

NOTES

THE DEVELOPMENT OF THE UNDUE BURDEN STANDARD IN *STENBERG v. CARHART*: WILL PROPOSED RU-486 LEGISLATION SURVIVE?

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INTRODUCTION

On June 28, 2000, the U.S. Supreme Court ruled on yet another divisive facet of the abortion issue. In *Stenberg v. Carhart*,¹ the Court held that a Nebraska statute banning partial-birth abortions was unconstitutional.² In its analysis, the Court applied the undue burden test from *Planned Parenthood v. Casey*³ and concluded that the Nebraska statute placed a substantial obstacle in the path of a woman seeking to terminate her pregnancy.⁴

The *Carhart* decision marks the Court's first direct application of the *Casey* holding, which dramatically revamped abortion analysis in 1992. The *Casey* Court abandoned the rigid trimester framework set forth in *Roe v. Wade*⁵ in favor of the undue burden standard.⁶ The Court viewed the standard as a compromise between state interests in regulating abortion and the fundamental rights of women to choose to terminate a pregnancy.⁷ The Court determined that a state could regulate previability abortion procedures provided that the state had a compelling interest and that the regulation did not unduly burden the woman's right to choose.⁸ On its face, the undue burden standard appeared to be a fair way to balance the competing interests. But in practice, the standard has proven to be vague, difficult to apply, and easily manipulated. The *Carhart* opinion provides an example of the difficulties presented by *Casey*'s undue burden standard.

This Note examines the *Carhart* opinion in detail, focusing on the individual

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1. 530 U.S. 914 (2000).

2. *Id.* at 922.

3. 505 U.S. 833 (1992).

4. *Carhart*, 530 U.S. at 930, 945-46.

5. 410 U.S. 113 (1973).

6. *Casey*, 505 U.S. at 873-74.

7. *Id.* at 876.

8. *Id.* at 877-78.

viewpoints of the Justices who wrote the majority, concurring and dissenting opinions. Part I describes the development of the standards the Court has used to evaluate abortion legislation. The two central cases on this point are discussed: *Roe* and *Casey*. Part II focuses on the application of the undue burden standard to the “partial birth abortion” question presented in *Carhart*. Part III explores the criticisms surrounding the undue burden standard and the inconsistencies that exist between the spirit of the *Casey* decision and the application of the undue burden standard in *Carhart*. Finally, Part IV attempts to consolidate the lessons of *Casey* and *Carhart* and apply them to the current debate over the recently FDA-approved RU-486. This Note also assesses the constitutionality of proposed state and federal legislation designed to regulate and limit the drug’s availability. Specifically, this Note addresses the constitutionality of the “RU-486 Patient Health and Safety Protection Act,”⁹ which is now before both houses of Congress, and the constitutionality of a similar proposed regulatory statute in Oklahoma.

I. THE STANDARDS: FROM *ROE* TO *CASEY*

The two primary cases setting forth the standards courts have used in evaluating abortion legislation are *Roe v. Wade*¹⁰ and *Planned Parenthood v. Casey*.¹¹ In *Roe*, the Court acknowledged that a woman’s right to terminate her pregnancy is part of the fundamental right to privacy found in the Due Process Clause of the Fourteenth Amendment.¹² Under *Roe*, any state regulation that limited this right was subject to a heightened level of scrutiny.¹³ The Court acknowledged that the state had important and legitimate interests in regulating two areas, the health of the mother and the protection of potential life.¹⁴ These interests became compelling at different stages in the pregnancy.¹⁵ The state’s

9. H.R. 482, 107th Cong. (2001).

10. 410 U.S. 113 (1973).

11. 505 U.S. 833 (1992).

12. *Roe*, 410 U.S. at 153. “This right of privacy [found] in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* Justice Rehnquist wrote a dissenting opinion in which he argued that a “right” to abortion should not be based on the Due Process Clause of the Fourteenth Amendment because the “right . . . was apparently completely unknown to the drafters of the Amendment.” *Id.* at 174 (Rehnquist, J., dissenting). Justice Rehnquist noted that at the time the Fourteenth Amendment was adopted, “at least [thirty-six] laws [had been] enacted by state or territorial legislatures limiting abortion,” suggesting that “[t]here apparently was no question concerning the validity of [these statutes] when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.” *Id.* at 175.

13. *Id.* at 154.

14. *Id.* at 163-64.

15. *Id.* at 162-63.

interest in protecting the health of the mother became “compelling” at the end of the first trimester.¹⁶ The Court stated that after this point, a state could regulate abortion procedures to the extent reasonably necessary to protect maternal health.¹⁷

Under the *Roe* scheme, the state’s interest in protecting potential human life did not become compelling until after fetal viability.¹⁸ The Court explained that at this point in the pregnancy “the fetus . . . presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of viable life after viability thus has both logical and biological justifications.”¹⁹ Thus, the Court found that a state could altogether prohibit abortion after a fetus reached viability, provided that legislation allowed for the procedure to be performed where it was necessary to preserve the life or health of the mother.²⁰ To guide states in their attempt to balance their interests with those of women seeking to terminate their pregnancies, the Court established a trimester framework:

(a) 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.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage 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.²¹

In 1992, the Supreme Court revisited the abortion issue in *Planned Parenthood v. Casey*.²² In this decision, the Court dramatically revamped the standards for evaluating the constitutionality of abortion legislation. Two factors contributed to this change in standards. First, by the time *Casey* was decided, the Court had lost all but one of the members who joined the majority in *Roe v. Wade* and gained new Justices with more socially conservative viewpoints.²³ Second,

16. *Id.* at 163.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 163-64.

21. *Id.* at 164-65.

22. 505 U.S. 833 (1992).

23. In 1973, the *Roe* Court consisted of Chief Justice Burger and Justices Douglas, Brennan, Powell, Stewart, White, Marshall, Blackmun, and Rehnquist. By 1992, when *Casey* was decided, the only remaining members were Chief Justice Rehnquist and Justices White and Blackmun. The remaining six seats were filled by Justices Stevens, O’Connor, Scalia, Kennedy, Souter, and Thomas.

