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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et. al., Plaintiffs, v. STATE OF CALIFORNIA; WILLIAM LOCKYER, Attorney General of the State of California, et. al., Defendants.	CASE NO. 01CECG03182 **NOTICE OF ERRATA TO NOTICE OF LODGMENT OF FEDERAL AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION** Date: December 14, 2006 Time: 3:30 p.m. Dept.: 72

PLEASE TAKE NOTICE that Plaintiffs EDWARD W. HUNT, et al. would like to court to take notice of the following Errata plaintiffs' filed with the court their Notice of Lodgment of Federal Authorities in Support of Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication on September 29, 2006 and inadvertently omitted copies of the federal authority. Plaintiffs hereby lodge with the court the following federal authority.

1. *Connally v. General Const. Co.* (1926) 269 U.S. 385, 46;
2. *Stenberg v. Carhart* (2000) 530 U.S. 914, 120;
3. *Weiner v. San Diego County* (2000) 210 F.3d 1025, 2000;
4. *Wolff v. McDonnell* (1974) 418 U.S. 539, 94.

Dated: October 13, 2006

TRUTANICH - MICHEL, LLP

C. D. Michel
Attorney For Plaintiffs

EXHIBIT 1

269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322

Supreme Court of the United States
CONNALLY, Commissioner of Labor of Oklahoma, et al.
v.
GENERAL CONST. CO.
No. 314.
Argued Nov. 30 and Dec. 1, 1925.
Decided Jan. 4, 1926.

Appeal from the District Court of the United States for the Western District of Oklahoma.
Suit by the General Construction Company against Claude C. Connally, Commissioner of Labor of the State of Oklahoma, and others, to enjoin defendants from enforcing particular statute. From an interlocutory decree for plaintiff (3 F. (2d) 666), defendants appeal. Affirmed.

West Headnotes

KeyCite Notes

- 231H Labor and Employment
  - 231HXIII Wages and Hours
    - 231HXIII(B) Minimum Wages and Overtime Pay
      - 231HXIII(B)1 In General
        - 231Hk2215 Constitutional and Statutory Provisions
          - 231Hk2218 Validity
            - 231Hk2218(6) k. Public Works and Employment. Most Cited Cases
              (Formerly 232Ak1095 Labor Relations, 255k69 Master and Servant)

61 Okl.St.Ann. §§ 3, 5, providing "that not less than the current rate of per diem wages in the locality" shall be paid to laborers, workmen, etc. held so uncertain as to be unconstitutional.

KeyCite Notes

- 92 Constitutional Law
  - 92XII Due Process of Law
    - 92k256 Criminal Prosecutions
      - 92k258 Creation or Definition of Offense
        - 92k258(2) k. Certainty and Definiteness in General. Most Cited Cases

To conform to due process, statute creating offense must explicitly define conduct constituting violation of it.

KeyCite Notes

- 92 Constitutional Law
  - 92XII Due Process of Law
    - 92k275 Deprivation of Liberty or Property as to Occupation or Employment
      - 92k275(2) Regulation of Employment of Labor
        - 92k275(3) k. Fair Labor Standards; Wages and Hours. Most Cited Cases

110 Criminal Law KeyCite Notes
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(2) Particular Statutes, Application to
110k13.1(4) k. Employment and Labor Relations. Most Cited Cases

231H Labor and Employment KeyCite Notes
231HXIII Wages and Hours
231HXIII(D) Hours of Service
231Hk2492 Constitutional and Statutory Provisions
231Hk2495 Validity
231Hk2495(5) k. Public Employees. Most Cited Cases
(Formerly 232Ak1367 Labor Relations)

Oklahoma statute fixing hours of service and wages for laborers held invalid.

KeyCite Notes

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2215 Constitutional and Statutory Provisions
231Hk2218 Validity
231Hk2218(6) k. Public Works and Employment. Most Cited Cases
(Formerly 232Ak1092 Labor Relations)

231H Labor and Employment KeyCite Notes
231HXIII Wages and Hours
231HXIII(D) Hours of Service
231Hk2492 Constitutional and Statutory Provisions
231Hk2495 Validity
231Hk2495(5) k. Public Employees. Most Cited Cases
(Formerly 232Ak1092 Labor Relations)

61 Okl.St.Ann. §§ 3, 5, providing eight-hour day for persons employed by or on behalf of state, and for "current rate of per diem wages in the locality," held violative of due process clause.

