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Cover Page Footnote

* J.D., Fordham University School of Law, 2002; B.A., Political Science, summa cum laude, Fordham University. I would like to thank Professor Charles M. Whelan, S.J., for his wisdom, time, patience, and guidance. I also would like to thank Gerard A. Imperato, and Professors Susan A. Beck and Thomas DeLuca, for sparking my interest in the law and for encouraging me to take risks. Thanks to the editors and staff members of the Fordham Urban Law Journal who took the time to help me with my Note. I dedicate this Note to my family and friends for their love, support, and sacrifice. All I am and will ever become is because of them.

“PARTIAL BIRTH” ABORTION AND THE HEALTH EXCEPTION: PROTECTING MATERNAL HEALTH OR RISKING ABORTION ON DEMAND?

*Gail Glidewell**

Because even the compelling interest of the State in protecting potential life after fetal viability was held [in Roe] to be insufficient to outweigh a woman's decision to protect her life or health, it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [Roe].¹

INTRODUCTION

In the first debate of the 2000 presidential election, President George W. Bush stated, “[W]e need to ban partial birth abortions [doing so] would be a positive step toward reducing the number of abortions in America.”² Former Vice President Albert Gore stated, however, “[O]n the issue of partial birth or so-called late-term abortion, I would sign a law banning that procedure, provided that doctors have the ability to save a woman's life or to act if her health is severely at risk.”³ This rhetoric captures the essence of one of the most contentious constitutional issues currently facing American courts—the legality of statutes banning the medical pro-

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1. *Harris v. McRae*, 448 U.S. 297, 316 (1980) (holding that a state that participates in the Medicaid program is not obligated under Title XIX of the Social Security Act to continue to fund those medically necessary abortions for which federal reimbursement was unavailable under the Hyde Amendment, the 1976 amendment to Title XIX severely limiting the use of any federal funds to reimburse the cost of abortions under the Medicaid program).

2. *Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A31.

3. *Id.*

cedure, intact dilation and extraction (“D&X”), or the so-called partial birth abortion procedure.⁴ The rhetoric also highlights a specific issue that courts have explored in the course of their inquiries into what I will term “the partial birth abortion question,” that is, what role the “maternal health exception” will play in future court decisions on the constitutionality of partial birth abortion bans. This Note explores the implications of the Supreme Court’s recent decision in *Stenberg v. Carhart* to invalidate a Nebraska statute banning partial birth abortion.⁵ Specifically, this Note focuses on one of the rationales the Court offered for its decision to invalidate the statute: the statute’s failure to contain an exception to the ban for instances in which abortions are medically necessary to protect the health of the woman.⁶ The majority held that the Nebraska partial birth abortion ban required a health exception.⁷ However, the majority provided few clear guidelines specifying the requirements of such a health exception.⁸

4. The dilation and extraction procedure (“D&X”) is a rarely used second trimester abortion procedure, accounting for approximately only one percent of all abortions performed after twenty-one weeks of pregnancy, or approximately only 0.01% of all abortions performed annually. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2608 (2000); Ann MacLean Massie, *So-Called “Partial-Birth Abortion” Bans: Bad Medicine? Maybe. Bad Law? Definitely*, 59 U. PITT. L. REV. 301, 317-18 (1998) (arguing that partial birth abortion bans are highly “constitutionally suspect” because of their vague language, lack of an exception for the health of the woman, and probable violation of *Casey*’s undue burden standard). For a more detailed discussion of the D&X procedure, see *infra* Part I.A. Opponents of late term abortion rights refer to the D&X procedure publicly as “partial birth” abortion. Linda Greenhouse, *The Supreme Court: The Nebraska Case*, N.Y. TIMES, June 29, 2000, at A1 (discussing the Supreme Court’s *Stenberg v. Carhart* decision and background to partial birth abortion bans). Pro-choice advocates, however, prefer to use the medical term, D&X. *Id.* I will use the term “partial birth” abortion throughout this Note because it is, for better or worse, how the procedure has come to be known and called by the public, press, and academia. For a more detailed discussion of the term, see *infra* Part I.A.

5. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

6. *Id.* at 2613. The *Carhart* Court also held that a statute that seeks to ban a particular abortion procedure must not contain any vague language. *Id.* at 2614. The statute must make clear, through its “plain language,” exactly which procedure(s) it “[is] intended to apply” to (in particular, “whether the law was intended to apply only to” the D&X procedure). *Id.* The majority held that because the language of the Nebraska statute prohibited the D&X, as well as the dilation and evacuation (“D&E”) procedure, the most common pre-viability, second trimester abortion procedure, the statute imposed an undue burden on a woman’s ability to obtain an abortion. *Id.* at 2617. The vagueness prong of the *Carhart* decision is beyond the scope of this Note, and will be discussed only briefly *infra* Part I.A.

7. *Carhart*, 120 S. Ct. at 2613.

8. *Id.* at 2609-613.

Prior to *Carhart*, approximately thirty states had statutes banning partial birth abortion.⁹ Only two of those statutes contained an exception for the health of the woman.¹⁰ After *Carhart*, it is highly likely that when confronted with the same set of circumstances as *Carhart*, future courts will require statutes banning partial birth abortion to contain health exceptions. Court battles likely will focus, in large part, on what provisions health exceptions should contain, and on how such provisions should be interpreted. However, just as abortion jurisprudence has evolved along with changes in medical knowledge, social, political, and moral standards, and the composition of the Supreme Court, future court decisions on the constitutionality of partial birth abortion bans will be shaped by similar changes.

The *Carhart* decision undoubtedly influenced President Bush and former Vice President Gore's statements *supra*. Their statements suggest several compelling questions such as: Will the Supreme Court still require partial birth abortion bans to contain health exceptions if it is faced with different circumstances than those faced by the *Carhart* Court? What are the implications of requiring a health exception in statutes banning partial birth abortion? What provisions will future courts require, or prohibit, in health exceptions? Will a health exception in a partial birth abortion ban risk abuse and endless exceptions to the rule?

These questions are important because debate over the constitutional limit on reproductive freedom as it pertains to abortion, or what I term "the abortion issue," has been a conspicuous part of the political landscape since even before the 1973 decision *Roe v. Wade*. The controversy over partial birth abortion is the most current manifestation of this debate. Like *Roe* in 1973, *Carhart* in 2000 was the culmination of several lower court challenges to state and federal abortion statutes.¹¹ Both decisions were also the em-

9. Greenhouse, *supra* note 4, at A1.

10. UTAH CODE ANN. § 76-7-310.5 (1996); OHIO REV. CODE ANN. § 2919.15 (West 1995) (repealed 1997). The Ohio statute was found unconstitutional by the Sixth Circuit in *Women's Med. Profl Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). The Sixth Circuit invalidated the statute because it found its language unconstitutionally vague, and because it contained medical emergency and health exception provisions that did not consider mental health risks. For a detailed discussion of the *Voinovich* court's analysis on the statute's health exception, see *infra* Parts II.B.1.a.ii., II.B.1.b, II.B.2.b., and II.B.3.a.

11. E.g., *Eubanks v. Stengel*, 224 F.3d 576 (6th Cir. 2000) (invalidating Kentucky statute banning "partial birth" abortion that was similar in language to the Nebraska statute in *Carhart*, as unconstitutionally overbroad in light of the Court's *Carhart* decision); *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 120 S. Ct. 2597 (2000)

bodiment of much more: contemporary moral values, the place of religion in constitutional inquiries into the right to abortion, and the role of each gender in defining and shaping that right.¹² Just as *Roe* was only the beginning of the national debate on abortion, *Carhart* is undoubtedly only the beginning of a national debate on partial birth abortion. Similarly, just as *Roe* did not conclusively settle the abortion issue, neither has *Carhart* conclusively settled the partial birth abortion issue. Although seemingly only a small piece of the issue, how future courts interpret the health exception in statutes banning partial birth abortion certainly will affect in fundamental ways the overall course of the controversy. How courts interpret maternal "health" will shape future abortion jurisprudence, and will alter the meaning of the right to abortion for future generations of women.

(invalidating Nebraska statute banning "partial birth" abortion because statute imposed an undue burden on a woman's right to choose to have an abortion); *Little Rock Family Planning Servs., P.A. v. Jegley*, 192 F.3d 794 (8th Cir. 1999) (invalidating Arkansas statute banning "partial birth" abortion because statute was unconstitutionally overbroad and placed an undue burden on a woman's right to obtain an abortion); *Richmond Med. Ctr. for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) (reversing denial of stay on preliminary injunction to enjoin enforcement of Virginia statute banning "partial birth" abortion, in part, because statute was not unconstitutionally vague); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463 (7th Cir. 1998) (invalidating Wisconsin statute banning "partial birth" abortion because statute was unconstitutionally vague and had no exception for the health of the woman), *rev'd en banc*, *The Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999) (upholding Illinois and Wisconsin statutes banning "partial birth" abortion because statutes could be interpreted to avoid vagueness and thus did not impose an undue burden on a woman's right to abortion); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (invalidating Ohio law banning pre- and post-viability "partial birth" abortion procedures because the law was unconstitutionally vague and contained medical emergency and health exception provisions that did not consider mental health risks); *Summit Med. Assocs., P.C. v. James*, 984 F. Supp. 1404 (M.D. Ala. 1998) (affirming decision that abortion providers stated constitutional undue burden claims when they challenged Alabama statutes banning "partial birth" and post-viability abortions), *aff'd and rev'd on other grounds*, *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997) (invalidating Michigan statute banning "partial birth" abortion because statute was unconstitutionally vague and imposed an undue burden on a woman's right to have an abortion); *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997) (invalidating statute banning "partial birth" abortion, in part, because statute was unconstitutionally vague and imposed an undue burden on a woman's ability to obtain an abortion).

12. Court battles over the constitutionality of abortion are fraught with ethical conflicts. The Supreme Court has acknowledged "the 'treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case.'" *United States v. Vuitch*, 402 U.S. 62, 79 (1971) (Douglas, J., dissenting in part) (quoting *Jordan v. De George*, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)).

This Note analyzes the central role of women's health in the debate over the limits of abortion rights, and how courts have invalidated or upheld abortion statutes based on whether they pose a risk to women's health.¹³ Part I of this Note provides a background on the current state of the partial birth abortion controversy, focusing specifically on how the health exception issue fits into this controversy. It also discusses Supreme Court case law comprising the foundation of the abortion and partial birth abortion debates, the current state of the law on the health exception, and the policy considerations underlying the debate. Part II presents the central controversy, which has two prongs: (A) whether, after *Carhart*, courts always will require statutes banning partial birth abortion to contain an exception for the health of the woman, and (B) what courts will require a health exception to contain to pass constitutional muster. Prong (B) is broken down into three controversial issues courts have focused on when analyzing health exceptions in abortion statutes: (1) the meaning and scope of the term "health," (2) the required severity of the risk to the woman's health, and (3) whether a subjective or an objective standard should be applied to determine when a woman's health is at risk.

Part III argues that future courts likely will require statutes banning partial birth abortion always to contain an exception for the health of the woman. Part III then argues, first, that although state legislatures should draft health exceptions that broadly define "health," more narrow interpretations of "health" probably will be upheld by future courts. Second, although state legislatures should require a woman's health to be at serious risk, the controversial nature of partial birth abortion may result in courts upholding stricter severity requirements. Third, courts should strike a reasonable balance and rely on a mixed subjective and objective standard to determine when a woman's health is at risk. This Note concludes that this proposal must be balanced against many unpredictable forces, including changes in political leadership in the executive and legislative branches, changes in the composition of the Supreme Court, and advances in medicine. Moreover, much of

13. Courts have not interpreted abortion statutes with only the state interest in protecting maternal health in mind. As will become clear in the following Parts of this Note, courts have considered other state interests in the course of passing judgment on abortion statutes. Nonetheless, the interest in the "preservation of the life or health of the mother" has never been obviated by other interests, and has never, prior to the partial birth abortion debate, resulted in courts upholding abortion statutes that lacked a health exception. *Roe v. Wade*, 410 U.S. 113, 164 (1973); *infra* Parts I-III.

the case law in this area is new, and older case law only recently has been applied to challenges to partial birth abortion bans. Thus, any predictions and conclusions are, necessarily, conditional.

I. FOUNDATIONS OF THE DEBATE

Future court decisions on partial birth abortion bans, and whether and what kind of a "maternal health exception" will be required in partial birth abortion bans, will have strong policy implications for the resolution of other aspects of the debate over abortion rights. Opponents of so-called partial birth abortion often stress what they believe to be the heinous nature of partial birth abortion procedures,¹⁴ as well as the moral differences between the partial birth abortion method and other abortion methods.¹⁵ Defenders of this medical procedure argue that maintaining the option of partial birth abortion is necessary if "choice"—a woman's right of whether or when to have an abortion—is to remain meaningful.¹⁶ Moreover, defenders of the procedure argue that banning partial birth abortion puts the health of certain women at risk.¹⁷ Therefore, opponents and defenders will watch closely any court decisions that appear to strengthen or weaken the legality of partial birth abortion. This Part will provide a brief background of the controversy and explain how the health exception issue relates to this controversy. It also will discuss the Supreme Court decisions that provide the foundation for a health exception requirement in abortion regulations, the current state of the law on the health exception, and where the controversy appears to be heading.

14. *E.g.*, *Stenberg v. Carhart*, 120 S. Ct. at 2635 (Kennedy, J., dissenting) ("The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious crimes against human life . . .").

15. *E.g.*, *id.* at 2626 (Kennedy, J., dissenting) ("Nebraska was entitled to find the existence of a consequential moral difference between the procedures."); Greenhouse, *supra* note 4, at A1 (quoting James Bopp, General Counsel for the National Right to Life Committee, calling the *Carhart* decision a "radical expansion of the right to abortion"); Nat Hentoff, *Close to Infanticide*, WASH. POST, Aug. 30, 1996, at A31 (arguing that partial birth abortion is akin to infanticide).

16. *E.g.*, *Carhart*, 120 S. Ct. at 2620 (Ginsburg, J., concurring) (remarking that "partial birth" abortion bans are enacted to "chip away at the private choice shielded by *Roe v. Wade*, even as modified by *Casey*").

17. Hentoff, *supra* note 15 ("[S]upporters . . . claim [partial birth abortions] are performed only when the fetus is severely deformed and could cause great harm to the mother or even her death.").

A. The "Partial Birth" Abortion Procedure and General Background of the Debate

In order to understand the nature of this controversy, one must first understand the actual procedures and terminology at issue. The term, "partial birth" abortion, is not a medically recognized term.¹⁸ It is a term created in the mid-1990s by opponents of abortion to describe a method of abortion that doctors generally use to terminate pregnancies that have progressed longer than approximately sixteen weeks.¹⁹ The term was selected in the hope that the graphic images of the procedure it conjures up would help to undermine public support for abortion rights.²⁰ Partial birth abortion is, nonetheless, understood in the medical community to mean a certain method of second trimester, late-term abortion referred to as an "intact dilation and extraction" ("D&X") procedure.²¹ Doctors perform the D&X procedure only after approximately the sixteenth week of pregnancy when the fetus's skull is too large to fit safely through an undilated cervix.²² The D&X procedure is per-

18. *E.g.*, *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1376 (D. Ariz. 1997) ("The term 'partial birth abortion' is not a medical term which is used in the field of obstetrics/gynecology.").

19. *Greenhouse*, *supra* note 4, at A1. To place partial birth abortion in context, it is useful to provide some statistics on the performance of abortion procedures in the United States. About ninety percent of all abortions in the United States take place during the first trimester, before the twelfth week of pregnancy. *Carhart*, 120 S. Ct. at 2605. During the first trimester, the most common abortion method is the "vacuum aspiration" method, which involves insertion of a vacuum tube into the uterus to evacuate the contents. *Id.* However, as the fetus grows in size, the vacuum aspiration method becomes difficult to use. *Id.* at 2606. About ten percent of all abortions are performed during the second trimester, from twelve to twenty-four weeks of pregnancy. *Id.* During this period, the most common method of abortion used, as discussed in the text, is the "dilation and evacuation" ("D&E") procedure. *Id.*; *infra* note 29 and accompanying text. D&E accounts for approximately ninety-five percent of all abortions performed from twelve to twenty weeks of pregnancy. *Carhart*, 120 S. Ct. at 2606. The D&X procedure also is performed during the second trimester, but to a far lesser extent than D&E. *See id.* at 2608. Only about one percent of all abortions are performed after twenty-one weeks of pregnancy, and D&X accounts for approximately only one percent of these abortions, or approximately 0.01% of all abortions performed annually. *Massie*, *supra* note 4, at 317-18. Lastly, only about 0.04% of all abortions are performed after twenty-six weeks. *Id.*

20. *Greenhouse*, *supra* note 4, at A1.

21. Maureen L. Rurka, Comment, *The Vagueness of Partial-Birth Abortion Bans: Deconstruction or Destruction?*, 89 J. CRIM. L. & CRIMINOLOGY 1233, 1236 (1999) ("In refusing to grant the legislatures th[e] leeway in drafting the partial-birth abortion bans, the thirteen federal courts that have struck down or enjoined enforcement of these bans on void-for-vagueness grounds have done a disservice to the principles of federalism.").