Roe had come under sharp criticism that the application of its holding had created a system of "abortion on demand," where the state's interest in protecting the potentiality of human life had been all but forgotten in the battle to protect a woman's right to choose.²⁴ In *Casey*, the Court was presented with an opportunity to overturn *Roe*; instead, the Court sought to effectuate a compromise between a state's legitimate interest in regulating abortion and a woman's right to terminate her pregnancy.²⁵

The Pennsylvania statute at issue in *Casey* imposed regulations on abortions through informed consent, parental consent, spousal notification, and recording and record-keeping requirements.²⁶ In evaluating these provisions, the Court set forth a new guideline for determining the constitutionality of abortion legislation.²⁷ The Court reaffirmed the essential holding of *Roe*, but abandoned its rigid trimester framework stating that "[t]he trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*."²⁸ In its place, the Court adopted the "undue burden" standard, which allows a state to recognize its interests in the previability stages of a woman's pregnancy, provided that the regulation does not have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."²⁹ The Court emphasized what it saw as the essential holding of *Roe*: that a woman has a fundamental right to terminate her pregnancy before viability, and that a state has a legitimate interest in protecting the potentiality of human life and the health of the mother.³⁰ The Court retained the *Roe* notions that after the fetus reaches viability, a state may altogether prohibit abortion so long as a valid health exception is present in the statute, and that a state "may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."³¹

However, under *Casey*, states have the ability to regulate previability abortions provided that the regulation does not place an undue burden on a woman's right to choose.³² The Court gave little guidance on the subject of what

24. See *Casey*, 505 U.S. at 871. The *Casey* Court acknowledged that several cases decided after *Roe* gave too little weight to legitimate state interests in regulating abortion: "[I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.'" *Id.* at 871 (quoting *Roe*, 410 U.S. at 163). "That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases." *Id.*

25. See *id.* at 869-79.

26. *Id.* at 844.

27. *Id.* at 877.

28. *Id.* at 873.

29. *Id.* at 877.

30. *Id.* at 877-78.

31. *Id.* at 879.

32. *Id.* Based on these standards, the Court determined that the informed consent, parental consent, and record-keeping portions of the Pennsylvania statute did not place an undue burden on

constitutes a “substantial obstacle in the path of a woman seeking an abortion,”³³ but the Court did note that a regulation designed to encourage a woman to choose *not* to terminate her pregnancy would be acceptable.

To promote the State’s profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.³⁴

The *Casey* decision does not reflect a unified consensus of the Court: the undue burden standard was set forth in a joint opinion authored by Justices O’Connor, Kennedy, and Souter. Justices Blackmun and Stevens concurred in part and dissented in part, taking issue with the plurality’s adoption of the undue burden standard. Justice Blackmun wrote:

Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman’s right to make her own reproductive decisions, free from state coercion. . . . The factual premises of the trimester framework have not been undermined, and the *Roe* framework is far more administrable, and far less manipulable, than the “undue burden” standard adopted by the joint opinion.³⁵

Further, he argued that the trimester system should be retained because “[n]o other approach has gained a majority, and no other is more protective of the woman’s fundamental right.”³⁶

Chief Justice Rehnquist, along with Justices White, Scalia, and Thomas, concurred in the judgment in part, but also dissented in part, maintaining that *Roe* should have been overturned.³⁷ In a separate opinion, Justice Scalia offered sharp criticism of the undue burden standard, stating that not only was the standard easily manipulated, but that it had no foundation in constitutional law: “The ultimately standardless nature of the ‘undue burden’ inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis.”³⁸

a woman’s right to choose to have an abortion. *Id.* at 881-87, 899-901. The spousal notification requirement, however, did create an undue burden because of the significant risk of spousal abuse that could arise if the woman was required to disclose her status to her husband. *Id.* at 887-98.

33. *Id.* at 878.

34. *Id.*

35. *Id.* at 930 (Blackmun, J., concurring in part and dissenting in part) (citation omitted).

36. *Id.* at 934 (Blackmun, J., concurring in part and dissenting in part).

37. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part).

38. *Id.* at 987 (Scalia, J., concurring in part and dissenting in part).

II. APPLYING CASEY: *STENBERG V. CARHART*

A. *The Majority Opinion*

Casey's undue burden standard came under criticism once again in the latest U.S. Supreme Court case dealing with yet another controversial facet of the abortion issue: the "partial birth abortion" debate.³⁹ In *Stenberg v. Carhart*,⁴⁰ the Supreme Court invalidated a Nebraska statute banning "partial birth abortions" on the grounds that the statute placed an undue burden on a woman's right to choose and that the statute lacked a valid health exception.⁴¹ The majority found that the statute was broad enough to encompass the two most common types of second trimester abortion procedures.⁴² One of the procedures, the dilation and evacuation method, also known as "D & E," accounts for approximately ninety-five percent of second trimester abortions.⁴³ A D & E abortion generally involves "(1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the [fifteenth] week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal

39. The case decided the partial birth abortion issue, which Congress had attempted to handle several times. In June 1995, Congress introduced a bill designed to ban a type of partial birth abortion procedure. See Partial-Birth Ban Abortion Act of 1995, H.R. 1833, 104th Cong. (1995). Both houses passed the bill, but President Clinton vetoed it. H.R. 1833, 142 CONG. REC. D304 (1996). Two years later, Congress passed the Partial-Birth Abortion Ban Act of 1997, but President Clinton again vetoed it. See H.R. 1122, 105th Cong. (1997); 143 CONG. REC. H8892 (1997).

40. 530 U.S. 914 (2000).

41. *Id.* at 930.

42. *Id.* at 939-40. The Nebraska statute, in relevant part, stated: "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." *Id.* at 921-22 (quoting NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999)). The statute defined partial birth abortion: "an abortion procedure in which the person performing such abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)). The statute further defined partial birth abortion as a procedure in which the person performs the abortion by "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for purposes of performing a procedure that the person performing the procedure knows will kill the unborn child and does kill the unborn child." *Id.*

43. *Carhart*, 530 U.S. at 924 (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, ABORTION SURVEILLANCE—UNITED STATES, 1996, at 41 (1999)). It is important to note that ninety percent of all abortions are performed during the first trimester utilizing the "vacuum aspiration" method. *Id.* at 923. The remaining ten percent generally occur during the second trimester (between twelve and twenty-four weeks), when vacuum aspiration is no longer an effective means of pregnancy termination due to the fetus' size. *Id.* at 924.

parts to facilitate evacuation from the uterus.”⁴⁴ Another second trimester procedure is the “D & X.”⁴⁵ The D & X involves the dilation of the cervix, and the removal of the intact fetus in one of two ways, depending upon the position of the fetus.⁴⁶ The D & E and D & X procedures involve collapsing the skull and evacuating its contents so that the entire fetal mass can pass through the cervix.⁴⁷ The State of Nebraska argued that the statute was intended to ban only the more controversial D & X procedure, not the more commonly employed D & E procedure.⁴⁸

Before evaluating Nebraska’s statute, the majority opinion began by reiterating the *Casey* analysis. The Court acknowledged that a woman has a constitutional right to terminate her pregnancy, and that a state has interests in protecting the health of the mother and the potentiality of human life.⁴⁹ The Court stated that it would apply the undue burden test to evaluate Nebraska’s statute.⁵⁰ If the statute placed an undue burden on a woman’s right to terminate her pregnancy in the previability stages, the statute would be declared unconstitutional.⁵¹ The Court also emphasized the importance of the health exception requirement in abortion-regulating legislation: “Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.”⁵²

With this framework in mind, the Court declared Nebraska’s statute unconstitutional.⁵³ With respect to its invalidation on health exception grounds,

44. *Id.* at 925 (citing W. HERN, ABORTION PRACTICE 146-56 (1984) and M. PAUL ET AL., A CLINICIANS GUIDE TO MEDICAL AND SURGICAL ABORTION 133-35 (1999)).

