**FOURTEENTH AMENDMENT** – DUE PROCESS – COMPLIANCE WITH SUPREME COURT JURISPRUDENCE IN THE POST *ROE* AND *CASEY* ERA – CRIMINALIZING THE PERFORMANCE OF PARTIAL-BIRTH ABORTIONS IN NEBRASKA VIOLATES THE UNITED STATES CONSTITUTION AS INTERPRETED IN *CASEY – STENBERG V. CARHART*, 120 S. Ct. 2597 (2000).

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*The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*[1]

## INTRODUCTION

In 1973, the United States Supreme Court decided *Roe v. Wade*.[2] In this landmark decision the Court held that the word "liberty," as stated within the Constitution, encompassed a woman's right to decide whether to terminate her pregnancy prior to fetal viability.[3] In the years following *Roe* the Court has repeatedly reaffirmed this central tenet,[4] even when deeming restrictions on certain

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[1] Griswold v. Connecticut, 381 U.S. 479, 494 (1965) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[2] 410 U.S. 113 (1973).

[3] Roe v. Wade, 410 U.S. 113, 154 (1973). In *Roe*, Justice Blackmun, writing for the majority, ultimately stated that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.*

[4] *See, e.g.*, Stenberg v. Carhart, 120 S. Ct. 2597 (2000); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Colautti v. Franklin, 439 U.S. 379 (1979); Moore v. East Cleveland, 431 U.S. 494 (1977); Singleton v. Wulff, 428 U.S. 106 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Munson v. South Dakota, 410 U.S. 950 (1973).

abortion procedures constitutional.[5] Typically, when confronted with regulatory abortion legislation, the Supreme Court has scrutinized the asserted State interests.[6] While the State's proffered interest in protecting potential life is not constitutionally grounded, it is a concern supported by both "humanitarian and pragmatic concerns."[7] It is this systematic view which has inundated the courts in the wake of both *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[8] Accompanying this view is the concept that an integral part of the woman's constitutional interest in liberty is her right to bodily integrity, "a right to control one's person."[9] It is this very enunciation and explication of liberty that has become a focal point of both legal and moral debates.[10]

The aforementioned decisions were monumental in the history of a woman's

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[5] *See, e.g., Casey*, 505 U.S. at 852. The United States Supreme Court delved into the grievances inflicted on a pregnant woman if the right to terminate an unwanted pregnancy did not exist. *Id.* The Court stated that "[t]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Id.* The Court determined that by not granting this pivotal right the law would essentially require women to sacrifice their liberty in order to enable others to survive. *Id.* This sacrifice, in turn, would impose a duty on women that has no parallel for men. *Id.* The Court explained:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she make the sacrifice.

*Id.* at 852.

[6] *Thornburgh*, 476 U.S. at 759 (Stevens, J., concurring). In *Thornburgh*, the Court first addressed the issue of the state's interests and established that a statute will not be invalidated as unconstitutional if it "[is] reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application." *Id.* at 774 (citing Griswold v. Connecticut, 381 U.S. 479, 503-04 (1965)).

[7] *Casey*, 505 U.S. at 914.

[8] *See Roe*, 410 U.S. 113 (1973); *Casey*, 505 U.S. 833 (1992).

[9] *Casey*, 505 U.S. at 915 (citing Rochin v. California, 342 U.S. 165 (1952); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

[10] Karen E. Walther, Comment, *Partial-Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693 (2000). In this comment, the author argued that a debate often results from the balancing of the state's asserted interest against a woman's right to choose to terminate her pregnancy. *Id.* at 693.

right to choose. While *Casey* essentially rejected the framework of *Roe,*[11] the Court was mindful of preserving the central holding that "[u]nder no circumstances can a state absolutely prohibit a woman from exercising her constitutional right to choose abortion prior to viability of the fetus."[12] Thus, the *Casey* Court refused to disturb the central holding of *Roe.*[13]

Since the Supreme Court's holdings in *Roe* and *Casey*, abortion has been considered a fundamental, though not unqualified right.[14] Most recently, abortion debates have focused on late-term abortions, otherwise known as partial-birth abortions.[15] Thus, the debate has shifted from a question of constitutional rights to one of whether a woman enjoys the right to choose a particular *method* of abortion.[16] Two partial-birth abortion procedures at the core of the recent tumultuous debate are known as the "dilation and evacuation" ("D&E") and "dilation and the extraction" ("D&X") methods.[17] These methods have fueled the ongoing debate, and as a result, many states have enacted legislation prohibiting partial-birth abortions.[18]

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[11] Allison D. Gough, Comment, *Banning Partial-Birth Abortion: Drafting A Constitutionally Acceptable Statute*, 24 DAYTON L. REV. 187, 188 (1998).

[12] *Id.* at 189-90. Gough argued that the right to choose to have an abortion falls within the panoply of constitutional guarantees. *Id.* However, this right is tempered by the state's interest in protecting the fetus and that interest becomes increasingly more compelling throughout the various stages of viability. *Id.*

[13] *Id.*

[14] Walther, *supra* note 10, at 693.

[15] *Id.*

[16] Gough, *supra* note 11, at 188. The current debate has focused on the prohibition of certain methods of abortion. Thus, this focus is considerably different from the initial debate of whether a woman initially possessed the right to choose to have an abortion which fell within the ambit of the Fourteenth Amendment. *Id.*

[17] For a discussion of these two abortion procedures see *infra* notes 43-45.

[18] Some of the states to include bans on partial-birth abortion include but are not limited to: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Montana, New Jersey, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wisconsin. Janet E. Gans Epner, Harry S. Jonas & Daniel L. Seckinger, 280 THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 724-29 (Aug. 26, 1998), *at* http://www.ama-assn.org/special/womb/library/readroon/vol_280a/jsc80006.html.

As evidenced throughout this casenote, when courts are confronted with the constitutionality of such prohibitory statutes they are evaluated under the "undue burden" standard established in *Casey*.[19] When measured under this standard, statutes have consistently been held unconstitutional because, as applied, they place a substantial obstacle upon a woman and her physician in their pursuit to adopt the best and safest methods available.[20] For example, *Women's Prof. Corp. v. Voinovich* involved an Ohio statute which banned the use of the D&X procedure either pre- or post-viability.[21] The statute was challenged on constitutional grounds.[22] Because it failed to be meticulously drafted, the statute was invalidated.[23] The district court supported this holding by stating that it was overbroad and therefore could not pass constitutional muster.[24]

Similarly, in *Evans v. Kelley*,[25] a Michigan Act banning partial-birth abortions was declared unconstitutional because it could be interpreted to include a ban on both the D&X and D&E procedures.[26] The court concluded that such a prohibition on safe and feasible methods of abortion constituted an undue burden when evaluated under the *Casey* standard.[27]

Recently, Nebraska enacted legislation prohibiting partial-birth abortions.[28] Confronted with a constitutional challenge to the statute, the United States Su-

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[19] *See, e.g,* Evans v. Kelley, 977 F. Supp. 1283, 1306-07 (E.D. Mich. 1997); Women's Prof. Corp. v. Voinovich, 911 F. Supp. 1051, 1058 (S.D. Ohio 1995).

[20] Gough, *supra* note 11, at 189. In her comment, Gough argued that more carefully drafted legislation would successfully avoid this debacle. *Id.* Specifically, she stated that to survive the undue burden standard of *Casey* the State must avoid the "void for vagueness" enigma and clearly define its prohibitions. *Id.* at 194-95.

[21] 911 F. Supp. 1051, 1057 (S.D. Ohio 1995).

[22] *Id.* (citing OHIO REV. CODE ANN. § 2919.15 (Anderson 1996)). Specifically, the statute was challenged because it was unconstitutionally vague and imposed an undue burden on doctors performing certain abortion procedures. *Id.*

[23] *Id.*

[24] *Id.*

[25] 977 F. Supp. 1283 (E.D. Mich. 1997).

[26] *Id.* at 1306-07.

[27] *Id.* at 1318.

[28] NEB. REV. STAT. § 28-328 (1997).

preme Court held that the statute did not survive scrutiny when evaluated under the undue burden test.[29]

## II. STATEMENT OF THE CASE

In *Stenberg v. Carhart*,[30] the United States Supreme Court granted certiorari to determine whether a controversial Nebraska statute[31] criminalizing the per-

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[29] Stenberg v. Carhart, 120 S. Ct. 2597, 2615-17 (2000).

[30] 120 S. Ct. 2597 (2000).

[31] NEB. REV. STAT. § 28-328 (1997). The statute reads as follows:

Partial-birth abortion; prohibition; violation; penalties:

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.

The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.

No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure pursuant to sections 71-147 to 71-161.20.

Upon the filing of criminal charges under this section by the Attorney General or a county attorney, the Attorney General shall also file a petition to suspend and revoke the attending physician's license to practice medicine pursuant to section 71-150. A hearing on such administrative petition shall be set in accordance with section 71-153. At such hearing, the attending physician shall have the opportunity to present evidence that the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. A defendant against whom criminal charges are brought under this section may bring a motion to delay the beginning of the trial until after the entry of an order by the Director of Regulation and Licensure as to whether the attending physician's conduct was nec-

formance of a "partial birth abortion"[32] violated the United States Constitution, as interpreted in *Casey*.[33] In a plurality opinion authored by Justice Breyer, the United States Supreme Court held that the Nebraska statute was unconstitutional because it lacked any exception for the preservation of the health or life of the mother.[34] Additionally, the Court determined that under *Casey*, the statute imposed an "undue burden"[35] upon a woman's ability to choose a common abortion procedure, thereby unduly burdening the right to choose abortion itself.[36]

The statute at issue in *Stenberg v. Carhart* defined 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 com-

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essary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, shall be admissible in the criminal proceedings brought pursuant to this section.

