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ABORTION & BIRTH CONTROL— RIGHT TO ABORTION & REGULATION THEREOF: THE UNITED STATES SUPREME COURT INVALIDATES A STATUTE BANNING PARTIAL BIRTH ABORTIONS

Stenberg v. Carhart, 530 U.S. 914 (2000)

I. FACTS

Dr. Leroy Carhart was a Nebraska doctor who performed abortions, including the partial birth procedure.[1] Dr. Carhart performed abortions from three weeks to viability.[2] Because no Nebraska hospitals openly performed abortions, Dr. Carhart was the only physician in the state who performed abortions after sixteen weeks of pregnancy.[3] After the fifteenth week of pregnancy, Dr. Carhart attempted to perform a D&X abortion in all abortion cases.[4] Dr. Carhart challenged a Nebraska statute banning partial birth abortions by claiming it was unconstitutional because it imposed an undue burden upon a woman seeking to obtain a partial birth abortion.[5] Violation of the Nebraska law was a Class III felony and mandated an automatic loss of the doctor's license as well as a prison term of up to twenty years and a fine up to $25,000.[6]

The issue in Dr. Carhart's case was whether the Nebraska statute banning partial birth abortions, without either a health exception for a woman or an exception for when a particular method is safest for a woman, imposed an undue burden on a woman seeking to obtain an

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1. Stenberg v. Carhart, 530 U.S. 914, 922 (2000); *see also* NEB. REV. STAT. § 28-326(9) (Supp. 2000) (defining partial birth abortion as: "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery").

2. Brief for Respondent at 14, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

3. *Id.* In 1996, Dr. Carhart performed 800 abortions, 200 of which were performed at fourteen or more weeks of gestation. *Id.*

4. *Id.* A D&X abortion, dilation and extraction, is an intact abortion performed when the fetus presents itself feet first in a breech presentation. *Stenberg*, 530 U.S. at 927. The doctor pulls the fetal body except the head through the cervix, so he can then collapse the head and remove the entire body. *Id.*

5. *Stenberg*, 530 U.S. at 929-30; *see also* NEB. REV. STAT. ANN. § 28-328(1) (Supp. 2000). The Nebraska statute states: "No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.* It further defines partial birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* § 28-326(9). The term "partially delivers vaginally" means "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." *Id.*

6. *Stenberg*, 530 U.S. at 922.

abortion, thus making it unconstitutional.[7] Dr. Carhart brought his lawsuit in federal district court seeking a declaration that the Nebraska statute violated the Constitution and asking for an injunction forbidding its enforcement just three days after the enactment of the statute.[8]

The district court entered a temporary restraining order and then later ordered a preliminary injunction.[9] The district court held the statute unconstitutional and permanently enjoined its enforcement.[10] On appeal, the Eighth Circuit affirmed, reading the Nebraska statute as banning both the D&X procedure as well as the D&E procedure.[11] The Eighth Circuit found the statute unconstitutional because the ban of both partial birth abortion procedures placed an undue burden on a woman seeking an abortion.[12] The Supreme Court granted certiorari.[13] The Supreme Court found the Nebraska partial birth abortion ban unconstitutional for two reasons: (1) the statute imposed an "undue burden" on a woman's ability to choose a D&E abortion, which unduly burdened her right to choose abortion itself, and (2) the statute lacked any exception for protection of the mother's health.[14]

The Supreme Court *held* the Nebraska partial birth abortion ban unconstitutional because the Court read the ban to include the D&E method of abortion, placing an undue burden in the path of a woman seeking an abortion.[15]

II. LEGAL BACKGROUND

The Hippocratic oath states, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion"[16] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[17] These translations of the Hippocratic oath illustrate the moral and ethical dilemma surrounding abortion since the beginning of

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7. *Id.* at 929-30.

8. Brief for Petitioners at 5, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830).

9. *Id.*

10. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1100 (D. Neb. 1998).

11. Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999). The D&E procedure, dilation and evacuation, involves dismemberment of the fetus or collapse of fetal parts to remove it from the uterus. *Stenberg*, 530 U.S. at 925.

12. *Carhart*, 192 F.3d at 1150-51; *see also* Petitioners' Brief at 5-6, *Stenberg* (No. 99-830).

13. *Stenberg*, 530 U.S. at 923.

14. *Id.* at 930.

15. *Id.* at 945-46.

16. Roe v. Wade, 410 U.S. 113, 131 (1973) (citing LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH 3 (1943)).

17. *Id.* (citing ARTURO CASTIGLIONI, A HISTORY OF MEDICINE 154 (2d ed. 1947)).

modern medicine.[18] Early common law coined the term "quickening" which described a stage during the pregnancy after which abortion became an indictable offense.[19] Christian theology and canon law fixed "quickening" to specific points of animation, forty days for males and eighty days for females.[20] Prior to these points, the fetus was regarded as part of the mother, and abortion could not be prosecuted as homicide.[21]

English statutory law criminalized abortion in 1803 in Lord Ellenborough's Act.[22] The Act made abortion of a "quick fetus" a capital crime and made pre-quickening abortions a lesser felony.[23] The Offenses Against the Person Act of 1861 was the basis for anti-abortion laws until reforms in 1967.[24] The Infant Life (Preservation) Act was enacted in 1929 and focused on the destruction of the life of a child capable of being born alive, if the willful act was performed with the necessary intent of a felony.[25] Guilt could not be found unless it was proven that the act was not done in good faith for the preservation of the life of the mother.[26]

Parliament enacted the Abortion Act of 1967, which permits a physician to perform an abortion when two other licensed physicians agree that either the pregnancy would involve a risk to the mother's life or family that would outweigh the risks of terminating the pregnancy or there is a substantial risk that if the child were born it would suffer from mental or physical abnormalities and be seriously handicapped.[27] In America, up until the mid-nineteenth century, abortion was regulated by the pre-existing English common law.[28] The first state to enact abortion legislation adopted part of Lord Ellenborough's Act in 1821 without imposing the death penalty.[29] Legislation began to replace common law

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18. *Id.* at 131-32.

19. *Id.* at 132-33 (explaining "quickening" as the first recognizable movement *in utero*, usually occurring in the sixteenth to eighteenth weeks of pregnancy).

20. *Id.* at 133-34 (defining animation as the point when a fetus has a soul and is recognizably human).

21. *Id.* at 134. St. Augustine's writings differentiated between an *embryo inanimatus*, a fetus not yet endowed with a soul, and *embryo animatus*, an embryo with a soul. *Id.* at 133 n.22. His writings are thought to have influenced the fixation of "quickening." *Id.*

22. *Id.* at 136.

23. *Id.* at 135-36. This distinction between the crimes disappeared with the death penalty in 1837. *Id.* at 136.

24. *Id.* at 136-37.

25. *Id.* at 137.

26. *Id.*

27. *Id.* at 137-38. The law also made it legal for a physician, without the concurrence of other physicians, to perform an abortion when immediately necessary to prevent serious injury to the mother. *Id.* at 138.

28. *Id.*

29. *Id.*

in the regulation of abortions in America around the time of the Civil War.[30]

A. *ROE V. WADE*

These concepts were further outlined many years later when the United States Supreme Court ignited a social and moral flame by ruling in *Roe v. Wade*[31] that a woman's right to abortion was partially protected under the Fourteenth Amendment's Due Process Clause.[32] Jane Roe was an unmarried pregnant woman seeking to obtain a safe clinical abortion.[33] Texas law made all abortions illegal unless they were performed "for the purpose of saving the life of the mother."[34] Roe claimed she could not obtain a legal abortion in Texas because her life did not appear threatened and she could not afford to travel out of state to obtain an abortion.[35]

The right to privacy concerning matters of childbearing was first recognized by the Court in *Eisenstadt v. Baird,*[36] when it recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[37] The Court found in *Katz v. United States*[38] that protection of an individual's general privacy, to be absolutely free from outside interference, was regulated by state law.[39] The Court in *Roe* chose to not absolutely protect a woman's right to privacy in her decision to obtain an abortion because of two compelling state interests: the health of the mother and the preservation of the potentiality of life.[40] The Court found Roe's circumstances distinctly different from those discussed in *Eisenstadt.*[41] The Court found it reasonable and appropriate for the state to decide at some point during a woman's pregnancy that another interest, either the

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30. *Id.* at 139.

31. 410 U.S. 113 (1973).

32. *Roe*, 410 U.S. at 164. Justice Blackmun delivered the opinion joined by Chief Justice Burger and Justices Douglas, Brennan, Stewart, Marshall, and Powell. Justices White and Rehnquist dissented. *Id.* at 115.

33. *Id.* at 120.

34. *Id.* at 118.

35. *Id.* at 120. As of 1970, the following states had abortion laws: Arizona, Connecticut, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Texas, Vermont, West Virginia and Wisconsin. *Id.* at 176-77 n.2.

36. 405 U.S. 438 (1972).

37. *Eisenstadt*, 405 U.S. at 453.

38. 389 U.S. 347 (1967).

39. *Katz*, 389 U.S. at 350-51.

