SUPREME COURT OF THE UNITED STATES

No. 99–830

DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL., PETITIONERS *v.* LEROY CARHART

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 28, 2000]

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

For close to two decades after *Roe* v. *Wade*, 410 U. S. 113 (1973), the Court gave but slight weight to the interests of the separate States when their legislatures sought to address persisting concerns raised by the existence of a woman's right to elect an abortion in defined circumstances. When the Court reaffirmed the essential holding of *Roe*, a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed. *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. *Id.*, at 871 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.

The Court's decision today, in my submission, repudiates this understanding by invalidating a statute advanc-

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

I

The Court's failure to accord any weight to Nebraska's interest in prohibiting partial-birth abortion is erroneous and undermines its discussion and holding. The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as "clinically cold or callous." *Ante*, at 3–4. The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life. Words invoked by the majority, such as "transcervical procedures," "[o]smotic dilators," "instrumental disarticulation," and "paracervical block," may be accurate and are to some extent necessary, *ante*, at 5–6; but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient. Repeated references to sources understandable only to a trained physician may obscure matters for persons not trained in medical terminology. Thus it seems necessary at the outset to set forth what may happen during an abortion.

The person challenging Nebraska's law is Dr. Leroy Carhart, a physician who received his medical degree from Hahnemann Hospital and University in 1973. App. 29. Dr. Carhart performs the procedures in a clinic in Nebraska, *id.,* at 30, and will also travel to Ohio to perform abortions there, *id.,* at 86. Dr. Carhart has no specialty certifications in a field related to childbirth or abortion

and lacks admitting privileges at any hospital. *Id.*, at 82, 83. He performs abortions throughout pregnancy, including when he is unsure whether the fetus is viable. *Id.,* at 116. In contrast to the physicians who provided expert testimony in this case (who are board certified instructors at leading medical education institutions and members of the American Board of Obstetricians and Gynecologists), Dr. Carhart performs the partial-birth abortion procedure (D&X) that Nebraska seeks to ban. He also performs the other method of abortion at issue in the case, the D&E.

As described by Dr. Carhart, the D&E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. *Id.,* at 61. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. *Ibid.* The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr. Carhart as "pulling the cat's tail" or "drag[ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction." *Id.*, at 62. The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb. *Id.*, at 63. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that "[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, . . . the fetus [is] alive." *Id.*, at 62. Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," *id.*, at 64, and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who

removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." *Id.*, at 63. At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces." *Id.*, at 125.

The other procedure implicated today is called "partial-birth abortion" or the D&X. The D&X can be used, as a general matter, after 19 weeks gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. *Id.*, at 61. In the D&X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. *Id.*, at 492. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. Brief for Petitioners 4. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, "[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child." Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 27. With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair of scissors. M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), in 139 Cong. Rec. 8605 (1993). Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. Brief for Petitioners 4. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus' head smaller is given the clinically neutral term "reduction procedure." 11 F. Supp. 2d

1099, 1106 (Neb. 1998). Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. App. 58. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.

Of the two described procedures, Nebraska seeks only to ban the D&X. In light of the description of the D&X procedure, it should go without saying that Nebraska's ban on partial-birth abortion furthers purposes States are entitled to pursue. Dr. Carhart nevertheless maintains the State has no legitimate interest in forbidding the D&X. As he interprets the controlling cases in this Court, the only two interests the State may advance through regulation of abortion are in the health of the woman who is considering the procedure and in the life of the fetus she carries. Brief for Respondent 45. The Court, as I read its opinion, accedes to his views, misunderstanding *Casey* and the authorities it confirmed.

Casey held that cases decided in the wake of *Roe* v. *Wade,* 410 U. S. 113 (1973), had "given [state interests] too little acknowledgment and implementation." 505 U. S., at 871 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). The decision turned aside any contention that a person has the "right to decide whether to have an abortion without 'interference from the State,'" *id.*, at 875, and rejected a strict scrutiny standard of review as "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Ibid.* We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. *Id.*, at 877.