*Id.*

[32] The definition of viability adopted by the drafters of the Nebraska statute is the same as that used by the United States Supreme Court: "the capacity for meaningful life outside the womb, albeit with artificial aid," and not just "momentary survival." NEB. REV. STAT. § 28-328 (1997); Roe v. Wade, 410 U.S. 113, 163-64 (1973). Partial-birth abortions refer to those abortions performed in the "gray zone," i.e. the time between twenty and twenty-seven weeks in which some fetuses may be viable and others are not, or later on in the pregnancy. Janet E. Gans Epner, Harry S. Jonas & Daniel L. Seckinger, 280 THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 724-29 (Aug. 26, 1998), *at* http://www.ama-assn.org/special/womb/library/readroon/vol_280a/jsc80006.html.

Partial-birth abortions are performed in the second and third trimesters and entail: inducing a breech delivery with forceps; delivering the legs, arms, and torso only; puncturing the back of the skull with scissors or a trochar; inserting a suction curette into the skull; suctioning the contents of the skull so as to collapse it; and completing the delivery. A partial breech delivery is not considered a "birth" at common law, where the passage of the head is the essential determinative factor. *Id.*

[33] *Stenberg*, 120 S. Ct. at 2609 (citing *Casey*, 505 U.S. 833 (1992)).

[34] *Id.*

[35] The "undue burden" analysis originated in *Casey*, 505 U.S. at 876. An undue burden may arise in two circumstances, either through the purpose or the effect of the law. *Id.* For example, an undue burden will exist if the legislature intended to place a substantial obstacle in the path of a woman seeking an abortion. *Id.* at 877. Furthermore, if it is determined that such an obstacle exists as a result of the law, the undue burden has been proven. *Id.*

[36] *Id.* at 2617.

pleting the delivery."[37] The statute further defined the phrase "partially delivers vaginally a living unborn child before killing the unborn child" to mean "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."[38] Violation of the statute resulted in a Class III felony which carried a prison term of up to twenty years, and a fine of up to $25,000.[39] Additionally, the statute mandated revocation of the performing doctor's license to practice medicine in Nebraska.[40]

Dr. Leroy Carhart, who performed abortions in Bellevue, Nebraska,[41] challenged the constitutionality of the Nebraska law as it was applied and on its face.[42] Following investigations by the Nebraska Attorney General's Office and the State Department of Health regarding Dr. Carhart's performance of abortions in the past, he challenged the law, fearing that his prosecution was imminent.[43] Dr. Carhart alleged that the statute, in its application, targeted the D&E[44] and

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[37] *Id.* at 2619 (citing NEB. REV. STAT. § 28-326(9) (1997)).

[38] *Id.* at 2605.

[39] NEB. REV. STAT. §§ 28-328(2), 28-105 (1997).

[40] § 28-328(4).

[41] Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1119-20 (D. Neb. 1998).

[42] *Id.*

[43] *Id.* at 1119.

[44] *Id.* at 1103. According to the American Medical Association ("AMA") Report of Board of Trustees on Late-Term Abortion, the most common procedure for inducing abortion early in the second trimester of pregnancy, or in the thirteenth through fifteenth weeks of gestation, is dilation and evacuation, which refers generically to transcervical procedures performed at thirteen weeks of gestation or later. *Id.* Further, the AMA report describes the D&E procedure as follows:

> Ultrasonography is used prior to the procedure to confirm gestational age, because the underestimation of gestational age can have serious consequences during a D&E procedure. D&E is similar to vacuum aspiration except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue. Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as paracervical block may be administered, dilating agents, if used, are removed, and instruments are inserted through the cervix into the uterus to remove fetal and placental tissue. Because fetal tissue is friable and

D&X[45] abortion procedures. Because D&X is often the "best or most appropriate procedure in particular circumstances to save the life or to preserve the health of a woman," the statute necessarily placed a substantial obstacle in the path of both the woman and her doctor in seeking the best medical treatment.[46]

The United States District Court for the District of Nebraska held that the statute imposed an undue burden on Dr. Carhart and his patients by adopting and threatening to enforce a vague "partial-birth" abortion law.[47] Though refusing to decide the issue of whether the law was facially invalid, the district court permanently enjoined enforcement of the law against Dr. Carhart and his patients, and those who were similarly situated.[48] Specifically, the court determined that an analysis regarding the facial validity of the law was unnecessary.[49] The court did

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> easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains. In pregnancies beyond fourteen weeks, oxytocin is given intravenously to stimulate the uterus to contract and shrink.

*Id.* (citation omitted).

[45] *Id.* at 1105-06. The January 1997 statement of the American College of Obstetricians and Gynecologists' ("ACOG") on intact dilation and extraction describes intact dilation and extraction as a form of D&E. *Id.* Additionally, the AMA report describes the intact D&X as "deliberate dilation of the cervix, usually over a sequence of days; instrumental conversion of the fetus to a footlong breech (removing the fetus by extracting the feet first); breech extraction of the body excepting the head; and partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." *Id.*

[46] The ACOG policy statement provided that intact D&X is one method of terminating pregnancy after sixteen weeks gestation, and stated that:

> [A]n intact D&E, [though not the *only* option to save the life or preserve the health of the woman], however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can made this decision. The potential exists that legislation *prohibiting* specific medical practices, such as intact D&X, may outlaw techniques that are critical to the lives and health of American women. The intervention of legislative bodies into medical decision making is inappropriate, ill advised and dangerous.

*Id.* (emphasis added).

[47] *Carhart*, 11 F. Supp. 2d at 1119-20.

[48] *Id.*

[49] *Id.* at 1126. The district court stated:

however address whether the statute, as applied, created "unnecessary health regulations that ha[d] the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion."[50] Because a woman's liberty interest falls squarely within the panoply of constitutional rights, the court noted that prohibitory state legislation must be evaluated under the undue burden standard and that this analysis was both clearly established and followed in the years following *Casey*.[51] The district court set forth three reasons for deeming the statute unconstitutional as applied to Dr. Carhart.[52]

First, the court determined that when Dr. Carhart chose to use the D&X procedure to perform late term abortions, it was the safest alternative.[53] This determination led the court to conclude that such a prohibitive law imposed an "undue burden" because it forced a doctor and his patients to consider the use of an "appreciably riskier procedure to promote nonviable fetal well-being."[54]

Second, the district court determined that, as applied, the Nebraska statute banned the D&X and D&E procedures because it prohibited "intentional and deliberate vaginal delivery of a 'substantial portion' of the intact fetus in order to accomplish the procedure."[55] The district court determined that, because these procedures are the "most frequently performed abortion procedures and are universally regarded as the safest,"[56] the statute imposed an "undue burden" on doc-

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> In this case, rather than making generalizations about the relative safety of the D&X in all cases, the "as applied" analysis requires a focus on the particular procedures used by Dr. Carhart. Thus, the question is not whether the D&X is 'always' safer. Rather, the question is whether it is safer in the 10 to 20 cases a year when Dr. Carhart uses his variant of the procedure.

*Id.*

[50] *Id.*

[51] *Id.* at 1122. This issue had been addressed by both the United States Supreme Court as well as many lower federal courts. *Id.* (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996)).

[52] *Id.* at 1120.

[53] *Carhart*, 11 F. Supp. at 1120.

[54] *Id.*

[55] *Id.*

[56] *Id.*

tors by prohibiting techniques that are considerably less risky than other alternatives.[57] Ultimately, the district court determined that the Nebraska law banned the D&X procedure, and as such, the law imposed an "undue burden" on Dr. Carhart and his patients.[58]

Finally, the district court determined that the law was unconstitutional because it was void for vagueness.[59] Specifically, the court found the "substantial portion" language of the statute unreasonably vague because such words required a doctor to know with medical certainty what in fact constituted a "substantial portion."[60] Furthermore, the court noted that it was unreasonable to charge a doctor with the responsibility of conforming his conduct to an ambiguously drafted law.[61] Accordingly, the district court determined that because the law banned a relatively safe procedure in its application and was vague in its language, an undue burden, resulting in a substantial obstacle, was thus imposed on both the doctor and the patient.[62]

The State of Nebraska appealed the district court's holding that the Nebraska statute was unconstitutional, the court's permanent enjoinment of the enforcement of the statute, and the award of attorney's fees and costs to the plaintiff.[63] The Court of Appeals for the Eighth Circuit affirmed the district court's rulings in all respects. [64]

In reaching this decision, the Eighth Circuit analyzed previous Supreme

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[57] *Id.* at 1121.

[58] *Id.* at 1122.

[59] Carhart, 11 F. Supp. at 1122.

[60] *Id.* at 1121. Specifically, the district court stated:

> [N]ebraska's partial-birth abortion law bans the D&E procedure because when a fetus is dismembered the dismemberment routinely involves an intentional and deliberate vaginal delivery of a "substantial portion" of the intact fetus in order to accomplish dismemberment.

*Id.*

[61] *Id.*

[62] *Id.*

[63] Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999).