40. Roe v. Wade, 410 U.S. 113, 159 (1973).

41. *Id.*; *see also Eisenstadt*, 405 U.S. at 453.

mother's health or the fetal existence, becomes significantly involved, and the woman is no longer isolated in her privacy.[42]

In *Roe*, the Court designed a trimester framework that recognized the state's interest in the health of the mother and the state's interest in the potentiality of life while outlining the extent to which a state can regulate abortion throughout the stages of pregnancy.[43] The Court used the substantive due process "compelling interest" test to determine when the state's interests were "compelling" enough to justify regulation.[44]

In determining these "compelling" points during a woman's pregnancy, the Court found no need to resolve at which point life actually begins.[45] The Court also declined to recognize Texas' argument that the fetus is a "person" within the meaning of the Fourteenth Amendment.[46] It concluded that a fetus could be deprived of life without due process because a fetus is not a person in the eyes of the Constitution.[47]

The Court found an absence of any "compelling" interest during the first stage of pregnancy, which extended to approximately the end of the first trimester.[48] Thus the Court found that a physician and his or her patient were free to determine, under appropriate medical judgment, whether to abort the pregnancy without interference from the state.[49] The first "compelling" interest that the Court recognized was the state's interest in the mother's health.[50] The Court recognized the first trimester's conclusion as the point at which the state's interest in the health of the mother becomes "compelling."[51] Regulation of abortion by the state after the first trimester was limited to matters related to the preservation and protection of the mother's health.[52] The second "compelling" interest was the state's interest in the potentiality of life.[53] The state's interest in the potentiality of fetal life became "compelling" to the Court at the point of viability, which is when the fetus can presumably

42. *Roe*, 410 U.S. at 159; *see also Eisenstadt*, 405 U.S. at 453.

43. *Roe*, 410 U.S. at 162-63.

44. *Id.* at 155 (implying that abortion falls into the category of fundamental rights which are generally protected from regulation absent a "compelling state interest").

45. *Id.* at 159.

46. *Id.* at 157-58.

47. *Id.* (finding no definition of "person" in the Constitution to encompass a fetus, because the Fourteenth Amendment defines "citizens" as "persons born or naturalized in the United States" and that definition does not include the unborn).

48. *Id.* at 163.

49. *Id.*

50. *Id.*

51. *Id.* (recognizing that the risk of medical complications resulting from abortion during the second trimester is increased).

52. *Id.* (providing examples of such matters as qualifications and licenses of abortion practitioners and what types of facilities can provide abortions).

53. *Id.*

survive outside the mother's womb.[54] A state can proscribe abortion after a fetus has reached the point of viability.[55] The Court did not make this provision absolute because it found a required exception when "necessary to preserve the life or health of the mother."[56]

Justice Rehnquist's dissent disagreed with the majority's application of the "compelling interest" test.[57] Justice Rehnquist implied that the rational relationship test outlined in *Williamson v. Lee Optical Co.*[58] was the proper standard because abortion was not a fundamental right.[59] The rational relationship test required that a challenged law have "a rational relation to a valid state objective."[60] Justice Rehnquist stated that the Texas statute would satisfy the *Lee Optical* rational relationship test.[61]

Justice Rehnquist questioned whether abortion was a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[62] Prior to the adoption of the Fourteenth Amendment in 1868, there were at least thirty-six laws enacted by state or territorial legislatures limiting abortion.[63] Twenty-one of those laws were still in effect at the time of *Roe*.[64] Justice Rehnquist stated that the Constitution's drafters did not intend to withdraw a state's ability to regulate abortion through passage of the Fourteenth Amendment.[65]

B. *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY*

Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[66] the Court again examined the extent to which a state can regulate abortion.[67] *Casey* was instituted by a group of five

54. *Id.*
55. *Id.*
56. *Id.* at 164.
57. *Id.* at 172-73 (Rehnquist, J., dissenting).
58. 348 U.S. 483 (1955).
59. Roe v. Wade, 410 U.S. 113, 173 (1973); *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). The rational relationship test was traditionally applied in the areas of social and economic legislation. *Roe*, 410 U.S. at 173. The "compelling interest" test is associated with the Equal Protection Clause under the Fourteenth Amendment. *Id.* The majority in *Roe* applied it under the Due Process Clause, which Justice Rehnquist stated would further confuse the abortion related area of law. *Id.*
60. *Roe*, 410 U.S. at 173.
61. *Id*; *see also Lee Optical*, 348 U.S. at 491.
62. *Roe*, 410 U.S. at 174 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
63. *Id.* at 175-76 n.1. (listing the thirty-six jurisdictions which had laws limiting abortion).
64. *Id.* at 175-76.
65. *Id.* at 177.
66. 505 U.S. 833 (1992).
67. *Casey*, 505 U.S. at 844. Justices O'Connor, Kennedy, and Souter delivered the joint opinion of the Court, joined in part by Justices Blackmun and Stevens. *Id.* at 844, 911, 922. Chief Justice Rehnquist concurred in the judgment in part and dissented in part, joined by Justices White, Scalia, and Thomas. *Id.* at 944. Justice Scalia concurred in the judgment in part and dissented in part, joined by

abortion clinics, one physician, and a class of physicians who performed abortions, in response to the Pennsylvania Abortion Control Act of 1982.[68] The provisions of the Act that were challenged involved four requirements: (1) informed consent,[69] (2) a twenty-four hour waiting period prior to the abortion,[70] (3) informed consent for parents of minors,[71] and (4) spousal notification.[72]

The joint opinion altered the constitutional protection of a woman's right to obtain an abortion that it initially found rooted in the substantive component of Fourteenth Amendment due process in *Roe*.[73] Abortion is not an expressly recognized freedom in the Constitution, but the joint opinion found that neither was the right to marry interracially,[74] the right to exercise control over the right to have children through contraceptive use,[75] nor the exercise of parental control over a child's education.[76] The joint opinion encompassed the right to obtain an abortion in an "open door" policy, which found neither the language of the Bill of Rights nor traditional state practices limited identification of rights protected under the Fourteenth Amendment's "substantive

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Chief Justice Rehnquist, and Justices White and Thomas. *Id.* at 979.

68. *Id.* at 844-45; *see also* 18 PA. CONS. STAT. §§ 3201-20 (2000).

69. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205. The informed consent provision required that twenty-four hours prior to the abortion the performing physician must orally inform the woman of the nature and risks of the procedure, the probable gestational age of the unborn child at the time the abortion will be performed, and the medical risks associated with carrying the child to term. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205. The pregnant woman must be informed by the physician or any other qualified health care provider or social worker that the department publishes printed materials which provide information, free of charge, to abortion alternatives. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205. Medical assistance benefits may be available for prenatal care and childbirth, and the unborn child's father is liable to provide support for the child. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205. The woman had a choice whether to review the materials, and she had a right to view that material if she wanted to. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205. The final stipulation was that the pregnant woman must certify in writing that the above information has been provided to her. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205.

70. *Casey*, 505 U.S. at 902-03; *see also* 18 PA. CONS. STAT. § 3205.

71. *Casey*, 505 U.S. at 904; *see also* 18 PA. CONS. STAT. § 3206.

72. *Casey*, 505 U.S. at 908; *see also* 18 PA. CONS. STAT. § 3209.

73. *Casey*, 505 U.S. at 846 (finding fundamental rights encompassed by the word liberty in the Constitution, traditionally those found in the Bill of Rights, to be protected against intrusion by the states); *see also* Roe v. Wade 410 U.S. 113, 168 (1973) (Stewart, J., concurring). Justice Stewart in his concurrence stated that the "liberty" protected in *Griswold v. Connecticut* was rooted in the substantive component of the Due Process Clause of the Fourteenth Amendment. *Id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding a State does not have the right to forbid a married couple to use contraceptives). Justice Stewart noted the majority's use of the substantive component of Fourteenth Amendment due process to protect a woman's liberty to privacy in obtaining an abortion. *Roe*, 410 U.S. at 168-70.

74. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding a state does not have the right to forbid interracial marriages).

75. *See Griswold*, 381 U.S. at 485-86 (finding a state does not have the right to forbid a married couple to use contraceptives).

76. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (finding parents have a right to send their children to a private school); Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923) (finding schools have the right to teach foreign languages).

sphere of liberty."[77] The joint opinion stated that *Roe* could be read in a few different ways.[78] One way to interpret *Roe* was as a rule followed by later cases in which a state's interest in the protection of life does not outweigh individual liberty claims regarding personal autonomy and bodily integrity.[79] Another way to interpret *Roe* was as *sui generis*, because later cases have upheld the central holding of *Roe* without questioning its constitutional validity.[80]

Casey reaffirmed one of *Roe's* holdings that after viability, the State can regulate and even proscribe abortion to further its interest in the potentiality of life.[81] The joint opinion rejected *Roe's* rigid trimester framework by holding that a state can regulate abortion subsequent to viability.[82] Medical advancements in neonatal care have advanced the point of viability that was initially recognized in *Roe* to a point earlier in the pregnancy, which was one factor in the joint opinion's decision to abandon the trimester framework.[83]

The joint opinion chose not to overrule *Roe* because of *stare decisis*, which persuaded the majority of justices to adhere to *Roe's* basic holding.[84] This adherence to *stare decisis* was justified when the joint opinion revisited two cases it found comparable to such a divisive issue as abortion: *Lochner v. New York*[85] and *Plessy v. Ferguson*.[86]

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77. *Casey*, 505 U.S. at 848.

78. *Id.* at 857.

79. *Id.* at 857; *see also* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

80. *Casey*, 505 U.S. at 857-58.

81. *Id.* at 879; *see also Roe*, 410 U.S. at 163-64. Although *Roe* established that a state has an important and legitimate interest in the potentiality of life, that interest has not been given enough attention by the Court in later decisions. *See Casey*, 505 U.S. at 871.

82. *Casey*, 505 U.S. at 878; *see also Roe*, 410 U.S. at 163-66.

83. *Casey*, 505 U.S. at 871; *see also Roe*, 410 U.S. at 163-66.

84. *Casey*, 505 U.S. at 861; *see also Roe*, 410 U.S. at 164-65.

