"[S]tare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today and reaffirm *Roe*."

AKRON v. AKRON CENTER FOR REPRODUCTIVE HEALTH

462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983).

In 1978 Akron adopted a comprehensive ordinance regulating abortions, including: (1) § 1870.03 requiring that all abortions after the first trimester be performed in accredited hospitals; (2) § 1870.05 setting up procedures for notifying, before abortions, the parents of unmarried minors; (3) § 1870.06 mandating that "the attending physician," before an abortion, make certain specified statements, inter alia, that "the unborn child is a human life from the moment of conception," and describing the characteristics of the fetus, the dangers of abortion, and the public services available to help women through pregnancy; and (4) § 1870.07 ordering, except in an emergency, a 24-hour delay between the time the woman signed a consent form and the abortion was performed.

Three corporations that ran abortion clinics in Akron and a physician who specialized in that work filed suit in a federal district court, asking for an injunction against enforcement of the various regulations. The district court upheld some provisions, but struck down others. Both sides appealed portions of that decision. The court of appeals affirmed in part and reversed in part. Both sides then sought and obtained certiorari.

Justice **POWELL** delivered the opinion of the Court....

These cases come to us a decade after we held in Roe v. Wade (1973) that the right to privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions, and again today, to define the limits of a State's authority to regulate the performance of abortions. And arguments continue to be made, in these cases and elsewhere, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.1 We respect it today and reaffirm *Roe*.

1. There are especially compelling reasons for adhering to stare decisis in applying the principles of *Roe*. That case was considered with special care. It was argued during the 1971 Term, and reargued– with extensive briefing– the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided ... the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.... [Footnote by the Court.]

Today, however, the dissenting opinion rejects the basic premise of *Roe* and its progeny.

The dissent stops short of arguing flatly that *Roe* should be overruled. Rather, it adopts reasoning that, for all practical purposes, would accomplish precisely that result....

In sum, it appears that the dissent would uphold virtually any abortion regulation under a rational-basis test. It also appears that even where heightened scrutiny is deemed appropriate, the dissent would uphold virtually any abortion-inhibiting regulation because of the State's interest in preserving potential human life.... This analysis is wholly incompatible with the fundamental right recognized in *Roe*.

II

In *Roe*, the Court held that the "right of privacy, ... founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Although the Constitution does not specifically identify this right, the history of this Court's constitutional adjudication leaves no doubt that "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." Poe v. Ullman (1961) (Harlan, J., dissenting from dismissal of appeal). Central among these protected liberties is an individual's "freedom of personal choice in matters of marriage and family life." *Roe* (Stewart, J., concurring). See, e.g., Eisenstadt v. Baird (1972); Loving v. Virginia (1967); Griswold v. Connecticut (1965); Pierce v. Society of Sisters (1925); Meyer v. Nebraska (1923). The decision in *Roe* was based firmly on this long-recognized and essential element of personal liberty.

The Court also has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given "the room he needs to make his best medical judgment." Doe v. Bolton (1973). See Whalen v. Roe (1977). The physician's exercise of this medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision should she choose abortion. See Colautti v. Franklin (1979).

At the same time, the Court in *Roe* acknowledged that the woman's fundamental right "is not unqualified and must be considered against important state interests in abortion." 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. We have recognized two such interests that may justify state regulation of abortions. 2

2. In addition, the Court repeatedly has recognized that, in view of the unique status of children under the law, the States have a "significant" interest in certain abortion regulations aimed at protecting children "that is not present in the case of an adult." Planned Parenthood v. Danforth (1976). See H.L. v. Matheson (1981).... A majority of the Court, however, has indicated that these state and parental interests must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement. See, e.g., *Matheson* (Powell, J., concurring) (Marshall, J., dissenting).... [Footnote by the Court.]

First, a State has an "important and legitimate interest in protecting the potentiality of

human life." Although the interest exists "throughout the course of the woman's pregnancy," Beal v. Doe (1977), it becomes compelling only at viability, the point at which the fetus "has the capability of meaningful life outside the mother's womb," *Roe*. At viability this interest in protecting the potential life of the unborn child is so important that the State may proscribe abortions altogether, "except when it is necessary to preserve the life or health of the mother." *Roe*.

