NOTE

INFANTICIDE OR CIVIL RIGHTS FOR WOMEN: DID THE SUPREME COURT GO TOO FAR IN *STENBERG V. CARHART*?

TABLE OF CONTENTS

I. INTRODUCTION

The dilation and extraction abortion procedure, commonly known as partial-birth abortion, is such an affront to the value of human life that thirty states have enacted legislation outlawing the use of this method of abortion.[1] The procedure is so horrific that it has been dubbed near infanticide by many.[2] The American Medical Association (AMA) does not support this form of abortion,[3] nor does the United States Congress.[4] However, in *Stenberg v. Carhart*, the United States Supreme Court seemed to ignore doctors, legislators, and the people of the United States by finding unconstitutional Nebraska's statute that banned the use of partial-birth abortions.[5] Nebraska's statute read:

> No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the

1. Stenberg v. Carhart, 530 U.S. 914, 977 (Kennedy, J., dissenting), 989 (Thomas, J., dissenting) (2000); *see also* Vida Foubister, *Supreme Court Rulings on Abortion Reinforce Physicians' Right to Make Medical Decisions*, AM. MED. NEWS, July 24, 2000 (listing the states that had passed "partial-birth abortion" bans: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin), *available at* http://www.ama-assn.org/sci-pubs/amnews/pick_00/prsa0724.htm.

2. *Stenberg*, 530 U.S. at 983 (Thomas, J., dissenting) ("'[P]artial birth abortion[]' so closely borders on infanticide that [thirty] [s]tates have attempted to ban it."); *see also* M. LeRoy Sprang, M.D. & Mark G. Neerhof, D.O., *Rationale for Banning Abortions Late in Pregnancy*, 280 JAMA 744 (1998) (noting that even pro-choice individuals "have found intact D&X too close to infanticide to ethically justify its continued use"), *available at* http://www.ama-assn.org./special/womh/library/readroom/vol_280/ cv80000x.htm.

3. *See* Sprang, *supra* note 2 (explaining that, after the AMA established a committee to study partial-birth abortion, it decided to officially support HR 1122, proposed federal legislation banning partial-birth abortions).

4. Refer to Part III.E *infra* (explaining Congress's attempts to pass a partial-birth abortion ban act).

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

> 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.[6]

The statute 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 completing the delivery."[7] The statute continued, defining "partially delivers vaginally a living unborn child before killing the unborn child" as "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."[8]

The gruesome detail with which this law describes the procedure it restricts indicates just how far we have denigrated the rights of unborn children in pursuit of a woman's right to privacy. In *Stenberg*, the case that would ultimately decide the legality of partial-birth abortions in the United States, the Supreme Court had the opportunity to give greater rights to the unborn, but declined the opportunity.[9] Part III.A of this Note will explore the history of abortion law in the United States, as it was first legalized by *Roe v. Wade*[10] and *Roe*'s companion case *Doe v. Bolton*,[11] as it was later developed in *Webster v. Reproductive Health Services*,[12] and, finally, as it was constricted in *Planned Parenthood v. Casey*.[13] Part III.B will discuss the various methods of abortion including suction curretage, dilation and evacuation, dilation and extraction, induction, hysterotomy, and hysterectomy. In Part III.C, this Note will comment on the Supreme Court's incorrect ruling in *Stenberg*, positing why the minority view

---

6. NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999).

7. *Id*. § 28-326(9).

8. *Id*.

9. *Stenberg*, 530 U.S. at 929–30 (holding Nebraska's partial-birth abortion ban unconstitutional).

10. 410 U.S. 113 (1973) (finding Texas abortion statutes unconstitutional and instituting restrictions on abortion regulations that change with the trimester progression of the pregnancy).

11. 410 U.S. 179 (1973) (holding portions of Georgia's abortion statute unconstitutional).

12. 492 U.S. 490 (1989) (upholding the constitutionality of a Missouri statute prohibiting use of public facilities or employees to perform or aid in the performance of nontherapeutic abortions).

13. 505 U.S. 833 (1992) (affirming *Roe v. Wade* but changing the test for determining the constitutionality of abortion restrictions from one based on the trimester of pregnancy to one implementing an undue burden analysis).

was the correct and better view. Part III.D explores the Hippocratic oath and the moral inconsistency of doctors who pledge this oath but later perform partial-birth abortions. Furthermore, Part III.E includes a discussion of the American public's evident desire for a ban on this type of abortion as illustrated by the support for the Partial-Birth Abortion Acts of 1995 and 1997, both of which were vetoed by President Bill Clinton.[14] Part III.F discusses the impact of *Stenberg* in light of the recent election of President George W. Bush. Finally, this Note concludes with the optimistic view that, with the possibility of new Supreme Court appointments by President Bush, legislation prohibiting partial-birth abortions may in the near future be upheld as constitutional.

II. CASE RECITATION

A. Prior Case History

On August 14, 1997, the United States District Court of Nebraska granted Leroy Carhart, M.D., a preliminary injunction enjoining the enforcement of Nebraska's law banning partial-birth abortions.[15] Shortly thereafter, the same court declared Nebraska's law unconstitutional and granted Carhart a permanent injunction against the law's enforcement.[16] Subsequently, the United States Court of Appeals for the Eighth Circuit affirmed the district court's ruling.[17] The United States Supreme Court granted Nebraska Attorney General Don Stenberg's petition for writ of certiorari on January 14, 2000.[18]

B. Primary Case

1. Majority Opinion. In *Stenberg v. Carhart*, Justice Breyer, joined by Justices Stevens, O'Connor, Souter, and Ginsburg, authored the majority opinion holding that Nebraska's statute criminalizing partial-birth abortions violated the Constitution.[19] In rendering this decision, the Court looked to three well-

14. *Stenberg*, 530 U.S. at 994–96 & 996 n.11 (Thomas, J., dissenting).

15. Carhart v. Stenberg, 972 F. Supp. 507, 523 (D. Neb. 1997) (noting that Dr. Carhart desired to perform D & X, or partial-birth abortions, and sought an injunction against the Nebraska statute to be able to do so).

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

17. Carhart v. Stenberg, 192 F.3d 1142, 1145 (8th Cir. 1999) (holding Nebraska's statute unconstitutional).

18. Stenberg v. Carhart, 528 U.S. 1110, 1110 (2000).

19. *Stenberg*, 530 U.S. at 918, 922.

established principles in the abortion rights legal arena.[20] "First, before 'viability . . . [a] woman has a right to choose to terminate her pregnancy.'"[21] "Second, 'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision [to have an abortion] before fetal viability' is unconstitutional."[22] "Third, '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.'"[23]

Because the Nebraska statute in question sought to ban a method of abortion, the Court began its opinion by discussing several abortion procedures.[24] The Court stated that about ninety percent of abortions performed in the United States are done before twelve weeks of gestational age, commonly known as the first trimester.[25] At this stage of pregnancy, a very safe abortion procedure of "vacuum aspiration" is most commonly used.[26]

About ten percent of abortions are performed between twelve and twenty-four weeks, during the second trimester.[27] The most common abortion procedure at this stage of pregnancy is the "dilation and evacuation" procedure (D & E).[28] Although this procedure varies depending on the stage of pregnancy, the D & E basically involves "(1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental

---

20. *See id.* at 921.

21. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992)). The Court in *Casey* decided that a woman has this right for two main reasons. *Casey*, 505 U.S. at 870. First, the Court adhered to the principle of *stare decisis*. *Id*. It acknowledged that judicial line-drawing was arbitrary, but that the decision in *Roe* was well reasoned; thus, the Court reaffirmed *Roe*'s holding that a woman has the right to choose to terminate her pregnancy before viability. *Id*. Second, the *Casey* Court noted that "viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that . . . overrides the rights of the woman." *Id*.

22. *Stenberg*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 877). *Casey* defines an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877.

23. *Stenberg*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 879, and Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

24. *Id.* at 923.

25. *Id*.

26. *Id*. (explaining that vacuum aspiration is an abortion process wherein a vacuum tube is inserted into the uterus to evacuate the contents of the uterus).

27. *Id*. at 924.

28. *Id*. The D & E procedure is performed in approximately ninety-five percent of abortions during the second trimester. *Id*.

disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus."[29] According to testimony from Dr. Carhart, to facilitate the dismemberment of the fetus, the doctor pulls a portion of the fetus through the cervix and then uses the traction between the cervix and the fetus to dismember it.[30]

A variation of the D & E known as an "intact D & E" involves removing the fetus from the uterus in one piece, rather than in several pieces.[31] There are two versions of the intact D & E, which vary depending on the position of the fetus.[32] If the fetus's head is at the cervix, the doctor collapses the fetus's skull, then extracts the whole fetus through the cervix.[33] If the fetus's feet are at the cervix, the doctor pulls the fetus (up to its head) through the cervix and into the vagina, after which he collapses the skull and removes the remainder of the fetus.[34] This version of the intact D & E is also known as "dilation and extraction" (D & X).[35] The Court acknowledged the district court's conclusion that "'the evidence is both clear and convincing that Carhart's [D & X] procedure is superior to, and safer than, the . . . other abortion procedures used during the relevant gestational period.'"[36]

The Court declared the Nebraska statute unconstitutional for two reasons.[37] "First, the law lacks any exception 'for the preservation of the . . . health of the mother.'"[38] "Second, [the law] 'imposes an undue burden on a woman's ability' to choose a [D & E] abortion, thereby unduly burdening the right to choose abortion itself."[39]

a. Health of the Mother. The Supreme Court emphasized the holdings of *Roe v. Wade* and *Casey* that the State has a substantial interest in the potential of human life and may

29. *Id*. at 925.

30. *Id*. at 925–26 (quoting Dr. Carhart's testimony at trial explaining the process necessary to achieve dismemberment of the fetus).

31. *Id*. at 927 (stating that the "intact D & E" procedure is usually used after the sixteenth week of pregnancy because the fetal skull is then too developed to pass through the cervix).

32. *Id*.

33. *Id*.

34. *Id*.

35. *Id*. The terms "intact D & E" and "D & X" both refer to partial-birth abortion. *See id*. at 927–28.

36. *Id*. at 928–29 (quoting Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998)).

37. *Id*. at 929–30.

38. *Id*. at 930 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992)).

