***Stenberg v Carhart* (2000) - Justice Breyer** - 5/4.

The *Stenberg* Court:
Since *Casey*, White & Blackmun are OUT — Ginsburg and Breyer are IN.
Majority (5): Stevens, O'Connor, Souter, Ginsburg & Breyer.
Minority (4): Rehnquist, Scalia, Kennedy & Thomas.

Issue: Is a Nebraska law banning "**partial birth abortion**" Constitutional?

Held: No...the statute is stricken.

Reasoning: Justice Breyer...*Roe v. Wade* & *Planned Parenthood v. Casey* establish the following legal principles:

First, before viability the woman has a right to choose to terminate her pregnancy.

Second, a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability is unconstitutional. An "undue burden" is any 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.

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.

The Nebraska law banning "partial birth abortion" reads as follows:

> "No partial birth abortion shall be performed in this state, **unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury**, including a life-endangering physical condition caused by or arising from the pregnancy itself."

Okay...so Nebraska has removed the "health" of the mother and a life threatening "emotional" problem as reasons to permit a partial birth abortion.

The statute defines "partial birth abortion" as:

> "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."

It further defines "partially delivers vaginally a living unborn child before killing the unborn child" to mean:

> "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."

The law carries a prison term of up to 20 years and a fine of up to $25,000. It also provides for the automatic revocation of a doctor's license to practice medicine in Nebraska.

This statute violates the Constitution.

Because Nebraska law seeks to ban one method of aborting a pregnancy, we must describe and then discuss several different abortion procedures.

1. 90% of all abortions performed in the United States take place during the first trimester when the predominant method is "vacuum aspiration" which involves insertion of a vacuum tube (cannula) into the uterus to evacuate the contents. It is typically performed on an outpatient basis under local anesthesia and is considered particularly safe.

2. 10% of all abortions are performed during the second trimester. In the early 1970's, inducing labor through the injection of saline into the uterus was the predominant method of second trimester abortion. Today, the medical profession has switched from medical induction of labor to surgical procedures for most second trimester abortions. The most commonly used procedure is called "dilation and evacuation" (D&E). That procedure (together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks.

3. The AMA describes the D&E procedure as follows:

Between 13 and 15 weeks:

"D&E is similar to vacuum aspiration except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue. Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as a paracervical block may be administered, dilating agents, if used, are removed and instruments are inserted through the cervix into the uterus to removal fetal and placental tissue. Because fetal tissue is friable and easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains."

After 15 weeks:

"Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages to remove fetal and placental tissue."

After 20 weeks:

"Some physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D&E to facilitate evacuation."

4. When instrumental disarticulation incident to D&E is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. Dr. Carhart testified at trial as follows: "Dismemberment occurs after a part of the fetus is pulled through the cervix."

5. The D&E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. Nonetheless studies show that **the risks of mortality and complication that accompany the D&E procedure between 12 and 20 weeks are significantly lower than those accompanying induced labor procedures** (the next safest second trimester procedures).

6. A variation of the D&E procedure is referred to as an "intact D&E." Like other versions of the D&E technique, it begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix "intact," *i.e.*, in one pass, rather than in several passes. It is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. The intact D&E proceeds in one of two ways. If the fetus presents head first (a vertex

presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix. The breech extraction version of the intact D&E is also known commonly as "dilation and extraction," or *D&X.* In the late second trimester, vertex, breech, and traverse/compound (sideways) presentations occur in roughly similar proportions.

7. The intact D&E procedure can also be found described in certain obstetric and abortion clinical textbooks, where two variations are recognized. The first, as just described, calls for the physician to adapt his method for extracting the intact fetus depending on fetal presentation. This is the method used by *Dr. Carhart.* A slightly different version of the intact D&E procedure, associated with Dr. Martin Haskell, calls for conversion to a breech presentation in all cases.

8. ACOG describes the D&X procedure in a manner corresponding to a breech-conversion intact D&E, including the following steps:

   “1. deliberate dilatation of the cervix, usually over a sequence of days;
   "2. instrumental conversion of the fetus to a footling breech;
   "3. breech extraction of the body excepting the head; and
   "4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus."

   Despite the technical differences we have just described, intact D&E and D&X are sufficiently similar for us to use the terms interchangeably.

