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Cover Page Footnote
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WINTER COUNT:* TAKING STOCK OF ABORTION RIGHTS AFTER *CASEY* AND *CARHART*

*Caitlin E. Borgmann***

In 1973, the United States Supreme Court decided *Roe v. Wade*,[1] the landmark case that established the right to abortion as a fundamental constitutional right. The Court faced its first real opportunity to reverse that monumental decision a mere sixteen years later. In *Webster v. Reproductive Health Services*,[2] the State of Missouri and the United States explicitly asked the Court to overrule *Roe*.[3] Women in the United States waited anxiously to see whether the Court would end the brief and besieged era of the constitutional right to abortion.[4] The Court in *Webster* ultimately ducked the question, but its decision presaged a fundamental change in how the Court would approach the right to abortion.[5] The right would be different from the one announced in *Roe*, and it would be weaker.

Within three years of *Webster*, the Court's composition changed, and the change boded ill for abortion rights. President George H. W. Bush appointed Justices Souter and Thomas, in quick succession, to replace two of the Court's liberal stalwarts, Justices Brennan and Marshall.[6] Hot on the heels of this shift, the Court accepted review of *Planned Parenthood v. Casey*,[7] a case in which the government again asked the Court to overrule *Roe*. The stakes for abortion as a constitutional right could not have been higher.

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* A winter count is a kind of calendar in which certain Native American tribes took stock of the year by chronicling its most important events.

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1. 410 U.S. 113 (1973).

2. 492 U.S. 490 (1989).

3. *Id.* The United States participated as amicus curiae.

4. In fact, women and pro-choice activists did more than wait passively. *Webster*'s filing in the Supreme Court occasioned a massive pro-choice march in Washington, D.C., that was attended by more than 300,000 demonstrators. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY 674 (updated ed. 1998).

5. *See infra* notes 15-27 and accompanying text.

6. Justice Souter was appointed in 1990 and Justice Thomas in 1991. SUPREME COURT A TO Z 429, 470 (Kenneth Jost ed., 1998).

7. 505 U.S. 833 (1992).

In a surprise decision, the Court declined to overturn *Roe*, with an improbable alliance of Justices reaffirming what it called *Roe*'s "essential holding."[8] The constitutional right to abortion had now dodged its second bullet, this time with a Court that appeared even less sympathetic to the abortion right. Some commentators proclaimed that the major legal battle over abortion was finished.[9] Indeed, today, at age thirty-one, *Roe* has yet to be expressly overruled. The Court recently reaffirmed a woman's right to choose abortion, striking down Nebraska's "partial-birth abortion" ban in *Stenberg v. Carhart*.[10] In that decision, the Court firmly announced it would not reexamine the constitutionality of abortion rights: "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 .... We shall not revisit those legal principles."[11] A cursory look at *Casey* and *Carhart* might lead an observer to conclude that, although the Court has renounced key aspects of *Roe*'s framework, the right to abortion remains well-protected under the federal Constitution.

But such a conclusion would ignore the implications of the Court's decision in *Casey* and would place too much hope in *Carhart*. *Casey* fundamentally changed the character of the right to abortion in this country, reinventing the right in a form more vulnerable to continued erosion.[12] And *Carhart*, although drawing an important line in the sand against extreme abortion measures, did not alter this basic fact.[13] Justice Blackmun, *Roe*'s author, had forecast the sea change in his dissent in *Webster*. The worst of Blackmun's fears have not been realized: abortion may not be banned altogether and severe restrictions that obstruct access to safe abortions are likewise impermissible. Beyond this bottom line, however, little of *Roe*'s protections remain and the right to abortion continues to be burdened in ever more creative ways. The women most at risk—including many poor women and teenagers—cannot overcome all of the barriers and have effectively lost

8. *Id.* at 846; *see infra* text accompanying notes 36-44.

9. *See, e.g.*, GARROW, *supra* note 4, at 737 ("After 1992 no serious scholar of the Supreme Court could any longer doubt that the constitutional core of *Roe*, as upheld and reaffirmed in *Casey*, was secure for all time.").

10. 530 U.S. 914 (2000).

11. *Id.* at 921.

12. *See* discussion *infra* Part II.

13. *See* discussion *infra* Part III.

their right to abortion.[14] In this article, I examine *Casey* and *Carhart* to assess the state of abortion rights today.

I. *WEBSTER V. REPRODUCTIVE HEALTH SERVICES*

Webster v. Reproductive Health Services[15] presented a constitutional challenge to Missouri's omnibus abortion statute.[16] The legislation was crafted by anti-choice activists specifically to put an abortion test case before the Supreme Court.[17] In a highly fractured decision, a plurality of the Court declined to overrule *Roe* explicitly although it upheld all of the statute's challenged provisions.[18] Justice Rehnquist, writing for the plurality, claimed that the case "affords us no occasion to revisit the holding of *Roe*, . . . and we leave [*Roe*] undisturbed."[19]

Although it carefully avoided overruling *Roe* outright, the plurality advocated limiting *Roe* dramatically.[20] Justice Rehnquist's opinion did not directly identify what level of review should apply to abortion restrictions, but the plurality's deference to the state's interests[21] signaled a significant retreat from *Roe*'s strict scrutiny standard, the highest level of constitutional review.[22] Justice Blackmun called the plurality's analysis "nothing more than a dressed-up version of rational-basis review, this Court's most lenient level of scrutiny."[23] The most hotly debated provision was a viability-testing requirement for all abortions performed starting at twenty weeks of pregnancy.[24] Admitting that this provision increased the costs of abortions and curbed physician discretion,

14. *See* Stanley K. Henshaw & Larry B. Finer, *Accessibility of Abortion Services in the United States, 2001*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 16 (2001).

15. 492 U.S. 490 (1989).

16. *Id.* at 500-01.

17. *See* Eloise Salholz & Ann McDaniel, *Battle over Abortion*, NEWSWEEK, May 1, 1989, at 29-30.

18. 492 U.S. at 521.

19. *Id.* Rehnquist wrote for himself, Justice White, and the newly appointed Justice Kennedy.

20. *Id.* at 517-21. Justice O'Connor denied that the constitutional validity of *Roe* and its precedents were even called into question in the case, suggesting that, when the right case came before the Court, "there will be time enough to reexamine *Roe*. And to do so carefully." *Id.* at 526 (O'Connor, J., concurring in part and concurring in the judgment). Justice Scalia, on the other hand, accused the Court of effectively overruling *Roe* and said he "would do it more explicitly." *Id.* at 532 (Scalia, J., concurring in part and concurring in the judgment).

21. *See id.* at 519-21.

22. *See* 16A AM. JURIS. 2D, *Constitutional Law* § 387 (1998) (describing the strict scrutiny test).

23. 492 U.S. at 555 (Blackmun, J., dissenting).

24. *See id.* at 513-17 (plurality opinion).

Rehnquist nonetheless proclaimed himself "satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life."[25] Rehnquist concluded, "To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases."[26]

Justice Blackmun, author of the majority opinion in *Roe*, saw a dangerous duplicity in the plurality's approach:

> Never in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review . . . the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed," . . . [b]ut this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State. The simple truth is that *Roe* would not survive the plurality's analysis, and that the plurality provides no substitute for *Roe*'s protective umbrella.[27]

In *Planned Parenthood v. Casey*, three Justices offered that substitute in the form of the undue burden test.

II. *PLANNED PARENTHOOD V. CASEY*

The Court confronted another opportunity to overrule *Roe* just three years later in *Planned Parenthood v. Casey*,[28] but this time the Court directly rebuffed the government's request that it do so.[29] *Casey* is widely known for upholding *Roe v. Wade*, but many do not comprehend the extent to which *Casey* in fact dismantled *Roe*'s protective framework. Indeed, the majority opinion's sweeping language, celebrating the importance of reproductive freedom

25. *Id.* at 519. Justice Blackmun lambasted this "newly minted standard" as "circular and totally meaningless." *Id.* at 554-55 (Blackmun, J., dissenting). As Blackmun pointed out, "[w]hether a challenged abortion regulation 'permissibly furthers' a legitimate state interest is the *question* that courts must answer in abortion cases, not the standard for courts to apply." *Id.* at 555.

26. *Id.* at 521.

27. *Id.* at 538 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia similarly accused the Court of "contriv[ing]" to avoid reaching the question of *Roe*'s legitimacy, *id.* at 532, claiming that, of all possible approaches, the plurality's avoidance of the question was "the least responsible." *Id.* at 537.

28. 505 U.S. 833 (1992).

29. *See id.* at 846.

for women's autonomy and equality,[30] masked, perhaps deliberately, the decision's alarming retreat from the lines the Court drew in *Roe*.

The joint opinion[31] opened dramatically, heartening those who feared a total loss of the constitutional right to abortion: "Liberty finds no refuge in a jurisprudence of doubt."[32] The opinion went on to decide that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[33] Apprehensive women reading these first pages of the joint opinion may well have breathed a sigh of relief.[34] Of course, the Court could have done away completely with the constitutional right to abortion.[35] Viewed in that light, *Casey* was a victory. But readers who managed to reach the latter parts of the voluminous joint opinion discovered that the Justices' moving rhetoric was misleading.

The most obvious danger sign was that *Casey* upheld all but one of the challenged provisions of the restrictive Pennsylvania Abortion Control Act.[36] Among other provisions, the joint opinion up-

30. *Id.* at 851-53.

31. The Court in *Casey* was splintered. In an unusual, jointly authored opinion, three Justices (O'Connor, Kennedy, and Souter) wrote for the majority (joined by Blackmun and Stevens) reaffirming *Roe*'s "essential holding," the medical emergency exception of the Pennsylvania Abortion Control Act, and striking down its spousal notification requirement. *Id.* at 880-98. The three wrote alone in rejecting *Roe*'s trimester framework in favor of the undue burden standard and in upholding the twenty-four-hour waiting period and parental notification provision (although Justice Stevens concurred in the judgment as to the parental notification provision). *Id.* at 873-77. They were joined by Stevens in upholding the reporting and recordkeeping requirements other than that relating to spousal notice. *Id.* at 900. Justices Rehnquist, White, Scalia, and Thomas would have overruled *Roe*. *See id.* at 944 (Rehnquist, J., dissenting) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled . . . .").

32. *Id.* at 844.

33. *Id.* at 846.

34. One commentator describes how journalists in the courtroom wept as the joint opinion's authors read portions of their surprise opinion aloud. GARROW, *supra* note 4, at 693.

35. *See, e.g.*, Linda Greenhouse, *Blackmun Papers: Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1.

> In the spring of 1992, Justice Harry A. Blackmun's struggle to preserve the right to abortion he had articulated for the Supreme Court two decades earlier was headed for bitter failure. Five justices had voted in a closed-door conference to uphold provisions in a restrictive Pennsylvania abortion law. *Roe v. Wade* was in peril.

Id.