85. 198 U.S. 45 (1905). In *Lochner*, the Court imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation when it found that liberty, under the Due Process Clause, protected the "right to make a contract." *Lochner*, 198 U.S. at 53. A post-*Lochner* case with significance was *Adkins v. Children's Hospital of District of Columbia*, which involved a requirement that employers of adult women comply with minimum wage standards. *See generally* Adkins v. Children's Hospital, 261 U.S. 525 (1923). The Court found this wage requirement to be an infringement of the constitutionally protected liberty to contract which was first recognized in *Lochner*. *Id.* at 558. The Court abandoned this *laissez-faire* economic theory created by *Lochner* when it overruled *Adkins* in *West Coast Hotel Co. v. Parrish*, by holding that the contractual freedom created in *Lochner* and protected in *Adkins* had been mistakenly protected under the Constitution. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937). The Great Depression had awakened Americans to not only the dangers of *laissez-faire* economics, but to the worldwide demise of *laissez-faire* economics. *West Coast Hotel*, 300 U.S. at 392-99. These dangers were not quite so obvious in times of greater economic prosperity such as when *Lochner* was decided in 1905. *Id.*; *see generally Lochner*, 198 U.S. 45.

86. 163 U.S. 537 (1896). The second decision the joint opinion discussed was the separate-but-equal rule promulgated in *Plessy v. Ferguson*, which established that racial segregation was not a denial of equal protection if the facilities were equal. *Plessy*, 163 U.S. at 550-51. The Court admitted fifty-eight years later in *Brown v. Board of Education*, that the "badge of inferiority" it had stated was self-imposed by the black race in *Plessy* was instead imposed by the racial segregation that the Court

These two cases were used by the joint opinion in *Casey* to illustrate situations where it found that its prior decisions were based on facts that had changed or had come to be understood differently.[87] The joint opinion found no reason to undertake the task of overruling *Roe* because it found that neither the factual underpinnings of its central holding nor the joint opinion's understanding of *Roe* had changed.[88] The joint opinion discussed the potential cost of overruling *Roe* in terms of social upheaval because men and women had relied on *Roe* to remedy their reproductive dilemmas.[89] Chief Justice Rehnquist's dissent argued that public opinion should not be factored into the Court's decision of whether or not to overrule such a "divisive" decision.[90] The Chief Justice also pointed out that the Court had overruled, in whole or in part, thirty-four of its own decisions in the last twenty-one years.[91]

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endorsed in *Plessy*. *Id.* at 551; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

87. *Casey*, 505 U.S. at 863-64. The majority found making the decisions to overrule *Lochner* and *Plessy* to be the Court's constitutional duty. *Id.*; *see also Lochner*, 198 U.S. at 53; *Plessy*, 163 U.S. at 551-52. The joint opinion discussed changed circumstances and assumed that because of these the public would accept the decisions to overrule. *See Casey*, 505 U.S. at 863-64. *But see Casey*, 505 U.S. at 958. (Rehnquist, C. J., dissenting) (challenging the court's reasoning that "its decision is exempt from reconsideration under established principles of stare decisis"). However, the two opinions the Court chose to illustrate why it adhered to *stare decisis* were unlike *Casey* because in *West Coast Hotel* and *Brown* the Court overruled itself and in *Casey* the Court chose not to overrule itself. *See Casey*, 505 U.S. at 863-64; *see generally West Coast Hotel*, 300 U.S. 379; *Brown*, 347 U.S. 483.

88. *Casey*, 505 U.S. at 864. Chief Justice Rehnquist in his dissent disagreed. *Id.* at 961-62. The Chief Justice found the Court in *West Coast Hotel* frankly admitted it had mistakenly found a constitutional right to "freedom of contract" in *Lochner*. *Id.* at 962-63; *see generally Lochner*, 198 U.S. 45. The Chief Justice also found the Court in *Brown* flat-out admitted it was constitutionally mistaken again in *Plessy* when it found protection of racial segregation under the Equal Protection Clause. *Casey*, 505 U.S. at 962-63; *see generally Plessy*, 163 U.S. 537; *Brown*, 347 U.S. 483.

89. *See Casey*, 505 U.S. at 856 (discussing the reliance people had placed on *Roe* in both economic and social developments and how people had organized intimate relationships and career choices around the premise that abortion will be available should contraception fail). The joint opinion also found abortion facilitated equal participation of women in society because abortion provided them with control over their reproductive lives. *Id.* Chief Justice Rehnquist disagreed with the majority's assertion that reliance on reproductive control through abortion had facilitated women's social rise to equality. *Id.* at 956-57. He cited other reasons, such as larger numbers of women obtaining higher education to compete with men for jobs and society's recognition of the female ability to fulfill jobs previously exclusively performed by men. *Id.*

90. *See Id.* at 962-63 (finding constitutional rules have no ties to public opinion nor does the doctrine of *stare decisis* rest on the support of the public). Chief Justice Rehnquist found the distinction between cases that are intensely divisive and those that are not to be purely subjective and difficult to distinguish. *Id.* at 958-59.

91. *Casey*, 505 U.S. at 959; *see also* Payne v. Tennessee, 501 U.S. 808, 828-830 n.1 (1991) (listing Perez v. Campbell, 402 U.S. 637 (1971) (overruling Kesler v. Dep't of Public Safety of Utah, 369 U.S. 153 (1962)); Dunn v. Blumstein, 405 U.S. 330, (1972) (overruling Pope v. Williams, 193 U.S. 621 (1904)); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (overruling Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928)); Miller v. California, 413 U.S. 15 (1973) (overruling Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966)); N.D. Pharmacy Bd. v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (overruling Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928)); Edelman v. Jordan, 415 U.S. 651 (1974) (overruling in part Shapiro v. Thompson, 394 U.S. 618 (1969), State Dep't of Health & Rehabilitative Servs. of Fla. v. Zarate, 407 U.S. 918 (1972), and Sterrett v. Mothers' & Children's Rights Org., 409 U.S. 809 (1972)); Taylor v. Louisiana, 419 U.S. 522 (1975) (overruling in effect Hoyt v. Florida, 368 U.S. 57 (1961)); Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) (overruling Low v. Austin, 80 U.S. 29 (1872)); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)

The *Casey* joint opinion affirmed *Roe's* basic holding that a woman has the right to terminate her pregnancy before viability.[92] The joint opinion also affirmed *Roe's* holding that an exception for the health of the mother must be present in state regulations seeking to prohibit post-viability abortions.[93] The joint opinion found *Roe's* trimester framework too rigid and rejected it for two flaws: its formulation "misconceive[d] the nature of the pregnant woman's interest; and in practice it undervalue[d] the State's interest in potential life."[94]

In examining the first flaw in the trimester approach, misconception of the pregnant woman's interest, the joint opinion found that many regulations, which served valid purposes and did not strike at the right of abortion itself, could be invalidated under *Roe*.[95] The joint opinion found that such laws had the incidental effect of making it more difficult or expensive to get an abortion.[96] But, the joint opinion found these "incidental effects," which made obtaining an abortion more difficult, not enough to invalidate the laws.[97]

(overruling Valentine v. Chrestensen, 316 U.S. 52 (1942)); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (overruling Maryland v. Wirtz, 392 U.S. 183 (1968)); New Orleans v. Dukes, 427 U.S. 297 (1976) (overruling Morey v. Doud, 354 U.S. 457 (1957)); Craig v. Boren, 429 U.S. 190 (1976) (overruling Goesaert v. Cleary, 335 U.S. 464 (1948)); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (overruling Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951)); Shaffer v. Heitner, 433 U.S. 186 (1977) (overruling Pennoyer v. Neff, 95 U.S. 714 (1878)); Dep't of Revenue of Wash. v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978) (overruling Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937)); United States v. Scott, 437 U.S. 82 (1978) (overruling United States v. Jenkins, 420 U.S. 358, (1975)); Hughes v. Oklahoma, 441 U.S. 322 (1979) (overruling Geer v. Connecticut, 161 U.S. 519 (1896)); United States v. Salvucci, 448 U.S. 83 (1980) (overruling Jones v. United States, 362 U.S. 257 (1960)); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (overruling Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)); Illinois v. Gates, 462 U.S. 213 (1983) (overruling Aguilar v. Texas, 378 U.S. 108 (1964)); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (overruling in part Rolston v. Mo. Fund Comm'rs, 120 U.S. 390 (1887)); United States v. One Assortment of Eighty-Nine Firearms, 465 U.S. 354 (1984) (overruling Coffey v. United States, 116 U.S. 436 (1886)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)); United States v. Miller, 471 U.S. 130 (1985) (overruling in part *Ex parte* Bain, 121 U.S. 1 (1887)); Daniels v. Williams, 474 U.S. 327 (1986) (overruling in part Parratt v. Taylor, 451 U.S. 527 (1981)); Batson v. Kentucky, 476 U.S. 79 (1986) (overruling in part Swain v. Alabama, 380 U.S. 202 (1965)); Solorio v. United States, 483 U.S. 435 (1987) (overruling O'Callahan v. Parker, 395 U.S. 258 (1969)); Welch v. Tex. Dep't of Highways and Public Transp., 483 U.S. 468 (1987) (overruling in part Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184 (1964)); South Carolina v. Baker, 485 U.S. 505 (1988) (overruling Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)); Thornburgh v. Abbott, 490 U.S. 401 (1989) (overruling in part Procunier v. Martinez, 416 U.S. 396 (1974)); Alabama v. Smith, 490 U.S. 794 (1989) (overruling Simpson v. Rice (decided with North Carolina v. Pearce), 395 U.S. 711 (1969)); Healy v. Beer Inst., 491 U.S. 324 (1989) (overruling Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966)); Collins v. Youngblood, 497 U.S. 37 (1990) (overruling Kring v. Missouri, 107 U.S. 221 (1883), Thompson v. Utah, 170 U.S. 343 (1898), and California v. Acevedo, 500 U.S. 565 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753 (1979))).

92. *Casey*, 505 U.S. at 870; *see also* Roe v. Wade, 410 U.S. 113, 163 (1973).