Casey is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that Nebraska's interests can be given proper weight. The State's brief describes its interests as including concern for the life of the unborn and "for the partially-born," in preserving the integrity of the medical profession, and in "erecting a barrier to infanticide." Brief for Petitioners 48–49. A review of *Casey* demonstrates the legitimacy of these policies. The Court should say so.

States may take sides in the abortion debate and come down on the side of life, even life in the unborn:

> "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself." 505 U. S., at 872 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.).

States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. Abortion, *Casey* held, has consequences beyond the woman and her fetus. The States' interests in regulating are of concomitant extension. *Casey* recognized that abortion is, "fraught with consequences for . . . the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life." *Id.,* at 852.

A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others. *Ibid.; Washington* v. *Glucksberg,* 521 U. S. 702, 730–734 (1997).

Casey demonstrates that the interests asserted by the State are legitimate and recognized by law. It is argued, however, that a ban on the D&X does not further these interests. This is because, the reasoning continues, the D&E method, which Nebraska claims to be beyond its intent to regulate, can still be used to abort a fetus and is no less dehumanizing than the D&X method. While not adopting the argument in express terms, the Court indicates tacit approval of it by refusing to reject it in a forthright manner. Rendering express what is only implicit in the majority opinion, JUSTICE STEVENS and JUSTICE GINSBURG are forthright in declaring that the two procedures are indistinguishable and that Nebraska has acted both irrationally and without a proper purpose in enacting the law. The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedure is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case.

Nebraska was entitled to find the existence of a consequential moral difference between the procedures. We are referred to substantial medical authority that D&X perverts the natural birth process to a greater degree than D&E, commandeering the live birth process until the skull is pierced. American Medical Association (AMA) publications describe the D&X abortion method as "ethically wrong." AMA Board of Trustees Factsheet on HR 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1 (AMA

Factsheet). The D&X differs from the D&E because in the D&X the fetus is "killed *outside* of the womb" where the fetus has "an autonomy which separates it from the right of the woman to choose treatments for her own body." *Ibid.*; see also App. 639–640; Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 27 ("Intact D&X is aberrant and troubling because the technique confuses the disparate role of a physician in childbirth and abortion in such a way as to blur the medical, legal, and ethical line between infanticide and abortion"). Witnesses to the procedure relate that the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus' body, wholly outside the woman's body and alive, reacts as though startled and goes limp. D&X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion.

Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct. This is not inconsistent, however, with the further proposition that as an ethical and moral matter D&X is distinct from D&E and is a more serious concern for medical ethics and the morality of the larger society the medical profession must serve. Nebraska must obey the legal regime which has declared the right of the woman to have an abortion before viability. Yet it retains its power to adopt regulations which do not impose an undue burden on the woman's right. By its regulation, Nebraska instructs all participants in the abortion process, including the mother, of its moral judgment that all life, including the life of the unborn, is to be

respected. The participants, Nebraska has determined, cannot be indifferent to the procedure used and must refrain from using the natural delivery process to kill the fetus. The differentiation between the procedures is itself a moral statement, serving to promote respect for human life; and if the woman and her physician in contemplating the moral consequences of the prohibited procedure conclude that grave moral consequences pertain to the permitted abortion process as well, the choice to elect or not to elect abortion is more informed; and the policy of promoting respect for life is advanced.

It ill-serves the Court, its institutional position, and the constitutional sources it seeks to invoke to refuse to issue a forthright affirmation of Nebraska's right to declare that critical moral differences exist between the two procedures. The natural birth process has been appropriated; yet the Court refuses to hear the State's voice in defining its interests in its law. The Court's holding contradicts *Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal.

II

Demonstrating a further and basic misunderstanding of *Casey*, the Court holds the ban on the D&X procedure fails because it does not include an exception permitting an abortionist to perform a D&X whenever he believes it will best preserve the health of the woman. Casting aside the views of distinguished physicians and the statements of leading medical organizations, the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. Dr. Carhart has made the medical judgment to use the D&X procedure in every case, regardless of indications, after 15 weeks gestation. 11 F. Supp. 2d, at 1105. Requiring Nebraska to defer to Dr. Carhart's judgment is no different than for-

bidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people. *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.

