

## Stenberg v. Carhart

530 U.S. 914, 120 S.Ct. 2597 (2000)

The Court's decision was five to four in affirming the federal appellate court's decision invalidating Nebraska's "partial birth abortion" law. The facts are discussed in the opinion for the Court delivered by Justice Breyer. Justices O'Connor, Ginsburg, and Stevens each filed concurring opinions. Justices Kennedy, Scalia, and Thomas each filed dissenting opinions, and Chief Justice Rehnquist joined the opinions of Justices Kennedy and Thomas.

□ Justice BREYER delivered the opinion of the Court.

We again consider the right to an abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins

at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.

Three established principles determine the issue before us. We shall set them forth in the language of the joint opinion in *Casey*. 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 shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

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."

We apply these principles to a Nebraska law banning "partial birth abortion." The statute 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." 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 classifies violation of the statute as a "Class III felony" carrying 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.

We hold that this statute violates the Constitution. . . .

The evidence before the trial court, as supported or supplemented in the literature, indicates the following:

1. About 90% of all abortions performed in the United States take place during the first trimester of pregnancy, before 12 weeks of gestational age. During the first trimester, the predominant abortion method is "vacuum

aspiration," which involves insertion of a vacuum tube (cannula) into the uterus to evacuate the contents. Such an abortion is typically performed on an outpatient basis under local anesthesia. The procedure's mortality rates for first trimester abortion are, for example, 5 to 10 times lower than those associated with carrying the fetus to term. Complication rates are also low. As the fetus grows in size, however, the vacuum aspiration method becomes increasingly difficult to use.

2. Approximately 10% of all abortions are performed during the second trimester of pregnancy (12 to 24 weeks). In the early 1970's, inducing labor through the injection of saline into the uterus was the predominant method of second trimester abortion. Today, however, 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 of gestational age.

3. D&E "refers generically to transcervical procedures performed at 13 weeks gestation or later." . . . There are variations in D&E operative strategy. However, the common points are that D&E 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 disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus.

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. . . .

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 the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures (the next safest mid-second trimester procedures).

6. At trial, Dr. Carhart and Dr. Stubblefield described a variation of the D&E procedure, which they 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. . . .

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. 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. The American College of Obstetricians and Gynecologists 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 nonviable fetuses, such as fetuses with abnormal fluid accumulation in the brain (hydrocephaly).

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.

The question before us is whether Nebraska's statute, making criminal the performance of a "partial birth abortion," violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey*, and *Roe v. Wade*. We conclude that it does 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. We shall discuss each of these reasons in turn. . . .

The fact that Nebraska's law applies both pre- and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability. Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.

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 describes its interests differently. It says the law "show[s] concern for the life of the unborn," "prevent[s] cruelty to partially born children," and "preserve[s] 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.

Consequently, the governing standard requires an exception "where it is

necessary, in appropriate medical judgment for the preservation of the life or health of the mother," for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Doe v. Bolton*, 410 U.S. 179 (1973). . . .

Nebraska responds that the law does not require a health exception unless there is a need for such an exception. . . . Nebraska, along with supporting *amici*, replies that these findings are irrelevant, wrong, or applicable only in a tiny number of instances. It says (1) that the D&X procedure is "little-used," (2) by only "a handful of doctors." It argues (3) that D&E and labor induction are at all times "safe alternative procedures." It refers to the testimony of petitioners' medical expert, who testified (4) that the ban would not increase a woman's risk of several rare abortion complications (disseminated intravascular coagulopathy and amniotic fluid embolus).

The Association of American Physicians and Surgeons et al., *amici* supporting Nebraska, argue (5) that elements of the D&X procedure may create special risks, including cervical incompetence caused by overdilatation, 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.

Nebraska further emphasizes (6) 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," (7) an American Medical Association policy statement that "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion." And it points out (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."

We find these eight arguments insufficient to demonstrate that Nebraska's law needs no health exception. For one thing, certain of the arguments are beside the point. The D&X procedure's relative rarity (argument (1)) is not highly relevant. The D&X is an infrequently used abortion procedure; but the health exception question is whether protecting women's health requires an exception for those infrequent occasions. A rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone—the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. Nor can we know whether the fact that only a "handful" of doctors use the procedure (argument (2)) reflects the comparative rarity of late second term abortions, the procedure's recent development, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility.

For another thing, the record responds to Nebraska's (and *amici*'s) medically based arguments. In respect to argument (3), for example, 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 respect to argument (4), the District Court simply relied on different expert testimony—testimony stating that "[a]nother advantage of the Intact D&E is that it eliminates the risk of embolism of cerebral tissue into the woman's blood stream."

In response to *amici*'s argument (5), the American College of Obstetricians and Gynecologists, in its own *amici* brief, denies that D&X generally poses risks greater than the alternatives. It says that the suggested alternative procedures involve similar or greater risks of cervical and uterine injury, for "D&E procedures, involve similar amounts of dilatation" and "of course childbirth involves even greater cervical dilatation." The College points out that Dr. Carhart does not reposition the fetus thereby avoiding any risks stemming from conversion to breech presentation, and that, as compared with D&X, D&E involves the same, if not greater, "blind" use of sharp instruments in the uterine cavity.