45. The Court also refers to a procedure known as the “intact D & E.” *Id.* at 927. Although there are technical differences between the intact D & E and the D & X (also known as the dilation and extraction method) both procedures involve the vaginal removal of an intact fetus, as opposed to the D & E method which involves the vaginal removal of dismembered fetal parts. *Id.* at 927-28 (citations omitted). The Court thus uses “D & X” and “intact D & E” interchangeably. *Id.* (citations omitted). For the purposes of this Note, reference to the D & X procedure encompasses both the D & X and intact D & E procedures.

46. *Id.*

47. *Id.*

48. *Id.* at 938-39. The D & X procedure is the more controversial of the two because, according to some, it more closely resembles infanticide. *Id.* at 1006-07 (Thomas, J., dissenting). Justice Thomas quoted the statement of a nurse who observed the performance of a D & X: “The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out . . .” *Id.* at 1007 (quoting *Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 18 (1995) (statement of Brenda Pratt Shafer)).

49. *Carhart*, 530 U.S. at 921.

50. *Id.*

51. *Id.*

52. *Id.* at 930.

53. *Id.* at 929-30.

the Court found that the “health exception” language⁵⁴ found in the statute was insufficient to truly protect a woman’s right to an abortion.⁵⁵ Based on the record, the Court found that there was evidence that the D & X would, at times, be the safest form of second trimester abortion.⁵⁶ The standard for drafting an acceptable health exception is that the procedure must be permitted when “‘it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,’ for this Court has made clear that a State may promote but not endanger a woman’s health when it regulates the methods of abortion.”⁵⁷ The Court further stated that “a State cannot subject women’s health to significant risks [where the pregnancy itself creates a threat to the mother’s health], *and also* where state regulations force women to use riskier methods of abortion.”⁵⁸ Thus, the possibility that the D & X procedure might be safer for some women than the D & E procedure requires that a woman should have access to the D & X when it is, in fact, the safest abortion procedure for her, as determined by her physician.⁵⁹

After determining that the statute was unconstitutional due to its lack of a valid health exception, the Court turned to the undue burden analysis. The Court found that the language of the statute was broad enough to impose a ban on both the D & E and D & X procedures:

Even if the statute’s basic aim is to ban D & X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D & E and D & X—though it would have been a simple matter, for example, to provide an exception for the performance of D & E and other abortion procedures.⁶⁰

The effect of such an interpretation meant that the statute severely constrained a woman’s right to obtain a second trimester abortion:

54. *See supra* note 42.

55. *Carhart*, 530 U.S. at 930-31.

56. *Id.* at 932-38.

57. *Id.* at 931 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)) (citation omitted); *see also* *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

58. *Carhart*, 530 U.S. at 931 (emphasis in original).

59. *See id.* at 937-39. “[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.’” *Id.* at 938 (quoting *Casey*, 505 U.S. at 879). In determining that the D & X may be a safer procedure in some instances than the D & E, the Court pointed to the fact that the D & X poses less of a risk to woman’s health because fewer “passes” with sharp instruments need to be made in the woman’s uterus in the D & X procedure, thus lessening the risk of uterine perforation and infection. *Id.* at 936.

60. *Carhart*, 530 U.S. at 939.

[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.⁶¹

Thus, the Nebraska statute was found unconstitutional on the basis of an insufficient health exception and because the statute placed an undue burden in the path of a woman seeking a second trimester abortion.⁶²

B. *The Concurrences*

Casey's undue burden standard was followed and applied, but not without criticism from six members of the Court. Although Justices Stevens and Ginsburg concurred in the result, Justice Stevens' concurrence, joined by Justice Ginsburg, illustrated the concern that the undue burden standard could limit a woman's right to an abortion in a manner inconsistent with the Fourteenth Amendment:

[T]he word "liberty" in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision[,] mak[ing] it impossible . . . to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.⁶³

Additionally, Justice Stevens did not agree that a state's interest in protecting the potentiality of human life could be served effectively by banning one second trimester procedure but not the other: "For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more

61. *Id.* at 945-46. It is important to note that although the D & E and the D & X are the most common and safest forms of second trimester abortions, other forms have been used, such as a labor-inducing procedure that involves the injection of saline into the uterus. *See id.* at 924 (citing CTRS. FOR DISEASE CONTROL PREVENTION, ABORTION SURVEILLANCE—UNITED STATES, 1996, at 8 (1999)).

62. It is significant that at the time of this decision, thirty states had statutes similar to the one at issue in *Carhart*. Richard W. Garnett, *The Courts and Abortion, if the Supreme Court Overturns Nebraska's Ban on Partial-birth Abortion, the Rationale Could Be Even Scariest Than the Decision*, THE WKLY. STANDARD, June 12, 2000, at 23. Immediately following the decision, statutes prohibiting "partial birth abortions" were struck down in several states, including Louisiana (*see Causeway Med. Suite v. Foster*, 221 F.3d 811 (5th Cir. 2000)); New Jersey (*see Planned Parenthood v. Farmer*, 220 F.3d 127 (3rd Cir. 2000)); Ohio (*see Women's Med. Prof'l Corp. v. Taft*, 162 F. Supp. 2d 929 (S.D. Ohio 2001)); and Virginia (*see Richmond Med. Ctr. for Women v. Gilmore*, 224 F.3d 337 (4th Cir. 2000)).

63. *Carhart*, 530 U.S. at 946 (Stevens, J., concurring).

akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other is simply irrational."⁶⁴ Thus, he implied that there is no room for states' interests in regulating previability abortions, even though the undue burden standard provides for courts to take those interests into account.⁶⁵

Justice Ginsburg, in a concurring opinion joined by Justice Stevens, stated that the Nebraska statute was designed to chip away at the rights protected by *Roe v. Wade* and modified by *Casey*.⁶⁶ Her concurrence endorsed a restatement of the undue burden standard as formulated by Chief Judge Posner of the Seventh Circuit: "[I]f a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."⁶⁷

Justice O'Connor's concurrence sought to clarify the positions set forth in the majority opinion and defended the *Casey* undue burden standard.⁶⁸ Although the Nebraska statute offered language resembling a "health exception," Justice O'Connor reiterated the point that it was not broad enough to adequately protect a woman's right to choose:

Because even a postviability proscription of abortion would be invalid absent a health exception, Nebraska's ban on previability partial-birth abortions, under the circumstances presented here, must include a health exception as well, since the State's interest in regulating abortions before viability is "considerably weaker" than after viability. The statute at issue here, however, only excepts those procedures "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury." This lack of a health exception necessarily renders the statute unconstitutional.⁶⁹

With respect to the undue burden standard, she stated that banning both the D & E and the D & X procedures placed an undue burden on a woman's ability to choose to terminate her pregnancy.⁷⁰ She then took the analysis one step further, offering guidance to states that may wish to proscribe a particular method of partial birth abortion:

If there were adequate alternative methods 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." Thus, a ban on partial-birth

64. *Id.* at 946-47 (Stevens, J., concurring).