I am in full agreement with JUSTICE THOMAS that the appropriate *Casey* inquiry is not, as the Court would have it, whether the State is preventing an abortionist from doing something that, in his medical judgment, he believes to be the most appropriate course of treatment. *Post,* at 32–36. *Casey* addressed the question "whether the State can resolve . . . philosophic questions [about abortion] in such a definitive way that a woman lacks all choice in the matter." 505 U. S., at 850. We decided the issue against the State, holding that a woman cannot be deprived of the opportunity to make reproductive decisions. *Id.*, at 860. *Casey* made it quite evident, however, that the State has substantial concerns for childbirth and the life of the unborn and may enact laws "which in no real sense depriv[e] women of the ultimate decision." *Id.*, at 875 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). Laws having the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" are prohibited. *Id.*, at 877. Nebraska's law does not have this purpose or effect.

The holding of *Casey*, allowing a woman to elect abortion in defined circumstances, is not in question here. Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman. The American College of Obstetricians and Gynecologists (ACOG) "could identify no circumstances under which [D&X] would be the only option to save the life or preserve the health of the woman." App.

600–601. The American Medical Association agrees, stating the "AMA's expert panel, which included an ACOG representative, could not find 'any' identified circumstance where it was 'the only appropriate alternative.'" AMA Factsheet 1. The Court's conclusion that the D&X is the safest method requires it to replace the words "may be" with the word "is" in the following sentence from ACOG's position statement: "An intact D&X, however, may be the best or most appropriate procedure in a particular circumstance." App. 600–601.

No studies support the contention that the D&X abortion method is safer than other abortion methods. Brief for Respondent 36, n. 41. Leading proponents of the procedure acknowledge that the D&X has "disadvantages" versus other methods because it requires a high degree of surgical skill to pierce the skull with a sharp instrument in a blind procedure. Haskell, 139 Cong. Rec. 8605 (1993). Other doctors point to complications that may arise from the D&X. Brief for American Physicians and Surgeons et al. as *Amici Curiae* 21–23; App. 186. A leading physician, Frank Boehm, M. D., who has performed and supervised abortions as director of the Fetal Intensive Care Unit and the Maternal/Fetal Medicine Division at Vanderbilt University Hospital, has refused to support use of the D&X, both because no medical need for the procedure exists and because of ethical concerns. *Id.*, at 636, 639–640, 656–657. Dr. Boehm, a fellow of ACOG, *id.*, at 565, supports abortion rights and has provided sworn testimony in opposition to previous state attempts to regulate abortion. *Id.*, at 608–614.

The Court cannot conclude the D&X is part of standard medical practice. It is telling that no expert called by Dr. Carhart, and no expert testifying in favor of the procedure, had in fact performed a partial-birth abortion in his or her medical practice. *E.g.*, *id.*, at 308 (testimony of Dr. Phillip Stubblefield). In this respect their opinions were court-

room conversions of uncertain reliability. Litigation in other jurisdictions establishes that physicians do not adopt the D&X procedure as part of standard medical practice. *E.g.*, *Richmond Medical Center for Women* v. *Gilmore*, 144 F. 3d 326, 328 (CA4 1998); *Hope Clinic* v. *Ryan*, 195 F. 3d 857, 871 (CA7 1999); see also App. 603–604. It is quite wrong for the Court to conclude, as it seems to have done here, that Dr. Carhart conforms his practice to the proper standard of care because he has incorporated the procedure into his practice. Neither Dr. Boehm nor Dr. Carhart's lead expert, Dr. Stubblefield (the chairman of the Department of Obstetrics and Gynecology at Boston University School of Medicine and director of obstetrics and gynecology for the Boston Medical Center) has done so.

Substantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion. The most to be said for the D&X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient. Under these circumstances, the Court is wrong to limit its inquiry to the relative physical safety of the two procedures, with the slightest potential difference requiring the invalidation of the law. As JUSTICE O'CONNOR explained in an earlier case, the State may regulate based on matters beyond "what various medical organizations have to say about the *physical* safety of a particular procedure." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 467 (1983) (dissenting opinion). Where the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method. See *Casey*, 505 U. S., at 880 (requiring a regulation to impose a "significant threat to the life or health of a woman" before its application would impose an undue burden (internal quotation marks omitted)). Dr. Carhart does not

decide to use the D&X based on a conclusion that it is best for a particular woman. Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right. *Id.*, at 874, 876 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). It is also important to recognize that the D&X is effective only when the fetus is close to viable or, in fact, viable; thus the State is regulating the process at the point where its interest in life is nearing its peak.

Courts are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard. In an earlier case, JUSTICE O'CONNOR had explained that the general rule extends to abortion cases, writing that the Court is not suited to be "the Nation's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." 462 U. S., at 456 (dissenting opinion) (internal quotation marks omitted). "Irrespective of the difficulty of the task, legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts." *Id.*, at 456, n. 4. Nebraska's judgment here must stand.

In deferring to the physician's judgment, the Court turns back to cases decided in the wake of *Roe*, cases which gave a physician's treatment decisions controlling weight. Before it was repudiated by *Casey*, the approach of deferring to physicians had reached its apex in *Akron, supra,* where the Court held an informed consent requirement was unconstitutional. The law challenged in *Akron* required the abortionist to inform the woman of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide assistance and information. *Id.*, at 442. The physician was also required to advise the woman of the

risks associated with the abortion technique to be employed and other information. *Ibid.* The law was invalidated based on the physician's right to practice medicine in the way he or she saw fit; for, according to the *Akron* Court, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.*, at 443. Dispositive for the Court was that the law was an "intrusion upon the discretion of the pregnant woman's physician." *Id.*, at 445. The physician was placed in an "undesired and uncomfortable straitjacket." *Ibid.* (internal quotation marks omitted). The Court's decision today echoes the *Akron* Court's deference to a physician's right to practice medicine in the way he sees fit.

The Court, of course, does not wish to cite *Akron*; yet the Court's holding is indistinguishable from the reasoning in *Akron* that *Casey* repudiated. No doubt exists that today's holding is based on a physician-first view which finds its primary support in that now-discredited case. Rather than exalting the right of a physician to practice medicine with unfettered discretion, *Casey* recognized: "Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position." 505 U. S., at 884 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). *Casey* discussed the informed consent requirement struck down in *Akron* and held *Akron* was wrong. The doctor-patient relation was only "entitled to the same solicitude it receives in other contexts." 505 U. S., at 884. The standard of medical practice cannot depend on the individual views of Dr. Carhart and his supporters. The question here is whether there was substantial and objective medical evidence to demonstrate the State had considerable support for its conclusion that the ban created a substantial risk to no woman's health. *Casey* recognized the point, holding the physician's ability to practice medicine was

"subject to reasonable . . . regulation by the State" and would receive the "same solicitude it receives in other contexts." *Id.,* at 884 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). In other contexts, the State is entitled to make judgments where high medical authority is in disagreement.

The Court fails to acknowledge substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature. In *Kansas* v. *Hendricks,* 521 U. S. 346 (1997), we held that disagreements among medical professionals "do not tie the State's hands in setting the bounds of . . . laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Id.*, at 360, n. 3. Instead, courts must exercise caution (rather than require deference to the physician's treatment decision) when medical uncertainty is present. *Ibid.* ("[W]hen a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation' ") (quoting *Jones* v. *United States,* 463 U. S. 354, 370 (1983)); see also *Collins* v. *Texas,* 223 U. S. 288, 297–298 (1912) (Holmes, J.) (declaring the "right of the state to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *Lambert* v. *Yellowley,* 272 U. S. 581, 596–597 (1926) (rejecting claim of distinguished physician because "[h]igh medical authority being in conflict . . . , it would, indeed, be strange if Congress lacked the power [to act]"); *Marshall* v. *United States,* 414 U. S. 417, 427 (1974) (recognizing "there is no agreement among members of the medical profession" (internal quotation marks omitted)); *United States* v. *Rutherford,* 442 U. S. 544 (1979) (discussing regulatory approval process for certain drugs).