9. Dr. Carhart testified he attempts to use the intact D&E procedure during weeks 16 to 20 because (1) it reduces the dangers from sharp bone fragments passing through the cervix, (2) minimizes the number of instrument passes needed for extraction and lessens the likelihood of uterine perforations caused by those instruments, (3) reduces the likelihood of leaving infection-causing fetal and placental tissue in the uterus, and (4) could help to prevent potentially fatal absorption of fetal tissue into the maternal circulation. The District Court made no findings about the D&X procedure's overall safety. The District Court concluded, however, 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 in the 10 to 20 cases a year that present to Dr. Carhart."

10. The materials presented at trial referred to the potential benefits of the D&X procedure in circumstances involving non-viable fetuses, such as fetuses with abnormal fluid accumulation in the brain (hydrocephaly). ("Intact D&X may be preferred by some physicians, particularly when the fetus has been diagnosed with hydrocephaly or other anomalies incompatible with life outside the womb"); (D&X "may be especially useful in the presence of fetal anomalies, such as hydrocephalus," because its reduction of the cranium

allows "a smaller diameter to pass through the cervix, thus reducing risk of cervical injury"). Others have emphasized its potential for women with prior uterine scars, or for women for whom induction of labor would be particularly dangerous.

11. There are no reliable data on the number of D&X abortions performed annually. Estimates have ranged between 640 and 5,000 per year.

We conclude that Nebraska's "partial birth abortion" statute violates the Constitution for at least two independent reasons.

First, the law lacks any exception "for the preservation of the . . . health of the mother."

Second, it "imposes an undue burden on a woman's ability" to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself.

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.'"

...The quoted standard also depends on the state regulations "promoting the State's interest in the potentiality of human life." The Nebraska law, of course, does not directly further an interest "in the potentiality of human life" by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion. **Nebraska says the law** "**shows concern for the life of the unborn**," "**prevents cruelty to partially born children**," and "**preserves the integrity of the medical profession**." But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the "health" requirement.

Justice Thomas says that this principle is limited to situations where the pregnancy *itself* creates a threat to health. He is wrong. The cited cases, reaffirmed in *Casey*, recognize that a State cannot subject women's health to significant risks both in that context **and also** where state regulations force women to use **riskier** methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed **significant** health risks.

Nebraska responds that the law does not require a health exception unless there is a need for such an exception and, here, there is no such need. It argues that "safe alternatives remain available" and "a ban on partial-birth abortion/D&X would create no risk to the health of women." The State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure.

In summary, the District Court concluded that "Carhart's D&X procedure is safer than the D&E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart."

Nebraska replies that D&E and labor induction are at all times "safe alternative procedures." The Association of American Physicians and Surgeons argues that elements of the D&X procedure may create risks. Nebraska further emphasizes that there are no medical studies "establishing the safety of the partial-birth abortion/D&X procedure" and "no medical studies comparing the safety of partial-birth abortion/D&X to other abortion procedures." These arguments are insufficient to demonstrate that Nebraska's law needs no health exception.

The D&X procedure's relative rarity is not highly relevant...[T]he State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it.

The District Court agreed that alternatives, such as D&E and induced labor, are "safe" but found that the D&X method was significantly *safer* in certain circumstances...

In sum, Nebraska has not convinced us that a health exception is "never necessary to preserve the health of women." Rather, a statute that altogether forbids D&X creates a significant health risk. The statute consequently must contain a health exception. This is not to say, as Justice Thomas and Justice Kennedy claim, that a State is prohibited from proscribing an abortion procedure whenever a particular physician deems the procedure preferable. By no means must a State grant physicians "unfettered discretion" in their selection of abortion methods. **But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Requiring such an exception in this case is no departure from *Casey*, but simply a straightforward application of its holding**.

The Eighth Circuit found the Nebraska statute unconstitutional because, in *Casey*'s words, it has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." It thereby places an "undue burden" upon a woman's right to terminate her pregnancy before viability. Nebraska does not deny that the statute imposes an "undue burden" *if* it applies to the more commonly used D&E procedure as well as to D&X. And we agree with the Eighth Circuit that it does so apply.

Our earlier discussion of the D&E procedure shows that it falls within the statutory prohibition. The statute forbids "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." We do not understand how one could distinguish, using this language, between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to the head is drawn through the cervix). Evidence before the trial court makes clear that D&E will often involve a physician pulling a "substantial portion" of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus. Indeed D&E involves dismemberment that commonly occurs only when the fetus meets resistance that restricts the motion of the fetus.

