Court Labors over Roe v. Wade and Gives Birth to New Standard

In *Colautti v. Franklin,*[1] the Supreme Court of the Unites States[2] struck down §5(a) of Pennsylvania's 1974 Abortion Control Act[3] as unconstitutionally vague. The Act was a comprehensive statute passed in the year following the Court's decisions in *Roe v. Wade*[4] and *Doe v. Bolton.*[5] In fact, the Act's definition of viability as "the capability of a fetus to live outside the mother's womb" imposed greater restrictions on state regulation of abortions than was required by *Roe.*[6]

In *Roe,* the U.S. Supreme Court concluded that there is a right of privacy, founded on the Fourteenth Amendment's concepts of personal liberty and restrictions upon state action, that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[7] The Court emphatically rejected, however, the argument that this right is absolute and unqualified.[8] This right must be balanced against important state interests in the health of the pregnant woman and in the potential life of the fetus.[9]

The Court in *Roe* ruled that up to the point where important state interests provide compelling justifications for intervention, "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[10] A practitioner who abused this privilege would be subject to judicial and intraprofessional remedies.[11] The first point at which a state's interests become compelling so as to allow it to regulate abortions is at approximately the end of the first trimester, for until this point, a woman's mortality risks in having an abortion may be less than in childbirth. After this point, a state's interest in the health of the mother becomes compelling and a state

1. ___ U.S. ___, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979).

2. Blackmun, J. delivered the opinion of the Court, in which Brennan, Stewart, Marshall, Powell, and Stevens, JJ., joined. White, J., filed a dissenting opinion, in which Burger, C.J., and Rehnquist, J. joined.

3. PA. STAT. ANN. tit. 35, §6605(a) (Purdon).

4. 410 U.S. 113 (1973).

5. 410 U.S. 179 (1973).

6. Compare PA. STAT. ANN. tit. 35, §6602 (Purdon), which reads in part: "'[v]iable' means the capability of a fetus to live outside the mother's womb albeit with artifical aid. . . .", with the language in Roe v. Wade, 410 U.S. at 160: "'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid."

7. 410 U.S. at 153.

8. *Id.* at 154.

9. *Id.* at 162.

10. *Id.* at 166.

11. *Id.*

may reasonably regulate the abortion procedure to preserve and protect maternal health.[12]

The Court in *Roe* also recognized that the states have an important and legitimate interest in potential life. The Court concluded that the compelling point for the exercise of this interest is at viability, since it is at this point that the fetus "presumably has the capability of meaningful life outside the mother's womb."[13] During this period of viability, the state may go so far as to proscribe abortion, except when an abortion is necessary to preserve the life and health of the mother.[14]

In *Bolton,* a companion case to *Roe,* the U.S. Supreme Court reiterated its conclusion in *Roe* that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand."[15] The Court then emphasized the importance of the physician's discretion in the abortion decision and the requirement that the physician's judgment "be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[16]

In light of *Doe* and *Bolton,* the Pennsylvania legislature had the power to regulate and even proscribe abortions during appropriate stages of pregnancy.[17] The legislature attempted to assert this power in the Abortion Control Act. In §2 of the Act, viability was defined as "the capability of a fetus to live outside the mother's womb albeit with artificial aid."[18] Since a careful analysis of §5(a) is central to a clear understanding of the district court's opinion in *Planned Parenthood Association v. Fitzpatrick,*[19] and of that decision as it was appealed to the U.S. Supreme Court in *Colautti,* §5(a) is presented in its entirety:

> Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the

12. *Id.* at 163.

13. *Id.*

14. *Id.* at 163-64. The word "health" in a statute regulating abortion should be broadly construed to include psychological as well as physical well-being in order to preclude a void for vagueness challenge. *Id.* at 191-92, *citing* United States v. Vuitch, 402 U.S. 62, 71-72 (1971).

15. 410 U.S. at 189.

16. *Id.* at 192.

17. 410 U.S. at 163-64.

18. *See* note 7, *supra.*

19. 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd sub nom.* Colautti v. Franklin, ___ U.S. ___, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979).

> fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.[20]

Prior to the date when the Act was to take effect, suit was filed in the United States District Court for the Eastern District of Pennyslvania challenging the constitutionality of nearly all of the Act's provisions.[21] In this case, *Planned Parenthood Association v. Fitzpatrick,*[22] a three-judge court invalidated the viability determination and standard of care provisions of §5(a) on two grounds: first, because §5(a) required a determination of viability and because that term, as defined in §2, was held unenforceably vague;[23] and second, because the court considered the section requiring a determination of whether a fetus may be viable to be an attempt to unlawfully regulate abortions during the second trimester in furtherance of interests other than the valid one of maternal health.[24]

The court in *Fitzpatrick,* along with other courts across the Nation,[25] was confused by *Roe's* definition of viability and interpreted *Roe* as requiring an objective standard of gestational age.[26] Accordingly, the court held that the Act's definition of viability failed to notify physicians what conduct on their parts was subject to civil and criminal sanctions, and was therefore unconstitutionally vague.[27]

The judgment of the district court in *Fitzpatrick* was pending on appeal to the U.S. Supreme Court when *Planned Parenthood of Missouri v. Danforth*[28] was decided. In *Danforth,* the Court reaffirmed *Roe* and *Bolton* and upheld a definition of viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb."[29] The Court rejected the view that a statute must define viability in terms of a specified number of weeks of gestation.[30] In light of *Danforth's*

20. PA. STAT. ANN. tit. 35, §6605(a) (Purdon). The Act imposes a penal sanction for a violation of §5(a): "Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted." *Id.* at §6605(d).

21. 401 F. Supp. 554 (E.D. Pa. 1975).

22. *Id.*

23. *Id.* at 571.

24. *Id.* at 572.

25. *See, e.g.,* Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974); Doe v. Rampton, 366 F. Supp. 189 (C.D. Utah 1973).

26. 401 F. Supp. at 571.

27. *Id.*

28. 428 U.S. 52 (1976).

29. *Id.* at 63.

30. *Id.* at 65. The Court stated further: "In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." 428 U.S. at 64.

clarification of the Supreme Court's definition of viability, the district court in *Fitzpatrick* modified its judgment and sustained Pennsylvania's definition of viability.[31] The district court maintained, however, as grounds for invalidating §5(a), that the "may be viable" standard of the viability determination requirement was an unlawful attempt to regulate a period of potential viability, *i.e.*, an attempt to unlawfully regulate abortions during the second trimester in furtherance of interests other than maternal health.[32] This decision in *Fitzpatrick* was appealed to the Supreme Court in *Colautti v. Franklin*, in which the sole issue was the validity of §5(a).[33]

Neither the majority nor the dissent in *Colautti* concurred with the district court in *Fitzpatrick* in predicating the validity or invalidity of §5(a) on an objective gestational test.[34] Nevertheless, a majority of the members of the Court found the viability determination and standard of care provisions of §5(a) to be impermissibly vague.[35]

The majority first concluded that the "is viable" provision of the viability determination requirement contained a double ambiguity.[36] Section 5(a) required every person who performs or induces an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. The physicians must conform to the prescribed standard of care if one of two conditions is satisfied: (1) he determines that the fetus is viable, or (2) there is sufficient reason to believe that the fetus may be viable. In regard to the second condition, "[i]t is ambiguous whether there must be 'sufficient reason' from the perspective of the judgment, skill, and training of the attending physician, or 'sufficient reason' from the perspective of a cross-section of the medical community or a panel of experts."[37] The latter interpretation presents a major hazard for a private practitioner without the skills and technology that are readily available at a teaching hospital or a large medical center. Indeed, the Court did not allow an objective standard for determination since it preferred to place such determination "in the judgment of the attending physician on the particular facts of the case before him. . . ."[38]

The majority was troubled by the "intended distinction between the phrases 'is viable' and 'may be viable.'"[39] The use of the disjunctive "or" in the Act indicated that these terms were not intended to be synonymous. The majority did not accept the argument that "may be viable" and "is viable" are synonymous, since such an interpretation would violate the

