CONSTITUTIONAL LAW—ABORTION—A REGULATION REQUIRING A WOMAN TO NOTIFY HER HUSBAND BEFORE RECEIVING AN ABORTION IS IMPERMISSIBLE BECAUSE IT UNDULY BURDENS THE WOMAN'S ABORTION RIGHT—*Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd*, 112 S. Ct. 2791 (1992).

The topic of abortion has long been a point of contention between the Supreme Court of the United States and the state legislatures.[1] With the landmark decision in *Roe v. Wade*,[2] the Court removed much of the legislative power in the abortion context by assuming the role of a judicial legislature.[3] The Court reverted to a more conservative role with regard to abortion regulations in *Webster v. Reproductive Health Services*,[4] transferring much of the power to regulate abortion back to the state legislatures.[5] In light of this heightened role, the Pennsylvania legislature recently passed amendments to the state's 1982 Abortion Control Act,[6] which have been called "the strictest in the country."[7] The validity of these amendments was challenged in *Planned Parenthood v. Casey*.[8] Substantially revising the district court's holding,[9] the United States Court of Appeals for the Third Circuit ruled that provisions requiring informed consent and disclosure, parental consent, reporting requirements, public disclosure of certain information in reports, and a twenty-four hour waiting period were constitutional.[10] The court struck down, however, a provision requiring spousal consent.[11] On appeal, the United States Supreme Court upheld the circuit court's findings while attempting to clarify the proper standard applica-

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1 David J. Zampa, Note, *The Supreme Court's Abortion Jurisprudence: Will The Supreme Court Pass The "Albatross" Back To The States?*, 65 NOTRE DAME L. REV. 731, 731 (1990).

2 410 U.S. 113 (1973).

3 Zampa, *supra* note 1, at 731, 742. By assuming the role of a judicial legislature, the Court infringed upon the rulemaking power of the legislature by evaluating the soundness of the policies the legislature drafted. *Id.* at 732.

4 492 U.S. 490 (1989).

5 Zampa, *supra* note 1, at 735.

6 18 PA. CONS. STAT. ANN. §§ 3201-3220 (1992).

7 Ruth H. Axelrod, Note, *Whose Womb Is It Anyway: Are Paternal Rights Alive and Well Despite* Danforth?, 11 CARDOZO L. REV. 685, 691 (1990).

8 947 F.2d 682 (3d Cir. 1991), *aff'd*, 112 S. Ct. 2791 (1992).

9 *See* Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990); *see also infra* notes 13-28.

10 *Casey*, 947 F.2d 682, 687, 719 (3d Cir. 1991).

11 *Id.* at 719.

ble to abortion cases.[12]

In 1988, five abortion clinics and one physician[13] filed a complaint in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of certain 1988 amendments to Pennsylvania's Abortion Control Act of 1982 (the Act).[14] On May 23, 1988, the district court preliminarily enjoined several portions of the Act, and thereafter the court stayed all further proceedings pending the United States Supreme Court decision in *Webster*.[15] Several months after the *Webster* decision, the Pennsylvania legislature adopted further amendments, which plaintiffs thereafter challenged in an amended complaint,

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12 Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

13 Planned Parenthood v. Casey, 744 F. Supp. 1323, 1329 (E.D. Pa. 1990). The abortion clinics bringing suit were Planned Parenthood of Southeastern Pennsylvania (PPSP), Reproductive Health and Counseling Center (RHCC), Women's Health Services, Inc. (WHS), Women's Suburban Clinic (WSC), and Allentown Women's Center (AWC). *Id.* Three of these clinics, PPSP, WHS, and WSC, were non-profit organizations which, in addition to providing abortions, also provided other health care services such as gynecological care, pregnancy testing, birth control education, and counseling services. *Id.* The remaining two clinics, RHCC and AWC, were for-profit organizations. *Id.* RHCC performed only first and early second trimester abortions, while AWC provided first trimester abortions, pregnancy testing and counseling, and contraceptive and gynecological care. *Id.*

The Physician was Dr. Thomas Allen, a private practitioner of obstetrics and gynecology in Pennsylvania and an associate clinical professor in the Department of Obstetrics and Gynecology at the University of Pittsburgh. *Id.* At the time of suit, Dr. Allen was also the Medical Director of WHS. *Id.*

14 Planned Parenthood v. Casey, 947 F.2d 682, 687 (3d Cir. 1991). Pennsylvania's 1982 Abortion Control Act was drafted based upon a model abortion statute developed by Americans United for Life, a non-profit, Chicago-based anti-abortion organization. *Casey*, 744 F. Supp. at 1327. After revision by the Pennsylvania legislature, the Act was presented to the House and Senate as an amendment to a Senate Bill and was passed by the House and Senate, despite a veto by then Pennsylvania Governor Richard Thornburgh. *Id.*; Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 751-52 (1986). Governor Thornburgh vetoed the legislation, arguing that certain provisions of the bill, as well as the bill's "overall tone and tenor" would impose "an undue, and, in some cases, unconstitutional burden upon even informed, mature adults intent upon obtaining an abortion under circumstances deemed permissible by the United States Supreme Court." *Casey*, 744 F. Supp. at 1327. After the 1982 Act was passed, but before it was put into effect, it was challenged as unconstitutional. *Thornburgh*, 476 U.S. at 752. The United States Supreme Court eventually heard the case and declared several provisions of the Act unconstitutional. *Id.* at 772; *see id.* at 751-54 (explaining the history of the Act); Nancy A. Nolan, Comment, *Toward Constitutional Abortion Control Legislation: The Pennsylvania Approach*, 87 DICK. L. REV. 373, 373 (1983) (characterizing Pennsylvania's attempt to regulate abortion as a "curious blend of the new and the old" drafted to both comply with and challenge the Supreme Court's decision in *Roe*).

15 *Casey*, 744 F. Supp. at 1325; *see* Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

to the Act.[16] In response, the district court broadened the preliminary injunction to include the 1989 amendments.[17]

After a trial on the merits, the district court found the original Act, as well as the 1988 and 1989 amendments, "hostile" to a woman's right to obtain an abortion, and accordingly invalidated and enjoined various sections of the Act.[18] The district court invalidated the following provisions: (i) a definition of "medical emergencies;"[19] (ii) a mandatory twenty-four hour waiting period between the time a woman consented to an abortion and the actual performance of the abortion;[20] (iii) a requirement that only the physician performing the abortion disclose specific information to the woman;[21] (iv) a provision for content-based informed

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16 *Casey*, 744 F. Supp. at 1325; *Casey*, 947 F.2d at 687.

17 *Casey*, 744 F. Supp. at 1325; *Casey*, 947 F.2d at 687.

18 *Casey*, 744 F. Supp. at 1372. The court also noted that "substantial portions" of the Act as amended in 1989 were merely "reenactment[s] of provisions" which both the Third Circuit and the United States Supreme Court declared unconstitutional in *Thornburgh*. *Id.*

19 *Id.* at 1377-78. The Act defined "medical emergency" as:

> That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother of for which a 24-hour delay will create grave peril of immediate and irreversible loss of a major bodily function."

18 PA. STAT. ANN. § 3203 (1989). The court determined that this definition was too narrow and could cause a physician to act contrary to his own best judgment, as the definition failed to encompass situations which would create serious risks to a woman's health, but not a "serious risk of substantial and irreversible impairment to a major bodily function." *Casey*, 744 F. Supp. at 1377-78.

20 *Casey*, 744 F. Supp. at 1378. The court declared that an identical provision had been found unconstitutional in Akron v. Akron Center for Reproductive Health Services, 462 U.S. 416 (1983). *Id.* The court also noted that this waiting period would impose a significant burden on a woman's abortion decision by increasing costs and the risk of delay, while furthering no state interest in maternal health. *Casey*, 744 F. Supp. at 1378. The court distinguished this provision from a similar provision held to be constitutionally valid in Hodgson v. Minnesota, 110 S. Ct. 2926 (1990). *Casey*, 744 F. Supp. at 1379. In *Hodgson*, the United States Supreme Court upheld a forty-eight hour waiting period for minors seeking abortions, rationalizing that this time period was necessary to allow parental involvement in the minor's abortion decision. *Id.* The Pennsylvania district court explained that the *Hodgson* court had clearly distinguished the situation from that presented in *Akron*, and thus the *Akron* decision remained controlling in this context. *Id.*

21 *Id.* Section 3205(a)(1) of the Act required that the physician, and not his agent, disclose to the woman seeking an abortion "(1) the nature of the proposed treatment and procedure and of the risks and alternatives to the procedure; (2) the probable gestational age of the fetus at the time the abortion is to be performed; and (3) the medical risks associated with carrying the pregnancy to term." *Id.* at 1379 n.35. Reasoning that the same provision had been contained in the 1982 Act, and that the *Akron* Court had invalidated a virtually identical provision, the district

consent;[22] (v) mandatory informed parental consent for minors;[23] (vi) spousal notification for married women;[24] and (vii) a clause permitting public inspection of reports that every abortion facility was required to file.[25] The court declared that these provisions attacked the very foundation of abortion rights established

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court determined that this section unconstitutionally burdened a woman's right to an abortion because it was not narrowly tailored to serve Pennsylvania's compelling interest in protecting the mother's health. *Id.* at 1379-80. The court recognized that there was no sufficient justification for not permitting this information to be conveyed to the women by trained counselors who, "[i]n many instances . . . are more understanding than physicians and have more time to spend with the patients." *Id.* at 1380.

[22] *Id.* Section 3205 of the Act specified five types of information to be provided to the woman "at least twenty-four hours prior to the abortion." *Id.* The information to be conveyed included: (i) the "nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision;" (ii) the "probable gestational age of the unborn child at the time the abortion is to be performed;" (iii) the "medical risks associated with carrying her child to term;" (iv) the fact that the "father of the unborn child is liable to assist in the support of the child;" and (v) that "medical assistance benefits may be available for prenatal care, child birth and neonatal care." *Id.* (citing 18 PA. CONS. STAT. ANN. § 3205 (a)(1) and (2)). The district court asserted that the information went "far beyond" what was normally required of informed consent necessary to make a reasoned medical decision, and structured the dialogue between the woman and her physician. *Id.* at 1381 (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762-63 (1986)).

[23] *Id.* at 1382. Parental informed consent was required by section 3206, which allowed for a medical emergency exception and a judicial bypass alternative. *Id.* at 1382-83 n.39. The judicial bypass alternative permitted a minor to petition the court for consent rather than obtaining it from a parent or guardian. *Id.* at 1383. Under this provision, the court would authorize the physician to perform the abortion if the court had found that the minor was mature enough to give consent by herself, or if an abortion would be in her best interests. *Id.* Although the court recognized that a state may permissibly impose parental notice and consent provisions upon minors, the court found this particular provision unconstitutional because of its requirement of "informed" parental consent, which the court believed would require a parent to make an "in-person" visit to the abortion provider. *Id.*

[24] *Id.* at 1384. Under § 3209 of the Act, a physician was prohibited from performing an abortion upon a married woman unless she signed a statement providing that she had notified her husband about the intended abortion. *Id.* The section allowed exceptions when the husband could not be located after diligent effort, if the husband was not the father of the child, if the pregnancy was the result of spousal sexual abuse, or if the woman believed that notifying her husband would result in harm to her. *Id.* The district court determined that this provision imposed a "legally significant burden on the abortion decision" while failing to further any of the compelling state interests identified in *Roe*. *Id.* at 1384-85; *see* Roe v. Wade, 410 U.S. 113, 154, 163 (1973) (identifying the state's compelling interests in maternal health and potential life).

[25] *Casey*, 744 F. Supp. at 1390. All facilities performing abortions were required to file certain reports under the Act, which were subject to public inspection if the facility had "received state appropriated funds during the preceding twelve months." *Id.* The district court predicted that such public disclosures would sub-

by *Roe v. Wade*[26] and reaffirmed by the long line of cases following *Roe*.[27] According to the district court, these regulations were not narrowly drawn to serve compelling state interests and thus unconstitutionally burdened the woman's abortion decision.[28]

The Commonwealth of Pennsylvania appealed the district court's decision to the United States Court of Appeals for the Third Circuit.[29] The Third Circuit partially reversed the district court's finding, determining that all the provisions at issue, except the spousal notice requirement, were constitutionally permissible.[30] In analyzing these regulations, the court of appeals first clarified the proper standard of review applicable to abortion regulations, reasoning that Justice O'Connor's "undue burden" standard was controlling.[31] Using this undue burden standard,

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ject the women seeking abortions to an increased risk of harassment from anti-abortion demonstrators picketing in front of the clinics. *Id.*

26 410 U.S. 113 (1973).

27 *Casey*, 744 F. Supp. at 1373; *see, e.g.*, Akron v. Akron Center For Reproductive Health, 462 U.S. 416, 420 n.1 (1983) ("These are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*."); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986) ("[T]he constitutional principles that led this Court to its decision in [*Roe*] . . . still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy.").

28 *Casey*, 744 F. Supp. at 1373-74, 1396. Two provisions of the Act were upheld by the district court, however. *Id.* at 1396. Section 3210(a) of the Act mandated that, except in the case of medical emergencies, no physician may perform an abortion without first making a determination of the probable gestational age of the fetus. *Id.* at 1388-89. The Act required only that the doctor perform such tests or examinations which a "prudent physician would consider necessary to make or perform in making an *accurate diagnosis* with respect to gestational age." *Id.* (emphasis in original). Because the requirement was "reasonably related to the Commonwealth's compelling interest in the protection of maternal health," the district court perceived no burden on the woman's abortion decision. *Id.* at 1389.

Sections 3214(a) and 3214(h) contained several reporting requirements to be disclosed by the abortion provider. *Id.* at 1391. The district court upheld all but two of these: a requirement that any referring physician be identified on a report, and a requirement that the physician disclose the basis for his medical judgment in several areas. *Id.* at 1392-93. The court found no justification for the name of the referring physician to appear on the report, reasoning that such a requirement was unrelated to maternal health, and was likely to cause physicians to "refuse to refer patients to abortion clinics." *Id.* at 1392. The court found that to enforce the provision regarding the basis for the physician's medical judgment would impermissibly interfere with the woman's abortion decision and create a "chilling effect upon the physician's exercise of his judgment." *Id.* at 1393.

29 Planned Parenthood v. Casey, 947 F.2d 682, 719 (3d Cir. 1991), *aff'd*, 112 S. Ct. 2791.

30 *Id.* at 719.

31 *Id.* at 688-97. The Court emphasized that *stare decisis* dictated that earlier cases applying a standard different from Justice O'Connor's undue burden standard were no longer binding on lower courts. *Id.* at 697-98 (citing Akron v. Akron

the court held that only the spousal notification provision placed an undue burden on the woman's abortion decision.[32]

The United States Supreme Court granted certiorari and, in a ruling that contained five separate opinions, utilized the "undue burden" standard to uphold the Third Circuit's conclusions on each of the challenged regulations .[33] In so doing, the Court redefined the "undue burden" standard while reaffirming *Roe v. Wade*.[34] The decision did, however, produce four Justices who called for *Roe*'s overturn.[35]

The Supreme Court first considered state abortion regulations in the landmark case of *Roe v. Wade*.[36] In *Roe*, the Supreme Court invalidated a Texas statute that criminalized all abortions except those necessary either to save the mother's life or to protect her health.[37] In so holding, *Roe* also effectively invalidated similar statutes in other states.[38] The *Roe* Court prohibited absolute state regulation of abortions by deeming abortion a fundamental right encompassed within the Fourteenth Amendment's

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Center for Reproductive Health, 462 U.S. 416 (1983); Thornburgh v. American College of Obstetrics and Gynecology, 476 U.S. 747 (1986)).

Justice O'Connor's undue burden standard employed a strict scrutiny level of review if a regulation on abortion causes an undue burden on a woman's abortion decision, while using a rational basis test if the regulation does not. *Id.* at 688-89. The Justice defined an undue burden as one which creates an " 'absolute obstacle [] or severe limitation [] on the abortion decision.' " *Id.* at 690 (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting)). Justice O'Connor first articulated an adherence to this standard while dissenting in *Akron* and consistently used the standard in every case before *Casey*. *See, e.g.*, Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3063 (1989) (O'Connor, J., concurring) ("[A] regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion.") (quoting *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting)); Hodgson v. Minnesota, 110 S. Ct. 2926, 2949-50 (1990) (O'Connor, J., concurring) ("It has been my understanding in this area that '[i]f the particular regulation does not 'unduly burde[n]' the fundamental right . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.' " (quoting *Akron*, 462 U.S. at 453)).

Justice O'Connor's early application of the undue burden standard had been criticized by commentators, who noted that "[s]he has yet to find an abortion regulation she didn't like." Alexander Wohl, *The Abortion Cases*, 76 A.B.A. J. 68, 70 (Feb. 1990) (quoting David O'Brien, a Professor of government at the University of Virginia).

[32] *Casey*, 947 F.2d at 719.

[33] Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

[34] *Id.* at 2804, 2819, 2821-23.

[35] *Id.* at 2855, 2873. Chief Justice Rehnquist and Justices White, Scalia and Thomas advocated overturning *Roe*. *See infra* notes 385-87.

[36] 410 U.S. 113 (1973).

[37] *Id.* at 117-18, 166.

[38] *Id.* at 118 n.2; Zampa, *supra* note 1, at 731 n.3.

right of privacy.[39] Having deemed abortion a fundamental right, the Supreme Court determined that state regulations on abortion would be subject to strict scrutiny and would be upheld only to further compelling state interests.[40]

Justice Blackmun, writing for the majority in *Roe*, declared that the fundamental right to an abortion was limited, and identified two compelling state interests that could justify certain regulations on abortion: the protection of both maternal health and potential life.[41] Dictating the proper balance between maternal and fetal rights, the Court asserted that these competing interests

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39 *Roe*, 410 U.S. at 152-53. The Court acknowledged that there was no explicit right of privacy mentioned in the Constitution, but cited a long line of cases in which such a right was attributed to the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* The Supreme Court first specifically recognized a right to privacy in Griswold v. Connecticut, 381 U.S. 479 (1965), holding that such a right emanated from the "penumbras of the Bill of Rights." *Id.* at 152. The *Roe* court related this right of privacy to the abortion context by the Fourteenth Amendment. *Id.* at 153. The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court supported this connection by outlining cases in which the Court found a privacy right in marital activities, procreation, the use of contraceptives, family relationships, and in child rearing and education. *Roe*, 410 U.S. at 152-53 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (child rearing); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Loving v. Virginia, 388 U.S. 1, 12 (1967) (the marital relation); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (use of contraceptives)).

The *Roe* decision has been the subject of numerous commentaries, both critical and laudatory. Philip B. Heymann & Douglas E. Barzelay, *The Forest and The Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 765 (1973). For example, Professor John Hart Ely criticized the *Roe* court for deeming the abortion right fundamental, finding this idea totally lacking in constitutional support. John H. Ely, *The Wages of Crying Wolf: A Commentary of* Roe v. Wade, 82 YALE L.J. 920, 936-37 (1973). Ely also opined that *Roe* made a "quantum jump" in finding this constitutional right, rather than by gradually building it on established constitutional rights. *Id.* at 936 n.93.

On the other hand, Professors Heymann and Barzelay found much precedential support for *Roe*. Heymann & Barzelay, *supra*, at 784. Although these professors recognized that the *Roe* opinion was not written in such a way as to clearly identify the long-standing precedential support for the outcome, the authors hail the decision as "justified in both reason and precedent." *Id.*

40 *Roe*, 410 U.S. at 155-56. The Court reasoned that past precedent had determined that "[w]here certain 'fundamental rights' are involved," regulations may only be justified by a showing that they promote a "compelling state interest," "and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155. This type of review is known as "strict scrutiny," and traditionally has been used by the Court to review legislation which regulated fundamental rights. JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991).

41 *Roe*, 410 U.S. at 154, 159.

were compelling only at certain times during the pregnancy.[42] The Court, therefore, constructed a trimester approach to pregnancy.[43] Under this approach, the majority pronounced that the state's interest in maternal health became compelling only at the end of the first trimester, when an abortion was more dangerous than childbirth.[44] Justice Blackmun declared that the state's interest in potential life was compelling only at the point of viability.[45] Because the Court had recognized no compelling state interest during the first trimester, the majority held that no substantial regulations could be placed on abortions during that period.[46] The Court determined, however, that the state could regulate abortion, at other stages of pregnancy, to further the two enunciated compelling interests.[47]

Because the *Roe* decision had left the state legislatures virtually powerless to promote their interests, the Court soon was deluged with cases regarding state laws testing the limits of *Roe*.[48] The first of these cases was *Planned Parenthood v. Danforth*,[49] which reached the Supreme Court three years after *Roe*.[50]

In *Danforth*, an abortion clinic and two physicians challenged

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42 *Id.* at 162-63. The court noted that the interest in maternal health and the interest in potential life must be regarded as "separate and distinct," each growing in importance at different stages of the woman's pregnancy. *Id.*

43 *Id.* at 163.