Even if the statute's basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D&E and D&X -- though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures. Nor does the statute anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus. Thus, the dissenters' argument that the law was generally intended to bar D&X can be both correct and irrelevant. The relevant question is *not* whether the legislature wanted to ban D&X; it is whether the law was intended to apply *only* to D&X. The plain language covers both procedures. Both procedures can involve the introduction of a "substantial portion" of a still living fetus, through the cervix, into the vagina -- the very feature of an abortion that leads Justice Thomas to characterize such a procedure as involving "partial birth."

The Nebraska State Attorney General argues that the statute does differentiate between the two procedures. He says that the statutory words "substantial portion" mean "the child up to the head." He consequently denies the statute's application where the physician introduces into the birth canal a fetal arm or leg or anything less than the entire fetal body. He argues further that we must defer to his views about the meaning of the state statute.

We cannot accept the Attorney General's narrowing interpretation of the Nebraska statute.

CONCURRENCE: Justice Stevens/Ginsburg...I am not persuaded that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of "potential life" than the equally gruesome procedure Nebraska claims it still allows.

> As a constitutional matter, since when are you, Justice Stevens, the arbiter of what is or is not more gruesome? Is that really your function? The legislatures of 30 states disagree with you.

...The *Roe v. Wade* holding -- that the word "liberty" in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision -- makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty. But one need not even approach this view today to conclude that Nebraska's law must fall. For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.

CONCURRENCE: Justice O'Connor...First, our precedent requires that the statute include a health exception. Second, **Nebraska's statute is unconstitutional on the alternative and independent ground that it imposes an undue burden on a woman's right to choose to terminate her pregnancy before viability.** Nebraska's ban covers not just the D&X procedure, but also the D&E procedure, "the most commonly used method for performing pre-viability second trimester

abortions." By proscribing the most commonly used method for pre-viability second trimester abortions, the statute creates a "substantial obstacle to a woman seeking an abortion" and, therefore, imposes an undue burden on a woman's right to terminate her pregnancy prior to viability...

If Nebraska's statute limited its application to the D&X procedure and included an exception for the life and health of the mother, the question presented would be quite different. As we held in *Casey*, an abortion regulation constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." If there were adequate alternative methods for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would "amount in practical terms to a substantial obstacle to a woman seeking an abortion." **Thus, 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 in my view.**

CONCURRENCE: Justice Ginsburg/Stevens...**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" violates the Constitution. *Casey*. Such an obstacle exists if the State stops a woman from choosing the procedure <u>her doctor "reasonably believes</u> will best protect the woman in the exercise of her constitutional liberty." Again as stated by Chief Judge Posner, "if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."**...

> This is just TOOOOOO much!!! Ginsburg and Stevens are giving free rein to one doctor on a case by case basis to determine what is constitutional and what is not. "Whatever her doctor <u>reasonably believes</u> will protect her interests" is defined as that which <u>no state can prohibit</u>. Truly remarkable, at least in my opinion.

DISSENT: Justice Scalia...**Someday *Stenberg* v. *Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception" -- which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (<u>how can one prove the contrary beyond a reasonable doubt?</u>) -- <u>is to give live-birth abortion free rein</u>. The 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**.

The two lengthy dissents in this case have set out to establish that today's result does not follow from *Planned Parenthood v. Casey*. It would be unfortunate, however, if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey*. It is not that, but

is *Casey*'s logical and entirely predictable consequence.

But the Court gives a second and independent reason for invalidating this humane (not to say anti-barbarian) law: That it fails to allow an exception for the situation in which the abortionist believes that this live-birth method of destroying the child might be safer for the woman. (As pointed out by Justice Thomas and elaborated upon by Justice Kennedy, there is no good reason to believe this is ever the case, but -- who knows? -- it sometime *might* be.)

I have joined Justice Thomas's dissent because I agree that today's decision is an "unprecedented expansion" of our prior cases, "is not mandated" by *Casey*'s "undue burden" test and can even be called (though this pushes me to the limit of my belief) "obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires." But I never put much stock in *Casey*'s explication of the inexplicable. In the last analysis, my judgment that *Casey* does not support today's tragic result can be traced to the fact that what I consider to be an "undue burden" is different from what the majority considers to be an "undue burden" -- a conclusion that can not be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today's majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised -- a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"– *i.e.*, goes too far.