36. The Court struck down a provision that required a married woman to notify her husband before obtaining an abortion. The district court had held all of the challenged provisions unconstitutional except for some of the reporting and recordkeeping requirements and a provision requiring the physician to make an accurate

held a requirement that a woman receive state-mandated information designed to dissuade her from having an abortion and then wait twenty-four hours before obtaining the abortion.[37] The joint opinion could reach this result only by overruling parts of two earlier decisions in which the Court had struck similar regulations under *Roe*'s strict scrutiny analysis.[38]

How did the Justices manage to uphold all of these restrictions while "reaffirming" *Roe*? They did so first by radically revising *Roe*'s "essential holding."[39] *Roe* established the following framework for evaluating abortion restrictions: 1) in the first trimester, the state may not regulate abortion, but instead must leave "the abortion decision and its effectuation . . . to the medical judgment of the pregnant woman's attending physician"; 2) after the first trimester, the state can regulate the abortion procedure, but only in ways "reasonably related to maternal health"; 3) after viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion," so long as it provides exceptions to protect the woman's life and health.[40]

The *Casey* joint opinion redefined *Roe*'s holding as comprising three parts: 1) a recognition of the woman's right to choose an abortion before viability and to obtain it "without undue interference" from the state; 2) a confirmation of the government's power to restrict abortions after fetal viability, provided such restrictions contain exceptions "for pregnancies which endanger the woman's life or health"; and 3) a recognition that the government has "legitimate interests *from the outset of the pregnancy* in protecting the health of the woman and *the life of the fetus*."[41]

This construction diverged significantly from *Roe*'s framework. Although *Roe* had generally acknowledged the state's "important and legitimate" interest in the fetus, Justice Blackmun was careful to recognize that interest as *compelling* only after viability.[42] Be-

diagnosis of gestational age. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1396 (E.D. Pa. 1990). The Court of Appeals affirmed in part and reversed in part, upholding all provisions but the husband-notification requirement. Planned Parenthood v. Casey, 947 F.2d 682, 719 (3d. Cir. 1991).

37. *Casey*, 505 U.S. at 887.

38. *Id.* at 870 (overruling in part Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 763-64 (1986) and City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444 (1983)).

39. *Id.* at 873.

40. Roe v. Wade, 410 U.S. 113, 164-65 (1973).

41. *Casey*, 505 U.S. at 846 (emphasis added). The Justices wrote for the majority in this part of the joint opinion.

42. *Roe*, 410 U.S. at 163.

cause the *Roe* Court had established that the right to abortion was a fundamental right, the state could infringe the right only to further a compelling state interest.[43] The *Casey* joint opinion, by asserting that the state had an interest in "protecting . . . the life of the fetus" *throughout* pregnancy,[44] positioned itself to permit pre-viability restrictions having nothing to do with women's health, restrictions that would have been invalid under *Roe*. Moreover, once it opened the door to such restrictions, the *Casey* joint opinion faced the question how to balance the state's newly enhanced fetal interest against the woman's interest in the abortion. The opinion's reference to "undue interference"[45] in the first prong of its *Roe* restatement, foreshadowed its adoption of the undue burden standard,[46] *Casey*'s answer to the balancing question.

The joint opinion's authors, having modified *Roe*'s holding, now went further, openly "reject[ing] the trimester framework" as 1) "misconceiv[ing] the nature of the pregnant woman's interest" and 2) "undervalu[ing] the State's interest in potential life."[47] The Justices corrected *Roe*'s first "flaw" by adopting the "undue burden" standard.[48] They corrected the second by allowing the state to advance its interest in the fetus even before viability, subject to the undue burden test.[49]

These changes were far more than modest adjustments to *Roe*. Rather, they altered the very nature of the abortion right, demoting it from a fundamental right to something more enigmatic and certainly more fragile. *Casey*'s standard lacks content, which makes it both difficult to apply and susceptible to manipulation. This in turn has rendered the right far more vulnerable to erosion.[50] Moreover, allowing the state to enact pre-viability restrictions based on fetal welfare[51] rather than the woman's health

43. *See id.*

44. *Casey*, 505 U.S. at 846.

45. *Id.*

46. *See id.* at 874-75 (describing the undue burden standard).

47. *Id.* at 873. Justices Blackmun and Stevens did not join this part of the joint opinion.

48. *See id.* at 874.

49. *See id.* at 876.

50. *See* Sabina Zenkick, *X Marks the Spot While* Casey *Strikes Out: Two Controversial Abortion Decisions*, 23 GOLDEN GATE U. L. REV. 1001, 1003 (1993).

51. *Casey* appeared to recognize only the state's interests in the woman's health and in the fetus (or in "potential life"). As discussed below, Justice Kennedy (an author of *Casey*'s joint opinion) in *Carhart* identified a far broader array of permissible state interests, some having little or no relation to the fetus. For simplicity, I refer primarily in this article to the state's interest in the fetus, although the state's motivation for passing an abortion restriction, while couched in terms of fetal welfare, is

meant that the Court had to extend *Roe*'s health exception into the pre-viability period, a development that has sowed additional confusion. Below I discuss the major problems with the undue burden standard, with the expansion of the state's fetal interest, and with the health exception requirement.

A. The Undue Burden Standard

The joint opinion in *Casey* substituted the "undue burden" standard for the strict scrutiny analysis required for all pre-viability abortion restrictions under *Roe*.[52] According to the joint opinion, the *Roe* framework "misconceived the nature of the pregnant woman's interest" before viability by construing the interest as too absolute.[53] The Justices asserted that "[o]nly 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."[54]

Although Justice O'Connor in several earlier opinions had advocated adopting an "undue burden" standard,[55] she and her colleagues articulated a new formulation of the standard in *Casey*. "A finding of an undue burden," the joint opinion explained, "is a 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."[56] The Justices apparently saw the malleability of their own standard, acknowledging that past opinions and different Justices had applied it "in ways that could be considered inconsistent."[57] Their attempt to elucidate the test, however, offered no method or standards by which to determine what constitutes a "substantial obstacle." Instead, the joint opinion's explanation was conspicuously question-begging: "In our considered judgment, an undue burden is an unconstitu-

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often motivated more by animus toward the woman. *See* Caitlin Borgmann & Catherine Weiss, *Beyond Apocalypse and Apology: A Moral Defense of Abortion*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 40, 42 (2003) (discussing how interests underlying abortion restrictions often have more to do with oppressing women than protecting their fetuses).

52. *See Casey*, 505 U.S. at 876-77.

53. *Id.* at 873.

54. *Id.* at 874.

55. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 530 (1989); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 453 (1983).

56. *Casey*, 505 U.S. at 877.

57. *Id.* at 876.

tional burden."[58] "Understood another way," the Justices tried again, "we answer the question . . . whether 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 could be constitutional. The answer is no."[59] Justice Scalia, in a scathing dissent, fumed that "the [undue burden] standard is inherently manipulable and will prove hopelessly unworkable in practice."[60] "Consciously or not," Scalia charged, "the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is 'appropriate' abortion legislation."[61]

Indeed, the joint opinion's determinations in *Casey* about which restrictions were permissible seemed to reflect little more than the Justices' own views as to which kinds of burdens were acceptable. The Justices appeared determined to uphold a state-directed information and twenty-four-hour waiting period requirement, even in the face of extensive proof that it burdened the abortion decisions of many women and increased the risks to their health.[62] For example, the district court found that the requirement, which demanded two separate visits to the clinic, would increase women's exposure to the harassment and hostility of anti-choice protestors and could delay abortions by up to two weeks, greatly raising the overall costs of the abortion and "making the procedure more dangerous medically."[63] The Justices also upheld a requirement that

58. *Id.* at 877.

59. *Id.*

60. *Id.* at 986 (Scalia, J., dissenting).

61. *Id.* at 987.

62. *Id.* at 886 (joint opinion) (noting district court's findings that waiting period did not further state's interest in women's health and that it increased the costs and "risk of delay" of abortions); *see also* Planned Parenthood v. Casey, 744 F. Supp. 1323, 1351-52, 1378 (E.D. Pa. 1990) (issuing extensive findings of fact documenting waiting period's burdens). Justice Blackmun, dissenting from the trio's upholding of the waiting period provision, optimistically forecasted that the requirement would, "in the future," be proven to impose an undue burden. *Casey*, 505 U.S. at 926, 938 n.9 (Blackmun, J., concurring in part and dissenting in part). That prediction proved false. On remand, the district court granted plaintiffs' motion to reopen the record and accept further evidence that the challenged provisions, including the waiting period, violated the newly established undue burden standard. Planned Parenthood v. Casey, 822 F. Supp. 227 (E.D. Pa. 1993). The Third Circuit reversed, holding that the Supreme Court's mandate precluded the reopening of the record. Casey v. Planned Parenthood, 14 F.3d 848, 863 (3d Cir. 1994). On motion for a stay of the Third Circuit's mandate, Justice Souter, sitting as Circuit Justice, agreed with the Third Circuit's interpretation and denied a stay. Planned Parenthood v. Casey, 510 U.S. 1309, 1312-13 (1994). The Supreme Court's mandate did not preclude an as-applied challenge once the law took effect, but no such challenge followed, and the provision remains in effect today.

63. *Casey*, 744 F. Supp. at 1351-52.

minors get their parents' consent or go to court to seek a judge's permission (a procedure known as a "judicial bypass") before obtaining an abortion. On the other hand, they struck down a requirement that married women notify their husbands of their intention to obtain an abortion.

The joint opinion seemed to reach these disparate conclusions by construing as "substantial obstacles" only those burdens that it viewed as tantamount to a ban on abortions.[64] Thus, for example, the Justices "disagree[d] with the District Court's conclusion that the 'particularly burdensome' effects of the waiting period on some women require[d] its invalidation."[65] The Justices, unlike the district court, were "not convinced" that the delays and increased costs and health risks imposed by "the 24-hour waiting period constitute[ ] an *undue* burden."[66] On the other hand, they found that the husband-notification requirement was "likely to *prevent* a significant number of women *from obtaining an abortion*. . . . We must not blind ourselves to the fact that the significant number of women [abused by their husbands] . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."[67] The Justices concluded that this burden was "an undue burden, and therefore invalid."[68]

In order to determine that the husband-notification requirement effectively amounted to a ban, whereas the parental consent requirement did not, the Justices manipulated the undue burden test

64. The joint opinion's enunciation of the undue burden test seemed to indicate that the threshold was not this high. For example, the opinion did not adopt Justice O'Connor's earlier formulations of the standard, in which she characterized an "undue burden" as one that "involve[s] *absolute obstacles* or severe limitations on the abortion decision." City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting) (emphasis added). But the joint opinion's application of the undue burden test to the specific restrictions at issue in *Casey* revealed the Justices' willingness to accept provisions that imposed heavy burdens, as long as the Justices did not view these burdens as absolute barriers.

65. *Casey*, 505 U.S. at 886-87.

66. *Id.* at 887 (emphasis added). The opinion faulted the *district court* for "not conclud[ing] that the waiting period is [a substantial] obstacle." *Id.* In fact, the district court catalogued the information and waiting period requirements' numerous and troubling effects and held these burdens unconstitutional. The court can hardly be taken to task for failing to utter the magic words "substantial obstacle" or "undue burden," when these standards were first announced and made controlling in *Casey* itself. *Cf.* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760-62 (1986) (striking down state-mandated information requirement); *City of Akron*, 462 U.S. at 449-51 (striking down state-mandated information and waiting period law).

67. *Casey*, 505 U.S. at 893-94 (emphasis added).

68. *Id.* at 895.

and ignored the district court's findings of fact about the parental consent provision's effects on minors. They manipulated the undue burden test by tinkering with the relevant pool of women to be considered in assessing the burdensomeness of each restriction. In assessing the husband-notification provision, the Court explained:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[69]

But the Justices provided little guidance for how to determine when, or for whom, a law operates as "a restriction," and indeed they appeared to exploit that term's ambiguity by applying it in seemingly inconsistent ways to different provisions.