KeyCite Notes

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(D) Hours of Service
231Hk2492 Constitutional and Statutory Provisions
231Hk2495 Validity
231Hk2495(5) k. Public Employees. Most Cited Cases
(Formerly 232Ak1367 Labor Relations)

61 Okl.St.Ann. §§ 3, 5, providing an eight-hour day for persons employed by or on behalf of state, and "that not less than the current rate of per diem wages in the locality" shall be paid to laborers, workmen, etc., held void for uncertainty.

***126 *385** Messrs. George F. Short, of Oklahoma City, Okl., and J. Berry King, of Muskogee, Okl., for appellants.
***388** Mr. J. D. Lydick, of Oklahoma City, Okl., for appellee.

Mr. Justice SUTHERLAND delivered the opinion of the Court.
This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of section 7255 and section 7257, Compiled Oklahoma Statutes 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides:
'That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the state, * * * and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state, * * * shall be deemed to be employed by or on behalf of the state. * * *'
For any violation of the section, a penalty is imposed by section 7257 of a fine of not less than $50 nor more than $500, or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense.
***127 *389** The material averments of the bill, shortly stated, are to the following effect: The construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen, and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day, and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.
The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance. From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages 'paid to laborers in the vicinity of Cleveland,' Okl., near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, $3.60 and $4; Johnson Refining Co., $3.60 and $4.05; Prairie Oil & Gas, $4; Gypsy Oil Co., $4; Gulf Pipe Line Co., $4; Brickyard, $3 and $4; I. Hansen, $3.60; General Construction Company, $3.20; Moore & Pitts Ice Company, $100 per month; cotton gins, $3.50 and $4; Mr. Pitts, $4; Prairie Pipe Line Company, $4; C. B. McCormack, $3; Harry McCoy, $3. The scale of wages paid by the construction company to its laborers was stated to be as follows: Six men at $3.20 per day, 7 men at $3.60, 4 men at $4.00, 2 men at $4.40, 4 men at $4.80, 1 man at $5.20, and 1 man at $6.50.
In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under ***390** authority of a statute of Oklahoma, which imposes upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform. Wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men, and it is impossible to determine under the circumstances whether the sums paid by the plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company, and its officers, agents, and representatives, with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under section 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.
The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will

deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term 'locality' itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed.
***391** Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under section 266, Judicial Code (Comp. St. s 1243), and granted; the allegations of the bill being taken as true. General Const. Co. v. Connally (D. C.) 3 F. (2d) 666.
[1] That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510. The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement; but it will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502, 45 S. Ct. 141, 69 L. Ed. 402; ***128** Omaechevarria v. Idaho, 246 U. S. 343, 348, 38 S. Ct. 323, 62 L. Ed. 763, or a well-settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, Nash v. United States, 229 U. S. 373, 376, 33 S. Ct. 780, 57 L. Ed. 1232; International Harvester Co. v. Kentucky, supra, at page 223 (34 S. Ct. 853), or, as broadly stated by Mr. Chief Justice White in United States v. Cohen Grocery Co., 255 U. S. 81, 92, 41 S. Ct. 298, 301 (65 L. Ed. 516, 14 A. L. R. 1045), 'that, for reasons found to ***392** result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' See also, Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 108, 29 S. Ct. 220, 53 L. Ed. 417. Illustrative cases on the other hand are International Harvester Co. v. Kentucky, supra, Collins v. Kentucky, supra, and United States v. Cohen Grocery Co., supra, and cases there cited. The Cohen Grocery Case involved the validity of section 4 of the Food Control Act of 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, s 3115 1/8 ff), which imposed a penalty upon any person who should make 'any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries.' It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.
Among the cases cited in support of that conclusion is United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers 'without crowding' was held to be void for uncertainty. In the course of its opinion, that court said (pages 596, 598):
'The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.
***393** * * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation,

should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'

In the light of these principles and decisions, then, we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees 'not less than the current rate of per diem wages in the locality where the work is performed.'

[2][3] We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction.[FN1] The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The ***394** 'current rate of wages' is not simple, but progressive-from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See People ex rel. Rodgers v. Coler, 166 N. Y. 1, 24-25, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605.

> FN1 The commissioner's own investigation shows that wages ranged from $3 to $4.05 per day, and the scale of wages paid by the construction company to its laborers, 25 in number, ranged from $3.20 to $6.50 per day, all but 6 of them being paid $3.60 or more.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the Legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the Legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase 'current rate of wages' as meaning either the lowest rate or the highest rate, or any intermediate rate, or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the Legislature as to promote it. See State v. Partlow, 91 N. C. 550, 553, 49 Am. Rep. 652; Commonwealth***129** v. Bank of Pennsylvania, 3 Watts & S. (Pa.) 173, 177.