31. 99 S. Ct. at 690, 58 L. Ed. 2d at 615.
32. *Id.* at 680, 58 L. Ed. 2d at 602.
33. *Id.* at 681, 58 L. Ed. 2d at 603.
34. *Id.* at 682 (majority opinion), 690 (dissenting opinion), 58 L. Ed. 2d at 605, 614-15.
35. *Id.* at 683, 686, 58 L. Ed. 2d at 606, 610.
36. *Id.* at 683, 58 L. Ed. 2d at 606.
37. *Id.* at 683-84, 58 L. Ed. 2d at 606-07.
38. *Id.* at 682, 58 L. Ed. 2d at 605; *see also* 410 U.S. at 192.
39. *Id.* at 684, 58 L. Ed. 2d at 607.

elementary canon of statutory construction "that a statute should be interpreted so as not to render one part inoperative."[40] Further, the Court rejected the suggestion that "may be viable" is an explication of the meaning of "viable," since "viable" had been defined for purposes of the Act in §2. The majority did not feel compelled to pinpoint the distinction between "viable" and "may be viable"; it was content to conclude that these terms "apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and in [*Danforth*]."[41]

The dissent blatantly rejected the majority's conclusion in this regard.[42] Writing for the dissent, Justice White viewed the "may be viable" provision as an attempt to protect a period of potential life that is precisely the kind of interest that *Roe* protected and *Danforth* reaffirmed.[43] The Pennsylvania Act defines viability as the *capability* of a fetus to live outside the mother's womb;[44] in *Roe,* the term "viable" was defined as the point at which the fetus is *potentially able* to live outside the mother's womb;[45] and in *Danforth,* the Court upheld a definition of viability as that stage of fetal development when the life of the unborn child *may be* continued indefinitely outside the womb.[46] Justice White noted that "only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between 'viability' defined as the ability to survive and 'viability' defined as that stage at which the fetus may have the ability to survive." Justice White continued: "It seems to me that, in affirming, the Court is tacitly disowning the 'may be' standard of the Missouri law as well as the 'potential ability' component of viability as that concept was described in *Roe.*"[47]

The majority expressly disavowed that it had "tacitly disowned" the definition of viability as set forth in *Roe* and *Danforth,* stating that its ruling "is confined to the conclusion that the viability determination requirement of §5(a) is impermissibly vague."[48]

The majority also felt that the vagueness of the viability determination requirement was compounded by the fact that §5(d) subjected physicians to potential criminal liability without regard to fault.[49] It is true that Pennsylvania's law of criminal homicide, which is made applicable to physicians by §5(d), conditions guilt upon a finding of scienter;[50] but, the major-

40. *Id.*
41. *Id.* at 684, 58 L. Ed. 2d at 608.
42. *Id.* at 691, 58 L. Ed. 2d at 615-16 (White, J., dissenting).
43. *Id.*
44. *See* note 7, *supra.*
45. 410 U.S. at 160, 163.
46. 428 U.S. at 63.
47. 99 S. Ct. at 691, 58 L. Ed. 2d at 616.
48. *Id.* at 684 n.11, 58 L. Ed. 2d at 608 n.11.
49. *Id.* at 685, 58 L. Ed. 2d at 608.
50. 18 PA. CONS. STAT. ANN. §§2501-2504 (Purdon).

ity explained, the required mental state is that of "intentionally, knowingly, recklessly or negligently caus[ing] the death of another human being."[51] Therefore, while a physician who fails to abide by the standard of care when there is sufficient reason to believe that the fetus "may be viable" is subjected to civil and criminal liabilities by §5(d),[52] "neither the Pennsylvania law of criminal homicide, nor the Abortion Control Act, requires that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable."[53]

The Court reasoned that given the uncertainty of the viability determination itself, coupled with the absence of a scienter requirement in the determination requirement and the further imposition of strict civil and criminal liability for an erroneous determination of viability, there could result "a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment."[54]

The dissent did not agree with this analysis. It felt that the various homicide statutes had been virtually ignored in that these statutes "not only define the specified degrees of scienter that are required for the various homicides, but also provide that ignorance or mistake as to a matter of fact, for which there is a reasonable explanation, is a defense to a homicide charge if it negatives the mental state necessary for conviction."[55] The dissent suggested that this matter should have been referred to the Pennsylvania courts which are more familiar with their own homicide laws.[56]