65. *See id.* (Stevens, J., concurring).

66. *Id.* at 951-52 (Ginsburg, J., concurring).

67. *Id.* at 952 (Ginsburg, J., concurring) (quoting *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, C.J., dissenting)).

68. *See id.* at 947 (O'Connor, J., concurring).

69. *Id.* at 948 (O'Connor, J., concurring) (citations omitted).

70. *See id.* (O'Connor, J., concurring).

abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view.⁷¹

C. *The Dissents*

In his dissent, Justice Scalia sharply criticized the *Carhart* majority opinion. He began by expressing his wish that this case someday be placed in the same category as *Korematsu v. United States*⁷² and *Dred Scott v. Sanford*.⁷³ He stated that this case represents a valid application of *Casey*'s undue burden standard,⁷⁴ but pointed out that the standard represents nothing more than the value judgments of the Justices.⁷⁵ In so doing, he ultimately criticized the foundation of *Casey*:

In the last analysis, my judgment that *Casey* does not support today's tragic result can be traced to the fact that what I consider to be an "undue burden" is different from what the majority considers to be an "undue burden"—a conclusion that can not be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects . . . the life of a partially delivered fetus, and how much one respects . . . the freedom of the woman who gave it life to kill it.⁷⁶

In contrast, Justice Kennedy's dissenting opinion, joined by Chief Justice Rehnquist, suggests that the undue burden standard may be a workable test; however, he believed that the court misapplied *Casey*'s holding.⁷⁷ Justice Kennedy stated that "[t]he Court's decision . . . invalidat[es] a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon that right. The Nebraska statute "expresse[d] a profound and legitimate respect for fetal life," and left open several other avenues for women seeking to obtain abortions—the ban did not mean that women could not obtain abortions, but merely that they could not obtain a specific type of procedure.⁷⁸ According to Justice Kennedy, *Casey* explicitly authorized states to use the legislative process in order to display moral concerns; such an expression is not unconstitutional so long as the woman's right

71. *Id.* at 951 (O'Connor, J., concurring) (quoting *Casey*, 505 U.S. at 884 (citation omitted)).

72. 323 U.S. 214 (1944).

73. 60 U.S. 393 (1857). Both *Korematsu* and *Dred Scott* are now viewed as two of the Court's most infamous missteps.

74. *Carhart*, 530 U.S. at 953 (Scalia, J., dissenting).

75. *Id.* at 954-55 (Scalia, J., dissenting).

76. *Id.* (Scalia, J., dissenting).

77. *See id.* at 957 (Kennedy, J., dissenting).

78. *Id.* at 956-57 (Kennedy, J., dissenting).

to choose is not unduly hampered.⁷⁹ In this instance, a woman's right to choose was not unduly hampered because the language of the Nebraska statute clearly operated to ban only the D & X procedure.⁸⁰ "The legislation is well within the State's competence to enact."⁸¹ Justice Kennedy also argued that the rules of statutory construction would show that the statute was meant to apply to only the more gruesome and disturbing D & X procedure, not the D & E procedure.⁸² He emphasized the point that according to *Casey*, states have a valid interest in expressing concern for unborn life.⁸³ States also have an interest in forbidding medical procedures that may cause the medical profession to become disdainful of life.⁸⁴ Thus, according to Justice Kennedy, Nebraska had the right to draw a moral distinction between the two procedures and prohibit the more gruesome D & X.⁸⁵ In his view, simply because the D & E is also a disturbing procedure does not mean that the state accomplishes nothing in banning the D & X: "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."⁸⁶

Justice Kennedy then criticized the "health exception" ground for invalidating the statute, stating that giving physicians the broad latitude to escape application of a statute simply by exercising "medical judgment" would in effect vitiate the legislature's purpose in enacting the statute: "Requiring Nebraska to defer to [the physician's] judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now [the physician] who sets abortion policy for the State of Nebraska, not the legislature or the people."⁸⁷

Justice Thomas also disliked this case's application of the standards set forth in *Casey*. Joined by Chief Justice Rehnquist and Justice Scalia, he began by stating that *Casey*'s undue burden standard has no constitutional roots and is not the appropriate standard for determining the constitutionality of abortion legislation.⁸⁸ Thomas continued that, even if the undue burden standard must be applied, the Court misapplied it in this instance.⁸⁹ Justice Thomas maintained that majority ignored the rules of statutory construction: "The majority . . . reject[ed] the plain language of the statutory definition, refuse[d] to read that definition in light of the statutory reference to 'partial birth abortion,' and

79. *See id.* at 979 (Kennedy, J., dissenting).

80. *See id.* at 989-97 (Kennedy, J., dissenting).

81. *Id.* (Kennedy, J., dissenting).

82. *See id.* at 973-77 (Kennedy, J., dissenting).

83. *Id.* at 961 (Kennedy, J., dissenting).

84. *Id.* at 961-62 (Kennedy, J., dissenting).

85. *Id.* at 962 (Kennedy, J., dissenting).

86. *Id.* at 963 (Kennedy, J., dissenting).

87. *Id.* at 965 (Kennedy, J., dissenting).

88. *Id.* at 982 (Thomas, J., dissenting).

89. *Id.* at 982-83 (Thomas, J., dissenting).

ignore[d] the doctrine of constitutional avoidance.”⁹⁰ Furthermore, Justice Thomas assumed that states have an interest in regulating or banning the D & X procedure. He relied on the detailed and graphic description of the procedure⁹¹ to make his point: “The question whether States have a legitimate interest in banning the procedure does not require additional authority.”⁹² Thus, because the statute did not prohibit the D & E procedure and the state had an obvious compelling interest in banning the D & X, there was no undue burden on the woman’s ability to choose abortion.⁹³

III. THE UNDUE BURDEN STANDARD: THE LESSONS OF *CASEY* AND *CARHART*

The undue burden standard, as set forth in *Casey* and applied in *Carhart*, has been criticized sharply not only by individual members of the U.S. Supreme Court, but also by legal scholars on both sides of the abortion issue. Conservative, pro-life activists have stated that the undue burden standard is unworkable and too easily manipulated by the judges who apply it, thus limiting states’ abilities to express their interests in fetal life.⁹⁴ They take the position that it is a vague standard that calls for judicial value judgments rooted in ethics rather than law.⁹⁵ Pro-choice activists are also critical of the standard. Many take the position that the undue burden standard as presented in *Casey* represents an attempt by moderates and conservatives to chip away at a woman’s fundamental right to choose how to terminate her pregnancy.⁹⁶

However, the undue burden standard is not without its supporters. Some commentators applaud the standard as a reasonable compromise between the interests of women and the states. They note that *Casey*’s undue burden standard presents an opportunity for states to express their interests and ensures that women can make fully informed choices, thus encouraging their informed consent to the procedure.⁹⁷ Some argue that the *Casey* standard encourages political speech and allows the state to help women “structure” their decision-making process.⁹⁸

In trying to reconcile the lessons of *Casey* and *Carhart*, it is difficult to predict what types of regulations the Court will strike down in the future. It is important to note that the *Carhart* opinion did not present a united court. Rather, it was a 5-4 decision in which the *Casey* undue burden standard was criticized by

90. *Id.* at 997 (Thomas, J., dissenting).