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word 'locality.' Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men, moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the state Supreme Court on rehearing in State v. Tibbetts, 205 P. 776, 779. But all the court did there was to define the word 'locality' as meaning 'place,' ***395** 'near the place,' 'vicinity,' or 'neighborhood.' Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word 'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 296, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16; Woods v. Cochrane and Smith, 38 Iowa, 484, 485; State ex rel. Christie v. Meek, 26 Wash. 405, 407-408, 67 P. 76; Millville Imp. Co. v. Pitman, etc., Gas Co., 75 N. J. Law, 410, 412, 67 A. 1005; Thomas v. Marshfield, 10 Pick. (Mass.) 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term 'neighborhood' was not sufficiently certain to identify the grantees. In other connections or under other conditions the term 'locality' might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression 'near the place' leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, 'How near?' And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary-as in the present case it is alleged it does vary-among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends, not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or

other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal. Interlocutory decree affirmed.

***396** Mr. Justice HOLMES and Mr. Justice BRANDEIS concur in the result, on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

Connally v. General Const. Co.
269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322

END OF DOCUMENT

EXHIBIT 2

West Reporter Image (PDF)

530 U.S. 914, 120 S.Ct. 2597, 68 USLW 4702, 2000 Daily Journal D.A.R. 6977, 147 L.Ed.2d 743, 00 Cal. Daily Op. Serv. 5252, 2000 CJ C.A.R. 3802

Briefs and Other Related Documents

Supreme Court of the United States
Don STENBERG, Attorney General of Nebraska, et al., Petitioners,
v.
Leroy CARHART.
No. 99-830.
Argued April 25, 2000.
Decided June 28, 2000.

Physician who performed abortions brought suit on behalf of himself and his patients challenging constitutionality of Nebraska statute banning "partial birth abortion." The United States District Court for the District of Nebraska, Richard G. Kopf, J., 972 F.Supp. 507, held statute unconstitutional. State of Nebraska appealed. The Eighth Circuit Court of Appeals, Richard S. Arnold, Circuit Judge, 192 F.3d 1142, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) statute was unconstitutional because it lacked any exception for preservation of health of the mother, and (2) statute was unconstitutional because it applied to dilation and evacuation (D&E) procedure as well as to dilation and extraction (D&X) procedure, and thus imposed undue burden on woman's ability to choose D&E abortion, thereby unduly burdening the right to choose abortion itself.
Affirmed.
Justice Stevens filed concurring opinion in which Justice Ginsburg joined.
Justice O'Connor filed concurring opinion.
Justice Ginsburg filed concurring opinion in which Justice Stevens joined.
Chief Justice Rehnquist filed dissenting opinion.
Justice Scalia filed dissenting opinion.
Justice Kennedy filed dissenting opinion in which Chief Justice Rehnquist joined.
Justice Thomas filed dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

West Headnotes

[1] KeyCite Notes

4 Abortion and Birth Control
4k102 k. Right to Abortion in General; Choice. Most Cited Cases
(Formerly 4k0.5)

The Constitution offers basic protection to the woman's right to choose whether to have an abortion.

[2] KeyCite Notes

4 Abortion and Birth Control
4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k0.5)

Before viability, the woman has a right to choose to terminate her pregnancy.

[3] KeyCite Notes

4 Abortion and Birth Control
4k104 k. Scope and Standard of Review. Most Cited Cases
(Formerly 4k1.30)

4 Abortion and Birth Control KeyCite Notes
4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k1.30)

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

[4] KeyCite Notes

4 Abortion and Birth Control
4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k0.5)

4 Abortion and Birth Control KeyCite Notes
4k108 k. Health and Safety of Patient. Most Cited Cases
(Formerly 4k0.5)

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.

[5] KeyCite Notes

4 Abortion and Birth Control
4k106 k. Fetal Age and Viability; Trimester. Most Cited Cases
(Formerly 4k0.5)

The State's interest in regulating abortion previability is considerably weaker than postviability, and, 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.

[6] KeyCite Notes

4 Abortion and Birth Control
4k108 k. Health and Safety of Patient. Most Cited Cases
(Formerly 4k0.5)

The principle that a State may promote but not endanger a woman's health when it regulates the methods of abortion is not limited to situations where the pregnancy itself creates a threat to health.

[7] KeyCite Notes

4 Abortion and Birth Control
4k109 k. Methods, Modes and Procedures. Most Cited Cases
(Formerly 4k0.5)

Nebraska's ban on "partial birth abortion" was unconstitutional because it lacked any exception for preservation of health of the mother; health exception was required because of District Court finding that dilation and extraction (D&X) procedure obviated health risks in certain circumstances, existence of highly plausible explanation of why that might be so, division of opinion among some medical experts over whether D&X was generally safer, and absence of controlled medical studies that would help answer these medical questions. Neb.Rev.St. §§ 28-326(9), 28-328(1).