The majority's final problem with the Abortion Control Act was the vagueness of the standard of care provision.[57] The majority felt that "[t]he statute does not clearly specify . . . that the woman's life and health must always prevail over the fetus' life and health when they conflict. The woman's life and health are not mentioned in the first part of the stated standard of care, which sets forth the general duty to the viable fetus. . . ."[58]

The majority attacked the second part of the standard, which directs the physician to employ the abortion technique best suited to fetal survival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother."[59] The Court interpreted the word "necessary" in this context to mean "that a particular technique must be

51. 99 S. Ct. at 685, 58 L. Ed. 2d at 608, *quoting* 18 PA. CONS. STAT. ANN. §2501 (Purdon).
52. *See* note 21, *supra*.
53. 99 S. Ct. at 685, 58 L. Ed. 2d at 608-09.
54. *Id.* at 686, 58 L. Ed. 2d at 610.
55. *Id.* at 692, 58 L. Ed. 2d at 616, *citing* 18 PA. CONS. STAT. ANN. §304 (Purdon).
56. *Id.* at 692, 58 L. Ed. 2d at 617.
57. *See* text accompanying note 20, *supra* for the full text of the standard of care provision.
58. 99 S. Ct. at 688, 58 L. Ed. 2d at 612.
59. *Id.*, *quoting* PA. STAT. ANN. tit. 35, §6605(a) (Purdon) (emphasis supplied by the Court).

indispensable to the woman's life or health—not merely desirable—before it may be adopted."[60] The phrase "'the life or health of the mother,' as used in §5(a), has not been construed by [the Pennsylvania courts], nor does it necessarily imply, that all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision."[61]

The Court reasoned that "it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival."[62] The Court held that when conflicting duties of this magnitude are involved, at the very least, the state must proceed with greater precision before subjecting a physician to possible criminal sanctions.

Though the Court specifically stated that its holding in *Colautti* "is confined to the conclusion that the viability determination requirement of §5(a) is impermissibly vague," it is essential that we look beyond what the Court said to what it has actually done. In *Roe,* "viability" was defined as the point at which the fetus is *potentially able* to live outside the mother's womb.[63] "Viability" was defined in *Colautti,* however, as "when, in the judgment of the attending physician on the particular facts of the case before him, there is a *reasonable likelihood* of the fetus' sustained survival outside the womb. . . ."[64] It seems obvious that a "reasonable likelihood" is more certain than a "potential ability," and that in *Colautti,* the Court has tacitly taken away some of the power it had previously granted the states to regulate abortions.

The question remains, to what extent can a state attempt to prescribe abortion techniques which provide the best opportunity for a viable fetus to be aborted alive? It is clear from *Colautti* that such attempts will be strictly scrutinized in light of maternal health, the doctor's right to make responsible medical decisions, and the imposition of civil and criminal liabilities on the attending physician.

It remains to be answered whether maternal health is to be interpreted so broadly as to allow a woman's right to terminate her pregnancy to include a right of destruction of a viable fetus when her doctor concludes that she is likely to suffer psychological harm if the fetus is not destroyed. State care for unwanted children does not mitigate the mother's trauma from bringing such children into the world in the first place.

The argument that the psychological health of the mother can override the state's interest in potential life so as to allow for destruction of the fetus becomes stronger in cases in which it is learned that the child will be born defective. While *Colautti* does not squarely meet this issue, the Court

60. 99 S. Ct. at 688, 58 L. Ed. 2d at 612.
61. *Id., citing* United States v. Vuitch, 402 U.S. at 71-72; 410 U.S. at 191.
62. *Id.*
63. 410 U.S. at 160, 163; this definition was reaffirmed in 428 U.S. at 63.
64. 99 S. Ct. at 682, 58 L. Ed. 2d at 605.

intimates that it will be willing to entertain this issue in the future.[65] It is in light of such future cases that we will be able to determine the extent to which the Court has restricted the state's power to regulate abortions by its decision in *Colautti*.

CHARLES A. WILLIAMS

65. *Id.* The Court noted that while modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome (mongolism), such testing may not be conclusive prior to viability. *Id.* at 682 n.8, 58 L. Ed. 2d at 605 n.8.