Second, because a State has a legitimate concern with the health of women who undergo abortions, "a State may properly assert important interests in safeguarding health [and] in maintaining medical standards." We held in *Roe*, however, that this health interest does not become compelling until "approximately the end of the first trimester" of pregnancy. Until that time, a pregnant woman must be permitted, in consultation with her physician, to decide to have an abortion and to effectuate that decision "free of interference by the State."

This does not mean that a State never may enact a regulation touching on the woman's abortion right during the first weeks of pregnancy. Certain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives. In *Danforth*, we unanimously upheld two Missouri statutory provisions, applicable to the first trimester, requiring the woman to provide her informed written consent to the abortion and the physician to keep certain records, even though comparable requirements were not imposed on most other medical procedures. The decisive factor was that the State met its burden of demonstrating that these regulations furthered important health-related State concerns. But even these minor regulations on the abortion procedure during the first trimester may not interfere with physician-patient consultation or with the woman's choice between abortion and childbirth.

From approximately the end of the first trimester of pregnancy, the State "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Roe*. The State's discretion to regulate on this basis does not, however, permit it to adopt abortion regulations that depart from accepted medical practice. We have rejected a State's attempt to ban a particular second-trimester abortion procedure, where the ban would have increased the costs and limited the availability of abortions without promoting important health benefits. See *Danforth*.

III

Section 1870.03 of the Akron ordinance requires that any abortion performed "upon a pregnant woman subsequent to the end of the first trimester of her pregnancy" must be "performed in a hospital." A "hospital" is "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association." § 1870.1(B). Accreditation by these organizations requires compliance with comprehensive standards governing a wide variety of health and surgical services. The ordinance thus prevents the performance of abortions in outpatient facilities that are not part of an acute-care, full-service hospital....

... [W]e now hold that § 1807.03 is unconstitutional.

A ...

We reaffirm today that a State's interest in health regulation becomes compelling at approximately the end of the first trimester. The existence of a compelling state interest in health, however, is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest. See *Doe*

B

There can be no doubt that § 1870.03's second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion. A primary burden created by the requirement is additional cost to the woman.... [A] second-trimester abortion costs more than twice as much in a hospital as in a clinic.... It therefore is apparent that a second-trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion.

Akron does not contend that § 1870.03 imposes only an insignificant burden on women's access to abortion, but rather defends it as a reasonable health regulation. This position had strong support at the time of *Roe*, as hospitalization for second-trimester abortions was recommended by the American Public Health Association (APHA) and the American College of Obstetricians and Gynecologists (ACOG). Since then, however, the safety of second-trimester abortions has increased dramatically. The principal reason is that the D[ilation] & E[vacuation] procedure is now widely and successfully used for second-trimester abortions....

... [E]xperience indicates that D & E may be performed safely on an outpatient basis in appropriate nonhospital facilities. The evidence is strong enough to have convinced the APHA to abandon its prior recommendation of hospitalization for all second-trimester abortions.... Similarly, the ACOG no longer suggests that all second-trimester abortions be performed in a hospital....

These developments, and the professional commentary supporting them, constitute impressive evidence that– at least during the early weeks of the second trimester D & E abortions may be performed as safely in an outpatient clinic as in a full-service hospital. We conclude, therefore, that "present medical knowledge," *Roe*, convincingly undercuts Akron's justification for requiring that *all* second-trimester abortions be performed in a hospital....

IV

We turn next to § 1870.05(B), the provision prohibiting a physician from performing an abortion on a minor pregnant woman under the age of 15 unless he obtains "the informed written consent of one of her parents or her legal guardian" or unless the minor obtains "an order from a court having jurisdiction over her that the abortion be performed or induced." ...