Instructive is *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905), where the defendant was convicted because he refused to undergo a smallpox vaccination. The defendant claimed the mandatory vaccination violated his liberty to "care for his own body and health in such way as to him seems best." *Id.*, at 26. He offered to prove that members of the medical profession took the position that the vaccination was of no value and, in fact, was harmful. *Id.*, at 30. The Court rejected the claim, establishing beyond doubt the right of the legislature to resolve matters upon which physicians disagreed:

> "Those offers [of proof by the defendant] in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety." *Ibid.*

The *Jacobson* Court quoted with approval a recent

state-court decision which observed, in words having full application today:

> "The fact that the belief is not universal [in the medical community] is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to common belief of the people, are adapted to [address medical matters]. In a free country, where government is by the people, through their chosen representatives, practical legislation admits of no other standard of action.'" *Id.*, at 35 (quoting *Viemester* v. *White*, 179 N. Y. 235, 241, 72 N. E. 97, 99 (1904)).

JUSTICE O'CONNOR assures the people of Nebraska they are free to redraft the law to include an exception permitting the D&X to be performed when "the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother." *Ante*, at 5. The assurance is meaningless. She has joined an opinion which accepts that Dr. Carhart exercises "appropriate medical judgment" in using the D&X for every patient in every procedure, regardless of indications, after 15 weeks' gestation. *Ante*, at 18–19 (requiring any health exception to "tolerate responsible differences of medical opinion" which "are present here."). A ban which depends on the "appropriate medical judgment" of Dr. Carhart is no ban at all. He will be unaffected by any new legislation. This, of course, is the vice of a health exception resting in the physician's discretion.

In light of divided medical opinion on the propriety of the partial-birth abortion technique (both in terms of physical safety and ethical practice) and the vital interests asserted by Nebraska in its law, one is left to ask what the first Justice Harlan asked: "Upon what sound principles as to the relations existing between the different depart-

ments of government can the court review this action of the legislature?" *Jacobson*, *supra,* at 31. The answer is none.

III

The Court's next holding is that Nebraska's ban forbids both the D&X procedure and the more common D&E procedure. In so ruling the Court misapplies settled doctrines of statutory construction and contradicts *Casey*'s premise that the States have a vital constitutional position in the abortion debate. I agree with the careful statutory analysis conducted by JUSTICE THOMAS, *post*, at 10–27. Like the ruling requiring a physician veto, requiring a State to meet unattainable standards of statutory draftsmanship in order to have its voice heard on this grave and difficult subject is no different from foreclosing state participation altogether.

Nebraska's statute provides:

> "No partial birth abortion shall be performed in this state unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. §28–328(1) (Supp. 1999).

The statute defines "partial birth abortion" as

> "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." §28–326(9).

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

> "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion

> thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." *Ibid.*

The text demonstrates the law applies only to the D&X procedure. Nebraska's intention is demonstrated at three points in the statutory language: references to "partial-birth abortion" and to the "delivery" of a fetus; and the requirement that the delivery occur "before" the performance of the death-causing procedure.

The term "partial-birth abortion" means an abortion performed using the D&X method as described above. The Court of Appeals acknowledged the term "is commonly understood to refer to a particular procedure known as intact dilation and extraction (D&X)." *Little Rock Family Planning Servs.* v. *Jegley*, 192 F. 3d 794, 795 (CA8 1999). Dr. Carhart's own lead expert, Dr. Phillip Stubblefield, prefaced his description of the D&X procedure by describing it as the procedure "which, in the lay press, has been called a partial-birth abortion." App. 271–272. And the AMA has declared: "The 'partial birth abortion' legislation is by its very name aimed exclusively [at the D&X.] There is no other abortion procedure which could be confused with that description." AMA Factsheet 3. A commonsense understanding of the statute's reference to "partial-birth abortion" demonstrates its intended reach and provides all citizens the fair warning required by the law. *McBoyle* v. *United States,* 283 U. S. 25, 27 (1931).