In my dissent in *Casey*, I wrote that the "undue burden" test made law by the joint opinion created a standard that was "as doubtful in application as it is unprincipled in origin"*;* "hopelessly unworkable in practice"*;* "ultimately standardless". Today's decision is the proof. As long as we are debating this issue of necessity for a health-of-the-mother exception on the basis of *Casey*, it is really quite impossible for us dissenters to contend that the majority is *wrong* on the law -- any more than it could be said that one is *wrong in law* to support or oppose the death penalty, or to support or oppose mandatory minimum sentences. The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the joint opinion's expressed belief that *Roe v. Wade* had "called the contending sides of a national controversy to end

their national division by accepting a common mandate rooted in the Constitution" and that the decision in *Casey* would ratify that happy truce. It seemed to me, quite to the contrary, that "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since"; and that, "by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees." Today's decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism -- as well it should. I cannot understand why those who *acknowledge* that, in the opening words of Justice O'Connor's concurrence, "the issue of abortion is one of the most contentious and controversial in contemporary American society" persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that contention and controversy rather than be consumed by it. **If only for the sake of its own preservation, the Court should return this matter to the people -- where the Constitution, by its silence on the subject, left it -- and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.**

DISSENT: Justice Kennedy/Rehnquist...The D&X can be used, as a general matter, after 19 weeks gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. In the D&X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, "as the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child." With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair of scissors. Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus' head smaller is given the clinically neutral term "reduction procedure." Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.

Casey held that cases decided in the wake of *Roe v. Wade* had "given state interests too little acknowledgment and implementation." The decision turned aside any contention that a person has the "right to decide whether to have an abortion without 'interference from the State'" and rejected a strict scrutiny standard of review as "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion.

States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.

Casey demonstrates that the interests asserted by the State are legitimate and recognized by law. It is argued, however, that a ban on the D&X does not further these interests. This is because, the reasoning continues, the D&E method, which Nebraska claims to be beyond its intent to regulate, can still be used to abort a fetus and is no less dehumanizing than the D&X method. While not adopting the argument in express terms, the Court indicates tacit approval of it by refusing to reject it in a forthright manner. Rendering express what is only implicit in the majority opinion, Justices Stevens and Ginsburg are forthright in declaring that the two procedures are indistinguishable and that Nebraska has acted both irrationally and without a proper purpose in enacting the law. **THE ISSUE IS NOT WHETHER MEMBERS OF THE JUDICIARY CAN SEE A DIFFERENCE BETWEEN THE TWO PROCEDURES. IT IS WHETHER NEBRASKA CAN. THE COURT'S REFUSAL TO RECOGNIZE NEBRASKA'S RIGHT TO DECLARE A MORAL DIFFERENCE BETWEEN THE PROCEDURE IS A DISPIRITING DISCLOSURE OF THE ILLOGIC AND ILLEGITIMACY OF THE COURT'S APPROACH TO THE ENTIRE CASE.**

The Court's holding contradicts *Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal.

Demonstrating a further and basic misunderstanding of *Casey*, the Court holds the ban on the D&X procedure fails because it does not include an exception permitting an abortionist to perform a D&X whenever he believes it will best preserve the health of the woman. The Court awards each physician a veto power over the State's judgment that the procedures should not be performed.

I am in full agreement with Justice Thomas that the appropriate *Casey* inquiry is not, as the Court would have it, whether the State is preventing an abortionist from doing something that, in his medical judgment, he believes to be the most appropriate course of treatment. Laws having the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus" are prohibited. Nebraska's law does not have this purpose or effect.

The holding of *Casey*, allowing a woman to elect abortion in defined circumstances, is not in question here. Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman. ACOG "could identify no circumstances under which D&X would be the only option to save the life or preserve the health of the woman." The AMA agrees, stating the "AMA's expert panel, which included an ACOG representative, could not find 'any' identified circumstance where it was 'the only appropriate alternative.'" The Court's conclusion that the D&X is the safest method requires it to replace the words "may be" with the word "is" in the following sentence from ACOG's position statement: "An intact D&X, however, may be the best or most appropriate

procedure in a particular circumstance."