93. *See Casey*, 505 U.S. at 872, 880 (finding a health exception assumed for pre-viability abortions as well as post-viability abortions); *see also Roe*, 410 U.S. at 163.

94. *Casey*, 505 U.S. at 873; *see generally Roe*, 410 U.S. 113.

95. *Casey*, 505 U.S. at 873-74.

96. *Id.* at 874.

97. *Id.* at 874-75.

The joint opinion replaced strict scrutiny with the "undue burden" standard which rendered a regulation unconstitutional when it imposed an undue burden on a woman's decision to obtain an abortion.[98] The undue burden standard was defined as when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[99] One factor in ascertaining whether a regulation is an undue burden is whether or not it "prevent[s] a significant number of women from obtaining an abortion."[100] Justice Scalia's dissent expressed frustration with the joint opinion's adoption of the undue burden standard which he concluded had no "coherent legal basis."[101]

The joint opinion found, by examining the second flaw in the trimester approach, that in practice the state's interest in potential life was undervalued.[102] The joint opinion also found that many pre-viability attempts by the state to influence a woman's decision of whether or not to obtain an abortion were being invalidated as undue burdens in direct conflict with *Roe's* recognition of a state's interest in protecting the potentiality of human life.[103] The Court found that not all state regulations promoting interests of the unborn were invalid.[104] State regulations which attempt to persuade a woman to choose childbirth over abortion or regulations that attempt to protect the pregnant woman's health are constitutional unless they place an undue burden in the woman's path.[105]

The joint opinion found constitutional the provisions of informed consent, the twenty-four hour waiting period, and informed consent for parents of minors because those provisions did not impose an undue burden on a woman seeking an abortion.[106] The joint opinion held the spousal notification provision unconstitutional because it placed an undue burden on a woman seeking an abortion.[107]

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98. *See id.* (finding that absent a showing that the regulation placed an undue burden on a woman's ability to obtain an abortion, the law does not violate the liberties in the Due Process Clause). Chief Justice Rehnquist's dissent argued that the appropriate test was whether the statute rationally furthers any legitimate state interests. *Id.* at 974. Justice Scalia also found the rational basis test to be the appropriate standard to test Pennsylvania's interests in regulating abortion. *Id.* at 981 (Scalia, J., dissenting).

99. *Id.* at 877.

100. *Id.* at 893.

101. *Id.* at 987 (Scalia, J., dissenting).

102. *Id.* at 875-76, *see also* Roe v. Wade, 410 U.S. 113, 163 (1973).

103. Planned Parenthood v. Casey, 505 U.S. 833, 875-76 (1992); *see generally Roe*, 410 U.S. 113.

104. *Casey*, 505 U.S. at 876.

105. *Id.* at 877.

106. *Id.* at 887; *see also* 18 PA. CONS. STAT. §§ 3201-20.

107. *Casey*, 505 U.S. at 895.

Roe had established the trimester framework which provided that during the first trimester the physician and patient were free to determine whether to abort the pregnancy without interference from the state; that regulation of abortion by the state after the first trimester was limited to matters related to the preservation and protection of the mother's health; and finally, that the state's interest in the potentiality of life became "compelling" at the point of viability and at that point the state could proscribe abortion.[108] *Casey* rejected *Roe's* trimester framework and redefined *Roe's* central holding to state that a woman has a right to terminate a previability pregnancy without "undue burden."[109] The joint opinion adopted an undue burden standard which made a regulation unconstitutional when it had the purpose or effect of placing a substantial obstacle in the path of a woman seeking to obtain an abortion of a nonviable fetus.[110]

C. PARTIAL BIRTH ABORTION PROCEDURES

The difference between D&E and D&X partial birth abortions must be explained before examining the Court's first reason for invalidating the Nebraska statute.[111] Approximately ten percent of all abortions are performed during the pregnancy's second trimester, the period between twelve to twenty-four weeks of pregnancy.[112] The most commonly used procedure is "dilation and evacuation," D&E, which combined with vacuum aspiration[113] accounts for ninety-five percent of abortions performed during the second trimester.[114]

A D&E abortion performed during the second trimester will usually include the following procedures: (1) dilation of the cervix, (2) removal of at least some fetal tissue using nonvacuum instruments, and (3) the potential need, after the fifteenth week, for instrumental dismemberment of the fetus or the collapse of fetal parts to remove it from the uterus.[115] A D&E abortion is performed using traction created by the opening between the uterus and vagina to dismember the fetus by tearing off its limbs using surgical instruments.[116]

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108. *Roe*, 410 U.S. at 163-64.

109. *Casey*, 505 U.S. at 870-73.

110. *Id.* at 877.

111. Stenberg v. Carhart, 530 U.S. 914, 929-30 (2000).

112. *Abortion Surveillance—United States, 1996, in* CENTERS FOR DISEASE CONTROL AND PREVENTION SURVEILLANCE SUMMARIES, MORBIDITY AND MORTALITY WEEKLY REPORT 41 (July 30, 1999).

113. OBSTETRICS: NORMAL & PROBLEM PREGNANCIES 1253-54 (S. Gabbe et al. eds., 3d ed. 1996). Vacuum aspiration involves the insertion of a vacuum tube into the uterus to evacuate the contents. *Id.*

114. *Abortion Surveillance, supra* note 112, at 41.

115. *Stenberg*, 530 U.S. at 924-25 (citing American Medical Association, Report of Board of Trustees on Late-Term Abortion, App. 490).

116. *Id.* at 925-26.

The risks involved with the D&E abortion procedure include accidental perforation and damage to neighboring organs through the use of instruments in the uterus, sharp fetal bone fragments passing through the uterus, and the risk of infections from fetal tissue accidentally left in the mother.[117]

Another variation of the D&E abortion procedure is "intact D&E."[118] It begins with dilation of the cervix and then the fetus is removed from the uterus through the cervix in one pass, "intact."[119] This procedure is usually used after the sixteenth week of pregnancy.[120] The "intact D&E" has two variations, depending upon the presentation of the fetus.[121] If the fetus presents itself head first, vertex presentation, the doctor first collapses the skull and then pulls the entire fetus through the cervix.[122] If the fetus presents itself feet first, breech presentation, then the doctor pulls the fetal body through the cervix while leaving the head in the cervix so he can first collapse it and then remove the entire body.[123] The breech presentation of D&E is also commonly known as a "dilation and extraction" abortion, or D&X.[124]

The D&X procedure is described by the American College of Obstetricians and Gynecologists in the following steps: (1) dilation of the cervix, (2) "instrumental conversion of the fetus to a footling breech," (3) breech extraction of the body except the head, and (4) "partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus."[125]

Once the fetal body except for the head is outside the mother's body, the appropriate tool to tear open the skull so its cranial contents can be vacuumed out is a pair of scissors, according to Dr. Martin Haskell, a leading proponent of the D&X procedure.[126] The process of

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117. *Id.* at 926.

118. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY 1042-43 (David H. Nichols et al. eds., 2000); E. STEVE LICHTENBERG ET AL., A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 136 (1999).

119. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY, *supra* note 118, at 1042-43; LICHTENBERG ET AL., *supra* note 118, at 136-37.

120. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY, *supra* note 118, at 1042-43; LICHTENBERG ET AL., *supra* note 118, at 136-37.

121. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY, *supra* note 118, at 1042-43; LICHTENBERG ET AL., *supra* note 118, at 136-37.

122. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY, *supra* note 118, at 1042-43; LICHTENBERG ET AL., *supra* note 118, at 136-37.

123. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY, *supra* note 118, at 1042-43; LICHTENBERG ET AL., *supra* note 118, at 136-37.

124. GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY, *supra* note 118, at 1042-43; LICHTENBERG ET AL., *supra* note 118, at 136-37.

125. Stenberg v. Carhart, 530 U.S. 914, 928 (2000) (quoting American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)).

126. *Id.* at 959-60 (Kennedy, J., dissenting) (citing M. Haskell, DILATION AND EXTRACTION FOR LATE SECOND TRIMESTER ABORTION (1992), in 139 Cong. Rec. 8605 (1993)).

vacuuming out the fetal skull contents is referred to by the medical community as "reduction procedure."[127] The fetal skull is "reduced" so that the head can be removed through the cervix and the entire body remains intact.[128] Brain death of the fetus does not happen until the skull is "reduced."[129] There are no reliable statistics on the number of D&X abortions performed annually, only estimates ranging from 640 to 5,000.[130] In addition to Nebraska, twenty-nine other states have laws banning partial birth abortions.[131]

III. ANALYSIS

In *Stenberg v. Carhart*, the Supreme Court struck down a Nebraska statute that banned partial birth abortions because it placed an undue burden on a woman seeking to obtain a partial birth abortion.[132] Justice Stevens wrote a concurring opinion which found no difference between the two partial birth abortion procedures and no furtherance of a legitimate interest by Nebraska banning D&X and not D&E.[133] Justice O'Connor concurred and found that the Nebraska statute could be constitutional if it implemented the required health exception and tailored the statutory language to explicitly exclude the D&E procedure from the partial birth abortion ban.[134] Justice Ginsburg wrote a concurring opinion which found no protection of the mother's life or health in the statutory ban, but instead an attempt to prevent abortions altogether.[135]

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127. *Id.* at 960.

128. *Id.*

129. *Id.*

130. *Id.* at 929 (comparing Henshaw, *Abortion Incidence and Services in the United States, 1995-1996*, 30 FAMILY PLANNING PERSPECTIVES 263, 270 (1998) with Joint Hearing on S. 6 and H. R. 9292 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 1st Sess., 46 (1997)).