[64] *Id.*

Court and federal cases regarding state laws and regulations that prohibited or restricted a woman from terminating her pregnancy.[65] Comparable to the analysis of the district court, the Eighth Circuit applied the undue burden standard enunciated in *Casey*.[66] The court rejected a proffered narrow interpretation of the statute because it conflicted with the statutory language.[67] The Eighth Circuit disagreed with the State's argument that the Nebraska Legislature's intent was to ban only the D&X procedure because the language of the statute described a procedure which encompassed more than just the D&X type of procedure.[68] In consonance with the analysis of the district court, the Eighth Circuit determined that the uncertainty encumbering the statute emanated from the statutory language "substantial portion," which was nowhere defined within the law.[69] First, the court determined that this language was vague because it failed to specifically define what it was banning.[70] Second, the court pointed to the overbreadth of the statute because the term "substantial portion encompass[ed] both the D&E and D&X procedures."[71]

Additionally, with regard to the State's arguments, the Eighth Circuit disagreed that neither *Roe* nor *Casey* should apply.[72] Specifically, the court was unwilling to agree with the State that, in the wake of *Roe* and *Casey*, the Su-

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[65] *Id.* at 1148. The Eighth Circuit's analysis referred to cases heard in the Fourth and Seventh Circuits where preliminary injunctions enjoining enforcement of the state's partial-birth abortion ban were granted. *Id.* Additionally, the Eighth Circuit looked to a number of district courts that addressed the constitutionality of state statutes banning partial-birth abortion and stated that all of those courts declared the statute unconstitutional, save one. *Id.* at 1149 (citing Planned Parenthood of Wis. v. Doyle, 44 F. Supp. 2d 975 (W.D. Wis. 1999)).

[66] *Id.* at 1149. Determining that the only pertinent analysis was the undue burden standard, the court stated, "[a]s we understand the record and the legal arguments in this case, no question is raised with respect to procedures performed on viable fetuses. The applicable legal standard is therefore the undue-burden rule of Casey." *Id.* at 1148 n.10.

[67] *Id.* at 1150. Preserving the theory that a statute should be construed so as not to raise constitutional doubts, the court refused to give certain words and phrases within the statute meanings which they could not "reasonably bear." *Id.*

[68] *Id.*

[69] *Carhart*, 192 F.3d at 1150.

[70] *Id.* at 1145.

[71] *Id.* at 1150.

[72] *Id.* at 1151.

preme Court left protection in place for the "partially born."[73] The Eighth Circuit refused to assume such a legal category existed, in confluence with Supreme Court jurisprudence and the lack of mention of such a category.[74] Accordingly, the court affirmed the holding of the district court below, finding that the Nebraska statute placed a substantial obstacle in the path of a woman seeking to have an abortion.[75] Furthermore, the court held that the statute was unconstitutional because it lacked any exception for the preservation of the life or health of the mother.[76]

The State appealed the Eighth Circuit's decision and the Supreme Court of the United States granted certiorari.[77] The Court, comparable to the decision of the Eighth Circuit, rejected the proffered narrowing interpretation of the statute and held that the statute was unconstitutional because it lacked any exception for the preservation of the life or health of the mother.[78] The Court also held the Nebraska statute unconstitutional because it imposed an undue burden on a woman's ability to choose a more common abortion procedure, thereby unduly burdening the right to choose abortion itself.[79]

## III. PRIOR CASE HISTORY

### *ROE V. WADE* – A WOMAN'S RIGHT TO CHOOSE TO HAVE AN ABORTION IS WITHIN THE SCOPE OF THE CONCEPT OF PERSONAL LIBERTY GUARANTEED UNDER THE FOURTEENTH AMENDMENT

The *Roe v. Wade*[80] decision marked the first time the United States Supreme

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[73] *Id.* The State urged the court to find that both Roe and Casey protected the "unborn," and, when considering partial-birth abortions, there was a "remaining" category for the "partially born" which would permit a state to legislate more stringently in order to protect that category. *Id.*

[74] *See id.*

[75] *Id.* at 1145.

[76] *Carhart*, 192 F.3d. at 1148.

[77] Stenberg v. Carhart, 120 S. Ct. 2597, 2597 (2000).

[78] *Id.* at 2604.

[79] *Id.* at 2609.

[80] 410 U.S. 113 (1973).

Court identified that a woman's right to choose to have an abortion was encompassed by the liberty clause set forth in the Fourteenth Amendment to the United States Constitution.[81] *Roe* involved the constitutionality of certain Texas statutes which made "it a crime to procure an abortion, . . . except with respect to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."[82] The facts of the case focused on "Jane Roe," a single

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[81] *Id.* The Fourteenth Amendment to the Constitution provides in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, *liberty*, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV (emphasis added).

[82] *Roe*, 410 U.S. at 118 (citations omitted). Specifically, the statutes of concern were Articles 1191-1194 and 1196 of Texas Penal Code. *Id.*

The Articles provided in pertinent part:

> 1191: Abortion
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> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus of embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.
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> 1192: Furnishing the means
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> Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
>
> 1193: Attempt at abortion
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> If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calcu-

woman who lived in Texas and instituted a federal action against the District Attorney of Dallas County, Texas in 1970.[83] Roe posited that her right to have an abortion was in jeopardy due to the implementation and ramifications of the Texas statutes.[84] The issue thus focused on whether the statutes were unconstitutionally vague in that they abridged a woman's right to privacy in violation of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[85]

A three-judge panel of the United States District Court for the Northern District of Texas denied the motion for an injunction against enforcement of the anti-abortion laws.[86] However, the panel granted Roe declaratory relief.[87] Following the decision of the district court, the State attempted to cross-appeal from the court's grant of that relief.[88] Following this attempt, the United States Court of Appeals ordered the appeals be held in abeyance pending the decision of the

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lated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

1194: Murder in producing abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

1196: By medical advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

*Id.* at 118 n.2. (quoting TEXAS PENAL CODE ARTS. 1191-1194, 1196).

[83] *Id.* at 120.

[84] *Id.*

[85] *Id.* The assertion was that the aforementioned amendments all protected an individual's right to privacy, thus, the challenge was fueled on various constitutional grounds. *Id.*

[86] *Id.* at 122-23.

[87] *Id.*

[88] *Roe*, 410 U.S. at 123.

United States Supreme Court.[89]

Justice Blackmun, writing for the majority, referred to the historical significance of the enactment of criminal abortion laws before embarking upon a constitutional analysis of the Texas statutes.[90] Describing the sharp dispute over the stated purpose of these laws, the Justice relied on *stare decisis* and stated that, though "[t]he Constitution does not explicitly mention any right of privacy[,] . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[91] Justice Blackmun reconciled the disparity of opinion regarding the derivation of such rights from the Constitution by expounding upon the "concept of personal liberty and restrictions upon state action."[92] Finally, Justice Blackmun announced that the right of privacy guaranteed by the Constitution did include the abortion decision.[93] However, the Court stressed that that right must be weighed against important state interests in regulation.[94] The Court divided the typical duration of the pregnancy into trimesters and created a corresponding timeline of how the State's interests increase in legitimacy as the months progress.[95] Justice Blackmun structured the framework such that during the first trimester, the decision to have an abortion remains between the woman and her physician.[96] During the second trimester, only regulations "reasonably related to the woman's health" are

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[89] *Id.*

[90] *Id.* at 148.

[91] *Id.* at 152-53 (citations omitted).

[92] *Id.* at 153. Supportive of this contention, the Justice opined that the detrimental effects resulting from a state restricting a woman's ability to choose to terminate her pregnancy would be "apparent." *Id.* Following that statement, Justice Blackmun listed the various aspects, both physiological and psychological, that would be taxed as a result of such state restrictions. *Id.*

[93] *Id.*

[94] Roe, 410 U.S. at 153. Justice Blackmun referred to the asserted state interests by historically tracing state objectives. *Id.* For example, the Justice stated that the laws used to be "the product of a Victorian social concern to discourage illicit sexual conduct." *Id.* at 148. Next, the Justice opined that states were concerned with the medical procedure as hazardous to the health of the woman. *Id.* Lastly, Justice Blackmun referred to the third asserted justification for state laws prohibiting abortion which directly related to the need to protect prenatal life. *Id.* at 150.

[95] *Id.* at 162-64.

[96] *Id.* at 163.

permitted.[97] Finally, during the third trimester, the State may prohibit abortions but is required to provide an exception for the procedure if necessary to preserve the health or life of the mother.[98]

In the aftermath of *Roe*, the burden on the State to legislate according to the established framework was substantial. Thus, since the *Roe* Court predicated abortion regulation upon the degree of the State's interests, state rights in regulation as balanced against the woman's right to choose to have an abortion became an issue of primary concern in cases to follow.[99]

### *DOE V. BOLTON* – THE COMPANION CASE TO *ROE V. WADE* AND THE "BEST CLINICAL JUDGMENT OF THE PHYSICIAN" STANDARD

Decided concurrently with *Roe v. Wade*,[100] *Doe v. Bolton*[101] involved a Georgia statute that criminalized abortion.[102] Doe, an indigent woman, was unable to provide adequate care for her three living children.[103] As a result of her poverty, two of her children had already been placed in foster homes.[104] Additionally, Doe had been a mental patient at the state hospital for some time, and, considering her history, she knew that she would be unable to support another child.[105] Doe attempted to have an abortion and was subsequently denied because she did not qualify under the Georgia statute, since, in the doctor's "best medical judgment," she did not meet the criteria required by the statute.[106]

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[97] *Id.*

[98] *Id.*

[99] Gough, *supra* note 11 at 188.

[100] 410 U.S. 113 (1973).

[101] 410 U.S. 179 (1973).

[102] *Id.* at 181.