In deferring to the physician's judgment, the Court turns back to cases decided in the wake of *Roe*, cases which gave a physician's treatment decisions controlling weight. Before it was repudiated by *Casey*, the approach of deferring to physicians had reached its apex in *Akron,* where the Court held an informed consent requirement was unconstitutional. The law challenged in *Akron* required the abortionist to inform the woman of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide assistance and information. The physician was also required to advise the woman of the risks associated with the abortion technique to be employed and other information. The law was invalidated based on the physician's right to practice medicine in the way he or she saw fit; for, according to the *Akron* Court, "it remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." Dispositive for the Court was that the law was an "intrusion upon the discretion of the pregnant woman's physician." The physician was placed in an "undesired and uncomfortable straitjacket." The Court's decision today echoes the *Akron* Court's deference to a physician's right to practice medicine in the way he sees fit.

The Court, of course, does not wish to cite *Akron*; yet the Court's holding is indistinguishable from the reasoning in *Akron* that *Casey* repudiated. No doubt exists that today's holding is based on a PHYSICIAN-FIRST VIEW which finds its primary support in that now-discredited case. Rather than exalting the right of a physician to practice medicine with unfettered discretion, *Casey* recognized: "Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." *Casey* discussed the informed consent requirement struck down in *Akron* and held *Akron* was wrong. The doctor-patient relation was only "entitled to the same solicitude it receives in other contexts." The standard of medical practice cannot depend on the individual views of Dr. Carhart and his supporters. The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health. *Casey* recognized the point, holding the physician's ability to practice medicine was "subject to reasonable regulation by the State" and would receive the "same solicitude it receives in other contexts." In other contexts, the State is entitled to make judgments where high medical authority is in disagreement.

Justice O'Connor assures the people of Nebraska they are free to redraft the law to include an exception permitting the D&X to be performed when "the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother." The assurance is meaningless. She has joined an opinion which accepts that Dr. Carhart exercises "appropriate medical judgment" in using the D&X for every patient in every procedure, regardless of indications, after 15 weeks' gestation. A ban which depends on the "appropriate medical judgment" of Dr. Carhart is no ban at all. This is the vice of a health exception resting in the physician's discretion.

I continue with my theme. If the law gives total discretion to the physician, physician always wins, regardless of what the law says about when abortion can take place.

The Court and Justice O'Connor conclude that the statute requires a health exception which, for all practical purposes and certainly in the circumstances of this case, allows the physician to make the determination in his own professional judgment. This is an immense constitutional holding. It is unnecessary; and, for the reasons I have sought to explain, it is incorrect. While it is not clear which of the two halves of the majority opinion is *dictum*, both are wrong.

Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away. The Court's holding stems from misunderstanding the record, misinterpretation of *Casey*, outright refusal to respect the law of a State, and statutory construction in conflict with settled rules. The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence. The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*. The Court closes its eyes to these profound concerns.

DISSENT: Justice Thomas/Scalia...In 1973, this Court struck down an Act of the Texas Legislature that had been in effect since 1857, thereby rendering unconstitutional abortion statutes in dozens of States. *Roe v. Wade.* **That decision was grievously wrong.** Abortion is a unique act, in which a woman's exercise of control over her own body ends human life or potential human life. Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.

In the years following *Roe*, this Court applied, and, worse, extended, that decision to strike down numerous state statutes that purportedly threatened a woman's ability to obtain an abortion. The Court voided parental consent laws (*Planned Parenthood v. Danforth),* legislation requiring that second-trimester abortions take place in hospitals (*Akron v. Akron Center for Reproductive Health),* and even a requirement that both parents of a minor be notified before their child has an abortion (*Hodgson v. Minnesota).* It was only a slight exaggeration when this Court described, in 1976, a right to abortion "without interference from the State." *Danforth.* The Court's expansive application of *Roe* in this period, even more than *Roe* itself, was fairly described as the "unrestrained imposition of the Court's own, extra-constitutional value preferences" on the American people. *Thornburgh.*