22. *Carhart*, 120 S. Ct. at 2607.

formed very rarely.²³ Although no reliable statistics exist on the number of D&X abortions performed annually, it is estimated that, of all abortions performed after twenty-one weeks (approximately one percent of all abortions performed in the United States), D&X represents only about one percent.²⁴ In a D&X abortion, doctors try to keep the fetus as intact as possible.²⁵ They extract the fetus feet-first,²⁶ and then use a sharp instrument to collapse the fetal skull.²⁷ The procedure typically involves: (1) deliberate dilation of the cervix, usually over a period of days, (2) instrumental conversion of the fetus to a footling position, (3) breech extraction of the body excepting the head, and (4) partial evacuation of the intracranial contents of the fetus "to effect vaginal delivery of a dead but otherwise intact fetus."²⁸

The most common second trimester abortion procedure used is called "dilation and evacuation" ("D&E"), a variation of the D&X procedure.²⁹ D&E generally is used in the period between twelve and twenty-four weeks of pregnancy,³⁰ and accounts for approximately ninety-five percent of all abortions performed between twelve and twenty weeks of pregnancy.³¹ The D&E procedure typically involves: (1) dilation of the cervix, (2) removal of at least

23. *Id.* at 2608 (estimating range as from 640 to 5000 D&X procedures performed per year).

24. *Id.*; Massie, *supra* note 4, at 317-18 (estimating that D&X represents only about one percent of all abortions performed after twenty-one weeks of pregnancy, or approximately 0.01% of all abortions performed annually).

25. *Carhart*, 120 S. Ct. at 2608.

26. Technically, "intact D&E" can proceed in one of two ways depending on how the fetus presents, head or feet first. *Id.* at 2607. It is the breech-extraction version of intact D&E that is commonly known as the D&X procedure. *Id.* The two procedures are, however, "sufficiently similar for us to use the terms interchangeably." *Id.* at 2608.

27. *Id.* at 2607.

28. *Id.* at 2608 (quoting AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS EXECUTIVE BD., STATEMENT ON INTACT DILATION AND EXTRACTION 599-60 (1997)). There are, in addition, other abortion methods that are used during the second trimester. See Rebecca L. Andrews, Note, *The Unconstitutionality of State Legislation Banning "Partial-Birth" Abortion*, 8 B.U. PUB. INT. L.J. 521, 528-29 (1999) (arguing that state legislation attempting to ban partial birth abortion is unconstitutional based on Supreme Court precedent). These methods include the "instillation" or "induction" methods, which involve simulation of labor by the removal of amniotic fluid in varying amounts and the instillation of saline in utero; "hysterotomy," a pre-term Cesarean section; and, "hysterectomy," the removal of the uterus. *Id.* However, because all of these procedures often result in severe complications to the pregnant woman, they are rarely used as abortion procedures. *Id.*

29. *Carhart*, 120 S. Ct. at 2606.

30. *Id.*

31. *Id.*

some fetal tissue using non-vacuum instruments, and (3) (after fifteen weeks) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus.³² Dismemberment generally occurs when the doctor pulls a portion of the fetus into the birth canal.³³

The main difference between the D&E and D&X procedures is that the D&X procedure involves "removing the fetus from the uterus through the cervix 'intact,' e.g., in one pass, rather than in several passes," as in the D&E procedure.³⁴ The rationale for associating the D&X, and not the D&E procedure, with "partial birth" abortion generally has been that because the fetus is delivered intact in a D&X procedure, "the child is delivered completely out of the uterus and the vagina," thus provoking some to term the procedure "partial birth infanticide."³⁵

The majority of court battles over the constitutionality of statutes banning partial birth abortion have focused on whether statutes purporting to ban only the D&X procedure could be

32. *Id.*

33. *Id.*

34. *Id.* at 2607.

35. Jill R. Radloff, Note, *Partial-Birth Infanticide: An Alternative Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1556, 1558 (1999) (suggesting that partial birth abortion bans should be replaced by partial birth infanticide bans because the latter "make[] it more likely that these statutes will be found constitutional because such bans neither infringe upon the right of a woman to choose to have an abortion nor are they unconstitutionally vague"). There has been thought-provoking discussion suggesting that the legal distinction between the D&X and D&E procedures is irrational and fails to accomplish any compelling state interests in regulating abortion. *E.g.*, *Carhart*, 120 S. Ct. at 2617 (Stevens, J., concurring). For example, in his concurring opinion in *Carhart*, Justice Stevens questioned whether banning only one of "these two equally gruesome procedures" furthers any legitimate state interests at all. *Id.* He described the distinction as "simply irrational." *Id.*; see also *id.* at 2620 (Ginsburg, J., concurring) ("[T]his law [the Nebraska statute] does not save any fetus from destruction, for it only targets a *method* of performing abortion . . . [n]or does the statute seek to protect the lives or health of pregnant women.") (citations omitted) (emphasis in original). For an in-depth discussion on the irrationality of the legal distinction between the D&E and D&X procedures, see *The Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, J., dissenting) (observing that laws that prohibit the D&X and not the D&E procedure do so "not because the procedure [D&X] kills the fetus, not because it risks worse complications for the woman than alternative procedures would do, [and] not because it is a crueler or more painful or more disgusting method of terminating a pregnancy . . ."), *vacated*, *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 467 (7th Cir. 1998) (holding, in part, that a Wisconsin law purporting to ban only the D&X procedure failed to accomplish any recognizable state interests), *rev'd en banc*, *The Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999).

interpreted also to ban the D&E procedure.³⁶ A ban on D&E would ban the most common second-trimester abortion procedure.³⁷ The *Carhart* Court,³⁸ as well as the vast majority of lower courts prior to *Carhart*, found that a ban on both procedures would make it almost impossible for a woman to obtain a safe second trimester abortion.³⁹ For example, in *Carhart*, the Nebraska statute defined partial birth abortion as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.”⁴⁰ The statute then defined “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 the procedure knows will kill the unborn child and does kill the unborn child.”⁴¹

The attorney general of Nebraska argued that the statute banned only the use of the D&X procedure, and not the more common D&E procedure.⁴² The *Carhart* Court held, however, that the statute was unconstitutional because its language was too vague and applied, in practice, to both procedures.⁴³ Because D&E is the most common second trimester abortion procedure, a statute interpreted as banning *both* the D&E and D&X procedures would impose an unconstitutional burden on a woman seeking an abortion.⁴⁴ Similar vagueness analyses were used by many of the lower courts prior to *Carhart*, often involving statutes with the exact or very similar language as the Nebraska statute in *Carhart*.⁴⁵

36. *E.g.*, *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997) (analyzing whether the language of the Arizona “partial birth” abortion statute banned only the D&X procedure, or the D&E procedure as well); *Doyle*, 162 F.3d at 469 (analyzing whether a statute that purported to ban only the D&X procedure could be constitutionally interpreted not also to ban the D&E procedure so as to avoid vagueness).

37. *Carhart*, 120 S. Ct. at 2606.

38. *Infra* Part I.B.4 for a detailed discussion of *Carhart*.

39. *Infra* note 45 for examples of such cases.

40. *Carhart*, 120 S. Ct. at 2605.

41. *Id.*

42. *Id.* at 2614.

43. *Id.*

44. *Id.* at 2617.

45. *E.g.*, *Eubanks v. Stengel*, 224 F.3d 576 (6th Cir. 2000) (invalidating Kentucky “partial birth” abortion ban, which described the procedure using language such as “substantial portion thereof,” as unconstitutionally overbroad); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386, 389 (8th Cir. 1999) (“The physician does

If a statute's language is not vague and applies only to the D&X procedure, courts then look to whether a D&X procedure requires an exception for the health of the woman. For instance, the *Carhart* Court's other main reason for invalidating the Nebraska statute was that the statute did not contain a health exception.⁴⁶ Prior to *Carhart*, only two partial birth abortion bans contained health exceptions.⁴⁷ The vast majority of the lower federal courts that addressed the health exception issue prior to *Carhart* concluded that statutes banning partial birth abortion required a health exception.⁴⁸ One court even invalidated one of the two state statutes that contained a health exception, in large part, because the court found the statute's health exception inadequate.⁴⁹

not have to intend to perform a 'partial-birth abortion,' as that phrase has been popularly used, to violate the Act. Simply intending to deliver a part of the fetus into the vagina, as part of the abortion procedure, while the fetus is still intact and living, is enough."); *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1379 (D. Ariz. 1997) ("[T]he Court concludes that the term 'partial birth abortion' is defined in such a way that a 'persons [sic] of common intelligence would necessarily guess at meaning and differ as to application."); *Evans v. Kelley*, 977 F. Supp. 1283, 1305 (E.D. Mich. 1997) ("The experts differed widely as to what they understood 'partially vaginally delivers a living fetus' to mean . . . [I]t was not clear to them whether the term meant partially delivering an intact fetus or delivering a part of a fragmented fetus or both situations.").

46. *Carhart*, 120 S. Ct. at 2613.

47. *Supra* note 10; *Greenhouse*, *supra* note 4, at A1.

48. *E.g.*, *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 466-69 (7th Cir. 1998) (holding that Supreme Court precedent requires statutes banning "partial birth" abortion to contain exceptions for the health of the woman), *rev'd en banc*, *The Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999); *Summit Med. Assocs., P.C. v. James*, 984 F. Supp. 1404, 1460 (M.D. Ala. 1998) (holding that the complete lack of a health exception in post-viability "partial birth" abortion ban had "the effect of limiting the woman's, and her doctor's, choice of an appropriate abortion method . . ."), *aff'd and rev'd on other grounds*, *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999); *Woods*, 982 F. Supp. at 1378 (invalidating statute banning "partial birth" abortion, in part, because statute did not contain an exception for the health of the woman). *Contra* *The Hope Clinic v. Ryan*, 195 F.3d 857, 873 (7th Cir. 1999) (holding that because "the D&X procedure is not essential to protect the health of any woman, given the availability of other procedures," a "case-by-case" health exception is not required in a ban on the D&X procedure), *vacated*, *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

49. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) (striking down ban on D&X, in part, because ban's health exception did not consider mental health risks).

B. The Foundation of the Health Exception in Abortion Jurisprudence

1. *Roe v. Wade: Writing Maternal Health Into the Constitution*

In *Roe v. Wade*, the Supreme Court struck down as unconstitutional a Texas criminal abortion statute that proscribed procuring or attempting an abortion except for the purpose of saving the woman's life.⁵⁰ The Court grounded its decision in the constitutional right to privacy, holding that, "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁵¹ The Court held that the right to an abortion was fundamental⁵² and any abridgment on the right was subject to strict judicial scrutiny⁵³ limited only by a compelling state interest.⁵⁴ The Court found, however, that a woman's right to terminate her pregnancy was not absolute.⁵⁵ The state had two "important and legitimate interest[s]" at stake: (1) preserving the health of the pregnant woman, and (2) "protecting the potentiality of human life."⁵⁶ These state interests grew in importance as a woman's pregnancy progressed.⁵⁷

The *Roe* Court grounded the abortion right, in large part, in what it believed to be the state's compelling obligation to protect maternal health.⁵⁸ The majority provided a broad interpretation of maternal health:⁵⁹

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. 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.⁶⁰

50. *Roe v. Wade*, 410 U.S. 113, 117-18, 164 (1973).

51. *Id.* at 153.

52. *Id.* at 155.

53. *See id.*

54. *Id.*

55. *Id.* at 153.

56. *Id.* at 162. The *Roe* Court also remarked that the state had an interest in "maintaining medical standards." *Id.* at 154.

57. *Id.* at 162.

58. *Id.* at 153.

59. *See id.*

60. *Id.*

The *Roe* majority constructed a trimester framework that balanced a woman's right to abortion against the state's interests.⁶¹ The majority built this trimester framework around the health and well-being of the pregnant woman as the "paramount" concern.⁶² During the first trimester of pregnancy, the woman, in consultation with her physician, was "free to determine, without regulation by the State" (except for requiring that abortions be performed by a licensed physician), and in her physician's medical judgment, that her pregnancy should be terminated.⁶³ The earliest "compelling" point at which the state could act to protect its legitimate interests was at approximately the end of the first trimester and throughout the second trimester.⁶⁴ During this time, the state could regulate abortions to "the extent that the regulation reasonably relates to the preservation and protection of maternal health."⁶⁵ The Court provided examples of such regulations, including imposing qualification and licensing requirements on people performing abortions, regulating abortion facilities (e.g., whether abortions must take place in hospitals or clinics), and regulating the licensing of such facilities.⁶⁶

It was only at the point of viability,⁶⁷ at approximately the beginning of the third trimester, that the state's interest in potential life became determinatively compelling.⁶⁸ At this point, the state could go so far as to proscribe abortion outright.⁶⁹ However, even in the third trimester, the state could not proscribe abortion "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁷⁰ In fact, the majority held that the Texas statute's lack of a health exception was one of the main factors that rendered the statute unconstitutional.⁷¹

The *Roe* Court, however, did not intend for these trimesters to be precise dividing lines for determining when the state's interests

61. *See id.* at 163-64.

62. *See id.*; Massie, *supra* note 4, at 357.

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

64. *Id.*

65. *Id.*

66. *Id.*

67. The *Roe* Court defined viability as the point at which the fetus "presumably has the capability of meaningful life outside the mother's womb." *Id.*

68. *Id.* at 163-64.

69. *Id.*

70. *Id.* at 164-65.

71. *Id.* at 164.

became compelling.⁷² Instead, they were approximations based on medical knowledge existing at the time.⁷³ The majority structured its decision around two general "compelling points,"⁷⁴ or dividing lines, that correlated to the state's two legitimate interests: (1) the point when mortality in an abortion procedure is greater than mortality in normal childbirth (representing the state's interest in maternal health),⁷⁵ and (2) the point of viability (representing the state's interest in potential life).⁷⁶ These two compelling points led to certain conclusions. First, before viability, a state regulation was justified only on the ground that it was necessary to protect against an increased risk to the woman's health.⁷⁷ Second, it was only at the point of viability that the state's interest in potential life could justify a proscription on abortion.⁷⁸ Even at that point, however, the state could not exercise its interest in potential life in a way that put the woman's life or health at risk.⁷⁹

The *Roe* Court granted a physician fairly broad discretion to determine, "in consultation with his patient,"⁸⁰ whether a woman should have an abortion. The Court held:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.⁸¹

At the point where the state's interests becomes compelling, however, "the State [is] free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests."⁸² The state's interest in potential fetal life, however, could never be strong enough to justify imposing a regulation that put the "life" or "health" of the woman at risk.⁸³ Therefore, under *Roe*, an abortion regulation

72. *Id.* at 163.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.*

79. *Id.* at 163-64.

80. *Id.* at 163.

81. *Id.* at 165-66.

82. *Id.* at 165.

83. *Id.* at 164-65.

must protect the life or health of the mother at all stages of pregnancy, even post-viability.⁸⁴

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey: Affirming Roe's Health Exception*

In the Supreme Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸⁵ the Joint Opinion⁸⁶ altered the abortion right as defined by *Roe*. It remained faithful, how-

84. See *id.*; see also Jennifer Landrum Elliott, Comment, *Will Charlie Brown Finally Kick the Football?: Missouri Enacts the Next Generation of Partial Birth Abortion Restrictions*, 44 ST. LOUIS U. L.J. 1083, 1102 (2000) (analyzing the confusion surrounding the constitutionality of statutes banning partial birth abortion prior to the Supreme Court's decision in *Carhart*).

85. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

86. There was no Opinion of the Court in *Casey*. *Id.* A "Joint Opinion" was signed by Justices O'Connor, Souter, and Kennedy. *Id.* at 843. The Joint Opinion has, nonetheless, been recognized as the controlling opinion. *E.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1310 n.2 (1994) (Souter, J.) (treating the Joint Opinion in *Casey* as controlling); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456 n.7 (8th Cir. 1995) ("We view the [J]oint [O]pinion as the Supreme Court's definitive statement of the constitutional law on abortion."); *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1444 (S.D. Ind. 1995) ("That opinion [the Joint Opinion] . . . states the controlling holdings of the Court."). In this Note, "Joint Opinion" will refer to the opinion adopted by Justices O'Connor, Souter, and Kennedy. Whenever a part of the Joint Opinion was joined by a majority of the justices, and is therefore part of the Opinion of the Court, it will be so noted.

The *Casey* decision is complex because of its several concurring and dissenting opinions. The following breakdown may be of assistance in understanding which provisions of the Pennsylvania statute each justice would have upheld or invalidated.

- I. The *judgment*: All of the provisions of the Pennsylvania abortion statute were upheld as constitutional, except for the spousal notification provision (with a medical emergency exception) and related record-keeping and reporting requirements. A breakdown of how the justices decided is as follows:

A) O'Connor, Kennedy, and Souter

- 1) Upheld as not imposing an undue burden:
 - a. Twenty-four hour waiting period with medical emergency exception. *Casey*, 505 U.S. at 879-80.
 - b. Informed consent requirement. *Id.* at 881-87.
 - c. Parental consent requirement with judicial by-pass option. *Id.* at 899-900.
 - d. Record keeping and recording requirements. *Id.* at 900-01.
- 2) Invalidated as posing an undue burden:
 - a. Spousal notification provision (with medical emergency exception) and related record-keeping and reporting requirements. *Id.* at 887-98, 901.