[103] *Id.* at 185.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 183 (citing GA. CODE ANN. § 26-1202(a) (1969)). Specifically, the statute required that, for an abortion to be authorized, a physician must determine in his or her "best medical judgment" that:

The first issue before the *Doe* Court was whether a justiciable controversy existed.[107] Deciding that Doe and her class had standing, Justice Blackmun concluded that there was a "sufficiently direct threat of personal detriment."[108] Next, the Court addressed the conclusion set forth in *Roe* that a woman does not enjoy an "absolute" constitutional right to an "abortion on her demand."[109] With this assertion, Justice Blackmun turned to what is the most salient issue for purposes of the *Stenberg* decision, the "best clinical judgment"[110] provision of the statute,[111] specifically the portion requiring confirmation by two independent physicians.[112] Justice Blackmun opined that such a requirement simply could not pass constitutional muster.[113] Finally, with regard to the health exception, the Court stated that when a doctor considers the life and health of the mother,

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A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

The pregnancy resulted from forcible or statutory rape.

*Id.* (citing GA. CODE ANN. § 26-1202(a)).

[107] *Doe*, 410 U.S. at 188.

[108] *Id.*

[109] *Id.* at 189-90.

[110] For purposes of this note, "clinical" may be used interchangeably with "medical."

[111] *Id.* at 199.

[112] *Id.* at 184 (citing GA. CODE ANN. § 26-1202(a)). Under this statute, the state required that for an abortion to be authorized or performed as a noncriminal procedure, the woman would need to obtain "written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman." *Id.*

[113] *Id.* at 200. Supporting this finding, the Justice explained that the "best clinical judgment" standard was more than sufficient and that the further requirement of confirmation by two other physicians could not pass constitutional muster. *Id.* It should be noted that the Court also held that the accredited hospital provision and the requirements for Georgia residency were also held violative of the Fourteenth Amendment. *Id.*

the doctor may also consider various "emotional, psychological, [and] familial factors."[114] Following these two cases, the Court was soon plagued with state statutes that attempted to thwart the impact of *Roe* through creative, and many times evasive, legislative techniques.[115]

### THORNBURGH V. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS – THE REQUIREMENT OF A HEALTH EXCEPTION FOR THE WOMAN

In 1986, the Supreme Court was again confronted with the controversial abortion issue. In *Thornburgh v. American College of Obstetricians and Gynecologists*,[116] Justice Blackmun revisited the constitutionality of privacy interests and concerns with maternal health.[117] *Thornburgh* involved an organization of obstetricians and gynecologists who challenged the constitutionality of several Pennsylvania statutes which, after having initially been declared unconstitutional, were redrafted.[118]

Writing for the majority, Justice Blackmun examined the Court's decision in

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[114] *Doe*, 410 U.S. at 192.

[115] In 1976, the Supreme Court, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), invalidated a statute which required pregnant women seeking to have abortions to obtain spousal consent or parental consent if the woman was a minor. *Id.* at 81. In 1980, the Supreme Court was again confronted with a statute that prohibited funding for medically necessary abortions. Harris v. McRae, 448 U.S. 297 (1980). The Court determined that the statute was constitutional, finding that the right to choose to terminate pregnancy did not equate with a right to financial resources. *Id.* at 318.

[116] 476 U.S. 747 (1986).

[117] *Id.* at 751.

[118] *Id.* at 750. The statute at issue in *Thornburgh* was formulated, enacted, and approved in 1982. *Id.* Specifically, the case brought before the Court challenged the constitutionality of six provisions of the statute that the court of appeals struck down as "facially invalid." *Id.* at 758. The provisions were as follows:

> § 3205 required informed consent; § 3208 required printed information; §§ 3214(a) and (h) required reporting requirements; § 3211(a) provided for a determination of viability; § 3210(b) set forth the degree of care required in post-viability abortions; and § 3210(c) provided for a second-physician requirement.

*Id.* The United States District Court for the Third Circuit denied the plaintiffs desired preliminary injunctive relief and the United States Court of Appeals for the Third Circuit, while declaring several provisions of the abortion control statute unconstitutional, remanded the provision concerning parental consent. *Id.*

*Roe* and cases decided in the wake of *Roe*.[119] While the issue in *Thornburgh* focused primarily on the provision requiring parental consent, Justice Blackmun took the opportunity to reaffirm the need to "recogniz[e] the constitutional dimensions of a woman's right to decide whether to end her pregnancy."[120] The Justice stated that "[the cases of the Supreme Court] long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."[121] In so stating, the Justice established and thus reaffirmed the principles announced in *Roe* and properly set the stage for future constitutional challenges to state statutes that threatened that very precious and vital "private sphere."[122]

## PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY – THE "UNDUE BURDEN" STANDARD

In 1992, the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*[123] and focused primarily on the States' important constitutional role in defining their interests and how they relate to the abortion debate.[124] *Casey* involved a Pennsylvania abortion statute which provided for certain restrictions on a woman's right to elect to have an abortion.[125] Justice

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[119] *Id.* at 759.

[120] *Id.*

[121] *Id.* at 772.

[122] *Thornburgh*, 476 U.S. at 772 (citing Carey v. Population Servs. Int., 431 U.S. 678 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

[123] 505 U.S. 833 (1992).

[124] *Id.*

[125] *Id.* at 844. At issue were five provisions of the Pennsylvania Abortion Control Act of 1982: §§ 3205, 3206, 3209, 3203, and 3214(f). The provisions required (1) that a woman seeking an abortion give her informed consent prior to the procedure, and required that she be provided with certain information at least twenty four hours before the abortion procedure; (2) that a woman obtain the informed consent of one parent if she was a minor but also provided for a judicial bypass procedure; (3) that unless certain exceptions applied, a married woman seeking an abortion must sign a statement that she had notified her husband; (4) provided for a "medical emergency" exception that excused the above requirements; and (5) imposed certain reporting requirements on facilities providing abortion procedures. 18 PA. CONS. STAT. §§ 3203-3220 (1990).

O'Connor initiated the opinion by stating that the fundamental holding of *Roe v. Wade* should be retained.[126] However, the Court rejected the trimester framework established in *Roe*.[127]

The Court, providing a tripartite analysis, recapitulated the central holding of *Roe*.[128] First, the Court recognized the right of a woman to choose to have an abortion prior to fetal viability without undue interference from the State.[129] Second, the Court reaffirmed that a State may not, pre-viability, prohibit abortion and place a substantial obstacle in the path of the woman seeking the procedure.[130] Third, the Court reaffirmed that the State does have a legitimate interest throughout the pregnancy regarding the health of both the mother and the fetus and may regulate procedures accordingly.[131] In addition, the Court declared that the State may restrict abortions post-viability.[132]

The Court then endeavored to establish an "undue burden" analysis, a standard more flexible than *Roe's* trimester framework.[133] Specifically, the Court stated that an undue burden will exist when a law's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[134] As such, state regulations which impose unnecessary health regulations will be deemed unconstitutional when evaluated under this stan-

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[126] *Casey*, 505 U.S. at 846 (citing Roe v. Wade, 410 U.S. 113 (1973)).

[127] *Id.* at 873.

[128] *Id.*

[129] *Id.* at 846.

[130] *Id.*

[131] *Id.*

[132] *Casey*, 505 U.S. at 846. The Court stated:

> [W]e also reaffirm *Roe's* holding that subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

*Id.* at 879 (citing Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

[133] *Id.* at 878-79.

[134] *Id.*

dard.[135] In the exact language of the Court, "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of [her] right to choose."[136]

## IV. OPINION

### *STENBERG V. CARHART*—THE UNITED STATES SUPREME COURT PRESERVES THE CENTRAL TENET OF *ROE* AND *CASEY* AND APPLIES THE "UNDUE BURDEN" STANDARD TO THE NEBRASKA STATUTE

The United States Supreme Court granted certiorari to resolve the issue of whether Nebraska's statute criminalizing the performance of partial-birth abortions violated the United States Constitution, as interpreted in *Roe* and *Casey*.[137] The Supreme Court applied the "undue burden" test derived from *Casey* and determined that the Nebraska statute was unconstitutional.[138] The plurality was divided into four concurring opinions.[139] Justice Breyer, joined by three concurring opinions, authored the plurality.[140]

Justice Breyer[141] initiated the opinion by explaining the controversial nature of the issue encompassing a woman's right to choose.[142] The Court reiterated that the necessary inquiry regarding the constitutionality of the Nebraska statute

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[135] *Id.*

[136] *Id.* at 877.

[137] Stenberg v. Carhart, 120 S. Ct. 2597, 2605 (2000).

[138] *Id.* at 2605 (citations omitted).

[139] *Id.* at 2598.

[140] *Id.* at 2604.

[141] Justice Breyer was joined in judgment by Justices Stevens, O'Connor, Ginsberg, and Souter.