44 *Id.* The Court found this to be true based on medical data that established that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* The Court thus concluded that after the end of the first trimester, a state could place regulations on abortion reasonably related to protecting maternal health. *Id.*

45 *Id.* The Court did not specifically define viability, but indicated that this is the point when a fetus is capable of "meaningful life outside the mother's womb." *Id.* The majority asserted that viability usually occurred at about twenty-eight weeks, but sometimes occurred as early as twenty-four weeks. *Id.* at 160. The Court also noted that after viability states could "go so far as to proscribe abortions." *Id.* at 163-64.

Yale Law Professor John H. Ely, criticized the Court for focusing on the viability point as the point at which potential life became compelling. Ely, *supra* note 39, at 924. Professor Ely commented that historically, the critical point in fetal development had been recognized as "quickening," "the point at which the fetus begins discernibly to move independently of the mother." *Id.* Professor Ely asserted that the majority furnished no conclusive reasoning as to why viability should be the point that renders the interest in potential life compelling. *Id.* at 924-25.

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

47 *Id.*

48 Zampa, *supra* note 1, at 732 n.6.

49 428 U.S. 52 (1976).

50 *Id.* Justice Blackmun, writing for the majority labelled this case the "logical and anticipated corollary to *Roe*," as it raised "issues secondary to those that were then before the Court." *Id.* at 55.

the constitutionality of a Missouri statute that extensively regulated abortion.[51] The challenged provisions required the informed written consent from the woman seeking an abortion and the written consent of her spouse or of a parent if she was a minor, and imposed certain reporting and recordkeeping requirements on abortion providers.[52] In assessing these provisions, Justice Blackmun, writing the Court's opinion, applied the strict scrutiny test only to those provisions found to create an undue burden[53] on the woman's abortion decision and evaluated the other provisions under a rational-relation standard.[54]

Examining the parental and spousal consent provisions, Justice Blackmun determined that both provisions were unduly bur-

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[51] *Id.* at 56.

[52] *Id.* at 58. The reporting and recordkeeping requirements were found in sections 10 and 11 of the Missouri Act, providing that every abortion facility and every physician performing abortions must keep records of the procedures on designated forms. *Id.* at 59. These records would compile the "relevant maternal health and life data and . . . monitor all abortions performed to assure that they . . . [were] done only under and in accordance with the provisions of the law." *Id.* at 79.

Other challenged aspects of the statute were its definition of viability; a requirement that the physician, under penalty of manslaughter, "exercise professional care 'to preserve the life and health of the fetus;' " a declaration that any infant surviving a non-emergency abortion would be deemed a ward of the state, depriving the mother (and the father if he had consented to the abortion) of all rights to the child; and a finding that the "saline amniocentesis" method of abortion was detrimental to maternal health after the first twelve weeks of pregnancy, and thus prohibited after that time. *Id.* at 58.

With respect to the Act's definition of viability as "that stage in fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems," the Court determined this to be a reasonable attempt to comply with *Roe* and declared it constitutional. *Id.* at 63-65. The Court announced, however, that the prohibition of the saline amniocentesis abortions and the physician's standard of care requirements were unconstitutional. *Id.* at 79, 83. The majority asserted that the prohibition on the saline amniocentesis method of abortion bore no rational relation to the protection of maternal health, as it was the most common and the safest currently available method of abortion. *Id.* at 77, 79. The majority also concluded that the physician's standard of care requirement unconstitutionally required the physician to preserve the life and health of the fetus before viability. *Id.* at 83.

[53] An undue burden had been recognized in situations creating "absolute obstacles or severe limitations on the abortion decision." *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).

[54] Zampa, *supra* note 1, at 749. The rational-relation test gives much deference to legislation in scrutinizing government action. NOWAK & ROTUNDA, *supra* note 40, at § 14.3. Under this standard the Court will only invalidate a law if it had no rational relationship to any legitimate interest of government. *Id.* State legislation is rarely invalidated under this test. Planned Parenthood v. Casey, 947 F.2d 682, 689 (3d Cir. 1991), *aff'd*, 112 S. Ct. 2791 (1992).

densome to the abortion decision.[55] The Court recognized that the application of both provisions would delegate to a third party an unlimited veto power over the abortion decision, thus placing an absolute obstacle on the decision.[56] Moreover, the majority, applying strict scrutiny, perceived no compelling state interests to justify these burdens and declared the provisions unconstitutional.[57] Justice Blackmun implied, however, that although a statute requiring a husband's consent would probably never pass constitutional muster,[58] a properly drafted parental consent provision for minors might withstand scrutiny.[59]

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[55] *Danforth*, 428 U.S. at 71, 75. The spousal consent provision provided that a married woman seeking an abortion during the first twelve weeks of pregnancy must first obtain the written consent of her spouse, except where the abortion was necessary to save the woman's life. *Id.* at 67-68. The Court argued that because the state could not place any conditions upon abortions during this period of pregnancy, it could not delegate such a power to the husband. *Id.* at 69. The Court used a similar rationale for striking down the parental consent provision. *Id.* at 74. The majority recognized that minors are protected by the same constitutional rights as adults, and thus cautioned 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 her pregnancy. *Id.*

[56] *Id.* at 71, 75. The Court recognized the interest of the husband in his wife's pregnancy and the state's interest in the marital relationship. *Id.* at 69. The Court did not find, however, that the marital relationship would be furthered by giving the husband such a veto power over his wife's abortion decision. *Id.* at 71. Further, the Court asserted that the wife's interest in her pregnancy would always outweigh the husband's, as it is she who must physically bear the child and endure the effects of pregnancy. *Id.* The Court also stated that the asserted interest in the familial unit and in parental authority was not supported by the parental consent statute. *Id.* at 75.

[57] *Id.* at 71, 75.

[58] *Id.* at 71. The Court recognized that when the husband's and wife's interest are in conflict, the wife's interest will always prevail, as she alone physically bears the child and is "more directly and immediately affected by the pregnancy." *Id.*

[59] *Id.* at 71, 75. The Court stressed that the fault with this Missouri provision was that it imposed upon the minor a prerequisite of "special-consent" to an abortion from someone other than the woman or her physician. *Id.* at 75. The Court emphasized that its holding was not meant to "suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.*

Commentary on the spousal notification aspect of *Danforth* has suggested that this decision did not sufficiently clarify the position that the husband had no fundamental interest in the fetus his wife carries. Ruth H. Axelrod, Note, *Whose Womb Is Anyway: Are Paternal Rights Alive And Well Despite* Danforth?, 11 CARDOZO L. REV. 685, 687-88 (1990). Therefore, a plethora of cases have arisen in lower courts in which husbands have attempted to enjoin their wives from obtaining an abortion, claiming a fundamental interest in the fetus. *Id.* Such commentary further suggests that the Supreme Court's recent decision in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), will only exacerbate the situation, as *Webster* permitted a much greater degree of state regulation of abortions than was permitted in the past. *Id.* at 688-90; *see also*, Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman's Womb Is Not A Man's Castle*, 55 BROOK. L. REV. 1359, 1404 (1989) (detailing

The Court next reviewed the Missouri statute's provisions requiring the woman's informed consent and the physician's mandatory recordkeeping and reporting, and found that neither provision created an undue burden.[60] Justice Blackmun declared that the state's interest in ensuring a woman's full awareness of the nature and consequences of an abortion justified the woman's informed consent provision.[61] The Justice also observed that the recordkeeping and reporting requirements reasonably advanced the state's interest in protecting maternal health by compiling relevant medical data regarding abortion.[62] Having identified the legitimate state ends served by these provisions, the Court accordingly upheld them as constitutional under *Roe*.[63]

Almost contemporaneous with the Court's consideration of the Missouri statute in *Danforth*, the Court also confronted the constitutionality of a Massachusetts abortion statute[64] in *Bellotti v. Baird*.[65] The Massachusetts law required a woman under the age of eighteen to obtain the consent of both parents before having an abortion.[66] In contrast to the parental consent provision in *Danforth*, the Massachusetts statute provided an option for judicial consent when parental consent could not be obtained.[67] Although the Court indicated that such an option could remove the undue burden of a parental consent provision, the Court declined to render a decision because the Massachusetts Supreme Judicial Court had not yet interpreted the statute; therefore the Court remanded the case for such interpretation.[68]

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the arguments advanced by potential fathers, and concluding that a recognition that a husband could prevent his wife's abortion would violate a woman's right to equal protection).

60 *Danforth*, 428 U.S. at 66-67, 80-81; Zampa, *supra* note 1, at 749 (discussing *Danforth*).

61 *Danforth*, 428 U.S. at 67. The Court noted that the abortion decision is serious and stressful, making it "imperative" that the decision be made with the woman's complete knowledge "of its nature and consequences." *Id.*

62 *Id.* at 81. The Court determined that because the information required to be disclosed by this provision would be kept confidential, the requirement was constitutionally permissible and presented no undue burden on the abortion decision. *Id.* The Court cautioned, however, that the State may not, "through the sheer burden of record-keeping detail," attempt to accomplish what has been "held to be an otherwise unconstitutional restriction." *Id.*

63 *Id.* at 67, 81.

64 MASS. GEN. LAWS ANN. ch. 112, §§ 12I-12U (West 1992).

65 428 U.S. 132 (1976) (*Bellotti I*).

66 *Id.* at 134.

67 *Id.* at 134-35.

68 *Id.* at 147. The court pronounced that it had consistently held that "abstention is appropriate when an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for

Four years later, in 1979, the *Bellotti* case returned to the Supreme Court.[69] Justice Powell, rendering the Supreme

federal constitutional adjudication, or at least materially change the nature of the problem.' " *Id.* at 146-47 (quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959)).

69 Bellotti v. Baird, 443 U.S. 622 (1979) (*Bellotti II*). The original plaintiffs objected to the interpretation that the Supreme Judicial Court of Massachusetts gave to the statute and therefore initiated suit once again in the district court. *Id.* at 631. The original plaintiffs, who became the appellees in this case, were: William Baird, founder and director of Parents Aid Society, Inc.; Parents Aid Society, a Massachusetts non-profit abortion center; Gerald Zupnick, M.D., a physician who regularly performed abortions at Parents Aid Society; and "Mary Moe," a pseudonym for a minor woman who was pregnant at the time the suit was commenced and who was permitted to represent a "class of unmarried minors in Massachusetts who . . . [had] adequate capacity to give a valid and informed consent [to abortion], and who . . . [did] not wish to involve their parents." *Id.* at 626 (quoting Baird v. Bellotti, 393 F. Supp. 847, 850 (Mass. 1975)); *see also* Bellotti v. Baird, (*Bellotti I*), 428 U.S. 132, 137-38 (1976) (describing the plaintiffs).

The Supreme Judicial Court had considered § 12S of the Massachusetts statute, which provided in part:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] 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 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.

Bellotti, 443 U.S. at 625 (citing MASS. GEN. LAWS ANN., ch. 112, §§ 12Q, 12T, and 12U (West Supp. 1979)).

The Massachusetts Supreme Judicial Court, in interpreting this provision, held that: (1) generally, a minor could not seek judicial consent unless the consent of both of her parents was first sought; (2) parents deciding whether or not to give consent to their minor daughter's abortion could consider only her best interests; (3) judicial consent would only be granted by considering the minor's best interests, and would not consider objections of the parents; (4) a judge could withhold consent, even when he found the minor to be mature and capable enough to make the abortion decision on her own, if the judge believed that an abortion was not in the minor's best interests. *Id.* at 630.

The district court declared the statute unconstitutional as interpreted, citing three problematic aspects: (1) the statute's requirement of parental notice in all cases where a parent was available, even when judicial notice was sought; (2) the statute's authorization of a judge's veto of the minor's abortion decision even if the minor was found to be mature enough to give informed consent, and (3) the statute's overbreadth created by the absence of a clear mandate that parents consider only the best interests of the minor in deciding whether to give consent. *Id.* at 631-32.

Court's opinion, affirmed the district court's finding that the abortion restrictions were unconstitutional.[70] The majority weighed three factors in its decision: the minor's constitutional right under *Roe* to an abortion free of unduly burdensome restrictions,[71] the states' right to place more limitations on the conduct of minors than on adults,[72] and the parents' interests in the upbringing of their children.[73] Justice Powell concluded that parental notice and consent statutes were constitutionally permissible if a third party would not have an absolute veto power over the abortion.[74]

To ensure the constitutional guarantees afforded to the abortion decision, the Court announced that any statute requiring parental consent must also contain an alternative procedure in which a minor may obtain consent.[75] The majority instructed that such a procedure must ensure anonymity and expediency, and must permit the minor to show either that she is mature enough to make a well-informed abortion decision on her own, or that an abortion is in her best interests.[76] Accordingly, be-

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[70] *Id.* at 651.

[71] *Id.* at 633, 642. The majority recognized that "the potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority." *Id.* at 642. Rather, the Court posited that a minor may be more burdened by an unwanted pregnancy, due to her lack of education and employment opportunities, as well as her emotional immaturity. *Id.* The Court also observed that the decision to abort is not one which could be postponed until the minor reaches the age of majority. *Id.* at 642-43.

[72] *Id.* at 635. The majority found that although children are entitled to the same degree of due process protections as adults in cases concerning the deprivation of liberty and property rights, the State is permitted to "adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.' " *Id.* (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)).

[73] *Id.* at 637. The Court observed that parents have a large measure of authority in raising their children, permitting parents to guide in the development of their offspring. *Id.* at 637-38. The majority concluded that "the tradition of parental authority is not inconsistent with our tradition of individual liberty," noting that laws placing restrictions on the actions of minors aid in the child's "full growth and maturity." *Id.* at 638-39.

[74] *Id.* at 643.

[75] *Id.*

[76] *Id.* at 643-44. In a concurring opinion, Justice Stevens argued that such a statute would not fall within the ambit of *Danforth*, as a judicial proceeding gives a judge an absolute veto over the woman's abortion decision. *Id.* at 653-54 (Stevens, J., concurring in the judgment). Justice Stevens posited that the decision whether or not to grant consent rests solely with the judge in a judicial proceeding, even if the judge "finds 'that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion.' " *Id.* at 653 (Stevens, J., concurring in the judgment) (quoting Baird v. Attorney General, 371 Mass. 741, 748, 360 N.E.2d 288, 293 (1977)). Therefore, the Justice concluded that no minor in Massachusetts

cause the Massachusetts statute failed to provide these elements, the majority struck it down as unconstitutional.[77]

The Supreme Court utilized its *Bellotti II* analysis in *H.L. v. Matheson*.[78] In *Matheson*, a pregnant minor challenged a Utah statute that mandated notification of a woman's husband or of a minor woman's parents, if possible, before an abortion could be performed.[79] The Court determined this provision to be constitutionally permissible under *Danforth* and *Bellotti II*, as it did not transfer a veto power to any third party, nor did it create an undue burden.[80] The Court distinguished this provision from those at issue in *Danforth* and *Bellotti II*, however, by noting that this provision merely required parental *notice*, not *consent*.[81] The majority observed that *Bellotti II* had expressly failed to equate parental *notice* with parental *consent* requirements.[82] The Court thus determined that alternative proceedings were not required for parental *notice* statutes.[83] Therefore, after identifying an important state interest which the provision furthered,[84] the majority upheld the statute.[85]

Danforth, *Bellotti II*, and *Matheson* represent the Court's first attempts to follow *Roe* and its trimester approach.[86] The Supreme Court subjected the state legislation to the undue burden standard of review to permit the states to advance the two compelling interests recognized in *Roe*: the protection of mater-

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could receive an abortion without receiving the consent of either both parents or a judge, thus subjecting every minor to an absolute third party veto. *Id.* at 653-54 (Stevens, J., concurring in the judgment).

77 *Id.* at 651.

78 450 U.S. 398 (1981).

79 *Id.* at 400. The Court scrutinized the Utah statute only as it applied to immature and unemancipated minors, determining that the plaintiff lacked standing to assert a claim on behalf of married or mature minors. *Id.* at 405-07. The plaintiff was a fifteen year old girl who was living with, and dependent on her parents at the time she discovered she was pregnant. *Id.* at 400. The plaintiff wanted to obtain an abortion, but did not wish to notify her parents of her decision, as was required by the Utah statute. *Id.* at 400-01. Therefore, the plaintiff instituted suit to challenge this statute. *Id.* at 401.

80 *Id.* at 411, 413.

81 *Id.* at 409.

82 *Id.* at 411 n.17.

83 *Id.*

84 The Court found that this provision would allow parents to furnish required medical information to the doctor performing the abortion, and furthered the goal of family integrity by allowing parents to protect their child from making a wrong decision in this area. *Id.* at 411-12.

85 *Id.* at 413.

86 Zampa, *supra* note 1, at 748-52 (analyzing *Danforth*, *Bellotti II* and *Matheson*).

nal health and potential life.[87] Applying this standard, the Court evaluated the legislation under a strict scrutiny review only when the legislation unduly burdened the abortion decision, and applied the rational-relation standard to legislation that was not unduly burdensome.[88]

The Court abandoned the unduly burdensome approach, however, in *Akron v. Akron Center for Reproductive Health*,[89] and instead applied the strict scrutiny standard to all aspects of an Ohio statute regardless of the presence or absence of an undue burden.[90] The provisions of the Ohio statute[91] challenged in *Akron* required the following: i) hospitalization for all abortions performed after the first trimester; ii) parental consent for women under fifteen years of age; iii) parental notice or a court order for women under the age of eighteen; iv) disclosure of specific information by the doctor performing the abortion to ensure the woman's informed consent; and v) a twenty-four hour waiting period between the woman's consent and abortion procedure.[92] The Court found that each provision posed an undue burden and applied strict scrutiny to strike each down.[93]

Addressing the hospitalization requirement, Justice Powell, authoring the majority opinion, acknowledged that under *Roe*, restrictions on abortions after the first trimester were intended to promote the State's compelling interest in maternal health and were therefore constitutional.[94] Justice Powell, however, added a

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87 *Id.*

88 *See* Planned Parenthood v. Casey, 947 F.2d 682, 688-97 (3d Cir. 1991) (outlining the Court's use of strict scrutiny and rational basis standards).

89 462 U.S. 416 (1983).

90 Zampa, *supra* note 1, at 752-53; *Akron*, 462 U.S. at 427 ("But restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest.").

91 AKRON, OHIO, ORDINANCE No. 160-1978 (1978).

92 *Akron*, 462 U.S. at 422-24. Another challenged provision required the "humane and sanitary" disposal of fetal remains. *Id.* at 424 (quoting AKRON, OHIO ORDINANCE No. 160-1978, § 1870.16 (Feb. 1978)). The Court struck down this provision, claiming its ambiguity implied a mandate that the physician provide a "decent burial" for a fetus. *Id.* at 451. As such, the Court determined it failed to give a physician "fair notice that his contemplated conduct is forbidden" and therefore violated due process. *Id.* at 451-52 (quoting U.S. v. Harris, 347 U.S. 612, 617 (1954)).

93 *Id.* at 426-27, 452.

94 *Id.* at 433; *see* Roe v. Wade, 410 U.S. 113, 163 (1973). For example, the Court noted that the *Roe* Court specifically asserted that states could require that abortions be performed in a hospital. *Akron*, 462 U.S. at 433.

new factor to *Roe*'s trimester framework.[95] The Justice declared that a state regulation that placed restrictions on second trimester abortions must also adhere to the accepted medical practice for the entire period to which the regulation applied.[96] The majority declared that it was not accepted medical practice to require hospitalization during the entire second trimester and struck the provision.[97]

Despite the absence of an "absolute obstacle" to abortion, the majority, under a strict scrutiny standard, also invalidated the informed consent and disclosure requirements and the twenty-four hour waiting period.[98] The majority submitted that the information required to be disclosed by the doctor, which involved the nature, risks, and alternatives to abortion, placed unreasonable obstacles upon the physician's medical judgment.[99] The Court also found the requirement that only the attending physician relate the information served no vital state need.[100] Similarly, the majority invalidated the twenty-four hour waiting period because the Court was unconvinced that the provision was

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[95] *Id.* at 434; *see* Zampa, *supra* note 1, at 753 (the Court "added a new dimension" to the trimester approach).