39. *Id*. (quoting *Casey*, 505 U.S. at 874).

therefore regulate post-viability abortions.[40] However, the State cannot regulate or proscribe abortion when it is necessary "'for the preservation of the life or health of the mother.'"[41] Petitioners argued that a health exception was not necessary because other safe methods of abortion are available.[42] However, the Supreme Court concluded that the State failed to show a ban on the D & X abortion procedure, without a health exception, might not or would not create significant health risks.[43] The Court then reviewed the evidence illustrating the benefits of the D & X procedure.[44] The State replied, giving eight arguments why these findings were irrelevant and wrong.[45] Nevertheless, the Court held that the eight arguments failed to establish that Nebraska's law did not need a health exception.[46]

---

40. *Id*. (citing *Casey*, 505 U.S. at 879, and Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

41. *Id*. at 931 (quoting *Casey*, 505 U.S. at 879).

42. *Id*. The U.S. District Court found that alternatives to the D & X procedure, "such as D & E and induced labor, are 'safe' but found that the D & X method was significantly *safer* in certain circumstances." *Id*. at 934.

43. *Id*. at 932. The Nebraska statute contains a health exception: "No partial-birth abortion shall be performed . . . 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." NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999) (emphasis added). However, the Court held that this exception was not broad enough, meaning that, essentially, there was no exception. *See Stenberg*, 530 U.S. at 937–38.

44. *Steinberg*, 530 U.S. at 932. The district court found that the D & X procedure was a safer abortion procedure for the "relevant gestational period" because it "permits the fetus to pass through the cervix with a minimum of instrumentation." *Id*. The benefits from this are that the D & X procedure: "'reduces operating time, blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix; prevents the most common causes of maternal mortality . . .; and eliminates the possibility of 'horrible complications' arising from retained fetal parts.'" *Id*. (quoting Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998)). However, the Court seemed to disregard other expert testimony finding that "elements of the D & X procedure may create special risks, including cervical incompetence caused by overdilitation, injury caused by conversion of the fetal presentation, and dangers arising from the 'blind' use of instrumentation to pierce the fetal skull while lodged in the birth canal." *Id*. at 933.

45. *Id*. at 933–34 (listing the eight arguments in support of the ban as follows: "(1) that the D & X procedure is 'little-used,'" (2) "by only 'a handful of doctors,'" (3) "that D & E and labor induction are at all times 'safe alternative procedures'" (4) "that the ban would not increase a woman's risk of several rare abortion complications," (5) "that the elements of the D & X procedure may create special risks," (6) "that there are no medical studies 'establishing the safety of the partial-birth abortion/D & X procedure,'" (7) that "'there does not appear to be any identified situation in which intact D & X is the only appropriate procedure to induce abortion,'" (8) "that the American College of Obstetricians and Gynecologists qualified its statement that D & X 'may be the best or most appropriate procedure,' by adding that the panel 'could identify no circumstances under which [the D & X] procedure . . . would be the only option to save the life or preserve the health of the woman'").

46. *Id*. at 934–36.

The Court found that the mere fact that the D & X procedure was rare and used only by a few doctors did not preclude the need for a health exception.[47] Further, the Court mentioned that the district court agreed there were other safe alternatives to the D & X method but found that the D & X method was the safest in some instances.[48] The Court agreed with Nebraska that "[t]here are no general medical studies documenting comparative safety."[49] The Court conceded "the import of the American Medical Association's statement . . . [recommending] 'that the procedure not be used *unless alternative procedures pose materially greater risk to the woman*,'" but noted the opinion of the American College of Obstetricians and Gynecologists that, in some circumstances, the D & X "can be the most appropriate abortion procedure."[50]

According to *Casey*, a health exception in the statute "necessary" for the preservation of the mother's life or health did not mean *absolute* necessity, but necessity according to comparative health risks.[51] Highlighting the uncertainty in the medical field regarding the relative safety of the D & X, the *Stenberg* Court commented that if the D & X really created a safer alternative for women, then the health exception was necessary.[52] However, if the medical community ultimately concludes that the D & X is not safer for women, then the exception would "simply turn out to have been unnecessary."[53] The Court held that "a statute that altogether forbids D & X creates a significant health risk" and, thus, "[t]he statute . . . must contain a health exception."[54]

b. Undue Burden. The Court also found the Nebraska statute unconstitutional because it placed a substantial obstacle in the path of a woman seeking an abortion, placing an "'undue burden' upon a woman's right to terminate her pregnancy before viability."[55] Nebraska agreed that the statute imposed an "undue burden" if it applied to both the more common D & E abortion

47. *Id*. at 934.

48. *Id*.

49. *Id*. at 935.

50. *Id*. at 935–36.

51. *See id*. at 937 (citing Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992)).

52. *Id*. at 937–38 (concluding that the differing opinions on the safety of D & X and the lack of medical research on this topic warranted enforcing the health exception requirement).

53. *Id*.

54. *Id*. at 938.

55. *Id*. (agreeing with the Eighth Circuit's conclusion).

method and the D & X method.[56] The State claimed it did not apply to the D & E method.[57]

The majority ruled that the statute covered both methods of abortion because the statute forbade "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof'" with the intention to kill the child.[58] It is uncontested that the statute covered the D & X; it was the D & E that was arguably not covered.[59] The majority ruled that the process constituted delivering a "substantial portion" of the child into the vagina and, therefore, the statute also covered the D & E.[60] Its decision was based on the fact that, with the D & E, the fetus's leg or arm is pulled through the cervix to aid the doctor in the dismemberment process.[61]

The Attorney General of Nebraska argued that the statutory language "'substantial portion'" referred to the "'child up to the head,'" but the Court would not defer to this "narrow interpretation" of the statute.[62] The Court noted that ten other federal courts, reviewing statutes comparable to Nebraska's, also determined that the statutes potentially applied to abortion procedures other than the D & X.[63] The Court concluded by stating that some prosecutors and future Attorneys General may choose to prosecute doctors who perform D & E abortions, creating the possibility of placing an "undue burden" on the woman's right to have an abortion.[64]

2. Concurring Opinion by Justice Stevens. Justice Stevens wrote a short concurrence, in which Justice Ginsburg joined, concluding that Nebraska's differentiation between two gruesome forms of abortion (D & E and D & X), where one cannot tell which method is closer to infanticide than the other, was irrational.[65] Justice Stevens reiterated that "the word 'liberty' in the Fourteenth Amendment includes a woman's right to make this

---

56. *Id*.

57. *See id*. at 938–39.

58. *Id*. at 938 (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)).

59. *See id*. at 939.

60. *See id*. at 939–40 (examining the statutory language and concluding that the statute was intended to apply to both the D & X and D & E procedures).

61. *See id*. at 938–39.

62. *Id*. at 940 (quoting NEB. REV. STAT. ANN. § 28-326(9)).

63. *See id*. at 941.

64. *Id*. at 945–46 (commenting that the potential "prosecution, conviction, and imprisonment" of those performing D & E abortions led to the conclusion that the statute created an undue burden on a woman's right to choose).

65. *Id*. at 946–47 (Stevens, J., concurring) (arguing the State did not further any legitimate interest by banning one of the procedures and not the other).

difficult and extremely personal decision."[66] He could not fathom how a state could have a legitimate interest in regulating which procedure the doctor will utilize in "best protect[ing] the woman in her exercise of this constitutional liberty."[67]

3. Concurring Opinion by Justice O'Connor. Justice O'Connor wrote a separate concurrence in which she highlighted the inconsistency in Nebraska's abortion laws.[68] She argued that the State's interest in regulating abortions prior to viability is "considerably weaker" than its interest after viability.[69] Nebraska's statute prohibiting post-viability abortions included an exception "to preserve the life or health of the mother."[70] According to Justice O'Connor, Nebraska's ban on pre-viability abortions logically should have also included the exception.[71] Also, she stressed her agreement with the majority that the pre-viability statute, because it encompassed both D & E and D & X methods, placed an undue burden on a woman's right to have an abortion.[72] Justice O'Connor also suggested, however, that Nebraska should have drafted its statute more clearly, excluding D & E from its reach.[73] She concluded by declaring that "a ban on partial-birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional."[74]

4. Concurring Opinion by Justice Ginsburg. Justice Ginsburg's concurring opinion, in which Justice Stevens joined, commented that, because the Nebraska statute only proscribed a *method* of abortion, it "does not save any fetus from destruction."[75] The statute's purpose is not to save a fetus, but merely to infringe on a woman's right to choose an abortion.[76] Additionally, Justice Ginsburg agreed with Seventh Circuit Chief Judge Posner's view that laws prohibiting abortion are a product

66. *Id.* at 946 (Stevens, J., concurring) (citing the holding in *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

67. *Id.* (Stevens, J., concurring).

68. *Id.* at 947–48 (O'Connor, J., concurring).

69. *Id.* at 948 (O'Connor, J., concurring).

70. *Id.* at 947–48 (O'Connor, J., concurring).

71. *Id.* at 948 (O'Connor, J., concurring).

72. *Id.* at 948–49 (O'Connor, J., concurring).

73. *See id.* at 949–50 (O'Connor, J., concurring) (noting that Kansas, Utah, and Montana have drafted statutes to exclude D & E abortions).

74. *Id.* at 951 (O'Connor, J., concurring).

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

76. *Id.* at 951–52 (Ginsburg, J., concurring) (citing Seventh Circuit Chief Judge Posner's review of similar statutes in Wisconsin and Illinois).

of state legislators "seek[ing] to chip away at the private choice shielded by *Roe v. Wade*."[77]

5. Dissent by Chief Justice Rehnquist. Chief Justice Rehnquist emphasized that he had not joined in *Casey*, and reasserted that it was "wrongly decided."[78] Nonetheless, he agreed with Justices Kennedy and Thomas in their application of *Casey* to the Nebraska statute.[79]

6. Dissent by Justice Scalia. Justice Scalia also wrote a dissenting opinion in which he compared *Korematsu v. United States*[80] and *Scott v. Sandford*[81] to *Stenberg*.[82] Just as *Korematsu* and *Scott* were later deemed mistakes in judicial history, Justice Scalia explained that he believed *Stenberg* will some day take its place "in the history of [the] Court's jurisprudence beside *Korematsu* and *Dred Scott*."[83] Furthermore, Justice Scalia stated that demanding a health exception for Nebraska's statute would be giving "live-birth abortion free rein."[84] He also commented that "[t]he notion that the Constitution of the United States, designed . . . 'to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."[85] In Justice Scalia's view, the majority did not correctly interpret the Nebraska statute because it abandoned the usual process of interpreting ambiguous statutes to make them "valid rather than void."[86] Moreover, the majority unnecessarily expanded *Casey* with its interpretation of the "undue burden" test.[87] According to Justice Scalia, the determination that there is an undue burden is a value judgment based on how much one values "the life of a partially delivered fetus" compared to the

---

77. *Id.* at 952 (Ginsburg, J., concurring); Roe v. Wade, 410 U.S. 113, 164–65 (1973) (recognizing a woman's right to abortion).