[8] KeyCite Notes 

4 Abortion and Birth Control
4k108 k. Health and Safety of Patient. Most Cited Cases
(Formerly 4k0.5)

The word "necessary" could not refer to an absolute necessity or to absolute proof, as it was used in *Planned Parenthood of Southeastern Pa. v. Casey,* which set forth the principle that, subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[9] KeyCite Notes 

4 Abortion and Birth Control
4k108 k. Health and Safety of Patient. Most Cited Cases
(Formerly 4k0.5)

The words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion, as they were used in *Planned Parenthood of Southeastern Pa. v. Casey,* which set forth the principle that, subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[10] KeyCite Notes 

4 Abortion and Birth Control
4k109 k. Methods, Modes and Procedures. Most Cited Cases
(Formerly 4k0.5)

A statute that altogether forbids dilation and extraction (D&X) creates a significant health risk and consequently must contain a health exception, but this is not to say that a State is prohibited from proscribing an abortion procedure whenever a particular physician deems the procedure preferable.

[11] KeyCite Notes 

4 Abortion and Birth Control
4k109 k. Methods, Modes and Procedures. Most Cited Cases
(Formerly 4k0.5)

By no means must a State grant physicians unfettered discretion in their selection of abortion methods.

[12] KeyCite Notes

4 Abortion and Birth Control
4k108 k. Health and Safety of Patient. Most Cited Cases
(Formerly 4k0.5)

4 Abortion and Birth Control KeyCite Notes
4k109 k. Methods, Modes and Procedures. Most Cited Cases
(Formerly 4k0.5)

Where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, the statute must include a health exception when the procedure is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[13] KeyCite Notes

4 Abortion and Birth Control
4k109 k. Methods, Modes and Procedures. Most Cited Cases
(Formerly 4k1.30)

Nebraska statute banning "partial birth abortion," which prohibited "delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that * * * does kill the unborn child," was unconstitutional because it applied to commonly used dilation and evacuation (D&E) procedure as well as to dilation and extraction (D&X) procedure, and thus imposed undue burden on woman's ability to choose D&E abortion, thereby unduly burdening the right to choose abortion itself; "substantial portion" language did not allow one to distinguish between D&E, where foot or arm is drawn through cervix, and D&X, where body up to head is drawn through cervix. Neb.Rev.St. §§ 28-326(9), 28-328(1).

[14] KeyCite Notes

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k47 k. Scope of Inquiry in General. Most Cited Cases

In considering constitutionality of Nebraska statute banning "partial birth abortion," Supreme Court would not give interpretative views of Nebraska Attorney General controlling weight, inasmuch as District Court and Court of Appeals had rejected his views, they had not used wrong legal standard in assessing his views, and his views did not bind Nebraska courts. Neb.Rev.St. §§ 28-326(9), 28-328(1).

[15] KeyCite Notes

170B Federal Courts

170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk460 Review on Certiorari
170Bk460.1 k. In General. Most Cited Cases

The Supreme Court normally follows lower federal-court interpretations of state law.

[16] KeyCite Notes

170B Federal Courts
170BVII Supreme Court
170BVII(B) Review of Decisions of Courts of Appeals
170Bk460 Review on Certiorari
170Bk460.1 k. In General. Most Cited Cases

The Supreme Court rarely reviews a construction of state law agreed upon by the two lower federal courts.

[17] KeyCite Notes

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk391 k. Sources of Authority; Assumptions Permissible. Most Cited Cases

The Supreme Court should not accept as authoritative an Attorney General's interpretation of state law when the Attorney General does not bind the state courts or local law enforcement authorities.

[18] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(5) k. Particular Officers, Construction By. Most Cited Cases

Under Nebraska law, the Attorney General's interpretative views do not bind the state courts.

[19] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k177 Constitutional and Statutory Rules and Provisions
361k179 k. Interpretation Clauses and Definitions in Statutes Construed. Most Cited Cases

When a statute includes an explicit definition, the Court of Appeals must follow that definition, even if

it varies from that term's ordinary meaning.

[20] KeyCite Notes

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases

The Supreme Court is without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.

[21] KeyCite Notes

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk392 k. Withholding Decision; Certifying Questions. Most Cited Cases

United States Supreme Court, when considering constitutionality of Nebraska statute banning "partial birth abortion," would not certify to Nebraska Supreme Court question of statute's interpretation; Nebraska Attorney General did not seek narrowing interpretation from Nebraska Supreme Court nor ask federal courts to certify interpretive question, statute was not fairly susceptible to narrowing construction, and Nebraska Supreme Court would grant certification only if certified question would be determinative of the cause, which it would not be in instant case. Neb.Rev.St. §§ 24-219, 28-326(9), 28-328(1).