[96] *Akron*, 462 U.S. at 434. The Court stated 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 may be reasonable for the remaining portion of the trimester." *Id.*; *see also* Zampa, *supra* note 1, at 753.

[97] *Akron*, 462 U.S. at 434-35. The Court cited to the district court findings, which showed that the majority of second trimester abortions were performed outside of hospitals, and thus concluded that such a hospitalization requirement would unduly burden the woman's abortion right. *Id.* at 435.

[98] *Id.* at 442, 445. The majority conceded that an informed consent provision had been found constitutional in *Danforth*, but determined that *Akron*'s additional requirements that the physician make certain disclosures to the woman in order to obtain informed consent rendered the statute unconstitutional. *Id. See* Zampa, *supra* note 1, at 754-55.

[99] *Akron*, 462 U.S. at 445. The Akron statute required the physician to inform the woman

> [t]hat 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.

Id. at 445 n.36 (quoting AKRON, OHIO ORDINANCE No. 160-1978, § 1870.06(B)(5) (Feb. 1978)).

[100] *Id.* at 448. The Court rejected Akron's assertion that non-physician's were not properly trained and qualified to relay and discuss the information required, finding no support for this assertion. *Id.*

reasonably related to the state's legitimate interest in ensuring informed consent.[101]

The Court also struck down the parental consent requirement,[102] finding that it did not provide the type of alternative proceeding for a minor mandated in *Bellotti II*.[103] The Court recognized that the provision allowed a minor to circumvent the need for parental consent with a court order but found this provision insufficient to satisfy *Bellotti II*, because the statute lacked explicit provisions for a judicial proceeding wherein the minor's maturity or best interests could be considered.[104] Accordingly, the majority disregarded Akron's argument that when an unconstrued statute may be subsequently interpreted by the state judiciary, abstention by the federal court would be appropriate.[105]

In a vehement dissent, Justice O'Connor criticized the majority's interpretation of the trimester approach and claimed that the majority distorted the undue burden standard.[106] The Justice recognized the inevitable confusion resulting from the majority's efforts to make the trimester scheme comport with advancing

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101 *Id.* at 450. The majority observed that the physician should have the sole discretion to advise a patient whether or not to proceed with an abortion *Id.*

102 The parental consent provision was found in § 1870.05(B) of the Ohio ordinance. *Id.* at 439. This section provided that a minor under the age of fifteen could not receive an abortion without first obtaining the written informed consent of one of her parents or a guardian, or obtaining a court order. *Id.*

103 *Id.* at 439-40.

104 *Id.* at 440-41. The Court reiterated the *Bellotti II* Court's holding which stated that a parental consent statute must also contain an alternative proceeding for the minor to obtain consent, in which the minor could show either that she was mature enough to make the abortion decision on her own, or that an abortion was in her best interests. *Id.* at 439-40 (citing Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (*Bellotti* II)).

105 *Id.* at 439. For an explanation of the abstention doctrine, see MARTIN REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY (1991); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 593-612 (1989).

106 *Akron*, 462 U.S. at 452-53 (O'Connor, J., dissenting); Susan M. Halatyn, Comment, *Sandra Day O'Connor, Abortion, And Compromise For The Court*, 5 TOURO L. REV. 327, 333-36 (1989). The Justice opined that the " 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved." *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). The Justice stressed that if the regulation was not found to unduly burden the abortion right, the evaluation was "limited to [a] determination that the regulation rationally relate[d] to a legitimate state purpose." *Id.* Justice O'Connor chastised the majority by stating, "[i]rrespective 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.' " *Id.* (quoting Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting)).

medical technology and the attendant burden placed on a state trying to adhere to the trimester framework.[107] The Justice also disagreed with the viability standard utilized.[108] Justice O'Connor posited that potential life was no less potential before viability, and hence the state's interest in potential life was present throughout all stages of pregnancy.[109] Justice O'Connor therefore completely rejected the trimester framework as an analysis destined to collide with itself.[110]

Justice O'Connor also called for the re-application of the undue burden standard, noting that the Court had often applied this test to restrictions on fundamental rights, including abortion.[111] Accordingly, the Justice denounced the majority's application of strict scrutiny to every provision.[112] Moreover, the dissenting Justice emphasized that a court applying the undue burden test should carefully examine how the legislature had ad-

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107 *Id.* at 455-56 (O'Connor, J., dissenting). The Justice found that the *Roe* trimester approach had created "lines" defining permissible and impermissible regulations at particular points of the pregnancy. *Id.* at 455 (O'Connor, J., dissenting). Justice O'Connor recognized that the majority's new component that a regulation adhere to "accepted medical practice" "blurred" these lines. *Id.* The Justice observed that a "State . . . [could] no longer rely on a 'bright line' that separate[d] permissible from impermissible regulation, and it [was] no longer free to consider the second trimester as a unit and weigh the risks posed by all abortion procedures throughout that trimester." *Id.*

108 *Id.* at 459 (O'Connor, J., dissenting). *See, generally*, Philip J. Prygoski, *Abortion and the Right to Die: Judicial Imposition of A Theory of Life*, 23 SETON HALL L. REV. 67 (1992) (contending that the Court, in cases such as *Roe*, has imposed value judgments of various stages of life).

109 *Akron*, 462 U.S. at 459-61 (O'Connor, J., dissenting).

110 *Id.* at 458 (O'Connor, J., dissenting). Justice O'Connor posited that "[j]ust as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother." *Id.* at 456-57 (O'Connor, J., dissenting).

111 *Id.* at 461-62 (O'Connor, J., dissenting). Justice O'Connor cited a number of abortion cases which had utilized this standard. *Id.* at 461 n.8 (O'Connor, J., dissenting). The Justice also observed that in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court applied this test in the context of a liberty interest, finding that "strict judicial scrutiny" applied only when legislation was found "to have 'deprived,' 'infringed,' or 'interfered' with the free exercise of" a fundamental right. *Id.* at 462 (O'Connor, J., dissenting) (quoting San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 37-38 (1973)). Additionally, Justice O'Connor cited First Amendment cases where this standard had been applied. *Id.* at 462-63 (O'Connor, J., dissenting) (citing Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960)).

112 *Id.* at 463 (O'Connor, J., dissenting).

dressed the problem.[113] The Justice declared that a test as austere as strict scrutiny was to be used by the Court with restraint and deference to legislative judgments.[114] Justice O'Connor concluded that under a proper application of the undue burden standard, none of the provisions at issue created an undue burden that was not justified by a legitimate state interest.[115]

The Court continued its trend of strictly scrutinizing all aspects of abortion regulations in *Thornburgh v. American College of Obstetricians and Gynecologists*.[116] The *Thornburgh* Court considered several sections of Pennsylvania's Abortion Control Act of 1982,[117] which had been challenged by several physicians and abortion providers in Pennsylvania.[118] The challenged provi-

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113 *Id.* at 465 (O'Connor, J., dissenting). The Justice referred to the legislatures as the " 'ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' " *Id.* (quoting Missouri, K & T. R. Co. v. May, 194 U.S. 267, 270 (1904)).

114 *Id.* at 463 (O'Connor, J. dissenting) (citation omitted).

115 *Id.* at 466, 468, 471, 473 (O'Connor, J., dissenting). Justice O'Connor disagreed with the majority's finding that the hospitalization requirement created an undue burden by increasing costs and decreasing the availability of abortions. *Id.* at 466 (O'Connor, J., dissenting). The Justice noted that no evidence had been presented to justify the assertion that this regulation would decrease the availability of abortions, and stated that any increased costs would be a reasonable means of furthering the State's compelling interest in maternal health. *Id.* at 466-67 (O'Connor, J., dissenting). Therefore, Justice O'Connor found that this provision was not unduly burdensome, and identified the rational relation to the State's legitimate interest in the health of its citizens to uphold the provision. *Id.* at 467 (O'Connor, J., dissenting).

Justice O'Connor also disagreed with the majority's analysis of the parental consent provision, chastising the majority for failing to apply the abstention doctrine. *Id.* at 469-70 (O'Connor, J., dissenting). Justice O'Connor declared that because the provision had not yet been construed by the state courts, the Supreme Court was wrong to interfere with the "independence of state governments" by imposing the Court's own interpretation of the statute upon the state. *Id.* at 470 (O'Connor, J., dissenting).

Addressing the informed consent provision, Justice O'Connor observed that a similar provision previously had been upheld. *Id.* at 471 (O'Connor, J., dissenting) (citing Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976) (*Bellotti I*); H.L. v. Matheson, 450 U.S. 398 (1981)). The Justice justified this regulation as furthering the state's interest that the abortion decision is made with the knowledge necessary for an informed choice. *Id.* at 472 (O'Connor, J., dissenting). The Justice upheld the twenty-four hour waiting period under a similar analysis, finding that this provision was reasonably related to the state's interest in ensuring that the woman make a "well-considered" choice. *Id.* at 473-74 (O'Connor, J., dissenting).

116 476 U.S. 747 (1986).

117 18 PA. CONS. STAT. ANN. §§ 3201-3220 (1982).

118 *Thornburgh*, 476 U.S. at 752, 758. Many of the challenged provisions were similar to provisions struck down in *Akron*. For instance, § 3205 of the Pennsylvania Act required the woman to give informed consent after certain explicit

sions: (i) required a woman to give informed consent after receiving certain information;[119] (ii) mandated the recording of specified information in a publicly available record, but keeping the woman's identity confidential;[120] (iii) ordered a physician performing a post-viability abortion to exercise care to preserve the life and health of the unborn child; and (iv) required the presence of a second physician during a post-viability abortion to take reasonable steps to preserve the life of the child.[121]

The majority applied strict scrutiny to invalidate all these provisions, despite the absence of proof that any provision created an undue burden.[122] The Court held the informed consent

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information was disclosed to her by the physician, a provision very similar to Akron's informed consent and disclosure requirement. *Id.* at 760.

119 *Id.* Two sections of the Pennsylvania Act, § 3205 and § 3208, required that "[s]even explicit kinds of information" be conveyed to the women in order for her to give informed consent. *Id.* Five of these were required to be conveyed to the woman by her physician, including:

(a) the name of the physician who will perform the abortion;
(b) the "fact that there may be detrimental physical and psychological effects which are not accurately foreseeable;"
(c) the "particular medical risks associated with the particular abortion procedure to be employed;"
(d) he probable gestational age; and
(e) the "medical risks associated with carrying her child to term."

Id. (quoting 18 PA. CONS. STAT. § 3205 (1982). The additional two kinds of information to be disclosed were the "fact that medical assistance benefits may be available for prenatal care, childbirth and neonatal care," and "the 'fact that the father is liable to assist' in the child's support, 'even in instances where the father has offered to pay for the abortion.' " *Id.* at 760-61 (quoting 18 PA. CONS. STAT. § 3205 (a)(1)-(2) (1982)).

120 *Id.* at 765. Section 3211(a) of the Act required the physician performing an abortion after the first trimester to disclose his basis for finding that the fetus was not viable. *Id.* Sections 3214(a) and (h) required the physician to file detailed reports about the abortion which included the names of the referring physician and the physician who performed the abortion; information about "the woman's political subdivision and State of residence, age, race, marital status, and number of prior pregnancies; the date of her last menstrual period and the probable gestational age; [and] the basis for any judgment that a medical emergency existed." *Id.*

121 *Id.* at 768-70.

122 *Id.* at 772. Additionally, in striking down the informed consent, disclosure, recordkeeping and reporting requirements, the Court disregarded the state's compelling interests in maternal health which could have justified these requirements. Zampa, *supra* note 1, at 755-56; *see Thornburgh*, 476 U.S. at 759-68 (providing the court's analysis of these provisions and the failure to recognize the compelling interests of maternal health).

Critics have denounced the *Thornburgh* and *Akron* Courts for using the doctrine of substantive due process to strike down laws it considered "unwise." Zampa, *supra* note 1, at 754-55. Substantive due process has not been given any generally accepted definition, but has come to refer to a liberal reading of the Fourteenth Amendment in which rights that are not explicitly stated in the amendment are attributed to it. *Id.* at 733-34 n.10. Courts have read rights, such as the right to

and disclosure requirement unconstitutional because the information that women would receive was irrelevant to informed consent and served no legitimate state interest.[123] The Court also struck down the recordkeeping and reporting requirements, claiming that the content of the required information was so personal that it was likely to reveal the identity of the woman, and that the requirement would deter women from seeking

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privacy, into the Fourteenth Amendment's concept of due process by reasoning that "certain rights are so fundamental to our concepts of ordered liberty that, in some cases, no process at all can deprive an individual of these rights, unless the state has a compelling state interest and the law is narrowly tailored to affect only that interest." *Id.* (citation omitted).

Substantive due process took on a negative connotation in the early part of this century with the Supreme Court's decision in Lochner v. New York, 198 U.S. 45 (1905). Ely, *supra* note 39, at 937. From the time of this decision until the 1930's, the Supreme Court invalidated a great deal of legislation under the substantive due process doctrine, often using the popular economic and social theories of the time to find these laws impermissible. *Id.* The Supreme Court's decisions during this time were sharply criticized for manufacturing rights that did not exist in the Constitution, and because the Justices often substituted their own views of wise social policy instead of deferring to the legislatures. *Id.* The Supreme Court finally denounced such "Lochnerism" (as this type of decision-making came to be known) in Ferguson v. Skrupa, 372 U.S. 726 (1963), stating:

> The doctrine that prevailed in *Lochner*, . . . and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Id. at 937-38 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963)).

Although the Supreme Court remains critical of Lochnerism, commentators have branded *Roe v. Wade* and its progeny as products of the *Lochner* philosophy. *Id.* at 939-40; *see also* Scott C. Shelley, Note, 22 SETON HALL L. REV. 1529 n.2 (1992) (providing a general analysis of substantive due process development).

[123] *Thornburgh*, 476 U.S. at 763. The Court recognized that generally informed consent requirements were constitutionally permissible. *Id.* at 760 The Court referred to the holding in *Akron*, invalidating a similar informed consent and disclosure requirement because the information required to be disclosed to the woman was designed to "influence the woman's informed choice between abortion and childbirth." *Id.* (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 443-44 (1983)). The Court also declared that this disclosure requirement "increase[d] the patient's anxiety, and intrude[d] upon the physician's exercise of proper professional judgment." *Id.* at 764. *But see id.* at 801 (White, J., dissenting), where Justice White's dissent recognized the truth in the majority's assertion that information required to be delivered to the woman could increase her anxiety and persuade her to choose childbirth over abortion. *Id.* The Justice espoused, however, that such a result would not render the provision unconstitutional because the *Roe* decision was not meant to "maximiz[e] the number of abortions, but [to] maximiz[e] choice." *Id.* The Justice also declared that former Supreme Court decisions permitted a state to "encourage women to . . . favor . . . childbirth rather than abortion." *Id.*; *see also* Zampa, *supra* note 1, at 757 (noting that "*Roe* did not require that states favor abortion over childbirth.").

abortions.[124]

Invalidating the physician's standard of care and the second physician requirements, the Court set aside the state's compelling interest in potential life[125] and instead focused on the provisions' failure to include a medical emergency exception.[126] The majority asserted that the legislature intentionally omitted such an exception, working an unconstitutional "trade-off" between the mother's health and fetal survival.[127]

Justice O'Connor penned another forceful dissent, reiterating the *Akron* dissent.[128] Justice O'Connor again advocated the application of the undue burden standard, and argued that the majority had enacted a new test that distorted the undue burden standard even more than the *Akron* holding.[129] Under the majority's new standard, Justice O'Connor opined, the Court appeared to strike down any regulation which posed even a slight possibility of deterring abortions for some women.[130] The Justice also criticized the majority for "straining" to find an "anti-abortion" intent in the statute, thereby creating "bad constitutional law."[131]

The direction of the Supreme Court's abortion jurisprudence changed dramatically with *Webster v. Reproductive Health Services*.[132] The *Webster* majority abandoned the strict scrutiny ap-

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124 *Thornburgh*, 476 U.S. at 766-67. The Court acknowledged that in *Danforth* it had found recordkeeping and reporting requirements permissible, as long as they protected the anonymity of the woman and were reasonably related to the protection of maternal health. *Id.* at 766.

125 Zampa, *supra* note 1, at 755-56; *see Thornburgh*, 476 U.S. at 768-71.

126 *Thornburgh*, 476 U.S. at 770-71.

127 *Id.* at 768, 771.

128 *Id.* at 814 (O'Connor, J., dissenting); *see supra* notes 106-15 and accompanying text for a discussion of Justice O'Connor's *Akron* dissent.

129 *Thornburgh*, 476 U.S. at 829 (O'Connor, J., dissenting). Justice O'Connor stated that the majority had adopted "a *per se* rule under which any regulation touching on abortion must be invalidated if it poses an 'unacceptable danger of deterring the exercise of that right.' " *Id.*

130 *Id.*

131 *Id.* at 833 (O'Connor, J., dissenting). *Thornburgh* has been referred to as the "high-water mark in the Supreme Court's restriction of state abortion regulations," and as the "pinnacle of the Court's intervention into the states' sphere of legislative authority." James Bopp, Jr. & Richard E. Coleson, *What Does* Webster *Mean?*, 139 U. PA. L. REV. 157, 158 n.5 (1989); Zampa, *supra* note 1, at 755. The Bopp & Coleson article posited that this decision demonstrated "both the extremes to which the *Roe* majority would go, and the rapidly eroding support for *Roe*." Bopp & Coleson, *supra*, at 158 n.5 (referring to Chief Justice Burger's defection from the *Roe* majority to the dissent).

132 492 U.S. 490 (1989). Due to the new conservative majority in the Supreme Court, many believed that *Webster* would be the test case that would overrule *Roe*. Christopher A. Crain, Note, *Judicial Restraint and The Non-Decision in* Webster v. Reproductive Health Services, 13 HARV. J.L. & PUB. POL'Y. 263, 263-64 (1990). The

proach evidenced in *Akron* and *Thornburgh*, instead exhibiting considerable deference to the Missouri legislature.[133] Furthermore, the noteworthy *Webster* holding explicitly overruled *Roe*'s trimester scheme.[134] In doing so, the Court also implicitly overruled the reasoning in the cases following *Roe* that relied on this trimester framework.[135]

Webster concerned a challenge to a Missouri statute[136] regulating abortions,[137] with specific attacks aimed at: i) the preamble, which declared that life begins at conception and asserted as protectable the interests of unborn children in life, well-being and health;[138] ii) a prohibition on the use of public facilities and employees to perform abortions; iii) a ban on the use of public funds for abortion counseling; and iv) a requirement that physicians conduct tests to determine viability before performing abortions.[139] The Court found all these provisions constitutional, because they permissibly furthered a legitimate state end.[140]

Chief Justice Rehnquist focused on the viability-testing re-

Court, however, took a position of judicial restraint — new to the Supreme Court in the abortion context. *Id.* at 264-65. Thus, the Court only limited *Roe*, emphasizing that *Roe* would only be reconsidered by a state statute directly calling it into question. *Id.* at 283-84.

133 Bopp & Coleson, *supra* note 131, at 158; Zampa, *supra* note 1, at 764.

134 Bopp & Coleson, *supra* note 131 at 163-64; Crain, *supra* note 132, at 282-83.

135 Bopp & Coleson, *supra* note 131, at 157-59; Crain, *supra* note 132, at 282-83.

136 MO. REV. STAT. § 1.205 (1986).

137 *Webster v. Reproductive Health Services*, 492 U.S. 490, 501 (1989).

138 *Id.* (quoting MO. REV. STAT. §§ 1.205.1(1), (2) (1986)).

139 *Id.* at 503.

140 *Id.* at 507, 511, 515, 519-20. In ruling on the preamble, the Court found that the court of appeals had wrongly applied the dictum in *Akron* to strike this provision down. *Id.* at 506. The *Akron* Court had declared that "a State may not adopt one theory of when life begins to justify its regulation of abortions." *Id.* at 504-05 (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444 (1983)). Because the Missouri preamble stated that life begins at conception, the court of appeals declared that it violated this language in *Akron*. *Id.* at 505. The Supreme Court, however, determined that the statement in the preamble was not used to regulate abortions, and thus it was simply a "value judgment," permissible under *Roe*. *Id.* at 506.