78. *Stenberg*, 530 U.S. at 952 (Rehnquist, C.J., dissenting) (noting that, despite his disagreement with *Casey*'s holding, Chief Justice Rehnquist recognized that the principles of *Casey* should have been applied correctly to the Nebraska statute).

79. *Id*. (Rehnquist, C.J., dissenting).

80. 323 U.S. 214, 223–24 (1944) (affirming Fred Korematsu's conviction for remaining in a military area from which persons of Japanese ancestry had been ordered excluded).

81. 60 U.S. 393, 454 (1856) (holding that Dred Scott was a slave and not a citizen, therefore dismissing his case for lack of jurisdiction).

82. *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting).

83. *Id*. (Scalia, J., dissenting).

84. *Id*. (Scalia, J., dissenting).

85. *Id*. (Scalia, J., dissenting).

86. *Id*. at 954 (Scalia, J., dissenting).

87. *Id*. at 954–55 (Scalia, J., dissenting).

value of "the freedom of the woman who gave it life to kill it."[88] Justice Scalia concluded by asserting that the Court should follow the Constitution's silence on the matter and leave it to the people to decide, "State by State, whether this practice should be allowed."[89]

7. Dissent by Justice Kennedy. Justice Kennedy maintained, in a dissent joined by Chief Justice Rehnquist, that *Casey* affirmed a state's right to enact legislation that promoted "the life of the unborn and [ensured] respect for all human life and its potential."[90] According to Justice Kennedy, the Nebraska statute was properly enacted—it neither denied women the right to have an abortion, nor did it place an undue burden on this right.[91]

Justice Kennedy began his opinion with a discussion of both the D & E and D & X abortion procedures.[92] His description of the D & E procedure revealed the revulsion with which he regarded it.[93] Justice Kennedy's narration explained that the fetus dies because "[i]t bleeds to death as it is torn from limb from limb" and, at the end of the procedure, "the abortionist is left with 'a tray full of pieces.'"[94] He then described the D & X abortion method, wherein the doctor delivers the fetus, leaving only the head inside the mother's uterus.[95] At this stage, he explained, "the abortion procedure has the appearance of a live birth."[96] The doctor continues in his apparent role of obstetrician delivering the child until he becomes an abortionist by tearing the child's skull open to remove his or her brain.[97]

Pitted against this brutal procedure, Justice Kennedy felt that the state of Nebraska should be allowed to assert its interests, including "concern for the life of the unborn and 'for the partially born,' in preserving the integrity of the medical profession, and in 'erecting a barrier to infanticide.'"[98] He argued that the State can take measures to ensure that its doctors are

88. *Id*. (Scalia, J., dissenting).

89. *Id*. at 956 (Scalia, J., dissenting).

90. *Id*. at 956–57 (Kennedy, J., dissenting) (citing Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992)).

91. *Id*. at 957 (Kennedy, J., dissenting).

92. *Id*. at 958–59 (Kennedy, J., dissenting).

93. *Id*. (Kennedy, J., dissenting).

94. *Id*. (Kennedy, J., dissenting) (quoting Dr. Carhart in the second reference).

95. *Id*. at 959 (Kennedy, J., dissenting).

96. *Id*. (Kennedy, J., dissenting).

97. *Id*. (Kennedy, J., dissenting).

98. *Id*. at 961 (Kennedy, J., dissenting) (noting that *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992), legitimized these policies).

regarded as healers.[99] Witnesses to the D & X procedure have reported that "the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus's body, wholly outside the woman's body and alive, reacts as though startled and goes limp."[100] According to Justice Kennedy, the majority refused to admit that *Case*y protected the State's right to promote life and regulate procedures resembling infanticide.[101]

Justice Kennedy argued that a health exception to the statute was unnecessary.[102] He noted that, according to experts, the AMA, and the American College of Obstetricians and Gynecologists, there are no circumstances under which D & X is the only option for abortion, there are no studies showing that D & X is safer than other abortion techniques, nor is D & X an easy medical procedure.[103] He concluded that the failure to include an exception for this uncertain procedure is clearly not a substantial burden on the woman's right to an abortion such that it outweighs the State's interest.[104]

Furthermore, Justice Kennedy noted that the inclusion of a health exception that any doctor could use at any time and without question would completely remove the efficacy of the ban itself.[105] He offered as a working example of this Dr. Carhart, who chose to use the D & X method any time the fetus was past fifteen weeks old, regardless of relevant medical indications.[106] Thus, he argued that a ban on partial-birth abortions that includes a health exception could potentially evolve into no ban at all. He criticized the majority's decision for echoing pre-*Casey* abortion jurisprudence that gave deference to "the physician's right to practice medicine in the way he or she saw fit."[107]

Justice Kennedy cited *Jacobson v. Massachusetts*[108] in an effort to affirm a legislature's legitimate role in determining

---

99. *Id*. at 962 (Kennedy, J., dissenting).

100. *Id*. at 963 (Kennedy, J., dissenting).

101. *See id*. at 964 (Kennedy, J., dissenting) (arguing that the majority's holding contradicted "*Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal").

102. *See id*. (Kennedy, J., dissenting) (stating that a health exception virtually grants doctors a veto power over the State).

103. *See id*. at 965–66 (Kennedy, J., dissenting).

104. *See id*. at 965 (Kennedy, J., dissenting) (noting the State's right to conclude that the statute banning the D & X procedure did not impose a substantial burden on the woman).

105. *See id*. at 964–65 (Kennedy, J., dissenting).

106. *Id*. (Kennedy, J., dissenting).

107. *Id*. at 968–69 (Kennedy, J., dissenting).

108. 197 U.S. 11 (1905).

proper medical practices when the medical community itself cannot resolve such matters.[109] *Jacobson* established that, when there is disagreement in the medical community, legislators should resolve the difference.[110] Thus, legislators have the duty to pass laws according to the people's common belief regarding medical matters.[111]

Justice O'Connor's concern that Nebraska's law included both D & E and D & X procedures, Justice Kennedy asserted, was the result of a misapplication of "settled doctrines of statutory construction."[112] Justice Kennedy argued that the text of the statute showed that it applied only to the D & X procedure.[113] Moreover, he explained, Nebraska's intention was demonstrated by direct reference to the statutory language: references to "partial-birth abortion," to the "delivery" of a fetus, and to the requirement that the delivery occur "before" the performance of the death-causing procedure.[114] Justice Kennedy observed that the term "partial-birth abortion" is widely known and commonly used when referring to D & X.[115] Likewise, he noted that "delivery" of a fetus can only refer to the intact fetus, as contemplated by the D & X procedure, rather than parts of the fetus, as in the D & E procedure,[116] and lastly, that delivery before the death-causing act is an aspect of the D & X procedure.[117] Conversely, with the D & E procedure, the fetus is first dismembered before a delivery occurs.[118] Justice Kennedy concluded that the majority ignored the long-established principle that statutes will be interpreted to avoid constitutional difficulties.[119] Had the statute been interpreted to apply to only D

109. *Stenberg*, 530 U.S. at 970–71 (Kennedy, J., dissenting).

110. *Id.* at 971–72 (Kennedy, J., dissenting) (citing *Jacobson*, 197 U.S. at 35).

111. *Id.* at 972 (Kennedy, J., dissenting). The Court in *Jacobson* held that "[i]t [was] no part of the function of a court or a jury to determine which [vaccination method] was likely to be the most effective . . . . That was for the legislative department to determine in the light of all the information it had or could obtain." *Jacobson*, 197 U.S. at 30.

112. *Stenberg*, 530 U.S. at 973 (Kennedy, J., dissenting).

113. *Id.* (Kennedy, J., dissenting).

114. *Id.* at 973–74 (Kennedy, J., dissenting); *see also* NEB. REV. STAT. ANN. § 28-328 (Supp. 1999) ("No *partial-birth abortion* shall be performed in this state . . .[where partial-birth abortion is defined as] an abortion procedure in which the person performing the abortion partially *delivers* vaginally a living unborn child *before* killing the unborn child and completing the delivery." (emphasis added)).

115. *Stenberg*, 530 U.S. at 974 (Kennedy, J., dissenting).

116. *Id.* (Kennedy, J., dissenting) (commenting that only D & X involves abortion of an intact fetus).

117. *Id.* (Kennedy, J., dissenting).

118. *Id.* (Kennedy, J., dissenting).

119. *Id.* at 978 (Kennedy, J., dissenting).

& X and not D & E abortions, he argued, the constitutional difficulty could have been avoided.[120]

8. Dissent by Justice Thomas. In his dissent, in which Chief Justice Rehnquist and Justice Scalia joined, Justice Thomas began by declaring that *Roe* had been decided incorrectly.[121] He continued by explaining that, in the years after *Roe*, abortion was unrestrained.[122] He noted that it was not until *Casey* that the Court again recognized the State's interest in respecting fetal life—an interest which the majority seemingly disregarded once more with this most current decision.[123] In accordance with *Casey*, Justice Thomas articulated that a state statute restricting abortion would be valid if it did not place an undue burden on a woman's right to receive an abortion, thereby imposing a substantial obstacle in her path.[124]

Justice Thomas discussed the various methods of abortion.[125] He described D & E as the process by which the physician tears off pieces of the fetus by the use of traction, leaving the doctor with a "'tray full of pieces.'"[126] Justice Thomas also described D & X, or partial-birth abortions.[127] Here, "[w]hile the fetus is stuck [with its head in the uterus, and its body outside], dangling partly out of the woman's body, and just a few inches from a completed birth, the physician uses an instrument . . . to tear or perforate the skull."[128] Sometimes, when the woman's cervix is inadvertently dilated too much, the doctor will actually have to hold the fetus inside of the woman so he can perform this procedure.[129]

Justice Thomas next discussed the language of Nebraska's attempt to ban partial-birth abortions.[130] Nebraska's statute clearly referred to D & X, or what is widely known and commonly

120. *See id*. (Kennedy, J., dissenting) (recognizing that Nebraska agreed that the statute would be unconstitutional if it applied to D & E).

121. *Id*. at 980 (Thomas, J., dissenting).

122. *See id*. (Thomas, J., dissenting).

123. *Id*. at 981 (Thomas, J., dissenting).

124. *Id*. at 981–82 (Thomas, J., dissenting) (citing Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992)).