B) Stevens

- 1) Upheld as necessary for a compelling state interest:
 - a. Record keeping and recording requirements. *Id.* at 900-01.
 - b. Informed consent requirement (upheld some). *Id.* at 917-18.

ever, to *Roe*'s central holdings. In a part joined by a majority of the justices, the Joint Opinion reaffirmed three central principles of *Roe*. First, a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State" under the Due Process Clauses of the Fifth and Fourteenth Amendments.⁸⁷ "Before viability, the state's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle" on the woman's ability to effectuate that right.⁸⁸ Second, the Joint Opinion explicitly reaffirmed *Roe*'s recognition of the state's power to restrict, and even proscribe abortions, after viability, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁸⁹ Third, the state has a legitimate interest, from the outset of pregnancy, in protecting the health of the woman and the potential life of the fetus.⁹⁰

The Joint Opinion made clear, however, that although it was reaffirming *Roe*'s central holdings, it was "at the same time accommodating the State's profound interest in potential life"⁹¹ It found that the state had legitimate interests in ensuring that the

c. Parental notification provision with judicial by-pass option. *Id.* at 922 n.8.

2) Invalidated as not necessary for a compelling state interest:

a. Spousal notification provision (with a medical emergency exception) and related record keeping and reporting requirements. *Id.* at 887-98, 901.

b. Twenty-four hour waiting period with medical emergency exception. *Id.* at 918-20.

c. Informed consent requirement (invalidated some). *Id.* at 917-18.

C) Blackmun

1) Invalidated all of the statute's provisions as not necessary for a compelling state interest. *Id.* at 922-43.

D) Rehnquist, Thomas, Scalia, and White

1) Upheld all of the statute's provisions as rationally related to a legitimate governmental interest. *Id.* at 944-79.

II. Abortion as a "liberty" interest under the Due Process Clauses:

A) O'Connor, Kennedy, Souter, Blackmun, and Stevens

1) Affirmed *Roe*, a pregnant woman's freedom of choice falls within the meaning of "liberty." *Id.* at 912-14, 922-26, 2803-816.

B) Scalia, Rehnquist, White, and Thomas

1) The right to abortion is *not* a constitutionally protected "liberty." *Id.* at 979-1002.

87. *Id.* at 846.

88. *Id.*

89. *Id.* at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

90. *Id.* at 846.

91. *Id.* at 873.

woman's choice was "thoughtful and informed."⁹² In an effort to balance a woman's right to an abortion with the state's compelling interests, the Joint Opinion revised the standard of review for restrictions on the abortion right, from a fundamental right subject to strict scrutiny review under *Roe*,⁹³ to a "liberty interest"⁹⁴ subject to an "undue burden" analysis under *Casey*.⁹⁵

An abortion regulation is unconstitutional when it imposes an "undue burden" on a woman's ability to obtain an abortion.⁹⁶ A burden is "undue" when the 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."⁹⁷ The Joint Opinion would uphold state abortion regulations that were "calculated to inform the woman's free choice, not hinder it."⁹⁸ In determining whether an abortion regulation imposed an undue burden on a woman's right to choose, the focus should be on "the group [of women] for whom the law is a restriction, not the group for whom the law is irrelevant."⁹⁹ For example, when addressing the Pennsylvania statute's spousal notification provision, in a part joined by a majority of the justices, the Joint Opinion dismissed the state's argument

92. *Id.* at 872.

93. *Roe*, 410 U.S. at 155.

94. *Jane L. v. Bangerter*, 809 F. Supp. 865, 875 n.25 (D. Utah 1992) ("In *Casey* the Court [sic] revised the woman's right to abortion from a virtually unassailable fundamental right subject to strict scrutiny review to a liberty interest subject to undue burden analysis."), *aff'd and rev'd on other grounds*, 61 F.3d 1493 (10th Cir. 1995).

95. *Casey*, 505 U.S. at 874. Only the three justices who signed the Joint Opinion—Justices O'Connor, Souter, and Kennedy—adopted the "undue burden" test. *Id.* at 869. Chief Justice Rehnquist, and Justices Thomas, White, and Scalia, would have adopted a lower standard of review than the undue burden test, in which abortion regulations must rationally relate to a legitimate state interest. *Id.* at 944. Justices Stevens and Blackmun would have preserved the abortion right as a fundamental right subject to strict scrutiny review (an abortion regulation must be necessary for a compelling state interest). *Id.* at 911, 922. In any event, in *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), the Court adopted the undue burden standard as the official standard of review when addressing pre-viability abortion regulations. *Infra* Part I.B.4.

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

97. *Id.* at 877. The undue burden analysis of the *Casey* Joint Opinion applied to pre-viability abortion regulations. *Id.* (explaining the standard of review as "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"). Post-viability abortion regulations remained subject to the same standard of review as under *Roe*, which recognized the state's stronger interest in protecting fetal life: "[S]ubsequent 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." *Id.* at 879 (quoting *Roe*, 410 U.S. at 164-65).

98. *Id.* at 877.

99. *Id.* at 894.

that the provision was constitutional because “it imposes almost no burden at all for the vast majority of women seeking abortions.”¹⁰⁰ Although the vast majority of married women voluntarily notify their husbands of their intentions to obtain abortions, in the “*large fraction* of the cases in which [the spousal notification provision] is relevant”¹⁰¹ (that is, for the group of women who would be at risk of spousal abuse if the provision were upheld),¹⁰² it will impose a substantial obstacle on a woman’s choice to have an abortion, regardless of how small that relevant group of women may be.¹⁰³

However, not every burden is necessarily “undue.”¹⁰⁴ Although a state abortion regulation may have the effect of burdening a particular group of women, it is “not of necessity a substantial obsta-

100. *Id.*

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

102. *Id.* at 894-95. The statistics relied upon by the *Casey* Joint Opinion in striking down the statute’s spousal notification provision were as follows: only about twenty percent of women who had abortions were married; of those twenty percent, approximately ninety-five percent voluntarily notified their husbands of their intentions to obtain an abortion. *Id.* at 894. The provision, therefore, affected only one percent of women who obtained abortions. *Id.* Nonetheless, the provision was struck down because it would have adversely affected (e.g., by risking spousal abuse, sexual assault, and rape) a “large fraction” of that one percent of women. *Id.* at 894-95.

103. *Id.* The challenge to the Pennsylvania statute in *Casey* was a facial challenge. *Id.* at 894. A facial challenge to a statute is the most difficult challenge to win. *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge generally requires a complaining party to show that no set of circumstances exists under which the statute would be valid. *Id.* However, the *Casey* Joint Opinion (without explicitly indicating it was doing so) applied a different standard to the facial challenge of the spousal notification provision of the Pennsylvania statute, referred to as the “large fraction” test: as long as there were *some circumstances* under which the provision could be applied unconstitutionally (e.g., the one percent of women who would suffer harm if compelled by the provision to inform their husbands of their intent to have an abortion), the provision would not (and did not) survive a facial challenge. *Casey*, 505 U.S. at 894-95. The fact that the spousal notification provision would have been applied constitutionally in the vast majority of cases (the ninety-nine percent of women who did not fear telling their husbands of their intent to have an abortion) was irrelevant to the Joint Opinion. *Id.* The debate over whether *Casey* officially replaced the *Salerno* facial challenge test with the “large fraction” test when analyzing abortion regulations is beyond the scope of this Note. For more in depth analyses on this debate, see, e.g., *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995) (“We believe the [*Casey*] Court [sic] effectively overruled *Salerno* for facial challenges to abortion statutes.”); *Richmond Med. Ctr. For Women v. Gilmore*, 11 F. Supp. 2d 795 (E.D. Va. 1998) (holding that the *Salerno* decision no longer applies in the context of facial challenges to abortion regulations on the ground that it imposes an undue burden on the right to abortion). In any event, the *Carhart* Court applied *Casey*’s “large fraction” test (without explicitly indicating it was doing so). See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2611 (2000) (“D&X is an infrequently used abortion procedure; but the health exception question is whether protecting women’s health requires an exception for those infrequent occasions.”); see also *infra* Part I.B.4.

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

cle."¹⁰⁵ For instance, state regulations that do nothing more than create "structural mechanism[s]" through which the state may express its compelling interests are not undue burdens under *Casey*.¹⁰⁶

The *Casey* Joint Opinion also dismantled the trimester framework established in *Roe*, stating: "We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*."¹⁰⁷ The Joint Opinion found that the state may "promote [its] profound interest in potential life" by taking measures "throughout pregnancy . . . to insure that the woman's choice is informed."¹⁰⁸ However, in a part joined by a majority of the justices, the Joint Opinion reaffirmed what it termed *Roe*'s "central holding," that the state cannot prohibit a woman from obtaining an abortion before viability.¹⁰⁹ Therefore, although the *Casey* Joint Opinion rejected *Roe*'s trimester framework, it reaffirmed *Roe*'s holding that the compelling "line should be drawn at viability," and that prior to viability, a woman has the right to decide to terminate her pregnancy.¹¹⁰ Moreover, the Joint Opinion reaffirmed *Roe*'s holding that even subsequent to viability, a state may proscribe abortion *only* if it will not impose a risk on the woman's life or health.¹¹¹

Five provisions of the Pennsylvania Abortion Control Act of 1982 were challenged as unconstitutional in *Casey*: an informed consent requirement;¹¹² a mandatory twenty-four hour waiting period between the time of the informed consent and the abortion, with a medical emergency exception;¹¹³ a parental consent provision for a minor's abortion, subject to a judicial bypass option;¹¹⁴ a spousal notification provision with a medical emergency provision;¹¹⁵ and certain reporting and record-keeping requirements for abortion facilities.¹¹⁶ The Joint Opinion upheld all of these provi-

105. *Id.*

106. *Id.* at 877. For example, the Joint Opinion identified the parental notification provision (with a judicial by-pass option) of the Pennsylvania statute as a "structural mechanism." *Id.* at 877, 899. The Joint Opinion went on to uphold the provision. *Id.* at 899.

107. *Id.* at 873.

108. *Id.* at 878.

109. *Id.* at 879.

110. *Id.* at 870.

111. *Id.* at 879.

112. *Id.* at 881-85.

113. *Id.* at 879-80, 885-87.

114. *Id.* at 899-900.

115. *Id.* at 887-98.

116. *Id.* at 900-01.

sions, except the spousal notification provision (and related reporting and record-keeping requirements), because they did not impose an undue burden on women's access to abortion.¹¹⁷

In analyzing the Pennsylvania statute's provisions, the Joint Opinion relied on the underlying premise that the state has a legitimate interest in enacting legislation that "favor[s] childbirth over abortion, even if those measures do not further [the interest of maternal health]" under *Roe*'s trimester framework.¹¹⁸ For example, assuming the statute's twenty-four hour waiting period was not related to maternal health, the provision was still constitutional, because it furthered the state's interest in protecting the life of the unborn.¹¹⁹ In addition, the Joint Opinion found that although the waiting period would impose a burden on some women in the form of increased delays, costs, and exposure to harassment, it would "not create any appreciable health risk,"¹²⁰ or any undue burden.¹²¹ The Joint Opinion also emphasized that an informed consent provision was a reasonable way for the state to express its legitimate interest in protecting the life of the unborn, which, as opposed to under *Roe*, the state is able to do pre-, as well as, post-viability.¹²² However, as under *Roe*, the state could *not* impose a risk on the woman's life or health, even when exercising its post-viability interest in potential life.¹²³

The *Casey* Joint Opinion did not explicitly modify the life and health exception required by *Roe*.¹²⁴ In a holding by a majority of the justices, the Joint Opinion upheld the statute's medical emergency provision.¹²⁵ The statute defined a medical emergency as "[t]hat condition which, on the basis of the physician's good faith clinical judgment . . . [is necessary] to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."¹²⁶ The provision permitted physicians to forgo the waiting period, parental consent, and spousal notification requirements of the Pennsylvania statute.¹²⁷ The Joint

117. *Id.* at 879.

118. *Id.* at 886.

119. *Id.* at 885.

120. *Id.* at 886.

121. *Id.* at 885.

122. *Id.* at 881-83.

123. *Id.* at 879.

124. Massie, *supra* note 4, at 341.

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

126. *Id.* at 879.

127. *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 699 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

Opinion deferred to the Third Circuit's interpretation of the emergency provision as broad enough to include the three serious, although not necessarily "irreversible," physical conditions of preeclampsia, inevitable abortion, and premature ruptured membrane.¹²⁸ The Third Circuit held that "[p]hysically threatening emergencies are covered" by the emergency provision.¹²⁹ The Joint Opinion also deferred to the Third Circuit's holding that the emergency provision was not void for vagueness simply because it contained a subjective standard of "good faith clinical judgment."¹³⁰

3. *Planned Parenthood of Central Missouri v. Danforth:* *Applying Roe to Regulations of Specific Abortion Techniques*

Neither *Roe* nor *Casey* addressed whether a state may regulate or ban a specific abortion technique as opposed to abortion in general.¹³¹ The Supreme Court addressed the issue in *Planned Parenthood of Central Missouri v. Danforth*.¹³² In *Danforth*, the Court invalidated a Missouri prohibition of a particular method of abortion known as "saline amniocentesis" because the Court held that doing so would have banned the most common and safest second trimester abortion procedure available at the time.¹³³ The method was performed after the first twelve weeks of pregnancy¹³⁴ (the second trimester under *Roe*). The majority invalidated the prohibition based on its findings that approximately seventy percent of all abortions performed in the United States after the first trimester used the prohibited procedure;¹³⁵ that there were no alternative abortion procedures that were widely used¹³⁶ and that were not "significantly more dangerous and critical for the woman;"¹³⁷ and that the maternal mortality rate in childbirth exceeded the mortality rate when saline amniocentesis was used.¹³⁸

The Court framed the issue as whether the ban on saline amniocentesis was a restriction reasonably related to the protection of

128. *Casey*, 505 U.S. at 880; *infra* Part II.B.1.a.i.

129. *Casey*, 947 F.2d at 702.

130. *Id.*; *infra* Part II.B.3.a.

131. Massie, *supra* note 4, at 342.

132. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

133. *Id.* at 78-79.

134. *Id.* at 75-76.

135. *Id.* at 76.

136. *Id.*

137. *Id.* Here, the Court was referring to the "hysterotomy" and "hysterectomy" methods of abortion. *Id.* For a description of these procedures, see *supra* note 28.

138. *Danforth*, 428 U.S. at 76.

maternal health as required by *Roe*.¹³⁹ The majority held that it was not and that the ban impermissibly “forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed.”¹⁴⁰ Therefore, the majority held that the ban did not serve the state’s interest in maternal health, the only permissible state interest at this stage of pregnancy (the second trimester) under *Roe*.¹⁴¹ In fact, the ban was detrimental to women’s health.¹⁴²

4. *Stenberg v. Carhart in Detail: The Supreme Court Requires a Nebraska “Partial Birth” Abortion Ban to Contain an Exception For the Health of the Pregnant Woman*

Stenberg v. Carhart, decided in June of 2000, is the Supreme Court’s first decision addressing a statute banning partial birth abortion.¹⁴³ In *Carhart*, the Court struck down as unconstitutional a ban on partial birth abortion. The Court did so primarily for two reasons: (1) the statute lacked an exception for the health of the woman,¹⁴⁴ and (2) the statute’s language was unconstitutionally vague and could be applied to ban both the D&X and D&E procedures.¹⁴⁵ Therefore, the statute imposed an undue burden on a woman’s ability to choose a D&E abortion and, in turn, the right to choose abortion itself.¹⁴⁶

139. *Id.*

140. *Id.* at 79.

141. *Id.* *Danforth* was decided in 1976 under *Roe*’s trimester framework and strict scrutiny standard of review. Although *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), altered *Roe* to require that attention be paid to the interests of the fetus throughout the entire pregnancy, *Danforth* remains an important case in the partial birth abortion debate primarily for three reasons: (1) the *Danforth* Court held that *Roe* may be applied when a particular method of abortion (such as the D&X procedure) is restricted; (2) in *Danforth*, “saline amniocentesis” was the most commonly used abortion method during the second trimester (just as D&E is the most commonly used late-term abortion method during the second trimester, while D&X is one of the *least* common methods used); and (3) there was no safe alternative abortion method available to the saline amniocentesis method. For a discussion on these points, see *infra* Parts II, III.

142. See *Danforth*, 428 U.S. at 79.

143. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000). Prior to *Carhart*, the Supreme Court had denied certiorari in *Voinovich v. Women’s Med. Prof’l Corp.*, 523 U.S. 1036 (1998), in which the Sixth Circuit had invalidated an Ohio statute banning post-viability partial birth abortions. See *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). For a discussion of the Sixth Circuit’s decision, see *infra* Parts II, III.

144. *Carhart*, 120 S. Ct. at 2609-613.

145. *Id.* at 2616-617.

146. *Id.* at 2609, 2613-617.