131. ALA. CODE § 26-22-3 (Supp. 2000); ALASKA STAT. § 18.16.050 (Michie 2000); ARIZ. REV. STAT. § 13-3603.01 (2001); ARK. CODE ANN. § 5-61-203 (Michie 1997); FLA. LAWS ch. 390.0111 (2001); GA. CODE ANN. § 16-12-144 (1998); IDAHO CODE § 18-613 (Michie Supp. 2001); 720 ILL. COMP. STAT. 513/10 (West Supp. 2001); IND. CODE ANN. § 16-34-2-7 (Michie Supp. 2000); IOWA CODE § 707.8A (West Supp. 2001); KAN. STAT. ANN. § 65-6721 (Supp. 2000); KY. REV. STAT. ANN. § 311.765 (Michie Supp. 2000); LA. REV. STAT. ANN. § 14:32.9 (West Supp. 2001); MICH. COMP. LAWS § 333.17016 (Supp. 2001); MISS. CODE ANN. § 41-41-73 (Supp. 2000); MONT. CODE ANN. § 50-20-102(e) (1999); N.J. STAT. ANN. § 2A:65A-6 (West 2000); N.M. STAT. ANN. § 30-5A-3 (Michie Supp. 2000); N.D. CENT. CODE § 14-02.6-02 (Supp. 1999); OHIO REV. CODE ANN. § 2919.17 (Anderson 1999); OKLA. STAT. tit. 21, § 684 (1999); R.I. GEN. LAWS § 23-4.12-2 (Supp. 2000); S.C. CODE ANN. § 44-4185 (Law. Co-op. Supp. 2000); S.D. CODIFIED LAWS § 34-23A-27 (Michie Supp. 2000); TENN. CODE ANN. § 39-15-209 (1997); UTAH CODE ANN. § 76-7-310.5 (1999); VA. CODE ANN. § 18.2-74.2 (Michie Supp. 2001); W. VA. CODE § 33-42-8 (2000); WIS. STAT. § 940.16 (Supp. 2000).

132. Stenberg v. Carhart, 530 U.S. 914, 930 (2000); *see also* NEB. REV. STAT. ANN. § 28-328(1) (Supp. 2000). Justice Breyer delivered the opinion of the Court joined by Justices Stevens, O'Connor, Souter and Ginsburg. *Stenberg*, 530 U.S. at 930.

133. *Stenberg*, 530 U.S. at 946-47 (Stevens, J., concurring).

134. *Id.* at 950 (O'Connor, J., concurring).

135. *Id.* at 951-52 (Ginsburg, J., concurring).

Chief Justice Rehnquist dissented and stated that he believed *Casey* was wrongly decided.[136] Justice Scalia dissented because he disagreed with the majority's application of the undue burden standard and expressed that the Court should leave the abortion decision up to the individual states.[137] Justice Kennedy's dissenting opinion found differences between D&E and D&X which justified Nebraska's ban on D&X.[138] Justice Thomas wrote a dissenting opinion which determined that Nebraska's statutory ban did not include the D&E procedure.[139]

A. MAJORITY OPINION

The Supreme Court declared the Nebraska partial birth abortion ban unconstitutional for two reasons: (1) because the statute imposed an "undue burden" on a woman's ability to choose a D&E abortion, which unduly burdened her right to choose abortion itself and (2) because the statute lacked any exception for protection of the mother's health.[140]

There are approximately 1,221,585 abortions performed in the United States each year according to 1996 statistics, which is the most recent year statistics are available. [141] About 67,000 or 5.5% of these are performed either in or after the sixteenth week of pregnancy which is from approximately the middle of the second trimester to the end of the third trimester.[142]

The Court found the Nebraska ban on partial birth abortions unconstitutional because under *Casey* it placed "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," thus qualifying as an undue burden on a woman's choice to obtain an abortion.[143] The Court interpreted the Nebraska statute to include the D&E abortion procedure in addition to the D&X procedure which the statute was aimed at prohibiting, and the Court held that banning both methods was unconstitutional.[144] Nebraska conceded that if the statute was construed to apply to both the D&X and D&E procedures, it would constitute an "undue burden," but Nebraska contended that the statute

136. *Id.* at 952 (Rehnquist, C.J., dissenting).
137. *Id.* at 955-56 (Scalia, J., dissenting).
138. *Id.* at 958-60 (Kennedy, J., dissenting).
139. *Id.* at 989 (Thomas, J., dissenting).
140. *Id.* at 930; *see also* NEB. REV. STAT. ANN. § 28-328(1) (Supp. 2000).
141. *Abortion Surveillance*, *supra* note 112 at 1, 5.
142. *Id.*
143. Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (quoting Planned Parenthood v. Casey, 505 U.S. 832, 877 (1992)).
144. *Id.* at 939.

only applied to the D&X procedure.[145] Both the district court and the court of appeals found the statute to include the D&E procedure, so the question of statutory interpretation was examined by the Court.[146]

The Court struggled to define the term "substantial portion" of the fetus as found in the statute.[147] Evidence from the trial court showed that D&E often involves the physician pulling a fetal arm or leg into the vagina before the fetus dies and dismemberment, as found in D&E, cannot be accomplished without pulling part of the fetus into the vagina.[148]

The Nebraska Attorney General contended the statutory language differentiated between the two procedures because he defined "substantial portion" as "the child up to the head."[149] He went further by alleging that the statute does not apply unless the abortionist introduces the entire fetal body into the birth canal.[150] Finally, the Attorney General argued that the statute differentiated between the overall "abortion procedure" and the "separate procedure" used to kill the unborn child.[151]

The Court rejected these arguments because the statutory language did not specifically track or separate the medical differences between the two procedures, nor did it provide an explicit exception to the ban for the D&E procedure.[152] The Court disagreed with the Nebraska Attorney General's interpretation that the statute applied only when the entire body was present in the birth canal.[153] The Court found the statutory language did not differentiate why the "substantial portion" of the fetus was being delivered into the vagina, whether for the purpose of dismemberment or "reduction."[154] The Court found that it did not have to follow the Attorney General's interpretation because it generally followed lower court interpretations of state law, and in this case, both lower courts had rejected the Attorney General's interpretation. [155]

The Court also looked to precedent, which weighed against accepting the Attorney General's interpretation when that interpretation did

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145. *Id.* at 938.

146. *Id.* at 938-39; *see also* Carhart v. Stenberg, 192 F.3d 1142, 1150 (8th Cir. 1999); Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1128-29 (D. Neb. 1998).

147. NEB. REV. STAT. ANN. § 28-326(9) (Supp. 2000); *see also Stenberg*, 530 U.S. at 939-43.

148. *Stenberg*, 530 U.S. at 939.

149. *Id.* at 940. When statutory language explicitly defines a term, that definition becomes controlling, even it differs from the ordinary meaning. *See* Meese v. Keene, 481 U.S. 465, 484-85 (1987) (finding the definition of a term excludes other meanings not stated in the statutory language).

150. *Stenberg*, 530 U.S. at 940.

151. *Id.* at 943.

152. *Id.* at 943-44.

153. *Id.* at 944.

154. *Id.*

155. *Id.* at 945. This statutory interpretation question surrounding the term "partial birth abortion" has been addressed by ten of the lower federal courts, all of which found the term could potentially include other abortion procedures. *Id.*

not bind state courts or law enforcement.[156] If the state does not follow its own Attorney General then the federal courts should not have to either.[157] In this case, Nebraska law did not make the Attorney General's interpretations binding.[158] In response to the Attorney General's final interpretive argument, the Court found that the statutory language nowhere contained the word "separate" in reference to procedure, which would separate the killing stage from the overall abortion procedure.[159]

The Court invalidated the Nebraska statute because it found no exception for the mother's health within the ban.[160] *Casey* reaffirmed the health exception *Roe* initially required.[161] Nebraska's law applies to both pre-viability and post-viability abortions, and because the law for post-viability abortions requires a health exception, pre-viability abortions at minimum require the same.[162] Nebraska disagreed with the Court as to whether the health exception was required.[163] Nebraska contended that its partial birth abortion ban did not require a health exception because "safe alternatives remain available."[164]

The Court disagreed with Nebraska, citing a failure to demonstrate that banning D&X without a health exception would not create significant health risks for the mother.[165] The majority recognized that the state may not subject the woman to health risks arising from the pregnancy itself or risks from being forced to choose alternative abortion procedures.[166] The district court concluded that the D&X procedure which Dr. Carhart performed was safer than the D&E procedure used at the same stage of pregnancy.[167] Nebraska and supporting *amici* refuted

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156. *Id.* at 940-41; *see also* State v. Coffman, 330 N.W. 2d 727, 728 (1983). Attorney General issued opinions are entitled to "substantial weight" and "to be respectfully considered" but are of "no controlling authority." *Id.*

157. Stenberg v. Carhart, 530 U.S. 914, 941 (2000); *see also Coffman*, 330 N.W. 2d at 728.

158. *Stenberg*, 530 U.S. at 941.

159. *Id.* at 943. The Court found the word "procedure" in the Nebraska statute to be used in reference to the entire abortion procedure throughout the subsections prior to the one the Attorney General referred to. *Id.* at 943-44; *see also* NEB. REV. STAT. ANN. § 28-326(9) & 328(1)-(4) (Supp. 2000).

160. *Stenberg*, 530 U.S. at 930-31.

161. *Id.* at 930 (citing Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992)). *Casey* required a health exception "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879; *see also* Roe v. Wade, 410 U.S. 113, 164-65 (1973).

162. *Stenberg*, 530 U.S. at 930; *see also* NEB. REV. STAT. ANN. § 28-328(1). The Nebraska statute excepts procedures "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury." *Id.*

163. *Stenberg*, 530 U.S. at 931.

164. *Id.*

165. *Id.* at 932.