With regard to the prohibition on the use of public employees and facilities to perform abortions, the Court upheld these as valid under a line of abortion funding cases previously decided. *Id.* at 511 (citing Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Harris v. McRae, 448 U.S. 297 (1980)). These cases found it permissible to withhold public funds for abortion, provided the funds were reallocated to childbirth-related expenses, reasoning that *Roe* permitted the favoring of childbirth over abortion. *Id.* at 509-10. The Court therefore concluded that Missouri's provision was constitutional. *Id.* at 511.

quirement.[141] In evaluating this provision, the plurality recognized that the statute furthered the state's interest in potential life, which the Court found compelling in *Roe*.[142] The plurality then noted that the Missouri provision seemed to conflict with the Court's determination in *Colautti v. Franklin*,[143] which held that neither the state nor the courts could impose regulations on medical judgments regarding fetal viability.[144] The Court attributed this conflict to the states' attempts to fashion regulations to comport with the rigid trimester approach.[145] The plurality, therefore, used this opportunity to reassess *Roe*'s trimester framework.[146] Postulating that the trimester approach had become an increasingly intricate regulatory labyrinth, inconsistent with the "notion of a constitution cast in general terms," the plurality expressly denounced this portion of *Roe*.[147] The Court opined that the state's interest in protecting human life existed throughout pregnancy, not just after viability.[148] After discarding the burdensome trimester scheme, the plurality upheld the viability-testing provision as permissibly furthering the state's interest in protecting potential life.[149]

Justice O'Connor wrote a separate concurrence which has emerged as the dominant opinion on this issue.[150] Justice

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141 *Id.* at 513-17. Chief Justice Rehnquist's plurality opinion was joined by only Justices White and Kennedy. *Id.* at 498-99. Justices O'Connor and Scalia each wrote separate concurring opinions. *Id.* at 522, 532.

142 *Id.* at 516 (citing Roe v. Wade, 410 U.S. 113, 162 (1973)); Zampa, *supra* note 1, at 771.

143 439 U.S. 379 (1979).

144 *Webster*, 492 U.S. at 516-17; Zampa, *supra* note 1, at 771.

145 *Webster*, 492 U.S. at 517.

146 *Id.* at 518-21.

147 *Id.* at 518. The plurality found that "[t]he key elements of the *Roe* framework - trimesters and viability - are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." *Id.* Therefore, the plurality recognized that this framework offered no set guidelines for the states to follow, and had become "unworkable in practice." *Id.* (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)). The Court also declared that the "rigid *Roe* framework" was not consistent with our "notion of a constitution cast in general terms." *Id.* The plurality asserted that the trimester framework had become so intricate that it was more of a "code of regulations" than "a body of constitutional doctrine." *Id.*

148 *Id.* at 519.

149 *Id.* at 519-20.

150 *Id.* at 522. (O'Connor, J., concurring in part and concurring in judgment); Bopp & Coleson, *supra* note 131, at 159-60. The Supreme Court case of Marks v. United States, 430 U.S. 188 (1977), instructed that when a majority refuses to apply a doctrine it is no longer binding precedent and a majority did not agree on a new doctrine, then the lower courts are to regard as precedent the opinion of the Justice

O'Connor agreed with the plurality's conclusion that the viability-testing provision was constitutional, but the Justice asserted that the proper test to apply was the undue burden test.[151] The Justice disagreed, however, with the plurality's finding that this provision conflicted with the Court's previous abortion decisions, and thus found no need to reevaluate *Roe*'s trimester framework.[152] In applying the undue burden test, Justice O'Connor found that the viability-testing regulation imposed no undue burden and was rationally related to the preservation of potential life.[153]

Webster's permissiveness in allowing states to place more regulations on abortion was reflected in *Hodgson v. Minnesota*.[154] The *Hodgson* majority[155] considered a Minnesota statute's[156] requirement of two-parent notification for a minor prior to obtaining an abortion, and found it constitutional when accompanied by a judicial bypass option.[157] The Court reached this decision despite the statute's characterization as the strictest in the nation.[158]

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who concurred in the judgment on the narrowest grounds. *See* Planned Parenthood v. Casey, 947 F.2d 682, 692-93 (3d Cir. 1991) (explaining the application of *Marks*).

151 *Webster*, 492 U.S. at 529-30; Zampa, *supra* note 1, at 773.

152 *Webster*, 492 U.S. at 523. (O'Connor J., concurring in part and concurring in judgment); Zampa, *supra* note 1, at 773. The Justice cited the Supreme Court's principle of refraining from deciding a constitutional question when there was no need to. *Webster*, 492 U.S. at 525-26.

153 *Webster*, 492 U.S. at 530. Like the *Roe* decision, *Webster* also generated a torrent of commentary. Some commentators have praised the decision as a first-step in overruling *Roe*, but without threatening "civil or contraceptive rights," and still recognizing a woman's right to an abortion. *See* Bopp & Coleson, *supra* note 131, at 177. Others have criticized *Webster* for what it failed to say, noting that the plurality failed to adequately explain its reasoning for effectively overruling *Roe*. Walter Dellinger & Gene B. Sperling, *Abortion And The Supreme Court: The Retreat From* Roe v. Wade, 138 U. PA. L. REV. 83, 83-84 (1989).

154 110 S. Ct. 2926 (1990). *Hodgson* was decided with another abortion regulation case, Ohio v. Akron, 110 S. Ct. 2972 (1990) (*Akron II*). The *Akron II* case involved issues very similar to *Hodgson*, thus an analysis of *Hodgson* may suffice to convey the implications of both cases for purposes of this note.

155 This majority consisted of Justice Stevens, who wrote the opinion for this portion of the case, Justice Brennan, Justice Marshall, Justice Blackmun, and Justice O'Connor. *Hodgson*, 110 S. Ct. at 2930.

156 MINN. STAT. ANN. § 144 (West 1988).

157 *Hodgson*, 110 S. Ct. at 2930-32.

158 *Id.* at 2931 n.5. The Court noted that 27 states had similar statutes, but required the notification of only one parent or allowed exceptions to a requirement of dual consent, while three states had statutes which were ambiguous as to whether the notice to one parent was sufficient. *Id.* The Court contrasted the Minnesota statute with a similar provision in Arkansas, which required notice to both parents but provided far more exceptions than the Minnesota statute. *Id.*

Subdivision 2 of the Minnesota statute did not provide for a judicial bypass option. *Id.* at 2931-32. This section provided in part:

Specifically, the provision required a minor to notify both parents of her decision to abort at least forty-eight hours before the performance of the procedure, and provided only very limited exceptions.[159] While recognizing the right of a state to require minors to obtain parental notice or consent prior to an abortion, the Court concluded that the requirement of notifying *both* parents served no legitimate interest and was unconstitutional.[160] The majority reasoned that the justification of parental notice statutes, i.e., to ensure a well-reasoned decision by the minor, could be satisfied by notifying only one parent.[161] Moreover, the Court noted that a dual-notification mandate would be detrimental to minors in dysfunctional families.[162]

> Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor . . . until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.
> (a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.
> (b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employees can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

Id. at 2931 (quoting MINN. STAT. ANN. § 144.343, subd. 2 (West 1988)). Subsection 6 of the statute provided the judicial bypass option as an alternative if subdivision 2 was ever " 'temporarily or permanently' enjoined by judicial order." *Id.* at 2932.

159 *Id.* at 2931-32. The statute provided exceptions only for situations in which only one parent was alive, if the second parent could not be located after "reasonably diligent effort," for situations where emergency treatment was necessary to prevent the death of the minor, or where the minor had advised the proper authorities that she was the victim of sexual or physical abuse. *Id.* No exception was provided for "a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the pregnant woman's mother." *Id.* at 2931.

160 *Id.* at 2944-45.

161 *Id.* at 2945.

162 *Id.* at 2945-46. The majority found that the testimony at trial had established that the requirement of two-parent notification had proved harmful to minors in dysfunctional families. *Id.* at 2945. The Court acknowledged the trial court had determined that this provision often resulted in "major trauma" to the minor and to her family and caused a violation of the privacy of both. *Id.*

The majority recognized that the statute's goal of creating full communication among all family members was desirable, but instructed that the State may not properly mandate such a goal. *Id.* at 2946. The Court noted that "[t]he State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together." *Id.*

The Court also addressed the portion of the provision that required a minor to wait forty-eight hours between the time of the notification and the performance of the abortion procedure. *Id.* at 2944. The Court reasoned that this provision pro-

The majority[163] declared, however, that the judicial bypass procedure's presence in subdivision six of the statute rendered the two-parent notification requirement constitutional.[164] The majority asserted that the bypass alternative fit within the framework established for such proceedings in *Bellotti II*, and that the alternative was consistent with the precedents established in other cases concerning parental consent and notification.[165]

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duced only a minimal burden, and was justified by the interest in giving the parent time to consult with the child and the physician. *Id.*

163 Justice Stevens dissented as to this portion of the decision, and therefore a different majority was comprised for this part, consisting of Justice Kennedy, Chief Justice Rehnquist, Justice White, Justice O'Connor and Justice Scalia. *Id.* at 2930.

164 *Id.* at 2971. Subdivision 6 of the statute provided in pertinent part:

> If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order of injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph . . . (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

Id. at 2933 (quoting MINN. STAT. ANN. § 144.343, subd. 6 (West 1988)).

165 *Id.* at 2970; *see* Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft, 462 U.S. 476, 491 (1983) ("It is clear, however, 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.' ") (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439-40 (1983)); Ohio v. Akron (*Akron II*), 110 S. Ct. 2972, 2979-80 (1990). The *Bellotti II* plurality stated the criteria for a bypass procedure in a consent statute:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must 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. In sum, the proce-

Against this background of Supreme Court abortion jurisprudence, the United States Court of Appeals for the Third Circuit decided *Planned Parenthood v. Casey*.[166] In *Casey*, the Third Circuit applied Justice O'Connor's undue burden standard to review several provisions of Pennsylvania's Abortion Control Act.[167] Examining the statute's provisions regarding a medical emergency exception, and requirements of informed consent, parental consent, spousal consent, and reporting and public disclosure, the court found that only the spousal notice provision presented an undue burden.[168]

The Third Circuit began its analysis by considering the standard of review to be applied, and emphasized that the proper standard would determine the degree to which the state could permissibly regulate abortions.[169] The court explained that the applicable standard of review depended upon whether a fundamental right was at issue.[170] The court noted that the existence of a fundamental right to an abortion was the subject of continuous disagreement among the Supreme Court Justices.[171] The court acknowledged that a majority of the Supreme Court in *Roe* had concluded that abortion was a fundamental right protected by a strict scrutiny standard of review.[172]

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dure 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*.

Bellotti, 443 U.S. at 643-44.

Therefore the majority posited that the judicial bypass procedure was an effective "means of handling exceptions from a reasonable general rule, and thereby [to] preserve the constitutionality of that rule . . . ." *Hodgson*, 110 S. Ct. at 2948.

166 947 F.2d 682 (3d Cir. 1991).

167 *Id.* at 697. *See* 18 PA. CONS. STAT. ANN. §§ 3201-20 (1992).

168 *Casey*, 947 F.2d at 719. The court determined that the spousal notice requirement was not narrowly tailored to serve a compelling state interest. *Id.* at 715. *See id.* at 699-719 for the court's analysis of all the provisions.

169 *Id.* at 687-88.

170 *Id.* at 688.

171 *Id.* at 688-89.

172 *Id.* at 688. Strict scrutiny is the standard the Supreme Court utilizes to review a governmental regulation on a fundamental right. NOWAK & ROTUNDA, *supra* note 40, § 14.3. In order for the regulation to be valid, it must be shown that the regulation is designed to further a compelling governmental interest, and that the regulation "is necessary, or narrowly tailored, to promote that compelling interest." *Id.*

The court stated that this strict scrutiny standard was followed by most of the Supreme Court's subsequent abortion decisions and, until recently, was considered to be the controlling standard. *Casey*, 947 F.2d at 691, 697. For cases following strict scrutiny analysis, see Doe v. Bolton, 410 U.S. 179 (1973); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

The court found, however, that two recent Supreme Court cases altered that standard of review.[173] The court recognized that in *Webster*[174] and *Hodgson*[175] Justice O'Connor's somewhat less stringent "undue burden" standard had replaced strict scrutiny as the controlling standard.[176] The Third Circuit noted that in *Webster* and *Hodgson* the strict scrutiny standard had been rejected by a majority of the Justices.[177] The appellate panel observed, however, that no new standard had commanded universal support among the majority,[178] thus resulting in splintered decisions regarding which standard should control.[179]

In determining the controlling standard, the court of appeals examined the United States Supreme Court decision in *Marks v. United States*.[180] The appellate panel claimed that the *Marks* Court established that, in a fragmented decision where no opinion consists of a five justice majority, the opinion of the Justice concurring in the judgment on the narrowest grounds should be considered the case's holding.[181]

Applying this reasoning to the Supreme Court's recent abortion decisions, the court of appeals found that no single standard of review had been utilized by a majority of the Court in *Webster*

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173 *Casey*, 947 F.2d at 694-95.

174 Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

175 Hodgson v. Minnesota, 110 S. Ct. 2926 (1990).

176 *Casey*, 947 F.2d at 697. The undue burden standard was based upon Justice O'Connor's belief that abortion was a "limited" fundamental right. *Id.* at 688-89. Therefore, under this standard, a regulation is given strict scrutiny if it "causes an 'undue burden' on a woman's abortion decision, and the rational basis standard if it does not." *Id.*

The Third Circuit noted that in *Webster* and *Hodgson* the strict scrutiny standard had been rejected by a majority of the justices. *Id.* at 695.

177 *Id.* at 695. The strict scrutiny standard commanded the allegiance of only four dissenters in *Webster*, and three in *Hodgson*. *Id.* at 695-96.

178 *Id.* at 693.

179 *Id.* at 695. The court declared that in a case such as this, *stare decisis* mandated a correct interpretation of which majority opinion had become the "law of the land." *Id.* at 692.

180 *Id.* (citing Marks v. United States, 430 U.S. 188 (1977)).

181 *Id.* at 693. The court explained that this concept was a bit more difficult in an opinion in which six or more Justices joined in the judgment and issued three or more opinions. *Id.* at 694 n.7. In this case, the court reasoned that the commanding opinion was that of the "Justice or Justices who concurred on the narrowest grounds *necessary to secure a majority*." *Id.* Thus, the court noted that "if three Justices issue[d] the broadest opinion, two Justices concur[red] on narrower grounds, and one Justice concur[red] on still narrower grounds, the two-Justice opinion was binding because that was the narrowest of the opinions necessary to secure a majority." *Id.* This standard, the court noted, would "necessarily produce results with which a majority of the Court from that case would agree." *Id.* at 693.

and *Hodgson*.[182] The court reasoned that because Justice O'Connor's concurring opinion in both cases represented the narrowest grounds of adjudication, the Justice's undue burden standard had become the law of the land.[183] Having established that the applicable standard had changed from that used in previous abortion cases, the court held that results of those earlier cases were therefore no longer binding on lower courts.[184] Thus, the court deemed only *Webster* and *Hodgson* binding.[185]

The appeals panel next discussed the application of the undue burden standard to abortion regulations, and determined that an undue burden only occurred when abortion regulations either severely limited or banned pre-viability abortions, or caused "a 'severe' or 'drastic' impact upon time, cost, or the number of legal providers of abortions."[186] The Third Circuit indicated that an abortion regulation normally creates an undue burden by giving a woman's husband, or a minor's parents, a veto power over the abortion decision.[187] The court clarified, however, that judicial bypass alternatives could remedy the undue burden created by such notification and consent regulations.[188]

Turning to the Pennsylvania regulations at issue, the court first considered the medical emergency exception.[189] The court observed that the Act permitted the immediate termination of a pregnancy posing a threat of death or significant and irreversible damage to a major bodily function.[190] The court of appeals rejected the district court's finding that this definition was uncon-

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182 *Id.* at 694-97.

183 *Id.* at 697.

184 *Id.* at 697-98.

185 *Id.*

186 *Id.* at 698 (quoting Webster v. Reproductive Health Services, 492 U.S. 490, 529-30 (1989) (O'Connor, J., concurring)).

187 *Id.* at 699.

188 *Id.*

189 *Id.* Section 3203 of the Act defined a medical emergency as:

> [T]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

Id. (quoting PA. STAT. ANN. tit. 18, § 3203 (1983 & Supp. 1991)).

190 *Id.* (quoting 18 PA. CONS. STAT. ANN. § 3203 (1983 & Supp. 1991). The court determined that *Roe* and its progeny had established the fact that all regulations that might "delay or prevent" an abortion must contain a medical emergency exception permitting a woman to obtain an abortion at any time during her pregnancy, without recourse to the regulations, when such an emergency arose. *Id.*

stitutionally narrow.[191] The court implied that the district court had improperly based its decision on a speculative, worst-case analysis[192] by assuming that three common pregnancy conditions, which created serious health risks to a woman, would not fall within the medical emergency definition.[193] The court did not dispute the fact that these conditions could lead to serious bodily injury if a woman diagnosed with any one of them failed to receive an abortion.[194] The court stressed, however, that Pennsylvania case law had instructed that the Commonwealth's statutes must be construed in favor of a constitutional interpretation.[195] The court of appeals therefore recognized that construing this provision in light of its goal of protecting the life and health of women would lead to the conclusion that any pregnancy condition presenting a substantial risk to a woman's health would fall within the medical emergency exception.[196]

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191 *Id.* at 698, 702. The district court found that the definition of medical emergency in the Pennsylvania Act was inadequate because it "interfered with the physician's independent medical judgment" and was "more restrictive than any other as applied in medical situations." Planned Parenthood v. Casey, 744 F. Supp. 1323, 1377 (E.D. Pa. 1990). The district court judge determined that this definition could cause a physician to act contrary to his own best medical judgment, as a situation could arise that the physician felt necessitated an emergency abortion but which did not fit within the Act's definition of emergency. *Id.*

192 *Casey*, 947 F.2d at 701 (quoting Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2981 (1990)). The court explained that the Supreme Court recently applied this principle in Rust v. Sullivan, 111 S. Ct. 1759 (1991), where a similar provision was at issue. *Id.* The Third Circuit declared that *Rust* involved a ban on abortion referrals, but this ban was not held to extend to emergency situations in which the woman's life was endangered. *Id.* The appeals panel instructed that the *Rust* Court had rejected such an interpretation of the provision, even though no medical emergency exception was explicitly contained in the statute, because in a facial challenge, " 'without any application . . . to a specific fact situation' it would not read the regulations to bar referral in such cases." *Id.* at 701-02 (quoting Rust v. Sullivan, 111 S. Ct. 1759, 1773 (1991)).

193 *Id.* at 701. The district court considered three common pregnancy conditions: preeclampsia, inevitable abortion, and prematurely ruptured membrane. *Id.* The clinics argued that, while each of these conditions could pose a serious threat to a woman's health if the pregnancy was not terminated, these conditions did not cause an immediate risk of "substantial and irreversible impairment to a major bodily function," and thus were not within the Act's definition of a medical emergency. *Id.* (citing Appellee's Brief at 6, Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *aff'd*, 112 S. Ct. 2791 (1992)).

194 *Id.* at 700.

195 *Id.* (citing Commonwealth v. Blystone, 549 A.2d 81 (1988); Hughes v. Commonwealth Dept. of Transportation, 523 A.2d 747 (1987); Frisby v. Shultz, 487 U.S. 474, 483 (1988); Webster v. Reproductive Health Services, 492 U.S. 490, 514 (1989)).

196 *Id.* at 701. The appeals panel also addressed a vagueness challenge to this provision, which the district court had failed to consider. *Id.* at 702. The court explained that, although the Act furnished civil and criminal sanctions for doctors

The court of appeals next examined the informed consent provision of the Act.[197] Section 3205(a)(1) required a referring

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who violated its provisions by performing a non-emergency abortion when it was otherwise not permitted, the statute was not vague because it allowed the physician to use his or her "good faith clinical judgment" in defining a medical emergency exception. *Id.* The good faith standard, concluded the court, was clearly subjective, requiring "a physician to violate his or her own good faith clinical judgment in order to be criminally liable." *Id.* The court further provided that such a subjective standard has consistently been upheld against vagueness challenges. *Id.* (citing U.S. v. Vuitch, 402 U.S. 62, 69-72 (1971) (requirement that an abortion be "necessary for the preservation of the mother's life or health" upheld against a vagueness challenge); Doe v. Bolton, 410 U.S. 179, 191-92 (1973) (statute requiring physician's "best clinical judgment" regarding necessity for abortion not vague); Colautti v. Franklin, 439 U.S. 379, 390-97 (1979) (statute vague where it was unclear whether a subjective or objective standard was to be used)).