It appeared that this era of Court-mandated abortion on demand had come to an end, first with our decision in *Webster* (lamenting that the plurality had "discarded" *Roe*), and then finally (or so we

were told) in our decision in *Planned Parenthood v. Casey.* Although in *Casey* the separate opinions of Justice Rehnquist and Justice Scalia urging the Court to overrule *Roe* did not command a majority, seven Members of that Court, including six Members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States' interest in respecting fetal life at all stages of development. The joint opinion authored by Justices O'Connor, Kennedy & Souter concluded that prior case law "went too far" in "undervaluing the State's interest in potential life" and in "striking down...some abortion regulations which in no real sense deprived women of the ultimate decision." *Roe* and subsequent cases, according to the joint opinion, had wrongly "treated all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted," a treatment that was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." Accordingly, the joint opinion held that so long as state regulation of abortion furthers legitimate interests -- that is, interests not designed to strike at the right itself -- the regulation is invalid only if it imposes an undue burden on a woman's ability to obtain an abortion, meaning that it places a *substantial obstacle* in the woman's path.

The *Casey* joint opinion was constructed by its authors out of whole cloth. The standard set forth in the *Casey* joint opinion has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace. Even assuming, however, as I will for the remainder of this dissent, that *Casey*'s fabricated undue-burden standard merits adherence (which it does not), today's decision is extraordinary. Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe. This holding cannot be reconciled with *Casey*'s undue-burden standard, as that standard was explained to us by the authors of the joint opinion, and the majority hardly pretends otherwise. In striking down this statute -- which expresses a profound and legitimate respect for fetal life and which leaves unimpeded several other safe forms of abortion -- the majority opinion gives the lie to the promise of *Casey* that regulations that do no more than "express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose" whether or not to have an abortion. Today's decision is so obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, **a reinstitution of the pre-*Webster* abortion-on-demand era in which the mere invocation of "abortion rights" trumps any contrary societal interest. If this statute is unconstitutional under *Casey*, then *Casey* meant nothing at all, and the Court should candidly admit it...**

Can a State constitutionally prohibit the partial birth abortion procedure without a health exception? Although the majority and Justice O'Connor purport to rely on the standard articulated in the *Casey* joint opinion in concluding that a State may not, they in fact disregard it entirely.

Though Justices O'Connor, Kennedy and Souter declined in *Casey*, on the ground of *stare decisis*, to reconsider whether abortion enjoys any constitutional protection, *Casey* professed to be, in part, a repudiation of *Roe* and its progeny. The *Casey* joint opinion expressly noted that prior case law had

undervalued the State's interest in potential life and had invalidated regulations of abortion that "in no real sense deprived women of the ultimate decision." "*Roe* v. *Wade* speaks with clarity in establishing...the State's 'important and legitimate interest in potential life.' That portion of the decision in *Roe* has been given too little acknowledgment." The joint opinion repeatedly recognized the States' weighty interest in this area. ("State...may express profound respect for the life of the unborn"); ("the State's profound interest in potential life"); ("profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage"). And, the joint opinion expressed repeatedly the States' legitimate role in regulating abortion procedures. ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted"); ("Not all governmental intrusion with abortion is of necessity unwarranted"). According to the joint opinion, "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."

The *Casey* joint opinion therefore adopted the standard: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." A regulation imposes an "undue burden" only if it "has the effect of placing a substantial obstacle in the path of a woman's choice."

There is no question that the State of Nebraska has a valid interest in prohibiting partial birth abortion. *Casey* itself noted that States may "express profound respect for the life of the unborn." States may, without a doubt, express this profound respect by prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life. The AMA has recognized that this procedure is "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed *outside* the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." Thirty States have concurred with this view.

Although the description of this procedure set forth above should be sufficient to demonstrate the resemblance between the partial birth abortion procedure and infanticide, <u>the testimony of one nurse</u> who observed a partial birth abortion procedure makes the point even more vividly:

> "The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp."

The question whether States have a legitimate interest in banning the procedure does not require additional authority. In a civilized society, the answer is too obvious, and the contrary arguments too offensive to merit further discussion.

The next question, therefore, is whether the Nebraska statute is unconstitutional because it does not contain an exception that would allow use of the procedure whenever "necessary in appropriate medical judgment, for the preservation of the...health of the mother." According to the majority, such a health exception is required here because there is a "division of opinion among some medical experts over whether D&X is generally safer than D&E, and an absence of controlled medical studies that would help answer these medical questions." In other words, unless a State can conclusively establish that an abortion procedure is no safer than other procedures, the State cannot regulate that procedure without including a health exception...The rule set forth by the majority and Justice O'Connor dramatically expands on our prior abortion cases and threatens to undo *any* state regulation of abortion procedures.