In evaluating the husband-notification provision, for example, the Justices made clear that the relevant pool was not all women seeking abortions. If that were true, the provision would not impose an undue burden, since the restriction "imposed almost no burden at all for the vast majority of women seeking abortions."[70] Nor did the Court assess the law's burden on all *married* women seeking abortions, despite the fact that the law required a married woman seeking an abortion to produce a "signed statement . . . that she has notified her spouse that she is about to undergo an abortion."[71] Rather, the Court looked only at married women who were unwilling to notify their husbands. But even among that pool, the Court disregarded those women who qualified for a statutory exemption, although a woman invoking an exemption was required to certify such potentially embarrassing or humiliating private facts as "that her husband is not the man who impregnated her; that her husband could not be located; that her pregnancy is the result of spousal sexual assault . . . ; or that [she] believes that notifying her husband will cause him or someone else to inflict bodily injury upon her."[72]

Instead, the Court deemed the husband-notification provision to operate as "a restriction" only upon "married women seeking abortions who do not wish to notify their husbands of their inten-

69. *Id.* at 894.
70. *Id.*
71. *Id.* at 887.
72. *Id.*; *see also id.* at 908-09 (appendix to joint opinion, quoting 18 PA. CONS. STAT. § 3209(b) (1989)).

tions *and who do not qualify for one of the statutory exceptions to the notice requirement.*"[73] Acknowledging the widespread problem of family violence, the Court concluded that women with abusive husbands would sooner forego an abortion than notify their husband of their intent to end a pregnancy.[74] For these women, the requirement did not "merely make abortions a little more difficult or expensive to obtain" but instead was likely to prevent them from obtaining an abortion altogether and therefore imposed an undue burden.[75] The Court's definition of the relevant pool in assessing the husband-notification provision thus seemed to predetermine the result the Court reached. Had the Court been inclined to uphold the requirement, it simply could have defined the pool differently, to include those women for whom the requirement imposed burdens short of an insurmountable obstacle.

In examining the parental consent measure, the Justices defined the relevant pool more broadly, taking into account the law's effects on teenagers who would *benefit* from the requirement. Thus, the joint opinion justified its different treatment of the husband-notification and the parental consent requirements as "based on the quite reasonable assumption that minors will benefit from consultation with their parents."[76] But teenagers will only benefit in this way if they can be convinced to talk to their parents. As the district court in *Casey* found, "[s]ome [teenagers] may lie about their age to attempt to avoid the [parental consent] requirements; others may decide to carry their pregnancy to term; and some may resort to self-abortion."[77] Moreover, the notion that all teenagers will benefit from parental consultation is simply false.[78] The joint opinion implicitly acknowledged as much when it emphasized the

73. *Id.* at 895 (emphasis added).

74. *Id.* at 888-94.

75. *Id.* at 893-94.

76. *Id.* at 895.

77. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1357 (1990); *see* Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 288 (1980) (describing research showing that many teenagers will resort to desperate measures to avoid telling their parents about a pregnancy and planned abortion); *see also* Council Report, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 83 (1993) (same).

78. *See* Stanley K. Henshaw & Kathryn Post, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 194, 204 & tbl. 7 (1992) (finding that a majority of minors whose parents found out about pregnancy without being voluntarily told by the minor reported adverse consequences, including at least six percent who reported being beaten, being forced to leave home, or having their parents' health affected).

problem of family violence in its discussion of the husband-notification measure.

The district court further construed the parental consent provision as mandating parental *informed* consent, requiring parents to make in-person visits to the clinic before the abortion could be performed.[79] Thus, the district court found, even a minor whose parents consented to the procedure might find her access to abortion delayed or obstructed, if her parents were unable or unwilling to visit the clinic in person.[80] In view of all these obstacles, the district court found that the parental consent provisions "would unduly burden a minor woman's ability to get an abortion" and that "the provisions may act in such a way as to *deprive [a teenager] of her right to have an abortion.*"[81]

Nevertheless, the Justices overlooked or ignored these findings of fact[82] and contemplated a pool of minors who would consult their parents in the face of the parental consent law and who would benefit from the law's requirements. If the Justices had wanted to invalidate the parental consent provision, they could have assessed the provision's burdens on those minors who would not or could not comply with the law's provisions and who would thereby be deterred or prevented from obtaining an abortion. For these minors, the provision would effectively amount to a ban as surely as it would for abused married women and thus would meet the Justices' apparently high threshold for a "substantial obstacle."[83]

The joint opinion's conclusions about what kinds of burdens are permissible demonstrates the high threshold set by the undue bur-

79. *Casey*, 744 F. Supp. at 1383-84.

80. *Id.* at 1357.

81. *Id.* (emphasis added).

82. In contrast, the Justices quoted several pages of the district court's findings on the burdens of the husband-notification requirement. *See* Planned Parenthood v. Casey, 505 U.S. 833, 888-91 (1992).

83. It is no surprise that the Justices upheld the parental notice law. Parental involvement requirements, with sufficient bypass mechanisms, had been deemed constitutional long before *Casey* was decided and the joint opinion, noting this, gave scant attention to this particular provision. *See id.* at 899-900. But the joint opinion in *Casey* was forging a new legal test. Its application of the undue burden test to the state-directed information and waiting period requirement necessitated overruling the otherwise-controlling Supreme Court precedents. *See supra* note 38 and accompanying text. Accordingly, the Justices should have explained how the newly minted undue burden test applied to a parental consent provision and why that test should allow the provision to stand, notwithstanding the Justices' seemingly contradictory ruling on husband notification. Their failure to do so is particularly inexcusable in light of the district court's findings of fact establishing the dangerous burdens the provision imposed.

den test—the only burdens clearly invalid under *Casey* are those equivalent to a ban on abortion—and raises the prospect that judges can manipulate the test, at least in certain cases, to predetermine whether a restriction effectively functions as a ban. But the manner in which the Justices administered the undue burden test in *Casey* highlights an additional, critical problem: the test's indifference to the cumulative burdens that multiple restrictions impose. The joint opinion addressed the challenged provisions *seriatim*, applying the undue burden standard to each. It examined how onerous each restriction was as if no other restrictions existed, ignoring how a woman would fare under the mounting obstacles as the Court upheld restriction upon restriction.[84] Thus, under *Casey*, a single provision may not place a substantial obstacle in a woman's path to abortion. A state can, and many do, accomplish the same result, however, by erecting separate hurdles that cumulatively amount to what is surely a "substantial" obstacle for many women.[85] Indeed, state legislatures consider and pass an ever-increasing number of anti-choice restrictions each year, no doubt at least partly because they are emboldened by the undue burden standard's leniency.[86]

The undue burden test is thus both too devoid of content and, as applied in *Casey*, too tolerant of restrictions short of a ban to protect adequately a woman's ability to exercise her right to abortion "free from the coercive and brooding influence of the State."[87]

84. In *Casey*, the cumulative burdens of the approved provisions were left to fall most heavily on minors, especially those who cannot consult with their parents and who live far from an abortion provider. Such minors first have to seek a judge's permission to allow them to get the abortion without telling their parents. They then have to make two trips to the distant clinic, one to obtain the state-mandated information and a second, at least twenty-four hours later, for the abortion. Since teens often fail initially to recognize or acknowledge a pregnancy, these minors may be far advanced in pregnancy by the time they have overcome all the obstacles, thereby increasing the risks to their health and the amount of money they must raise to finance the abortion. To secretly accomplish negotiating absences from school and finding transportation is surely an insurmountable burden to many teens who would otherwise seek to end their pregnancies. *See generally* Stanley K. Henshaw, *Factors Hindering Access to Abortion Services*, 27 FAM. PLAN. PERSP. 54 (1995).

85. *See* NARAL PRO-CHOICE AMERICA, WHO DECIDES? A STATE-BY-STATE REPORT ON THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS (2004), *available at* http://www.naral.org/yourstate/whodecides/index.cfm.

86. State legislatures considered 558 anti-choice measures in 2003 alone (a thirty-five percent increase over 2002, and they enacted forty-five anti-choice measures in 2003 a thirty-two percent increase from 2002). *Id. at* http://www.naral.org/yourstate/whodecides/trends/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=10083.

87. Webster v. Reprod. Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

The joint opinion's authors seemed satisfied that they had sufficiently preserved "the essential holding of *Roe*"[88] by ensuring that states could not directly or indirectly prevent women from "mak[ing] the ultimate decision"[89] whether to end a pregnancy before viability. But, through restrictions such as state-directed information mandates and waiting periods, parental involvement requirements, and other onerous measures,[90] states have succeeded in making it extremely burdensome for women to obtain abortions.[91] Moreover, as individually permissible burdens pile up, they can together create insurmountable obstacles for some women, a problem to which *Casey* provides no answer.

B. The State's Interest in Fetal Welfare

Casey's significant departures from *Roe*, including the undue burden standard, stem from the joint opinion's enhanced regard for the state's interest in the fetus. The state's fetal interest had been recognized in *Roe* but regarded as "compelling" only after fetal viability.[92] *Casey* established that this interest could justify state regulation of abortion from the earliest stages of pregnancy.[93] The joint opinion stated, "The woman's liberty is not so unlimited, however, that *from the outset* the State cannot show its concern for the life of the unborn . . . ."[94] With this modification, the Justices ran headlong into the most vexing aspect of the abortion rights constitutional conundrum: how to balance the woman's liberty in-

88. *Casey*, 505 U.S. at 846.

89. *Id.* at 877.

90. *See, e.g.*, CTR. FOR REPROD. RIGHTS, TARGETED REGULATION OF ABORTION PROVIDERS (TRAP): AVOIDING THE TRAP (Aug. 2003) (regarding onerous and discriminatory abortion facility regulations), *available at* http://www.crlp.org/pub_fac_trap.html; Am. Civil Liberties Union, Public Funding for Abortion Map, *at* http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=11617&c=146 (Jan. 15, 2003) (regarding bans on publicly funded abortions).

91. *See generally* NARAL Pro-Choice America, Access to Abortion, *at* http://www.nara l.org/Issues/access/index.cfm (last visited Mar. 30, 2004); *see also* Henshaw, *supra* note 84.

92. Roe v. Wade, 410 U.S. 113, 163 (1973).

93. *Casey*, 505 U.S. at 869.

94. *Id.* (emphasis added). Justice O'Connor earlier had advocated recognizing the state's fetal interest as "compelling" throughout pregnancy, but the joint opinion took pains not to invoke that word; instead, it characterized the state's interest as "legitimate," "important," and "substantial." *See, e.g., id.* at 871, 876. Under the strict scrutiny standard, a fundamental right cannot be infringed unless the state's interest is compelling. By allowing the state to burden the abortion decision for less-than-compelling reasons, the joint opinion signaled that it did not consider the constitutional right to abortion to be fundamental.

terest in terminating her pregnancy against a state's asserted interest in the fetus.

In contrast, *Roe*'s much-disparaged "trimester" framework[95] had minimized the relevant sphere of this quandary. When *Roe* held that the state's interest in the fetus did not become "compelling" until after viability,[96] it ensured that the woman's liberty interest would face off against the state's fetal interest only with respect to exceedingly rare, post-viability abortions.[97] Restrictions designed to further the state's interest in potential life were permissible, with exceptions to preserve a woman's life and health, only for the minute percentage of abortions performed after fetal viability, not for those performed earlier.[98]

The *Casey* majority expounded at length on the "soundness" of *Roe*'s protection of a woman's liberty interest in abortion.[99] But it struck directly at the heart of this interest when it repudiated *Roe*'s declaration that the state could advance its countervailing interest in the fetus only after viability.[100] The strength of the state's interest in fetal welfare is inversely proportional to that of the woman's liberty.[101] The Court could not expand *Roe*'s recognition of the state's interest in the fetus into the pre-viability stage without placing the woman's liberty fundamentally at risk. Indeed, the *Casey* joint opinion acknowledged that *Roe*'s "trimester framework no doubt was erected to ensure that the woman's right to choose not

95. In fact, *Roe*'s framework did not exactly track the trimesters of pregnancy. The Court permitted abortions to be restricted or banned after fetal viability, a line which the Court noted occurred roughly at seven months (twenty-eight weeks) of pregnancy, but which it admitted could occur as early as twenty-four weeks. *See Roe*, 410 U.S. at 160.