166. *Id.*

167. *Id.* The district court concluded that because the D&X procedure allows the fetus to pass through the cervix with minimal instrumentation used, it reduces risks from damage caused by instru

the district court's findings with eight separate arguments: (1) the D&X procedure was rarely used, (2) it was used by only a "handful of doctors," (3) D&E and labor inductions are always "safe alternative procedures," (4) the ban would not increase a woman's risk of several rare abortion complications, (5) D&X elements created special risks,[168] (6) there were no medical studies "establishing the safety of the partial birth abortion/D&X procedure," (7) an American Medical Association policy statement suggested there was no situation where D&X was the "only appropriate" abortion procedure, and (8) the American College of Obstetricians and Gynecologists found no situation where D&X was the "only option" to protect the mother's life.[169]

The Court responded by finding Nebraska's arguments insufficient to bypass the health requirement for its partial birth abortion ban.[170] The majority found the first two factors, involving procedure rarity, to be irrelevant to the constitutional question.[171] The third factor was unsupported by the district court's findings of the D&X procedure to be "significantly *safer* in certain circumstances."[172] The district court relied on opposing medical testimony to reject the fourth factor by showing that if the ban included D&E, abortion complications would be increased.[173] The Court refuted Nebraska's fifth argument with statements from the American College of Obstetricians and Gynecologists *amici* brief which stated that D&X produced risks similar to those presented by D&E procedures.[174] The majority agreed with Nebraska's sixth and seventh arguments: there were no comparable safety studies involving the D&X procedure and that, according to the American Medical Association, there was no present situation requiring only the D&X procedure.[175] The Court disagreed with the American College of Obstetricians and Gynecologists' similar statement describing no cir-

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ments, decreases operating time, blood loss, complications from bony fragments, and eliminates the risk of infection caused by fetal tissue left behind. *Id.*

168. *Id.* at 933. Special risks created by the D&X procedure include: cervical incompetence caused by overdilation, injury by changing the fetal presentation to breech, and dangers when using instruments to pierce the fetal skull. *Id.*

169. *Id.* at 933-34.

170. *Id.* at 934.

171. *Id.* The Court held that the health exception served to protect women in the rare situations where D&X procedures would be necessarily used or chosen. *Id.* The Court also held that there were a few potential reasons why few doctors used the D&X procedure: the procedure's controversy, rarity of late second term abortions, and potential procedural lack of utility. *Id.*

172. *Id.*

173. *Id.* at 935.

174. *See id.* (finding that actual childbirth requires greater cervical dilation than partial birth abortion procedures).

175. *See id.* (finding Nebraska's sixth and seventh arguments not enough to justify the D&X ban).

cumstances requiring only a D&X abortion because of contradictory statements in its *amici* brief.[176]

Finally, in requiring a health requirement, the Court examined the *Casey* phrase, "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[177] The majority found that differences in medical judgment did not remove the health requirement, because the disagreement signaled some sort of risk, which required the health exception for both pre- and post-viability abortions.[178]

B. CONCURRENCE BY JUSTICE STEVENS, JOINED BY JUSTICE GINSBURG

Justice Stevens began his concurrence by stating that he could not find how the D&X method of partial birth abortion which Nebraska sought to ban was any more brutal, gruesome, or less respectful of "potential life" than the D&E abortion method which the Nebraska statute allowed.[179] Justice Stevens found it incomprehensible how the state could have a legitimate interest in potentially requiring a doctor to go against his best medical judgment by performing an alternate abortion procedure.[180] Justice Stevens also found no medical difference between the D&X and D&E abortion procedures and no furtherance of a legitimate interest by Nebraska in banning D&X and not D&E.[181]

C. CONCURRENCE BY JUSTICE O'CONNOR

Justice O'Connor analyzed the health exception found in the Nebraska statute.[182] The Nebraska statute only excepted procedures which were "necessary to save the life of the mother whose life is endangered by a physical disorder."[183] This provision did not include all situations where the mother's life may be endangered, and Justice O'Connor concluded that it did not satisfy the health exception requirement and thus rendered the statute unconstitutional.[184]

Justice O'Connor stated that the Nebraska statute could be constitutional if it implemented the required health exception and tailored the statutory language to explicitly exclude the D&E procedure from the

176. *Id.* at 935-36.
177. *Id.* at 937 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992)).
178. *Id.* at 937-38.
179. *Id.* at 946 (Stevens, J., concurring) (finding both D&E and D&X partial birth abortion procedures to be equally gruesome).
180. *Id.* at 946-47.
181. *Id.*
182. *Id.* at 947 (O'Connor, J., concurring).
183. *Id.*; *see also* NEB. REV. STAT. ANN. § 28-328(1) (Supp. 2000).
184. Stenberg v. Carhart, 530 U.S. 914, 947-48 (2000).

partial birth abortion ban.[185] Three states currently include language explicitly excluding the D&E procedure from the respective partial birth abortion bans: Kansas, Utah, and Montana.[186] Justice O'Connor discussed that a ban on D&X alone would likely not amount to an "undue burden" on the woman's decision of whether to obtain an abortion.[187]

D. CONCURRENCE BY JUSTICE GINSBURG, JOINED BY JUSTICE STEVENS

Justice Ginsburg observed that the Nebraska statute did not prevent any fetus from being destroyed, it simply regulated the method by which the fetus can and cannot be destroyed.[188] The statute also did not seek to protect the lives or health of pregnant women.[189] Justice Ginsburg agreed with Judge Posner's dissent in *Hope Clinic v. Ryan*,[190] that the law did not prohibit the D&X procedure because it kills the fetus, nor because of its risks, nor because of its repulsive nature.[191] Instead, Judge Posner concluded that the Wisconsin law in *Hope Clinic* banned D&X because state legislators sought to chip away at the private choice shielded by *Roe* and *Casey*.[192] Justice Ginsburg, by agreeing with Judge Posner, implied that Nebraska in this case enacted the partial birth abortion ban to prevent women from obtaining abortions altogether.[193]

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185. *Id.* at 950.

186. *Id.; see also* KAN. STAT. ANN. § 65-6721(b)(2)(C) (Supp. 2000). The Kansas ban does not apply to "[d]ilation and evacuation abortion procedures involving dismemberment of the fetus prior to removal from the body of the pregnant woman." *Id. See also* UTAH CODE ANN. § 76-7-310.5(1)(a) (1999). The partial birth prohibition "does not include the dilation and evacuation procedure involving dismemberment prior to removal." *Id. See also* MONT. CODE ANN. § 50-20-401(3)(c)(ii) (1999). Montana defines the banned partial birth abortion procedure as when

> (A) the living fetus is removed intact from the uterus until only the head remains in the uterus;
> (B) all or a part of the intracranial contents of the fetus are evacuated;
> (C) the head of the fetus is compressed; and
> (D) following fetal demise, the fetus is removed from the birth canal.

Id.

187. *Stenberg*, 530 U.S. at 951.

188. *Id.* (Ginsburg, J., concurring).

189. *Id.*

190. 195 F.3d 857 (7th Cir. 1997).

191. *Stenberg*, 530 U.S. at 951-52; Hope Clinic v. Ryan, 195 F.3d 857, 880-82 (7th Cir. 1997) (Posner, J., dissenting).

192. *Stenberg*, 530 U.S. at 952 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992) and Roe v. Wade, 410 U.S. 113 (1973)).

193. *Id.*

E. DISSENT BY JUSTICE SCALIA

Justice Scalia found that a ban on the D&X procedure with the required health exception would only give the abortionist ultimate control over application of the D&X procedure.[194] The only thing inhibiting the abortionist's decision to proceed would be self-assurance in his medical judgment that the D&X procedure will most effectively protect the mother's health.[195] Justice Scalia also stated that his definition of "undue burden" differed from the joint opinion's definition of "undue burden" found in *Casey*.[196] He described the determination of what constitutes an undue burden as a value judgment depending on respect: whether one believed more in respecting the life of the partially delivered fetus or respecting the freedom of the mother to kill it.[197]

Justice Scalia stated that the Court should leave the ultimate decision regarding not just partial birth abortion, but all types of abortion, to the people by allowing the state legislatures to decide whether or not to permit abortions within their respective state boundaries.[198] Justice Scalia reiterated his sentiment from his dissent in *Casey* when he stated "*Casey* must be overruled."[199] Justice Scalia noted the *Casey* joint opinion's expressed belief that "Roe v. Wade had 'called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.'"[200] Justice Scalia repeated his reaction to the joint opinion from his dissent in *Casey* by stating "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since."[201]

F. DISSENT BY JUSTICE KENNEDY, JOINED BY CHIEF JUSTICE REHNQUIST

Justice Kennedy viewed the issue in this case not as whether the Court could see a difference between the D&E and D&X abortion procedures, but whether Nebraska could differentiate between them.[202] The Association of American Physicians and Surgeons distinguished

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194. *Id.* at 953 (Scalia, J., dissenting).
195. *Id.*
196. *Id.* at 954-55; *see also Casey*, 505 U.S. at 874.
197. *Stenberg*, 530 U.S. at 954-55. Justice Scalia stated that in determining whether or not an undue burden exists, the conclusion cannot be proven true or false by factual inquiry or legal reasoning. *Id.*
198. *Id.* at 955.
199. *Id.*
200. *Id.* at 956 (quoting *Casey*, 505 U.S. at 867 (discussing Roe v. Wade, 410 U.S. 113 (1973))).
201. *Id.* (quoting *Casey*, 505 U.S. at 995-96).
202. *Id.* at 962 (Kennedy, J., dissenting).

