving procedural regulations. *See supra* notes 55-63 and accompanying text.

182. 103 S. Ct. at 2509.

183. *Id.* at 2510.

184. *Id.* at 2512 (quoting *Harris v. McRae*, 448 U.S. 297, 325 (1980)).

185. 103 S. Ct. at 2512-15. It is not certain that Justice O'Connor would have struck down the informational requirements of Ohio's informed consent statute, to which Justice Powell referred as the "parade of horrors." *See supra* note 149 and accompanying text. O'Connor dismissed these provisions "because it appears that the City of Akron conceded their unconstitutionality . . ." 103 S. Ct. at 2515.

186. In arguing that strict scrutiny should apply only when there is a heavy burden on the fundamental right, Justice O'Connor did not cite a single abortion case. Rather, she cited *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973), an equal protection case. 103 S. Ct. at 2510.

187. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2494 (1983).

188. *Id.* at 2496.

stake.”<sup>189</sup> Thus, it seems unlikely that the Court will adopt the dissenting view and limit the application of strict scrutiny to only those abortion regulations that constitute an “undue burden,” as defined by Justice O’Connor.<sup>190</sup>

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189. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

190. Implicit in Justice O’Connor’s view of when strict scrutiny should apply is the belief that nothing less than a direct obstacle constitutes an “undue burden.” 103 S. Ct. at 2512-16.