[22] KeyCite Notes

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk43 k. Questions of State or Foreign Law Involved. Most Cited Cases

170B Federal Courts KeyCite Notes
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk392 k. Withholding Decision; Certifying Questions. Most Cited Cases

Certification of a question of the interpretation of a state statute to a state court or abstention is appropriate only where the statute is fairly susceptible to a narrowing construction

***2600 *914** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The Constitution offers basic protection to a woman's right to choose whether to have an abortion. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674. Before fetal viability, a woman has a right to terminate her pregnancy, *id.,* at 870, 112 S.Ct. 2791 (plurality opinion), and a state law is unconstitutional if it imposes on the woman's decision an "undue burden," *i.e.,* if it has the purpose or effect of placing a substantial obstacle in the woman's path, *id.,* at 877, 112 S.Ct. 2791. Postviability, the State, in promoting its interest in the potentiality of human life, may regulate, and even proscribe, abortion except where "necessary, in appropriate medical judgment, for the preservation of the [mother's] life or health." *E.g., id.,* at 879, 112 S.Ct. 2791. The Nebraska law at issue prohibits any "partial birth abortion" unless that procedure is necessary to save the mother's life. It defines "partial birth abortion" as a procedure in which the doctor "partially delivers vaginally a living unborn child before killing the ··· child," and defines the latter phrase to mean "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the ··· child and does kill the ··· child." Violation of the law is a felony, and it provides for the automatic revocation of a convicted doctor's state license to practice medicine. Respondent Carhart, a Nebraska physician who performs abortions in a clinical setting, brought this suit seeking a declaration that the statute violates the Federal Constitution. The District Court held the statute unconstitutional. The Eighth Circuit affirmed.

Held: Nebraska's statute criminalizing the performance of "partial birth abortion[s]" violates the Federal Constitution, ****2601*** as interpreted in *Casey* and *Roe.* Pp. 2605-2617.

(a) Because the statute seeks to ban one abortion method, the Court discusses several different abortion procedures, as described in the evidence below and the medical literature. During a pregnancy's second trimester (12 to 24 weeks), the most common abortion procedure is "dilation and evacuation" (D & E), which involves dilation of the cervix, removal of at least some fetal tissue using nonvacuum surgical instruments, and (after the 15th week) the potential need for instrumental ****915*** dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus. When such dismemberment is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. The risks of mortality and complication that accompany D & E are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures). A variation of D & E, known as "intact D & E," is used after 16 weeks. It involves removing the fetus from the uterus through the cervix "intact," *i.e.,* in one pass rather than several passes. The intact D & E proceeds in one of two ways, depending on whether the fetus presents head first or feet first. The feet-first method is known as "dilation and extraction" (D & X). D & X is ordinarily associated with the term "partial birth abortion." The District Court concluded that clear and convincing evidence established that Carhart's D & X procedure is superior to, and safer than, the D & E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Carhart. Moreover, materials presented at trial emphasize the potential benefits of the D & X procedure in certain cases. Pp. 2605-2608.

(b) The Nebraska statute lacks the requisite exception "for the preservation of the ··· health of the mother." *Casey, supra,* at 879, 112 S.Ct. 2791 (plurality opinion). The State may promote but not endanger a woman's health when it regulates the methods of abortion. Pp. 2608-2613.

(i) The Court rejects Nebraska's contention that there is no need for a health exception here because safe alternatives remain available and a ban on partial birth abortion/D & X would create no risk to women's health. The parties strongly contested this factual question in the District Court; and the findings and evidence support Dr. Carhart. P. 2610.

(ii) Nebraska and its supporting *amici* respond with eight arguments as to why the District Court's findings are irrelevant, wrong, or applicable only in a tiny number of instances. Pp. 2610-2611.