We do not quarrel with Nebraska's argument (6), for Nebraska is right. There are no general medical studies documenting comparative safety. Neither do we deny the import of the American Medical Association's statement (argument (7))—even though the State does omit the remainder of that statement: "The AMA recommends that the procedure not be used unless alternative procedures pose materially greater risk to the woman."

We cannot, however, read the American College of Obstetricians and Gynecologists panel's qualification (that it could not "identify" a circumstance where D&X was the "only" life- or health-preserving option) as if, according to Nebraska's argument (8), it denied the potential health-related need for D&X. That is because the College writes the following in its *amici* brief: "Depending on the physician's skill and experience, the D&X procedure can be the most appropriate abortion procedure for some women in some circumstances. D&X presents a variety of potential safety advantages over other abortion procedures used during the same gestational period." . . .

The upshot is a District Court finding that D&X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these medically related evidentiary circumstances, we believe the law requires a health exception. . . .

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. . . .

The judgment of the Court of Appeals is Affirmed.

□ (*Justice O'CONNOR, concurring.*)

I write separately to emphasize the following points.

First, the Nebraska statute is inconsistent with *Casey* because it lacks an

exception for those instances when the banned procedure is necessary to preserve the health of the mother. . . . Contrary to the assertions of Justice KENNEDY and Justice THOMAS, the need for a health exception does not arise from "the individual views of Dr. Carhart and his supporters." Rather, as the majority explains, where, as here, "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the mother." Accordingly, our precedent requires that the statute include a health exception.

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 dilation and extraction (D&X) procedure, but also the dilation and evacuation (D&E) procedure, "the most commonly used method for performing previability second trimester abortions." . . . Thus, it is not possible to interpret the statute's language as applying only to the D&X procedure. Moreover, it is significant that both the District Court and the Court of Appeals interpreted the statute as prohibiting abortions performed using the D&E method as well as the D&X method. . . . Indeed, Nebraska conceded at oral argument that "the State could not prohibit the D&E procedure." By proscribing the most commonly used method for previability 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.

It is important to note that, unlike Nebraska, some other States have enacted statutes more narrowly tailored to proscribing the D&X procedure alone. Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion, such as the D&E and vacuum aspiration procedures. . . . By restricting their prohibitions to the D&X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a principal defect of the Nebraska law. . . .

Nebraska's statute, however, does not meet these criteria. It contains no exception for when the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother; and it proscribes not only the D&X procedure but also the D&E procedure, the most commonly used method for previability second trimester abortions, thus making it an undue burden on a woman's right to terminate her pregnancy. For these reasons, I agree with the Court that Nebraska's law is unconstitutional.

□ Justice GINSBURG, with whom Justice STEVENS joins, concurring.

I write separately only to stress that amidst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska's "partial birth abortion" law. As the Court observes, this law does not save any fetus from destruction, for it targets only "a method of performing abortion." Nor does the statute seek to protect the lives or health of pregnant women. Moreover, as Justice STEVENS points out, the most common method of performing previability second trimester abortions is no less distressing or susceptible to gruesome description. . . .

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*.

□ Justice STEVENS, with whom Justice GINSBURG joins, concurring.

[D]uring the past 27 years, the central holding of *Roe v. Wade* has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That 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.

□ Justice SCALIA, dissenting.

I have joined Justice THOMAS's dissent because I agree that today's decision is an "unprecedented expansio[n]" 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. . . .

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 "call[ed] 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, "[t]he 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.

□ Justice KENNEDY, with whom Chief Justice Rehnquist joins, dissenting.

The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.

The Court's decision today, in my submission, repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right. The legislation is well within the State's competence to enact. Having concluded Nebraska's law survives the scrutiny dictated by a proper understanding of *Casey*, I dissent from the judgment invalidating it. . . .

□ Justice THOMAS, with whom Chief Justice Rehnquist and Justice SCALIA join, dissenting.

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 reinstatement 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.

To reach its decision, the majority must take a series of indefensible steps. The majority must first disregard the principles that this Court follows in every context but abortion: We interpret statutes according to their plain meaning and we do not strike down statutes susceptible of a narrowing construction. The majority also must disregard the very constitutional standard it purports to employ, and then displace the considered judgment of the people of Nebraska and 29 other States. The majority's decision is lamentable; because of the result the majority reaches, the illogical steps the majority takes to reach it, and because it portends a return to an era I had thought we had at last abandoned. . . .

[Because I interpret] Nebraska's partial birth abortion statute [to] permit doctors to perform D&E abortions, the question remains whether a State can 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." The joint opinion repeatedly recognized the States' weighty interest in this area.

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—one not designed to strike at the right itself—in prohibiting partial birth abortion. *Casey* itself noted that States may "express profound respect for the life of the unborn."

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." . . .

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. . . .

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.