197 *Casey*, 947 F.2d at 701. This provision was found in section 3205 of the Act, which the court paraphrased, 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) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
>
> (i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
>
> (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
>
> (iii) The medical risks associated with carrying her child to term.
>
> (2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:
>
> (i) The [Pennsylvania] [D]epartment [of Health] publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
>
> (ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.
>
> (iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.
>
> (3) A copy of the printed material has been provided to the woman if she chooses to view these materials.
>
> (4) The pregnant woman certifies in writing, prior to the abortion,

or performing physician to inform the woman seeking the abortion of: (i) the nature and risks of the abortion procedure and appropriate alternatives to it; (ii) the likely gestational age of the fetus; and (iii) the risks involved in continuing the pregnancy to term.[198] While acknowledging the possible resulting delays, increased costs, decreased availability, and the unfairness of compelling a woman to receive unsolicited information, the court failed to recognize any of these burdens as undue.[199] The court determined that none of these effects would be drastic or severe.[200] Finding no undue burden, the court applied the rational-relation test.[201] The court easily identified a legitimate state interest supporting the information requirements—fully informed abortion decisions.[202]

Considering section 3205 (a)(2), which required the physician *or* a counselor to inform the woman of available assistance benefits, possible abortion alternatives, the availability of printed materials describing fetal development, and the obligation of the child's father to assist in financial support, the court similarly found no undue burden created.[203] The court determined that any delay resulting from these provisions, which would increase

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that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1991).

198 *Casey*, 947 F.2d at 703.

199 *Id.* at 703-04.

200 *Id.* at 703. The court found that any delay in the abortion procedure which this provision would cause would only be minimal. *Id.* Similarly, the appeals panel determined that the district court had not produced evidence of a significant increase in cost which would be likely to produce an "absolute obstacle" on the abortion right. *Id.* The court also asserted that this provision would "not cause abortion providers to stop providing any or all abortions, and, accordingly, . . . [would] not cause a drastic or severe reduction in the availability of abortion." *Id.* Finally, the court reasoned that mandating a woman to receive this information even if she has not requested it was necessary for the woman to make a fully informed abortion decision. *Id.* Therefore, the court concluded that this provision created no undue burden. *Id.* at 704.

201 *Id.* at 703-04. The court explained that a statute will only be struck down under the rational relation test if it is not "rationally related to a legitimate state interest." *Id.* at 689. The court called this a deferential standard, and noted that "state legislation is rarely invalidated as not rationally related to a legitimate state interest." *Id.* (citing Williamson v. Lee Optical, 348 U.S. 483, 487 (1955); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

202 *Id.* at 704. Additionally, the court concluded that it was rational for the state to require this information be conveyed by the physician rather than by a counselor, as a physician would be more qualified and more capable of providing relevant medical information. *Id.*

203 *Id.*

costs and decrease availability, would be minimal.[204] Thus, the court justified this section as furthering a legitimate interest in the potential life of the fetus throughout all stages of pregnancy.[205]

The final informed consent provision considered by the Third Circuit was the requirement of a twenty-four hour waiting period between the time the woman received the mandated information and the time that the abortion was performed.[206] Although the court conceded that this waiting period was likely to produce delays of over twenty-four hours,[207] the court did not find the delay unduly burdensome.[208] Analogizing to the *Hodgson* case, the court pointed out that the *Hodgson* Court had approved a judicial bypass procedure, finding no evidence indicating a possible delay of a week or more.[209] Applying the rational basis test, the appellate court recognized the state's interest in ensuring that women seeking abortions make a well-reasoned and well-informed decision.[210]

The court next addressed the parental consent provision in

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204 *Id.* at 704-05.

205 *Id.* at 701. The court also addressed a First Amendment challenge which had been brought by the clinics, who claimed that these informed consent provisions violated the First Amendment by disseminating the Commonwealth's ideology that childbirth was always preferable to abortion. *Id.* at 705. The court rejected this idea, finding that this was commercial speech which was constitutionally permissible as long as it did not attempt to advocate a particular political, religious or nationalistic opinion. *Id.* (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)). Additionally, the court again stressed the legitimate interest the state had in providing women with this particular information, which the court noted was neither untrue nor unverifiable. *Id.* at 705-06.

206 *Id.* at 706.

207 *Id.* The court referred to the district court's findings, which had determined that because most abortion clinics did not perform abortions every day, this twenty-four hour waiting period could actually result in delays of over twenty-four hours. *Id.* The district court had calculated that in some cases the delay could be as long as two weeks. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1378-79 (1990). The district court also cautioned that the delay would cause women to make two trips to an abortion clinic, thus increasing travel time and expenses and possibly doubling a woman's subjection to harassment from demonstrators outside the clinics. *Id.*

208 *Casey*, 947 F.2d at 706-07.

209 *Id.* The district court also cited *Hodgson* when discussing this provision. *Casey*, 744 F. Supp. at 1379. The district court declared that *Hodgson* had validated a forty-eight hour waiting period for minors seeking abortions, but in doing so, had "*explicitly distinguished* the situation before it from that presented in *Akron*," which had invalidated a twenty-four hour waiting period for all women. *Id.* (emphasis added). Thus, the district court attempted to demonstrate that such a provision would be permissible for minors, but would create an undue burden for adult women. *Id.*

210 *Casey*, 947 F.2d at 707.

section 3206.[211] This section provided that a woman under the age of eighteen must obtain the informed consent of at least one parent or a guardian before receiving an abortion.[212] The court found the provision constitutionally permissible because it allowed a minor to receive judicial consent to an abortion.[213] The court of appeals indicated that such a provision without a judicial bypass option would unduly burden the minor's abortion decision by permitting a parent or guardian to have absolute veto power over the minor's decision.[214] The court found, however, that a judicial bypass option comporting with the requirements enunciated in *Bellotti v. Baird*[215] (*Bellotti II*) cured the undue burden.[216] The court observed that Pennsylvania's Act complied with the *Bellotti II* requirements by: (i) allowing a minor to petition the court for a determination that she was mature enough to make her decision without parental consent, or that she was not

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211 *Id.* at 707-09. This section provided in pertinent part:

> (a) GENERAL RULE - Except in the case of a medical emergency, or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she had been adjudged an incompetent . . ., a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian.
>
> . . .
>
> (c) PETITION TO THE COURT FOR CONSENT - If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.
>
> (d) COURT ORDER - If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

Id. (quoting 18 PA. CONS. STAT. ANN. § 3206 (1983 & Supp. 1991)).

212 *Id.* at 707.

213 *Id.* at 708.

214 *Id.*

215 443 U.S. 622 (1979). *See supra* notes 69-77 for an analysis of *Bellotti* II.

216 *Casey*, 947 F.2d at 708-09.

mature, but an abortion was in her best interests; (ii) mandating that these hearings and any appeals be prompt; and (iii) requiring that the proceedings be confidential.[217] Accordingly, the court validated the provision and justified the state's rational attempt to ensure that minors fully understand the implications of an abortion.[218]

The court found the spousal notice provision in section 3209, however, to be somewhat more problematic.[219] The Third Circuit explained that this section required a married woman to give her physician a signed statement indicating that she has notified her husband of her intent to abort.[220] The court listed four exceptions to the spousal notice requirement: (i) the husband was not the father of the child; (ii) diligent efforts failed to locate the husband; (iii) the pregnancy resulted from sexual abuse from the husband which had been reported to a law enforcement agency; or (iv) the woman feared that notifying her husband would be likely to cause physical abuse by either the husband or

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217 *Id.* at 709. *See Bellotti II*, 443 U.S. at 642-44.

218 *Casey*, 947 F.2d at 709.

219 *Id.* Section 3209 stated in pertinent part:

> (a) SPOUSAL NOTICE REQUIRED - In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.
>
> (b) EXCEPTIONS - The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provided the physician a signed statement certifying at least one of the following:
>
> (1) Her spouse is not the father of the child.
>
> (2) Her spouse, after diligent effort, could not be located.
>
> (3) The pregnancy is a result of spousal sexual assault . . . which has been reported to a law enforcement agency having the requisite jurisdiction.
>
> (4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual. Such statements need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

Id. (citing 18 PA. CONS. STAT. ANN. § 3209 (1983 & Supp. 1991)).

220 *Casey*, 947 F.2d at 709. The court noted that the Commonwealth was required to provide forms for this statement, which contained a warning that any false statements were punishable by law. *Id.*

another.[221] The court concluded that despite the exceptions, this section created an undue burden on the woman's abortion decision.[222]

The court stressed that only the effects upon the woman should be considered, not the countervailing interests of the husband.[223] Thus, the court determined that this provision would impose severe limits on a woman's abortion decision, because the husband could penalize the woman for her choice.[224] The court enumerated the possible consequences of requiring spousal notification, including physical or economic force by the husband to prevent the wife from obtaining an abortion, psychological coercion, or the inhibition of a woman's unrestrained choice due to the feared reaction of her husband.[225] The court of appeals recognized that even the exceptions that Pennsylvania provided could not remedy the undue burden, because they did not adequately address all the reasonably predictable burdens.[226] Therefore, the court concluded that the spousal notice provision would be likely to dissuade many women from seeking abortions, and thus found it necessary to apply the strict scrutiny test.[227]

Although the court considered the husband's interests in applying the strict scrutiny test, it found none to be compelling.[228] The court identified three state interests, but did not find any compelling.[229] The court found the state's interest in promoting

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221 *Id.* at 709-10.

222 *Id.* at 713.

223 *Id.* at 710.

224 *Id.*

225 *Id.* at 712. The psychological coercion mentioned by the court included threats by the husband to dissolve the marriage or to disclose the wife's abortion decision to family or friends. *Id.*

226 *Id.* at 712-13. The court found that the exception for a woman who reasonably believed that notifying her husband would result in bodily injury to her did not consider battered wives. *Id.* The court stated that the district court had concluded, with sufficient evidence, "that battered spouses are psychologically incapacitated from making the assertion required by the statute even when there is ample objective evidence for the required fear." *Id.* at 713. Additionally, the court noted that this exception may not include women who have never before been victims of physical abuse by their husbands, but feared that this notification could occasion a violent outburst. *Id.*

The court also discussed the exception for a woman whose pregnancy was the result of sexual abuse by her husband. Observing that this exception would only come into effect if the woman had reported her husband to law enforcement authorities, the court found this to be an unreasonable prerequisite, as it could have "devastating effects" on the marital relationship. *Id.* at 713.

227 *Id.*

228 *Id.* at 714-15.

229 *Id.* at 713-15.

marital integrity to be somewhat ambiguous.[230] The court of appeals reasoned that if marital integrity meant honesty and full disclosure between a husband and wife, the interest was less than legitimate.[231] Alternatively, the court concluded that a Commonwealth interest in marital integrity, intended to preserve marital harmony, was legitimate but not compelling, and was not served by a narrowly-tailored regulation.[232]

The Third Circuit reasoned that it could consolidate the state's second interest in furthering the husband's interest in having children within marriage with the state's third interest in protecting fetal life.[233] The court deemed the husband's right to the fetus legitimate but not compelling.[234] The court declared that the wife's right to an abortion was always paramount to the state's interest in protecting the husband's right to the fetus.[235] Accordingly, the court invalidated the spousal notice requirement because the requirement placed an undue burden upon the woman's abortion decision that was not justified by a compelling state interest.[236]

The Third Circuit next considered the confidential reporting requirements of section 3214 of the Act.[237] The court first clari-

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230 *Id.* at 714.

231 *Id.* The court explained that in *Hodgson*, a similar interest in familial integrity had been deemed an intrusion into the "private realm of family life," and thus not a legitimate state interest. *Id.* (quoting *Hodgson*, 110 S. Ct. at 2946).

232 *Id.* The court added, however, that even if this were a compelling interest, the section was not narrowly tailored to further it, as there was no proof that the required disclosure would "save more marriages than it destroy[ed]." *Id.*

233 *Id.*

234 *Id.* at 714-15.

235 *Id.* Because the woman's abortion right was grounded in the right of privacy, the court noted, she was "constitutionally privileged" to make her decision free of interference from anyone else, including her husband. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Planned Parenthood v. Danforth, 428 U.S. 52, 70 n.11 (1976)).

236 *Id.* at 715.

237 *Id.* at 715-19. The relevant portions of this section are:

> (a) GENERAL RULE - For the purpose of promotion of maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, 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 following information:
>
> (1) Identification of the physician who performed the abortion, the concurring physician . . ., the second physician . . ., and the facility where the abortion was performed and of the referring physician, agency or service, if any.
>
> (2) The county and state in which the woman resides.

fied that reporting requirements had been deemed constitutionally permissible in the abortion context, as long as the reports were kept confidential and did not attempt to impose, through the sheer burden of recordkeeping detail, an unconstitutional restriction.[238] The court then addressed section 3214's four specific disclosure requirements, which the district court had found unconstitutional.[239] These requirements involved provisions regarding the basis of the physician's decision as to gestational age, the necessity for a third trimester abortion, the presence of a medical emergency, and the identity of the referring physician.[240]

The court of appeals declared that these disclosure requirements did not create an undue burden.[241] The court remarked that the district court had determined that the reporting of this information would increase the cost of every abortion by only a few dollars — an insufficient increase to constitute an undue burden.[242] The court also stressed that adequate safeguards maintaining the confidentiality of the reports protected against public disclosure of sensitive information, and did not create an undue

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(3) The woman's age.
(4) The number of prior pregnancies and prior abortions of the woman.
(5) The gestational age of the unborn child at the time of the abortion.
(6) The type of procedure performed or prescribed and the date of the abortion.
(7) Pre-existing medical conditions of the woman which would complicate the pregnancy, if any, and if known, any medical complication which resulted from the abortion itself.
(8) The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1). . . .
(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

Id. at 715 n.28 (quoting 18 PA. CONS. STAT. ANN. § 3214 (a) (i) (1983 & Supp. 1991)).

238 *Casey*, 947 F.2d at 716 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 81 (1976)).

239 *Id.*

240 *Id.*

241 *Id.* at 716-17.

242 *Id.* at 716. Specifically, the district court had found that by requiring this information to be disclosed in a report for every abortion would cost "$12,000 per year for an abortion clinic that performed 7,000 abortions per year," which amounted to an increase of only a few dollars per abortion. *Id.*

burden.[243] The court then determined that these reporting requirements were rationally related to Pennsylvania's interest in obtaining important statistics about abortions and ensuring that doctors and clinics were complying with the Act.[244]

The court of appeals rejected the district court's view that the required inclusion of the referring physician's name in the report would cause many physicians to stop referring women for abortions.[245] The court concluded that procedural mechanisms safeguarding the confidentiality of the reports made that result unlikely.[246] Accordingly, the court found no undue burden present in the reporting requirement.[247]

Finally, the court examined section 3207(b), which required every publicly funded abortion facility to file a report containing the number of abortions performed during each trimester.[248]

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243 *Id.* The court noted that *Thornburgh* had invalidated similar provisions, determining that an undue burden was created because of the lack of confidentiality of these reports. *Id.* at 716 n.29.

244 *Id.* at 716-17. The court rejected the district court's opinion that these provisions would create a "chilling effect" upon the physician's exercise of his or her judgment, finding no support for this assertion. *Id.* at 717.

245 *Id.*

246 *Id.*

247 *Id.* Additionally, the Court reasoned that the referring physician could perform some of the Act's requirements, such as obtaining the woman's informed consent and determining gestational age. *Id.* The court opined that the district court had overlooked these facts in making its determination that the state had no interest in clarifying any information the referring physician might provide. *Id.*

248 *Id.* at 717-18. Section 3207(b) provided:

> 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 following 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 contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.
>
> The information contained in those reports which are filed pursuant to this subsection by facilities which receive State appropriated funds during the 12-calendar-month period immediately preceding a request to inspect a copy of such reports shall be deemed public information. Reports filed by facilities which do not receive State appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be

The appeals panel refuted the district court's determination that the provision would unduly burden the abortion right by increasing the amount of protests occurring in front of the abortion clinics and eventually reducing the number of abortion providers.[249] The court of appeals acknowledged the substantial amount of protests occurring in front of abortion clinics, but concluded that the district court had failed to demonstrate a clear nexus between the reporting requirement and either increased private harassment or the existence of an undue burden.[250] The court also rejected the argument that this provision placed an "unconstitutional condition on the receipt of public funds."[251] The court stated that such a claim required the implication of a constitutional right warranting strict scrutiny review.[252] The court concluded, however, that no unconstitutional condition could be found because strict scrutiny was not invoked in the absence of an undue burden.[253] The court thus determined this provision to be constitutionally permissible, recognizing that Pennsylvania had a legitimate state interest in informing its taxpayers how the state allocated their funds.[254]

In a separate opinion, Judge Alito dissented from the court's invalidation of the spousal notification requirement.[255] Judge Alito joined in the remainder of the court's opinion, except the court's interpretation that a two-parent notification requirement without a judicial bypass was subject to strict scrutiny because it imposed an undue burden.[256]

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assessed by the department a fine of $500 for each day it is in violation hereof.

18 PA. CONS. STAT. ANN. § 3207(b) (1983 & Supp. 1991)).

249 *Casey*, 947 F.2d at 717.

250 *Id.* at 718 (citing American College of Obstetricians v. Thornburgh, 737 F.2d 283, 297-98 (3d Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986)). The court noted that it first enunciated this standard in *Thornburgh* in which virtually the same reporting requirement was considered. *Id.* The court noted that most of the clinics encountered protests without the public disclosure requirement, and that the clinics were publicly listed and advertised in the phone book. *Id.*

251 *Id.* The court explained that the doctrine of unconstitutional conditions prohibits the government from conditioning the grant of a governmental benefit upon the surrender of a constitutional right. *Id.* at 718-19 (citing Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989)).

252 *Id.* at 719.

253 *Id.*

254 *Id.* at 718. The court also noted that this was consistent with Pennsylvania's practice of making records of public expenditures and disbursements publicly available. *Id.*

255 *Id.*

256 *Id.* at 719 (Alito, J., concurring in part and dissenting in part).

Judge Alito agreed with the majority's conclusion that *Webster* and *Hodgson* had changed the controlling standard in abortion cases to that of Justice O'Connor's undue burden test.[257] The judge disagreed with the majority only concerning which prong of the test should be applied.[258] Judge Alito posited that no undue burden existed, and therefore suggested that the appellate court should have applied the rational-relation test to the spousal notification provision.[259]

Judge Alito asserted that Justice O'Connor had defined what constituted an undue burden in numerous abortion decisions.[260] The judge noted that Justice O'Connor often held that no undue burden was created by parental notification statutes, even when two-parent notice with a judicial bypass option was mandated.[261] Judge Alito remarked that Justice O'Connor made these conclusions despite evidence that these provisions either would substantially inhibit many minors from choosing abortions, or would result in many of the same harms that the majority attributed to the Pennsylvania statute's spousal notice provision.[262] The judge also found that Justice O'Connor declined to find an undue burden imposed by regulations increasing or even doubling the cost of abortions.[263] Surveying Justice O'Connor's abortion opinions,

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257 *Id.* at 720 (Alito, J., concurring in part, dissenting in part).

258 *Id.*

259 *Id.*

260 *Id.* According to Judge Alito, Justice O'Connor consistently concluded that an undue burden resulted from "absolute obstacles or severe limitations on the abortion decision," or when another person had an absolute veto power over the woman's abortion decision. *Id.* (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting)). The judge emphasized, however, that Justice O'Connor's opinions cautioned that an undue burden was *not* created when a regulation merely *inhibited* abortions in some way or when a regulation caused only *some* women to be less likely to choose an abortion. *Id.* at 720-21 (Alito, J., concurring in part and dissenting in part) (citing Thornburgh v. American College of Obstetricians, 476 U.S. 747, 829 (1986)).

261 *Id.* at 721 (Alito, J., concurring in part and dissenting in part) (citing Hodgson v. Minnesota, 110 S. Ct. 2926, 2950-51 (1990); H.L. v. Matheson, 450 U.S. 398 (1981)).