The statute's intended scope is demonstrated by its requirement that the banned procedure include a partial "delivery" of the fetus into the vagina and the completion of a "delivery" at the end of the procedure. Only removal of an intact fetus can be described as a "delivery" of a fetus and only the D&X involves an intact fetus. In a D&E, portions of the fetus are pulled into the vagina with the

intention of dismembering the fetus by using the traction at the opening between the uterus and vagina. This cannot be considered a delivery of a portion of a fetus. In Dr. Carhart's own words, the D&E leaves the abortionist with a "tray full of pieces," App. 125, at the end of the procedure. Even if it could be argued, as the majority does, *ante*, at 25–26, that dragging a portion of an intact fetus into the vagina as the first step of a D&E is a delivery of that portion of an intact fetus, the D&E still does not involve "completing the delivery" of an intact fetus. Whatever the statutory term "completing the delivery" of an unborn child means, it cannot mean, as the Court would have it, placing fetal remains on a tray. See *Planned Parenthood of Wis.* v. *Doyle*, 9 F. Supp. 2d 1033, 1041 (WD Wis. 1998) (the statute is "readily applied to the partial delivery of an intact child but hardly applicable to the delivery of dismembered body parts").

Medical descriptions of the abortion procedures confirm the point, for it is only the description of the D&X that invokes the word "delivery." App. 600. The United States, as *amicus*, cannot bring itself to describe the D&E as involving a "delivery," instead substituting the word "emerges" to describe how the fetus is brought into the vagina in a D&E. Brief for United States as *Amicus Curiae* 10. The Court, in a similar admission, uses the words "a physician pulling" a portion of a fetus, *ante,* at 20, rather than a "physician delivering" a portion of a fetus; yet only a procedure involving a delivery is banned by the law. Of all the definitions of "delivery" provided by the Court, *ante*, at 25–26, not one supports (or, more important for statutory construction purposes, requires), the conclusion that the statutory term "completing the delivery" refers to the placement of dismembered body parts on a tray rather than the removal of an intact fetus from the woman's body.

The operation of Nebraska's law is further defined by

the requirement that the fetus be partially delivered into the vagina "before" the abortionist kills it. The partial delivery must be undertaken "for the purpose of performing a procedure that the person . . . knows will kill the unborn child." Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). The law is most naturally read to require the death of the fetus to take place in two steps: First the fetus must be partially delivered into the vagina and then the defendant must perform a death-causing procedure. In a D&E, forcing the fetus into the vagina (the pulling of extremities off the body in the process of extracting the body parts from the uterus into the vagina) is also the procedure that kills the fetus. *Richmond Medical Center for Women* v. *Gilmore*, 144 F. 3d, at 330 (order of Luttig, J.). In a D&X, the fetus is partially delivered into the vagina before a separate procedure (the so-called "reduction procedure") is performed in order to kill the fetus.

The majority rejects this argument based on its conclusion that the word "procedure" must "refer to an entire abortion procedure" each time it is used. *Ante*, at 25. This interpretation makes no sense. It would require us to conclude that the Nebraska Legislature considered the "entire abortion procedure" to take place after the abortionist has already delivered into the vagina a living unborn child, or a substantial portion thereof. Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999). All medical authorities agree, however, that the entire abortion procedure begins several days before this stage, with the dilation of the cervix. The majority asks us, in effect, to replace the words "for the purpose of performing" with the words "in the course of performing" in the portion of §28–326(9) quoted in the preceding paragraph. The reference to "procedure" refers to the separate death-causing procedure that is unique to the D&X.

In light of the statutory text, the commonsense understanding must be that the statute covers only the D&X.

See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 698 (1973). The AMA does not disagree. It writes: "The partial birth abortion legislation is by its very name aimed exclusively at a procedure by which a living fetus is intentionally and deliberately given partial birth and delivered for the purpose of killing it. There is no other abortion procedure which could be confused with that description." AMA Factsheet 3 (internal quotation marks omitted). *Casey* disavows strict scrutiny review; and Nebraska must be afforded leeway when attempting to regulate the medical profession. See *Kansas* v. *Hendricks,* 521 U. S., at 359 ("[W]e have traditionally left to legislators the task of defining terms of a medical nature that have legal significance"). To hold the statute covers the D&E, the Court must disagree with the AMA and disregard the known intent of the legislature, adequately expressed in the statute.