125. *See id*. at 984–89 (Thomas, J., dissenting) (discussing D & E, induction, and intact D & E or partial-birth abortion).

126. *Id*. at 984–85 (Thomas, J., dissenting) (quoting the testimony of Dr. Carhart).

127. *Id*. at 986–87 (Thomas, J., dissenting) (referring to D & X as "intact D & E").

128. *Id*. at 987 (Thomas, J., dissenting).

129. *Id*. at 988 (Thomas, J., dissenting).

130. *Id*. at 989 (Thomas, J., dissenting) (noting that twenty-nine other states in addition to Nebraska had attempted to ban partial-birth abortion).

accepted as partial-birth abortion.[131] The statute's reference to the doctor "partially deliver[ing]" the fetus could not mean removing pieces, as is done in the D & E procedure.[132] Secondly, the statute prohibited a delivery *before* killing the fetus.[133] In the D & E, the death-causing procedure *is* the process of pulling out the fetus piece by piece.[134] Consequently, the delivery does not occur *before* the death.[135] Furthermore, the statute prohibited delivery of a living "'unborn child, or a substantial portion thereof.'"[136] A fetal arm or a foot severed during the D & E procedure Justice Thomas argued, does not seem to constitute either a "living unborn child" or a "*substantial* portion thereof." Justice Thomas also argued that the majority overlooked a long-standing statutory interpretation rule obliging the Court to find a constitutionally-acceptable statutory construction if at all possible.[137] He felt that the Court should have adhered to this principle and construed the statute to ban only D & X abortions.[138]

The majority agreed with the contention that Nebraska should have used more precise terms in its statute, even medical terms.[139] Justice Thomas answered by arguing there is no rule requiring legislators to use terms accepted by the medical community.[140] Moreover, he argued, this is unnecessary because the State used a more specific term—"partial-birth abortion"—which had a more significant meaning to a greater number of people than "dilation and extraction."[141] Dilation and extraction, or D & X, he explained, could also be construed to mean any process in which the female is dilated prior to the fetus being extracted.[142] Furthermore, he argued, if the legislature had been more specific in drafting the legislation, doctors not performing the

131. *Id*. (Thomas, J., dissenting).

132. *Id*. at 990 (Thomas, J., dissenting).

133. *Id*. at 991 (Thomas, J., dissenting).

134. *Id*. (Thomas, J., dissenting).

135. *See id*. at 992 (Thomas, J., dissenting).

136. *Id*. (Thomas, J., dissenting) (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)).

137. *Id*. at 996 (Thomas, J., dissenting) (citing Erznoznik v. Jacksonville, 422 U.S. 205, 216 (1975); Frisby v. Schultz, 487 U.S. 474, 482 (1988)).

138. *See id*. at 996–98 (Thomas, J., dissenting) (suggesting that the constitutional problems referred to by the majority could be avoided through a narrower construction of the phrase "substantial portion" as applied in the Nebraska statute).

139. *Id*. at 999 (Thomas, J., dissenting) (referring to the majority's opinion).

140. *Id*. (Thomas, J., dissenting).

141. *See id*. at 993–96 (Thomas, J., dissenting).

142. *Id*. at 1000 (Thomas, J., dissenting) (explaining that the phrase "dilation and extraction" could also be used to describe dilation and evacuation, or D & E).

abortion procedure *exactly* as outlined in the statute could easily escape liability.[143]

Justice Thomas next discussed the lack of any adequate statutory health exception in the Nebraska statute.[144] He focused on the State's strong interest in protecting against near infanticide.[145] Unless *Casey* is overturned, he explained, the State's profound interest—deeming life precious and protecting against this dehumanizing process of abortion—is extremely powerful.[146] Justice Thomas continued, "'[t]he 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body.'"[147] Moreover, he argued that the majority misinterpreted *Casey*'s meaning of health exception: "*Casey* said that a health exception must be available if '*continuing her pregnancy* would constitute a threat' to the woman."[148] There are no known circumstances in which a partial-birth abortion is required and "it is not clear that *any* woman would be deprived of a safe abortion by her inability to obtain a partial-birth abortion."[149] To consider a procedure "necessary" because it has comparative health benefits, he argued, "eviscerates *Casey*'s undue-burden standard."[150] Justice Thomas closed by stating that prohibiting partial-birth abortions without a health exception is not an undue burden, nor a substantial obstacle to abortion.[151] "[T]here is no showing that any one faces a significant health risk from the partial birth abortion ban."[152]

---

143. *Id*. at 1002–03 (Thomas, J., dissenting) (hypothesizing that, when formulating the ban on partial-birth abortions, the Nebraska legislature was primarily concerned with ending the performance of any procedure "that resembles infanticide and threatens to dehumanize the fetus").

144. *Id*. at 1005–06 (Thomas, J., dissenting).

145. *Id*. 1006 (Thomas, J., dissenting).

146. *Id*. at 1005–06 (Thomas, J., dissenting).

147. *Id*. at 1007 (Thomas, J., dissenting) (quoting Brief of Amici Curiae Ass'n of Am. Physicians & Surgeons et al. at App. 1, Stenberg v. Carhart, 530 U.S. 914 (2000)).

148. *Id*. at 1009 (Thomas, J., dissenting) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 880 (1992)).

149. *Id*. at 1020 (Thomas, J., dissenting).

150. *Id*. at 1012 (Thomas, J., dissenting) (arguing that no regulation of abortion procedures would be allowed under the majority's standard for requiring a health exception).

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

152. *Id*. at 1015 (Thomas, J., dissenting).

III. ANALYSIS

A. History of Abortion Law in the United States

1. Roe v. Wade. The constitutional basis supporting a woman's right to an abortion is "the right to privacy," or the "constitutional protection of certain personal decisions, especially those involving . . . reproductive choices made by an individual as against government intrusion."[153] In 1973, with *Roe v. Wade*, the Supreme Court of the United States entered the abortion battleground and rendered an opinion which left the pro-life movement wounded and the pro-choice movement victorious.[154] The Texas statutes at issue in *Roe* criminalized the procurement of an abortion or the attempt to procure an abortion unless it was to save the life of the mother.[155] The Supreme Court found the Texas law to be unconstitutional.[156]

The Court began by acknowledging the constitutional right to personal privacy, or the "guarantee of certain areas or zones of privacy."[157] Furthermore, certain "fundamental rights" may only be limited when regulations limiting them serve a "compelling state interest."[158] The Court found that the right to privacy, founded in the Fourteenth Amendment's concept of personal liberty, included a woman's decision to terminate her pregnancy.[159] The Court made clear, however, that this right to an abortion was not absolute, but was restricted by the State's interests in "safeguarding health, in maintaining medical standards, and in protecting potential life."[160] The Court

153. Martin H. Belsky, *Privacy: The Rehnquist Court's Unmentionable "Right"*, 36 TULSA L.J. 43, 43 (2000) (discussing the Supreme Court's treatment of privacy rights in the United States); *see also* Roe v. Wade, 410 U.S. 113, 152–54 (1973) (legalizing abortion).

154. Years after *Roe*, Norma McCorvey, the woman designated as "Jane Roe"—the plaintiff in *Roe v. Wade*—declared that her case was "wrongly decided and has caused great harm to the women and children of our nation." Affidavit of Norma McCorvey in Support of Motion for Leave to File an Amicus Curiae at 1, Marie v. Whitman (D.N.J. 2000) (No. 99-2692).

155. *Roe*, 410 U.S. at 117–18 (noting similar statutes were in effect in a majority of the states).

156. *Id*. at 166.

157. *Id*. at 152 (recognizing that past Supreme Court justices have found the roots of privacy rights in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, as well as "in the penumbras of the Bill of Rights").

158. *Id*. at 155.

159. *Id*. at 153; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .")

160. *Roe*, 410 U.S. at 153–54.

concluded that "the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation."[161] Therefore, the woman's privacy is not absolute, and at some point in time the State has the power to assert its interests against those of the woman.[162]

In *Roe*, the Court also settled an often-debated issue regarding whether constitutional protections should be applied to the unborn.[163] Ultimately, the Court concluded that the reach of the Fourteenth Amendment, protecting against the deprivation of any person's life, liberty, or property by the State,[164] is not broad enough to include the unborn.[165]

Finally, the Court summarized its findings according to both the rights of the woman and the rights of the State, depending on the stage of pregnancy.[166] During the first trimester, the abortion decision is left to the woman's doctor.[167] Throughout the second trimester, the State may implement regulations to protect the mother's health.[168] After the fetus has become viable, "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."[169]

2. Doe v. Bolton. Termed the "Georgia companion" to Texas's *Roe v. Wade*, *Doe v. Bolton*[170] raised a constitutional challenge to Georgia's law criminalizing abortion.[171] The Supreme Court acknowledged that, on the same day it was hearing *Doe*, it had struck down the Texas criminal abortion law in *Roe*.[172] However, the Court explained that the legislation in *Doe* merited its own consideration.[173]

---

161. *Id*. at 154.

162. *Id*. at 159.

163. *See id*. at 158 (recognizing that the conclusion that constitutional protections do not extend to the unborn is consistent with a long history of federal court precedent).

164. U.S. CONST. amend. XIV, § 1.

165. *Roe*, 410 U.S. at 158.

166. *Id*. at 164–65.

167. *Id*. at 164.

168. *Id*. (stating that abortion regulation "reasonably related to maternal health" will be allowed "[f]or the stage subsequent to approximately the end of the first trimester").

169. *Id*. at 164–65.

170. 410 U.S. 179 (1973).

171. *Id*. at 179 (stating that Georgia's law prohibiting abortion included exceptions for circumstances in which the life or health of the mother was in danger, the fetus was likely to be born with a serious defect, or rape caused the pregnancy).

172. *Id*. at 181–82.

173. *Id*. at 182.

The Court began by reiterating *Roe*'s holding that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand."[174] Next, the Court discussed the portion of the Georgia statute criminalizing abortion except when the abortion is "necessary."[175] The Court held that the term "necessary" was not constitutionally void for vagueness.[176] In fact, the Court helped give meaning to this seemingly vague term by essentially defining "necessary."[177] The Court referred to a previously decided case, *United States v. Vuitch*,[178] discussing an abortion statute that criminalized abortion unless "necessary for the preservation of the mother's life or health."[179] In making the determination of what is "necessary" for the mother's "health," the Court stated that doctors may consider several factors including physical, emotional, and psychological well-being, familial factors, and the woman's age.[180]

In *Doe*, the legislation the Court held unconstitutional included provisions requiring: (1) the abortion to be performed in an approved hospital, (2) the abortion procedure to be approved by a hospital committee, and (3) that the doctor's judgment to perform the abortion be confirmed by two other independent doctors.[181] The Court held each provision unconstitutional.[182] While both *Doe* and *Roe* were influential in greatly expanding a woman's right to obtain an abortion, the Court eventually imposed some restrictions on abortion.