262 *Id.* In *Matheson*, Justice Marshall, dissenting, argued that the statute requiring parental notice for minors prior to any abortion could result in "physical or emotional abuse, withdrawal of financial support or actual obstruction of the abortion decision." H.L. v. Matheson, 450 U.S. 398, 398 (1981) (Marshall, J., dissenting). These are similar consequences to those that the majority concluded would result from Pennsylvania's spousal notice provision. *Casey*, 947 F.2d at 707-12. The majority found that the spousal notice requirement would be likely to cause a husband to use physical or economic force against the wife, psychological coercion or other means to prevent his wife from obtaining an abortion. *Id.* at 712.

263 *Casey*, 947 F.2d at 721. (Alito, J., concurring in part and dissenting in part).

Judge Alito acknowledged that the Justice never found an undue burden in regulations that inhibited only marginally a woman's abortion decision.[264] Thus, the dissent concluded that to impose an undue burden, a regulation would have to severely and broadly limit abortions.[265]

Having interpreted Justice O'Connor's undue burden standard, Judge Alito declared that the evidence failed to show that the spousal notification requirement in section 3209 imposed an undue burden.[266] The judge found no broad inhibiting effect resulting from this provision.[267] Judge Alito reasoned that because the record indicated that section 3209 was likely only to inhibit abortions to some degree, and did not demonstrate that the consequences would be greater than those recognized by

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264 *Id.*

265 *Id.*

266 *Id.* at 721-22 (Alito, J., concurring in part and dissenting in part). Judge Alito referred to Justice O'Connor's opinion in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). *Id.* at 722 n.2 (Alito, J., concurring in part and dissenting in part). Judge Alito explained Justice O'Connor had emphasized in *Thornburgh* that "a party challenging the constitutionality of a statute must bear the burden of proving that the law imposes an undue burden." *Id.* (citing *Thornburgh*, 476 U.S. at 827). The judge stated the plaintiffs failed to meet that burden of proof. *Id.* at 722 (Alito, J., concurring in part and dissenting in part).

267 *Id.* at 722 (Alito, J., concurring in part and dissenting in part). Judge Alito noted that the district court posited that because most married women voluntarily notified their husbands before seeking abortions and the majority of abortions are sought by *unmarried* women, section 3209 would affect few women. *Id.* (concurring in part and dissenting in part) (citing Planned Parenthood v. Casey, 744 F. Supp. 1323, 1360 (E.D. Pa. 1990)). The judge continued that this number of adversely affected women would be reduced by application of the four exceptions. The spousal notice provision excepted a woman from notifying her husband if: (1) the woman's husband was not the father of the child; (2) her husband could not be located after she had made a diligent effort to find him; (3) the pregnancy resulted from sexual abuse from the husband, which had been reported to a law-enforcement agency; or (4) the woman feared that notifying her husband would be likely to cause her physical abuse by her husband or by another. *Id.* at 709-10 (Alito, J., concurring in part and dissenting in part). Moreover, Judge Alito suggested that the affected group could be narrowed further by assuming that some women would overcome their initial disinclination to notify their husbands. *Id.* at 722-23 (Alito, J., concurring in part and dissenting in part). The judge noted, however, that the plaintiffs had ignored these possibilities and failed to produce evidence showing how many women would actually be harmed by section 3209. *Id.* The dissent also noted that this provision would not give a husband "veto power" over his wife's abortion decision. *Id.* This point was in accord with the majority's holding. *Id.* at 710. The majority found, however, that an undue burden was created by this provision because it would severely limit the woman's abortion decision. *Id.* at 713. Thus, the majority determined that this notification requirement, while not giving the husband a veto power, could permit the husband to prevent his wife's abortion in other ways, such as by psychological coercion or by threatening to dissolve the marriage. *Id.* at 710-12.

provisions that Justice O'Connor had validated, section 3209 did not create an undue burden.[268] The judge recognized the potentially grave consequences of section 3209, but cautioned that the court should defer to the legislature in addressing these consequences.[269]

Finding no undue burden, Judge Alito reasoned that section 3209 need only be shown to further a legitimate state interest, under the rational-relation test.[270] The judge agreed with the majority that the state had a legitimate interest in protecting the husband's interest in the fetus.[271] After recognizing the state's

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268 *Id.* at 723 (Alito, J., concurring in part and dissenting in part).

269 *Id.* at 723-24. (Alito, J., concurring in part and dissenting in part). Judge Alito asserted that the legislature had anticipated such consequences and had attempted to remedy them by including the four exceptions in the section. *Id.* at 724 (Alito, J., concurring in part and dissenting in part).

Noting Justice O'Connor's opinion in *Hodgson*, the judge rejected the majority's interpretation that Justice O'Connor ruled that the two-parent notification statute presented an undue burden with no compelling state interest. *Id.* Instead, the judge argued that Justice O'Connor held the provision unconstitutional for a lack of a reasonably related and legitimate state interest. *Id.* Acknowledging that Justice O'Connor had joined in most of Justice Stevens's lead opinion in *Hodgson*, Judge Alito analyzed Justice Stevens's opinion when interpreting Justice O'Connor's decision. *Id.* Judge Alito pointed out that Justice Stevens did not apply or even discuss strict scrutiny. *Id.* Instead, the judge asserted, Justice Stevens had used the lenient rational relation test in finding an undue burden. *Id.*; *see* Hodgson v. Minnesota, 110 S. Ct. 2926, 2937 (1990). Moreover, Judge Alito noted that part VII of Justice Stevens's opinion was dedicated to an explanation of the provision's failure under the rational relation test. *Casey*, 947 F.2d at 724 (Alito, J., concurring in part and dissenting in part). Judge Alito found this to be clear support for the fact that Justice Stevens did not employ strict scrutiny in his analysis. *Id.*

Judge Alito opined that Justice O'Connor employed the same level of scrutiny in *Hodgson*. *Id.* Although the judge recognized that Justice O'Connor had not joined in the portion of Justice Stevens's discussion of the applicable standard, Judge Alito analyzed Justice O'Connor's language and concluded that the Justice agreed with Justice Stevens's use of the rational relation test. *Id.* Judge Alito quoted a portion of Justice O'Connor's opinion, which stated: "I agree with Justice Stevens' statement that the statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests." *Id.* (quoting Hodgson v. Minnesota, 110 S. Ct. 2926, 2949-50 (1990) (O'Connor, J., concurring).

Additionally, the judge emphasized that Justice O'Connor joined part VII of Justice Stevens's opinion discussing the statute's failure to satisfy a legitimate state interest. *Id.* at 724-25 (Alito, J., concurring in part and dissenting in part). Judge Alito therefore postulated that Justice O'Connor would not have joined in that portion of the opinion if the Justice favored a different standard. *Id.* at 725 (Alito, J., concurring in part and dissenting in part). Thus, Judge Alito concluded that Justice O'Connor's opinion could not be read to mean that she found an undue burden under strict scrutiny analysis. *Id.*

270 *Id.*

271 *Id.* (citing *id.* at 715-16). The majority had admitted that this interest was legitimate but not compelling, the level necessary to satisfy the strict scrutiny test they applied. *Id.* Judge Alito cited Supreme Court cases which had found a funda-

legitimate interest, Judge Alito asserted that the abortion issue, as other matters regarding domestic relations, fell within the "virtually exclusive province of the States."[272] Therefore, the judge considered whether the provision was rationally related to that interest.[273] Judge Alito instructed that a state statute must not be invalidated because of a court's belief that it is "inartfully drawn,"[274] or that it produces some adverse consequences.[275] Rather, the judge stressed that only a clear showing of statutory arbitrariness and irrationality could overcome the provision's "presumption of rationality."[276]

The judge concluded that the provision was rationally related to the state's interest because some married women might seek an abortion without notifying their husbands, therefore infringing the husband's rights in the fetus.[277] Accordingly, Judge Alito declared that because the plaintiffs had shown nothing more than mere disagreement on the wisdom of this statute, and had failed to demonstrate the irrationality or arbitrariness of the statute, the court could not overrule the legislature.[278]

The Third Circuit's majority opinion proved to be an accurate barometer of the case's final resolution by the Supreme Court.[279] In a joint opinion, the Court affirmed the Third Circuit's ruling on every challenged regulation, while espousing and crystallizing the "undue burden" standard as the relevant test in abortion cases.[280] The Court also chose this opportunity to reaffirm the central holding of *Roe v. Wade*.[281] In the Court's divisive review of *Casey*, five Justices expressed varying rationales for their decision to reaffirm,[282] while the remaining four Justices un-

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mental interest in protecting the man's right to father a child and in the welfare of a child that a father will assist in raising. *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 123 (1989); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1969); Stanley v. Illinois, 405 U.S. 645 (1972)). Based on these decisions, the judge reasoned "that a husband has a 'legitimate' interest in the welfare of a fetus he has conceived with his wife." *Id.* at 725-26.

272 *Id.* at 726. (Alito, J., concurring in part and dissenting in part) (quoting U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 178 (1981)).

273 *Id.*

274 *Id.* (quoting U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 175 (1981)).

275 *Id.*

276 *Id.*

277 *Id.*

278 *Id.* at 726-27 (Alito, J., concurring in part and dissenting in part).

279 *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

280 *Id.* at 2819, 2821-33.

281 *Id.* at 2804.

282 *See id.* at 2803, 2838, 2843.

equivocally called for *Roe*'s overturn.[283]

Justices O'Connor, Kennedy and Souter, authoring the joint opinion, began their analysis with a dictum-filled defense of *Roe*.[284] The Justices next recognized three sections as comprising *Roe*'s essential holding.[285] First, the Court recognized a woman's right to an abortion at any time before fetal viability without undue interference from the government.[286] Second, the Justices confirmed the states' ability to restrict abortions once the fetus has reached viability.[287] Finally, Justices O'Connor, Kennedy, and Souter maintained that the state had an interest in protecting the life of the mother and the fetus throughout pregnancy.[288]

Having delineated *Roe*'s central framework, the Court justified *Roe*'s reaffirmance on the basis of the Fourteenth Amendment's substantive due process component.[289] The Justices observed the Court's history of protecting certain liberty rights from governmental intrusion, regardless of whether those rights are enumerated in the Constitution itself.[290] Acknowledging the

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283 *See id.* at 2855, 2873. Chief Justice Rehnquist and Justices White, Scalia and Thomas advocated reversing *Roe*. *Id.*

284 *Id.* at 2804. Opining "[l]iberty finds no refuge in a jurisprudence of doubt," the Justices seemed to admonish the federal government by noting that *Casey* was the sixth case in the past decade in which the United States had submitted an *amicus curiae* brief urging *Roe's* overturn. *Id.* at 2803. The Justices asserted that *Roe's* progeny had clouded the meaning and scope of the case's holding, therefore requiring a reaffirmance and restatement of that decision. *Id.* at 2804.

285 *Id.*

286 *Id.* The Court opined that the state interest in the fetus was not strong enough before viability to allow the state to either proscribe abortion or impose "substantial obstacle[s]" to impede a woman's choice. *Id.* Later in the opinion the Court used this "substantial obstacle" language as a cornerstone of its "undue burden" standard. *Id.* at 2820.

287 *Id.* at 2804. The Court pointed out that such restrictions would have to contain exceptions for women whose health would be jeopardized if forced to carry the fetus to term. *Id.*

288 *Id.*

289 *Id.* The Fourteenth Amendment provides that states cannot "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, Sec. 1.

290 *Casey*, 112 S. Ct. at 2805. The Court cited Turner v. Safley, 482 U.S. 78, 95 (1987) (upholding prisoners' constitutional right to marry); Carey v. Population Services International, 431 U.S. 678, 684-86 (1977) (upholding contraception as a constitutionally protected right); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is protected by the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (the right to marital privacy under the Fourteenth Amendment protects the use of contraception); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (upholding parents' liberty to direct the education and raising of their children). *Casey*, 112 S. Ct. at 2805.

difficulty of determining what rights should be deemed fundamental, the Court decided that reasoned judgment should suffice.[291] Thus, by noting the constitutional protections given to certain personal decisions creating a realm of privacy,[292] the Court explained that *Roe* fell within the line of cases making the use of contraception a fundamental right.[293]

Justices O'Connor, Kennedy and Souter buttressed the reaffirmance of *Roe* with a detailed dissertation on the importance of *stare decisis*.[294] According to the Justices, when deciding whether to overrule a past holding, the Court must consider a number of questions concerning the benefits and detriments of abandoning past precedent.[295] The Court considered several issues, including whether *Roe* had proven unworkable, whether its holding had been relied on to the point where overruling it would inflict hardship on people's lives, whether legal principles had advanced so as to leave *Roe* doctrinally incorrect, and whether the case's factual underpinnings had drastically changed.[296]

The Justices succinctly stated that *Roe* had not proven unworkable because the holding represented a mere limitation on a state's power to regulate abortion.[297] While conceding that *Roe* had required, and would continue to require, judicial review to determine if a state regulation exceeded *Roe's* constraints, the Court reiterated that such review was within the purview of judicial competence.[298]

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291 *Id.* at 2806. The Justices said that "reasoned judgment" did not allow the judiciary to use subjective opinions, but called upon Justices to reasonably apply the law. *Id.* Justice Scalia, however, argued that the joint opinion was based on "personal predilection," not reasoned judgment. *Id.* at 2876 (Scalia, J., concurring in part and dissenting in part).

292 *Id.* at 2807. *See e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing a right of privacy in the area of reproductive planning which cannot be unjustifiably intruded upon by the government); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing a zone of privacy surrounding the family which the government cannot infringe upon).

293 *Casey*, 112 S. Ct. at 2807-08. For cases upholding contraception as a fundamental right, see Carey v. Population Services International, 431 U.S. 678 (1977) (right to contraception protected by Fourteenth Amendment); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending right to use contraception to unmarried individuals); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception protected by right to marital privacy).

294 *Casey*, 112 S. Ct. at 2808. *Stare decisis* is defined: "To abide by, or adhere to, decided cases." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990).

295 *Casey*, 112 S. Ct. at 2808.

296 *Id.* at 2809 (citations omitted).

297 *Id.* (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)).

298 *Id.*

The Court next maintained that members of the general public had organized their lives and intimate relationships for nearly two decades in reliance on *Roe*'s protection of abortion.[299] Equating a woman's ability to make reproductive decisions with the ability to be an equal participant in society, the Justices declared that overruling *Roe* would detrimentally affect society.[300]

The Court continued its *stare decisis* analysis by asserting that no changes had been wrought to the legal principles supporting *Roe*'s main doctrine.[301] The Justices posited that the *Roe* Court had placed its decision in the line of cases involving the family, procreation, and intimate relationships.[302] Because the decisions in this area had not been disturbed, the Justices determined, the legal principles upon which *Roe* was premised had not undergone a metamorphosis.[303] Similarly, the Court observed that cases protecting personal autonomy and bodily integrity, which might be argued as the basis of *Roe*, had not been questioned.[304] Finally, the Justices stated that if *Roe* was to be considered *sui generis*,[305] then the Court's continued reaffirmance of *Roe* evidenced the holding's correctness.[306]

Addressing the question of whether the factual underpinnings of *Roe* had changed enough to render the decision unjusti-

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299 *Id.* The Court acknowledged that this reliance could not be proven, but stated that the "certain cost" of overruling *Roe* could not be measured either. *Id.* Chief Justice Rehnquist, however, noted that the record contained no proof of any reliance on *Roe* that could not be rectified by reproductive planning. *Id.* at 2862 (Rehnquist, C.J., concurring in part and dissenting in part). *See infra* notes 385-425 and accompanying text for discussion of the Chief Justice's opinion.

300 *Casey*, 112 S. Ct. at 2862.

301 *Id.* at 2810.

302 *Id.* This line of cases includes: Carey v. Population Services International, 431 U.S. 678 (1977) (protecting the use of contraception); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (subjecting regulations regarding "family living arrangements" to careful examination); Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the use of contraception).

303 *Casey*, 112 S. Ct. at 2810.

304 *Id.* (citing Riggins v. Nevada, 112 S. Ct. 1810 (1992); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990); Washington v. Harper, 494 U.S. 210 (1990); Rochin v. California, 342 U.S. 165 (1952); Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

305 *Sui generis* is defined: "Of its own kind or class; i.e. the *only one* of its own kind; peculiar." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

306 *Casey*, 112 S. Ct. at 2810. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (*Roe* expressly affirmed by five Justices); Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416 (1983) (*Roe* expressly affirmed by six Justices). Justice O'Connor also noted the ambiguous affirmance of *Roe* in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (majority of Justices either expressly affirmed or refused to discuss the constitutionality of *Roe*).

fiable, the Court acknowledged that changes had occurred, but not to the extent of weakening the *Roe* mandate.[307] The Court noted that maternal health care and neonatal care advances allowed for safer abortions and earlier fetal viability than in 1973.[308] The opinion rationalized that these factual changes merely affected the time frame in which abortions could be performed.[309] Therefore, the Justices stressed, *Roe's* viability standard remained unchanged.[310]

Recognizing the heated national debate surrounding the abortion issue, the Justices next compared the decision to uphold *Roe* with two similarly controversial cases.[311] First, the Court focused on *Lochner v. New York*,[312] which declared contractual freedom to be a fundamental right protected by the Fourteenth Amendment.[313] The Justices noted that *Lochner* was subsequently overruled by *West Coast Hotel Co. v. Parrish*[314] because *Lochner's* theory of laissez faire economics hindered governmental attempts to improve human welfare.[315] Second, the Court considered *Plessy v. Ferguson*,[316] which upheld racial segregation as constitutionally permissible.[317] The Justices observed that *Plessy* was overruled by *Brown v. Board of Education*[318] because of advances in the social sciences proving that segregation had the ef-

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307 *Casey*, 112 S. Ct. at 2811-12.

308 *Id.* at 2811. The Court pointed out that fetal viability had occurred at approximately twenty-eight weeks in 1973 when *Roe* was decided, and nearly twenty years later was in the twenty-three to twenty-four week range. *Id.*

309 *Id.*

310 *Id.* at 2811-12.

311 *Id.* at 2812.

312 198 U.S. 45 (1905).

313 *Casey*, 112 S. Ct. at 2812. In *Lochner*, the Court struck down a New York law limiting the number of hours a bakery employee could work per week. *Lochner*, 198 U.S. at 64. The Court ruled that the employee's liberty to contract overrode the State's health related goals. *Id.* at 57-58. The majority disregarded ample evidence that long hours directly impacted on employee's health. *Id.* at 70-72. (Harlan, J., dissenting).

314 300 U.S. 379 (1937).

315 *Casey*, 112 S. Ct. at 2812. In *West Coast*, the Court upheld minimum wage requirements for women as a legitimate means of improving worker's economic bargaining power. *West Coast*, 300 U.S. at 400. The *West Coast* Court implied that *Lochner's* view of contractual liberty failed to protect workers from oppressive conditions created by their weak bargaining position. *Id.*

316 163 U.S. 537 (1896).

317 *Casey*, 112 S. Ct. at 2813. In *Plessy*, the Court held that racial segregation did not violate the Equal Protection Clause. *Plessy*, 163 U.S. at 551-52. The Court rejected arguments that segregation had detrimental psychological effects on Blacks. *Id.* at 551.

318 347 U.S. 483 (1954).

fect of branding minority groups as inferior.[319]

According to Justices O'Connor, Kennedy and Souter, the decisions in *West Coast* and *Brown* were based on new understandings of previously misinterpreted facts.[320] The Justices emphasized that these changed circumstances made the *West Coast* and *Brown* decisions understandable to the general public and, therefore, defensible.[321] Reasserting that neither the factual underpinnings nor the legal justification of *Roe* had been similarly transformed, the Court concluded that *Roe*'s reversal would merely be the result of doctrinal preferences rather than the application of constitutional law principles.[322] Such a result, the Justices concluded, would strike a serious blow to the Court's legitimacy because the public would perceive the decision as grounded in political considerations rather than judicial review.[323]

The Justices next considered the appropriate standard for determining the constitutionality of state abortion restrictions.[324] The Justices rejected *Roe*'s rigid trimester framework as undervaluing the state interest in potential life from the moment of conception.[325] Particularly, the Court rejected cases that interpreted *Roe* as requiring strict scrutiny of all state regulations on first trimester abortions.[326] Instead, the Justices opined, a woman's right to have an abortion does not prohibit the state from

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319 *Casey*, 112 S. Ct. at 2813. In *Brown*, the Court ruled that racially segregated schools were violative of the Equal Protection Clause. *Brown*, 347 U.S. at 495. The Court relied on data which proved that the psychological effects of segregation made the practice inherently unequal. *Id.* at 494-95.