96. *See id.* at 163-65.

97. In 2000, approximately 1.4% of abortions were performed at twenty-one weeks of gestation or later. Centers for Disease Control and Prevention, *Abortion Surveillance—United States, 2000*, MORBIDITY & MORTALITY WEEKLY, Nov. 28, 2003, *at* http://www.cd c.gov/mmwr/preview/mmwrhtml/ss5212a1.htm. Fetal viability normally does not occur until at least twenty-four weeks of pregnancy.

98. *See Roe*, 410 U.S. at 163-65. In reality, increased solicitude toward the state's pre-viability interest in potential life crept into some of the Court's abortion decisions long before *Casey*. *See infra* text accompanying notes 111-14 and note 125.

99. *See Casey*, 505 U.S. at 857-62.

100. *See id.* at 846 (finding that "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus").

101. The state's fetal interest is thus not akin to other compelling governmental interests that may, from time to time, override fundamental constitutional rights. The government's interest in public safety, for example, may outweigh the right to free speech in certain instances. But, outside these limited circumstances, there is nothing inherently at odds between the interest in public safety and the right to free speech.

become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."[102]

Apparently recognizing the hornets' nest into which they had stumbled, the joint opinion's authors attempted a fast exit, adding that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[103] The opinion called permissible those "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn."[104] It indicated that laws with a "valid purpose" were those "not designed to strike at the right itself."[105] The *Casey* joint opinion thus initially appeared to balance the state's and the woman's competing interests in the pre-viability stage largely in the woman's favor, permitting the state to do little more than communicate its preference for childbirth. Not surprisingly, however, the joint opinion failed to rein in the conflict it set up between the state's and the woman's interests in the pre-viability stage.

State-mandated information laws and waiting periods would seem to be the prototypical example of what the *Casey* joint opinion considered a permissible pre-viability law enacted to further the state's interest in the fetus. The opinion described Pennsylvania's state-directed information and waiting period law as "legislation aimed at ensuring a decision that is mature and informed, . . . [while] express[ing] a preference for childbirth over abortion."[106] But was the law merely meant to "inform the woman's free choice" or was it "calculated to hinder" the woman's decision? The Justices assumed the former, but it is unclear upon what they based their assumption, especially given the district court's extensive findings documenting the burdens that the requirement imposed. And if the Justices' assumption was wrong, what kind of proof could the plaintiffs have produced to establish the law's impermissible intent?[107]

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102. *Id.* at 872.

103. *Id.* at 877. Moreover, the joint opinion said, "a statute which, while furthering the interest in potential life . . . has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.*

104. *Id.*

105. *Id.* at 874.

106. *Id.* at 883, 885.

107. Establishing such intent to the Court's satisfaction has proven virtually impossible in practice. *Compare, e.g.*, Mazurek v. Armstrong, 520 U.S. 968, 971 (1997) (per curiam) (finding no basis for concluding that physician-only abortion law's purpose was to interfere with the right to abortion), *with Casey*, 505 U.S. at 980 (Stevens, J.,

In fact, there is no meaningful distinction between a fetal-interest-furthering law intended to make abortions harder to obtain and one intended to promote the state's preference for childbirth over abortion. The goals are too interrelated and too likely furthered by the same pieces of legislation. Justice Scalia was frank about the underlying goals of laws enacted to further the state's interest in potential life. Disputing that such a law would ever be "calculated to inform the woman's free choice, not hinder it," Scalia remarked, "*Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated to hinder' a decision to have an abortion."[108]

The joint opinion explained that a statute that permissibly furthers the state's fetal interest—i.e., one that is not *designed* to hinder the woman's right to abortion—may nevertheless *impose* such a hindrance as long as the resulting burden is not undue. The opinion stated that a law serving a legitimate purpose that "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[109] Indeed joint opinion went on to uphold the waiting period in *Casey*, even though the law was not intended to promote women's health and imposed considerable burdens on women seeking abortions.

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dissenting) ("When one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive was to make abortions more difficult." (citation omitted)). Moreover, *Mazurek* calls into question whether an improper purpose alone could ever suffice to invalidate an abortion restriction. *See id.* at 972 (majority opinion) (questioning Court of Appeals' assumption that "a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right . . . could render [a] law invalid"). This is so notwithstanding *Casey*'s description of an undue burden as one whose "purpose *or* effect" is to impose a substantial obstacle. *Casey*, 505 U.S. at 877 (emphasis added).

108. *Casey*, 505 U.S. at 986-87 (Scalia, J., dissenting). At the margins, one can imagine restrictions designed to further the state's fetal interest and not to hinder abortion (although surely these would be ultimately unsatisfactory to opponents of the right to abortion). For example, a state might require a second doctor to be present during abortions in which the fetus might be viable, in order to provide medical care should the fetus be born alive. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 770-71 (1986). Or the state might, in the interests of preserving the dignity of the fetus, prohibit procedures that are more gruesome than other available methods. Where the fetus is viable, the state might require the doctor to use the procedure most likely to produce a live birth. The state could also require the fetus to be anaesthetized before any abortion performed late in pregnancy. In the current state of medicine, however, all such measures would increase the health risks to the pregnant woman and would, therefore, hinder the right to abortion as a matter of fact.

109. *Casey*, 505 U.S. at 874.

Casey's decision to open the door to pre-viability restrictions that promote the state's interest in the fetus thus granted the state far broader latitude than it had under *Roe* to enact measures that hinder a woman's access to abortion throughout pregnancy.

In fact, the Court had begun to show some solicitude toward the state's pre-viability interest in the fetus long before *Casey* was decided. Four years after *Roe*, the Court decided that a state need not fund abortions for low-income women within a program that paid for the costs of prenatal care and childbirth because *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion."[110] In a later funding case, Justice Blackmun decried the Court's toleration of restrictions intended neither to make abortion safer nor to "inform" the woman's decision but to hinder a woman's access to abortion:

> While technically leaving intact the fundamental right protected by *Roe v. Wade*, the Court, "through a relentlessly formalistic catechism," once again has rendered the right's substance nugatory. This is a course nearly as noxious as overruling *Roe* directly, for if a right is found to be unenforceable, *even against flagrant attempts by government to circumvent it*, then it ceases to be a right at all.[111]

In the abortion funding cases, however, the Court took pains to distinguish funding prohibitions from laws that affirmatively interfere with the right to abortion, calling the funding limitations "different in kind" from direct restrictions impermissible under *Roe*.[112] The Court emphasized that in a funding prohibition the state "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[113] The *Casey* joint opinion went a step

110. Maher v. Roe, 432 U.S. 464, 474 (1977). *Maher* addressed government-funded elective abortions but the Court later extended its holding to medically necessary abortions. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that "a State that participates in the Medicaid program is not obligated . . . to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment," and that such funding restrictions do not violate the federal Constitution).

111. Rust v. Sullivan, 500 U.S. 173, 220 (1991) (Blackmun, J., dissenting) (citations omitted and emphasis added).

112. *Harris*, 448 U.S. at 314.

113. As the dissenting Justices forcefully argued, the Court's distinction between bans on publicly funded abortions and affirmative interference with abortion is a hollow one. Funding bans exert a coercive effect that steers indigent women away from abortions. *See, e.g., id.* at 330 (Brennan, J., dissenting) (asserting that "both by design and in effect [denial of public funds for abortions] serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have"); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting) (asserting a similar proposition);

further. The opinion held that the Constitution permits direct restrictions on pre-viability abortions to be based solely on a state's interest in protecting the fetus. In doing so, the opinion weakened *Roe*'s foundation more openly and directly.

Casey may be blamed for officially inviting the state and its interest in the fetus into the constitutional conversation about pre-viability abortions; in a sense, though, Justice Blackmun himself may inadvertently have opened the door. Although his opinion in *Roe* established the right to abortion as a fundamental constitutional right, it was, as many have observed, oddly taciturn when it came to addressing the importance of reproductive autonomy in women's lives.[114] Blackmun offered a single, scant, almost perfunctory paragraph on the effects of abortion bans on women, describing the bans' "detriment" in a detached, passive voice:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.[115]

At the same time, the opinion was exceptionally deferential to physicians, often describing the right to abortion as though it belonged solely to the doctor:

> The [Court's] decision vindicates the right of the physician to administer medical treatment according to his professional judgment . . . . Up to [the points at which the state's interests are compelling,] the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[116]

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see also DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, & THE MEANING OF LIBERTY 230-36 (1997).

114. *See, e.g.*, GARROW, *supra* note 4, at 613-15 (describing various commentators' criticisms of *Roe* for focusing insufficiently on women's individual liberty).

115. Roe v. Wade, 410 U.S. 113, 153 (1973).

116. *Id.* at 164-66. In a later abortion decision, Justice White accused Blackmun of seeming to recognize a physician's constitutional right to determine how to practice medicine, claiming that Blackmun's discussion "smack[ed] of economic due process rights for physicians." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 802-04 (1986); *cf. id.* at 762. Justice Blackmun's background before becoming a judge may well account in part for his solicitude toward the medical profession:

Roe's failure to focus on the importance of abortion to women thus left women disconcertingly out of the debate from the very beginning. The opinion's relative silence on that score may have unwittingly invited, or at least failed to provide an adequate backstop against, a growing consideration for the state's countervailing interest in the fetus.[117]

Ironically, the joint opinion in *Casey* strongly, even passionately, articulated a woman-centered, equality-based argument for upholding the right to abortion, firmly grounded in the Due Process Clause of the Fourteenth Amendment.[118] *Casey* thus tantalizingly positioned the majority to reaffirm, without modifying, *Roe*, but in a doctrinally sounder fashion. "This opinion makes sense and puts the right to abortion on a firmer jurisprudential foundation than ever before," Professor Laurence H. Tribe optimistically declared shortly after the Court issued its decision.[119] Despite their rhetoric, however, the opinion's authors simply were not prepared to accord the right to abortion the same level of protection Blackmun had given it in *Roe*, and their solicitude toward the state's fetal interest was the proof.

He anguished over whether to become a doctor or a lawyer. Having opted for the latter, he later served for nine years as the first resident counsel to the Mayo Clinic and the Mayo Association in Rochester, Minnesota. As a Supreme Court Justice, he was often the author of opinions that shaped medical practice. *See* Larry Gostin, *Guest Editor's Introduction*, 13 AM. J. L. & MED. 153, 153 (1987).

117. Blackmun's conception of the abortion right appears to have evolved over time. For example, his fervent dissent in *Webster* forthrightly addressed the importance of reproductive freedom to women:

> [T]he plurality . . . casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children. The plurality does so either oblivious or insensitive to the fact that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life.

Webster v. Reprod. Health Servs., 492 U.S. 490, 557 (1989) (Blackmun, J., dissenting).