3. Webster v. Reproductive Health Services. While *Roe* was the pivotal case in abortion history, other cases went on to develop and shape abortion law. After *Roe* and *Doe*, the Supreme Court struck down several state statutes that infringed on a woman's right to obtain an abortion.[183] The Supreme Court

174. *Id.* at 189.

175. *Id.* at 191.

176. *Id.* at 191–92.

177. *Id.* at 192 (explaining that whether "'an abortion is necessary' is a professional judgment that the Georgia physician will be called upon to make routinely").

178. 402 U.S. 62 (1971).

179. *Doe*, 410 U.S. at 191 (commenting that the statute under analysis in *Vuitch* had been interpreted to include psychological and physical well-being of the mother as considerations in determining whether an abortion was necessary).

180. *Id.* at 192.

181. *Id.*

182. *Id.* at 194, 198–99.

183. *See* Hodgson v. Minnesota, 497 U.S. 417, 455 (1990) (finding unconstitutional the Minnesota statute requiring notification of both of a minor's parents prior to having an abortion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 431–33 (1983) (holding unconstitutional a statute requiring that second and third trimester abortions be performed in a hospital); Planned Parenthood v. Danforth, 428 U.S. 52, 75

appeared to ignore States' interests, giving rise to the "abortion on demand" era.[184] However, the Court seemed to change its lenient abortion-allowing attitude in *Webster v. Reproductive Health Services* by upholding a rigid set of abortion regulations.[185] In fact, the concept that the fundamental right to privacy includes abortion was never even mentioned in *Webster*.[186] Furthermore, in his dissent, Justice Blackmun, the author of *Roe*, implied that *Webster* had silently overruled *Roe*.[187]

In *Webster*, the Court found that statutes banning the use of public facilities or employees to assist in or to perform abortions were constitutional.[188] The Court stated that "[n]othing in the Constitution requires States to enter or remain in the abortion business or entitles private physicians and their patients access to public facilities for the performance of abortions."[189] In fact, "the State need not commit *any* resources to performing abortions."[190] Thus, *Webster* saw the end of the "abortion on demand" era and started a new abortion era in which the State's rights were valued as well as the woman's right to choose an abortion.

4. Planned Parenthood v. Casey. While *Roe* was a landmark case because it legalized abortion,[191] another highly influential, but lesser known, case—*Planned Parenthood of Southeastern Pennsylvania v. Casey*[192]—seemingly put limitations and restrictions on the *Roe* decision. In *Casey*, the Supreme Court's opinion began by reaffirming the three essential holdings of *Roe*.[193] First, the majority recognized a woman's right to choose an abortion before the point of viability, noting that the State

(1976) (holding that a parental consent requirement for minors attempting to obtain an abortion was unconstitutional).

184. *See* Stenberg v. Carhart, 530 U.S. 914, 980–81 (2000) (discussing abortion law history). Additionally, the Court in *Planned Parenthood v. Casey*, discussed the uneven application of *Roe*'s holding. 505 U.S. 833, 871 (1992). Subsequent to *Roe*, courts focused on a woman's right to terminate her pregnancy, while ignoring the important State interest in protecting the potentiality of human life. *Id*.

185. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 490–91 (1989).

186. *See id*. at 491–92.

187. *See id*. at 537–38 (Blackmun, J., concurring in part and dissenting in part) (implying that the holding in *Webster* was a result of the desire that several justices had to return to the States the power to regulate abortion).

188. *Id*. at 491–92.

189. *Id*. at 492.

190. *Id*. (emphasis added).

191. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973).

192. 505 U.S. 833 (1992).

193. *Id*. at 846.

must not interfere unduly with this right.[194] Second, the Court recognized that, after fetal viability, the State can restrict abortions if the restrictions include exceptions to protect the woman's life or health.[195] Third, the Court noted that the State has a legitimate interest in protecting both the life of the fetus, which may become a child, as well as the health of the woman.[196]

The Court acknowledged the State's interest in protecting potential life.[197] Subsequent abortion cases, the Court continued, have not given this State interest enough appreciation and implementation.[198]

In *Casey*, the Court rejected the trimester framework outlined in *Roe*[199] because it was "a rigid prohibition on all previability regulation aimed at the protection of fetal life."[200] Thus, it "undervalue[d] the State's interest in [protecting] potential life."[201] The new standard articulated by the Court was the undue burden test.[202] When a state's abortion law imposes an undue burden on the woman's ability to choose an abortion, it is unconstitutional.[203] An undue burden is a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[204]

Next, the *Casey* Court applied the articulated standards to the Pennsylvania laws at issue.[205] The Court held that the provision allowing an emergency abortion to preserve the

194. *Id*. (explaining that, before viability, the State cannot prohibit abortion, nor can it impose a substantial obstacle on the woman's right to choose an abortion).

195. *Id*.

196. *Id*.

197. *Id*. at 871 (recognizing the State's "'important and legitimate interest in protecting the potentiality of human life'" (quoting Roe v. Wade, 410 U.S. 113, 162 (1973))).

198. *Id*.

199. *Roe*, 410 U.S. at 164–65. The rigid trimester framework prohibits state laws from interfering with abortions during the first trimester, allows some regulation during the second trimester, and more regulation during the third. *Id*.

200. *Casey*, 505 U.S. at 873.

201. *Id*.

202. *Id*. at 874. While the State can pass regulations showing its interest in the potentiality of human life (for example, counseling the mother to choose adoption over abortion), the State cannot prohibit a woman from ultimately choosing an abortion before viability. *Id.* at 878. However, after viability, the State can regulate and even proscribe abortion, except when it is necessary for the preservation of the life or health of the mother. *Id*. at 879.

203. *See id*. at 876–77.

204. *Id*. at 877. The Court further stated that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, 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 the right to choose." *Id*.

205. *Id*. at 879.

mother's health was constitutional.[206] In ruling on the Pennsylvania laws in question, the Court overruled previous case law[207] by holding that informed consent requirements for abortion were constitutional.[208] Thus, informed consent regulations could require a doctor to give "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus."[209] Furthermore, the Court found that a mandatory twenty-four hour waiting period before a woman can obtain an abortion does not create an undue burden and is thus constitutional.[210] The Court also examined the spousal notification requirement and found it to be unconstitutional.[211] Conversely, the Court found the parental consent requirement to be constitutional.[212]

Since 1992, *Casey* has been one of the main precedential abortion cases by which the courts structure their opinions. Abortion law in the United States has spanned the spectrum from a pre-*Roe* world in which abortion was illegal, to the post-*Casey* world in which the State's rights and the woman's rights are both deemed important considerations. An understanding of the historical background that constitutes the Court's framework for deciding abortion cases will lead to a more comprehensive understanding of *Stenberg v. Carhart*.[213] In addition to understanding the historical background of abortion case law in the United States, it is also important to have a comprehensive understanding of the procedures used to perform abortions.

---

206. *Id*. at 879–80. The Pennsylvania statute required a woman's life or major bodily function to be in danger before allowing a physician to perform an abortion in a medical emergency. *Id*. at 879.

207. In both *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 442 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 764 (1986), the Supreme Court held unconstitutional the regulations imposing a duty on doctors to fully inform their patients about all medical risks related to abortion.

208. *Casey*, 505 U.S. at 882.

209. *Id*.

210. *Id*. at 885–87 (finding that the twenty-four hour waiting period "is a reasonable measure to implement the State's interest in protecting the life of the unborn").

211. *Id*. at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.").

212. *Id*. at 899 (noting that a parental consent requirement "may provide the parent . . . of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in the context of the values and moral religious principles of their family").

213. 530 U.S. 914 (2000).

B. Abortion Procedures

Because this Note focuses on abortion, it is appropriate to discuss the various methods of abortion utilized in the medical community. There are six methods of abortion utilized by abortion doctors: suction curettage, dilation and evacuation, dilation and extraction, induction, hysterotomy, and hysterectomy.[214]

1. Suction Curretage. Suction curettage, or vacuum aspiration, is the most common first trimester method of abortion.[215] To perform this procedure, the physician uses either local or general anesthesia.[216] The doctor then dilates the cervix, inserts a suction tube into the uterus, and removes the fetus from the uterus.[217] Complications from this method of abortion are rare.[218]

2. Dilation and Evacuation. Most commonly used during the second trimester, the D & E can be accomplished through local anesthesia on an outpatient basis.[219] The D & E begins with an overnight dilation of the cervix.[220] The next day, after the cervix is dilated, the doctor evacuates the contents of the uterus using suction and forceps to dismember the fetus to more easily remove it from the uterus.[221]

3. Dilation and Extraction. The D & X is the controversial method of abortion at issue in *Stenberg*.[222] It is similar to the D & E, with the exception that the D & X involves a partial delivery of the baby prior to the abortion.[223] After the woman's cervix has

---

214. Jill R. Radloff, Note, *Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1558–59 (1999); Karen E. Walther, Comment, *Partial-Birth Abortion: Should Moral Judgment Prevail over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693, 696–701 (2000); Janet E. Gans Epner, Ph.D., et al., *Late-term Abortion*, 280 JAMA 724 (1998), *available at* http://www.ama-assn.org/special/womh/library/readroom/vol_280a/jsc80006.htm.

215. Epner et al., *supra* note 214 (noting that menstrual regulation is a type of early suction curettage that can be performed no later than forty-two to fifty days after the last menstrual period).

216. Walther, *supra* note 214, at 697 (explaining that suction curettage can be done on an outpatient basis).

217. Radloff, *supra* note 214, at 1559 n.14.

218. Walther, *supra* note 214, at 698.

219. *Id*.

220. Radloff, *supra* note 214, at 1559 n.15 (detailing the dilation step of the D & E procedure).

221. *Id*.