D&X from D&E because in the D&X procedure, the fetus is "killed *outside* of the womb" where the fetus at this point becomes separated from the mother's control over her own body.[203] This difference to Justice Kennedy put D&X more akin to infanticide and substantiated Nebraska's concerns that D&X presented a greater risk of disrespect for life and disrespect for the medical profession.[204]

Justice Kennedy found that Nebraska's lack of a statutory health requirement essentially gave the abortionist, specifically Dr. Carhart, a "veto power over the state's judgment" against the D&X procedure because Dr. Carhart performed the D&X procedure in all cases after the fifteenth week of pregnancy.[205] Because Justice Kennedy found slight differences in physical safety between the D&E and D&X procedures, he found that *Casey* allowed a state to take into account grave moral issues presented by the abortion method and to regulate abortions accordingly.[206] Justice Kennedy did not accept expert medical opinions citing situations in which D&X is the only option to protect the mother's life because none of the experts called to testify by Dr. Carhart had ever actually performed a partial birth abortion.[207]

Justice Kennedy found the majority's decision to be a regression toward pre-*Casey* cases such as *Akron v. Akron Center for Reproductive Health, Inc.*,[208] which held that a law requiring a physician to provide a woman seeking an abortion with an informed decision infringed on the physician's discretion to practice medicine in accordance with his or her own medical judgment.[209] *Casey* involved a similar provision requiring informed consent, and the joint opinion in *Casey* held that *Akron* was wrong when it invalidated the informed consent law because a physician who practices abortion, just like any other physician, is subject to state regulation.[210]

Justice Kennedy also disagreed with the majority's interpretations of the Nebraska statute's terminology.[211] Justice Kennedy construed the statute to ban only D&X because of its use of the words "deliver" and "delivery" and the meaning of delivery as the birthing of an intact

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203. *Id.* at 962-63.
204. *Id.* at 963.
205. *Id.* at 964-65.
206. *Id.* at 966-67. Justice Kennedy found the "significant health threat" standard unsatisfied in this case. *Id.* at 967; *see also Casey*, 505 U.S. at 880 (requiring the regulation to impose a "significant [health] threat to the life or health of a woman").
207. Stenberg v. Carhart, 530 U.S. 914, 964 (2000).
208. 462 U.S. 416 (1983).
209. *Stenberg*, 530 U.S. at 968-69; *see also* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 442-45 (1983).
210. *Stenberg*, 530 U.S. at 969; *see also Casey*, 505 U.S. at 884-85; *Akron*, 462 U.S. at 448-50.
211. *Stenberg*, 530 U.S. at 973.

fetus.[212] The statute defined partial birth abortion as when the abortionist "partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[213] No party argued that a dismembered fetus qualifies under the term "delivery;" instead only an intact fetus can be "delivered" in compliance with Nebraska statutory language.[214]

In further analyzing Nebraska's statutory language, Justice Kennedy found the requirement that the fetus be partially delivered into the vagina "before" the abortionist kills it to be naturally understood to require two steps in the procedure causing fetal death.[215] First, the fetus must be partially delivered into the vagina, and second, the abortionist must kill it.[216] The D&E procedure combines these two steps because the procedure, which brings the fetus into the vagina, is also the process of dismemberment, which kills the fetus.[217] Because of this understanding, Justice Kennedy interpreted the statute to exclude D&E from the ban.[218]

Finally, Justice Kennedy noted that the Nebraska Attorney General was given the opportunity to interpret the statute too late and his interpretation was given too little weight.[219] The district court granted an injunction before the law was even applied, which denied the State Legislature and the Attorney General the opportunity to interpret the statute.[220] The majority in this case chose not to recognize the Attorney General's interpretation of the statutory language.[221]

G. DISSENT BY JUSTICE THOMAS, JOINED BY THE CHIEF JUSTICE AND JUSTICE SCALIA

Justice Thomas examined the statutory language of Nebraska's ban and determined that the law did not include the D&E procedure.[222] Like Justice Kennedy, Justice Thomas focused on the statute's use of the

212. *Id.* at 973-74.
213. *Id.* at 973; *see also* NEB. REV. STAT. ANN. § 28-326(9) (Supp. 2000).
214. *Stenberg*, 530 U.S. at 974. Justice Kennedy noted that the United States in its *amicus* brief did not use the word "delivery" in reference to D&E, but instead substituted "emerges." *Id.* at 975. He also noted the majority used the words "physician pulling" a portion of the fetus rather than "physician delivering" a portion of the fetus. *Id.* This he interpreted to support his contention that only the D&X procedure was banned because of the statutory ban of a procedure involving a "delivery." *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 975-76.
218. *Id.* at 976.
219. *Id.* at 977.
220. *Id.* at 978-79.
221. *Id.*
222. *Id.* at 989 (Thomas, J., dissenting).

words "deliver" and "delivery."[223] He concluded that the statutory language could not be construed to include the D&E procedure of fetal dismemberment because limbs cannot be "delivered"; only an intact fetus can be delivered.[224] He agreed with Justice Kennedy in finding that the statute's language separated the process of killing the fetus from the process of delivering it.[225] Justice Thomas found D&E to be excluded from the ban because dismemberment is the process which both pulled the fetus into the vagina and killed the fetus.[226]

Justice Thomas took his analysis of the statute's plain meaning beyond the majority's.[227] He found that ordinary rules of statutory interpretation required ambiguity to be resolved by examining the common understanding of the term.[228] The majority construed the common meaning of "partial birth abortion" to include the D&E procedure.[229]

Justice Thomas examined what the common meaning of "partial birth abortion" was in other American arenas.[230] He found support equating "partial birth abortion" with D&X in the medical community because the American Medical Association,[231] other physicians,[232] and one of Dr. Carhart's own medical experts[233] acknowledged that the phrase "partial birth abortion" is associated with the D&X procedure and not the D&E procedure.[234] The district court in this case as well as other lower courts recognized that "partial birth abortion" is commonly understood to mean D&X.[235]

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223. *Id.* at 990.

224. *Id.* at 990-91; *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 597 (1993) (defining deliver as: "to assist in giving birth; to aid in the birth of"); STEDMAN'S MEDICAL DICTIONARY 453 (26th ed. 1995) (defining deliver as: "[t]o assist a woman in childbirth"); OXFORD ENGLISH DICTIONARY 422 (2d ed. 1989) (defining deliver as: "[t]o disburden of the foetus, to bring to childbirth"); B. MALOY, MEDICAL DICTIONARY FOR LAWYERS 221 (2d ed. 1989) (defining deliver as: "[t]o aid in the process of childbirth; to bring forth; to deliver the fetus, placenta").

225. Stenberg v. Carhart, 530 U.S. 914, 991-92 (2000).

226. *Id.*

227. *Id.* at 992.

228. *Id.* at 992-93.

229. *Id.* at 939.

230. *Id.* at 993.

231. *Id.* at 993 (citing AMA Board of Trustees Factsheet on H.R. 1122 (June 1997) (finding the D&X procedure different from other abortion procedures because in D&X the fetus is killed outside the womb)).

232. *Id.*; *see also* Planned Parenthood v. Doyle, 44 F. Supp. 2d 975, 999 (W.D. Wis. 1999) (citing testimony); Richmond Medical Center for Women v. Gilmore, 55 F. Supp. 2d 441, 455 (E.D. Va. 1999) (citing testimony).

233. *See* Stenberg v. Carhart, 530 U.S. 914, 994 (2000) (finding expert Dr. Phillip Stubblefield testified that the press refers to the D&X procedure as "partial birth abortion").

234. *Id.*

235. *See* Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1121, n.26 (D. Neb. 1998) (finding that partial birth abortions are known as intact dilation and extraction or D&X); *see also* Little Rock Family Planning Services v. Jegley, 192 F.3d 794, 795 (8th Cir. 1999); Planned Parenthood of Greater Iowa, Inc. v. Miller, 195 F.3d 386, 387 (8th Cir. 1999).

Finally, Justice Thomas looked to legislation using the term "partial birth abortion."[236] Congress used the term twice when it drafted legislation aimed at banning "partial birth abortions."[237] Hearings and debates conducted regarding these bans repeatedly separate the term "partial birth abortion" from the D&E procedure.[238] Two states out of thirty, Ohio[239] and Missouri,[240] chose not to refer to the banned procedure as "partial birth abortion."[241]

Reasoning that the majority and Justice O'Connor evaded construing the statute, Justice Thomas discussed the Court's responsibility to consider "whether a construction of the statute is fairly possible that would avoid the constitutional question."[242] The Nebraska Legislature had traditionally shouldered the responsibility of defining medical terms that carried legal significance, and those definitions were generally not required to be identical to medical definitions.[243]

Justice Thomas found that both the majority and Justice O'Connor expanded on the principles set forth in *Roe* and *Casey*.[244] *Casey* held that a health exception is required "if 'continuing her pregnancy would constitute a threat' to the woman."[245] Neither *Roe* nor *Casey* discussed circumstances in which a physician considered a banned abortion procedure to be more preferable to legal abortion procedures, as in this case.[246] Justice Thomas faulted the majority and Justice O'Connor for not distinguishing between situations where health concerns require a pregnant woman to obtain an abortion and situations where health concerns cause her to prefer a particular method of abortion.[247]

Justice Thomas disagreed with the majority's assessment of the *Casey* standard questioned by this case.[248] He stated the real *Casey*

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236. *Stenberg*, 530 U.S. at 994.

237. *Id.* Congressional legislation prohibiting partial birth abortions was introduced in the Partial Birth Abortion Ban Act, H.R. 1833, 104th Cong., 1st Sess. (1995) and Partial Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong., 1st Sess. (1997). *Id.* at 994 n.11. Both pieces of legislation passed both Congressional houses by wide margins but were vetoed by President Clinton. *Id.* Both times the House voted to override the veto but the Senate fell short of overriding the veto, which killed the legislation. *Id.*

238. *Id.*

239. OHIO REV. CODE ANN. § 2919.15(A) (Anderson 1999). The Ohio ban refers to the banned procedure simply as "dilation and extraction." *Id.*

240. MO. STAT. ANN. § 563.300 (Vernon Supp. 2001). The Missouri ban refers to the banned procedure as "infanticide," defined as killing a partially born infant. *Id.*

241. *Stenberg*, 530 U.S. at 995 n.11.