91. *See supra* note 48.

92. *Carhart*, 530 U.S. at 1007 (Thomas, J., dissenting) (internal citation omitted).

93. *See id.* at 1005-06 (Thomas, J., dissenting).

94. Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 295 (1995).

95. *Id.*

96. *Id.*

97. Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 797 (1996).

98. *See id.*

a majority of the Justices, suggesting that the issue of how to evaluate abortion regulations will continue to be contentious. Most scholars have interpreted *Casey* as an affirmation or recognition of states' interests in protecting the health of the mother and the potential life of the unborn fetus.⁹⁹ However, as commentators have pointed out, the *Casey* Court failed to firmly set forth a set of state interests that would justify interference with a woman's right to choose: "One might expect that before the Court would so fundamentally depart from traditional due process analysis, it would have a firm grasp of the state interest that led it to do so. But the *Casey* opinion contains many conclusions with little analysis."¹⁰⁰

The *Carhart* majority decision does little to clarify the situation. An attempted synthesis of the *Casey* and *Carhart* decisions suggests that the Court acknowledges that states have a compelling interest in protecting fetal life. However, an examination of the majority opinion shows that the Justices gave little weight to Nebraska's interest. The Court simply stated in a somewhat conclusory fashion that the statute placed an undue burden on a woman's right to choose.¹⁰¹ The Court also failed to present states with any guidance on how to draft legislation that expresses their interests without placing an undue burden on a woman's right to choose. The Stevens concurrence suggests that there is absolutely no valid state interest that can justify regulating previability abortions.¹⁰² Justice O'Connor's concurrence offers a little help, stating that a statute that banned just one and not both of the second trimester procedures would be constitutional.¹⁰³

On the other hand, it is important to remember that the holding of *Casey* mandates that courts give at least some weight to state interests in evaluating abortion legislation.¹⁰⁴ The *Carhart* majority barely mentioned the interests that led Nebraska to enact this statute. Thus, the *Carhart* decision did little to clarify the murky and malleable undue burden standard set forth in *Casey*. States are left with little guidance in drafting abortion legislation.

Nonetheless, *Carhart* does seem to stand for the proposition that an outright prohibition on certain methods of abortion is unconstitutional if those methods are the only ones available to a woman at a certain time in her pregnancy.¹⁰⁵ However, such a rule seems obvious and offers little help to states drafting legislation that falls somewhere short of expressing an outright ban on an abortion procedure. Alternatively, the *Carhart* decision may be read to

99. Mark H. Woltz, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1806 (1993).

100. Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265, 321 (1993) (footnote omitted).

101. See *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

102. See *id.* at 946 (Stevens, J., concurring).

103. See *id.* at 950-51 (O'Connor, J., concurring).

104. See *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992).

105. See *Carhart*, 530 U.S. at 945-46.

invalidate any state ban on a particular previability abortion procedure.¹⁰⁶

From the holdings of *Casey* and its pre-*Carhart* progeny, it appears that regulations designed to aid women in the informed consent process, regulations dealing with parental consent and notice, and regulations dealing with record-keeping requirements are constitutional.¹⁰⁷ On the other hand, under *Casey* and *Carhart*, statutes dealing with spousal notification and statutes prohibiting particular types of second-trimester abortion procedures fail to pass the undue burden test.¹⁰⁸

IV. CARHART AND THE RU-486 DEBATE

It is difficult to predict what types of regulations in the future will represent a state's valid furtherance of a compelling interest and what types of regulations will present undue burdens. *Carhart* left a number of questions unanswered. Does the banning of a particular previability method of abortion always place an undue burden in the path of a woman seeking an abortion, as Justice Stevens suggests?¹⁰⁹ Or is an undue burden presented only where the method in question is the only safe method available, as Justice O'Connor suggests?¹¹⁰ It is unclear which path the Court will adopt. The next section will focus on proposed RU-486 legislation and will assess the constitutionality of these bills using the undue burden framework presented in *Casey* and *Carhart*. Additionally, this section will show how important the resolution of this dilemma created by *Carhart* is to the unique issues presented by RU-486.

A. How RU-486 Works

On September 28, 2000, the United States Food and Drug Administration approved the drug mifepristone,¹¹¹ commonly known as RU-486, for use as an abortifacient.¹¹² The drug was approved for use in France in 1988, but it has met with considerable opposition in the United States.¹¹³ The FDA's approval of RU-

106. See *id.* at 940-41.

107. See *id.*; see also *Casey*, 505 U.S. 833 (1992); *Majurek v. Armstrong*, 520 U.S. 968 (1997).

108. See *Carhart*, 530 U.S. at 922; *Casey*, 505 U.S. at 877.

109. See *Carhart*, 530 U.S. at 946 (Stevens, J., concurring).

110. See *id.* at 951 (O'Connor, J., concurring).

111. "In the United States, the brand name for mifepristone is Mifeprex™, which is manufactured by Danco Laboratories, LLC . . ." MIFEPRISTONE: EXPANDING WOMEN'S OPTIONS FOR EARLY ABORTIONS, Mifepristone Fact Sheet, at http://www.plannedparenthood.org/library/ABORTION/Mif_fact.html (last visited Nov. 11, 2001) [hereinafter EXPANDING WOMEN'S OPTIONS].