222. Stenberg v. Carhart, 530 U.S. 914, 925–35 (2000).

223. *Id*. at 958–59 (Kennedy, J., dissenting).

been dilated, the physician uses forceps to locate the fetus's lower extremities (such as a foot or leg).[224] The physician then uses his hands to partially deliver the fetus, all but the head, into the vagina.[225] The doctor then reduces the size of the head so it can also pass through the cervix.[226] This is accomplished by piercing the skull of the fetus with scissors and inserting a tube into the head to suction out the contents.[227]

4. Induction. This method of abortion is used in the second and third trimester.[228] It involves injecting the amniotic cavity in the uterus with a hypertonic solution of saline, urea, or prostaglandin.[229] "This solution 'causes fetal demise and induces uterine contractions.'"[230] Complications are similar to those of labor, including fear, lack of control, and abdominal pain.[231]

5. Hysterotomy. This form of abortion is rarely used because of the high maternal mortality rate associated with it.[232] The procedure consists of anesthesia administered through an epidural, spinal, or general anesthesia, followed by the "surgical delivery of the fetus through an incision in the uterine wall and abdomen."[233]

6. Hysterectomy. Similar to the hysterotomy, the hysterectomy is also rarely used because of the high maternal morbidity rate.[234] The hysterectomy is the surgical removal of the female's uterus, which leaves her sterile.[235]

C. Stenberg v. Carhart

The majority of the Supreme Court concluded that the Nebraska statute was unconstitutional for two reasons.[236] First,

---

224. Walther, *supra* note 214, at 699.

225. *Id.* at 699–700 (explaining that, at this point, the cervix is not usually dilated enough for the head to be delivered without injuring the woman).

226. *Id.* at 700.

227. *Id.*

228. *See* Epner et al., *supra* note 214 (explaining that labor induction is one of the several procedures used to induce abortion from the sixteenth to the twenty-fourth week of pregnancy).

229. Radloff, *supra* note 214, at 1559 n.17.

230. *Id.* (quoting Carhart v. Stenberg, 972 F. Supp. 507, 517 (D. Neb. 1997)).

231. Walther, *supra* note 214, at 700.

232. Epner et al., *supra* note 214.

233. *Id.*

234. *Id.* ("Hysterectomy may be appropriate in cases involving a preexisting pathologic condition, such as large uterine leiomyomas or carcinoma in situ of the cervix.").

235. Walther, *supra* note 214, at 701.

236. Stenberg v. Carhart, 530 U.S. 914, 929–30 (2000).

Nebraska's statute lacked an adequate exception "'for the preservation of the . . . health of the mother,'" as is required by *Casey*.[237] Second, 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."[238]

1. Health of the Mother. The Supreme Court in *Casey* clearly reaffirmed the essential holding of *Roe* that, after viability, the State can regulate and proscribe abortion unless abortion is necessary "for the preservation of the life or health of the mother."[239] The Court continued by noting that a State cannot interfere with the woman's right to obtain an abortion "if continuing her pregnancy would constitute a threat to her health."[240]

The Supreme Court made a grave mistake in finding the Nebraska statute unconstitutional. Previously, in *Casey*, the Court held that a State could not force a woman to continue her pregnancy.[241] Therefore, a health exception is necessary if without it a woman would be forced to continue her pregnancy.[242] However, the Court in *Stenberg* seemed to diverge away from the *stare decisis* principle when it gave new meaning to the word "necessary." In *Stenberg*, the Court defined "necessary" as the woman's right to choose a *preferable* method of abortion, rather than the ability to have an abortion at all when her health condition mandated it.[243] The Nebraska statute did not force women to continue their pregnancy, but merely proscribed one form of abortion that is so close to infanticide that many cannot make the distinction.[244] In his dissent, Justice Thomas eloquently explained that the majority failed to recognize the difference "between cases in which health concerns *require* a woman to

237. *Id*. (quoting Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992)). While the Nebraska statute did contain a health exception, the Court concluded that it was not broad enough. *Id*. at 937–38. Thus, because the health exception was insufficient, it was essentially no health exception at all. *Id*.

238. *Id*. at 930 (quoting *Casey*, 505 U.S. at 874).

239. *Casey*, 505 U.S. at 879.

240. *Id*. at 880 (responding to the petitioner's argument that the definition of medical emergency is too narrow and does not allow the woman to have an abortion absent significant health risks).

241. *Id*. at 879 (explaining that a state may make exceptions to this rule for particular circumstances).

242. *Id*. at 880.

243. *Stenberg*, 530 U.S. at 1009–10 (Thomas, J., dissenting) (noting that *Roe* and *Casey* do not say anything regarding cases in which a physician prefers one method of abortion over the other).

244. Refer to note 2 *supra* (recognizing that thirty states have banned partial-birth abortions because it is so closely related to infanticide).

obtain an abortion and cases in which health concerns cause a woman who desires an abortion . . . to *prefer* one method over another."[245]

Subsequent to *Casey*, the Supreme Court has upheld other state abortion regulations, notwithstanding the lack of a health exception.[246] For example, in *Mazurek v. Armstrong*,[247] the Supreme Court ruled on the validity of a Montana statute that only allowed licensed physicians to perform abortions.[248] A group of doctors and a physician-assistant challenged the statute, calling for injunctive relief.[249] Ultimately, the Supreme Court ruled that an injunction was not proper because the underlying case did not have a "fair chance of success on the merits," which is the required threshold for granting an injunction.[250]

In *Mazurek*, the Court correctly realized that, even with the prohibition against physician-assistants performing abortions, a woman could still obtain an abortion.[251] This holding was consistent with *Casey*.[252] The Montana law did not seem to place a woman's health at issue because the woman was not being forced to continue her pregnancy. Merely one means of obtaining an abortion was foreclosed to her. Similarly, the Nebraska statute foreclosed a method of abortion without forcing the woman to continue her pregnancy. Thus, no health exception should have been required.

Furthermore, another restriction on abortion procedure had been accepted in the United States for years. The Food and Drug Administration (FDA) had for years proscribed the use of RU 486, the drug known as the abortion pill.[253] This drug has been used extensively around the world.[254] While the worldwide acceptance of RU 486 seems to indicate it is a viable method of

---

245. *Stenberg*, 530 U.S. at 1010 (Thomas, J., dissenting) (emphasis added).

246. *Id*. (Thomas, J., dissenting) (declaring that the majority seems to be confused as to when a health exception is required).

247. 520 U.S. 968 (1997).

248. *Id*. at 969.

249. *Id*. at 969–70.

250. *Id*. at 970, 975–76 (quoting Mazurek v. Armstrong, 94 F.3d 566, 567–68 (9th Cir. 1996)).

251. *Id*. at 973–74.

252. *Id*. at 971 (discussing the *Casey* opinion which upheld a regulation requiring physicians to disclose information about the abortion directly to their patients).

253. *See* Childbirth by Choice Trust, *RU 486: The "Abortion" Pill* (January 2001) (disclosing general information about the drug, including its effects and uses, and noting its worldwide acceptance), *at* http://www.cbctrust.com/RU486.96.html.

254. *Id*. The drug originated in France in 1989. *Id*. In 1991, Great Britain approved its use, followed by most of Europe, Scandinavia, and China. *Id*.

abortion, the FDA did not approve it until the year 2000.[255] The history of RU 486 is another example where one method of abortion was being proscribed without a health exception, even though some may have considered it to be the safest method.

As Justice Thomas articulated in his dissent, the *Stenberg* majority expanded the health exception described in *Roe* and reiterated in *Casey*.[256] The health exception from *Roe* and *Casey* applies to instances in which abortion is necessary for the preservation of the health or life of the mother.[257] However, the majority has stretched the definition of "necessary" from absolute necessity to necessary if there are comparative health risks.[258] This interpretation totally eviscerates the State's right to regulate abortion because any doctor can now perform a D & X if it would be comparatively safer for the mother.[259] This interpretation "imposes unfettered abortion on demand" because the exception "entirely swallows the rule."[260] Thus, the *Stenberg* Court misinterpreted *Casey*'s requirement for a health exception and, by doing so, found what should have been a constitutional statute to be unconstitutional.

2. Undue Burden. The majority's second reason for finding Nebraska's law unconstitutional is that the law created a substantial obstacle to a woman choosing an abortion.[261] This substantial obstacle, in turn, imposed an undue burden on the woman's general right to choose an abortion.[262] The majority was correct in its interpretation of *Casey*. However, the majority's mistake was in ignoring years of statutory interpretation when it ruled that the Nebraska statute applied to both D & E and D & X

---

255. *Id*. (reporting that "mifepristone" or "RU 486" was available in the United States as of September 2000); *see also* Rachel Zimmerman, *Wrangling over Abortion Intensifies as RU-486 Pill Nears the Market*, WALL ST. J., Nov. 14, 2000, at B1, 2000 WL-WSJ26616781 (explaining that, as the drug RU 486 nears the market, the heated abortion controversy remains intact)

256. Stenberg v. Carhart, 530 U.S. 914, 1012 (2000) (Thomas, J., dissenting).

257. *Id*. (Thomas, J., dissenting).

258. *Id*. (Thomas, J., dissenting). No longer is a health exception required out of absolute "necessity," meaning a health exception that would allow an abortion in cases in which abortion would preserve the mother's health or life. *Id*. (Thomas, J., dissenting). After *Stenberg*, a health exception is "necessary" if one method of abortion is *safer* than other available methods of abortion. *Id*. at 1012–13 (Thomas, J., dissenting).

259. *See id*. (Thomas, J., dissenting). Because deciding which method of abortion to use is a judgment call, doctors can *always* choose the D & X method of abortion as did Dr. Carhart. Refer to notes 105–06 *supra* and accompanying text.

260. *Stenberg*, 530 U.S. at 1012 (Thomas, J., dissenting).

261. *Id*. at 930.

262. *Id*.

abortion procedures.[263] Nebraska agreed that if the statute did in fact apply to the commonly used D & E as well as the D & X abortion method, this would be an undue burden.[264] However, contrary to the majority's conclusion, the dissent found it clear that the Nebraska statute did not apply to the D & E method, but only to the D & X method.[265]

The Nebraska statute criminalized partial-birth abortion.[266] Partial-birth abortion was defined as "'an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.'"[267] It is incomprehensible how the majority could have included the D & E abortion method as a procedure prohibited by this statute. The D & E procedure is accomplished, after cervical dilation, by the physician grabbing a fetal extremity (such as an arm or leg) and pulling it through the cervix.[268] Essentially, the doctor tears off pieces of the fetus and pulls them through the cervix.[269] It is clear that pulling pieces of a fetus through the cervix is not a "delivery" of the fetus, as defined in the Nebraska statute.

Furthermore, the statute requires that a living child be *partially delivered*.[270] This is another aspect of the D & X abortion procedure that differs from the D & E procedure. As opposed to partially delivering a living fetus, the doctor *extracts* pieces of the fetus in a D & E.[271] After the extraction, the physician is left with a "'tray full of pieces.'"[272] A tray full of pieces is obviously not a living child under the statute.