The *Carhart* Court premised its decision to strike down the Nebraska statute on "three established principles" in abortion jurisprudence: (1) "before 'viability . . . the woman has a right to choose to terminate her pregnancy'";¹⁴⁷ (2) a law in furtherance of the state's interest in fetal life that imposes an undue burden on the woman's right to choose an abortion pre-viability is unconstitutional;¹⁴⁸ and (3) "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."¹⁴⁹

The Nebraska statute applied to both pre- and post-viability abortions.¹⁵⁰ Although the Court held that *Casey* clearly reaffirmed *Roe*'s holding that *post-viability* abortion regulations require a health exception,¹⁵¹ the *Carhart* Court found that *Casey* and *Roe* also required a *pre-viability* health exception.¹⁵² The *Carhart* majority explained that because the *Casey* Joint Opinion found that the state's interest in regulating abortion pre-viability is much weaker than its interest post-viability, and that *Casey* required a health exception post-viability, "it at a minimum requires the same in respect to pre-viability"¹⁵³ The *Carhart* Court also held that although the statute regulated only a method of abortion, "a risk to a woman's health is the same whether it . . . arise[s] from regulating a particular method of abortion, or from barring abortion entirely."¹⁵⁴ Relying on precedent,¹⁵⁵ the Court held that the

147. *Id.* at 2604 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 870 (1992)).

148. *Id.* Therefore, the *Carhart* Court adopted the undue burden test as the official standard of review when analyzing pre-viability abortion regulations, obviating any confusion over how to interpret the complex *Casey* decision. *Supra* note 95 and accompanying text.

149. *Carhart*, 120 S. Ct. at 2604 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

150. *Id.* at 2609.

151. *Id.*

152. *Id.*

153. *Id.*; see also *id.* at 2618 (O'Connor, J., concurring) ("Because even a post-viability proscription of abortion would be invalid absent a health exception, Nebraska's ban on pre-viability partial birth abortions, under the circumstances presented here, must include a health exception as well, since the State's interest in regulating abortion before viability is 'considerably weaker' than after viability." (quoting the majority opinion, *Id.* at 2609)).

154. *Carhart*, 120 S. Ct. at 2609.

155. See *infra* Part II.B for discussions on the following cases: *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (see also *supra* Part I.B.3), and *Doe v. Bolton*, 410 U.S. 179 (1973)).

state cannot pass abortion regulations that “subject women’s health to significant risk[s]” or “force women to use riskier methods of abortion.”¹⁵⁶ However, the majority only briefly addressed the proper scope of a health exception, by holding that a health exception cannot be limited “to situations where the pregnancy *itself* created the health risk.”¹⁵⁷

In holding that the Nebraska statute required a health exception, the Court relied, in large part, on the fact that there was a “division of opinion among some medical experts over whether D&X is generally safer,”¹⁵⁸ and whether a D&X ban without a health exception would create “a significant health risk” for women.¹⁵⁹ The majority conceded that there was, in fact, uncertainty in the medical community as to whether “D&X is a safer abortion method in certain circumstances.”¹⁶⁰ The majority found, however, that this uncertainty demonstrated possible health risks to women—*not* the absence of risk.¹⁶¹ Relying on *Casey*’s large fraction test,¹⁶² the Court held that because there is substantial medical authority in support of the medical necessity of D&X for some women, a ban on D&X would impose an undue burden on those women for whom it was the safest procedure.¹⁶³ The Court held in this respect,

[T]he uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.¹⁶⁴

Again relying on *Casey*’s large fraction test,¹⁶⁵ the majority found that it was “beside the point” that D&X is a rarely used

156. *Carhart*, 120 S. Ct. at 2609.

157. *Id.* (emphasis in original).

158. *Id.* at 2612.

159. *Id.* at 2613.

160. *Id.*

161. *Id.* at 2612.

162. *Supra* note 103 and accompanying text.

163. *See Carhart*, 120 S. Ct. at 2610. Among the medical benefits associated with D&X (and therefore the medical risks of D&E) cited by the Court were reductions in: operating time, blood loss, risk of infection, complications from bony fragments, and complications from retained fetal parts. *Id.* at 2610, 2612.

164. *Id.* at 2613.

165. *Supra* note 103 and accompanying text.

procedure.¹⁶⁶ Rather, the focus should be on "whether protecting women's health requires an exception for those infrequent occasions."¹⁶⁷ Therefore, while the Court conceded that there were no medical studies documenting the safety of D&X compared to that of D&E, it held that a health exception was necessary in a ban on D&X because there was substantial medical opinion that D&X "can be the most appropriate abortion procedure for some women in some circumstances."¹⁶⁸

The *Carhart* Court also found that the word "necessary" in the clause "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," did not mean "absolute necessity" or "absolute proof."¹⁶⁹ To the contrary, medical procedures may be considered "appropriate" based on comparative health risks and benefits.¹⁷⁰ Moreover, universal medical agreement on a procedure's comparative benefits and risks is not required.¹⁷¹ The Court held that *Casey*'s words, "appropriate medical judgment," must be interpreted to "tolerate responsible differences in medical opinion" because doctors often differ in their determinations of what is appropriate treatment based on comparative health risks.¹⁷² A state, however, is not required to grant physicians "unfettered discretion" in their choice of abortion methods.¹⁷³ The majority held:

[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."¹⁷⁴

166. *Carhart*, 120 S. Ct. at 2611. The *Carhart* Court also held that it was insignificant that only a "handful of doctors" used D&X. *Id.* The Court elaborated that the fact that few doctors use a medical procedure does not imply that the procedure is not necessary for some patients' health. *Id.* Rather, a number of reasons could explain why the D&X procedure rarely is used, such as the rarity of late term abortions, D&X's recent development, or the controversy surrounding it. *Id.*

167. *Id.*

168. *Id.* at 2612.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 2613.

174. *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

II. THE CONFLICT: WHETHER COURTS WILL REQUIRE "PARTIAL BIRTH" ABORTION BANS TO CONTAIN HEALTH EXCEPTIONS, AND WHAT COURTS WILL REQUIRE THOSE HEALTH EXCEPTIONS TO CONTAIN

A. After *Carhart*, Will Courts Require "Partial Birth" Abortion Bans to Contain Exceptions for the Health of the Pregnant Woman?

The *Carhart* majority arguably did not hold that partial birth abortion bans *always* must contain a health exception. On the surface, the *Carhart* decision seems to suggest that any ban on partial birth abortion will require a health exception.¹⁷⁵ A careful reading of the decision, its concurring opinions, and the case law presented in Part I, however, suggests that an answer to this threshold inquiry may depend on the particular circumstances under which a constitutional challenge to a partial birth abortion ban arises.

Undoubtedly, one of the two constitutional defects the *Carhart* Court found in the Nebraska partial birth abortion ban was that it did not have an exception for the health of the woman.¹⁷⁶ The *Carhart* majority held that, generally, precedent demanded a health exception: *Roe* and *Casey* required an exception, "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."¹⁷⁷ The state, in promoting its compelling interests, may not endanger a woman's health.¹⁷⁸ However, in this respect, the *Carhart* Court suggested that in its past decisions it had invalidated statutes that imposed significant health risks, not any and all health risks.¹⁷⁹ The Court focused its health exception analysis around the fact that there are, currently, no safe alternatives to the D&X procedure.¹⁸⁰ The Court opined, "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."¹⁸¹ The majority rebutted this contention by finding that, under the particular circumstances, there was a need for D&X, because there was substantial medical evidence supporting "the proposition that in some circumstances, D&X would be

175. *Supra* Part I.B.4.

176. *Supra* Part I.B.4.

177. *Roe v. Wade*, 140 U.S. 113, 164-65 (1973).

178. *Supra* Part I.B.4.

179. *Supra* Part I.B.4.

180. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2610 (2000).

181. *Id.*

the safest procedure," despite the rarity of those circumstances.¹⁸² The majority then described several health risks of a ban on D&X under those rare circumstances.¹⁸³ The Court summed up its health exception analysis with a narrow finding: "*Given these medically related evidentiary circumstances, we believe the law requires a health exception.*"¹⁸⁴

This textual analysis of *Carhart* suggests that, as long as there is "substantial" medical evidence that D&X is the safest procedure for some women in some circumstances, courts will require a health exception. If, however, new evidence emerges that suggests that D&X is not in fact safer than D&E for some women in some circumstances, a court may find that a health exception is not "necessary" for the health of the mother. In her concurrence in *Carhart*, Justice O'Connor articulated this thought when she considered, "Nebraska's ban on previability partial birth abortions, *under the circumstances presented here*, must include a health exception" ¹⁸⁵ In fact, Justice O'Connor stated, even more pointedly, "If there were adequate alternative measures for a woman safely to obtain an abortion before viability, it is unlikely that prohibiting the D&X procedure alone would 'amount in practical terms to a substantial obstacle to a woman seeking an abortion.' " ¹⁸⁶

The *Carhart* majority, however, did not hold explicitly that a health exception was required only because, or only in circumstances in which, there were no safe alternative abortion methods to D&X.¹⁸⁷ Rather, the Court held only that under the circumstances presented to the Court, a health exception absolutely is required under *Casey*.¹⁸⁸ It is revealing that Justice O'Connor's pointed statements did not make it into the majority opinion.

182. *Id.* at 2611.

183. *Id.* at 2610, 2612.

184. *Id.* at 2612 (emphasis added).

185. *Id.* at 2618 (O'Connor, J., concurring) (emphasis added).

186. *Id.* at 2620 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

187. *See id.* at 2609-13.

188. *Id.* at 2613 ("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.").

B. What Must a Health Exception Look Like for it to Pass Constitutional Muster?

If future courts determine that statutes banning partial birth abortion require a health exception, the controversy will shift to the issue of how such courts should require legislatures to construct health exceptions. More specifically, what features will courts require or forbid a health exception to contain, and how will future courts interpret health exceptions? How difficult will it be for a state or Congress to draft a health exception that will pass constitutional muster? This Part presents competing sides of this controversy by analyzing three issues that courts have tended to explore most extensively. These issues are: (1) the meaning and scope of the term "health" in a health exception; (2) the required severity of the risk to the woman's health; and (3) whether there should be a subjective or an objective standard for determining when a woman's health is at risk.

1. The Meaning and Scope of the Term "Health"

Most courts have interpreted broadly the meaning and scope of the term "health" in abortion statutes,¹⁸⁹ though these interpretations have varied in their particular degrees of broadness. Some courts and individual judges, however, have taken more restrictive views on the meaning and scope of "health."

a. The Broad Interpretation of "Health"

i. Review of Roe, Casey, and Carhart

As discussed in Part I, the Court in *Roe* interpreted broadly the meaning and scope of the "health" of the woman.¹⁹⁰ In fact, the *Roe* Court emphasized that avoiding the "[s]pecific and direct" medical harm that a pregnancy may bring to a woman was a primary justification for the abortion right.¹⁹¹ The examples of "specific and direct" medical harm provided by the Court included such diverse areas as the "distressful life and future" additional offspring may impose on a woman, the "psychological harm" a woman may experience as a result of pregnancy, and the "mental and

189. This Note sometimes will discuss health exception provisions interchangeably with medical emergency provisions in abortion statutes. Although the two may serve different purposes in abortion regulations, both are equally useful in analyzing how courts will deal with the three controversial issues being explored in this Note, particularly the meaning and scope of the term "health."

190. *Supra* Part I.B.1.

191. *See Roe v. Wade*, 410 U.S.113, 153 (1973).

physical health" consequences that child care may impose on a woman.¹⁹² The majority did not limit its interpretation of the health of the woman to severe or permanent health problems, nor did it limit it to health problems arising out of the pregnancy itself.¹⁹³

The Joint Opinion in *Casey* explicitly reaffirmed *Roe*'s interpretation of the meaning of the "health of the woman," that is, that the state has a compelling interest, post-viability, in restricting abortion, except when the life or health of the mother is at risk.¹⁹⁴ The Joint Opinion also articulated a broad interpretation of the meaning of "health" by reaffirming the Third Circuit's interpretation of the Pennsylvania statute's medical emergency provision.¹⁹⁵ The statute defined a medical emergency as a "serious risk of substantial and irreversible impairment of a major bodily function."¹⁹⁶ The Third Circuit held that the provision was broad enough to encompass the "serious conditions" of preeclampsia, inevitable abortion, and premature ruptured membrane.¹⁹⁷ The Third Circuit found that the term "risk" in the provision "implied an event that may or may not happen in the future."¹⁹⁸ Therefore, although the three conditions were not, by definition, "substantial and irreversible" health risks, they qualified under the medical emergency provision because "it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences."¹⁹⁹ In a Part joined by a majority of the justices, the Joint Opinion found that such an interpretation was required because "abortion regulations [c]ould not in any way pose a significant threat to the life or health of the woman."²⁰⁰ However, the Joint Opinion deferred to the Third Circuit's finding that the medical emergency provision was limited to covering physical health risks only.²⁰¹

The *Carhart* majority made few substantial findings on the proper scope of a health exception.²⁰² The Court held that a health

192. *Id.*

193. *Id.* at 153, 164-65.

194. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992). This finding was joined by a majority of the justices. *Id.* at 846.

195. *Id.* at 879-80.

196. *Id.* at 879.

197. *Id.* at 880.

198. *Casey*, 947 F.2d 682, 701 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

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

200. *Id.* (quoting *Casey*, 947 F.2d at 701).

201. *Casey*, 505 U.S. at 880; *infra* Part II.B.1.b.

202. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2609-613 (2000).

exception cannot be limited to health risks arising out of the pregnancy itself.²⁰³ The scope of this finding, however, is unclear as to questions such as whether the Court meant that a health exception should encompass both physical and mental health risks, and whether it should encompass both temporary and permanent risks.²⁰⁴ When discussing the health risks associated with the D&E procedure, the majority focused exclusively on physical health risks.²⁰⁵ The majority did not hold, however, that physical health risks were the only kinds of health risks that would be considered under a health exception to a partial birth abortion ban.²⁰⁶

The *Carhart* Court also held that a health exception need not be limited to health risks that are strictly "necessary" to protect the woman's health.²⁰⁷ Rather, the Court found that an abortion procedure may be sufficiently "necessary" for the health of the woman "in light of estimated comparative health risks in particular cases."²⁰⁸ Therefore, if D&X is shown to be "safer" than D&E for a woman's health in some cases, D&X is constitutionally "necessary" for the woman's health.²⁰⁹ D&X need be only comparatively more necessary than D&E and any other late-term abortion procedures that may exist.²¹⁰

ii. *Other Broad Interpretations of the
Meaning and Scope of "Health"*

Many other courts have interpreted broadly the meaning and scope of the term "health" in abortion statutes. In *United States v. Vuitch*, decided before *Roe*, the Court interpreted the meaning of "health" broadly to include "mental health," as well as "psychological" and "physical well-being."²¹¹ The majority opined that a health exception should not be required to specify explicitly mental or psychological health in its language to avoid a vagueness chal-

203. *Id.* at 2609.

204. *See generally id.* at 2611-17.

205. *Id.* at 2610-12.

206. *Id.*

207. *Id.* at 2612.

208. *Id.*

209. *Id.*

210. *Id.*

211. *United States v. Vuitch*, 402 U.S. 62, 72 (1971). Commentators have noted that *Vuitch* is a particularly important decision because it was decided two years prior to *Roe*, before the abortion debate became highly politicized on a national level. *E.g.*, David J. Garrow, *A LOOK AT . . . The New Politics of Abortion: When "Compromise" Means Caving In*, WASH. POST, June 1, 1997, at C03 (discussing the controversy surrounding Senator Daschle's proposed bill banning post-viability abortions).

lenge.²¹² Rather, the "general usage and modern understanding" of the word health was broad enough to encompass physical, mental, and psychological health risks, all by implication.²¹³

In *Doe v. Bolton*, the companion case to *Roe*, the Court also interpreted the meaning of "health" very broadly.²¹⁴ The *Bolton* Court found that a doctor may exercise his medical judgment in light of factors related to health, which included the woman's "physical, emotional, psychological, [and] familial [health], and [her] age."²¹⁵ The majority opined, "This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman."²¹⁶ In *Planned Parenthood of Central New Jersey v. Verniero*, in which the district court had invalidated a statute banning partial birth abortion, the Third Circuit similarly provided a very broad definition of "health":

A woman's health may be severely compromised by carrying a pregnancy to term. Certain physical and mental health conditions are aggravated by or progress during pregnancy. Physiological stress on the body increases during pregnancy and may exacerbate physical conditions such as certain neurological and immunological diseases, liver or kidney disease, severe hypertension, cardiac conditions, and diabetes. For example . . . [a] woman who suffers from a severe eye disease, relating to a pre-existing condition of diabetes, may, because her laser therapy is inconsistent with pregnancy, incur blindness if required to carry to term. Mental conditions, such as schizophrenia, may also worsen as a result of a pregnancy²¹⁷

212. *Vuitch*, 402 U.S. at 72.

213. *Id.* The Court quoted the definition of "health" found in WEBSTER'S DICTIONARY: "the 'state of being . . . sound in body (or) mind.'" *Id.* However, the Court arguably suggested that the term "health" does not necessarily permit a doctor to take all factors relevant to a woman's health into consideration in deciding whether to conduct an abortion. *Id.* at 71. The majority opined: "[D]octors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health." *Id.*

214. *See Doe v. Bolton*, 410 U.S. 179, 192 (1973).