320 *Casey*, 112 S. Ct. at 2813. *See supra* notes 315 and 319 for discussion of these misinterpreted facts.

321 *Casey*, 112 S. Ct. at 2813.

322 *Id.* at 2813-14.

323 *Id.* at 2814. The Justices asserted:

> [T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

Id.

324 *Id.* at 2816.

325 *Id.* at 2817. The Court noted that the *Roe* opinion expressly established the State's "important and legitimate interest in protecting the potentiality of human life." *Id.* (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).

326 *Id.* Strict scrutiny review requires the state law to be narrowly drawn to further a compelling interest. *Id.* The Court cited Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983), as an example of a case that wrongly applied strict scrutiny analysis to a state abortion decison. *Casey*, 112 S. Ct. at 2817.

enacting legislation aimed at informing her decision.[327] The mere fact that such legislation could make the abortion right more difficult to exercise, the Justices continued, did not necessarily render it constitutionally infirm.[328]

Against this backdrop, the Court articulated the undue burden analysis as the proper approach in abortion cases.[329] The Justices declared that the undue burden standard compelled the Court to uphold the pre-viability abortion restrictions unless the restrictions unduly burdened a woman's decision to terminate a pregnancy.[330] The Justices then defined an undue burden as a "substantial obstacle" to a woman's right to choose, which either intentionally or effectively alters her ability to make the decision.[331]

The Court next focused its attention on the undue burden standard's application to each of the state regulations at issue in *Casey*.[332] First, the Justices upheld the statute's medical emergency definition.[333] The Justices ruled that the definition did not work an undue burden because it adequately encompassed the medical emergency exception mandated by *Roe*.[334]

Justices O'Connor, Kennedy and Souter next considered and upheld the statute's informed consent section.[335] The Court found a legitimate state interest in ensuring that a woman's abor-

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For a discussion of *Akron*'s application of strict scrutiny, see *supra* notes 89-90 and accompanying text.

327 *Casey*, 112 S. Ct. at 2818.

328 *Id.* To support this view, the Court analogized abortion restrictions to constitutional ballot access limitations that hindered the fundamental right to vote. *Id. See, e.g.*, Anderson v. Celebreezze, 460 U.S. 780, 788, 788 n.9 (1983) (citing cases which upheld reasonable, nondiscriminatory restrictions such as ballot access and candidate eligibility limitations).

329 *Casey*, 112 S. Ct. at 2819.

330 *Id.* (quoting Maher v. Roe, 432 U.S. 464, 473-74 (1977)).

331 *Id.* at 2820. The Justices clarified this standard by stating that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Id.* Justice Scalia, however, admonished the joint opinion by stating that "[d]efining an 'undue burden' as an 'undue hinderance' (or a 'substantial obstacle') hardly 'clarifies' the test." *Id.* at 2877-78 (Scalia, J., concurring and dissenting). The Justice opined that the undue burden standard was in effect "standardless." *Id.* at 2878.

332 *Id.* at 2821-22.

333 *Id.*; *see supra* note 189 for text of the medical emergency definition. The Court accepted the court of appeals's broad construction of the definition which included all conditions that could pose a substantial health risk to the mother. *Id.*

334 *Id. See supra* note 190 for the court of appeals analysis of the necessity of such exceptions.

335 *Casey*, 112 S. Ct. at 2821-22; *see supra* note 197 for text of the informed consent section.

tion choice was informed, and decided that providing women with truthful, straightforward information relating to the abortion procedure was proper.[336] The Justices further asserted there was no evidence that requiring a doctor to provide women with specific information either compromised the doctor/patient relationship or erected a substantial obstacle to the woman's abortion decision.[337]

The Court experienced difficulty in justifying its decision to uphold the statute's mandatory twenty-four hour waiting period.[338] Although the Justices found a twenty-four hour waiting period rationally aimed at allowing women to make a well-reasoned decision, the Court conceded that the restriction could lead to much longer delays and higher costs for some women.[339] Nevertheless, the Justices concluded that the burden imposed by the waiting period was not a substantial obstacle and did not increase health risks.[340]

The only section of the Pennsylvania abortion law that the Court invalidated as an undue burden was the spousal notification provision.[341] The Justices examined the district court's detailed findings, which discussed the prevalence of domestic violence in the United States.[342] Noting that the district court specifically found a relationship between the notification of pregnancy and subsequent spousal abuse in some marriages, the Court determined that many women would choose to forego an

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336 *Casey*, 112 S. Ct. at 2822-23. The Court overruled intimations in Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444 (1983) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 762 (1986) that forcing doctors to provide women with "truthful, nonmisleading information about the nature of the [abortion] procedure, the attendant health risks and those of childbirth, and the probable gestational age of the fetus" was unconstitutional. *Id.* at 2833.

337 *Id.*

338 *Id.* at 2825.

339 *Id.*; *see supra* note 207 for discussion of possible ramifications for the twenty-four hour waiting period requirement.

340 *Casey*, 112 S. Ct. at 2825-26. The Court noted that the district court had not utilized the undue burden standard to determine if the waiting period acted as a substantial obstacle. *Id.* Therefore, the Court continued, the record was not sufficient to conclude that the waiting period unduly burdened a woman's abortion choice. *Id.* at 2826.

341 *Id.* at 2830. *See supra* note 219 for the text of the spousal notification section.

342 *Casey*, 112 S. Ct. at 2827. The district court record included findings that domestic violence occurred in two-million United States families, women were unlikely to report spousal abuse for fear of retaliatory abuse, and many abused women did not consider themselves to be battered or victims of sexual assaults by their husbands. *Id.*

abortion rather than choose to comply with spousal notification.[343] Such a situation, the Justices continued, would furnish many husbands with an effective power to veto the wife's decision.[344] Additionally, the Court refused to analogize spousal notification to constitutional parental notice laws because, the Justices opined, a husband could not be given the same control over his wife as a parent has over his or her child.[345]

Although the Court struck down the spousal notification requirement, the Justices upheld the section requiring unemancipated minors to receive parental consent for an abortion.[346] The Justices adhered to precedent by holding that the section's judicial bypass procedure made it constitutional.[347]

Finally, the Court validated all of the statute's recordkeeping and reporting requirements, except the spousal notification reporting requirement.[348] In so doing, the Justices noted a strong state interest in health care which would be furthered by the compilation of information required by the provision.[349] Furthermore, the Court declared, the negligible increase in abortion costs resulting from the requirements did not rise to the level of an unduly burdensome obstacle.[350]

Justice Stevens, concurring in part and dissenting in part, agreed with the joint opinion's reaffirmation of *Roe*.[351] The Justice praised the Court's reliance on *stare decisis* and echoed the contention that overruling *Roe* would have great societal costs.[352]

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343 *Id.* at 2828-29.

344 *Id.* at 2831.

345 *Id.* at 2830.

346 *Id.* at 2832; *see supra* note 211 for the text of the parental consent section.

347 *Id. See, e.g.*, Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990); Hodgson v. Minnesota, 110 S. Ct. 2926 (1990); Akron v. Akron Center for Reproductive Health Services, 462 U.S. 416, 440 (1983); Bellotti v. Baird, 443 U.S. 622 (1979).

348 *Casey*, 112 S. Ct. at 2832. *See supra* note 237 for the text of the recordkeeping and reporting requirements.

349 *Casey*, 112 S. Ct. at 2832-33. The Court reaffirmed that recordkeeping and reporting requirements "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* at 2832 (quoting Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 80 (1975)).

350 *Id.* at 2833 (Stevens, J., concurring in part and dissenting in part). The Court asserted that there was a point where increased cost could constitute a substantial obstacle. *Id.*

351 *Id.* at 2838 (Stevens, J., concurring in part and dissenting in part). Justice Stevens emphasized that "[t]he portions of the Court's opinion that I have joined are more important than those with which I disagree." *Id.*

352 *Id.*

Furthermore, the Justice concurred with the reiteration of *Roe*'s holding that post-viability abortions could be heavily regulated and the Court's implicit reaffirmation that the mother's life and health takes priority over prenatal life.[353]

Justice Stevens, however, disagreed with the court's dismantling of the trimester framework crafted in *Roe*.[354] In particular, Justice Stevens implied that the Court had, in fact, overvalued the state interest in protecting the unborn.[355] The Justice reached this conclusion by portraying the state interest as grounded in "humanitarian and pragmatic concerns," not in the Constitution.[356] Conversely, Justice Stevens posited that the woman's liberty interest in abortion was protected by the Constitution through *Roe*.[357] Thus, the Justice concluded that the state could display a preference for childbirth over abortion but could not use persuasive tactics to prejudice the woman's choice.[358]

Utilizing this framework, the Justice analyzed the Pennsylvania Act's informed consent section.[359] Justice Stevens would have invalidated the requirements forcing a woman's physician to provide specific information regarding abortion alternatives, the availability of medical assistance, and the father's responsibility to provide child support.[360] The Justice opined that these requirements were designed to dissuade women from having an

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353 *Id.* at 2838-39 (Stevens, J., concurring in part and dissenting in part).

354 *Id.* at 2839 (Stevens, J., concurring in part and dissenting in part). *See supra* note 325 and accompanying text for the court's reasoning for abandoning *Roe*'s trimester framework.

355 *Casey*, 112 S. Ct. at 2839 (Stevens, J., concurring in part and dissenting in part).

356 *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part). Justice Stevens asserted that these concerns were based on many citizens' moral view that abortion is unacceptable and offensive. *Id.* The Justice continued, stating that "[t]he State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives include the occasional Mozart or Curie." *Id.*

357 *Id.*

358 *Id.* The Justice opined that the State could display its preference for childbirth through funding, promoting family values, and erecting programs to provide abortion alternatives. *Id.* at 2840-41 (Stevens, J., concurring in part and dissenting in part). Justice Stevens cited Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 760 (1986) and Akron v. Akron Center for Reproductive Health Services, 462 U.S. 416, 442-43 (1983), as examples of cases where information requirements designed to influence the abortion choice were invalidated. *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part).

359 *Id.*; *see supra* note 197 for the text of 18 PA. CONS. STAT. ANN. § 3205 (1983 & Supp. 1991) (the informed consent section).

360 *Casey*, 112 S. Ct. at 2840.

abortion.[361] Justice Stevens voted to uphold the provision requiring doctors to provide information regarding the medical risks of an abortion and carrying a baby to term as a neutral requirement similar to other medical procedures.[362] Finally, the Justice argued for the invalidation of the twenty-four hour waiting period because the Justice found this provision based on erroneous assumptions regarding a woman's decisionmaking capabilities.[363]

Justice Stevens next applied the joint opinion's undue burden standard to the Pennsylvania statute and again determined that most of the informed consent section should have been struck down.[364] Depicting an undue burden as one that is too severe or that lacks any rational justification, the Justice resolved that the 24-hour waiting period was both severe and irrational.[365] Similarly, Justice Stevens found no justification for the other informed consent provisions that he previously invalidated.[366] Justice Stevens concluded by voting to strike down the parental consent provision, and by concurring with the remainder of the joint opinion.[367]

Justice Blackmun, concurring in part and dissenting in part, praised the joint opinion's reaffirmation of *Roe* and defended the trimester framework.[368] The Justice began by stating that all *non de minimis* abortion restrictions should be subjected to strict judicial scrutiny.[369] Justice Blackmun continued by declaring that

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361 *Id.*

362 *Id.* In fact, Justice Stevens opined that such neutral requirements enhanced a woman's decision. *Id.* at 4819 (Stevens, J., concurring in part and dissenting in part).

363 *Id.* at 2841-42 (Stevens, J., concurring in part and dissenting in part). The Justice rejected the argument that the waiting period furthered the State interest in potential life, reasoning that all obstacles imposed by the State would be held valid if such an argument was accepted. *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part). Justice Stevens articulated, "[t]he State cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right." *Id.*

364 *Id.* at 2842-43 (Stevens, J., concurring in part and dissenting in part).

365 *Id.* at 2843 (Stevens, J., concurring in part and dissenting in part). The Justice reached this conclusion by relying on the district court's finding that the waiting period would cause long delays and increase costs for some women seeking an abortion. *Id.* Justice Stevens found no legitimate purpose for imposing such a restriction, reiterating that the restriction was based on erroneous assumptions about women's decision-making capabilities. *Id.*

366 *Id.*

367 *Id.* Justice Stevens did not articulate his reasoning for disagreeing with the informed consent section.

368 *Id.* at 2844, 2847-48 (Blackmun, J., concurring in part and dissenting in part).

369 *Id.* at 2849 (Blackmun, J., concurring in part and dissenting in part). Justice

Roe's trimester framework best satisfied strict scrutiny analysis.[370] The Justice restated *Roe*'s mandate that the state's interest in the fetus began at viability while its interest in the health of the mother began at the end of the first trimester.[371] Positing that the trimester framework's factual underpinnings had not been undermined, the Justice asserted that the trimester approach was less malleable than the joint opinion's undue burden standard.[372] Observing other cases adopting similar, nontextual methods for analyzing constitutional rights, Justice Blackmun rejected arguments that the trimester framework was infirm because it was not enumerated in the Constitution's text and because it resembled a code rather than constitutional doctrine.[373]

The Justice also countered the Court's assertion that *Roe* failed to value the state's interest in potential human life throughout a woman's pregnancy.[374] Recognizing the state's legitimate interest in the fetus from the moment of conception, Justice Blackmun submitted that only a compelling interest could pass strict scrutiny.[375] The Justice reiterated that viability marked the point at which the state's interest became compelling,[376] and agreed with Justice Stevens's view that the state could not attempt to persuade or coerce a woman's abortion decision.[377]

Applying strict scrutiny analysis, Justice Blackmun voted to

Blackmun asserted that the Court had reaffirmed fundamental rights of bodily integrity and personal privacy which had traditionally been subjected to strict scrutiny. *Id.*

370 *Id.*

371 *Id.* at 2847 (Blackmun, J., concurring in part and dissenting in part) (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

372 *Id.* at 2848 (Blackmun, J., concurring in part and dissenting in part).

373 *Id.* (citing New York Times v. Sullivan, 376 U.S. 254 (1964); Zorach v. Clauson, 343 U.S. 306 (1951)).

374 *Id.* at 2848 (Blackmun, J., concurring in part and dissenting in part); *see supra* note 325 and accompanying text for the Justices' reasoning for abandoning *Roe*'s trimester framework.

375 *Casey*, 112 S. Ct. at 2849 (Blackmun, J., concurring in part and dissenting in part).

376 *Id.* Justice Blackmun wrote:

> The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.

Id. (quoting Webster v. Reproductive Health Services, 492 U.S. 490, 553-54 (1989)).

377 *Id.*

strike down all of the statute's challenged provisions.[378] The Justice characterized the informed consent provisions as inflexible imperatives designed to discourage a woman's abortion choice.[379] Furthermore, the Justice accepted the district court finding that the burdens imposed by the twenty-four hour waiting period were not justified.[380] Similarly, Justice Blackmun said that the parental consent requirements were overly burdensome.[381] Finally, the Justice disagreed with the statute's reporting requirements because Justice Blackmun feared that physicians, knowing their names would appear on state reports, might refuse to refer women to abortion clinics.[382]

The Justice concluded the opinion with an unbridled attack on Chief Justice Rehnquist.[383] Justice Blackmun admonished the Chief Justice for failing to recognize a general right of privacy in the Constitution, and expressed concern that *Roe* could be overturned in the future.[384]

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378 *Id.* at 2850 (Blackmun, J., concurring in part and dissenting in part).

379 *Id.*; *see supra* note 197 for text of the informed consent section. Specifically, the Justice objected to the prohibition against counselors providing the mandated information, and opposed the information's content. *Id.*

380 *Id.* at 2851 (Blackmun, J., concurring in part and dissenting in part). *See supra* notes 18-28 and accompanying text for the district court's findings.

381 *Casey*, 112 S. Ct. at 2852 (Blackmun, J., concurring in part and dissenting in part). Relying on the district court's contention that the provision would require an in-person visit to the abortion facility by the parent, Justice Blackmun opined that such a requirement could lead to substantial delays for the minor seeking an abortion. *Id.*

382 *Id.* Justice Blackmun asserted that despite the confidentiality of such reports, many physicians might fear that they could be the victims of harassment for referring women to abortion clinics. *Id.* Furthermore, the Justice declared that Pennsylvania had not shown a sufficient reason for requiring the naming of physicians on state reports. *Id.*

383 *Id.* at 2853 (Blackmun, J., concurring in part and dissenting in part). The Justice wrote:

> THE CHIEF JUSTICE's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy.

Id.

384 *Id.* at 2854 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun closed the opinion by stating:

> In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.
>
> I am 83 years old. I cannot remain on this Court forever, and

Chief Justice Rehnquist, joined by Justices White, Scalia and Thomas, concurred in part and dissented in part, and called for Roe's overturn while attacking the joint opinion's undue burden standard.[385] Noting that *Casey* was the fourth consecutive abortion case in which the Court was unable to attain a majority,[386] the Chief Justice stated that the confusion and uncertainty spawned by the Court's abortion jurisprudence necessitated a reexamination of *Roe*.[387]

The Chief Justice began this reexamination, stating that the Court had deemed rights fundamental if they were necessary to ordered liberty[388] or were strongly rooted in the country's traditions.[389] According to Chief Justice Rehnquist, abortion failed both tests.[390] First, the Chief Justice refused to find an overall right of privacy arising out of cases protecting the right to marry, procreate, and use contraception.[391] The Chief Justice opined that the abortion question was unique because, unlike other privacy-related cases, abortion involved the destruction of potential human life.[392] Therefore, Chief Justice Rehnquist articulated, abortion was not an essential component of ordered liberty.[393]

Second, Chief Justice Rehnquist examined the history of abortion laws in the United States to determine if abortion was a

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> when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Id. at 2854-55 (Blackmun, J., concurring in part and dissenting in part).

385 *Id.* 2855 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice called the undue burden standard "an unjustified constitutional compromise, one which leaves the Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution." *Id.* at 2855-56 (Rehnquist, C.J., concurring in part and dissenting in part).

386 *Id.* at 2858 (Rehnquist, C.J., concurring in part and dissenting in part) (citing Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990); Webster v. Reproductive Health Services, 492 U.S. 490 (1989)).

387 *Id.* at 2858 (Rehnquist, C.J., concurring in part and dissenting in part).

388 *Id.* at 2858-59 (Rehnquist, C.J., concurring in part and dissenting in part) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

389 *Id.* at 2859 (Rehnquist, C.J., concurring in part and dissenting in part) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

390 *Id.*

391 *Id. See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (protection of right to use contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (protection of the right to marry); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (protection of right to procreate).

392 *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).

393 *Id.*

fundamental right rooted in the country's traditions.[394] Noting the prevalence of laws banning and restricting abortions at the time of the Fourteenth Amendment's ratification, and for many years before and thereafter, the Chief Justice reasoned that the right to an abortion was not rooted in the country's history.[395] Concluding that abortion was not a fundamental right, the Chief Justice stressed that creating fundamental rights not expressed in the Constitution's language or design compromised the Court's legitimacy.[396]

Chief Justice Rehnquist next questioned the Court's *stare decisis* analysis.[397] The Chief Justice found a paradox in the Court's reaffirmation of *Roe* and the discarding of the trimester approach upon which the case was based.[398] Terming the joint opinion a revision of *Roe* rather than a reaffirmation, Chief Justice Rehnquist charged Justices O'Connor, Kennedy, and Souter with misapplying *stare decisis* principles.[399] Specifically, the Chief Justice found unpersuasive the argument that *Roe*'s factual underpinnings had remained unchanged.[400] The Chief Justice argued that because *Roe*'s legal principles were unfounded, it was irrelevant that the decision's viability standard had not been transformed.[401] Similarly, Chief Justice Rehnquist attacked the joint

394 *Id.*

395 *Id.* Chief Justice Rehnquist noted that English common law had proscribed abortion after "quickening," and that twenty-eight of the forty-five states and territories in 1868, the year of the Fourteenth Amendment's adoption, had laws prohibiting or restricting abortions. *Id.* The Chief Justice further noted that twenty-one of those states still had the same abortion laws in effect when *Roe* was decided in 1973. *Id.*

396 *Id.* at 2860 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice buttressed this view by relying on Bowers v. Hardwick, 478 U.S. 186 (1986), which stated: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* (quoting *Bowers*, 478 U.S. at 194.).