---

263. *See id*. at 938–39.

264. *Id*. at 938.

265. *Id*. at 990 (Thomas, J., dissenting) (explaining that the Nebraska statute cannot be read to include "removing pieces of an unborn child from the uterus one at a time").

266. *See id*. at 989 (Thomas, J., dissenting).

267. *Id*. at 989–90 (Thomas, J., dissenting) (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)) (noting that "partially delivers" means "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure . . . [that] will kill the unborn child and does kill the unborn child'" (quoting NEB. REV. STAT. ANN. § 28-326(9))).

268. *Id*. at 984–85 (Thomas, J., dissenting) (observing that the physician uses forceps to perform the D & E procedure).

269. *Id*. (Thomas, J., dissenting) (quoting testimony by Drs. Stubblefield and Hodgson).

270. *Id*. at 989–90 (Thomas, J., dissenting) (reporting that the statute defines "partial-birth abortion" as an "abortion procedure in which the person performing the abortion partially delivers . . . a living unborn child before killing the unborn child and completing the delivery").

271. *Id*. at 984–85 (Thomas, J., dissenting) (explaining that the fetus will die inside the womb from blood loss as the limbs are removed).

272. *Id*. (Thomas, J., dissenting) (quoting testimony by Dr. Carhart).

Moreover, the Nebraska statute prohibits partial delivery of a living fetus *before* killing the child and completing the delivery.[273] During the D & E procedure, neither the child, nor any part of the child, is removed from the uterus *before* the killing occurs.[274] Thus, the D & E procedure is clearly not covered by the Nebraska statute.

While there is clearly no ambiguity in the statute, the majority still claimed the statute applied to both forms of abortion. By doing so, the majority ignored the sound principle of statutory interpretation that if there is a possible interpretation that avoids a constitutional question, that interpretation should be used.[275] The majority would have avoided the constitutional question if they had interpreted the Nebraska statute to apply only to D & X abortions and not D & E abortions. An interpretation rendering only D & X abortions subject to the statute would have been perfectly logical and clearly supported by the plain language of the statute. Therefore, the Court in *Stenberg* should have interpreted the statute to avoid constitutional difficulties.

For the foregoing reasons, it is apparent that the Nebraska statute was intended only to prohibit the D & X abortion method and not the more commonly used D & E procedure. With this understanding, the D & E method would remain available as an abortion option. Therefore, there would have been no substantial obstacle obstructing a woman's choice. Hence, there was no undue burden, and the statute should have been found constitutional.

D. Hippocratic Oath

In *Roe*, the Court examined the development of abortion law.[276] It began with a discussion of the Hippocratic Oath,[277] an

---

273. *Id*. at 989–90 (Thomas, J., dissenting) (noting that the Nebraska statute only applies if the physician intentionally delivers into the vagina a living unborn child or a substantial portion of that child).

274. *Id*. at 991 (Thomas, J., dissenting) (recognizing that, according to the statute, the dismemberment of the fetus in the D & E procedure cannot occur before the death of the fetus because it causes the death of the fetus).

275. *See id*. at 996–97 (Thomas, J., dissenting) (arguing that the majority ignored the doctrine of constitutional avoidance when it interpreted the Nebraska statute). In *Frisby v. Schultz*, the Court discussed an ordinance that prohibited picketing outside the residence or dwelling of an individual. 487 U.S. 474, 476 (1988). The Court held that, even though the ordinance did not outline the picketing ban's precise scope, "the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties." *Id*. at 482; *see also* Erznoznik v. Jacksonville, 422 U.S. 205, 216 (1975) (holding that "a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts").

276. *See* Roe v. Wade, 410 U.S. 113, 130 (1973) (discussing various historical attitudes toward abortion).

277. *Id*. (noting that the Hippocratic Oath is the "ethical guide of the medical

oath that has been recited for two thousand years by doctors as they enter the medical field.[278] There are various translations of the Oath, including:

> "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion," or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[279]

While the AMA's approved version of the oath omits any mention of abortion, it retains the requirement to practice medicine in "uprightness and honor" and to "exercise [the] art solely for the cure of [the] patients."[280]

Considering the specificity of the Hippocratic Oath, how can a physician perform the D & X abortion procedure in good faith? Upholding honor and uprightness in the practice of medicine cannot include partially delivering a child, only to tear its skull open and kill the child before the delivery is completed. As Justice Kennedy noted in his dissent, the physician goes from the apparent role of obstetrician—delivering a child—to the role of abortionist—killing the child before delivery.[281] Dr. Carhart himself admitted that the fetus's heart may continue to beat for

---

profession").

278. *Hippocratic Oath*, Microsoft Encarta Online Encyclopedia 2000 [hereinafter *Hippocratic Oath*], *at* http://encarta.msn.com (last visited Feb. 14, 2002).

279. *Roe*, 410 U.S. at 131.

280. *See Hippocratic Oath*, *supra* note 278. The AMA's approved version of the Hippocratic Oath reads in its entirety:

> You do solemnly swear, each by whatever he or she holds most sacred
> That you will be loyal to the Profession of Medicine and just and generous to its members
> That you will lead your lives and practice your art in uprightness and honor
> That into whatsoever house you shall enter, it shall be for the good of the sick to the utmost of your power, your holding yourselves far aloof from wrong, from corruption, from the tempting of others to vice
> That you will exercise your art solely for the cure of your patients, and will give no drug, perform no operation, for a criminal purpose, even if solicited, far less suggest it
> That whatsoever you shall see or hear of the lives of men or women which is not fitting to be spoken, you will keep inviolably secret
> These things do you swear. Let each bow the head in sign of acquiescence
> And now, if you will be true to this, your oath, may prosperity and good repute be ever yours; the opposite, if you shall prove yourselves forsworn.

Id.

281. Stenberg v. Carhart, 530 U.S. 914, 959–60 (2000) (Kennedy, J., dissenting) (disclosing that, after extracting the body of the fetus, the abortionist then tears open the skull while it is still in the woman's uterus).

minutes after the brain has been suctioned out of the skull.[282] Can a doctor perform this procedure and coterminously fulfill his duty to uphold medical dignity? He cannot!

Furthermore, according to Mary Ellen Morton, a neonatal specialist, fetus's can feel agonizing pain during the D & X procedure.[283] This infliction of pain clearly contradicts the Hippocratic Oath. Babies born extremely premature, as early as twenty-three or twenty-four weeks, are administered anesthesia during any surgery and analgesic and amnesiac drug after surgery to relieve pain.[284] Moreover, Dr. Robert J. White concluded that "'[b]y the 20th week of gestation and beyond, the fetus has in place the neurocircuitry to appreciate pain. . . . [T]here are studies that demonstrate even at 8 weeks through 13 weeks, there's enough neurocircuitry present so that pain and noxious stimuli could be perceived.'"[285] Thus, although babies can feel the pain, physicians continue to perform the D & X procedure, which seems to be in direct conflict with the Hippocratic Oath.

E. Federal Legislation Banning Partial-Birth Abortions

In 1995, the United States Congress passed the Partial-Birth Abortion Ban Act of 1995.[286] This bill passed in both houses of Congress but was vetoed by President Clinton.[287] A vote to override the presidential veto passed in the House but fell short of the required two-thirds majority in the Senate.[288] In 1997, the House again proposed, and both the House and Senate passed, the Partial-Birth Abortion Ban Act.[289] Again, President Clinton

---

282. *Id*. at 960 (Kennedy, J., dissenting) (observing that brain death does not occur until after the contents of the skull have been suctioned out by the vacuum).

283. Ann MacLean Massie, *So-Called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 348 (1998) (relating that Ms. Morton based her belief on her observations of the reactions of very young babies to injections and punctures).

284. *Id*. (discussing the evidence Ms. Morton used to prove that a fetus experienced pain during a D & X procedure).

285. *Id*. (quoting testimony by Robert J. White, M.D., Professor of Surgery at Case Western Reserve University).

286. Radloff, *supra* note 214, at 1555 n.3; Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. (1995); *Stenberg*, 530 U.S. at 996 n.11 (Thomas, J., dissenting).

287. *Stenberg*, 530 U.S. at 996 n.11 (Thomas, J., dissenting).

288. *Dilation and Extraction Procedures (a.k.a. D&Xs, PBAs, and Partial-Birth Abortions): All Sides to the Issue* [hereinafter *Dilation and Extraction Procedures*] (stating that the vote in the Senate was fifty-seven to forty-one in favor of overriding President Clinton's veto), *at* http://www.religioustolerance.org/abo_pba.htm (last visited Feb. 24, 2002).

289. *Stenberg*, 530 U.S. at 996 n.11 (Thomas, J., dissenting) (noting that both the Senate and House passed the bill by wide margins).

vetoed the Act.[290] Similarly, the House voted to override the veto, but the Senate fell short of the required two-thirds majority by three votes.[291] In October 1999, the Senate passed the Partial-Birth Abortion Ban Act of 1999.[292] It also passed in the House but again was vetoed by the President.[293] Likewise, the House voted to override the veto, but the Senate was two votes short of overriding the presidential veto.[294]

Undaunted and determined, the House passed another partial-birth abortion act on April 5, 2000, by a margin of 287 to 141.[295] This margin is two votes more than is required to override a presidential veto.[296] On May 25, 2000, the bill was placed on the Senate Legislative Calendar.[297] However, the Senate did not take further action on the bill during the 2000 session.[298] Because the bill was not passed within the congressional term in which it was introduced, the bill will have to be reintroduced.[299] If the bill is reintroduced and passes both houses, the bill will be presented for presidential approval.[300] However, when the approved version of the bill goes to the president, it will not be President Clinton's choice to veto it again. On January 20, 2001, George W. Bush was inaugurated as the forty-third president of the United States.[301] In his speech accepting the Republican Party's presidential nomination, President Bush stated that he would sign a partial-birth abortion ban into law if elected.[302] Thus, when

---

290. *Id*. (Thomas, J., dissenting).

291. *Id*. (Thomas, J., dissenting); *see also Dilation and Extraction Procedures*, *supra* note 288 (stating that the second vote in the Senate was sixty-four to thirty-six in favor of overriding President Clinton's veto).

292. *Dilation and Extraction Procedures*, *supra* note 288.

293. *Id*.

294. *Id*.