118. See *Planned Parenthood v. Casey*, 505 U.S. 833, 846-53 (1992), arguing that:

> [A woman's] suffering [in pregnancy and childbirth] is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

119. Linda Greenhouse, *The Supreme Court: A Telling Court Opinion*, N.Y. TIMES, July 1, 1992, at A1.

C. The Health Exception Requirement

Casey's articulation and application of *Roe*'s health exception requirement did not fully blunt the harms the Court invited by allowing pre-viability restrictions based on the state's fetal interest. Although *Casey* read *Roe*'s health exception as applying to the pre-viability period, the opinion did not foreclose the possibility that the Court would tolerate some unspecified level of risk to a woman's health.

In *Roe*, the Court established the requirement that all post-viability abortion restrictions must include exceptions for when a woman's health or life is at stake: "For the stage subsequent to viability, the State . . . 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."[120] This directive appears to state that, when a woman needs a post-viability abortion because her life or health is at risk (i.e. in a risky pregnancy), the state must waive both a ban and any regulation short of a ban. The corollary of this reading is that bans or restrictions on elective post-viability abortions are permitted. The quoted language thus assumes a situation in which the woman's own pregnancy poses the risk that is to be alleviated by the health exception.

Roe did not address whether abortion restrictions must contain exceptions even for healthy pregnancies where the *restriction itself* increases a woman's medical risks, such as by delaying her abortion or forcing her doctor to use a more dangerous procedure. The Court did not have to confront this latter question because *Roe*'s health exception requirement, on its face, applied only to post-viability restrictions.[121] Before *Casey*, *Roe*'s health exception requirement was rarely invoked with respect to pre-viability restrictions because, under *Roe*'s framework, the state could regulate abortions before viability only to promote the woman's health.[122] Stated an-

120. *Roe*, 410 U.S. at 164-65.

121. Most states ban abortions after viability with exceptions only for women whose life or health is at risk, so that in these states the only women who can obtain post-viability abortions are by definition ill or dying. *See* NARAL PRO-CHOICE AMERICA, OVERVIEW OF STATE REPRODUCTIVE RIGHTS LAWS 3 (2003), *available at* http://www.naral.org/your state/whodecides/trends/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=10085. Even absent a post-viability ban, only a tiny percentage of women seek post-viability abortions, and virtually none of these women have healthy pregnancies. Centers for Disease Control and Prevention, *supra* note 97.

122. In a significant exception to the general rule laid out in *Roe*, the Court permitted certain parental involvement requirements long before *Casey*, although these re-

other way, in pre-viability restrictions the state's and the woman's interests were by definition aligned. The need for a life and health exception arose after viability because, at this stage of pregnancy, the state was permitted to act in furtherance of its interest in fetal welfare, an interest separate from and potentially in conflict with the woman's well-being.

Nevertheless, in an early post-*Roe* decision, the Court invalidated a pre-viability restriction because of the increased health risks it imposed on all women seeking second-trimester abortions. In *Planned Parenthood v. Danforth*, the Court struck down a procedure ban that applied before viability on the grounds that it "force[d] a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed."[123] Other pre-*Casey* decisions echoed *Danforth*'s rejection of state-imposed health risks on women. In *Thornburgh v. American College of Obstetricians & Gynecologists*,[124] the Court held that an abortion restriction may not require a "trade-off" between a woman's health and fetal survival or fail to allow "maternal health [to] be the physician's paramount consideration."[125] For example, a state law requiring that a second doctor attend all post-viability abortions in order to provide medical care to the fetus should it be born alive must contain an exception for emergencies when the

quirements apply pre-viability and are justified on grounds distinct from an interest in the woman's health. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 450 (1990) (noting that the "usual justification" for parental involvement provision is "assur[ing] that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate"). In at least two opinions, the Court hinted that any such requirement demands a medical emergency exception. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 407 n.14 (1981) ("There is no authority for the view expressed in the dissent that the statute would apply to 'minors with emergency health care needs.' . . . Appellant does not so contend, and the Utah Supreme Court in this case took pains to say that time is of the essence in an abortion decision." (citation omitted)); Bellotti v. Baird, 443 U.S. 622, 630 (1979) (including among "important aspects" of statute as construed by Massachusetts Supreme Judicial Court that parental consent requirement is waived "when the need for the abortion constitutes an emergency requiring immediate action" (internal quotation marks omitted)). *But see Hodgson*, 497 U.S. at 422 (noting without discussion that parental notice statute, upheld by Court, contained exception only for when "an immediate abortion is necessary to prevent the woman's *death*" (emphasis added)).

123. 428 U.S. 52, 78-79 (1976).

124. 476 U.S. 747 (1986).

125. *Id.* at 768-69; *see also* Colautti v. Franklin, 439 U.S. 379, 400 (1979) (invalidating Pennsylvania restriction that did "not clearly specify . . . that the woman's life and health must always prevail over the fetus' life and health when they conflict" and which may require physician to "make a 'trade-off' between the woman's health and additional percentage points of fetal survival").

second physician cannot be located in time.[126] Moreover, the Court stressed the absolute primacy of women's health, tolerating *no measurable health increase* to a woman.[127]

Because *Casey* extended the reach of the state's fetal interest into the pre-viability stage, the question whether *Roe*'s health exception requirement also applied to the pre-viability stage became pivotal. *Casey* held that it did, treating *Roe*'s health exception requirement as the *sine qua non* of abortion restrictions and suggesting that the validity of all of the remaining restrictions at issue in *Casey* depended upon the adequacy of the statute's medical emergency exception.[128]

Despite its strong reaffirmation of *Roe*'s health exception requirement, *Casey* left unanswered some questions about the requirement. First, did the Justices understand the health exception requirement to apply only to risky pregnancies? Or should it apply even to healthy pregnancies when the abortion restriction itself would increase the woman's health risks? The joint opinion did not offer a definitive, unambiguous answer to this question. On the one hand, *Casey* did not renounce the Court's earlier rulings in which it had established the "no-trade-off" principle.[129] Indeed, the question was not directly before the Court in *Casey*, since the plaintiffs had not challenged the medical emergency exception based on its failure to cover situations in which the restrictions imposed health risks on women with normal pregnancies.[130]

126. *See Thornburgh*, 476 U.S. at 769-71 (finding a post-viability, second-physician requirement unconstitutional for lack of medical emergency exception); *see also* Planned Parenthood v. Ashcroft, 462 U.S. 476, 484 n.8 (1983) (recognizing that post-viability, second-physician requirement must contain an exception for the situation where the health of the mother is endangered by delay in the arrival of the second physician and finding such an exception implicit in the statute).

127. *See Thornburgh*, 476 U.S. at 768-69.

128. *See* Planned Parenthood v. Casey, 505 U.S. 833, 879-80 (1992). The health exception at issue in *Casey* took the form of a medical emergency exception. *See id.* at 879. The term "health exception" is normally used to refer to an exemption from a ban on abortion or abortion procedures. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 930-31 (2000) (discussing need for "health exception" to ban on abortion procedure). A "medical emergency exception," on the other hand, exempts a woman from restrictions short of a ban when an emergency situation exists. *See, e.g.*, *Thornburgh*, 476 U.S. at 770 (requiring that a post-viability, second-physician requirement must contain an emergency exception for "situation where the health of the mother [i]s endangered by delay in the arrival of the second physician").

129. *See supra* note 125 and accompanying text.

130. The medical emergency exception was challenged on the basis that it was too narrow and did not cover three serious health conditions (preeclampsia, inevitable abortion, and premature ruptured membrane) that could require an immediate abortion. *Casey*, 505 U.S. at 880. The joint opinion accepted the Court of Appeals' con-

Nevertheless, it is troubling that the joint opinion was so unmoved by the district court's findings that the waiting period and parental involvement requirements imposed considerable health risks even on healthy women.[131] The opinion asserted that the medical emergency exception, as construed, sufficiently alleviated the waiting period's harms. But the exception had been construed only to apply to certain serious medical conditions arising in pregnancy. The opinion disregarded the risks from the substantial delays that the waiting period would commonly cause.[132] And the Justices wholly ignored the district court's findings that the parental consent provision could delay or even block some teenagers' access to abortion.[133] The joint opinion thus seemed to allow an abortion restriction to impose some unspecified measure of risk on healthy women, with no exception to alleviate that risk as long as the statute included an exception for women with risky pregnancies.

Second, *Casey* did not unambiguously hold that a health exception must protect a woman in the face of *any* measurably increased risk. The opinion's discussion of the medical emergency exception stated that the Court would be required to invalidate the exception if "it foreclose[d] the possibility of an immediate abortion despite some *significant* health risks."[134] It is not clear what the Justices meant by "significant" and whether they meant to leave open the possibility that some, less serious risks might be permissible.[135]

Moreover, the opinion troublingly closed its discussion of the medical emergency exception by concluding that "the medical

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struction, which read the exception to encompass these conditions, and held the provision constitutionally adequate. *Id.*

131. *See id.* at 885-86; *see also supra* notes 77-84 and accompanying text.

132. *See Casey*, 505 U.S. at 885-86. See also Carhart, 530 U.S. at 1014 (Thomas, J., dissenting) noting that:

> Without question, there were women for whom the [waiting period] regulation would impose some additional health risk who would not fall within the medical emergency exception. The Court concluded, despite the certainty of this increased risk, that there was no showing that the burden on any of the women was substantial.

133. *See supra* notes 80-81.

134. *Casey*, 505 U.S. at 880.

135. In *Thornburgh*, the Court found that a health exception's reference to a "significantly greater risk" suggested a higher level of risk than simply a "meaningfully increased" risk. 476 U.S. 747, 769 (1986). Justice O'Connor disagreed with the Court, arguing that "significantly greater risk" could "fairly be read to require only that the risk be a real and identifiable one." *Id.* at 832 (O'Connor, J., dissenting) (internal quotation marks omitted). She added, however, "I express no opinion as to the point at which a 'trade-off' between the health of the woman and the survival of the fetus would rise to the level of an undue burden." *Id.*

emergency definition *imposes no undue burden* on a woman's abortion right."[136] That formulation seemed to subsume the medical emergency exception within the undue burden test rather than treating it as a separate, categorical requirement. If this were indeed what the opinion intended, a woman need only be excused from compliance with a restriction if the risk to her health reached a level that the Court would consider an undue burden.

The Court in *Carhart* resolved at least some of the uncertainty left by *Casey*'s discussion of the health exception requirement, clarifying, for example, that the requirement is independent and not subject to the undue burden test.[137] Nevertheless, *Casey*'s ambiguous language in describing the health exception requirement and the opinion's tolerance of certain health risks may encourage legislatures to experiment with what qualifiers a medical emergency exception could contain and still pass constitutional muster.

III. *STENBERG V. CARHART*

Casey struck an ostensible compromise on the contentious abortion issue by eliminating *Roe*'s "trimester" framework and substituting the undue burden standard. The Justices pronounced this compromise satisfactory because, on the one hand, it affirmed *Roe*'s "essential holding," and on the other, it gave states greater leeway to regulate pre-viability abortions.[138] Energetically exploiting the latitude that *Casey* granted them, anti-choice activists, states legislatures, and more recently Congress have tested how much restriction is permissible, annually passing a deluge of laws interfering with abortion.[139] The "partial-birth abortion" bans are a part of this tide.

Although the "partial-birth abortion" bans' proponents argue that the procedure they claim to target is never medically necessary and in fact is sometimes dangerous to women,[140] this has never

136. *Casey*, 505 U.S. at 880 (emphasis added).

137. *See infra* Part III.

138. *See Casey*, 505 U.S. at 876.