The relevant legal standards are not in dispute. The Court has held that "the State may not impose a blanket provision ... requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor." *Danforth.* In Bellotti v. Baird (1979) (*Bellotti*

II), a majority of the Court indicated that a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. [Plurality opinion of four Justices.] The *Bellotti* II plurality cautioned, 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. Under these decisions, it is clear that Akron may not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval.

Akron's ordinance does not create expressly the alternative procedure required by *Bellotti* II....

V

The Akron ordinance provides that no abortion shall be performed except "with the informed written consent of the pregnant woman, ... given freely and without coercion." § 1870.06(A). Furthermore, "in order to insure that the consent for an abortion is truly informed consent," the woman must be "orally informed by her attending physician" of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth. § 1870.06(B). In addition, the attending physician must inform her "of the particular risks associated with her own pregnancy and the abortion technique to be employed ... [and] other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term." § 1870.06(C)....

A

In *Danforth*, we upheld a Missouri law requiring a pregnant woman to "certif[y] in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion." We explained:

> The decision to abort ... is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent. ...

The validity of an informed consent requirement thus rests on the State's interest in protecting the health of the pregnant woman. The decision to have an abortion has "implications far broader than those associated with most other kinds of medical treatment," *Bellotti* II (plurality opinion), and thus the State legitimately may seek to ensure that it has been made "in the light of all attendant circumstances– psychological and emotional as well as physical– that might be relevant to the well-being of the patient." This does not mean, however, that a State has unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. It remains primarily the responsibility of the physician to ensure

that appropriate information is conveyed to his patient, depending on her particular circumstances. *Danforth's* recognition of the State's interest in ensuring that this information be given will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth.

B

Viewing the city's regulations in this light, we believe that § 1870.06(B) attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits. First, it is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. Subsection (3) requires the physician to inform his patient that "the unborn child is a human life from the moment of conception," a requirement inconsistent with the Court's holding in *Roe* that a State may not adopt one theory of when life begins to justify its regulation of abortions. Moreover, much of the detailed description of "the anatomical and physiological characteristics of the particular unborn child" required by subsection (3) would involve at best speculation by the physician. And subsection (5), that begins with the dubious statement that "abortion is a major surgical procedure" and proceeds to describe numerous possible physical and psychological complications of abortion, is a "parade of horribles" intended to suggest that abortion is a particularly dangerous procedure.

An additional, and equally decisive, objection to § 1870.06(B) is its intrusion upon the discretion of the pregnant woman's physician.... For example, even if the physician believes that some of the risks outlined in subsection (5) are nonexistent for a particular patient, he remains obligated to describe them to her.... By insisting upon recitation of a lengthy and inflexible list of information, Akron unreasonably has placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." *Whalen*.

C

Section 1870.06(C) presents a different question. Under this provision, the "attending physician" must inform the woman

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

The information required clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent....

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

and counseling from a qualified person, not the identity of the person from whom she obtains it.... [O]n the record before us we cannot say that the woman's consent to the abortion will not be informed if a physician delegates the counseling task to another qualified individual.

In so holding, we do not suggest that the State is powerless to vindicate its interest in making certain the "important" and "stressful" decision to abort "is made with full knowledge of its nature and consequences." *Danforth*. Nor do we imply that a physician may abdicate his essential role as the person ultimately responsible for the medical aspects of the decision to perform the abortion. A State may define the physician's responsibility to include verification that adequate counseling has been provided and that the woman's consent is informed. In addition, the State may establish reasonable minimum qualifications for those people who perform the primary counseling function....

VI

The Akron ordinance prohibits a physician from performing an abortion until 24 hours after the pregnant woman signs a consent form. § 1870.07....

We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course....

Justice **O'CONNOR,** with whom Justice **WHITE** and Justice **REHNQUIST** join, dissenting.

... [I]t is apparent from the Court's opinion that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the "stages" of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs. The Court's analysis of the Akron regulations is inconsistent both with the methods of analysis employed in previous cases dealing with abortion, and with the Court's approach to fundamental rights in other areas.