[142] *Id.* at 2604. Justice Breyer confronted the discrepancy of opinions among Americans by stating that the issue is truly about when life begins. *Id.* Faced with these irreconcilable points of view, Justice Breyer opined that such issues must be determined in light of the "Constitution's guarantees of fundamental individual liberty." *Id.* Further, Justice Breyer stated that within those constitutional guarantees lies the "basic protection to the woman's right to choose." *Id.*

was whether, as applied, the statute imposed an "undue burden" on a woman's right to choose abortion.[143] Specifically, this issue was addressed because the Nebraska law sought to ban one method of aborting a pregnancy.[144] As written, the statute failed to provide for an exception for the health or life of the mother.[145] The Court sought guidance and looked to three established principles to determine the issue before it, namely the constitutional doubt surrounding the statute.[146] First, the Court referred to the *Casey* opinion and established a precedential foundation regarding a woman's right to choose when to terminate her pregnancy.[147] Second, the Court examined the State's interest in fetal life and determined that " 'a law designed to further [that State interest] which imposes an undue burden on a woman's decision before fetal viability' is unconstitutional."[148] Third, the Court described when a state, in promoting its interest in the "potentiality of human life," may regulate abortion.[149] Specifically, the Court stated that a State may promote its interests and regulate or even proscribe abortions, except where, in the best medical judgment of the doctor, an abortion is necessary to preserve the health or the life of the mother.[150]

Following this initial tripartite inquiry, the Court discussed the aforemen-

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[143] *Id.*

[144] Stenberg, 120 S. Ct. at 2605. Because the law prohibited partial birth abortions, and was challenged as unconstitutionally vague, it, as applied, banned common procedures such as D&E and D&X and thus interfered with the best medical judgment of a doctor in situations where an exception for the health or the life of the mother may have been necessary. *Id.* at 2606. Undoubtedly, the effect of banning one method of abortion without providing for such an exception contributed to the Supreme Court's finding the statute unconstitutional. *Id.* at 2609.

[145] *Id.*

[146] *Id.* at 2604.

[147] *Id.* Specifically, the Court stated: "[f]irst, before 'viability . . . the woman has a right to choose to terminate her pregnancy." *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992) (Justices O'Connor, Kennedy, and Souter)).

[148] *Id.* Further, the Court extracted the definition of undue burden from *Casey* and stated that " [a]n undue burden is . . . shorthand for the conclusion that 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." *Id.* (quoting *Casey*, 505 U.S. at 877).

[149] *Id.*

[150] *Stenberg*, 120 S. Ct. at 2604 (quoting *Casey*, 505 U.S. at 879 (quoting Roe v. Wade, 410 U.S. at 164-65)).

tioned state objectives and the language of the Nebraska statute.[151] Specifically, the Court endeavored to evaluate the statute under the *Casey* standard to determine its constitutionality.[152] Recognizing the Court's reluctance to deviate from the central holdings of *Casey* and *Roe*, Justice Breyer concluded that, when evaluated under the principles of these two holdings, the Nebraska statute violated the United States Constitution for two distinct reasons.[153] First, the Court stated that the law did not provide for any exception "for the preservation of the . . . health of the mother."[154] Second, the Court determined that the statute "impose[d] an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself."[155]

Next, the Court referred to its holding in *Casey*, where the Court reiterated the central tenet of *Roe v. Wade*.[156] Ultimately, in an opinion by Justice O'Connor, the *Casey* Court stated that a state may regulate abortion under certain circumstances, *except* where, in the exercise of appropriate medical judgment, it is necessary for the preservation of the health or life of the mother.[157] Justice Breyer applied the reasoning established in *Casey* and determined that because Nebraska's law applied both to "pre- and post-viability [stages of the pregnancy, it] aggravat[ed] the constitutional problem presented."[158]

The Court rejected the State's proffered interest in promoting the potentiality of human life because the Nebraska law regulated a *method* of performing abortions which lacked any exception that would provide for the preservation of the health or life of the mother.[159] Additionally, the Court vehemently disagreed with the other State interests Nebraska implored the Court to accept.[160] More-

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[151] *See supra* notes 31-32.

[152] *Stenberg*, 120 S. Ct. at 2609. .

[153] *Id.*

[154] *Id.* (quoting *Casey*, 505 U.S. at 879).

[155] *Id.* (quoting *Casey*, 505 U.S. at 874).

[156] *Id.* at 2609 (citing Roe v. Wade, 410 U.S. 113 (1973)).

[157] *Id.* (citing *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. 164-65)).

[158] *Stenberg*, 120 S. Ct. at 2609.

[159] *Id.* Specifically, the Court stated that the Nebraska law does not directly further an interest "in the potentiality of human life by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion." *Id.* (emphasis added).

[160] *Id.* Nebraska described three state interests in regulating this method of abortion.

over, the *Stenberg* Court referred once again to the undue burden standard derived from *Casey* with regard to the structure with which such a law must conform.[161] Specifically, the Court stated that the governing standard requires an exception "where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother."[162] The Court determined that, because, as applied, the Nebraska statute lacked such an exception, the stated justifications for the law were counterintuitive.[163] Converse to the law's objectives of preserving and protecting life, Justice Breyer suggested that the law acted to endanger the life of the mother by failing to provide for the aforementioned exception.[164]

Moreover, the Court refused to accept Nebraska's rebuttal to such an inference.[165] Supportive of this refusal, the Court explained that Nebraska "fail[ed] to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record show[ed] that significant medical authority support[ed] the proposition that in some circumstances, D&X would be the safest procedure."[166] Addressing the issue of providing for a health exception, the Court explained that, although D&X may in fact be an "infrequently used abortion procedure," the health exception inquiry requires that even for those "infrequent occasions," protection of the woman's health should be paramount.[167] Notwithstanding the Court's reluctance to accept Nebraska's ar-

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Specifically, the State argued that the law "show[ed] concern for the life of the unborn, prevent[ed] cruelty to partially born children, and preserve[d] the integrity of the medical profession." *Id.*

[161] *Id.* (citing *Casey*, 505 U.S. at 879).

[162] *Id.*

[163] *Id.* The Court logically reasoned that a law which claims to protect one life (the fetus) while potentially having the effect of threatening another (the mother), cannot be constitutionally sound. *Id.* at 2617 (Stevens, J., concurring).

[164] Stenberg, 120 S. Ct. at 2609.

[165] *Id.* at 2611. Nebraska responded " that the law does not require a health exception unless there is a need for such an exception. And here there is no such need . . . . It argues that 'safe alternatives remain available' and 'a ban on partial-birth abortion/D&X would create no risk to the health of women.'" *Id.*

[166] *Id.*

[167] *Id.* at 2611. Further, the Court stated that "[a] rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone – the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it." *Id.*

gument, Justice Breyer did agree that "there [were] no general medical studies documenting comparative safety [regarding D&X and other abortion procedures]."[168] Though the Court conceded that there may not be a situation in which D&X is the "only" life or health preserving option for the woman,[169] the Court relied on the Brief for the American College of Obstetricians and Gynecologists ("ACOG") to explain the beneficial aspects of D&X.[170] Comparable to the findings of the district court, and in accordance with the language of *Casey*, the Supreme Court determined that the word "necessary," as used in the phrase "necessary, in the appropriate medical judgment, for the preservation of the life or health of the mother,"[171] did not refer to "an absolute necessity or to absolute proof."[172]

Following this analysis, the Court addressed how the Nebraska statute should be interpreted.[173] Denying the Attorney General's proffered narrowing interpretation of the Nebraska statute,[174] the Court explained that it would follow the

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[168] *Id.* at 2611-12.

[169] *Id.* at 2612.

[170] *Stenberg*, 120 S. Ct. at 2612 (citing the Brief of Amici Curiae for the ACOG). The salient section of the brief provided in pertinent part:

> Depending on the physician's skill and experience, the D&X procedure can be the most appropriate abortion procedure for some women in some circumstances. D&X presents a variety of potential safety advantages over other abortion procedures used during the same gestational period. Compared to D&Es involving dismemberment, D&X involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and the cervix.

*Id.* (quoting Brief of Amici Curiae for the ACOG at 21-22).

[171] *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992)).

[172] *Id.*

[173] *Id.* at 2613-14.

[174] *Id.* at 2614. The Attorney General proposed an interpretation of the statute that implored the Court to find that the statute did not differentiate between the two abortion procedures, namely D&X and D&E. *Id.* The argument urged the Court to find that the statutory words "substantial portion" mean "the child up to the head." *Id.* Therefore, the Attorney General "denie[d] the statute's application where the physician introduces into the birth canal a fetal arm or leg or anything less than the entire fetal body." *Id.*

lower federal court interpretations of state law.[175] The Court was reluctant to deviate from the findings of the two lower courts, both of which had rejected the Attorney General's narrowing interpretation.[176] Next, Justice Breyer explained that precedent "warns against accepting as 'authoritative' an Attorney General's interpretation of state law because 'the Attorney General does not bind state courts or local law enforcement authorities.'"[177] Moreover, the Court referred to the Eighth Circuit's treatment of the statute when it looked to the statute's plain language and the Court further recognized the "duty to give [the law] a construction . . . that would avoid constitutional doubts."[178] Because the Nebraska statute included an explicit definition, the Court stated that it must adhere to that definition.[179] Finally, the Court announced that a narrowing interpretation would be exercised only where such a construction was "reasonable and readily apparent."[180] Accordingly, Justice Breyer declined to certify the question of whether a federal litigant must await a state court construction before bringing the federal lawsuit.[181]

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[175] *Id.* (citing McMillian v. Monroe County, 520 U.S. 781, 786 (1997); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 (1985)).

[176] *Stenberg*, 120 S. Ct. at 2614.

[177] *Id.* The Court stated that "[u]nder Nebraska law, the Attorney General's interpretative views do not bind state courts." *Id.* (citing State v. Coffman, 213 Neb. 560, 561 (1983)).