139. In 2003, states enacted forty-five anti-choice laws. *See* NARAL PRO-CHOICE AMERICA FOUNDATION, *supra* note 85. *Casey* thus has not taken the heat off of the state and lower federal courts, which must deal with the resulting litigation challenging these many restrictions. Moreover, due to the fact-intensive nature of the undue burden test, these litigations often cannot be decided as a matter of law without the need for a trial. *See* Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring) (emphasizing fact-intensive nature of undue burden test).

140. *See, e.g.*, Carhart v. Stenberg, 530 U.S. 914, 1015-16 (2000) (Thomas, J., dissenting).

been the professed motive for the bans.[141] Rather, the bans aim to highlight the grisly nature of abortion and the cruelty of abortion procedures to fetuses.[142] Also, by drafting the bans with vague and broad language that encompasses safe and common methods of abortion, the bans' supporters aim to threaten access to abortions generally.[143] Under *Roe*, bans with such a purpose would have been automatically impermissible.[144] *Casey*, however, officially sanctioned previability abortion restrictions that do not even pretend to be about advancing a woman's health or wellbeing as long as these restrictions pass the ill-defined undue burden test. Supporters of restrictions such as the "partial-birth abortion" bans thus can openly assert that their bans are not aimed at preserving women's health, and they need not fear that courts will automatically invalidate the bans because their underlying purpose is constitutionally impermissible.

In *Stenberg v. Carhart*,[145] the Court addressed the constitutionality of Nebraska's "partial-birth abortion" ban. The Court's decision invalidating the ban confirms that there are limits to what a state may do to further its interest in the fetus. Certainly, sweeping restrictions like the one addressed in *Carhart*, which the Court found amounted to a virtual ban on second-trimester abortions, are not permissible. Nevertheless, *Carhart* offers only a few significant insights into the *Casey* standard. While positive in its outcome, *Carhart* did little to clarify the ambiguities and practical problems in *Casey* that cast doubt on whether *Casey*'s standard can be applied to less extreme restrictions in a fair, predictable manner and whether it can be relied on to keep the right to abortion robust.

Carhart struck Nebraska's "partial-birth abortion" ban in a 5-4 decision, holding it unconstitutional because it lacked a health ex-

141. *See id.* at 951 (Ginsburg, J., concurring).

142. *See, e.g., id.* at 930-31 (describing Nebraska's claims that "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.'").

143. *See id.* at 951-52 (Ginsburg, J., dissenting).

144. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 78-79 (1976). In *Danforth*, the Court found that a Missouri ban on the saline amniocentesis method of abortion would prohibit a safe procedure and the one most commonly used after the first trimester: "[A]s a practical matter, [the ban] forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Id.* at 79. It thus "fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge." *Id.*

145. *Carhart*, 530 U.S. at 914.

ception and because it imposed an undue burden on a woman's abortion decision by prohibiting safe and common abortion procedures.[146] The majority line-up included a notable defection from the *Casey* alliance: Justice Breyer wrote for the majority and was joined by Justices Ginsburg, O'Connor, Souter, and Stevens, while Justice Kennedy, a co-author of *Casey*, added his voice to dissenters Rehnquist, Scalia, and Thomas. The majority in *Carhart* seemed to apply *Casey* straightforwardly and to arrive easily at its result, but a closer examination of the opinion reveals subtle hints that the Court may have achieved its slim majority only with deliberately ambiguous drafting.

While Justice Kennedy did not pronounce himself ready to overrule *Roe*, he wrote an embittered dissent in which he sharply disagreed with the majority's interpretation of *Casey*'s rulings on the health exception requirement and the state interests underlying abortion regulation.[147] In *Casey*, Kennedy had co-authored an opinion expounding women's liberty interest in abortion, defending the right with such statements as: "[The woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[148] Kennedy now openly displayed virulent personal revulsion at abortion, taking it upon himself to translate what he viewed as the Court's overly clinical descriptions of the procedures at issue into gruesome terms fitting the perspective of one "shocked when confronted with a new method of ending human life."[149] Pointing an accusing finger at Justice O'Connor throughout the opinion,[150] Kennedy gave every impression of a Justice who had been lured into joining *Casey*'s controlling opinion on the assumption that the decision would rarely interfere with states' discretion in enacting abortion restrictions and who felt betrayed by the outcome in *Carhart*.

Justice Kennedy's angry desertion reveals how *Casey* merely put a false front of consensus over a serious and unabated divide among its authors as to how far a state can go in restricting abortion. The Court had clearly achieved agreement that states could

146. *Id.* at 937-38.
147. *See id.* at 956-79.
148. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).
149. *Carhart*, 530 U.S. at 957 (Kennedy, J., dissenting).
150. *See, e.g., id.* at 967-68, 972, 977-78 (Kennedy, J., dissenting).

not totally ban abortion, but the three-Justice coalition in *Casey* had failed to reach the elusive middle ground regarding lesser restrictions that truce-minded Justices on both sides of the abortion controversy could accept.[151] Indeed, in *Carhart*, Justice Scalia gloated about the futility of the Court's search for common ground in the abortion war:

> While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the majority opinion's expressed belief that . . . the decision in *Casey* would ratify [a] happy truce [achieved in *Roe*]. . . . I cannot understand why [certain Justices] persist in the belief that this Court . . . can resolve th[e] contention and controversy [engendered by abortion] rather than be consumed by it.[152]

A. The State's Interest in Fetal Welfare

Casey's greatest blow to abortion rights was its expansion of the state's right to restrict abortion in the name of the fetus.[153] The decision's other major drawbacks—its weakening of the standard against which to measure abortion restrictions and its failure to affirm unequivocally the primacy of women's health—can be traced to this fundamental departure from *Roe*. *Carhart* left undisturbed *Casey*'s increased regard for the state's fetal interest. At the same time, it dodged the issue of whether the state may justify abortion restrictions for reasons other than to try to save the lives of fetuses.

Justice Breyer, writing for the majority, examined the state's interests supporting Nebraska's ban and concluded that the ban "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."[154] Nebraska, however, asserted indirect fetal interests, claiming that the ban "shows concern for the life of the unborn" and "prevents cruelty to partially born children."[155] It also claimed that the ban "preserves the integrity of the medical profession."[156] The majority opinion did not answer

151. *See generally* Sylvia A. Law, *Abortion Compromise: Inevitable and Impossible*, 1992 U. ILL. L. REV. 921 (1992).

152. *Carhart*, 530 U.S. at 955-56 (Scalia, J., dissenting).

153. *See supra* at Part II.B.

154. *Carhart*, 530 U.S. at 930. The Court ultimately found that the ban prohibited more than a single method. *See infra* note 191 and text accompanying note 210.

155. *Id.*

156. *Id.* at 931.

whether these are legitimate state interests because it found that a health exception was required regardless of the interest asserted.[157]

Two concurring Justices denied that the state had *any* valid interest in enacting the ban. Justice Ginsburg noted that "this law does not save any fetus from destruction . . . . Nor does the statute seek to protect the lives or health of pregnant women."[158] Given that the state purportedly meant to allow other, equally distasteful procedures, Ginsburg concluded that "the law prohibits the procedure [simply] because the state legislators seek to chip away at the private choice shielded by *Roe v. Wade*."[159] She declared, "'[I]f 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.'"[160]

Justice Stevens stated that, because the Court has held that the Fourteenth Amendment's protection of "liberty" encompasses the "woman's right to make this difficult and extremely personal decision," it was "impossible for [him] 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."[161] Justice Stevens's opinion, however, reflects a pre-*Casey* conception of the abortion right, one in which the woman's welfare alone is central to legitimate regulation of pre-viability abortion. Given *Casey*'s disavowal of this conception,[162] the *Carhart* majority's refusal to reject the ban as furthering no legitimate state interest is not surprising.

Unfortunately, although not unexpectedly, the majority opinion did not adopt Justices Stevens's and Ginsburg's views of the impermissibility of Nebraska's interests in enacting the ban. It also did not say whether the state's interests in the fetus and in the woman's

157. *Id.* at 930-31 (internal quotation marks omitted).

158. *Id.* at 951 (Ginsburg, J., concurring).

159. *Id.* at 951-52.

160. *Id.* at 952 (quoting Hope Clinic v. Ryan, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, C.J., dissenting)). Ginsburg further claimed that a "substantial obstacle" (i.e., an undue burden) exists any time a state "stops a woman from choosing the procedure her doctor 'reasonably believes will best protect'" her. *Id.* (citation omitted).

161. *Id.* at 946 (Stevens, J., concurring) (emphasis added). Stevens also asserted that, even if one believed that abortion were not protected as a fundamental right, the ban should be struck as unconstitutional because it was "simply irrational" in prohibiting one procedure while permitting others "equally gruesome." *Id.* at 946-47.

162. *See* Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992) (noting that *Roe*'s framework "misconceives the nature of the pregnant woman's interest [and] undervalues the State's interest in potential life").

health are the *only* legitimate interests that the state may advance. Even assuming the state's interests are so limited, *Carhart* did not address the breadth of the state's interest in the fetus and whether it includes related but more atmospheric interests such as "fetal dignity," an interest Nebraska asserted. Although the Court acknowledged that Nebraska's ban did not further the state's interest in the fetus as that interest is normally understood—the interest in saving a fetus from destruction—it did not declare that the state's fetal interest must always be so narrowly conceived.[163]

Justice Kennedy, on the other hand, promoted an alarmingly broad view of the state interests that could justify pre-viability restrictions.[164] Asserting that "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate," Kennedy claimed that *Casey* "held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion."[165] Kennedy asserted that a state's legitimate interests could include "concern for the life of the unborn and 'for the partially-born,' [and interests] in preserving the integrity of the medical profession, and in 'erecting a barrier to infanticide.'"[166] Since the majority did not firmly reject these interests as valid justifications for pre-viability restrictions, legislatures may well perceive an invitation to experiment with what kinds of state interests they may advance through abortion restrictions.

Carhart's frustrating refusal to address directly the legitimacy of the state's interests can most likely be attributed to the need to persuade Justice O'Connor to join the opinion. Justices Stevens and Ginsburg clearly saw the ban as not furthering any legitimate state interest. Justices Breyer and Souter may have had sympathy for that view as well. Justice O'Connor, however, was willing to tolerate some procedure bans, and she went out of her way to assert that "a ban on partial birth abortion that only proscribed the D&X method of abortion and that included an exception to pre-

163. Justice Thomas pointed out that, by considering whether the ban imposed an undue burden, the majority assumed that the state had a legitimate interest in enacting it. *Carhart*, 530 U.S. at 1008 n.18 (Thomas, J., dissenting).

164. *Id.* at 961 (citing *Casey*, 505 U.S. at 877).