215. *Id.*; *see also Doe v. Kenley*, 584 F.2d 1362, 1366 (4th Cir. 1978) (holding that a health exception based on the broad definition of "health" in *Bolton* was required in a state policy limiting state medical assistance to therapeutic abortions).

216. *Bolton*, 410 U.S. at 192.

217. *Planned Parenthood of Cent. New Jersey v. Verniero*, 41 F. Supp. 2d 478, 502 (D. N.J. 1998), *aff'd on other grounds*, *Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000). *Farmer* did not address the health exception portion of *Verniero*. *Id.*

Many courts that have supported a broad interpretation of the meaning of "health" have emphasized that health exceptions should include mental, as well as physical, health risks. For example, in many of the cases already discussed, the courts defined "health" to include mental and psychological health: *Roe* ("psychological harm," "mental and physical health");²¹⁸ *Vuitch* ("mental" and "psychological" health);²¹⁹ *Bolton* ("physical, emotional, psychological, [and] familial" health);²²⁰ and *Verniero* ("mental conditions").²²¹

In *Women's Medical Professional Corp. v. Voinovich*, the Sixth Circuit invalidated an Ohio statute that banned the D&X procedure, banned all post-viability abortions, and contained a viability-testing requirement.²²² The statute contained a health exception for when a "physician determines . . . that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."²²³ The exception provided exemptions for a non-exhaustive list of health risks, all of which the court found to be unquestionably physical in nature.²²⁴ The court held that "on its face," the statute "appears to be limited to physical health risks."²²⁵ Relying on *Bolton*²²⁶ and *Vuitch*,²²⁷ the Sixth Circuit held that a statute banning post-viability abortions must contain a health exception that includes both physical and mental health risks.²²⁸ The court concluded that a post-viability abortion ban that did not account for mental health risks unconstitutionally

218. *Supra* Part I.B.1.

219. *Supra* Part II.B.1.a.ii.

220. *Supra* Part II.B.1.a.ii.

221. *Supra* Part II.B.1.a.ii.

222. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 190, 210 (1997). The Supreme Court denied certiorari in *Voinovich*. See 523 U.S. 1036 (1998). For a discussion of Justice Thomas's dissent from the denial of certiorari in *Voinovich*, see *infra* Part II.B.1.b.

223. *Voinovich*, 130 F.3d at 190. The health exception in *Voinovich* applied specifically to the statute's ban on post-viability abortions. *Id.*

224. *Id.* at 206. These examples were: pre-eclampsia, inevitable abortion, prematurely ruptured membrane, diabetes, and multiple sclerosis. *Id.*

225. *Id.*

226. *Supra* Part II.B.1.a.ii.

227. *Supra* Part II.B.1.a.ii.

228. *Voinovich*, 130 F.3d at 208-09; see also *Karlin v. Foust*, 188 F.3d 446, 490 (7th Cir. 1999) ("[I]t would also seem illogical for a state to seek to protect a woman's physical health while at the same time casting aside all concerns regarding her mental health."); *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1467 (S.D. Ind. 1995) ("[I]t is difficult to see how . . . restrictive concepts [such as 'substantial and irreversible impairment' and 'major bodily function'] can be recon-

violated *Roe* and *Casey*'s holding that in post-viability abortions, the state cannot proscribe abortions when they are necessary to preserve the woman's life or health.²²⁹

The *Voinovich* court distinguished its holding from *Casey*.²³⁰ The medical emergency provision of the Pennsylvania statute in *Casey* was "substantially identical" to the Ohio statute's health exception in *Voinovich*, particularly in that both provisions provided non-exhaustive lists of physical health risks.²³¹ Specifically, the *Casey* Joint Opinion had deferred to the Third Circuit's interpretation that the medical emergency provision was limited to physical health risks.²³² The *Voinovich* court held, however, that there was a fundamental difference between a statute such as the one in *Casey* that merely created delays to women's access to abortion, and a statute, such as the one in *Voinovich*, that completely banned all post-viability abortions.²³³ The Sixth Circuit considered that a medical emergency provision without a mental health exception does not necessarily impose an undue burden in a statute imposing merely delays on women's access to abortion (e.g., informed con-

ciled with the requirement in *Casey*, *Roe* and [*Bolton*] that a medical emergency exception apply where compliance would cause a 'threat to her health.'").

229. *Voinovich*, 130 F.3d at 209. Former President William Jefferson Clinton also believed that a ban on partial birth abortion should contain a mental health exception. See Nancy E. Roman & Paul Bedard, *Senators Battle Over Bill On Partial-Birth Abortion; Clinton Backs Daschle Amid Emotional Pleas*, WASH. TIMES, May 15, 1997, at A12 (discussing President Clinton's decision to support Senator Tom Daschle's ban on post-viability abortions, which provided an exception for "grievous injury" to the woman's physical health). President Clinton twice vetoed bills passed by Congress prohibiting partial birth abortion, in part, because the bills did not contain health exceptions. See Greenhouse, *supra* note 4, at A1. However, President Clinton supported Senator Daschle's proposed ban on post-viability abortions, although the ban contained a health exception limited to physical health risks. *Supra* Roman & Bedard, at A12. President Clinton believed that the health exception's language—when a woman's pregnancy "risks grievous injury to her physical health" because of "a severely debilitating disease or impairment specifically caused by the pregnancy"—was sufficient to cover "severe mental stress, [which] can sometimes manifest itself physically." *Id.*; see also Garrow, *supra* note 211, at C03 (discussing the controversy surrounding Senator Daschle's proposed bill banning post-viability abortions); Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?: Women's Medical Professional Corporation v. Voinovich and the Mental Health Exception To Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 835 (1999) (concluding that post-viability health exceptions should be limited to physical health risks to protect the state's compelling interest in potential life).

230. *Voinovich*, 130 F.3d at 207.

231. *Id.*; *supra* notes 128 (*Casey*) and 224 (*Voinovich*) and accompanying text.

232. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 880 (1992) (relying on *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 701-02 (3d Cir. 1991)).

233. *Voinovich*, 130 F.3d at 208.

sent and reporting requirements).²³⁴ The same provision, however, in an abortion statute banning all access to an abortion procedure, necessarily imposes an undue burden under *Casey*.²³⁵

b. The Narrow Interpretation of "Health"

Some courts and individual judges have called for a more narrow interpretation of the meaning and scope of the term "health" in abortion statutes. These courts and judges generally have held that a health exception should be limited to physical health risks, and should not include mental, psychological, emotional, or other kinds of risks. In short, they have opined that a broad interpretation of "health" will "swallow the rule."²³⁶

The *Casey* Joint Opinion found that the Pennsylvania statute's medical emergency exception should have been interpreted broadly enough not only to include "substantial and irreversible" health risks, but also to include health risks that could lead to illnesses with "substantial and irreversible consequences."²³⁷ The *Casey* Joint Opinion, however, deferred to the lower court's finding that the exception was limited to physical health risks.²³⁸ The Third Circuit held only that, "The essence of the [medical emergency] definition . . . is that it allows a woman and her doctors to forego many of the Act's requirements when there is a medical emergency to the woman's *physical* health" ²³⁹

234. *Id.*

235. *Id.* In his dissenting opinion in *Voinovich*, Judge Boggs also argued that mental health risks should be included in an abortion statute's medical emergency provision. *Id.* at 216-17 (Boggs, J., dissenting). However, Judge Boggs used a different analysis than the majority. *Id.* Judge Boggs argued that in the language of the statute's medical emergency exception, "impairment of a major bodily function," already included "sufficiently severe 'mental and emotional harm'" risks, even though it did not specifically list mental health risks. *Id.* at 217. Although the provision listed only physical health conditions, it specifically provided that the list was "not limited to" those specific conditions. *Id.* Judge Boggs opined: "It is counterintuitive to say that sufficiently severe mental harm is not an impairment of a major bodily function; if anything, it could be seen as an impairment of the *most* significant bodily function." *Id.* (emphasis in original).

236. *A Woman's Choice-East Side Women's Clinic v. Newman*, 671 N.E.2d 104, 112 (Sup. Ct. Ind. 1996) (Sullivan, J., dissenting); *see also Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (criticizing the majority for embracing a broad definition of health that "apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries").

237. *Casey*, 505 U.S. at 880; *infra* Part II.B.1.a.i.

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

239. *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 701 (3d Cir. 1991) (emphasis added).

Similarly, in his dissenting opinion in the Supreme Court's denial of certiorari in *Voinovich*, Justice Thomas argued that Supreme Court precedent did not in any way suggest that a post-viability abortion regulation required a mental health exception.²⁴⁰ He contended that the vast majority of state statutes addressing abortion have not contained mental health exceptions.²⁴¹ He further argued that decisions such as *Vuitch* and *Bolton*, which permitted physicians to consider mental health risks,²⁴² did not *require* health exceptions to include mental health risks.²⁴³ Rather, these courts provided, at best, that abortion regulations *could* contain mental health exceptions and still be constitutional.²⁴⁴ Justice Thomas was concerned that a broad interpretation of "health," especially in a post-viability abortion regulation as in *Voinovich*, was contrary to the principle, reaffirmed in *Casey*, that a state's interest in restricting abortion is "strongest after viability."²⁴⁵ Finally, he argued that because the vast majority of partial birth abortion statutes on the books at the time the Court denied certiorari in *Voinovich* had "not specified whether such abortions must be permitted on mental health grounds," requiring statutes to do so would "cast unnecessary doubt" on the meaning of partial birth abortion bans.²⁴⁶

In any event, decisions such as *Vuitch*, *Bolton*, and *Voinovich*,²⁴⁷ "approved of taking a broad range of considerations into account

240. *Voinovich v. Women's Med. Prof'l Corp.*, 523 U.S. 1036, 1037 (1998) (Thomas, J., dissenting).

241. *Id.*

242. *Supra* Part II.B.1.a.ii.

243. *Voinovich*, 523 U.S. at 1039-040 (Thomas, J., dissenting).

244. *Id.*; Wassom, *supra* note 229, at 812-14 (arguing that there is no "constitutional necessity" of a mental health exception). It has been argued that these Courts decided the cases on vagueness grounds, and only in dicta suggested that broad definitions of health were permissible in abortion statutes. Wassom, *supra* note 229, at 813-19. For example, in *Vuitch*, the majority did not require that health exceptions incorporate mental health risks. *United States v. Vuitch*, 402 U.S. 62, 72 (1971); Wassom, *supra* note 229, at 812-14. Instead, the majority held only that the meaning of "health" in the abortion statute was not void for vagueness, and that doctors could consider a "broad range of factors" when determining if a woman's health was at risk. *Vuitch*, 402 U.S. at 62; Wassom, *supra* note 229, at 812-14. Similarly, in *Bolton*, the Court's "ultimate holding" was that the statute's health exception was not void for vagueness. Wassom, *supra* note 229, 814-17. Only in dicta did the *Bolton* majority opine that physicians could include any number of factors, including mental health risks, in the definition of "health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973); Wassom, *supra* note 229, at 814-17. In sum, these decisions "approved of the state's *interest* in considering all facets of "health," not its *requirement* to do so." Wassom, *supra* note 229, at 817 (emphasis in original).

245. *Voinovich*, 523 U.S. at 1037 (Thomas, J., dissenting).

246. *Id.* at 1040.

247. *Supra* Part II.B.1.a.ii.

when assessing the impact of an unwanted pregnancy on a woman's health."²⁴⁸

2. *Must a Woman's Health be Severely at Risk?*

Neither *Roe* nor *Casey* explicitly addressed how severe or serious a health risk must be to qualify under a health exception in an abortion statute, or, for that matter, whether a severity requirement is required in a health exception at all.²⁴⁹ Several courts have, however, analyzed the language of health exceptions in abortion statutes, particularly "choice of method statutes,"²⁵⁰ to determine how severe a risk must be to a woman's health to qualify under a health exception.

a. *The Impermissible "Trade-Off"*

Some courts have held that requiring a health risk to meet a particular level of severity is unconstitutional because it results in a statute that no longer focuses on maternal health as its "paramount concern."²⁵¹ For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*,²⁵² the Court invalidated a choice of method statute because the statute's health exception was unconstitutional.²⁵³ The health exception provided that a doctor was exempt from the choice of method requirement if, "in [his] good-faith medical judgment [the abortion] technique 'would present a significantly greater medical risk to the life or health of the pregnant woman.'"²⁵⁴ The majority affirmed the lower court's finding that the statute's health exception required an unconstitutional "trade-off between the woman's health and fetal survival, and failed to require that maternal health be the physician's paramount consideration."²⁵⁵ The majority opined that the language, "signifi-

248. Wassom, *supra* note 229, at 817.

249. See generally *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of South-eastern Pa. v. Casey*, 505 U.S. 833 (1992).

250. A "choice of method" statute is a statute that requires the doctor to use the abortion technique "which would provide the best opportunity for the unborn child to be aborted alive." *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 468 (1986).

251. Massie, *supra* note 4, at 357.

252. *Casey* departed from the holding of *Thornburgh* with regard to invalidating certain informed consent requirements. *Casey*, 505 U.S. at 881-87. However, the "trade-off" analysis in *Thornburgh* was not addressed in *Casey*.

253. *Thornburgh*, 476 U.S. at 768-69. In *Thornburgh*, the choice of method statute applied to post-viability abortions only. *Id.* at 768.

254. *Id.* (emphasis added).

255. *Id.* at 768-69.

cantly greater medical risk," unconstitutionally required the "mother to bear an increased medical risk in order to save her viable fetus."²⁵⁶

In *Jane L. v. Bangerter*, the Tenth Circuit, relying on *Roe*, *Casey*, and *Thornburgh*, invalidated a choice of method statute that excepted only cases where the abortion method would "gravely damage a woman's medical health."²⁵⁷ In *Bangerter*, the court held that requiring the woman's health to be in "grave" danger before she could take advantage of the statute's health exception imposed an unconstitutional "health burden" on the woman.²⁵⁸ The court explained that such a health burden was contrary to the "unifying thread" of *Roe* and *Casey*: that maternal health is the physician's paramount concern.²⁵⁹ The Tenth Circuit found the statute unconstitutional because:

Under the statute . . . [the woman] may have to endure additional health damage and suffering if the method most likely to save her unborn child's life . . . would itself inflict damage, albeit not "grave" damage, on her health . . . [This] clearly demand[s] that a woman bear an "increased medical risk" in order to save the life of a viable fetus.²⁶⁰

Courts also have used the "trade-off" rationale to strike down health exceptions in partial birth abortion bans. For example, in *Planned Parenthood of Central New Jersey v. Verniero*,²⁶¹ the district court held that a partial birth abortion ban that completely lacked a health exception created an unconstitutional "trade-off" under *Thornburgh*, resulting in "a woman [being] forced to make an untenable choice between either undergoing a risky abortion

256. *Id.* at 769; *see also* *Colautti v. Franklin*, 439 U.S. 379, 400-01 (1979) (holding that a choice of method statute was void for vagueness because it was ambiguous whether the statute's health exception applied an objective or a subjective standard to determine when a woman's health was at risk).

257. *Jane L. v. Bangerter*, 61 F.3d 1493, 1502-505 (10th Cir. 1995), *rev'd sub nom. on other grounds*, *Leavitt v. Jane L.*, 518 U.S. 137 (1996) (emphasis added).

258. *Id.* at 1503.

259. *Id.* at 1504.

260. *Id.* at 1505.

261. *Planned Parenthood of Cent. New Jersey v. Verniero*, 41 F. Supp. 2d 478 (D. N.J. 1998), *aff'd on other grounds*, *Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000). *Farmer* did not address the health exception portion of *Verniero*. *See also* *Summit Med. Assocs., P.C. v. James*, 984 F. Supp. 1404, 1460, 1463 (M.D. Ala. 1998) (denying motion to dismiss and holding that post-viability abortion statute's strict health exception and whether it impermissibly required a "trade-off," was an issue for trial), *aff'd and rev'd on other grounds*, *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999).

procedure or continuing her pregnancy in the face of unknown risks and health concerns.”²⁶²

b. The Permissible “Trade-Off”

Some courts and individual judges are of the opinion that abortion statutes are not necessarily unconstitutional because they contain health exceptions that require a more severe risk to the woman’s health. In fact, some courts have found that health exceptions *must* contain some sort of severity requirement to avoid the exception “swallow[ing] up the rule.”²⁶³

In *Casey*, the Joint Opinion upheld the Pennsylvania statute’s medical emergency provision that was limited to “serious risks of substantial and irreversible impairment of a major bodily function.”²⁶⁴ As discussed above, the Joint Opinion deferred to the Third Circuit’s broad interpretation of the terms “serious” and “risk.”²⁶⁵ However, the Third Circuit also found that while a woman was not required to suffer an immediate health risk, her health problem had to be one that could lead to a “a substantial and irreversible impairment.”²⁶⁶ Moreover, other references throughout the Third Circuit and Supreme Court opinions reveal a clear intent to limit the medical emergency provision to serious and permanent health risks. For instance, the Third Circuit continually used language such as, “serious risk,” “irreversible injury,” and “significant” risk.²⁶⁷ The Third Circuit considered, “the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from

262. *Verniero*, 41 F. Supp. 2d at 502 (quoting *Hope v. Ryan*, 995 F. Supp. 847, 860 (N.D. Ill. 1998)) (citations omitted).