Our recent cases indicate that a regulation imposed on "a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.' " Maher v. Roe (1977). See also Harris v. McRae (1980). In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of pregnancy involved. If the particular regulation does not "unduly burden[ ]" the fundamental right, *Maher*, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' " Plyler v. Doe (1982) (Burger, C.J., dissenting).

I

The trimester or "three-stage" approach adopted by the Court in *Roe* ... cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests. The decision of the Court today graphically illustrates why the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.

... [T]he State's compelling interest in maternal health changes as medical technology changes, and any health regulation must not "depart from accepted medical practice." In applying this standard, the Court holds that "the safety of second-trimester abortions has increased dramatically" since 1973, when *Roe* was decided. Although a regulation such as one requiring that all second-trimester abortions be performed in hospitals "had strong support" in 1973 "as a reasonable health regulation," this regulation can no longer stand because, according to the Court's diligent research into medical and scientific literature, the dilation and evacuation procedure (D & E), used in 1973 only for first-trimester abortions, "is now widely and successfully used for second trimester abortions." ...

It is not difficult to see that despite the Court's purported adherence to the trimester approach adopted in *Roe*, the lines drawn in that decision have now been "blurred" because of what the Court accepts as technological advancement in the safety of abortion procedure.... [T]he State must continuously and conscientiously study contemporary medical and scientific literature in order to determine whether the effect of a particular regulation is to "depart from accepted medical practice" insofar as particular procedures and particular periods within the trimester are concerned. Assuming that legislative bodies are able to engage in this exacting task, it is difficult to believe that our Constitution *requires* that they do it as a prelude to protecting the health of their citizens. It is even more difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area....

Just 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.

In 1973, viability before 28 weeks was considered unusual.... However, recent studies have demonstrated increasingly earlier fetal viability. It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future. Indeed, the Court has explicitly acknowledged that *Roe* left the point of viability "flexible for anticipated advancements in medical skill." *Colautti*

The *Roe* framework, then, is clearly on a collision course with itself.... [I]t is clear that the trimester approach violates the fundamental aspiration of judicial decision making through the application of neutral principles "sufficiently absolute to give them roots throughout the

community and continuity over significant periods of time...." A. Cox, *The Role of the Supreme Court in American Government* 114 (1976). The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

The Court adheres to the *Roe* framework because the doctrine of stare decisis "demands respect in a society governed by the rule of law." Although respect for stare decisis cannot be challenged, "this Court's considered practice [is] not to apply stare decisis as rigidly in constitutional as in nonconstitutional cases." Glidden Company v. Zdanok (1962). Although we must be mindful of the "desirability of continuity of decision in constitutional questions ... when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, when correction depends on amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." Smith v. Allwright (1944).

Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* and employed by the Court today on the basis of stare decisis. For the reasons stated above, that framework is clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated.

II

The Court in *Roe* correctly realized that the State has important interests "in the areas of health and medical standards" and that "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." The Court also recognized that the State has "*another* important and legitimate interest in protecting the potentiality of human life." (Emphasis in original.) I agree completely that the State has these interests, but in my view, the point at which these interests become compelling does not depend on the trimester of pregnancy. Rather, these interests are present *throughout* pregnancy....

The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous in childbirth, it simply does not follow that the State has no interest before that point....

The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," the Court chose the point of viability– when the fetus is *capable* of life independent

of its mother– to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward....

III

Although the State possesses compelling interests in the protection of potential human life and in maternal health throughout pregnancy, not every regulation that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny. "... *Roe* did not declare an unqualified 'constitutional right to an abortion' .... Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher*. The Court and its individual Justices have repeatedly utilized the "unduly burdensome" standard in abortion cases.

The requirement that state interference "infringe substantially" or "heavily burden" a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context. In San Antonio Independent School District v. Rodriguez (1973), we observed that we apply "strict judicial scrutiny" only when legislation may be said to have " 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." If the impact of the regulation does not rise to the level appropriate for our strict scrutiny, then our inquiry is limited to whether the state law bears "some rational relationship to legitimate state purposes." Even in the First Amendment context, we have required in some circumstances that state laws "infringe substantially" on protected conduct, Gibson v. Florida Legislative Investigation Committee (1963), or that there be "a significant encroachment upon personal liberty," Bates v. City of Little Rock (1960).