Strained statutory constructions in abortion cases are not new, for JUSTICE O'CONNOR identified years ago "an unprecedented canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." *Thornburgh* v. *American College of Obstetricians and Gynecologists,* 476 U. S. 747, 829 (1986) (dissenting opinion) (internal quotation marks omitted). *Casey* banished this doctrine from our jurisprudence; yet the Court today reinvigorates it and, in the process, ignores its obligation to interpret the law in a manner to validate it, not render it void. *E.g., Johnson* v. *Robison,* 415 U. S. 361, 366–367 (1974); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988). Avoidance of unconstitutional constructions is discussed only in two sentences of the Court's analysis and dismissed as inapplicable because the statute is not susceptible to the construction offered by the Nebraska Attorney General. *Ante*, at 26. For the reasons here discussed, the statute is susceptible to the construc-

tion; and the Court is required to adopt it.

The Court and JUSTICE O'CONNOR seek to shield themselves from criticism by citing the interpretations of the partial-birth abortion statutes offered by some other federal courts. *Ante*, at 23. On this issue of nationwide importance, these courts have no special competence; and of appellate courts to consider similar statutes, a majority have, in contrast to the Court, declared that the law could be interpreted to cover only the D&E. See *Hope Clinic*, 195 F. 3d, at 865–871; *Richmond Medical Center*, *supra,* at 330–332 (order of Luttig, J.). Thirty States have enacted similar laws. It is an abdication of responsibility for the Court to suggest its hands are tied by decisions which paid scant attention to *Casey*'s recognition of the State's authority and misapplied the doctrine of construing statutes to avoid constitutional difficulty. Further, the leading case describing the deference argument, *Frisby* v. *Schultz,* 487 U. S. 474, 483 (1988), declined to defer to a lower court construction of the state statute at issue in the case. As *Frisby* observed, the "lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." See also *Webster* v. *Reproductive Health Services,* 492 U. S. 490, 514 (1989) (opinion of REHNQUIST, C. J.); *id.*, at 525 (O'CONNOR, J., concurring in part and concurring in judgment).

The majority and, even more so, the concurring opinion by JUSTICE O'CONNOR, ignore the settled rule against deciding unnecessary constitutional questions. The State of Nebraska conceded, under its understanding of *Casey*, that if this law must be interpreted to bar D&E as well as D&X it is unconstitutional. Since the majority concludes this is indeed the case, that should have been the end of the matter. Yet the Court and JUSTICE O'CONNOR go much farther. They conclude that the statute requires a health exception which, for all practical purposes and

certainly in the circumstances of this case, allows the physician to make the determination in his own professional judgment. This is an immense constitutional holding. It is unnecessary; and, for the reasons I have sought to explain, it is incorrect. While it is not clear which of the two halves of the majority opinion is *dictum*, both are wrong.

The United States District Court in this case leaped to prevent the law from being enforced, granting an injunction before it was applied or interpreted by Nebraska. Cf. *Hill* v. *Colorado*, *ante,* p. ___. In so doing, the court excluded from the abortion debate not just the Nebraska legislative branch but the State's executive and judiciary as well. The law was enjoined before the chief law enforcement officer of the State, its Attorney General, had any opportunity to interpret it. The federal court then ignored the representations made by that officer during this litigation. In like manner, Nebraska's courts will be given no opportunity to define the contours of the law, although by all indications those courts would give the statute a more narrow construction than the one so eagerly adopted by the Court today. *E.g., Stenberg* v. *Moore*, 258 Neb. 199, 206, 602 N. W. 2d 465, 472 (1995). Thus the court denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute. This cannot be what *Casey* meant when it said we would be more solicitous of state attempts to vindicate interests related to abortion. *Casey* did not assume this state of affairs.

IV

Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away. The Court's holding stems from misunderstanding the record, misinterpretation of *Casey*, outright refusal to

respect the law of a State, and statutory construction in conflict with settled rules. The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence. The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*. The Court closes its eyes to these profound concerns.

From the decision, the reasoning, and the judgment, I dissent.