(iii) The eight arguments are insufficient to demonstrate that Nebraska's law needs no health exception. For one thing, certain of the arguments are beside the point. The D & X procedure's relative rarity (argument (1)) is not highly relevant. The State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. And the fact that only a "handful" of doctors use the procedure (argument (2)) may reflect the comparative rarity of late second term abortions, the procedure's recent development, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility. For another thing, the record responds to Nebraska's (and *amici's*) medically based arguments. As to argument (3), the District ****916*** Court agreed that alternatives such as D & E and induced labor are "safe," but found that the D & X method was *safer* in the circumstances used by Carhart. As to argument (4)-that testimony showed that the

statutory ban would not increase a woman's risk of several rare abortion complications-the District Court simply relied on different expert testimony than the State. Argument (5)-the assertion of *amici* Association of American Physicians and Surgeons et al. that elements of the D & X procedure may create special risks-****2602** is disputed by Carhart's *amici,* including the American College of Obstetricians and Gynecologists (ACOG), which claims that the suggested alternative procedures involve similar or greater risks of cervical and uterine injury. Nebraska's argument (6) is right-there are no general medical studies documenting the comparative safety of the various abortion procedures. Nor does the Court deny the import of the American Medical Association's (AMA) recommendation (argument (7)) that intact D & X not be used unless alternative procedures pose materially greater risk to the woman. However, the Court cannot read ACOG's qualification that it could not identify a circumstance where D & X was the "only" life- or health-preserving option as if, according to Nebraska's argument (8), it denied the potential health-related need for D & X. ACOG has also asserted that D & X can be the most appropriate abortion procedure and presents a variety of potential safety advantages. Pp. 2611-2612.

(iv) The upshot is a District Court finding that D & X obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of medical opinion over whether D & X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these circumstances, the Court believes the law requires a health exception. For one thing, the word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the ··· health of the mother," 505 U.S., at 879, 112 S.Ct. 2791, cannot refer to absolute proof or require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion. For another thing, the division of medical opinion signals uncertainty. If those who believe that D & X is a safer abortion method in certain circumstances turn out to be right, the absence of a health exception will place women at an unnecessary risk. If they are wrong, the exception will simply turn out to have been unnecessary. Pp. 2612-2613.

(c) The Nebraska statute imposes an "undue burden" on a woman's ability to choose an abortion. See *Casey, supra,* at 874, 112 S.Ct. 2791 (plurality opinion). Pp. 2613-2617.

***917** i) Nebraska does not deny that the statute imposes an "undue burden" *if* it applies to the more commonly used D & E procedure as well as to D & X. This Court agrees with the Eighth Circuit that the D & E procedure falls within the statutory prohibition of intentionally delivering into the vagina a living fetus, or "a substantial portion thereof," for the purpose of performing a procedure that the perpetrator knows will kill the fetus. Because the evidence makes clear that D & E will often involve a physician pulling an arm, leg, or other "substantial portion" of a still living fetus into the vagina prior to the fetus' death, the statutory terms do not to distinguish between D & X and D & E. The statute's language does not track the medical differences between D & E and D & X, but covers both. Using the law's statutory terms, it is impossible to distinguish between D & E (where a foot or arm is drawn through the cervix) and D & X (where the body up to the head is drawn through the cervix). Both procedures can involve the introduction of a "substantial portion" of a still living fetus, through the cervix, into the vagina-the very feature of an abortion that leads to characterizing such a procedure as involving "partial birth." Pp. 2613-2614.

(ii) The Court rejects the Nebraska Attorney General's arguments that the state law does differentiate between the two procedures- *i.e.,* that the words "substantial portion" mean "the child up to the head," such that the law is inapplicable where the physician introduces into the birth canal anything less than the entire ****2603** fetal body-and that the Court must defer to his views. The Court's case law makes clear that the Attorney General's narrowing interpretation cannot be given controlling weight. For one thing, this Court normally follows lower federal-court interpretations of state law, *e.g., McMillian v. Monroe County,* 520 U.S. 781, 786, 117 S.Ct. 1734, 138 L.Ed.2d 1, and rarely reviews such an interpretation that is agreed upon by the two lower federal courts. *Virginia v. American Booksellers Assn., Inc.,* 484 U.S. 383, 395, 108 S.Ct. 636, 98 L.Ed.2d 782. Here, the two lower courts both rejected the Attorney General's narrowing interpretation. For another, the Court's precedent warns against accepting as "authoritative" an Attorney General's interpretation of state law where, as here, that interpretation does not bind the state courts or local law enforcement. In Nebraska, elected county attorneys have independent authority to initiate criminal prosecutions. Some present prosecutors (and future Attorneys General) might use the law at issue to pursue physicians who use D & E procedures. Nor can it be said that the lower courts used the wrong legal standard in assessing the Attorney General's interpretation. The Eighth Circuit recognized its duty to

