Ten years ago the Supreme Court of the United States decided *Roe v. Wade,* a case that essentially gave every woman in America the right to "abortion on demand" at least until the point in her pregnancy when the fetus became "viable." After fetal viability, states were empowered to limit abortions to those women whose lives or health would be endangered by the continuation of the pregnancy. Up until this decision, the majority of states had laws that permitted abortion only to save the life of the pregnant woman. This widespread antipathy which state legislatures had for abortion gave a clear indication of the activity that would follow: many legislatures passed statutes designed to reduce the impact of the *Roe v. Wade* decision. For example, various statutes were passed that required parental consent, spousal consent, record-keeping, report to state health departments, "informed consent" of the patient, attempts to preserve the life of the fetus, and similar provisions. The federal and state governments also prohibited the use of public funds for virtually all abortions for indigent women. As a result of this activity, the Supreme Court has had numerous occasions on which to further clarify its decision in *Roe.* In the early cases following *Roe,* it seemed clear that the Court would continue to protect women's rights to make reproductive decisions by striking down spousal consent requirements, parental consent requirements, and arbitrary fetal viability standards.

After a number of "pro-choice" decisions, the Court decided the Medicaid funding cases, in which it held that neither the state nor federal government had any responsibility to fund abortions for an indigent woman, even if her health or life were endangered by the pregnancy, and even though public funds were made available to pay the expenses of childbirth should a woman choose to continue her pregnancy.  

As a result of this apparent shift in sympathy by the Court, the recently decided cases entitled *Akron v. Akron Center for Reproductive Health* and *Planned Parenthood of Missouri v. Ashcroft* were anxiously anticipated. These cases indicate that six Justices remain firmly committed to the doctrines set down in *Roe,* and the Court sees a clear distinction between requiring states to pay for abortions, and permitting states to place artificial obstacles in the way of women who desire abortions. In these cases, the Court struck down state statutes or city ordinances that required: parental notification of impending abortions for all unmarried women under age 18; a 24-hour waiting period between the time a consent form is signed and the performance of the abortion; fetal remains to be disposed of in a "humane and sanitary manner"; that all abortions performed subsequent to the end of the second trimester be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association; and that the physician must disclose certain "facts" to the woman including "the unborn child is a human life from the moment of conception" and describing in detail the fetus' appearance, sensitivity to pain, brain function, and presence of external members and stating that abortion is a "major surgical procedure" which can result in serious complications. The Court upheld provisions requiring: the presence of a second physician when an abortion is to be performed after the fetus is viable; a pathological examination of the tissue removed at the abortion; and that a minor obtain either parental consent or have the option of demonstrating to a judge (or other state agent) that she is a mature minor. Once the finding of maturity is made, the decision whether or not to abort is solely the minor's. This last provision is the most controversial, with four Justices arguing that the state may not require either parental or judicial intervention.

It is not the specific statutory provisions that were struck down, but the reasons why they were struck down that make these cases important. The general notion that the Court puts forth is that any regulation that places an undue or arbitrary burden or obstacle between the woman and her ability to obtain an abortion will be closely scrutinized. An example of this is how the Court deals with the issue of Akron's requirement that second trimester abortions be performed in fully accredited hospitals. In *Roe* the Court stated that subsequent to the end of the first trimester the state may regulate the abortion procedure to the extent that "the regulation reasonably relates to the preservation and protection of maternal health." The *Akron* decision further illuminates what it means for a regulation to be "reasonably" related to maternal health. The Court's interpretation of the term "reasonable" is much stricter here than in the typical police power case where states are given substantial leeway to formulate measures to protect public health. The Court in this case finds that there are less restrictive means for protecting maternal health equally well. Thus, the Court points out that while such a statute might have been upheld in 1973, since that time both the American Public Health Association (APHA) and the American College of Obstetricians and Gynecologists (ACOG) have determined that early second trimester abortions could be performed in adequately equipped outpatient clinics just as safely as in a hospital. The Court also found that in-hospital abortions cost $850–900 whereas clinic abortions cost $350–400, and that many hospitals in Akron would not perform second trimester abortions. The Court therefore concluded that by preventing the performance of abortions in appropriate non-hospital
settings, "Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure."