112. *Id.*

113. See Daniel S. Levy, *A Long Journey*, TIME, Oct. 9, 2000, at 42. In June 1989, President Bush issued a ban on the import of the drug, which was lifted in 1993 when President Clinton came into office. In 1996, the Population Council filed a new-drug application with the FDA, and the drug was approved in 2000. *Id.*

486 contains relatively few restrictions on its distribution.¹¹⁴ The drug's label states that

[t]reatment with Mifeprex and misoprostol for the termination of pregnancy requires three office visits by the patient. Mifeprex should be prescribed only by physicians who have read and understood the prescribing information. Mifeprex may be administered only in a clinic, medical office, or hospital, by or under the supervision of a physician, able to assess the gestational age of an embryo and to diagnose ectopic pregnancies. Physicians must be able to provide surgical intervention in cases of incomplete abortion or severe bleeding, or have made plans to provide such care through others, and be able to assure patient access to medical facilities equipped to provide blood transfusions and resuscitation, if necessary.¹¹⁵

Additionally, the drug has been approved for use only through the first forty-nine days of pregnancy; thereafter, a woman seeking to terminate her pregnancy must opt for a surgical abortion.¹¹⁶

B. The Significance of RU-486 as New Technology

To fully understand the dimension RU-486 adds to the abortion debate, it is necessary to set forth the characteristics that make it fundamentally different from surgical abortion. There is a compelling argument that new regulations will place an undue burden on a woman's right to choose to terminate her pregnancy, due in large part to the unique nature of this particular method of abortion. Although medical abortion requires three visits to the doctor's office, as opposed to the one visit necessary for surgical abortions, medical abortion is a non-invasive means of pregnancy termination requiring significantly less expertise than that required of surgical abortions.¹¹⁷ The difference is between taking a pill

114. Mifeprex Tablets Label at <http://www.fda.gov/cder/foi/label/2000/206871b1.htm> (last visited Nov. 11, 2001).

115. *Id.* The "medical abortion" (rather than "surgical abortion") occurs after the administration of two different drugs. At the healthcare provider's office, the patient is given 600mg of mifepristone in a single oral dose. Two days later, the patient returns to the health care provider and is evaluated to determine whether the embryo has been expelled. If not, then 400mcg of misoprostol are administered orally. This dosage is necessary for most patients. Soon after the administration of the misoprostol, the embryo is expelled in what amounts to a "heavy period." About fourteen days after mifepristone is administered, the patient is required to return to her health care provider for a check-up to determine whether a complete termination of the pregnancy has occurred. Thus, according to the FDA, a total of three office visits are required for a complete medical abortion. *Id.*

116. *See id.*

117. EXPANDING WOMEN'S OPTIONS, *supra* note 111. *See also* Elizabeth A. Silverberg, Note, *Looking Beyond Judicial Deference to Agency Discretion: A Fundamental Right of Access to RU-486?*, 59 BROOK. L. REV. 1551, 1559 (1994).

and undergoing surgery. That fundamental difference is the attraction and the advantage of RU-486.¹¹⁸ It allows women to terminate their pregnancies discreetly, with the actual expulsion of the embryo occurring in the privacy of their own homes.¹¹⁹ Another major attraction is RU-486's availability through virtually any gynecologist or family practitioner.¹²⁰ These means are far more available than surgical abortions.¹²¹

According to women who participated in the clinical trials for RU-486 prior to the drug's approval, the major lure of the drug was privacy and control.¹²² One woman, who had undergone a surgical abortion several years prior to her experience with RU-486 stated, "The whole experience was much less traumatic than my surgical abortion. . . . I felt much more in control and calmer being at home It made all the difference."¹²³ Another woman found her experience with the RU-486 clinical trials to be more positive than surgical abortion: "I didn't want to just lie back on a table and have something done to me. . . . When you have an unplanned pregnancy, control is really important. I wanted to be involved."¹²⁴

Thus, although the complete "medical abortion" requires three trips to the doctor's office, women involved in the clinical trials found that the extra trips far outweighed the "baggage" associated with obtaining a surgical abortion.¹²⁵ Because the drug can be prescribed and administered in the doctor's office of any physician meeting the FDA requirements—most general practitioners and gynecologists are qualified¹²⁶—the pills can be obtained discreetly, conveniently, and without the necessity of crossing the picket lines surrounding most abortion clinics.¹²⁷ In effect, the drug could bring about what some commentators term "anonymous abortions."¹²⁸ Women with access to the drug may not be faced with the potential public condemnation associated with surgical abortions.¹²⁹

118. See Silverberg, *supra* note 117, at 1559.

119. *Id.*

120. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

121. *Id.*

122. *Id.* See also Dana Hudepohl, *RU-486: Not Just an Abortion Drug. Could It Save Your Life?* GLAMOUR, Jan. 2001, at 126.

123. *Id.* at 194.

124. Noelle Howey, *What You Can Learn from My RU-486 Abortion*, SELF, Apr. 2000, at 97.

125. Hudepohl, *supra* note 122, at 127.

126. See Nancy Gibbs, *The Abortion Pill*, TIME, Oct. 9, 2000, at 40.

127. Hudepohl, *supra* note 122, at 127.

128. David Whitman & Stacey Schultz, *A Little Pill but a Big Dispute*, U.S. NEWS & WORLD REPORT, Oct. 9, 2000, at 18, available at LexisNexis, U.S. News & World Report File.

129. *Id.* One commentator stated that

[t]he abortion pill may also lessen the stigma of abortion and public qualms about the procedure. In many cases, drug-induced abortions will take place in patients' homes after they take RU-486 and misoprostol, and they will generally occur earlier in the pregnancy than surgical abortions. Opinion polls consistently show that Americans find abortions in the first few weeks of pregnancy less troubling than those performed in the

The convenience of RU-486 attracts other women, especially those in rural areas.¹³⁰ Due to pro-life protests, the number of abortion clinics has decreased, making it difficult for many women to obtain surgical abortion. “Protesters can now easily identify abortion providers, and the picketing, harassment, and incidents of violence—including the murders of three doctors—have thinned the ranks of clinics, hospitals, and physicians offering abortions in recent years.”¹³¹ Furthermore, women in rural areas typically have to drive long distances to obtain surgical abortions.¹³² RU-486, on the other hand, may be obtained through a local family practitioner or gynecologist.

An additional difference between surgical abortions and RU-486 is that medical abortions can be performed earlier in pregnancy than surgical abortions.¹³³ Thus, a woman with access to RU-486 need not delay her decision until surgery can be performed.¹³⁴

C. Proposed Regulatory Statutes and Undue Burden Analysis

The approval of RU-486 places the abortion debate on an entirely different plane than it was at the time *Casey* and *Carhart* were decided. The undue burden analysis was developed with only surgical abortions in mind. The privacy and control associated with the drug and its potential widespread availability make RU-486 an attractive option for women seeking to terminate an early pregnancy. With access to this new technology as open as many anticipate it will be,¹³⁵ will any regulation place an undue burden on a woman’s right to choose? The answer depends in large part upon how one reads the *Carhart* opinion. If one adopts the O’Connor view,¹³⁶ then a ban on RU-486 would not place an undue burden on a woman’s right to choose. However, if the *Carhart* opinion is interpreted to mean that a ban on any form of previability abortion places an undue burden on a woman’s right to choose, then proposed RU-486 legislation will not survive.

The Supreme Court had an opportunity to determine whether denial of access to RU-486 placed an undue burden on a woman’s right to choose to terminate her pregnancy in *Benten v. Kessler*.¹³⁷ This case came before the Court in 1992, before the FDA approved RU-486.¹³⁸ In *Benten*, a woman tried to import the

second or third trimesters.