263. *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 112 (Sup. Ct. Ind. 1996) (Sullivan, J., dissenting). In *Newman*, Indiana’s medical emergency provision allowed abortions only when the delay in termination of the pregnancy would “create serious risk of substantial and irreversible impairment of a major bodily function.” *Id.* Judge Sullivan argued that an interpretation of this language also to mean a “substantial but reversible” impairment,” or “irreversible impairments of *minor* bodily functions,” risked “open[ing] [up the exception] to every abortion you can think of . . .” *Id.* (emphasis added) (citations omitted); *see also* *Doe v. Kenley*, 584 F.2d 1362, 1366 (4th Cir. 1978) (holding that, while life exception in state policy limiting reimbursement for abortions to those performed to save a woman’s life should be replaced by a health exception, the health exception was to be limited to instances of “substantial endangerment of health”).

264. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992).

265. *Casey*, 505 U.S. at 880; *supra* Part II.B.1.a.i.

266. *Casey*, 505 U.S. at 880; *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 700-01 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

267. *Casey*, 947 F.2d at 700-01.

serving as an excuse for noncompliance"268 The Supreme Court concluded that the Third Circuit's interpretation of "serious" risk did not impose an undue burden on a woman's abortion right and was, therefore, constitutional.²⁶⁹

Similarly, in *Voinovich*, although the Sixth Circuit invalidated an Ohio statute banning partial birth abortion on other grounds,²⁷⁰ the opinion's language suggests that the court saw no constitutional problem with a health exception that required a more severe health risk.²⁷¹ The statute provided for an exception when "the abortion is necessary to prevent . . . serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."²⁷² The court held that the exception was unconstitutional "because it does not allow . . . abortions where necessary to prevent a *serious, non-temporary threat* to a pregnant woman's mental health."²⁷³ This language suggests approval of a health exception requiring a serious and permanent health risk.²⁷⁴ In fact, in an effort to temper its holding that health exceptions to partial birth abortion bans require a mental health exception, the Sixth Circuit emphasized that a health exception can encompass only "*severe irreversible risks* of mental and emotional harm."²⁷⁵

In his dissenting opinion in *Thornburgh*, Justice White similarly approved of the health exception in the Pennsylvania statute that required that a woman be exposed to a "significantly greater medical risk" before she could take advantage of the exception.²⁷⁶ He concluded that the word "significantly" could be interpreted to mean merely a "meaningful," "cognizable," "appreciable," or "non-negligible" health risk.²⁷⁷ Justice White argued that rather than requiring a "trade-off" between the mother's health and fetal survival, the health exception required only that the "risk be a real and identifiable one."²⁷⁸ He contended that a requirement that a

268. *Id.* at 701.

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

270. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997). The Sixth Circuit invalidated the statute, in large part, because its health exception was limited to physical health risks. *Supra* Part II.B.1.a.ii.

271. *See Voinovich*, 130 F.3d at 209.

272. *Id.*

273. *Id.* (emphasis added).

274. *Id.*

275. *Id.* (emphasis added).

276. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 807 (1986) (White, J., dissenting).

277. *Id.*

278. *Id.*

risk to a woman's health be "significantly greater" was a proper expression of the state's interest in potential fetal life, and a guaranty that the state's interest would not be "subordinated to a purported maternal health risk that is in fact wholly insubstantial."²⁷⁹

c. *Stenberg v. Carhart: The Middle-of-the-Road
Approach to the "Trade-Off"*

In *Carhart*, the Court took a middle-of-the-road approach on the issue of how severe a health risk should be to qualify under a health exception in a partial birth abortion ban. The majority opinion suggests that while a health risk need not be strictly "necessary" for the preservation of a woman's health, it should, nonetheless, be a serious health risk.²⁸⁰ For example, although the majority invalidated the Nebraska statute, in part, because it did not contain a health exception at all,²⁸¹ the majority qualified its holding by finding that a "State cannot subject women's health to *significant risks*."²⁸² Although the Court did not elaborate extensively on this statement, it provided examples of what it meant by "significant risk," e.g., that a "significant" health risk means something more than just situations in which the pregnancy itself creates the health threat.²⁸³

The majority also forbade states from forcing women to "use *riskier* methods of abortion."²⁸⁴ Although the majority did not define what it meant by "riskier" when describing the health benefits of the D&X procedure (i.e., how D&X may be "less risky" than D&E for "some women in some circumstances"), the majority listed health benefits such as: "reduces complications from bony fragments," "reduces operating time, blood loss and risk of infection," "prevents the most common causes of maternal mortality (e.g., retained fetal tissue)," and "involves less risk of uterine perforation or cervical laceration."²⁸⁵ While these "health risks" are

279. *Id.* Although former President William Jefferson Clinton vetoed two bills by Congress banning partial birth abortion, in part, because they did not contain health exceptions, he appeared to support a health exception that applied only to severe risks to a woman's health. See Wassom, *supra* note 229, at 835 n.289. President Clinton stated, "I support a [health] exception . . . making crystal clear that the procedure may be used only in cases where a woman risks death or serious damage to her health, and in no other case." *Id.*

280. See *Stenberg v. Carhart*, 120 S. Ct. 2597, 2604-605, 2609, 2610, 2612 (2000).

281. *Id.* at 2604-605.

282. *Id.* at 2609 (emphasis added).

283. *Id.*

284. *Id.* (emphasis added).

285. *Id.* at 2610, 2612.

not all permanent in nature (not "irreversible"), they are surely serious. Moreover, after listing the benefits of D&X, the majority agreed with the district court's finding that "D&X *significantly* obviates health risks in certain circumstances" ²⁸⁶

When analyzing the clause, "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," ²⁸⁷ however, the *Carhart* majority held that a "health risk" was not required to be so severe that an abortion must be "absolutely necessary" for the preservation of the mother's health. ²⁸⁸ Rather, the Court held that a medical procedure may be constitutionally "necessary" when viewed in light of "comparative" health risks and benefits in a particular case. ²⁸⁹

3. "In Appropriate Medical Judgment": A Subjective or Objective Standard for Determining When a Woman's Health is at Risk?

Roe provided, and *Casey* affirmed, that the state may regulate, and even proscribe, abortion after viability, "except where . . . necessary, *in appropriate medical judgment*, for the preservation of the life or health of the mother." ²⁹⁰ Different courts have interpreted the phrase, "in the appropriate medical judgment of the attending physician," either from an objective or subjective perspective. Most courts have adopted a subjective, "good faith," interpretation of the clause. A significant minority of courts and justices, however, have interpreted the clause from an objective perspective, usually on the ground that a subjective approach risks encouraging "abortion on demand." ²⁹¹

a. The Subjective Interpretation

When first articulating the "appropriate medical judgment" standard, the *Roe* Court did not address explicitly whether it intended the phrase to be interpreted objectively, subjectively, or somewhere in between. ²⁹² Throughout *Roe*, however, the majority con-

286. *Id.* at 2612 (emphasis added).

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

288. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2612 (2000).

289. *Id.*

290. *Roe*, 410 U.S. at 165 (emphasis added) (quoted in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992)).

291. *E.g.*, *Carhart*, 120 S. Ct. at 2652 (Thomas, J., dissenting) (arguing that a broad and subjectively-based health exception "eviscerates *Casey*'s undue burden standard and imposes unfettered abortion-on-demand").

292. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973).

sistently stressed the central role of the physician in the abortion decision, both in counseling the woman about whether to have the abortion,²⁹³ and in determining how the abortion was to be carried out.²⁹⁴

Moreover, the *Roe* decision contains language that strongly suggests approval of a case-by-case, doctor-by-doctor, determination of whether an abortion is necessary.²⁹⁵ For example, the Court held that during the first trimester,²⁹⁶ "the attending physician, in consultation with his patient, is *free to determine*, without regulation by the State, that, *in his medical judgment*, the patient's pregnancy should be terminated."²⁹⁷ The Court noted further that its decision "vindicates the right of the physician to administer medical treatment . . ." and, that the "basic responsibility for [the abortion decision] must rest with the physician."²⁹⁸

Roe's language also suggests, however, that this case-by-case determination should be balanced by objective medical standards.²⁹⁹ For example, the majority opined that physicians' broad discretion was to be checked against an objective medical standard.³⁰⁰ In this respect, the majority found that if "the individual practitioner" abused his privilege of exercising proper medical judgment," legal and "intra-professional" remedies would apply.³⁰¹

In *Vuitch*, the Court also supported granting physicians broad discretion to determine when an abortion was necessary to protect a woman's life or health.³⁰² The Court opined that, "whether a particular operation is necessary for a patient's . . . health is a judg-

293. *Roe*, 410 U.S. at 153 ("All these factors the woman and her responsible physician necessarily will consider in consultation.").

294. *Id.* at 164 ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.").

295. *Id.* at 163.

296. The *Roe* Court found that up to the two "compelling points" in a pregnancy, the points at which the state's interests in maternal health and fetal survival become compelling, "the abortion decision in all its aspects is inherently, and primarily, a medical decision." *Id.* at 166. This does not mean, however, that after these two points the abortion decision is no longer primarily a medical one and the state may come in and regulate at its will. *Id.* at 163. Rather, even at these compelling points, the state's regulatory power is limited: Under both *Roe* and *Casey*, the state may not regulate abortion where such regulation would threaten a woman's life or health. *Supra* Parts I.B.1, 2.

297. *Roe*, 410 U.S. at 163 (emphasis added).

298. *Id.* at 165-66.

299. *Id.* at 163.

300. *Id.* at 165-66.

301. *Id.* at 166.

302. See *United States v. Vuitch*, 402 U.S. 62, 71 (1971).

ment that physicians are obviously called upon to make routinely whenever surgery is considered."³⁰³ In fact, the majority went so far as to suggest that the burden of proving that a physician has not acted within a statute's health exception should be on the prosecution.³⁰⁴ The majority concluded: "We are unable to believe that Congress intended that a physician be required to prove his innocence."³⁰⁵

In *Bolton*, the Court adopted a subjective approach to determine the proper scope of a doctor's discretion in deciding when an abortion is "necessary" for the woman's health.³⁰⁶ The abortion statute in *Bolton* provided that an abortion was "non-criminal" when "based upon [the physician's] *best clinical judgment* . . . that an abortion is necessary"³⁰⁷ The Court rejected the argument that because the "best clinical judgment" language would be "subject to diverse interpretation," doctors would act arbitrarily without an objective standard to guide them.³⁰⁸ Instead, consistent with *Vuitch*, the *Bolton* majority pointed out that it was the norm in the medical field for doctors to be called upon to decide whether a procedure was "necessary" for a patient's health.³⁰⁹ There was no valid reason why deciding whether an abortion was necessary for a woman's health should be any different.³¹⁰

In *Casey*, the Pennsylvania statute provided that an exception existed under the medical emergency provision "on the basis of the physician's good faith clinical judgment."³¹¹ The *Casey* Joint Opinion affirmed the Third Circuit's finding that the subjective standard in the statute was not void for vagueness, because: "We fail to see how any physician practicing in good faith could fear conviction under the Act."³¹² Determining whether an emergency is present

303. *Id.* at 72.

304. *Id.* at 69-71.

305. *Id.* at 71.

306. *Doe v. Bolton*, 410 U.S. 179, 183, 191-92 (1973).

307. *Id.* at 183 (emphasis added).

308. *Id.* at 191.

309. *Id.* at 192.

310. *Id.*; see also *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). The *Danforth* Court stressed similar themes as the *Bolton* Court. *Danforth*, 428 U.S. at 64. In passing judgment on a Missouri statute that defined viability, the *Danforth* majority elaborated that viability is "a matter of medical judgment, skill, and technical ability, and we preserved [in *Roe*] the flexibility of the term [T]he determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Id.*

311. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992).

312. *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 702 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992); *Casey*, 505 U.S. at 880.

under the statute is, moreover, the “type of judgment[] that physicians are obviously called upon to make routinely whenever surgery is considered.”³¹³

In *Voinovich*, the Sixth Circuit found the partial birth abortion ban’s health exception, which had a mixed objective and subjective standard to determine when a woman’s health was a risk, void for vagueness.³¹⁴ The health exception provided that the existence of a health risk would be determined “by a physician, and that physician determines, in good faith *and* in the exercise of reasonable medical judgment.”³¹⁵ The court found that the health exception was unconstitutionally vague³¹⁶ because physicians would be liable even if they acted in their own good faith medical judgment.³¹⁷ Moreover, the court found that a requirement that a doctor’s determination be objectively reasonable to other physicians “would chill the performance of . . . abortions”³¹⁸

b. *The Objective Interpretation*

A few courts and justices support the proposition that a physician’s medical determination should be based on an objective standard of reasonableness in the medical community, because a subjective standard would encourage “abortion on demand.”³¹⁹

313. *Casey*, 947 F.2d at 702 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)).

314. *Voinovich*, 130 F.3d at 203-04. As discussed in Part II.B.1.a.ii *supra*, one of the Sixth Circuit’s primary reasons for invalidating the statute was that its health exception was limited to physical health considerations.

315. *Id.* at 190 (emphasis added).

316. *Id.* at 203. More precisely, the *Voinovich* court found that the constitutional defect of the statute’s health exception was that it did not contain a scienter, or intent, requirement. *Id.* Nonetheless, the court’s conclusion that the statute required a scienter requirement presupposed that the statute was unconstitutionally vague because it imposed both an objective and a subjective reasonableness requirement. *Id.* The Sixth Circuit found merely that a scienter requirement may have *saved* the *already*-unconstitutional statute. *Id.*

317. *Id.* at 204.

318. *Id.* at 203. Two other cases have supported the proposition that a physician should be required to show only that he exercised a subjective, good faith determination of reasonableness: *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526, 534 (8th Cir. 1994) (holding that a medical emergency clause to an informed consent requirement of an abortion statute was “saved” from vagueness by language that permitted physicians to rely on their “good faith clinical judgment” in determining whether a condition constituted a medical emergency); *Doe v. Kenley*, 584 F.2d 1362, 1365 (4th Cir. 1978) (“The Medical Assistance Program does not intend to second guess each physician on his/her professional judgment . . .”).

319. *E.g.*, *Stenberg v. Carhart*, 120 S. Ct. 2597, 2652 (2000) (Thomas, J., dissenting) (arguing that a broad and subjectively based health exception “eviscerates *Casey*’s undue burden standard and imposes unfettered abortion-on-demand”).

In *Karlin v. Foust*, the Seventh Circuit held that a medical emergency provision in an informed consent statute was constitutional even though it relied upon an objective standard for evaluating a physician's decision to perform an emergency abortion.³²⁰ The emergency provision at issue in *Karlin* required a physician to exercise "reasonable medical judgment" when determining if a pregnant woman should be exempt from the statute's provisions.³²¹ The court explicitly rejected the *Voinovich* court's finding that an objective standard is necessarily unconstitutional.³²² The *Karlin* court found, instead, that an objective standard would not chill a physician's discretion to decide whether a procedure is necessary for the preservation of maternal health.³²³ An objective standard would give physicians fair warning that their actions are illegal.³²⁴ The majority based its finding on the fact that there always exists a "number of reasonable medical options" from which a doctor could choose.³²⁵ Finally, the court found that doctors are, in any event, routinely called upon to "assess[] the seriousness of a risk to a patient's health . . . under an objective standard knowing that if they make an objectively erroneous determination they may be subject to civil liability."³²⁶

Similarly, in his dissenting opinion in *Bolton*, which Chief Justice Rehnquist joined, Justice White argued that granting doctors broad discretion to determine when an abortion is necessary to protect a woman's health could create a situation in which, "for any. . . reason[], or for no reason at all . . ." any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure."³²⁷ Likewise, in his dissenting opinion in *Carhart*, Justice Kennedy argued that the *Carhart* majority, by invalidating the Nebraska statute because it lacked a health exception, "awards each physician a veto power over the state's judgment that the procedures should not be performed."³²⁸ He

320. *Karlin v. Foust*, 188 F.3d 446, 463 (7th Cir. 1999).

321. *Id.* at 459.

322. *Id.* at 460-64.

323. *Id.* at 465.

324. *Id.* at 464-65.

325. *Id.* at 464.

326. *Id.* at 464-65.

327. *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting).

328. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2627 (2000) (Kennedy, J., dissenting); see also *id.* at 2621 (Scalia, J., dissenting) (arguing that if a health exception in a partial birth abortion ban permitted a physician, "in his expert medical judgment," to determine when an abortion was "necessary" for the woman's health, the physician would effectively "give live-birth abortion free rein").

also contended that precedent did not support a standard in which an abortion is deemed "necessary" whenever the individual physician believes it to be the "most appropriate course of treatment."³²⁹ Rather, he argued that the *Casey* Joint Opinion found that the state had an interest in protecting potential life; and granting doctors boundless discretion to decide when an abortion is necessary would effectively nullify that state interest.³³⁰ Finally, in his dissenting opinion in *Carhart*, Justice Thomas summed up the critique of a subjectively based health exception as follows:

[S]uch a health exception requirement eviscerates *Casey*'s undue burden standard and imposes unfettered abortion-on-demand. The exception entirely swallows the rule. In effect, no regulation of abortion procedures is permitted because there will always be *some* support for a procedure and there will always be some doctors who conclude that the procedure is preferable.³³¹

c. *Stenberg v. Carhart: Uncertain Precedent on the Meaning of "In Appropriate Medical Judgment"*

Writing for the majority in *Carhart*, Justice Breyer only briefly addressed the physician's proper role in determining when a wo-

329. *Id.* at 2627 (Kennedy, J., dissenting) ("*Casey* does not give precedence to the views of a single physician or a group of physicians regarding the relative safety of a particular procedure.").