The majority and Justice O'Connor suggest that their rule is dictated by a straightforward application of *Roe* and *Casey*. But that is simply not true. In *Roe* and *Casey*, the Court stated that the State may "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." *Casey* said that a health exception must be available if "*continuing her pregnancy* would constitute a threat" to the woman. Under these cases, if a State seeks to prohibit abortion, even if only temporarily or under particular circumstances, as *Casey* says that it may the State must make an exception for cases in which the life or health of the mother is endangered by continuing the pregnancy. These cases addressed only the situation in which a woman must obtain an abortion because of some threat to her health from continued pregnancy. But *Roe* and *Casey* say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods. Today's majority and Justice O'Connor twist *Roe* and *Casey* to apply to the situation in which a woman desires -- **for whatever reason** -- an abortion and wishes to obtain the abortion by some particular method. In other words, the majority and Justice O'Connor fail to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion (for whatever reason) to prefer one method over another...

The majority effectively concedes that *Casey* provides no support for its broad health exception rule by relying on pre-*Casey* authority, including a case that was specifically disapproved of in *Casey* for giving too little weight to the State's interest in fetal life. See *Casey* (overruling the parts of *Thornburgh* that were inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn);(relying on *Thornburgh* for the proposition that the Court was expanding on *Roe* in that case). Indeed, Justice O'Connor, who joins the Court's opinion, was on the Court for *Thornburgh* and was in dissent, arguing that, under the undue-burden standard, the statute at issue was constitutional (arguing that the challenged state statute was not "unduly burdensome"). The majority's resort to this case proves my point that the holding today assumes that the standard set forth in the *Casey* joint opinion is no longer governing.

And even if I were to assume that the pre-*Casey* standards govern, the cases cited by the majority provide no support for the proposition that the partial birth abortion ban must include a health exception because some doctors believe that partial birth abortion is safer. In *Thornburgh*, *Danforth*, and *Doe*, the Court addressed health exceptions for cases in which *continued pregnancy* would pose

a risk to the woman. And in *Colautti,* the Court explicitly declined to address whether a State can constitutionally require a tradeoff between the woman's health and that of the fetus. The broad rule articulated by the majority and by Justice O'Connor are unprecedented expansions of this Court's already expansive pre-*Casey* jurisprudence.

As if this state of affairs were not bad enough, the majority expands the health exception rule articulated in *Casey* in one additional and equally pernicious way. Although *Roe* and *Casey* mandated a health exception for cases in which abortion is "necessary" for a woman's health, the majority concludes that a procedure is "necessary" **if it has any comparative health benefits**. In other words, according to the majority, so long as a doctor can point to support in the profession for his (or the woman's) preferred procedure, it is "necessary" and the physician is entitled to perform it. But such a health exception requirement eviscerates *Casey*'s **undue burden standard** and imposes **unfettered abortion-on-demand**. **The exception entirely swallows the rule**.

Like I said from the beginning, if *Roe* is overruled and states pass laws permitting abortion only to preserve the life or "health" of the mother and they define "health" liberally, all of this is much ado about nothing because if the "exception swallows the rule," the rule is irrelevant.

The majority assiduously avoids addressing the *actual* standard articulated in *Casey* – whether prohibiting partial birth abortion without a health exception poses a substantial obstacle to obtaining an abortion. And for good reason: Such an obstacle does not exist. Moreover, even if I were to assume credible evidence on both sides of the debate, that fact should resolve the undue-burden question in favor of allowing Nebraska to legislate. Where no one knows whether a regulation of abortion poses any burden at all, the burden surely does not amount to a "substantial obstacle." Under *Casey*, in such a case we should defer to the legislative judgment.

In Justice O'Connor's words: "It is...difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the ACOG or similar group revises its views about what is and what is not appropriate medical procedure in this area." *Akron v. Akron Center for Reproductive Health, Inc.*

The Court today disregards these principles and the clear import of *Casey*. We were reassured repeatedly in *Casey* that not all regulations of abortion are unwarranted and that the States may express profound respect for fetal life. Under *Casey*, the regulation before us today should easily pass constitutional muster. But the Court's abortion jurisprudence is a particularly virulent strain of constitutional exegesis. And so today we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result. I respectfully dissent.