Akron v. Akron Center for Reproductive Health (1983)...6/3.

The *Akron* Court
(There is a change on the Court since *Matheson*.)
Stewart is OUT and O'Connor is IN.
Majority (6): Brennan, Marshall, Burger(Chief), Blackmun, Powell & Stevens.
Minority (3): O'Connor, White & Rehnquist.

An Akron, Ohio, ordinance...

1. (§1870.03)...requires all abortions performed after the first trimester of pregnancy to be performed in a hospital.

This is unconstitutional. The *Roe*[1] trimester standard continues to provide a reasonable legal framework for limiting a State's authority to regulate abortions. Where the State adopts a health regulation governing the performance of abortions during the second trimester, the determinative question should be whether there is a reasonable medical basis for the regulation. This second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion. There was testimony that a second-trimester abortion costs more than twice as much in a hospital as in a clinic. Akron defends §1870.03 as a reasonable health regulation. This position had strong support at the time of *Roe* v. *Wade*, as hospitalization for second-trimester abortions was recommended by the American College of Obstetricians and Gynecologists. Since then, however,

[1]9A-AP-4 on this website.

the safety of second-trimester abortions has increased dramatically.

2. (§1870.05(B))...prohibits a physician from performing an abortion on an unmarried minor < 15 unless he obtains the **consent** of one of her parents or unless the minor obtains an **order from a court** having jurisdiction over her that the abortion be performed.

This is unconstitutional. In *Bellotti v. Baird*[2], the plurality cautioned that the State must provide an alternative procedure whereby a pregnant minor 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; therefore, it is clear that Akron may not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval. Akron's ordinance does not create expressly the alternative procedure required by *Bellotti*.

The majority of the Supreme Court could not even see its way to honor the elected leaders of Ohio in their attempt to require notice to parents of pregnant 12, 13 and 14 year old girls.

3. (§1870.06(B) & (C))...requires that the attending physician inform his patient of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth, and also inform her of the particular risks associated with her pregnancy and the abortion technique to be employed.

This is unconstitutional. The validity of an informed consent requirement rests on the State's interest in protecting the health of the pregnant woman. The State legitimately may seek to ensure that it has been made "in the light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient." *Colautti v. Franklin*[3]. This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. **It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances.** *Danforth*'s recognition of the 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.

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[2]9A-AP-11 on this website.

[3]9A-AP-10 on this website.

The Court places all confidence in **one physician**, nixing ANY confidence in a state legislature, to determine what information should be provided to the woman. This is remarkable, especially given the undeniable truth that the physician is not going to make any significant $ unless the woman opts to have the abortion. Does the Court really believe that an abortionist will provide "just the right" amount of information to the woman?

Much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. It requires the physician to inform his patient that "the unborn child is a human life from the moment of conception," a requirement inconsistent with the Court's holding in *Roe* v. *Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions. Moreover, much of the detailed description of "the anatomical and physiological characteristics of the particular unborn child" would involve speculation by the physician. And the dubious statement that "abortion is a major surgical procedure" and the description of numerous possible physical and psychological complications of abortion, is a "parade of horribles" intended to suggest that abortion is particularly dangerous.

Section 1870.06(c) presents a different question. Under this provision, the "attending physician" must inform the woman "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." This information is valid. The Court of Appeals also held, however, that §1870.06(c) was invalid because it required that the disclosure be made by the "attending physician." The court found that "the practice of all three plaintiff clinics has been for the counseling to be conducted by persons other than the doctor who performs the abortion" and determined that Akron had not justified requiring the physician personally to describe the health risks. **Akron challenges this holding as contrary to our cases that emphasize the importance of the physician-patient relationship**. In Akron's view, as in the view of the dissenting judge below, the "attending physician" requirement "does no more than seek to ensure that there is in fact a true physician-patient relationship even for the woman who goes to an abortion clinic."

We are not convinced 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.

It appears more and more that the liberal wing of the Court has an agenda that prefers abortion to **<u>any</u>** other option. They no longer interpret — they routinely legislate. What do you think?

4. (§1870.07)...prohibits a physician from performing an abortion until 24 hours after the pregnant woman signs a consent form.

This is unconstitutional. Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period.

> All the State seeks is a waiting period to give the pregnant woman one day to think about her decision before proceeding. Most States, maybe all States, provide a 24 or 48 hour period after the birth of a child for the mother to renege on her prior decision to give her child up for adoption because of the serious and long term ramifications of such a decision. Yet, the Majority of the Supreme Court cannot stomach a 24 hour period of contemplation before killing a fetus. Is not that decision at least as momentous as adoption?

5. (§1870.16)...requires physicians performing abortions to ensure that fetal remains are disposed of in a "humane and sanitary manner."

This is unconstitutional. The Court of Appeals found that the word "humane" was impermissibly vague as a definition of conduct subject to criminal prosecution. The court invalidated the entire provision, declining to sever the word "humane" in order to uphold the requirement that disposal be "sanitary." We affirm. Akron contends that the purpose of §1870.16 is simply "to preclude the mindless dumping of aborted fetuses onto garbage piles." It is far from clear, however, that this provision has such a limited intent. The phrase "humane and sanitary" does, as the Court of Appeals noted, suggest a possible intent to "mandate some sort of 'decent burial' of an embryo at the earliest stages of formation." This level of uncertainty is fatal where criminal liability is imposed. *Colautti v. Franklin.* Because §1870.16 fails to give a physician "fair notice that his contemplated conduct is forbidden," we agree that it violates the Due Process Clause. We are not persuaded by Akron's argument that the word "humane" should be severed from the statute. The uncertain meaning of the phrase "humane and sanitary" leaves doubt as to whether the city would have enacted §1870.16 with the word "sanitary" alone. Akron remains free, of course, to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains.

DISSENT: Justice O'Connor/White/Rehnquist...Our recent cases indicate that a regulation imposed on "a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'" *Maher v. Roe*[4]. *Harris v. McRae*[5]. In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of pregnancy involved. If the particular regulation does not "unduly burden" the fundamental right, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'" The trimester or "three-stage" approach

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[4]9A-AP-9 on this website.

[5]9A-AP-12 on this website.

adopted by the Court in *Roe* cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests.

The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time ..." The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

The Court in *Roe* correctly realized that the State has important interests "in the areas of health and medical standards" and that "the State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." The Court also recognized that the State has *"another* important and legitimate interest in protecting the potentiality of human life." I agree, but in my view, the point at which these interests become compelling does not depend on the trimester of pregnancy. Rather, these interests are present *throughout* pregnancy. **The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible.**

The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," the Court chose the point of viability -- when the fetus is *capable* of life independent of its mother -- to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.