One can learn a number of lessons from the invalidation of this provision. First, the fact that a regulation is related to the protection of maternal health is not enough to sustain it. If there is a less expensive or less intrusive means of protecting maternal health equally well, the state is required to use the less burdensome means. Second, the Court will use what is deemed to be good medical practice as defined by professional organizations as a yardstick against which to measure state regulations allegedly designed to protect maternal health. Third, the nature of state regulations that are Constitutionally permissible will change as technology changes. This means that state legislatures will have to be attuned to technological and scientific advances if they wish to ensure the validity of their statutes regulating abortions. It also means that those who wish to challenge such statutes may obtain different results as such advances become established—in 1973 the challengers would have lost this case, since both the APHA and ACOG at that time supported in-hospital second trimester abortions.

Of course, there is no bright line between a requirement that is "unduly burdensome" and one that is "reasonable" or "necessary." The Missouri statute requiring pathological examination of tissue removed at the abortion is an example. The cost of such an examination was estimated to be $19.40; and the Court found that this additional cost would not "significantly burden a pregnant woman's abortion decision." The four Justices who dissented from this portion of the decision view this issue in a different light. They claim that the cost of such a pathological examination could be as much as $40 and that this would increase the cost of an abortion by 20 per cent. They also argue that for a woman on welfare or an unemployed teenager, this may put the price of an abortion beyond reach. Thus we have an example of how subjective a test this is.

However, there are other criteria that contributed to the Court's upholding the pathological examination requirement. First, there is ample medical testimony that such examinations are useful and necessary to both protect the health of the patient and to obtain information to provide a statistical basis for studying complications. Second, there is no less expensive or burdensome procedure available. And probably most importantly, there is a statutory requirement in Missouri that all tissue (with a few exceptions) surgically removed in a hospital must be examined by a pathologist. As a result of this, abortion patients are not singled out for special treatment. Given these factors, and the relatively low cost, one can perhaps understand why the Court permits this requirement to stand.

Finally, as in earlier cases, the Court is not only concerned with the rights of pregnant women, but also with the rights of physicians. The Akron ordinance required physicians to make certain statements to pregnant women which were designed not to inform women of risks and benefits, but to dissuade women from having abortions. The Court believes it is the "responsibility of the physician to ensure that appropriate information is conveyed to his patient," that requiring specific statements to be made is an "intrusion upon the discretion of the pregnant woman's physician" and that the insistence upon the "recitation of a lengthy and inflexible list of information . . . unreasonably has placed 'obstacles in the path of the doctor . . . ." In striking down the 24-hour delay between signing the consent form and the performance of the abortion, the Court states, "The decision whether to proceed with an abortion is one to which it is important to 'afford the physician adequate discretion in the exercise of his medical judgment.'"

While the Court will not permit states to interfere in the details of the doctor-patient relationship without very good cause, it will permit the use of general guidelines. Thus, the Court upheld a provision in the Akron ordinance requiring that a woman be informed of the "particular risks associated with her own pregnancy and the abortion technique to be employed . . . ." which is a general provision, giving physicians a certain amount of discretion as to what to discuss with each individual patient. However, any statute that requires a recitation of a litany of horrors will be struck down.

This case provides us with valuable information about the future of abortion litigation. First, six of the Justices are willing and able to enforce both a woman's right to obtain an abortion and a physician's right to perform abortions. As long as the composition of the Court remains stable, states will have a heavy burden to sustain limitations on a woman's ability to obtain an abortion. On the other side, there are three Justices who not only are willing to ignore the law as set down in Roe v Wade, but who are apparently ready to overrule it. Justice Sandra Day O'Connor's dissent in these cases is really a dissenting opinion to Roe v Wade.

This case may not signal the end of state legislatures trying to restrict access to abortion. As with any judicial opinion, this case does not answer every question, and contains standards that are subjective and open to legitimate differences in interpretation. Moreover, the political heat that is produced by the abortion issue has stimulated some legislative bodies to pass clearly unconstitutional legislation to make a political statement and to harass pro-choice forces. Unconstitutional statutes must still be struck down by courts.

It is without question, however, that these decisions clarify a great many issues, elucidate the direction the Court is taking in this area, and send a clear signal that this Court believes that states should not interfere with an individual's reproductive decisions.

REFERENCES

3. 51 L.W. 4767 (June 14, 1983).
4. 51 L.W. 4783 (June 14, 1983).
5. 410 U.S. at 163.