330. *Id.* (Kennedy, J., dissenting). Justice Kennedy stated, "A ban which depends on the 'appropriate medical judgment' of Dr. Carhart is no ban at all This, of course, is the vice of a health exception resting on the doctor's discretion Rather than exalting the right of a physician to practice medicine with unfettered discretion, *Casey* recognized: 'Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position.'" *Id.* at 2629, 2631 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

331. *Id.* at 2652 (Thomas, J., dissenting) (emphasis in original). It also has been argued that although some courts have supported a subjective standard in health exceptions, no court has required one. *E.g.*, Wassom, *supra* note 229, at 819-20 ("[N]o decision explicitly has found the subjectivity requirement to be a constitutional mandate."). Rather, these courts generally have based their ultimate findings on vagueness analyses, finding it unclear whether the statutes imposed subjective or objective standards. *See id.* at 819; *see also Doe v. Bolton*, 402 U.S. 62, 71-2 (1973) (arguing that the abortion statute's health exception was not void for vagueness simply because "health" could include psychological, as well as physical, factors); *United States v. Vuitch*, 402 U.S. 62, 72 (1971) (holding that the meaning of "health" in the abortion statute was not void for vagueness); *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992) (finding abortion statute constitutional on the ground that the subjective language in the statute's medical emergency provision was not void for vagueness), *aff'd and rev'd on other grounds*, 61 F.3d 1493 (10th Cir. 1995).

man's health is at risk under a health exception.³³² In so doing, Justice Breyer, for the most part, responded to the arguments of the dissenting justices, without providing a clear answer regarding whether a physician should be subject to an objective or subjective standard under a health exception in a partial birth abortion ban.³³³ For example, the majority noted, "By no means must a state grant physicians 'unfettered discretion' in their selection of abortion measures."³³⁴ A state may, in fact, proscribe an abortion procedure even when "a particular physician" deems it necessary for a woman's health.³³⁵

However, "where substantial medical authority supports the proposition that banning a particular abortion procedure would endanger women's health, *Casey* requires the statute to include a health exception when the [abortion] procedure is 'necessary . . . for the preservation of the life or health of the mother.'"³³⁶ The *Carhart* Court did not address whether a health exception still would be required if there was no longer a divide in medical opinion about the health risks of the D&E procedure; or, if there was no longer "substantial medical authority" supporting the proposition that banning D&X "could endanger a woman's health."³³⁷

III. THE FUTURE OF THE HEALTH EXCEPTION

A. After *Carhart*, Courts Likely Will Require Statutes Banning "Partial Birth" Abortion Always to Contain an Exception for the Health of the Woman

One thing is certain: if courts are faced with the same circumstances as in *Carhart*, they undoubtedly will require any statute banning partial birth abortion to contain an exception for the health of the woman. This prediction is drawn from several points gleaned from the case law. First, the fact that partial birth abortion is a *pre-viability* abortion procedure has sometimes been ignored or overlooked in cases and commentary.³³⁸ The vast majority of the court decisions in Parts I and II *supra* make clear that the Supreme Court never, prior to the partial birth abortion controversy, came

332. *Carhart*, 120 S. Ct. at 2613.

333. *See id.*; *see also supra* Part II.B.3.b for a discussion of the dissenting opinions in *Carhart*.

334. *Carhart*, 120 S. Ct. at 2613.

335. *Id.*

336. *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992)) (quotations omitted).

337. *Id.*

338. *See supra* Parts I, II.

close to holding that states have the authority to ban outright a pre-viability abortion procedure.³³⁹ Such a holding would be contrary to even the most liberal reading of the seminal cases in abortion jurisprudence. *Roe* and *Casey*, and all subsequent decisions, have unequivocally required that *post-viability* abortion regulations contain an exception for the health of the woman.³⁴⁰ Even at the point at which the state's interest in potential life is at its strongest—*post-viability*—the state still cannot proscribe abortion when it is necessary to protect the woman's life or health.³⁴¹

It is, therefore, irrational to argue that, *pre-viability*, when the state's interests are weaker than they are post-viability (even under *Casey*),³⁴² a state can proscribe an abortion procedure without including a health exception. The *Carhart* majority recognized the constitutional absurdity of such a situation, and laid the issue to rest.³⁴³ The majority persuasively reasoned that because *Roe* and *Casey* require that *post-viability* abortion proscriptions have health exceptions, *pre-viability* abortion proscriptions also must have health exceptions—because the state's interest in regulating abortion is weaker pre-viability than it is post-viability.³⁴⁴

A constitutional mandate requiring a health exception in pre-viability and post-viability abortion proscriptions can mean only one thing—abortion regulations *must* be constructed in a way that protects the health of the woman at *all* stages of pregnancy. The requirement that pre-viability abortion proscriptions contain health exceptions also is supported firmly by several other discrete points throughout abortion case law. For instance, although *Casey* fundamentally altered many of *Roe*'s holdings,³⁴⁵ *Casey* did not obviate the need for a health exception in pre-viability abortion regulations.³⁴⁶ Although the *Casey* Joint Opinion stressed the permissibility of state abortion regulations throughout pregnancy,³⁴⁷ it did not come close to suggesting that a state may ban a pre-viability abortion procedure to further its compelling interests. As the *Voinovich* court observed, *Casey* upheld only structural measures of the Pennsylvania abortion statute that did not impose

339. *Supra* Parts I-II.

340. *Supra* Part I.B.1, 2.

341. *Supra* Part I.B.1, 2.

342. *Supra* Part I.B.1, 2.

343. *Supra* Part I.B.4.

344. *Supra* Part I.B.4.

345. *Supra* Part I.B.2.

346. *See supra* Part I.B.2.

347. *Supra* Part I.B.2.

absolute bans on a woman's access to abortion.³⁴⁸ Whatever inconvenience or burden these measures may impose on a pregnant woman, if she complies with the measures, she ultimately will be permitted to exercise her constitutional right to obtain an abortion. A ban on abortion without a health exception, however, does not allow a woman ultimately to exercise her constitutional right to abortion. In any event, the Pennsylvania statute in *Casey* at least contained a medical emergency provision that excused compliance with the statute's measures under certain circumstances.³⁴⁹

Upholding pre-viability abortion proscriptions that do not include health exceptions would, moreover, contravene the controlling principle and spirit behind *Roe* and *Casey*. The decision to grant constitutional protection to a woman's right to have an abortion was built around the state's interest in the health and well-being of the woman as the "paramount concern."³⁵⁰ Although the *Roe* Court recognized compelling state interests that qualified a woman's right to abortion,³⁵¹ the framework *Roe* established relied on the state's interest in maternal health. Under *Roe*, the state could begin regulating abortion *only* when it became necessary to protect an increased risk to the woman's health.³⁵² Although the *Casey* Joint Opinion dismantled the trimester framework, it still structured the abortion right around the state interests recognized in *Roe*.³⁵³ Having reaffirmed *Roe*'s requirement of a post-viability health exception, a state cannot under *Casey* exercise its interest in potential life to the detriment of the pregnant woman's health at any time during a pregnancy. In short, a partial birth abortion ban without a health exception would fly in the face of the ultimate goal of *Roe* and *Casey*—preventing the erection of insurmountable barriers to a woman's access to abortion when such access may be necessary for the preservation of her health.³⁵⁴

A more difficult issue arises when a state regulation bans one particular method of abortion. The *Danforth* decision arguably suggests that a proscription on a pre-viability abortion method may

348. *Supra* Parts II.B.1.a.ii, II.B.2. These measures included an informed consent requirement, a twenty-four hour waiting period, a parental notification requirement, and related reporting requirements. *Supra* Part I.B.2.

349. *Supra* Part I.B.2.

350. Massie, *supra* note 4, at 357 and accompanying text.

351. These interests are the preservation of maternal health and the protection of potential fetal life. *Supra* Part I.B.1.

352. *Supra* Part I.B.1.

353. *Supra* Part I.B.2.

354. *See supra* Part I.B.1, 2.

be upheld as long as it contains a guaranty that a woman's health will not be jeopardized.³⁵⁵ The constitutional inquiry relating to partial birth abortion then becomes: What if there is no medical evidence supporting the necessity of the D&X procedure? What if the D&X procedure is found to be only as safe as the D&E procedure?

The *Danforth* Court held, specifically, that a ban on an abortion method was unconstitutional *if it imposed a risk on the woman's health*.³⁵⁶ *Danforth* also held that a primary rationale for striking down the ban on the "saline amniocentesis" method of abortion was that all other available alternatives were "significantly more dangerous and critical for the woman."³⁵⁷ Similarly, the *Carhart* Court interpreted undue burden to mean situations when an abortion regulation prevents a woman from obtaining the *safest* abortion under the circumstances.³⁵⁸ Also, the *Carhart* majority opinion discussed at length the fact that a health exception was required in the Nebraska statute because there was significant medical authority supporting the medical necessity of D&X for some women under some circumstances.³⁵⁹ The *Carhart* majority, therefore, adhered to the precautionary principle—that precisely because there was substantial medical authority supporting the medical necessity of D&X, the procedure should not be banned without a health exception.³⁶⁰ Like decisions before it, *Carhart* was written with the health of the pregnant woman as its "paramount" concern.³⁶¹

The *Carhart* Court did not, however, address the issue of what the Court would have decided had there been no substantial evidence in support of the medical necessity of D&X.³⁶² Under *Danforth*, a health exception arguably is *not* required if there are safe alternatives to the banned abortion procedure. Moreover, al-

355. *Supra* Part I.B.3.

356. *Supra* Part I.B.3.

357. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 76 (1976).

358. *Supra* Part I.B.4.

359. *Supra* Part I.B.4.

360. *Supra* Part I.B.4.

361. *Massie*, *supra* note 4, at 357 and accompanying text.

362. *Supra* Part I.B.4. It is interesting to note that in his partial concurrence and partial dissent in *Danforth*, Justice Stevens foreshadowed this issue in the partial birth abortion debate. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 101-02 (1976) (Stevens, J., dissenting). He opined, "If two abortion procedures had been *equally accessible* to Missouri women, in my judgment the United States Constitution would not prevent the state legislature from outlawing the one it found to be less safe even though its conclusion might not reflect a unanimous consensus of informed medical opinion." *Id.* (emphasis added).

though the banned procedure in *Danforth* was the *most* common second trimester method of abortion at the time,³⁶³ D&X is one of the *least* common methods of second trimester abortion—at most comprising one percent of all second trimester abortions performed in the United States, or approximately 0.01% of all abortions performed annually.³⁶⁴ Thus, in a situation where there is not substantial medical evidence supporting the necessity of D&X, a ban on D&X without a health exception may be distinguished from the ban upheld in *Danforth*.

This analysis is, however, faulty for several reasons. First, *Danforth* was decided before *Casey*.³⁶⁵ The *Casey* Joint Opinion explicitly held that, in the facial challenge to the Pennsylvania statute, it was irrelevant whether a provision would affect only a small group of women.³⁶⁶ Rather, in determining whether an abortion regulation imposes an undue burden, the focus should be on the group of women, regardless of how small, who would be adversely affected by the law.³⁶⁷ In fact, the Joint Opinion invalidated the spousal notification provision in the Pennsylvania statute, even though it affected only one percent of all women who obtained abortions.³⁶⁸ Under *Casey*, therefore, the mere fact that D&X may be medically necessary for less than one percent of the women who obtain abortions is irrelevant to a determination of whether a D&X ban should have a health exception. Surely, a complete ban on a medical procedure such as D&X, with no health exception at all, would be an undue burden on those women for whom the procedure is the medically safest alternative.

Second, *Carhart* adopted a lenient test for determining whether one abortion procedure is safer than another.³⁶⁹ Although it was undisputed in *Carhart* that there were no medical studies documenting the comparative safety of D&X and D&E,³⁷⁰ the majority found this fact unimportant because there was substantial medical evidence that D&X was medically necessary for some women in some circumstances.³⁷¹ The Court held, moreover, that universal

363. *Supra* Part I.B.3.

364. *Supra* Part I.A.

365. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

366. *Supra* Part I.B.2.

367. *Supra* Part I.B.2.

368. *Supra* Part I.B.2.

369. *Supra* Part I.B.4.

370. *Supra* Part I.B.4.

371. *Supra* Part I.B.4.

agreement on a procedure's comparative benefits and risks is not required, and that a procedure need not be absolutely necessary for a woman's health.³⁷² The majority reasoned that the "appropriate medical judgment" of physicians will "often differ," and these differences in medical opinion must be tolerated.³⁷³ Based on such a lenient standard, even if advances in medicine improve the D&E procedure, it is likely that it always will be easy to make a case that D&X is comparatively safer than D&E for some women in some circumstances, and therefore, necessary for the preservation of women's health under *Roe* and *Casey*.

Lastly, the *Carhart* majority did not make the analytical leap that a health exception is *not* required in the absence of substantial evidence that D&X is medically necessary.³⁷⁴ Rather, the majority held only, that *because* there was such substantial evidence, a health exception was necessarily required.³⁷⁵ It is quite possible, then, that future courts will require a health exception in partial birth abortion bans even when there is far less than substantial evidence supporting the medical necessity of D&X. The argument that the *Carhart* majority intended to require a health exception *only* when there is substantial medical evidence supporting the necessity of D&X is further weakened by the fact that Justice O'Connor felt compelled to make explicitly such an analytical leap in her concurrence—a leap the majority refused to make.³⁷⁶

In sum, based on Supreme Court precedent and the *Carhart* decision, it is highly unlikely that future courts will uphold a statute banning partial birth abortion that does not contain an exception for the health of the pregnant woman.

B. What a Health Exception Must Look Like to Pass Constitutional Muster

1. *States Should (But Are Not Required to) Draft Health Exceptions to "Partial Birth" Abortion Bans That Broadly Define "Health"*

How broadly courts *should* interpret the meaning of "health" in partial birth abortion bans is a separate analysis from how broadly courts *will* likely interpret the meaning of "health."

372. *Supra* Part I.B.4.

373. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2612 (2000).

374. *Supra* Part I.B.4.

375. *See supra* Part I.B.4.

376. *Supra* Part II.A. for Justice O'Connor's full statement in this respect.

As Justice Thomas argued in his dissenting opinion in the Supreme Court's denial of certiorari in *Voinovich*, precedent does not require states to draft partial birth abortion bans which broadly define "health."³⁷⁷ Except for the Sixth Circuit's decision in *Voinovich*, no decision discussed in Part II established a minimum threshold of broadness that partial birth abortion bans must meet.³⁷⁸ Rather, the decisions have provided that abortion statutes may constitutionally incorporate a broad meaning of "health," and that such broad interpretations do not render statutes void for vagueness.³⁷⁹ There have been no decisions, except for *Voinovich*, that have invalidated a statute because it contained an unconstitutionally narrow interpretation of "health."³⁸⁰ For example, although the *Roe* Court opined that the health of the woman should be defined using diverse factors such as her physical, psychological, and emotional health, the majority did not hold that such a broad interpretation was required.³⁸¹

The *Casey* Joint Opinion, however, encouraged a degree of broadness in the meaning of "health," when it affirmed the Third Circuit's finding that a health risk would qualify under the statute's medical emergency provision if it could lead to "substantial and irreversible" consequences.³⁸² This requirement, in any event, did not rise to a constitutional mandate that abortion statutes contain a broad definition of "health." Although *Carhart* only briefly addressed the proper scope of a health exception in partial birth abortion bans, the Court did in fact hold that a health exception should be broad enough to cover health risks beyond those arising out of the pregnancy itself.³⁸³ This finding suggests that the Court will invalidate very narrow interpretations of the meaning of "health," but it does not predict how broad an interpretation of "health" the Court will uphold. At the very least, the majority's language strongly suggests that it will interpret health exceptions to include a woman's pre-existing health conditions. This interpretation is consistent with the broad definitions of "health" provided in decisions such as *Vuitch*, *Roe*, *Bolton*, and *Verniero*.³⁸⁴ These decisions interpreted "health" to include a wide variety of pre-existing

377. *Supra* Part II.B.1.b.

378. *See supra* Part II.B.1.a.

379. *Supra* Part II.B.1.a.

380. *Supra* Part II.B.1.a.

381. *Supra* Part II.B.1.a.i.

382. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 880 (1992).

383. *Supra* Part I.B.4.