[178] *Id.* at 2615. (citing Carhart v. Stenberg, 192 F.3d 1142, 1150 (8th Cir. 1999)). In addition to adhering to the propounded legal standard of the Eighth Circuit, the Court reasoned that the statute in question had language based on model statutory language. *Id.* Ten lower federal courts found this language "potentially applicable to other abortion procedures." *Id.* (citing Planned Parenthood of Greater Iowa, Inc. v. Miller, 195 F.3d 386 (8th Cir. 1999); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794, 797-98 (8th Cir. 1999); Hope Clinic v. Ryan, 995 F. Supp. 2d 847, 865-71 (N.D. Ill. 1998); R. I. Med. Soc. v. Whitehouse, 66 F. Supp. 2d 288, 309-10 (R.I. 1999); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1155 (S.D. Fla. 1998); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604, 614-15 (E.D. Va. 1998); Planned Parenthood of Cent. N. J. v. Verniero, 41 F. Supp. 2d 478, 503-04 (N.J. 1998); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1034-35 (W.D. Ky. 1998); Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 2d 1369, 1378 (Ariz. 1997); Evans v. Kelley, 977 F. Supp. 2d 1283, 1317 (E.D. Mich. 1997)).

[179] *Id.* Specifically, the Court stated that the words "partial birth abortion" and "partially delivers vaginally a living unborn child" are subject to the statute's "*explicit statutory definition.*" *Id.* (emphasis added).

[180] *Id.* at 2616 (citing Boos v. Barry, 485 U.S. 312, 330 (1988); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972)).

[181] *Id.* at 2617. The Court stated: "[c]ertification of a question (or abstention) is appropriate only where the statute is 'fairly susceptible' to a narrowing construction." *Id.* (citing

As a result, the Court held that because the Nebraska statute banned commonly used abortion procedures without providing for an exception for the preservation of the health and/or life of the woman, it placed an undue burden upon a "woman's right to make an abortion decision."[182] In so holding, the Court reasoned that the law placed "all those who perform abortion procedures [using both D&X and D&E in fear of] prosecution, conviction, and imprisonment."[183]

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBERG JOINED, CONCURRING IN THE JUDGMENT

Justice Stevens, in a forthright concurrence, voiced the belief that any State that required a doctor to abstain from performing a procedure other than the one that he or she "reasonably believes will best protect the woman in her exercise of [the constitutional liberty announced in *Roe,*]" cannot possibly further a legitimate State interest.[184] Justice Stevens then noted that since the Supreme Court's holding in *Roe*, the word "liberty" as interpreted in the Fourteenth Amendment to the Constitution,[185] encompassed a woman's "right to make this difficult and extremely personal decision."[186] Furthermore, Justice Stevens stated that because the Nebraska statute was disproportionate as applied and banned one procedure but not the other, the ramifications of the law unduly burdened doctors in their decision-making authority.[187] Thus the law was simply "irrational."[188]

JUSTICE O'CONNOR CONCURRING IN THE JUDGMENT

In a separate concurring opinion, Justice O'Connor wrote to emphasize the controversial nature of the issue before the Court.[189] Justice O'Connor con-

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Houston v. Hill, 482 U.S. 451, 468-71 (1987)).

[182] *Stenberg*, 120 S. Ct. at 2617.

[183] *Id.*

[184] *Id.* at 2617 (Stevens, J., concurring).

[185] U.S. CONST. amend. XIV.

[186] *Stenberg*, 120 S. Ct. at 2617 (Stevens, J., concurring).

[187] *Id.*

[188] *Id.*

[189] *Id.* at 2617 (O'Connor, J., concurring). "The issue of abortion is one of the most con-

tended that the Nebraska statute, as applied, could not be reconciled with the *Casey* decision.[190] In determining that the lack of a health exception renders the statute unconstitutional, Justice O'Connor engaged in a comparative analysis under the findings established in the *Casey* decision.[191]

First, Justice O'Connor stated that the statute was unconstitutional because it banned a necessary procedure even in circumstances where the procedure may serve to preserve the health or life of the woman.[192] According to the Justice, proscribing even post-viability abortions without providing for such an exception could not survive constitutional scrutiny.[193] Accordingly, Justice O'Connor contended that the Court made the correct determination in this case, finding that it was necessary to provide for a health exception.[194]

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tentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve virtually irreconcilable points of view." *Id.*

[190] *Id.* at 2618 (O'Connor, J., concurring) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

[191] *Id.*

[192] *Stenberg,* 120 S. Ct. at 2618 (O'Connor, J., concurring) (citing *Casey,* 505 U.S. at 870). The Court stated:

> As we held in *Casey*, prior to viability 'the woman has a right to choose to terminate her pregnancy.' After the fetus has become viable, States may substantially regulate and even proscribe abortion, but any such regulation or proscription must contain an exception for instances "where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother.

*Id.* (citing *Casey*, 505 U.S. at 879 (quoting Roe v. Wade, 410 U.S. 113, 165 (1973)).

[193] *Id.*

[194] *Id.* Specifically the Court stated:

> [A]s the majority explains, . . . where [as evidenced in the current situation] "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the mother." Accordingly, our precedent requires that the statute include a health exception.

*Id.*

Second, Justice O'Connor explained, in accordance with the holding of the plurality, that Nebraska's statute was unconstitutional because it imposed an undue burden upon a woman's right to choose whether to have an abortion.[195] In agreement with the plurality, Justice O'Connor stated that due to the vague language "substantial portion," the statute necessarily included a ban on the most commonly used methods of performing partial-birth abortions.[196] Moreover, because the statute, as applied, banned both the D&X and D&E procedures, the law placed an undue burden upon the woman's decision-making capabilities.[197]

Third, Justice O'Connor differentiated between other States which had enacted similar statutes.[198] In such states, the Justice noted that the statutes were "more narrowly tailored to proscribing [only one] procedure alone."[199] Justice O'Connor proffered that if Nebraska had drafted the statute to ban only one type of procedure and there were other safe and viable means by which to have a late-term abortion, the issue before the Court would be quite different, and perhaps, the statute would pass constitutional muster.[200] Finally, Justice O'Connor determined that because the statute failed to provide for a health exception, it did not meet the criteria established in both *Roe* and *Casey*.[201]

JUSTICE GINSBERG, WITH WHOM JUSTICE STEVENS JOINED, CONCURRING IN THE JUDGMENT

Justice Ginsberg concurred separately and urged that "amidst all the emo-

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[195] *Id.*

[196] *Id.* at 2619-20 (O'Connor, J., concurring).

[197] *Id.*

[198] *Stenberg*, 120 S. Ct. at 2619-20 (O'Connor, J., concurring). Justice O'Connor specifically addressed similar legislation in Kansas which purposely excluded a ban on more common methods of abortion. *Id.* The Justice further discussed Utah and Montana statutes which avoided constitutional doubts by restricting their prohibitions to only the D&X procedure. *Id.*

[199] *Id.* at 2619 (O'Connor, J., concurring). Justice O'Connor mentioned similar statutes that exist in Kansas, Montana and Utah for comparison to the Nebraska statute. *Id.* (citing KAN STAT. ANN. § 65-6721(b)(2) (Supp. 1998); MONT. CODE ANN. § 50-20-401(3)(c)(ii) (Supp. 1999); UTAH CODE ANN. § 76-7-310.5(1)(a) (1999)).

[200] *Id.* at 2619-20 (O'Connor, J., concurring).

[201] Id. at 2620 (O'Connor, J., concurring) (citing Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 510 U.S. 833 (1992)).

tional uproar caused by an abortion case," the Court should not forget the "character" of the Nebraska statute in issue.[202] The Justice stressed that because the statute targeted a *method* of performing abortions, without providing an exception for the health or the life of the woman, it failed to protect the best interests of the woman.[203] Primarily Justice Ginsberg agreed with Seventh Circuit Chief Judge Posner because, as the Chief Judge commented, "the law prohibit[ed] the procedure because the State legislatures [sought] to chip away at the private choice shielded by *Roe v. Wade*, even as modified by *Casey*."[204]

Additionally, Justice Ginsberg agreed with the plurality that, as applied, the statute placed a substantial obstacle in the path of a woman seeking to have an abortion, without giving the appropriate deference to what the woman and her doctor believed to be the most reasonable decision to make under such circumstances.[205] Accordingly, Justice Ginsberg determined that a statute that intercepts the ability of a doctor and his patient to make choices in the best interests of the patient will be unconstitutional in the wake of *Roe* and *Casey*.[206]

### CHIEF JUSTICE REHNQUIST, DISSENTING

In a terse dissenting opinion, Chief Justice Rehnquist voiced dismay with the holding of the plurality.[207] Similar to the Chief Justice's dissent in *Casey*,[208] Jus-

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[202] *Id.* at 2620 (Ginsberg, J., concurring).

[203] *Id.*

[204] *Stenberg*, 120 S. Ct. at 2620 (Ginsberg, J., concurring) (citing Hope Clinic v. Ryan, 195 F.3d 857, 881 (1999) (dissenting opinion)).

[205] *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992)). Specifically, the Court stated: "[s]uch an obstacle exists if the State stops a woman from choosing the procedure her doctor 'reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty.'" *Id.*

[206] *Id.* (citing *Roe*, 410 U.S. 113 (1973); *Casey*, 505 U.S. 833 (1992)).

[207] *Id.* at 2621 (Rehnquist, C.J., dissenting).