give the law a construction that would avoid constitutional doubt, but nonetheless concluded that the Attorney General's interpretation would twist the law's words, giving them a meaning they cannot reasonably bear. ***918** The Eighth Circuit is far from alone in rejecting such a narrowing interpretation, since 11 of the 12 federal courts that have interpreted on the merits the model statutory language on which the Nebraska law is based have found the language potentially applicable to abortion procedures other than D & X. Regardless, were the Court to grant the Attorney General's views "substantial weight," it would still have to reject his interpretation, for it conflicts with the statutory language. The statutory words, "substantial portion," indicate that the statute does not include the Attorney General's restriction-"the child up to the head." The Nebraska Legislature's debates hurt the Attorney General's argument more than they help it, indicating that as small a portion of the fetus as a foot would constitute a "substantial portion." Even assuming that the distinction the Attorney General seeks to draw between the overall abortion procedure itself and the separate procedure used to kill an unborn child would help him make the D & E/D & X distinction he seeks, there is no language in the statute that supports it. Although adopting his interpretation might avoid the constitutional problem discussed above, the Court lacks power do so where, as here, the narrowing construction is not reasonable and readily apparent. *E.g.*, Boos v. Barry, 485 U.S. 312, 330, 108 S.Ct. 1157, 99 L.Ed.2d 333. Finally, the Court has never held that a federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 770, n. 11, 108 S.Ct. 2138, 100 L.Ed.2d 771. But any authoritative state-court construction is lacking here. The Attorney General neither sought a narrowing interpretation from the Nebraska Supreme Court nor asked the federal courts to certify the interpretive question. Cf. Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170. Even were the Court inclined to certify the question now, it could not do so because certification is appropriate only where the statute is "fairly susceptible" to a narrowing construction, see Houston v. Hill, 482 U.S. 451, 468-471, 107 S.Ct. 2502, 96 L.Ed.2d 398, as is not the case here. Moreover, the Nebraska Supreme Court grants certification only if the certified question is determinative of the cause, see *id.*, at 471, 107 S.Ct. 2502, as it would not be here. In sum, because all those who perform abortion procedures using the D & E method must fear prosecution, conviction, and imprisonment, the Nebraska law imposes an undue burden upon ****2604** a woman's right to make an abortion decision. Pp. 2613-2617.
192 F.3d 1142, affirmed.
BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post,* p. 2617. O'CONNOR, J., filed a concurring opinion, *post,* p. 2617. GINSBURG, J., filed a concurring ***919** opinion, in which STEVENS, J., joined, *post,* p. 2620. REHNQUIST, C.J., *post,* p. 2620, and SCALIA, J., *post,* p. 2621, filed dissenting opinions. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post,* p. 2623. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C.J., and SCALIA, J., joined, *post,* p. 2635.

Donald B. Stenberg, Lincoln, NE, for petitioners.
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For U.S. Supreme Court briefs, see:2000 WL 228615 (Pet.Brief)2000 WL 340275 (Resp.Brief)2000 WL 432363 (Reply.Brief)

***920** Justice BREYER delivered the opinion of the Court.

[1] We again consider the right to an abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of ***921** these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the

woman's right to choose. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.

[2] Three established principles determine the issue before us. We shall set them forth in the language of the joint opinion in *Casey.* First, before "viability ··· the woman has a right to choose to terminate her pregnancy." *Id.,* at 870, 112 S.Ct. 2791 (plurality opinion).

[3] Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. *Id.,* at 877, 112 S.Ct. 2791. An "undue burden is ··· shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid.*

[4] Third, " 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " *Id.,* at 879, 112 S.Ct. 2791 (quoting *Roe v. Wade, supra,* at 164-165, 93 S.Ct. 705).

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

"No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering****2605** physical condition caused by or arising***922** 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 law classifies violation of the statute as a "Class III felony" carrying a prison term of up to 20 years, and a fine of up to $25,000. §§ 28-328(2), 28-105. It also provides for the automatic revocation of a doctor's license to practice medicine in Nebraska. § 28-328(4).

We hold that this statute violates the Constitution.

I

A

Dr. Leroy Carhart is a Nebraska physician who performs abortions in a clinical setting. He brought this lawsuit in Federal District Court seeking a declaration that the Nebraska statute violates the Federal Constitution, and asking for an injunction forbidding its enforcement. After a trial on the merits, during which both sides presented several expert witnesses, the District Court held the statute unconstitutional. 11 F.Supp.2d 1099 (D.Neb.1998). On appeal, the Eighth Circuit affirmed. 192 F.3d 1142 (1999); cf. *Hope Clinic v. Ryan,* 195 F.3d 857 (C.A.7 1999) (en banc) (considering***923** a similar statute, but reaching a different legal conclusion). We granted certiorari to consider the matter.