384. *Supra* Parts I.B.1, II.B.1.a.

health conditions, including diabetes, schizophrenia, mental and emotional ailments, and even health complications resulting from living under bad economic conditions.³⁸⁵

The *Carhart* Court did not, however, address whether a health exception must, should, or can cover mental, as well as physical, health risks.³⁸⁶ Although the majority listed only physical health risks of the D&E procedure, it did not hold that physical health risks should be the only types of risks considered under a partial birth abortion ban's health exception.³⁸⁷ Rather, the majority used the physical health factors only as illustrative examples of the comparative risks of the D&X and D&E procedures.³⁸⁸ There is, therefore, no textual reason to suggest that courts should not consider a woman's non-physical health risks under a partial birth abortion ban's health exception. Nonetheless, neither *Carhart* nor *Casey* established an affirmative rule that courts *must* broadly interpret the meaning of "health" in abortion statutes.

There is, however, ample precedent strongly suggesting that courts *should* require partial birth abortion bans to incorporate broad definitions of "health," or at the very least, uphold such definitions.³⁸⁹ There have been several decisions that have advocated in dicta that the meaning of "health" should be broadly defined;³⁹⁰ and there is an overwhelming amount of case law that suggests that a health exception should incorporate (or at least be interpreted to incorporate) a broad spectrum of health factors.³⁹¹ Broad interpretations of "health" should be required especially in pre-viability abortion proscriptions such as partial birth abortion bans, because the state's compelling interests are at their weakest pre-viability.³⁹² Doctors should be permitted to consider as broad a range of health factors (if not broader factors) when determining if a pre-viability, as opposed to a post-viability abortion, is necessary for a woman's health.

The "paramount" concern of past abortion decisions—the preservation of maternal life and health—also militates in favor of a

385. *Supra* Part II.B.1.a. Given the controversial status of partial birth abortion, however, the author believes that courts may be hesitant to consider non-medical factors such as bad economic conditions as relevant health factors under an abortion statute's health exception.

386. *Supra* Part II.B.1.a.i.

387. *Supra* Part I.B.4, II.B.1.a.i.

388. *Supra* Part I.B.4, II.B.1.a.i.

389. For a discussion of the case law, see *supra* Part II.B.1.a.

390. For a discussion of the case law, see *supra* Part II.B.1.a.

391. For a discussion of the case law, see *supra* Part II.B.1.a.

392. *Supra* Part I.B.2.

broadly defined health exception.³⁹³ Courts such as those that decided *Roe*, *Bolton*, *Verniero*, and *Voinovich*,³⁹⁴ did not arrive at their decisions to embrace broad definitions of "health" without considering a range of issues. A woman's health, just as any person's health, cannot be considered in a vacuum; rather, a woman's health is affected by many different and competing forces. It is arbitrary at best to, for instance, limit the health exception to physical health risks, and then claim that a health exception is adequately protecting a woman's health. Although, as Justice Thomas argued, a more narrow health exception may help prevent abuse of a ban,³⁹⁵ it will do so at the great cost of inadequately protecting a woman's health. The ultimate result of a narrow interpretation of "health" will be an irrational world where a woman who develops a serious heart problem will be permitted to have an abortion, but a woman who develops a serious mental problem that will be worsened by carrying the fetus to term will be banned from having an abortion.

Although some courts and justices have pointed to the potential for abuse of a very broad health exception, and how a narrow health exception may prevent such abuse,³⁹⁶ these courts and justices have failed to point to any history of abuse resulting from broad interpretations of health prior to the partial birth abortion controversy. Many of the decisions supporting a broad interpretation of health were decided almost three decades ago. For example, *Vuitch* was decided in 1971, *Roe* in 1973, and *Bolton* also in 1973.³⁹⁷ Prior to the partial birth abortion debate, there were no significant cases challenging these or other decisions broadly interpreting "health." One is, therefore, compelled to speculate as to why, now, in the midst of the partial birth abortion controversy, there is such heated debate over whether, for example, there should be a mental health exception in partial birth abortion bans.³⁹⁸

In many ways, partial birth abortion is arguably different in kind from earlier-term abortion. First, partial birth abortion is used less often than earlier-term abortion.³⁹⁹ Second, late-term abortion

393. See Massie, *supra* note 4, at 357 and accompanying text.

394. *Supra* Part II.B.1.a.

395. See *supra* Part II.B.1.b.

396. See *supra* Part II.B.1.b.

397. *United States v. Vuitch*, 402 U.S. 62 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

398. Compare *supra* Part II.B.1.a with Part II.B.1.b.

399. *Supra* note 19 and accompanying text.

procedures are very complex to carry out.⁴⁰⁰ Finally, some partial birth abortions are performed at a point during pregnancy when the state's interest in potential life is considered strongest.⁴⁰¹ Precedent unequivocally requires, nonetheless, that a woman's health must never, at any stage in a pregnancy, be put at risk.⁴⁰² Yet courts and judges have called for health exceptions to be limited to physical health risks, even to permanent physical health risks.⁴⁰³ They have ignored the reality that "health" is far too multifaceted to be limited in such a way, and as a result, have placed their support behind legislation that jeopardizes women's well-being. Not including an exception for when a woman's mental, emotional, or other kind of health is at risk is decidedly contrary to the goal of preserving women's health.

In sum, courts should interpret the meaning of "health" broadly to encompass verifiable mental, emotional, and physical health risks, including pre-existing risks and risks arising out of the pregnancy. Broad interpretations of "health" are not, however, required by precedent. All that appears certain after *Carhart* is that the definition of health must include pre-existing health conditions. Courts may err on the side of caution and interpret health exceptions more narrowly to avoid risking abortion on demand. The controversial nature of partial birth abortion may militate against broad interpretations of health. If courts are to remain faithful to the idea of abortion jurisprudence as an engine for the preservation of maternal health,⁴⁰⁴ however, they should interpret precedent as commanding them to adopt a broad definition of the meaning and scope of "health." In fact, because the weight of case law interprets the meaning of "health" so broadly, courts attempting to restrict access to partial birth abortion may, instead, attempt to restrict the reach of the health exception by requiring a serious risk to a woman's health. This is the focus of the following section.

2. *A Woman's Health Should at Least be at Serious Risk*

Although a health exception should not contain a strict severity requirement, the risk to the woman's health should be something more than a mere incidental risk.

400. See Greenhouse, *supra* note 4, at A1.

401. *Supra* Parts I.B.1, 2.

402. See *supra* Part I.B.

403. See *supra* Part II.B.1.b.

404. See Massie, *supra* note 4, at 357 and accompanying text.

Abundant case law, including *Thornburgh* and *Bangerter*, has held that a doctor should not be required to make a trade-off between the woman's health and the life of the fetus.⁴⁰⁵ In these cases, courts have wisely held that requiring a health risk to meet a particular level of severity fails to accord the state's interest in maternal health the fair weight precedent demands it receive.⁴⁰⁶ An abortion technique should not be required to be indispensable to a woman's health to qualify under a health exception. If this were the case, *health* exceptions would start to look more like *life* exceptions. If a doctor is required to abide by strict severity requirements in health exceptions, he will be forced to disregard important, but less critical, risks to his patient's health. As a result, the doctor will be prevented from considering his duty to his patient as his "paramount concern."⁴⁰⁷ Ironically, rather than limiting the scope of the health exception,⁴⁰⁸ strict severity requirements may, in fact, encourage abuse of the health exception. Physicians may over-exaggerate or lie about a patient's health problems so that the patient can obtain an abortion under a health exception.

Although strict severity requirements do, in fact, impose health burdens on women, health exceptions with no severity requirement at all also risk potentially dangerous consequences. In his dissenting opinion in *Thornburgh*, Justice White, perhaps without intending to do so, articulated a thoughtful compromise between requiring a strict severity requirement and having none at all. The abortion statute at issue in *Thornburgh* required that a woman be exposed to "significantly greater medical risk."⁴⁰⁹ Justice White argued that the word "significantly" could be interpreted to mean a "meaningful," "non-negligible," or "appreciable" health risk.⁴¹⁰ This interpretation provides a subtle compromise: although a strict severity requirement may expose a woman to unnecessary health risks, a requirement that a health risk be serious, meaningful, or non-negligible, helps to ensure that the risk to maternal health is legitimate and provides state legislatures with a mechanism for protecting against frivolous health exception claims. Although a broad definition of health may protect against irrational distinc-

405. *Supra* Part II.B.2.a.

406. *Supra* Part II.B.2.a.

407. *Supra* Part II.B.2.a; Massie, *supra* note 4, at 357 and accompanying text.

408. *Supra* Part II.B.2.b.

409. *Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747, 807 (White, J., dissenting).

410. *Id.*

tions between what is and is not a health risk, the extreme of allowing physicians to consider *any and all* health risks as serious enough to qualify under a health exception raises the concern that the exception will “swallow up the rule.”⁴¹¹

The *Carhart* majority addressed the debate over health exception severity requirements with a well-balanced compromise reminiscent of Justice White’s *Thornburgh* dissent. The majority took a middle-of-the-road approach by suggesting that, although a health risk need not be strictly “necessary” for the preservation of a woman’s health, the risk should be at least a serious or significant risk.⁴¹² Rather, as long as there is evidence that an abortion procedure (e.g., D&X) is comparatively safer than another procedure (e.g., D&E), for some women in some circumstances, access to both procedures is constitutionally necessary for the preservation of women’s health.⁴¹³ This is a generous standard, because it is likely such evidence will be present in most cases.

In sum, following *Carhart*, courts should and likely will uphold health exceptions that require a health risk to at least be serious or significant. Because of the controversial nature of partial birth abortion, legislatures may pass statutes with health exceptions that have stricter severity requirements. It is difficult to predict what courts will do when faced with constitutional challenges to such statutes. Although there have been more decisions that have found the trade-off unconstitutional than constitutional, the extent to which courts will allow legislatures to go remains unclear.⁴¹⁴

3. *States Should Draft Health Exceptions with a Mixed Subjective and Objective Standard*

Ample case law supports the proposition that a health exception can provide physicians adequate discretion to determine when a partial birth abortion is necessary for a woman’s health (“in appro-

411. *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 112 (Sup. Ct. Ind. 1996) (Sullivan, J., dissenting); *supra* Part II.B.1.b.

412. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2616 (2000); *supra* Part II.B.2.c.

413. *Supra* Parts I.B.4, II.B.1.a.i.

414. There is insufficient case law to predict how future courts will handle a requirement that a health risk be permanent (irreversible) in nature. Some of the health risks of the D&X procedure listed by the *Carhart* Court as justifications for the necessity of a health exception in a D&X ban were temporary health risks, including risks relating to operating time, blood loss, risk of infection, and complications from bony fragments. *Supra* Part II.B.2.c. To the contrary, the *Voinovich* court did not find a constitutional problem with the language of the statute’s health exception which required a “serious, non-temporary” health risk. *Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187, 190 (6th Cir. 1997).

priate medical judgment"),⁴¹⁵ while avoiding granting physicians "unfettered discretion."⁴¹⁶

Starting with *Roe*, most courts have held that doctors should be permitted to make good faith, subjective judgments as to whether an abortion is necessary for a particular woman.⁴¹⁷ These courts have suggested that substantial evidence from the medical community should *not* be required to show that a ban on an abortion procedure will put a woman's health at risk.⁴¹⁸ The *Casey* Joint Opinion, as well as the *Vuitch* and *Bolton* Courts, noted that it always has been common practice in the medical community for doctors to use their best medical judgment to determine when a certain medical procedure is necessary for a certain patient.⁴¹⁹ A purely objective approach, stripping a doctor of his discretion to determine the necessity of an abortion for a woman's health, would be impractical and unwise; a physician's good-faith medical determination would never be final, leaving him or her vulnerable to potential lawsuits.⁴²⁰ There also is the risk that an objective standard will presume that all doctors and medical facilities are alike with the same available resources, technology, and expertise.⁴²¹ Finally, as the *Voinovich* court pointed out, there is the danger that if physicians know that they may be prosecuted for exercising their good faith medical judgment, they may be wary of performing partial birth abortions at all.⁴²²

Support for the adoption of a subjective interpretation of "appropriate medical judgment"⁴²³ also can be found in the extensive case law supporting a broad interpretation of the meaning and scope of health.⁴²⁴ For example, *Vuitch* and *Bolton* support the principle that a physician should be permitted to determine whether an abortion is necessary by considering a spectrum of relevant circumstances.⁴²⁵ These circumstances include all factors relevant to the woman's well-being, such as her physical, psychological, and mental health.⁴²⁶ A physician must, therefore, have the discre-

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

416. *Carhart*, 120 S. Ct. at 2613.

417. *Supra* Part II.B.3.a.

418. *See supra* Part II.B.3.a.

419. *Supra* Part II.B.3.a.

420. *Supra* Part II.B.3.a.

421. *Supra* Part II.B.3.a.

422. *Supra* Part II.B.3.a.

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

424. *Supra* Part II.B.3.a.

425. *Supra* Part II.B.3.a.

426. *Supra* Part II.B.3.a.

tion to rely on his good faith medical judgment to consider all of the circumstances in a given situation.

A doctor should not, however, have unbridled discretion to determine when an abortion is necessary for a woman's health. A balance must be struck. If physicians are not accountable to any outside authority, the medical world will be as dangerous and impractical as a world where doctors are required to get approval for every move they make. Some objective check must be in place to avoid what Justice Thomas called "unfettered abortion on demand."⁴²⁷

In *Roe*, for example, the majority suggested that a physician does *not* have unfettered discretion to determine whether an abortion is necessary for a woman's health.⁴²⁸ Rather, if the "individual practitioner" abuses his discretion, the *Roe* Court warned that objective legal and "intra-professional" remedies would apply.⁴²⁹ Therefore, even under *Roe*, which emphasized the physician's active involvement in the abortion decision, sanctions based on objective medical standards would be imposed if a physician abused his discretion.⁴³⁰ The *Carhart* Court, although it did not discuss the issue at length,⁴³¹ also noted that a state is not required to grant physicians "unfettered discretion" to determine when an abortion is necessary for the woman's health.⁴³² However, the majority did not address the important issue of whether an objective or a subjective standard should be applied in cases with no substantial medical authority supporting the necessity of the D&X procedure.⁴³³

In the future, courts will likely (and should) strike a reasonable balance and adopt a mixed subjective and objective standard to determine when a woman's health is at risk. This balance will avoid the risk of rendering individual doctors impotent and vulnerable to malpractice suits, while also avoiding the risk of creating a system of abortion on demand. Courts should not require a showing of substantial objective medical authority to prove that the D&X procedure is constitutionally necessary for a woman's health. A physician's discretion should, however, be weighed against an objective medical standard that protects against the abuse of the broad discretion granted.

427. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2652 (Thomas, J., dissenting).

428. *Supra* Parts II.B.3.a.

429. *Roe*, 410 U.S. at 166.

430. *Supra* Part II.B.3.a.

431. *Supra* Part II.B.3.c.

432. *Carhart*, 120 S. Ct. at 2613.

433. *Supra* Part II.B.3.c.

CONCLUSION

Any attempt to predict how future courts will decide a given issue is fraught with uncertainty. Although courts consider precedent to be binding, precedent may be interpreted in any number of ways, often colored by a judge's perceptions, biases, and world view. Moreover, changes in political leadership in the executive or legislative branches, changes in the composition of the Supreme Court, unforeseen advances in medicine, and any number of other high profile events could shape the outcomes of future court decisions. Finally, because much of the case law regarding partial birth abortion is new, and more established case law only recently has been applied to challenges to partial birth abortion bans, any conclusions are necessarily conditional.

Uncertainty notwithstanding, the vast case law addressing abortion rights permits a number of predictions about the future of the health exception in partial birth abortion bans. First, after *Carhart*, it is highly likely that future courts always will require a health exception in partial birth abortion bans. Second, although precedent strongly suggests that the meaning and scope of the term "health" should be broadly interpreted, courts are unlikely to require a broad interpretation of the meaning of "health." Third, despite policy arguments that strict severity requirements will impose undue health burdens on pregnant women, because of the controversial nature of partial birth abortion, some courts may try to limit access to partial birth abortion by requiring that a woman's health be severely at risk. In any event, future courts undoubtedly will uphold some sort of severity requirement. What still is too difficult to predict is whether courts will adopt the thoughtful middle-ground *Carhart* alternative, requiring that the risk to a woman's health be at least a significant risk. Hopefully, courts will strike a reasonable balance and adopt a mixed subjective and objective standard to determine when a woman's health is at risk.

However courts decide to shape the future of the health exception in partial birth abortion bans, it is critical that they never lose sight of the fact that no other state interest—regardless of how compelling—should ever jeopardize a woman's health. Courts commit a grave disservice to women when they put politics before maternal health. Courts also commit a grave disservice to the Constitution and preceding case law, especially *Roe* and *Casey*, when they deny women the freedom to have an abortion for health reasons. Chief Judge Posner of the Seventh Circuit articulated the es-

sential danger of a partial birth abortion ban without a health exception:

The answer is that opponents of abortion do not think there should be an exception for abortions that endanger a woman's health. Life, yes, but not health. These [partial birth abortion] statutes, remember, are not concerned with saving fetuses, with protecting fetuses from a particularly cruel death, with protecting the health of the woman, with protecting viable fetuses. . . . They are concerned with making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions. *The statement is that fetal life is more valuable than women's health.*⁴³⁴

434. *The Hope Clinic v. Ryan*, 195 F.3d 857, 880-81 (7th Cir. 1999) (en banc) (Posner, C.J., dissenting) (emphasis added), *vacated*, *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).