Id.

130. *See id.*

131. *Id.* “Nationwide, the number of abortion facilities fell from 2380 in 1992 to 2042 in 1996” *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. A survey conducted found that “44 percent of gynecologists and 31 percent of family practitioners would be at least ‘somewhat likely’ to prescribe RU-486.” *Id.*

136. *See Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (O’Connor, J., concurring).

137. 505 U.S. 1084 (1992) (application to vacate stay denied).

138. *Id.*

drug from Europe in order to terminate her pregnancy.¹³⁹ Federal officials confiscated the supply of the drug, and the Supreme Court upheld the confiscation.¹⁴⁰ However, Justice Stevens argued that the government's confiscation of the drug placed an undue burden on the woman's constitutionally protected right to abort her pregnancy.¹⁴¹ In response, the majority stated that it expressed "no view on the merits of this assertion."¹⁴² Thus, the question of whether regulating a woman's access to the drug places an undue burden on her right to choose is still open.

On October 4, 2000—mere days after the drug's FDA approval—politicians introduced a bill in both houses of Congress designed to "require the Food and Drug Administration to establish restrictions regarding the qualifications of physicians to prescribe the abortion drug commonly known as RU-486."¹⁴³ The proposed statute, known as the "RU-486 Patient Health and Safety Protection Act," reads in pertinent part:

With respect to the application that was submitted under section 505(b) of the Federal Food, Drug, and Cosmetic Act for the drug mifepristone (commonly referred to as RU-486, to be marketed as MIFEPREX), and that was approved on September 28, 2000, the Secretary of Health and Human Services, acting through the Commissioner of Food and Drugs, shall promptly modify the conditions of the approval of such drug to establish the additional restriction that the drug may not be prescribed by any person other than a licensed physician who meets the following requirements:

(1) The physician is qualified to handle complications resulting from an incomplete abortion or ectopic pregnancy.

(2) The physician has been trained to perform surgical abortions and has met all applicable legal requirements to perform such abortions.

(3) The physician is certified for ultrasound dating of pregnancy and detecting ectopic pregnancy.

(4) The physician has completed a program regarding the prescribing of such drug that uses a curriculum approved by the Secretary.

(5) The physician has admitting privileges at a hospital to which the physician can travel in one hour or less, determined on the basis of starting at the principal medical office of the physician and traveling to the hospital, using the transportation means normally used by the physician to travel to the hospital, and under the average conditions of

139. *Id.* at 1084.

140. *Id.* at 1084-85.

141. *Id.* at 1085-86 (Stevens, J., dissenting).

142. *Id.* at 1085.

143. RU-486 Patient Health and Safety Protection Act, H.R. 482, 107th Cong. (2001); S.R. 251, 107th Cong. (2001). This bill was referred to the House Committee on Energy and Commerce on February 7, 2001.

travel for the physician.¹⁴⁴

Under the undue burden standard presented in *Casey* and applied in *Carhart*, it is likely that such a bill would survive a constitutional challenge, given its emphasis on procedural safety. This statute sets forth what appear to be reasonable guidelines aimed at protecting women's safety.

Under Justice O'Connor's view in *Carhart*, the bill will not place an undue burden on a woman's right to choose.¹⁴⁵ An argument could be made that these regulations fall into the same category as those rules upheld in *Casey*: regulations aimed at informed consent, parental notification, and waiting periods.¹⁴⁶ Those regulations upheld in *Casey* were designed to ensure that women received adequate information about their choice; additionally, none of the restrictions had the effect of placing the woman's health in jeopardy.¹⁴⁷ Similarly, the guidelines set forth in the proposed congressional bill are aimed at protecting a woman's health by placing additional requirements on the treating physician, not by placing additional burdens on a woman seeking an abortion.¹⁴⁸ Additionally, these requirements merely duplicate many of the requirements already in place upon physicians who perform surgical abortions.¹⁴⁹ Thus, at the very least, it would be no more difficult for a woman to obtain an abortion under this bill than it ever has been, indicating that the proposed regulations do not place an undue burden on a woman's right to choose to terminate her pregnancy.

However, if Justice Stevens' position in *Carhart*¹⁵⁰ is followed, then these regulations could be seen as an undue burden on a woman's right to choose. The advantages of RU-486—control, privacy, and availability in rural areas¹⁵¹—may be negated by a bill of this sort. The drug is currently available through general practitioners, many of whom may not meet the requirements of the bill. If the bill passes, then it could strike a major blow to the availability of the drug and place an undue burden on a woman's ability choose terminate her pregnancy, especially in rural areas. A woman who would have had access to the drug through her family doctor would then have to travel to an abortion clinic where her privacy and control will be compromised. For many rural women, the

144. *Id.*

145. Under *Casey* and *Carhart*, this proposed bill would place an undue burden on a woman's right to choose to terminate her pregnancy only if the restrictions have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion. See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992); *Carhart*, 530 U.S. at 947-52.

146. See *Casey*, 505 U.S. at 879.

147. See *id.*

148. See RU-486 Patient Health and Safety Protection Act, H.R. 482, 107th Cong. (2001).

149. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

150. See *Carhart*, 530 U.S. at 946 (Stevens, J., concurring). Justice Stevens suggested that there was no room for states' interests in regulating previability abortions, even though the undue burden standard provides for courts to take those interests into account. *Id.* (Stevens, J., concurring).

151. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

prospect of traveling to an abortion clinic may place a substantial obstacle in their paths to terminate their pregnancies.

Furthermore, RU-486 can be used earlier than most surgical abortions can be performed.¹⁵² This bill could limit prescription privileges of the drug to essentially the same individuals who are licensed to perform surgical abortions. Women who wish to terminate their pregnancies early but cannot obtain access to the drug will be forced to wait until the pregnancy has proceeded to the point where only a surgical abortion may be performed.¹⁵³ Therefore, a bill limiting the drug's availability may place an undue burden on a woman's ability to choose *when* to terminate her pregnancy. However, even if a court accepts that the regulations may make it more difficult for women to get RU-486, the compelling state interest of protecting the health of the mother will probably be cited as a reason for justifying the regulations imposed by Congress.

Another type of proposed regulation offered from states appears in the form of an outright ban of the drug. On January 4, 2001, a bill banning the distribution of RU-486 in the state of Oklahoma was presented before the Oklahoma legislature:

A. It shall be unlawful for any person to prescribe, dispense, distribute, or otherwise make available mifepristone (RU-486) in this state.