397 *Id.* The Chief Justice chastised the joint opinion for relying on *stare decisis* rather than stating whether *Roe* had been correctly decided. *Id.* Chief Justice Rehnquist also charged the joint opinion with rejecting *Roe*'s finding of abortion as a fundamental right necessitating strict judicial scrutiny. *Id.*

398 *Id.*

399 *Id.* at 2860-61 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist stated that "authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact. 'Stare decisis is not . . . a universal, inexorable command,' especially in cases involving the interpretation of the Federal Constitution." *Id.* at 2861 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).

400 *Id.*

401 *Id.*

opinion's reliance argument, rationalizing that no reliance had been proven.[402]

The Chief Justice next stated that the Court's contention that *Roe* should be upheld to preserve the Court's legitimacy, was unfounded.[403] Expressing concern about Justices O'Connor, Kennedy, and Souter's decision to give highly controversial cases heightened precedential weight, Chief Justice Rehnquist questioned how the Court would determine whether a case was sufficiently controversial to receive this special protection.[404] Taken to its logical conclusion, the Chief Justice submitted, the joint opinion's *stare decisis* analysis would allow public perception to play a role in Court decisions, thus weakening the Court's legitimacy as an institution unmoved by external pressures.[405]

Chief Justice Rehnquist also rejected the Court's undue burden standard as lacking a constitutional basis.[406] Although disagreeing with *Roe*'s trimester framework, the Chief Justice opined that the trimester approach did, at least, adhere to the constitutional principle that fundamental rights must be strictly scrutinized.[407] Declaring that the undue burden standard did not

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402 *Id.* at 2862 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice attacked the joint opinion's assertion that *Roe* had made it possible for women to be equal participants in society, stating that women's economic and social advances had been the product of their own efforts and society's acceptance of them in new roles. *Id.* Furthermore, Chief Justice Rehnquist continued, reproductive planning could remedy any reliance by taking immediate action if *Roe* were overturned. *Id.* The Chief Justice did not expound, however, on what type of action could be taken. *Id.*

403 *Id.*

404 *Id.* at 2863 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist opined that the Court was not in a good position to determine how a particular issue is perceived by the country because the Court is supposed to ignore public opinion. *Id.*

405 *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice expressed consternation over the Court's use of Lochner v. New York, 198 U.S. 45 (1905) and Plessy v. Ferguson, 163 U.S. 537 (1896), as examples of why the Court should not overrule *Roe*. *Id.* at 2864 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist noted that by overruling *Lochner* and *Plessy*, the Court had increased its "stature." *Id.* Asserting that *Lochner* and *Plessy* were overruled because their legal principles were erroneous and not as the result of new understandings of previously misunderstood facts, the Chief Justice questioned why *Roe* should not, similarly, be overruled. *Id.* at 2864-65 (Rehnquist, C.J., concurring in part and dissenting in part). Furthermore the Chief Justice stated: "The Judicial Branch derives its legitimacy not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution." *Id.* at 2865 (Rehnquist, C.J., concurring in part and dissenting in part).

406 *Id.* at 2866 (Rehnquist, C.J., concurring in part and dissenting in part).

407 *Id.*

subject abortion regulations to strict scrutiny, the Chief Justice questioned the standard's application in this area.[408] Chief Justice Rehnquist also expressed that the undue burden standard would be arbitrary in its application, depending on courts' subjective views of what a substantial obstacle entailed.[409]

Stating that abortion regulations should be determined by the state legislatures, Chief Justice Rehnquist explained that the Court should recognize abortion as a liberty interest protected by the Fourteenth Amendment's Due Process Clause, rather than a fundamental right.[410] As a result, the Chief Justice continued, the Court should utilize a rational basis approach in testing abortion regulations.[411]

Beginning this rational basis analysis of the Pennsylvania statute, Chief Justice Rehnquist voted to uphold the provisions of the informed consent section.[412] Positing that ensuring an informed abortion decision and the preservation of unborn life were legitimate state interests, the Chief Justice ascertained that the required information was rationally related to these interests.[413] Chief Justice Rehnquist also upheld the section's twenty-four hour waiting period, characterizing it as a reasonable re-

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408 *Id.* Referring to the undue burden test Chief Justice Rehnquist stated: "It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result in the sort of 'simple limitation,' easily applied, which the joint opinion anticipates. In sum, it is a standard which is not built to last." *Id.*

409 *Id.* Chief Justice Rehnquist reinforced this theory by noting that the authors of the joint opinion and Justice Stevens, both applying the undue burden test, had reached different results with regard to the Pennsylvania statute's informed consent section. *Id. See supra* notes 335-37 and 364-66 and accompanying text for the joint opinion's and Justice Stevens's undue burden analysis of the informed consent requirements.

410 *Casey*, 112 S. Ct. at 2867. (Rehnquist, C.J., concurring in part and dissenting in part).

411 *Id.* Rational basis review allows a statute to be upheld if the law is "rationally related to a legitimate state interest." *Id.* (citation omitted).

412 *Id. See supra* note 197 for text of the informed consent section.

413 *Id.* Chief Justice Rehnquist opined that requiring the imparting of information pertaining to abortion procedures and risks was "clearly related to maternal health and to the State's legitimate purpose in requiring informed consent." *Id.* (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 446 (1983)). The Chief Justice also found a state interest in the fetus which was rationally related to provisions requiring a woman to be apprised of the fetus' gestational age and the risks of childbirth. *Id.* (citing Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 445-46 n.37 (1983)). Agreeing with the court of appeals that states can decide that a physician is the best qualified person to give the woman this information, the Chief Justice discounted arguments that counselors should be able to provide the required information as well. *Id.* (citing Planned Parenthood v. Casey, 947 F.2d 682, 704 (3d Cir. 1991)). Chief Justice Rehnquist also found dis-

quirement furthering the state interest in promoting a carefully considered decision by the mother.[414]

The Chief Justice also maintained that the parental consent requirements were constitutional.[415] Buttressing this contention by citing numerous cases upholding similar provisions,[416] the Chief Justice asserted that a state had a strong interest in protecting minors.[417] This interest, Chief Justice Rehnquist continued, was rationally furthered by parental consent requirements designed to give parents an opportunity to assist their children in making a responsible decision.[418]

Chief Justice Rehnquist disagreed with the Court's decision to strike down the statute's spousal notification section, noting the provision's numerous exceptions.[419] Opining that a provision should be upheld against a facial challenge unless it is proven unconstitutional under all circumstances,[420] the Chief Justice rejected the Court's contention that the section should be invalidated because it could effectively deny some women an abortion.[421] The Chief Justice submitted that the state interest in protecting the fetus and promoting marital integrity, and the husband's interest in the fetus, were rationally related to the notification requirement.[422]

Continuing a rational basis analysis, Chief Justice Rehnquist voted to uphold the statute's reporting requirements and medical

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positive the fact that the required information was not false or misleading. *Id.* at 2868 (Rehnquist, C.J., concurring in part and dissenting in part).

414 *Id.* The Chief Justice noted that the waiting period and information requirements would be waived in the case of a medical emergency. *Id.*

415 *Id.*

416 *Id.* at 2869 (Rehnquist, C.J., concurring in part and dissenting in part) (citing Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Bellotti v. Baird, 443 U.S. 622 (1979)).

417 *Id.* Chief Justice Rehnquist stated that the State undoubtedly " 'has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.' " *Id.* (quoting Hodgson v. Minnesota, 110 S. Ct. 2926 (1990)).

418 *Id.* (quoting *Ohio v. Akron Center for Reproductive Health*, 497 U.S. at 520 (1990)).

419 *Id.* at 2869-70 (Rehnquist, C.J., concurring in part and dissenting in part). *See supra* note 219 for text of spousal notification section.

420 *Casey*, 112 S. Ct. at 2870 (Rehnquist, C.J., concurring in part and dissenting in part) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

421 *Id.* The Chief Justice posited that an abortion restriction should not be struck down simply because it could deny women the right to choose in some "worst case" scenarios. *Id.* (citing Ohio v. Akron Center for Reproductive Health, 497 U.S. at 514).

422 *Id.* at 2871 (Rehnquist, C.J., concurring in part and dissenting in part).

emergency exception.[423] The Chief Justice found the reporting requirement to be rationally related to the state's legitimate interest in increasing medical knowledge in the maternal health field.[424] Finally, Chief Justice Rehnquist agreed with the Third Circuit's interpretation of the medical emergency exception and the joint opinion's decision to uphold it.[425]

Justice Scalia, joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, concurred in part and dissented in part, and reiterated much of the Chief Justice's analysis by urging the Court to return the abortion question to the states.[426] Opining that abortion was not a constitutionally protected liberty, the Justice defended this view by stating that the Constitution did not address abortion and the country's traditions had allowed abortion to be prohibited by state legislatures.[427]

Declaring the entire Pennsylvania statute constitutional, Justice Scalia attacked numerous assertions made in the joint opinion.[428] First, Justice Scalia took exception with Justices O'Connor, Kennedy, and Souter's assertion that the Court's reasoned judgment should suffice when adjudicating substantive due process claims.[429] The Justice opined that this approach would lead courts to utilize subjective viewpoints in adjudicating such issues rather than constitutional interpretations.[430] Chastising the Court for not stating whether *Roe* was a correct application of "reasoned judgment," Justice Scalia asserted that *Roe* was wrongly decided.[431]

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423 *Id.* at 2872 (Rehnquist, C.J., concurring in part and dissenting in part). *See supra* notes 189, 237 for texts of the recordkeeping and reporting requirements and the medical emergency definition.

424 *Id.*

425 *Id.* at 2873 (Rehnquist, C.J., concurring in part and dissenting in part).

426 *Id.* (Scalia, J., concurring in part and dissenting in part). Justice Scalia opined:

> The States may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.

Id.

427 *Id.* Justice Scalia compared the abortion question to laws outlawing bigamy. *Id.* at 2874 (Scalia, J., concurring in part and dissenting in part). The Justice stated that bigamy laws intrude upon people's liberty to marry whom they choose, but bigamy has not been regarded as a fundamental right because the Constitution has not enumerated it and bigamy is not part of the country's traditions. *Id.*

428 *Id.* at 2875-85 (Scalia, J., concurring in part and dissenting in part).

429 *Id.* at 2875.

430 *Id.*

431 *Id.*

Justice Scalia next challenged the Court's assertion that overruling *Roe* would create a "jurisprudence of doubt."[432] The Justice asserted that the undue burden standard would create more doubt in the abortion arena because courts would have different opinions about what constituted an undue burden.[433] Furthermore, Justice Scalia charged the Court with manufacturing the test by taking phrases from previous abortion decisions out of context.[434] Specifically, Justice Scalia admonished Justice O'Connor for softening the undue burden analysis that the Justice had previously advocated.[435]

Reiterating much of Chief Justice Rehnquist's opinion, Justice Scalia finished the dictum-filled analysis by asserting that the Court's abortion jurisprudence had been disruptive to the country, and by attacking the joint opinion's *stare decisis* analysis.[436] Justice Scalia concluded with an impassioned plea to the Court to return the abortion question to the states.[437]

Planned Parenthood v. Casey is the Supreme Court's most re-

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[432] *Id.* at 2876 (Scalia, J., concurring in part and dissenting in part).

[433] *Id.* Justice Scalia stated, "to come across this phrase ['Liberty finds no refuge in a jurisprudence of doubt'] in the joint opinion—which calls upon federal district judges to apply an 'undue burden' standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear." *Id.*

[434] *Id.* at 2878 (Scalia, J., concurring in part and dissenting in part). Justice Scalia opined that Justice Blackmun's use of the phrase "undue burden" in Bellotti v. Baird, 428 U.S. 132, 147 (1976) was not intended to be utilized as the basis of a constitutional standard. *Id.* at 2876 n.3 (Scalia, J., concurring in part and dissenting in part).

[435] *Id.* Justice Scalia noted, among other alleged inconsistencies, that while in *Akron v. Akron Center for Reproductive Health, Inc.*, Justice O'Connor had defined undue burdens as "*absolute* obstacles or *severe* limitations on the abortion decision," the joint opinion had cushioned this language in *Casey* by terming an undue burden as a "substantial" obstacle. *Id.* (quoting Akron v Akron Center for Reproductive Health, Inc., 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting)). Similarly, Justice Scalia pointed out that Justice O'Connor had previously opined that "the State possesses *compelling* interests in the protection of potential human life . . . throughout pregnancy" which had been downgraded to "substantial" or "profound" interests by the *Casey* opinion. *Id.* at 2879 (Scalia, J., concurring in part and dissenting in part) (quoting *Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. at 461) (O'Connor, J., dissenting).

[436] *Id.* at 2881-85 (Scalia, J., concurring in part and dissenting in part).

[437] *Id.* at 2885 (Scalia, J., concurring in part and dissenting in part). Justice Scalia expounded:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.
>
> We should get out of this area, where we have no right to be, and

cent attempt to clarify the boundaries of the abortion issue. Justices O'Connor, Kennedy, and Souter sought to clarify the ambiguities left by *Webster* and its progeny, while emphasizing that the essential holding of *Roe v. Wade* would remain intact.[438] The Court's attempt to craft a decisive ruling, however, merely demonstrated more indecision and created greater ambiguity, as evidenced by the Court's five separate opinions. Moreover, the Court's endeavor to reach a compromise between pro-life and pro-choice positions, by reaffirming *Roe* while permitting restrictive abortion regulations, has left both sides dissatisfied[439] and has resulted in an opinion laden with contradictions.

As Chief Justice Rehnquist noted, the Court's pretense of adhering to *stare decisis* was merely an illusion.[440] The joint opinion's veiled language and manipulated constitutional analysis effectively overruled *Roe* because an essential element of the *Roe* decision was a mandate that abortion was a fundamental right to be analyzed by strict scrutiny. Moreover, the Court effectively overruled cases following *Roe*, such as *Akron* and *Thornburgh*, because these cases used strict scrutiny to strike down many of the same provisions that the *Casey* Court upheld under the undue burden standard.

In abandoning the strict scrutiny test for the undue burden standard,[441] the Court again created only an illusion of adherence to precedent. As Justice Scalia recognized, the Court softened the definition of an undue burden from the definition employed in previous abortion cases.[442] In all of Justice O'Connor's former opinions discussing this standard, the Justice defined the standard as an "absolute obstacle or severe limitation on the abortion right."[443] The *Casey* decision, however, changed this analysis by defining an undue burden as "a substantial obsta-

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> where we do neither ourselves nor the country any good by remaining.

Id.

438 *Casey*, 112 S. Ct. at 2084.

439 Marie Adrine, *Abortion Ruling Has Limited Impact in New Jersey*, NJ LAWYER, July 6, 1992, at 1.

440 *Casey*, 112 S. Ct. at 2860 (Rehnquist, C.J., concurring in part and dissenting in part). The Chief Justice observed that "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality." *Id.*

441 *See supra* notes 111-15 and accompanying text for a discussion of the undue burden test.

442 *Casey*, 112 S. Ct. at 2878 (Scalia, J., concurring in part and dissenting in part).

443 Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting).

cle in the path of a woman seeking an abortion of a nonviable fetus."[444]

This language, on its face, suggests that the Court would strike down abortion restrictions more liberally than under previous formulations of the undue burden test, because of the shift from "absolute" obstacles to "substantial" obstacles. This shift, however, is illusory, because the new approach is applied to any woman seeking to abort a *nonviable* fetus. Thus, in reality, the Pennsylvania abortion regulations are as restrictive as any previously upheld, and they display the unworkability of the standard. Pennsylvania's abortion regulations have been referred to as "the strictest in the country,"[445] yet the Court upheld all but one of the provisions, finding no substantial burdens present. Furthermore, the subjective character of the standard was exemplified by the fact that Justice Stevens would have invalidated the parental and informed consent provisions as working an undue burden while the Court did not. These factors demonstrate the easy manipulation of the undue burden standard. If the Supreme Court has proven to be inconsistent in applying the standard, how are the lower courts to apply the test in a consistent manner?

Chief Justice Rehnquist's opinion aptly recognized that the creation of a substantial obstacle is largely a matter of opinion.[446] The Chief Justice noted that the Court resorted to the particular views of the Justices in upholding the twenty-four hour waiting period because this restriction failed to create a substantial burden on the abortion decision.[447] Conversely, the joint opinion's authors struck down the twenty-four hour waiting period despite findings by the district court that such a requirement would result in increased costs and risks of delay in abortions.[448] The Justices recognized that this provision would create a burden, but reasoned that "[a] particular burden is not of necessity a substantial obstacle."[449]

The Court, however, did defer to the findings of the district court on the spousal notice provision to determine that it created an undue burden.[450] The Justices recognized that this provision would only affect a very narrow group of women, but asserted

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444 *Casey*, 112 S. Ct. at 2820.
445 Axelrod, *supra* note 7, at 691.
446 *Id.* at 2867 (Rehnquist, C.J., concurring in part and dissenting in part).
447 *Id.*
448 Planned Parenthood v. Casey, 744 F. Supp. 1323, 1378 (E.D. Pa. 1990).
449 *Casey*, 112 S. Ct. at 2825.
450 *Id.* at 2827.

that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects."[451] While this maxim worked well to invalidate the spousal notice provision, the Court clearly discarded it with regard to the twenty-four hour waiting period provision. The authors of the joint opinion failed to consider those women who are indigent or who have to travel great distances to obtain abortions, those upon whom this regulation will fall most heavily. Clearly the twenty-four hour waiting period will prove to be a significant burden on these women.

Judge Alito's dissent in the Third Circuit's opinion in *Casey* exemplified the inconsistency of the Supreme Court's decision. Judge Alito carefully outlined Justice O'Connor's prior abortion decisions in an attempt to discern the correct application of the undue burden standard.[452] The judge stated that Justice O'Connor had consistently held that no undue burden was created by regulations which caused only some women to be less likely to choose an abortion.[453] Utilizing this determination, Judge Alito concluded that the spousal notice provision should be upheld, since it only affected a very small percentage of women.[454] Thus, the Court's decision both is inconsistent with the Court's application of the undue burden standard and departs from Justice O'Connor's former interpretations. The undue burden standard has become a parody of itself, as the Justices have used it to strike down or uphold provisions at whim, based on individual, subjective interpretations. This inconsistency only heightens the already pervasive confusion surrounding the abortion issue, and leaves no clear standard for lower courts to follow.

Despite the Court's assertions to the contrary, *Roe* has been dead since *Webster*. Although the Justices claimed to endorse the central holding of *Roe*, nothing is more central to the *Roe* decision than its mandate that abortion is a fundamental right. By employing the undue burden standard, the Supreme Court, in an attempt to take the middle ground, has fabricated a new yardstick

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451 *Id.* at 2829.

452 Planned Parenthood v. Casey, 947 F.2d 682, 719-27, *aff'd*, 112 S. Ct. 2791 (1992) (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part).

453 *Id.* at 720-21. (Alito, J., concurring in part and dissenting in part) (citing Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting)).

454 *Id.* at 722-23 (Alito, J., concurring in part and dissenting in part).

by which to analyze state abortion restrictions. The problem with such a compromise is two-fold: first, the Court has done precisely what the Justices purportedly sought to avoid—created a "jurisprudence of doubt;"[455] second, the Court has given more ammunition to the Justices who oppose *Roe* because those Justices can now attack the premise that abortion should receive special protection, and also question the manner in which it is tested.[456]

Decisive guidelines are needed to determine how far a woman's liberty interest in abortion may extend without interfering with the potential life of the fetus. If abortion is to continue as a constitutionally protected right, a return to the strict scrutiny test is warranted to attain consistency, because it best prevents ambiguity and manipulation. The *Casey* decision, however, has left the abortion issue in limbo, with American citizens powerless to act as nine Justices sit poised to shift the guidelines again when the next abortion case reaches the Supreme Court.

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455 *Casey*, 112 S. Ct. at 2878.

456 Chief Rehnquist displayed this fact by stating, "[w]hile we disagree with [the strict scrutiny standard], it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion." *Id.* at 2866 (Rehnquist, C.J., concurring in part and dissenting in part).

* The views expressed in the conclusion are solely those of Mary Edwards.