

[NOTE: This opinion has been edited for use by students and teachers. For ease of reading, no indication has been made of deleted material and case citations. Any legal or scholarly use of this case should refer to the full opinion.]

STENBERG v. CARHART

530 U.S. 914 (2000)

JUSTICE BREYER delivered the opinion of the Court.

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

Three established principles determine the issue before us. We shall set them forth in the language of the joint opinion in *Casey*. First, before "viability . . . the woman has a right to choose to terminate her pregnancy."

Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. An "undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

Third, "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

We apply these principles to a Nebraska law banning "partial birth abortion." The statute reads as follows:

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

The statute defines "partial birth abortion" as:

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

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

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

The law classifies violation of the statute as a “Class III felony” carrying a prison term of up to 20 years, and a fine of up to \$ 25,000. It also provides for the automatic revocation of a doctor’s license to practice medicine in Nebraska.

We hold that this statute violates the Constitution.

Dr. Leroy Carhart is a Nebraska physician who performs abortions in a clinical setting. He brought this lawsuit in Federal District Court seeking a declaration that the Nebraska statute violates the Federal Constitution, and asking for an injunction forbidding its enforcement. After a trial on the merits, during which both sides presented several expert witnesses, the District Court held the statute unconstitutional. On appeal, the Eighth Circuit affirmed.

Because Nebraska law seeks to ban one method of aborting a pregnancy, we must describe and then discuss several different abortion procedures. Considering the fact that those procedures seek to terminate a potential human life, our discussion may seem clinically cold or callous to some, perhaps horrifying to others. There is no alternative way, however, to acquaint the reader with the technical distinctions among different abortion methods and related factual matters, upon which the outcome of this case depends. For that reason, drawing upon the findings of the trial court, underlying testimony, and related medical texts, we shall describe the relevant methods of performing abortions in technical detail.

The evidence before the trial court, as supported or supplemented in the literature, indicates the following: [The Court went on to describe various methods of abortion, including evidence that in some cases the method prohibited by the Nebraska statute, referred to as “D&X,” or dilation and extraction, was safer than the more commonly used “D&E,” or dilation and evacuation procedure.]

The question before us is whether Nebraska’s statute, making criminal the performance of a “partial birth abortion,” violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey* and *Roe v. Wade*. We conclude that it does for at least two independent reasons. First, the law lacks any exception “for the preservation of the . . . health of the mother.” *Casey*. Second, it “imposes an undue burden on a woman’s ability” to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself. We shall discuss each of these reasons in turn.

The *Casey* joint opinion reiterated what the Court held in *Roe*; that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*”

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

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

Consequently, the governing standard requires an exception “where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,” *Casey*, for this Court has made clear that a State may promote but not endanger a woman’s health when it regulates the methods of abortion.

Nebraska responds that the law does not require a health exception unless there is a need for such an exception. And here there is no such need, it says. It argues that “safe alternatives remain available” and “a ban on partial-birth abortion/D&X would create no risk to the health of women.” The problem for Nebraska is that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart. The State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure. [The Court considered each of Nebraska’s arguments in turn in light of the evidence provided by both sides.]

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

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

[The Court also concluded that, because of the way the more common D&E procedure is sometimes performed, it too would be banned by the statute.] The statute forbids “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child.” We do not understand how one could distinguish, using this language, between D&E (where a foot or arm is drawn through the cervix) and D&X (where the body up to

the head is drawn through the cervix). Evidence before the trial court makes clear that D&E will often involve a physician pulling a “substantial portion” of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus. Indeed D&E involves dismemberment that commonly occurs only when the fetus meets resistance that restricts the motion of the fetus: “The dismemberment occurs between the traction of . . . [the] instrument and the counter-traction of the internal os of the cervix.” And these events often do not occur until after a portion of a living fetus has been pulled into the vagina.

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

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 viability 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.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE SCALIA, dissenting.

I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child -- one cannot even accurately say an entirely unborn human child -- proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a “health exception” -- which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?) -- is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, “to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,” prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

For close to two decades after *Roe v. Wade*, the Court gave but slight weight to the interests of the separate States when their legislatures sought to address persisting concerns raised by the existence of a woman’s right to elect an abortion in defined circumstances. When the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and

legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed. *Planned Parenthood of Southeastern Pa. v. Casey*. The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.

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