B. Any person violating the provisions of this section, upon conviction thereof, shall be guilty of a felony.

C. Any person, authorized by the laws of this state to prescribe, dispense, or distribute medicine in this state, prescribing, dispensing, distributing, or otherwise making available mifepristone (RU-486) in this state, in violation of the provisions of this section, shall be subject to license suspension, revocation, or other administrative penalties by the state administrative licensing entity.¹⁵⁴

When faced with a ban on a particular abortion procedure, it becomes evident through *Carhart* that the undue burden standard is not the best vehicle for analyzing the constitutionality of this proposal. Under the trimester framework of *Roe*, such an outright ban clearly would have been unconstitutional. Because the drug has been approved only for use during the first forty-nine days of pregnancy—well within the first trimester—*Roe* would have unconditionally protected a woman's right to terminate her pregnancy using RU-486.

Under *Casey* and *Carhart* however, the constitutionality of Oklahoma's proposed statute is less clear.¹⁵⁵ The *Casey* Court abandoned the trimester system

152. Howey, *supra* note 124, at 97-98.

153. *See id.*

154. H.B. 1038, 48th Leg., 1st Sess. § 1 (Okla. 2001). This bill was referred to the Oklahoma House Committee on Public Health on February 6, 2001.

155. Although this discussion is limited to the statute's constitutionality according to *Casey*'s and *Carhart*'s undue burden standards, the state's outright ban may have other constitutional problems in terms of effectively "overruling" the FDA where it appears that the FDA has preempted

and held that states may regulate previability abortions to achieve a compelling state interest provided that the regulation does not present an undue burden on a woman's right to choose.¹⁵⁶ The *Carhart* majority opinion, which also considered an outright ban on a particular abortion procedure, provided little guidance in setting forth standards for states wishing to establish abortion regulations. At the very least, the Court appears to have held unconstitutional any outright ban on partial birth abortion procedures in the absence of other available means of pregnancy termination.¹⁵⁷ This statement reflects Justice O'Connor's concurrence. Thus, a logical corollary to this rule might be as follows: Where other means of pregnancy termination are available to a woman seeking a particular abortion procedure, the state may prohibit that procedure if it has a compelling state interest. Because RU-486 is merely one type of abortion method, banning RU-486 would be constitutional if the state had a compelling interest.

Under Justice O'Connor's view, it would be permissible for a state to ban the use of RU-486 if it could show a compelling state interest for doing so.¹⁵⁸ Such an action would not unduly burden a woman's right to choose to terminate her pregnancy because surgical abortions would still be available to her. The two primary interests states use to justify abortion regulations are protecting the health of the mother and protecting fetal life.¹⁵⁹ Oklahoma could argue that the ban on RU-486 furthers the state interest of protecting the health of the mother, an interest that the Supreme Court has recognized as compelling.¹⁶⁰ Because the actual expulsion of the embryo occurs without medical supervision,¹⁶¹ the state could argue that an abortion induced by RU-486 places the mother's safety at risk. Additionally, because most general practitioners can prescribe the drug under the FDA guidelines, the state could argue that the woman risks obtaining the drug from a physician not qualified to handle the complications that could arise from the induced miscarriage. Although the Court would probably recognize these interests, it is important to note that they may be achieved in a less restrictive way through a regulatory statute such as the RU-486 Patient Health and Safety Protection Act.¹⁶²

The state also may argue that the interest of protecting fetal life would validate the ban on RU-486. However, such an argument was not accepted in *Carhart*, where the interest in fetal life was arguably more compelling because the abortion procedure in question affected more fully developed fetuses.¹⁶³ Studies have shown that individuals find early abortions more "acceptable" than

state action. Silverberg, *supra* note 117, at 1600.

156. *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992).

157. *See Stenberg v. Carhart*, 530 U.S. 914, 951 (2000) (O'Connor, J., concurring).

158. *Id.* at 947-52 (O'Connor, J., concurring).

159. *See id.* (O'Connor, J., concurring).

160. *See id.* (O'Connor, J., concurring).

161. *See EXPANDING WOMEN'S OPTIONS*, *supra* note 111.

162. H.R. 482, 107th (2001).

163. *See Carhart*, 530 U.S. at 922.

late term abortions, reflecting the societal view that the interest in fetal life becomes more compelling as the pregnancy progresses.¹⁶⁴ Thus, it is unlikely given the Court's decision in *Carhart* not to uphold Nebraska's partial birth abortion statute that it would uphold Oklahoma's statute. Nonetheless, under Justice O'Connor's view, this statute would probably be constitutional because other means of first trimester abortions would still be available to women seeking to terminate a pregnancy.

However, the *Carhart* majority opinion might be interpreted to mean that *any* outright ban on a particular method of previability abortion is unconstitutional as placing an undue burden on a woman's right to choose, consistent with Justice Stevens' position.¹⁶⁵ If this interpretation is adopted, then Oklahoma's ban on RU-486 would be unconstitutional regardless of the proposed compelling state interest. Even though surgical abortions are available to women, a ban on RU-486 would unduly burden a woman's right to choose because RU-486 operates *before* most surgical abortions can be performed.¹⁶⁶ Therefore, a ban on RU-486 would unduly burden a woman's right to choose *when* to have her abortion. Such a ban would have the purpose and effect of placing a substantial obstacle in the path of a woman seeking an early pregnancy abortion. For women in many rural parts of the country, surgical abortions are difficult to obtain.¹⁶⁷ In contrast, RU-486 will allow virtually every American woman easy access to early pregnancy abortions.¹⁶⁸ Placing a ban or heavily regulating the availability of the drug would place a substantial obstacle in the path of a woman in rural America seeking an abortion. Additionally, RU-486 allows women a large degree of privacy; they can obtain the drug from their family practitioner and undergo much of the "procedure" in the privacy of their own homes.¹⁶⁹ Thus, these women can avoid the stigma and trauma that accompanies obtaining a surgical abortion at an abortion clinic.¹⁷⁰ Denying women access to such a private means of pregnancy termination unduly burdens their ability to choose abortion.¹⁷¹ Thus, although the state may convey a compelling state interest in regulating the availability of the drug, a court adopting Justice Stevens' view may find one of the above arguments viable and hold that the regulation of the drug places an undue burden on a woman's right to choose the manner to terminate her pregnancy. Consequently, the regulation would be found unconstitutional if Justice Stevens' view were adopted.

164. See Whitman & Schultz, *supra* note 128.

165. *Carhart*, 530 U.S. at 946 (Stevens, J., concurring).

166. Howey, *supra* note 124.

167. See EXPANDING WOMEN'S OPTIONS, *supra* note 111.

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.*

CONCLUSION

The primary criticism of *Casey*, used by both sides of the abortion debate, is that the undue burden standard is vague, mushy, malleable, and too easily manipulated. It provides an unworkable framework for evaluating abortion issues. *Carhart* did little to clarify the murkiness surrounding the undue burden standard and left open the question of whether a ban on a particular previability abortion procedure was an undue burden per se, or whether a particular method could be banned provided that other methods of abortion remained available. After *Carhart*, the boundaries of the undue burden standard are unclear. The emerging debate over RU-486 provides another venue for testing the undue burden standard, and the question presented in *Carhart* must be answered in order to properly assess this new proposed legislation.