295. *End This Grisly Act*, AUGUSTA CHRON., Apr. 10, 2000, at A4, *available at* 2000 WL 17290955 (reporting that the bill imposes a maximum of two years' imprisonment on doctors who perform partial-birth abortions).

296. *Dilation and Extraction Procedures*, *supra* note 288.

297. *Bill Summary & Status for the 106th Congress* (noting that the purpose of the bill is to ban partial-birth abortions), *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r. 03660 (last visited Feb. 14, 2002).

298. *Dilation and Extraction Procedures*, *supra* note 288 (disclosing that, as of August 9, 2000, a compromise bill had not been drafted).

299. *How a Bill Becomes a Law*, 3 WEST'S ENCYCLOPEDIA OF AM. L. 162 (1998).

300. *Id*. at 164 (recognizing that the president can either sign, veto, pocket veto, or refuse to act on the bill).

301. Bennett Roth, *The Inauguration of George W. Bush / Bush Vows New Civility / President Outlines His Vision for Nation*, HOUS. CHRON., Jan. 21, 2001, at A1, *available at* 2001 WL 2993845.

302. Jackie Calmes, *Republican Convention 2000: Bush Vows to Be 'President with a Purpose'*, WALL ST. J., Aug. 4, 2000, at A12, *available at* 2000 WL-WSJ 3039137.

the approved bill goes to the president, President Bush—if he upholds his promise—will approve it.

F. Results of Stenberg

President Bush clearly stated that he would sign a partial-birth abortion ban into law.[303] However, the bill passed by the House in April of 2000 contains similar language to the statute found unconstitutional by the Supreme Court in *Stenberg*.[304] The bill defined partial-birth abortion as:

> an abortion in which the person performing the abortion deliberately and intentionally vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother . . . and performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother.[305]

Thus, if President Bush signs a version of the bill with this or similar language, it will inevitably be challenged in the courts. Such was the issue in *Dickerson v. United States*.[306] In *Dickerson*, the Court faced a challenge of 18 U.S.C. § 3501.[307] Before *Dickerson*, in *Miranda v. Arizona*,[308] the Supreme Court outlined the requirements for the warning that must be given to a suspect during an arrest to ensure the admissibility of the suspect's words in court.[309] Subsequently, the U.S. Congress enacted 18 U.S.C. § 3501, which modified *Miranda* by specifying that the admissibility of evidence would be based on whether the statement was voluntarily made.[310] In *Dickerson*, the Court held that "*Miranda*, being a constitutional decision of [the] Court, may not be in effect overruled by an Act of Congress."[311] Likewise, if the Partial-Birth Abortion Ban Act is signed into law, and then

---

303. *Id*.

304. *See* Vida Foubister, *House Moves Abortion Method back to Congress' Agenda*, AM. MED. NEWS, May 1, 2000 (noting that opponents feel the new version's similar language fails to correct the defects from the prior bill), *at* http://www.ama-assn.org/sci-pubs/amnews/pick_00/gvsc0501.htm.

305. *Id*. (quoting the new version of the bill banning partial-birth abortions).

306. 530 U.S. 428 (2000).

307. *Id*. at 432 (reporting that the petitioner was indicted for bank robbery and moved to suppress a voluntary statement he made to the F.B.I. prior to receiving his "*Miranda* warnings").

308. 384 U.S. 436 (1966).

309. *Id*. at 444 (disclosing that a statement is admissible in court if, prior to any questioning, the suspect is warned that (1) he has a right to remain silent, (2) any statement he makes may be used as evidence against him in court, and (3) he has a right to have an attorney present during questioning).

310. *Dickerson*, 530 U.S. at 431–32.

311. *Id*. at 432.

challenged, the Court will most likely follow the principle articulated in *Dickerson* and find the Act unconstitutional.

There is yet another angle of this issue to ponder. The Wall Street Journal reported that "[t]he most sweeping social-policy decision that . . . George W. Bush . . . can hope to make as president is this: whom to put on the Supreme Court."[312] Last year, twenty of the seventy-three cases that the Supreme Court heard were decided by only one vote.[313] In thirteen of these cases, the conservative majority prevailed.[314] Thus, the next appointed members of the Supreme Court can either "make or break" the Court's present conservative majority.[315] The Court's conservative majority currently consists of Chief Justice Rehnquist, who is seventy-six years old, Sandra Day O'Connor, seventy years old, Anthony Kennedy, sixty-three years old, Antonin Scalia, sixty-four years old, and Clarence Thomas, fifty-one years old.[316] The liberal-to-moderate minority consists of Paul Stevens, eighty years old,[317] David Souter, sixty years old, Ruth Bader Ginsburg, sixty-seven years old, and Stephen Breyer, sixty-one years old.[318] It has been six years since a Supreme Court justice was appointed, which is the longest time period between appointments in 177 years.[319] Thus, President Bush will likely have the opportunity to appoint a Supreme Court justice, especially if he is re-elected. President Bush could appoint a conservative to the bench so that when the Partial-Birth Abortion Ban Act is challenged,[320] the Court might not find the legislation unconstitutional or in direct conflict with *Stenberg*.

However, Supreme Court appointments are completely unpredictable. Even though one would surmise that President Bush would appoint a conservative, the appointee may not rule as the President plans. The Court could conclude, as did the

---

312. Robert S. Greenberger & Jackie Calmes, *Next President Likely to Tip Balance of Supreme Court*, WALL ST. J., Oct. 2, 2000, at A36, *available at* 2000 WL-WSJ 26611552.

313. *Id*. (commenting that this was the highest proportion of one-vote margins in a decade).

314. *Id*. (noting that these thirteen decisions were 5-4 in favor of the Court's conservative majority).

315. *Id*. (quoting Thomas Goldstein, an attorney who regularly practices before the Supreme Court).

316. *Id*. (listing the members of the conservative majority of the Supreme Court and their ages as of October 2000).

317. Justice Stevens is the oldest member of the Court. *Id*.

318. *See id*. (identifying the liberal-to-moderate minority of the Supreme Court and their ages as of October 2000).

319. *Id*.

320. This Act has not been passed yet, but the scenario is posed assuming that the Act is signed into law.

Court in *Dickerson*, that Court precedent could not be overruled by legislative acts. Assuming this *arguendo*, there is still another option to ensure that partial-birth abortions do not become legal in the United States: a constitutional amendment.

The Supreme Court's decision in *Stenberg* prompted U.S. Catholic bishops to call for a constitutional amendment banning abortion.[321] Nearly three hundred bishops unanimously approved the position statement.[322] The statement said that *Roe* "helped to create an abortion climate, in which many Americans turn to the destruction of innocent life as an answer to social and personal problems."[323] The statement also said that "[*Stenberg*] has brought our legal system to the brink of endorsing infanticide. . . . We recommit ourselves to the long and difficult task of reversing the Supreme Court's abortion decisions—*Stenberg v. Carhart* as well as *Roe v. Wade*."[324] The statement continued by encouraging people to explore legal reform, including a constitutional amendment.[325]

Cathleen Cleaver, the head of the bishop's secretariat, acknowledged that the chances of successfully amending the Constitution are small.[326] However, a constitutional amendment might not be as far-reaching as it appears. To successfully amend the Constitution, two-thirds of both houses must approve the amendment.[327] As both houses have already approved the Partial-Birth Abortion Ban Act on several occasions,[328] this may not be such a difficult task. If this amendment method is unsuccessful, there is another way the Constitution can be amended. Two-thirds of the states can propose an amendment and, after three-fourths of the legislatures of the states approve it, it will amend the Constitution.[329] This again may at first seem unattainable, but two-thirds of the states equals thirty-four states. Three-

---

321. Richard Vara, *Bishops Scold Court over Abortion, Want Ban in Constitution*, HOUS. CHRON., Nov. 16, 2000, at 12A, *available at* 2000 WL 24526941 (noting that the Catholic bishops called for the Court's abortion decisions "to be condemned, resisted and ultimately reversed").

322. *Id.*

323. *Id.*

324. *Abortion and the Supreme Court: Advancing the Culture of Death*, National Conference of Catholic Bishops (Nov. 15, 2000), *at* http://www.usccb.org/prolife/issues/abortion/culture.htm.

325. *Id.*

326. Vara, *supra* note 321.

327. U.S. CONST. art. V (outlining the requirements that Congress must follow to amend the Constitution).

328. Refer to notes 286–99 *supra* and accompanying text (explaining Congress's attempts to pass a partial-birth abortion ban act).

329. U.S. CONST. art. V (stating the requirements that the states must follow in order to amend the Constitution).

fourths of the states equals thirty-eight states. Before the Supreme Court's decision in *Stenberg*, thirty states already had statutes in place that banned partial-birth abortion.[330] Thus, it would only take the support of four more states to propose an amendment, and eight more states to then pass such an amendment.

IV. CONCLUSION

Ultimately, the Supreme Court misinterpreted abortion precedent in its application of *Casey* in *Stenberg*. As the dissent stated, there is no need for a health exception because the statute does not force a woman to continue her pregnancy. It merely forecloses a method of abortion. Additionally, the Nebraska statute does not create an undue burden on a woman's right to choose an abortion because she can still choose to have a D & E abortion instead of a D & X or partial-birth abortion. Ultimately, the State has a strong interest in preserving the potential life of the fetus and can enact legislation to reflect that interest.

Just as the State has an interest in preserving potential life, so should physicians have this similar interest. In considering partial-birth abortion, it is impossible to reconcile a physician's duty to preserve life and uphold medical integrity with his actions of committing infanticide. If physicians are to adhere to the Hippocratic Oath, which they have sworn to uphold, they must abandon this method of abortion.

If the current Supreme Court will not end the use of D & X abortions, hopefully a new Supreme Court will. With the election of President Bush, perhaps a more conservative Supreme Court is on the horizon. New appointments, as President Bush may be called to make, can ensure that this heinous abortion method is outlawed. If President Bush adheres to his promise to sign a partial-birth abortion ban into law, then a new conservative Court can uphold its constitutionality.

Nonetheless, if left with no other option, the people must rally to pass a constitutional amendment banning partial-birth abortions. Before *Stenberg*, thirty states had statutes similar to Nebraska's outlawing partial-birth abortions. The Supreme Court essentially told the people of thirty states that their beliefs and opinions are unimportant. This cannot stand! Together, the people of the United States can act, through

330. Refer to note 1 *supra* and accompanying text (listing the thirty states).

their legislatures, to propose and pass an amendment which will put an end to this grotesque procedure of infanticide. Then, and only then, can we become one indivisible nation with liberty and justice *for all*.

Stephanie Schmutz