In Carey v. Population Services International (1977), we eschewed the notion that state law had to meet the exacting "compelling state interest" test " 'whenever it implicates sexual freedom.' " Rather, we required that before the "strict scrutiny" standard was employed, it was necessary that the state law "impose[ ] a significant burden" on a protected right or that it "burden an individual's right to prevent conception or terminate pregnancy by *substantially* limiting access to the means of effectuating that decision...." (Emphasis added.) The Court stressed that, "even a burdensome regulation may be validated by a sufficiently compelling state interest." ...

Indeed, the Court today follows this approach. Although the Court does not use the expression "undue burden," the Court recognizes that even a "significant obstacle" can be justified by a "reasonable" regulation.

The "undue burden" required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting "compelling state interest" standard....

The "unduly burdensome" standard is particularly appropriate in the abortion context because of the *nature* and *scope* of the right that is involved. The privacy right involved in the abortion context "cannot be said to be absolute." *Roe*. "*Roe* did not declare an unqualified

'constitutional right to an abortion.' " *Maher*. Rather, the *Roe* right is intended to protect against state action "drastically limiting the availability and safety of the desired service," against the imposition of an "absolute obstacle" on the abortion decision, *Danforth*, or against "official interference" and "coercive restraint" imposed on the abortion decision, *Harris* (White, J., concurring). That a state regulation may "inhibit" abortions to some degree does not require that we find that the regulation is invalid. See H.L. v. Matheson (1981)....

In determining whether the State imposes an "undue burden," we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, "the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' Missouri, K. & T.R. Co. v. May (1904) (Holmes, J.)." *Maher*. This does not mean that in determining whether a regulation imposes an "undue burden" on the *Roe* right that we defer to the judgments made by state legislatures. "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." Columbia Broadcasting System, Inc. v. Democratic National Committee (1973).

We must always be mindful that "[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate government objective of protecting potential life.' " *Harris*....

[Justice O'Connor then examined each of the regulations and found all were rationally related to the compelling governmental interest in preserving potential human life and did not impose "an undue burden" on the right to abortion.]

Editors' Notes

(1) **Query:** Both Powell and O'Connor claimed to be defenders of stare decisis. Which used it more properly? To what extent is that interpretive *technique* useful in settling the basic questions of *Akron*?

(2) **Query:** Did O'Connor use a fundamental rights *mode* of interpretation or did she use a variant of balancing? Or both? Are they in fact compatible with each other? Did O'Connor accept a woman's fundamental right to an abortion? See fn. 1 to Powell's opinion for the Court. Did Powell himself use or merely presume a fundamental rights *mode* of interpretation? 8497.0000>

(3) **Query:** To what extent were Powell and O'Connor debating the question of WHO shall interpret?

(4) **Query:** Powell, following *Roe*, said that government cannot impose a theory of when human life begins. But, by denying that a fetus is a person, do not *Roe* and *Akron* impose a theory, indeed a theory supposedly grounded in the Constitution, that at least until viability a

fetus is not a human life?

(5) The Court decided two other abortion cases the same day as *Akron*. Planned Parenthood v. Ashcroft invalidated Missouri's requirement that abortions after 12 weeks of pregnancy be performed in hospitals but sustained, over the dissents of Justices Blackmun, Brennan, Marshall, and Stevens, provisions mandating: (1) a pathology report for each abortion; (2) the presence of a second physician where the fetus is viable; and (3) where "unemancipated minors" are involved, the written permission of one parent or guardian or of a juvenile court. Simopoulos v. Virginia sustained a state statute requiring that second trimester abortions be performed in a hospital or licensed clinic.

(6) For an elaboration of Justice O'Connor's argument that *Roe* is at war with itself, see Daniel Callahan, "How Technology is Reframing the Abortion Debate," 16 *Hastings Center Report* 33 (1986).