242. *Id.* at 996.

243. *Id.* at 999 (citing Kansas v. Hendricks, 521 U.S. 346, 359 (1997)).

244. *Id.* at 1009 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992) and Roe v. Wade, 410 U.S. 113 (1973)).

245. *Id.* (quoting *Casey*, 505 U.S. at 880).

246. *Id.* at 1010.

247. *Id.*

248. *Id.* at 1013 (citing *Casey*, 505 U.S. at 877).

question was whether prohibiting a partial birth abortion without a health exception posed a substantial obstacle to obtaining an abortion.[249] Justice Thomas concluded that it did not for two reasons: because the Court did not identify a real or substantial barrier to obtaining an abortion and because the Court could not demonstrate that such an obstacle would affect a sufficient number of women to justify invalidating the statute on its face.[250]

Justice Thomas relied on physician testimony that claimed there were no circumstances in which D&X was the only abortion procedure to save the mother's life.[251] This testimony was supported by the American College of Obstetricians and Gynecologists Executive Board.[252] He also relied on testimony presented to the Nebraska legislature of evidence of increased health risks arising from the D&X procedure.[253] Justice Thomas asserted that because *Stenberg* was a facial challenge to the Nebraska statute, the operative test should be whether there was a "large fraction" of women seeking to obtain a partial birth abortion who would face a substantial obstacle in their path toward obtaining a safe abortion because of their inability to use the D&X procedure.[254] Justice Thomas found this standard easily satisfied because of the small number of women who obtained an abortion after sixteen weeks of pregnancy as well as the alternative D&E procedure's availability.[255]

IV. IMPACT

Stenberg v. Carhart has caused a ripple effect across the nation's sea of abortion legislation and abortion debate, which has been anything but tranquil in the wake of *Roe* and *Casey*. Since *Stenberg* was decided on June 28, 2000, several state partial birth abortion bans have been struck down as unconstitutional by courts.[256] Currently, eighteen states'

249. *Id.*
250. *Id.*
251. *Id.* at 1015.
252. *Id.*
253. *Id.*
254. *Id.* at 1019-20.
255. *Id.*
256. *See* Planned Parenthood v. Farmer, 220 F. 3d 127, 153 (3d Cir. 2000) (finding N.J. STAT. ANN. § 2A:65A-6(e) (West 2000) unconstitutional because it placed an undue burden on women seeking abortions by banning D&E as well as D&X and because it had no health exception for women); Richmond Med. Ctr. For Women v. Gilmore, 224 F.3d 337, 339 (4th Cir. 2000) (finding VA. CODE ANN. § 18-2-74.2 (Michie Supp. 2001) unconstitutional because it was "indistinguishable" from the Nebraska statute found unconstitutional in *Stenberg*); Causeway Med. Suite v. Foster, 221 F.3d 811, 812 (5th Cir. 2000) (finding LA. REV. STAT. ANN. § 14:32.9 (West Supp. 2001) unconstitutional in light of the Supreme Court's decision in *Stenberg*); Eubanks v. Stengel, 224 F.3d 576, 576 (6th Cir. 2000) (finding Kentucky partial birth abortion ban unconstitutional because it dealt with similar issues addressed in *Stenberg*); Planned Parenthood v. Miller, 195 F.3d 386, 389 (8th Cir. 1999) *cert. denied*, 530 U.S.

"partial birth" abortion bans are permanently blocked by court action taken either prior to or subsequent to *Stenberg*.[257] In ten states, "partial birth" abortion bans have never been litigated but are not considered enforceable after *Stenberg*.[258] Three states' "partial birth" abortion bans were limitedly enforced prior to *Stenberg* and now may no longer be enforceable.[259]

Justice O'Connor's concurrence has left state legislators as well as some of the dissenters to wrestle with the question as to the constitutionality of a partial birth abortion ban which explicitly excludes the D&X procedure and includes a health exception for the life of the mother.[260] Justice O'Connor stated that the Kansas, Montana and Utah statutes, which explicitly exclude the D&E procedure from the ban, were constitutional under the standards set forth in *Stenberg*.[261] Justice Thomas' dissent discredited Justice O'Connor's assurance that laws similar to Nebraska's which were unconstitutional could be easily remedied by adding a health exception and excluding D&E.[262] So far, there has not been a challenge to a partial birth abortion ban which has addressed either of these issues.[263]

Neither of North Dakota's two abortion clinics practiced either the D&E or the controversial D&X procedure.[264] Jane Bovard, administrator of the Red River Women's Clinic in Fargo, North Dakota, and Kim Horab, administrator of the Fargo Women's Health Organization Clinic, have said that even prior to the ban, the partial birth abortion procedure was not performed at either clinic.[265] The Fargo Women's Health Organization Clinic has since closed, but since both clinics performed

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1274 (2000) (enjoining permanently IOWA CODE § 707.8A(2) (Supp. 2001) as unconstitutional because it imposed an undue burden on a woman seeking to obtain an abortion because it banned the D&E method as well as the D&X method); Daniel v. Underwood, 102 F. Supp. 2d 680, 686 (S.D. W.Va. 2000) (finding W. VA. CODE §§ 33-42-3(3)-(5) & 33-42-8 (2000) unconstitutional because they imposed an undue burden by banning both D&E and D&X and because they contained no health exception for the woman).

257. *See The Status of Major Abortion-Related Laws and Policies in the States, May 31, 2001*, The Alan Guttmacher Institute, *at* http://www.agi-usa.org/pubs/abort_law_status.html (last visited July 31, 2001) (listing: Alaska, Arizona, Arkansas, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Nebraska, New Jersey, Ohio, Rhode Island, Virginia, West Virginia, and Wisconsin).

258. *Id.* (listing: Indiana, Kansas, Mississippi, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah).

259. *Id.* (listing: Alabama, Georgia, and Montana).

260. Stenberg v. Carhart, 530 U.S. 914, 951 (2000) (O'Connor, J., concurring); *see also supra* Part III.E-G (discussing the dissenting opinions of Justices Scalia, Kennedy, and Thomas).

261. *See Stenberg*, 530 U.S. at 950 (listing KAN. STAT. ANN. § 65-6721(b) (Supp. 2000); UTAH CODE ANN. § 76-7-310.5(1)(a) (1999); MONT. CODE ANN. § 50-20-401(3)(c)(ii) (1999)).

262. *Id.* at 1013 (Thomas, J., dissenting).

263. *See* Pat Wingert, *The Next Abortion Battle*, NEWSWEEK, July 10, 2000, at 24. Nebraska pro-life groups claim they will not support a rewrite of the unconstitutional statute excluding D&E and including a health exception for the mother. *Id.*

264. Blake Nicholson, *Officials: N.D. Ban More Narrow*, BISMARCK TRIBUNE, June 29, 2000, at 10A.

265. *Id.*

abortions only through the sixteenth week of pregnancy, women seeking abortions after this stage are referred to abortion clinics in other states.[266] There are no records kept by the State Health Department as to whether the partial birth abortion procedure was performed in North Dakota hospitals before the ban took effect.[267]

North Dakota's law is "materially distinct from Nebraska," according to Doug Barh, North Dakota Solicitor General.[268] North Dakota's partial birth abortion ban defines "partially born" as "(a) the living intact fetus's entire head . . . or any portion of the living intact fetus's torso above the navel, in the case of a breech presentation, is delivered past the mother's vaginal opening; or (b) . . . delivered outside the mother's abdominal wall."[269] This definition clears up some disagreement between the majority and the dissenters in *Stenberg* as to the interpretation of Nebraska's statutory use of "deliver" and "delivery" because it defines what portions of a fetus have to be delivered to qualify as a partial birth abortion.[270] North Dakota's law is similar to Nebraska's in the aspect that neither allows a physician to use partial birth abortion even if his or her medical judgment finds the procedure most appropriate.[271] North Dakota's law differs from Nebraska's however, because North Dakota's exception for situations in which the mother's life is in jeopardy is more comprehensive than Nebraska's.[272]

V. CONCLUSION

The Supreme Court invalidated a Nebraska statute that banned partial birth abortions on the grounds that the statute placed an undue burden on a woman seeking to obtain a partial birth abortion.[273] The Court found the Nebraska partial birth abortion ban unconstitutional for

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266. *Id.*; *see also One of Fargo's Two Abortion-Performing Clinics Closes*, STAR TRIBUNE, Feb. 2, 2001, at 3B.

267. *See* Nicholson, *supra* note 264.

268. *Id.*

269. N.D. CENT. CODE § 14-02.6-01 (Supp. 1999).

270. Stenberg v. Carhart, 530 U.S. 914, 942-43, 973 (2000).

271. *See* Nicholson, *supra* note 264.

272. *See* N.D. CENT. CODE § 14-02.6-03 (Supp. 1999). Section 14-02.6-03 states:

> Exception for the life of mother. Section 14-02.6-02 does not prohibit a physician from taking measures that in the physician's medical judgment are necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, if:
>
> 1. Every reasonable precaution is also taken, in this case, to save the child's life; and
> 2. The physician first certifies in writing, setting forth in detail the facts upon which the physician relies in making this judgment. This certification is not required in the case of an emergency and the procedure is necessary to preserve the life of the mother.

Id.

273. *Stenberg*, 530 U.S. at 930.

two reasons: (1) because the statute imposed an "undue burden" on a woman's ability to choose a D&E abortion, which unduly burdened her right to choose abortion itself, and (2) because the statute lacked any exception for protection of the mother's health.[274]

Mandy Joersz[*]

274. *Id.*

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* * *