165. *Id.* It is by no means clear that *Casey* held any such thing. Justice Kennedy apparently relied on *Casey*'s ambiguous and passing reference to statutes supported by "the interest in potential life *or some other valid state interest.*" *Casey*, 505 U.S. at 877 (emphasis added). Elsewhere on that page, the *Casey* joint opinion referred only to the state's interest in the fetus or in potential life and said it was permissible for the state to "express profound respect for the life of the unborn." *Id.*

166. *Carhart*, 530 U.S. at 961-62 (Kennedy, J., dissenting) (citation omitted).

serve the life and health of the mother would be constitutional."[167] By ducking the issue of the legitimacy of the state's interests and focusing instead on the absence of a health exception, the majority was able to agree on the grounds for striking down Nebraska's ban. But in doing so, the Court failed to reject categorically any limitation on a woman's right to choose the procedure her physician reasonably believes will best protect her.[168]

B. The Health Exception Requirement

The absence of a health exception was perhaps the most obvious constitutional flaw in Nebraska's "partial-birth abortion" ban. The Court in *Carhart* began its analysis with a discussion of this flaw.[169] Notwithstanding Justice Breyer's assurance that it was a "straightforward application," the Court faced a number of issues in applying the health exception requirement. Although it favorably resolved some important questions left open by *Casey*, *Carhart*'s conclusions were cautious and conservative. Anti-choice advocates will no doubt pounce upon these aspects of *Carhart* in an attempt to blunt the decision's impact.[170]

Notably, the majority separated its health exception discussion and its undue burden analysis, treating the health exception as an independent requirement. The majority's approach thus rejected *Casey*'s suggestion that the health exception requirement might be subject to the undue burden standard.[171] This was an important clarification that should prove helpful in challenging abortion restrictions that lack a health exception.[172]

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

168. *See* Women's Medical Prof'l Corp. v. Taft, 353 F.3d 436, 447 (6th Cir. 2003) ("In a broader sense, even by focusing on the need for a health *exception*, the Court *invites* state regulation of abortion methods. If it were otherwise, the Court would have held, in a straightforward fashion, that states may not interfere at all with medical discretion when abortions are involved.").

169. *Carhart*, 530 U.S. at 930-38.

170. At least one court has already relied upon *Carhart*'s qualified language to uphold a ban on D&X with a limited health exception. *See Women's Medical Prof'l Corp.*, 353 F.3d at 448.

171. Justice Thomas took issue with the majority's approach, arguing that *Casey* indeed intended for the health exception to be subject to the undue burden standard. *Carhart*, 530 U.S. at 1011 n.20, 1012-13 (Thomas, J., dissenting). Justice Kennedy appeared to adopt the same view. *See id.* at 964-66 (Kennedy, J., dissenting) (suggesting that a ban on D&X without a health exception would "not amount to a substantial obstacle to the abortion right").

172. *See, e.g.*, Planned Parenthood of Rocky Mountains Servs. v. Owens, 287 F.3d 910, 917 (D. Colo. 2002) (relying on *Carhart* in affirming invalidation of parental notification for abortion law based on lack of health exception). *But see Women's Medical Prof'l Corp.*, 353 F.3d at 447 ("While the majority opinion in *Carhart* does not

The Court set out the health exception requirement as formulated in *Roe*: "[S]ubsequent to viability, the State . . . 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.*"[173] Nebraska's "partial-birth abortion" ban applied throughout pregnancy, but the Court explained that *Roe*'s demand for a health exception in post-viability restrictions applies with equal or greater force before viability.[174] *Carhart* thus stated explicitly what *Casey* had implicitly confirmed: "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."[175] This is so, the Court explained, because "[t]he State's interest in regulating abortion previability is considerably weaker than postviability."[176]

Justice Thomas, dissenting, argued that the principle the Court articulated applies only to situations where the pregnancy itself threatens the woman's health.[177] "[*Roe* and *Casey*] addressed only the situation in which a woman must obtain an abortion because of some threat to her health from continued pregnancy," Thomas asserted. "But [they] say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods."[178] The majority responded that the Court's precedents:

> [r]ecognize 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. They make clear that a risk to a women's [sic] health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely.[179]

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employ the undue burden standard explicitly in connection with the health exception issue, its analysis [of the health exception requirement] reflects *Casey*'s acknowledgment of the importance of reconciling profound state interests and personal rights.").

173. *Carhart*, 530 U.S. at 930 (quotation marks omitted).

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* at 1009 (Thomas, J., dissenting).

178. *Id.* at 1010.

179. *Id.* at 931. Justice O'Connor agreed that "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." *Id.* at 947 (O'Connor, J., concurring) (emphasis added). This statement is somewhat opaque, however, since it is not clear what she meant by "necessary to preserve the health of the mother." Did

The Court thus clarified that, at least with respect to restrictions on abortion procedures, the health exception requirement applies not only to *unhealthy pregnancies*, but also to any pregnancy—healthy or not—when harm is caused by the *abortion regulation* itself.[180]

In articulating the health exception requirement in *Carhart*, the majority referred exclusively to pre-*Casey* decisions, in which the Court had said that, when acting to further its interest in the fetus, a state may not impose a "trade-off" between the woman's health and fetal welfare.[181] The majority claimed that these rulings were "re-affirmed in *Casey*,"[182] although they were not mentioned at all in *Casey*'s discussion of the medical emergency exception.[183] Moreover, *Casey* had not clearly affirmed the principle that a state may never impose a "trade-off" between the woman's health and fetal welfare.[184] *Carhart* did not go quite that far either: in stating that "a State cannot subject women's health to *significant* risks,"[185] the majority appeared to adopt a formulation of the "no trade-off" principle that turns on the significance of the risk imposed.[186] The Court offered no guidance, however, for determining whether any given health risk is "significant."[187]

The addition of the word "significant" may, again, reflect a concession necessary to garner the vote of Justice O'Connor, who

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she refer to situations in which, as majority indicated, the procedure is simply the safest among safe procedures (even for a healthy woman)? Or was she referring only to women whose health is already at risk?

180. Justice Kennedy denied that Nebraska's ban required an exception to protect the woman's health, referring to the "vice of a health exception resting in the physician's discretion." *Id.* at 972 (Kennedy, J., dissenting). Kennedy would have permitted the state to subject women to some unspecified measure of increased health risks in order to accommodate its desire to address the "grave moral issues presented by a new abortion method." *Id.* at 967. "Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right," he declared. *Id.* at 967-68.

181. *See id.*, at 931 (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986); Colautti v. Franklin, 439 U.S. 379, 400 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 76-79 (1976); Doe v. Bolton, 410 U.S. 179, 197 (1973)).

182. *Carhart*, 530 U.S. at 931.

183. *Id.*; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 880 (1992) (discussing the medical emergency exception).

184. *See Casey*, 505 U.S. at 874-75; *see also supra* notes 128-37 and accompanying text.

185. *Carhart*, 530 U.S. at 931 (emphasis added).

186. *Id.*; *see also* Women's Medical Prof'l Corp. v. Taft, 353 F.3d 436, 448 (6th Cir. 2003) (asserting that *Carhart* "firmly recasts" the Court's no-trade-off decisions "in the 'significant health risk' mold").

187. In *Thornburgh*, the Court refused to read the term "significant" as denoting merely meaningful or real. *See supra* note 135.

might have insisted on the qualifier in order to preserve the possibility of upholding health exceptions that allow some margin of risk. The joint opinion in *Casey*, as well as earlier O'Connor dissents, suggest that O'Connor feels ambivalent about how much health risk a state should be allowed to impose.[188] Whatever the Court's reasons for including the "significant" qualifier, some will construe *Carhart*'s repeated use of this modifier to allow for limited health exceptions that impose some measure of increased health risks on women. At least one lower court has already applied *Carhart* in this manner.[189]

The next issue the *Carhart* Court faced in evaluating the ban's lack of a health exception was whether *all* procedure bans require a health exception or whether an exception is required only when the banned procedure may be safer than other methods. The Court took the latter position, examining the safety of the dilation and extraction ("D&X") method that Nebraska claimed to target[190] before concluding that the ban required a health exception.[191] The Court reviewed the medical evidence regarding the safety of D&X and concluded that "a statute that altogether forbids D&X creates a significant health risk. The statute consequently must contain a health exception."[192]

In assessing the safety of D&X, the Court recognized that "[d]octors often differ in their estimation of comparative health risks and appropriate treatment."[193] Therefore, the majority opinion said, *Casey*'s phrase "necessary, in appropriate medical judg-

188. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 832 (1986) (O'Connor, J., dissenting) ("I express no opinion as to the point at which a 'trade-off' between the health of the woman and the survival of the fetus would rise to the level of an undue burden.").

189. *Women's Medical Prof'l Corp.*, 353 F.3d at 444, 448, 453 (upholding ban on D&X with a health exception limited to abortions "necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function"). *Id.* at 440.

190. The procedure is also known as intact dilation and evacuation ("intact D&E"). In fact, the Court ultimately determined that the ban encompassed more than this one procedure, also banning dilation and evacuation ("D&E"), the most commonly used procedure for second-trimester abortions. *See Carhart*, 530 U.S. at 927. For purposes of the health exception discussion, however, the Court treated the ban as though it reached only D&X.

191. *Id.* at 937-78. Justice Stevens, although joining the majority opinion, questioned the state's prerogative ever to second guess a physician's choice of procedure if the physician "reasonably believes" the procedure will "best protect the woman." *Id.* at 946 (Stevens, J., concurring).

192. *Id.* at 938.

193. *Id.* at 937.

ment,"[194] to preserve a woman's life or health "cannot refer to an absolute necessity or to absolute proof."[195] Nevertheless, in deciding whether the state could ban the procedure, the Court did not leave the question of a procedure's appropriateness solely to an individual doctor's reasonable medical judgment: "This is not to say . . . 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.*"[196] Although specifically rejecting the need for medical *consensus*, the Court seemed to require a fairly high level of "medical authority" confirming the method's safety: "[W]here *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.'"[197]

In reality, however, physicians are never granted "unfettered discretion" in determining the course of medical treatment because the threat of malpractice and loss of license constrains them. In malpractice cases, the plaintiff bears the burden of proof in establishing that a physician's conduct, or choice of procedure, in a given case has caused harm. *Carhart*'s "substantial medical authority" requirement, however, shifts the burden of proof to the physician, or to women needing the banned procedure, to establish the need for an exception to the ban. Thus, a state is free to enact a generalized ban, and it may omit a health exception unless the *physician* can show that "substantial medical authority" supports the need

194. Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992).

195. *Carhart*, 530 U.S. at 937. *But see* Women's Medical Prof'l Corp. v. Taft, 353 F.3d 436, 447 (6th Cir. 2003) ("Although *Carhart* cautions that the term 'necessary' does not 'refer to an absolute necessity or to absolute proof,' the word cannot be emptied entirely of its distinctive meaning by being equated with 'desirable.' As used in *Roe* and developed in *Carhart*, it at least denotes some measure of compulsion . . . ." (citations omitted)).

196. *Carhart*, 530 U.S. at 938 (emphasis added).

197. *Id.* (emphasis added) (quoting *Casey*, 505 U.S. at 879). Elsewhere, the Court referred to "significant medical authority." *Id.* at 932. Justice O'Connor likewise emphasized the need for medical authority establishing D&X as safe:

> [T]he need for a health exception does not arise from the individual views of Dr. Carhart . . . . [Rather] 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 . . . the statute [must] include a health exception.

Id. at 948 (O'Connor, J., concurring) (internal quotations omitted).

for one. Conditioning the necessity of a health exception on the physician's proof of "substantial medical authority" unfairly subjects abortion to a unique standard. This is particularly unwarranted where, as here, the state purports to base the ban on its interest in the fetus, not on an interest in protecting women from a dangerous abortion method. If instead all abortion procedure bans were required to contain a health exception for when the doctor reasonably believes, in the exercise of her best medical judgment, that the procedure is safest, women should be adequately protected.

The Court's decision in *Doe v. Bolton*, the companion case to *Roe*, supports the latter view.[198] In *Doe*, the Court invalidated provisions of Georgia's abortion law that required confirmation by two other physicians and approval by a committee before any abortion could be performed.[199] The Court pointed out that no other medical or surgical procedure was subject to these requirements and concluded that women were sufficiently protected by "[t]he statute's emphasis . . . on the attending physician's 'best clinical judgment.'"[200] The Court noted:

> If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this professional censure and the deprivation of his license are available as remedies. . . . [R]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that [the physician] possesses the requisite qualifications.[201]

While *Carhart* concluded that the "substantial" or "significant" medical authority requirement had been met on the record before it, the Court did not indicate whether less extensive proof of safety would suffice to mandate a health exception. The Court in *Carhart* acknowledged that the record reflected disagreement among plaintiffs' and defendants' experts on the safety issue, but the Court was aslo presented with voluminous evidence on the safety of the D&X procedure,[202] a record amassed through years of "partial-birth

198. 410 U.S. 179 (1973).