[208] *Id.* (Rehnquist, C.J., dissenting). "[I did] and continue to believe that case is wrongly decided." *Id.* Specifically, Chief Justice Rehnquist announced in *Casey* that the Court was mistaken in *Roe* when it declared that a woman's fundamental right to liberty included the ability to choose to have an abortion. *Casey*, 505 U.S. at 953. Furthermore, the Chief Justice stated that it was within the unique province of the Court to clarify constitutional misinterpretations when decisions are made as a result of erroneously applying *stare decisis*. *Id.* at 955 (emphasis added).

tice Rehnquist reaffirmed this vehement opposition and, comparable to the sentiments in *Casey*, refused to accept the plurality's reasoning in *Stenberg*.[209]

JUSTICE SCALIA, DISSENTING[210]

Justice Scalia took this opportunity to recapitulate the proposition which *Casey* stood for and referred to the decision in *Stenberg* as more than a "regrettable misapplication" of *Casey*.[211] Justice Scalia initiated a strenuous dissent and stated that, while not embracing the desire to write a separate dissent originally, it was necessary to do so in light of the "error" the plurality made in declaring the Nebraska statute unconstitutional.[212]

First, the Justice disagreed wholeheartedly with the Court's construction of the statute.[213] Referring to the statute as humane and even "anti-barbarian,"[214] Justice Scalia described the decision of the plurality as an "unprecedented expansion" of prior caselaw.[215] To support this assertion, the Justice stated that the undue burden test derived from *Casey* did not mandate the inquiry the Court engaged in.[216] Instead, the Justice went so far as to consider the Court's application of the undue burden test "irreconcilable with *Casey's* explication of what its

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[209] *Stenberg*, 120 S. Ct. at 2621 (Rehnquist, C.J., dissenting)

[210] *Id.* (Scalia, J., dissenting). Justice Scalia intimated that, while the standard practice of the Court is to publish dissents in the order of the seniority of their authors, this dissent should be read following the other dissents to achieve a true understanding of the issues set forth. *Id.*

[211] *Id.* Justice Scalia argued that the plurality disregarded all "fair meaning" of the statute and interpreted it to include a ban on procedures not addressed at all. *Id.* Such an interpretation, in the Justice's opinion, constituted the Court's willingness to "bend the rules" in an effort to find statutes limiting abortion unconstitutional. *Id.*

[212] *Id.*

[213] *Id.* Justice Scalia wrote that, by interpreting the statute to include "procedures other than live-birth abortion," the Court disregarded the "fair meaning" and erred in deeming the statute void as opposed to valid. *Id.*

[214] *Id.*

[215] *Stenberg*, 120 S. Ct. at 2621 (Scalia, J., dissenting)

[216] *Id.* at 2621-22 (Scalia, J., dissenting). Arguing that the undue burden standard is subject to divergent opinions, the Justice explained that an undue burden is often determined by weighing value judgments because such a standard cannot be demonstrated "true or false by factual inquiry or legal reasoning." *Id.*

undue burden standard require[d]."[217]

Further, Justice Scalia vehemently disagreed with the Court's definition and application of the undue burden test, supporting this criticism by propounding the view that the undue burden standard stands for nothing more than an unworkable "standardless" moral barometer.[218] Describing the undue burden test as a "value judgment,"[219] Justice Scalia stated that the foremost issue depended on "how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave life to kill it."[220] Justice Scalia then criticized the Court's failure to preserve constitutional principles and recapitulated the belief that the decision was decided, as most are, by "a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject."[221] Ultimately, Justice Scalia reaffirmed the belief of the dissent in *Casey* and concluded that it was erroneously decided and that the decision in *Stenberg* was a natural product of that mistake.[222] Finally, Justice Scalia reminded the plurality of the role of the Court and explained that decisions surrounding abortion are questions of policy, not of law, therefore "the Court should return this matter to the people."[223]

JUSTICE KENNEDY, WITH WHOM THE CHIEF JUSTICE JOINED, DISSENTING

Justice Kennedy initiated a lengthy dissent by stating that the Court's decision "repudiates [the State's constitutional authority] by invalidating a statute advancing critical state interests."[224] First, the Justice criticized the plurality's

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[217] *Id.* at 2622 (Scalia, J., dissenting).

[218] *Id.* Essentially the Justice described the undue burden standard as one that is both unprincipled in origin and unworkable in practice. *Id.*

[219] *Id.*

[220] *Id.*

[221] Stenberg, 120 S. Ct. at 2622 (Scalia, J., dissenting).

[222] *Id.* The Justice surmised that the Court's opinions both in Casey and in Stenberg are "policy-judgment[s]-couched-as-law." *Id.*

[223] *Id.* at 2623 (Scalia, J., dissenting). In so stating, Justice Scalia implored that *Casey* be overruled. *Id.*

[224] *Id.* (Kennedy, J., dissenting).

failure to lend any weight to Nebraska's stated interest in prohibiting partial-birth abortions.[225] Imploring the Court to consider the shock of ending human life as opposed to considering the statutes ban on the methods of such procedures, the Justice expressed disappointment in the Court's failure to address the issue presented before it.[226]

Second, Justice Kennedy, in accordance with the other dissenters, referred to the *Casey* decision and it's reliance on the constitutional role of the States.[227] In so stating, the Justice concluded that Nebraska, acting within its constitutional powers, was in fact "entitled to find the existence of a consequential moral difference between the [D&E and D&X] procedures."[228] In accordance with the dissent of Justice Scalia, Justice Kennedy reiterated the belief that the plurality evidenced a basic misunderstanding of *Casey*.[229] In addition, Justice Kennedy agreed with Justice Thomas as to what the appropriate *Casey* inquiry requires.[230] Justice Kennedy explained that *Casey* did *not* address whether the challenged statute was interfering with a doctor's best medical judgment.[231] Alternatively the Justice believed that the *Casey* inquiry was whether the state possessed the ability to resolve philosophic questions about abortion in such a definitive way

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[225] *Id.*

[226] *Id.* at 2623-25. Justice Kennedy supported this notion by engaging in a discussion of various abortion procedures. *Id.*

[227] *Stenberg*, 120 S. Ct. at 2625 (Kennedy, J., dissenting) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).

[228] *Id.* at 2626 (Kennedy, J., dissenting). The Justice further stated that "[i]t ill-serves the Court, its institutional position, and the constitutional sources it seeks to invoke to refuse to issue a forthright affirmation of Nebraska's right to declare that critical moral differences exist between the two procedures." *Id.* at 2627 (Kennedy, J., dissenting).

[229] *Id.* Justice Kennedy stated that, by its decision, the plurality allows a doctor to have veto power over State legislation. *Id.* As such, the result is "no different than forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people." *Id.* "Casey does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure." *Id.*

[230] *Id.* Justice Kennedy explained that while the plurality sided against the State in Casey, evident in its aftermath was the remaining power of a State to legislate to protect the unborn. *Id.*

[231] *Id.*

that would deprive a woman of any choice in the matter.[232] Further, the Justice articulated that the *Casey* standard allowed for a woman to elect abortion in *defined circumstances* and, in disagreement with the plurality, disdained the notion that this was *not* an inquiry before the Court.[233] Rejecting the plurality's interpretation of *Casey* as allowing a doctor to exercise his or her best medical judgment, Justice Kennedy referred to a statement by the ACOG that it "could identify no circumstances under which [D&X] would be the only option to save the life or preserve the health of the woman."[234] Accordingly, the Justice explained that the Court erred in concluding that D&X is an integral part of standard medical practice.[235] Supportive of this contention, Justice Kennedy stated that "[c]ourts are ill-equipped to evaluate the relative worth of particular surgical procedures."[236] Criticizing the Court for lending itself to a "physician-first view," the Justice argued that such an interpretation derives its only support from *Akron v. Akron Center for Reproductive Health,*[237] a "now-discredited case."[238]

Third, Justice Kennedy argued that the Court misapplied "settled doctrines of statutory construction and contradict[ed] *Casey's* premise that the States have a vital constitutional position in the abortion debate."[239] Essentially, the Justice propounded that, by declaring the Nebraska statute unconstitutional, the plurality was now requiring a level of legislative draftsmanship that could be considered virtually unattainable.[240] Following the Justice's soliloquy regarding the subse-

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[232] *Id.* at 2627 (citing *Casey*, 505 U.S. at 850) (Kennedy, J., dissenting).

[233] *Stenberg,* 120 S. Ct. at 2627 (Kennedy, J., dissenting)

[234] *Id.* (citing Brief for the ACOG App. 600-01).

[235] *Id.* at 2628 (Kennedy, J., dissenting).

[236] *Id.* at 2629 (Kennedy, J., dissenting).

[237] 462 U.S. 416 (1983).

[238] *Stenberg*, 120 S. Ct. at 2629 (Kennedy, J., dissenting). Justice Kennedy explained that the *Casey* decision discussed the informed consent requirement invalidated in *Akron* and the Court's "physician-first" opinion in *Stenberg* closely resembled the reasoning applied in *Akron. Id.* (citing Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (holding the informed consent requirement of an Ohio law unconstitutional). Therefore, by relying on a case without mentioning its name, Justice Kennedy accused the *Carhart* plurality of erroneously determining that the Nebraska statute was constitutional. *Id.*

[239] *Id.* at 2631 (Kennedy, J., dissenting).

[240] *Id.*

quent burden that will be imposed on the State as a result of the plurality's holding,[241] Justice Kennedy expressed sincere regret with the Court's ignorance of the "settled rule against deciding unnecessary constitutional questions."[242] Lastly, the Justice accused the plurality of successfully disregarding medical ethical opinions and substituting its own judgment.[243]

JUSTICE THOMAS, WITH WHOM THE CHIEF JUSTICE AND JUSTICE SCALIA JOINED, DISSENTING

Justice Thomas authored a separate dissent and embarked upon a critique of the Court's jurisprudence regarding the consistent invalidation of abortion statutes since the landmark decision *Roe v. Wade*.[244] The Justice further castigated the Court for having erroneously decided *Roe* and subsequent cases.[245] Critiquing the Court for repeatedly striking down state statutes that "purportedly threatened a woman's ability to obtain an abortion," Justice Thomas disdained the Court's "extraconstitutional value preferences."[246]

Following this rather arduous introduction, Justice Thomas continued the tirade by concurring with the other dissenters in their disagreement with the holding of *Casey*.[247] First, the Justice stated that the majority's holding in *Casey* had no "historical or doctrinal pedigree."[248] Although Justice Thomas determined

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[241] *Id.* Specifically, Justice Kennedy stated that "[t]he Court fail[ed] to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature." *Id.* at 2630 (Kennedy, J., dissenting).