199. *Id.* at 197-99.

200. *Id.* at 199.

201. *Id.* (internal quotation marks omitted) (citing Dent v. West Virginia, 129 U.S. 114, 122-23 (1889)).

202. *See Carhart*, 530 U.S. at 932-36.

abortion" litigation across the country.[203] Would the Court have reached a different conclusion if the procedure had been banned before the evidence was as fully developed? And, even if the *Carhart* majority would have been satisfied with less evidence, how can plaintiffs and lower courts determine the perimeters of the "substantial medical authority" requirement? Until the standard has been applied to more fact scenarios, these questions will remain.

Carhart's failure to require a health exception in every abortion procedure ban may mean that some courts will be hesitant to invalidate as a matter of law procedure bans lacking such an exception. For example, when Congress recently passed a "partial-birth abortion" ban, it refused to add a health exception, notwithstanding the Court's decision in *Carhart*.[204] Given the similarity between the federal ban and the Nebraska ban struck in *Carhart*, it would seem that courts addressing the federal ban could have ruled on the health exception question without a trial. In all three challenges to the federal ban, however, the judges have held trials in which the banned procedures' safety is a major issue.[205] In one case, the judge denied plaintiffs' motion for summary judgment, in which plaintiffs claimed that the ban was invalid as a matter of law under *Carhart* because it lacked a health exception. Instead, the judge interpreted *Carhart* to call for an inquiry into the banned procedures' safety.[206]

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203. For a periodically updated list of "partial-birth abortion" bans passed and challenged nationwide, *see* Center for Reproductive Rights, *"Partial Birth Abortion" Bans*, *at* http://www.crlp.org/st_law_pba.html (last updated Feb. 3, 2004).

204. *See* Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2004). The ban is under challenge in three separate cases: Planned Parenthood Fed'n v. Ashcroft, No. C03-4872 PJH, 2004 WL 432222, at *2 (N.D. Cal. Mar. 5, 2004); Carhart v. Ashcroft, 292 F. Supp. 2d 1189 (D. Neb. 2003); Nat'l Abortion Fed'n v. Ashcroft, 287 F. Supp. 2d 525 (S.D.N.Y. 2003).

205. *See* Henry J. Kaiser Family Foundation, *Federal Trials To Determine Constitutionality of Abortion Ban Begin in Three Cities*, KAISER DAILY REPRODUCTIVE HEALTH REP., Mar. 30, 2004, *at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=22 933 (last visited Apr. 5, 2004).

206. Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ.8695 (RCC), 2004 WL 540470, *3 (S.D.N.Y. Mar. 17, 2004) ("The constitutionality of the Act must be judged according to *Stenberg*'s requirement that abortion regulations must include a maternal health exception if 'a significant body of medical opinion believes a procedure brings with it greater safety advantages.'" (citing *Carhart*, 530 U.S. at 937)). The federal ban is distinctive both in that it is the first congressional ban on an abortion method and because Congress purported to avoid the health exception requirement by including detailed congressional "findings" that the ban is never medically necessary. *Id.* at *11. Courts applying *Carhart* to state "partial-birth abortion" bans may be more willing to strike as a matter of law bans that lack a health exception. *See, e.g.*, Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376, 377 (4th Cir. 2000) (Luttig, J., concurring)

The *Carhart* decision would have protected women's health far more strongly had it established explicitly and unreservedly that a procedure ban must always include an exception that permits a doctor to rely on her best medical judgment in determining how to carry out an abortion. The Court shied away from such an absolute pronouncement, perhaps recognizing that automatically requiring such a health exception would, at least in theory, render most procedure bans toothless.[207] The majority's formulation thus suggests the possibility that some procedure bans might be constitutional even without a health exception.

In sum, *Carhart*'s treatment of the health exception requirement clarified important aspects of the requirement that had been uncertain after *Casey*. The health exception requirement is an independent one; it is not subject to the undue burden test. The requirement applies to eliminate risks caused by the abortion regulation itself and not merely those caused by a risky pregnancy. At the same time, the Court's careful use of qualifiers like "significant" and "substantial" suggest that at least some members of the majority wanted to leave open the possibility of upholding some restrictions that impose an increased risk to a woman's health.

C. The Undue Burden Standard

The majority in *Carhart* concluded that, independent of the health exception flaw, Nebraska's "partial-birth abortion" ban posed an undue burden.[208] Here, the Court's task was made easier by the fact that, given the Court's reading of the statute, the Nebraska attorney general essentially conceded the undue burden question.[209] The Court read the ban to encompass not only D&X, the single procedure Nebraska claimed it targeted, but also D&E,

("The [Supreme] Court has now unequivocally held that *any* ban on partial-birth abortion must include an exception for the health of the mother" (emphasis added)).

207. *See Carhart*, 530 U.S. at 965. In fact, even a ban with a broad health exception is likely to have a chilling effect on physicians, especially if criminal penalties are attached. As it is, Justices Kennedy and Thomas accused the Court of deferring too much to the physician's discretion. Plaintiff Dr. Leroy Carhart testified that he performs D&X whenever possible in the second trimester because, in his medical judgment, it is safer for women in the middle to later part of the second trimester. *See id.* at 928. Leaving the application of the health exception to the doctor's discretion would appear to allow Dr. Carhart to perform the procedure whenever he felt it was safer; if so, he could continue to perform it as often he did before. This prospect led Justice Kennedy to complain that "[r]equiring Nebraska to defer to Dr. Carhart's judgment is no different from forbidding Nebraska from enacting a ban at all." *Id.* at 965 (Kennedy, J., dissenting).

208. *Id.* at 945-46.

209. *See id.* at 917.

the most commonly used method of second-trimester abortion.[210] Although the attorney general disputed that the ban had this scope, he did not dispute that under the Court's construction the ban was unconstitutional.[211] The Court's undue burden discussion was thus primarily an exercise in statutory construction. Once the Court determined that the ban prohibited D&E, its job was finished.

Because the Court reached its undue burden conclusion so easily, *Carhart* offered no undue burden *analysis* that might give needed shape and content to the undue burden standard. Having devoted pages to the far more complicated question of why the ban prohibited not only D&X but D&E, the Court needed only one paragraph to explain its conclusion that the ban therefore imposed an undue burden:

> In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.[212]

It seems self-evident that a ban on the most common method of abortion in a given stage of pregnancy creates a substantial obstacle. The Court clearly saw no reason to elaborate.[213] But knowing more about why the Court believed the ban imposed an undue burden might have helped illuminate the contours of the undue burden test. For example, the Court would likely have pointed out that the ban left no alternative procedure whatsoever in the early part of the second trimester.[214] If this were the Court's primary or

210. *Id.* at 930; *see also supra* note 190.

211. *Id.* at 933. Justices Kennedy and Thomas likewise appeared to assume that, if the ban prohibited D&E and not merely D&X, it would be unconstitutional. *See id.* at 972-73, 978 (Kennedy, J., dissenting) (arguing that the ban should have been construed narrowly and, read that way, did not impose an undue burden); *Id.* at 990, 1013 (Thomas, J., dissenting) (same as previous cite).

212. *Id.* at 945-46.

213. The Court undoubtedly would have found it harder to reach agreement among the five Justices in the majority had it tried to impart more content to the terms "undue burden" and "substantial obstacle."

214. *See, e.g.*, Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 297, 313 (D.R.I. 1999) (discussing unavailability of alternative procedures to D&E from the beginning of the second trimester until approximately sixteen weeks of pregnancy), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

only stated reason for finding an undue burden, this could indicate that the term "undue burden" is reserved for those restrictions that effectively remove the abortion option altogether. The Court might also have discussed the health risks implicated by the remaining available procedures; if so, its discussion might have provided some insight into the level of state-imposed risk that the Court would or would not find acceptable.[215] Or the Court might have recognized that the remaining procedures not prohibited by the ban imposed unacceptable burdens on women apart from physical risk, for example, causing the woman to suffer more pain and emotional trauma.[216] Such a conclusion would indicate that "undue burden" encompasses more than simply bans and virtual bans on abortion.

Instead, *Carhart* tells us little more about the undue burden test than what we could already gather from *Casey*. At minimum, restrictions are invalid under the undue burden test if the Justices view them as imposing an insurmountable obstacle on women seeking abortions. Whether and to what extent the Court would employ the standard to strike down less burdensome restrictions remains uncertain. Nothing in either *Casey* or *Carhart*'s application of the undue burden test definitively answers this question.

IV. CONCLUSION

Roe v. Wade undeniably advanced women's equality and autonomy when it boldly established abortion as a fundamental constitutional right. But the decision simultaneously opened a Pandora's box by acknowledging that the government has an interest in fetal welfare that may sometimes override the woman's rights. Under *Roe*, the conflict between the state's fetal interest and the woman's right to abortion was, at least theoretically, confined to the post-viability period. However uncontroversial it may seem to insist on limits to a woman's right to abort a viable fetus, *Roe*'s basis for limiting that right—the recognition of a sufficiently weighty governmental interest in potential life—is one that could easily be applied to abortions earlier in pregnancy. With the door left ajar in *Roe*, it was perhaps inevitable that subsequent decisions would

215. *See, e.g., id.* at 313-14 (discussing risks imposed by labor induction abortions, the major alternative to D&E after approximately sixteen weeks of pregnancy).

216. *See, e.g., id.* at 313 (discussing difficult "psychological effects" of labor induction abortions).

push it open wider and wider.[217] To allow the state to advance its interest in the fetus at any stage of pregnancy automatically raises the questions why it should not be allowed to do so at other stages and why the interest is always subordinate to the woman's health. But by officially inviting this conflict into the pre-viability period, *Casey* created a predicament from which the Court will not soon extricate itself.

Casey clearly paved the way for far greater state encroachment on the right to abortion in the name of fetal welfare. But while *Casey* gutted much of *Roe*, it retained *Roe*'s protection both against absolute bans on abortion and against serious restrictions that are equivalent to a ban. *Carhart* reaffirmed *Casey*'s promise that there are limits to permissible restrictions designed to advance the state's interest in the fetus, demonstrating that a solid majority of the current Court agrees that the undue burden test prohibits the most extreme abortion restrictions. Many women today thus remain able to obtain abortions when they need them.

Carhart does not prove that *Casey* left much of *Roe* intact, however. The undue burden standard continues to lack sufficient structure and content to guard effectively against burdensome abortion restrictions. And the more the individual restrictions pile up, the greater the overall barriers to women seeking abortions. These barriers are especially daunting, even insurmountable, for poor women, teenagers, and women living in rural areas. The fact that affluent, adult women still enjoy access to abortions should never obscure the disturbing reality that too many other women—particularly those who wield the least political power—are completely denied abortions thanks to the restrictions *Casey* allows. The Court, while claiming to uphold *Roe*'s "essence," in fact has stripped much of its substance. For the growing numbers of women who find it impossible to overcome the obstacles that states throw in their path, the shell that remains is not enough.

217. *See* Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992) (allowing states to enact pre-viability legislation based on interest in fetus is "the inevitable consequence of our holding [in *Roe*] that the State has an interest in protecting the life of the unborn").