[242] *Id.* at 2634 (Kennedy, J., dissenting).

[243] *Id.* at 2635 (Kennedy, J., dissenting). Justice Kennedy stated that "[t]he Court's holding stem[med] from misunderstanding the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules." *Id.*

[244] *Stenberg*, 120 S. Ct. at 2635 (Thomas, J. dissenting) (citing Roe v. Wade, 410 U.S. 113 (1973)).

[245] *Id.*

[246] *Id.* (quoting Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 794 (1986) (White, J., dissenting)).

[247] *Id.* at 2636 (Thomas, J., dissenting) (citing *Casey*, 505 U.S. 833 (1992)).

[248] *Id.*

that the "fabricated" undue burden standard established in *Casey* lacked constitutional merit, the Justice entertained the standard for the remainder of the dissent despite the opinion that the standard did not "merit adherence."[249] Supportive of this contention, Justice Thomas explained that even if the standard set forth in *Casey* was given deference as the plurality would like, the opinion in *Stenberg* simply does not conform to what the undue burden standard requires.[250] Specifically, the Justice argued that the Court participated in a reinstitution of the "pre-*Webster* abortion-on-demand era in which the mere invocation of 'abortion rights' trump[ed] any contrary societal interest."[251]

Next, Justice Thomas described the holding of the Court as a blatant disregard of principles that the Court follows in every context aside from abortion.[252] First, the Justice stated that statutory construction requires interpretation according to the plain meaning and invalidation of such statutes should not occur purely due to a failure to partake in a narrowing construction.[253] Second, Justice Thomas concluded that the plurality displaced the "judgment of the people of Nebraska" when it "disregard[ed] the very constitutional standard it purport[ed] to employ."[254] Finally, the Justice urged that the holding of the Court resulted from a series of "indefensible steps," supported by illogical interpretation and the furthering of moral as opposed to constitutional values.[255]

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[249] *Id.*

[250] *Stenberg*, 120 S. Ct. at 2636 (Thomas, J., dissenting). Justice Thomas vehemently disagreed with the plurality's application of the undue burden standard from *Casey*. *Id.* The Justice stated that "the majority opinion gives the lie to the promise of *Casey* that regulations that do no more than 'express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.'" *Id.* In so stating, Justice Thomas believed that declaring the Nebraska statute unconstitutional under *Casey* essentially stood for the proposition that "*Casey* meant nothing at all." *Id.*

[251] *Id.* In accordance with the other dissenters, Justice Thomas stated that the Court's decision was "irreconcilable" with the standard set forth in Casey. *Id.*

[252] *Id.*

[253] *Id.* The argument set forth by the Justice established the belief that because the Nebraska statute did not, on its face, prohibit the D&X and D&E procedures, the plurality erroneously found that the statute extended its reach to such procedures. *Id.* Therefore, the plain meaning and a narrow interpretation, in Justice Thomas' opinion, would be the appropriate construction. *Id.*

[254] *Id.* at 2637 (Thomas, J., dissenting).

[255] *Id.*

Following the Justice's extreme disappointment with the holding of the Court, Justice Thomas recapitulated the facts of the case and described the disagreement among the parties regarding the appropriate term for the D&X abortion procedure.[256] Justice Thomas embarked upon this recapitulation to emphasize the role of the Court when statutory language is at issue.[257] The Justice stated that "when there are two possible interpretations of a term, and only one comports with the statutory definition, the term should *not* be read to include the unstated meaning."[258]

Subsequent to resolving that Nebraska's partial-birth abortion statute permitted doctors to perform D&E abortions, Justice Thomas discussed the legitimate state interest furthered by the statute.[259] Justice Thomas referred to Justice Kennedy's current dissent and stated that the issue of whether the state was asserting a legitimate interest required no additional authority because "[i]n a civilized society, the answer is too obvious."[260]

Next, Justice Thomas discussed the plurality's interpretation that the statute did not provide for a health exception for the preservation of the health or life of the woman.[261] While arguing that this conclusion was far from a straightforward application of *Roe* and *Casey*, the Justice opined that such an exception is not mandated by prior caselaw.[262] Supportive of this assertion, Justice Thomas commented that the plurality effectively conceded that *Casey* and the precursors to that decision simply did not support the proposition that the partial-birth abor-

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[256] *Stenberg*, 120 S. Ct. at 2637-45 (Thomas, J., dissenting).

[257] *Id.*

[258] *Id.* at 2645 (Thomas, J., dissenting) (emphasis added). This argument enforced the Justice's belief that the Nebraska legislature did not draft the statute so as to include and effectively ban D&E or D&X. *Id.* Because the statute banned partial-birth abortion, Justice Thomas propounded that there was only one possible interpretation of partial-birth abortion, i.e., a universal ban that is equally applied under certain circumstances set forth in the statute. *Id.*

[259] *Id.* at 2649-50 (Thomas, J., dissenting). The Justice argued that the "threshold question under Casey is whether the abortion regulation serves a legitimate state interest. Only if the statute serves a legitimate state interest is it necessary to consider whether the regulation imposes a substantial obstacle to women seeking an abortion." *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).

[260] *Id.*

[261] *Id.* at 2650-51 (Thomas, J., dissenting).

[262] Stenberg, 120 S. Ct. at 2651 (Thomas, J., dissenting).

tion ban required a health exception.[263]

Lastly, Justice Thomas argued that the plurality's expansion of the health exception was reached in complete contravention to *Roe*, *Casey*, and their progeny.[264] Concluding that the plurality's decision articulated nothing less than a gross misunderstanding of *Casey*, Justice Thomas opined that a proper understanding of *Casey* demonstrates that "not all regulations of abortion are unwarranted and the States may express profound respect for fetal life."[265] As such, and contrary to the opinion of the plurality, Justice Thomas stated that the Nebraska statute does pass constitutional muster.[266]

## V. CONCLUSION

When the Supreme Court's holding in *Stenberg* is examined in light of the debate over prohibitions on partial-birth abortions, the Court's application of the undue burden standard reflects a proper analysis of state statutes that attempt to restrict a woman's choice to terminate her pregnancy. By adopting the undue burden standard for the Nebraska statute in *Stenberg v. Carhart*, the Court articulated the absolute need for states to narrowly tailor restrictions on this right to the states' objective in enacting such legislation.[267] By discussing the ramifications of the statute on both women and doctors performing the procedures banned by the statute, the Court re-emphasized the foremost obligation of the state to consider whether enacted legislation will place a substantial obstacle in the path of a woman and her doctor choosing a safe and commonly used procedure to perform late-term abortions.[268]

Implicit in the Court's decision is both a recognition and a reaffirmation of the rights enunciated in *Roe* and preserved in *Casey*, that a state cannot subject a

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[263] *Id.* Justice Thomas explained that as opposed to addressing methods of abortion, the stated health exception required a decision to be made in favor of the abortion in cases in which *continued pregnancy* would pose a risk to the health or life of the woman. *Id.* (citing Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 770 (1986); Doe v. Bolton, 410 U.S. 179, 197 (1973); Colautti v. Franklin, 439 U.S. 379 (1979)).

[264] *Id.*

[265] *Id.* at 2656 (Thomas, J., dissenting).

[266] *Id.*

[267] *See Stenberg*, 120 S. Ct. 2597 (2000).

[268] *Id.*

woman to riskier alternatives by banning or regulating a method of abortion.[269] Finding that the Nebraska statute, as applied, failed to provide an exception for the health or life of the mother, the Court deferred to its reasoning in *Casey* and reiterated the importance of allowing for procedures that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[270] Ultimately, the Court maintained and preserved the analysis which originated in *Casey* and it's progeny and determined that the Nebraska statute, by banning a safe method of performing abortions, lacked an exception for the health or life of the woman.[271] The Statute essentially created the resultant effect of placing an undue burden upon a woman's right to have an abortion.[272]

Although a state does enjoy a continuing interest in the life of both the mother and the fetus,[273] that interest does not vest the state with absolute authority to legislate in a manner that compromises the fundamental rights announced in both *Roe* and in *Casey*.[274] Accordingly, the holding in *Stenberg v. Carhart* validates and reaffirms precedent that requires that state statutes include a health exception.[275] Because the phrase "partial-birth abortion" carries with it the notion of moral condemnation, it is vital that our courts stay focused on constitutional rights and not be swayed by societal disdain. Shadowing the public debate over the moral and legal dilemmas accompanying abortion lies the disagreement among our own Supreme Court Justices.

What is essential to the preservation of constitutional rights is a departure from moral legislation and a concurrent move toward a rational balance between statutory restrictions and fundamental liberties. Though this controversy is unlikely to be remedied in the near future, one may be cautiously optimistic that the preservation of liberty rights so deeply embedded in our constitution will remain.

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[269] *Id.* at 2609-10.

[270] *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 879 (1992)).

[271] *Id.*

[272] *Id.* at 2613-14.

[273] Roe v. Wade, 410 U.S. 113, 162 (1973).

[274] *Stenberg*, 120 S. Ct. at 1617-18 (2000).

[275] *Id.*