B

Because Nebraska law seeks to ban one method of aborting a pregnancy, we must describe and then discuss several different abortion procedures. Considering the fact that those procedures seek to terminate a potential human life, our discussion may seem clinically cold or callous to some, perhaps

horrifying to others. There is no alternative way, however, to acquaint the reader with the technical distinctions among different abortion methods and related factual matters, upon which the outcome of this case depends. For that reason, drawing upon the findings of the trial court, underlying testimony, and related medical texts, we shall describe the relevant methods of performing abortions in technical detail.

The evidence before the trial court, as supported or supplemented in the literature, indicates the following:

1. About 90% of all abortions performed in the United States take place during the first trimester of pregnancy, before 12 weeks of gestational age. Centers for Disease Control and Prevention, Abortion Surveillance-United States, 1996, p. 41 (July 30, 1999) (hereinafter Abortion Surveillance). During the first trimester, the predominant abortion method is "vacuum aspiration," which involves insertion of a vacuum tube (cannula) into the uterus to evacuate the contents. Such an abortion is typically performed on an outpatient basis under local anesthesia. 11 F.Supp.2d, at 1102; Obstetrics: Normal & Problem Pregnancies 1253-1254 (S. Gabbe, J. Niebyl, & J. Simpson eds.3d ed.1996). Vacuum aspiration is considered particularly safe. The procedure's mortality rates for first trimester abortion are, for example, 5 to 10 times lower than those associated with carrying the fetus to term. Complication rates are also low. *Id.*, at 1251; Lawson et al., Abortion Mortality, ****2606*** United ****924*** States, 1972 through 1987, 171 Am. J. Obstet. Gynecol. 1365, 1368 (1994); M. Paul et al., A Clinicians Guide to Medical and Surgical Abortion 108-109 (1999) (hereinafter Medical and Surgical Abortion). As the fetus grows in size, however, the vacuum aspiration method becomes increasingly difficult to use. 11 F.Supp.2d, at 1102-1103; Obstetrics: Normal & Problem Pregnancies, *supra,* at 1268.

2. Approximately 10% of all abortions are performed during the second trimester of pregnancy (12 to 24 weeks). Abortion Surveillance 41. In the early 1970's, inducing labor through the injection of saline into the uterus was the predominant method of second trimester abortion. *Id.*, at 8; *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 76, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). Today, however, the medical profession has switched from medical induction of labor to surgical procedures for most second trimester abortions. The most commonly used procedure is called "dilation and evacuation" (D & E). That procedure (together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks of gestational age. Abortion Surveillance 41.

3. D & E "refers generically to transcervical procedures performed at 13 weeks gestation or later." American Medical Association, Report of Board of Trustees on Late-Term Abortion, App. 490 (hereinafter AMA Report). The AMA Report, adopted by the District Court, describes the process as follows.

Between 13 and 15 weeks of gestation:

"D & E is similar to vacuum aspiration except that the cervix must be dilated more widely because surgical instruments are used to remove larger pieces of tissue. Osmotic dilators are usually used. Intravenous fluids and an analgesic or sedative may be administered. A local anesthetic such as a paracervical block may be administered, dilating agents, if used, are removed and instruments are inserted through the cervix into the ****925*** uterus to removal fetal and placental tissue. Because fetal tissue is friable and easily broken, the fetus may not be removed intact. The walls of the uterus are scraped with a curette to ensure that no tissue remains." *Id.*, at 490-491.

After 15 weeks:

"Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages to remove fetal and placental tissue." *Id.*, at 491.

After 20 weeks:

"Some physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D & E (after 20 weeks), to facilitate evacuation." *Id.*, at 491-492.

There are variations in D & E operative strategy; compare *ibid.* with W. Hern, Abortion Practice 146-156 (1984), and Medical and Surgical Abortion 133-135. However, the common points are that D & E involves (1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments; and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus.

4. When instrumental disarticulation incident to D & E is necessary, it typically occurs as the doctor pulls a portion of the fetus through the cervix into the birth canal. Dr. Carhart testified at trial as follows:

"Dr. Carhart: ··· 'The dismemberment occurs between the traction of ··· my instrument and the counter-traction of the internal os of the cervix ····
"Counsel: 'So the dismemberment occurs after you pulled a part of the fetus through the cervix, is that correct?
***2607 *926** "Dr. Carhart: 'Exactly. Because you're using-The cervix has two strictures or two rings, the internal os and the external os ··· that's what's actually doing the dismembering ···.
"Counsel: 'When we talked before or talked before about a D & E, that is not-where there is not intention to do it intact, do you, in that situation, dismember the fetus in utero first, then remove portions?
"Dr. Carhart: 'I don't think so. ··· I don't know of any way that one could go in and intentionally dismember the fetus in the uterus. ··· It takes something that restricts the motion of the fetus against what you're doing before you're going to get dismemberment.' " 11 F.Supp.2d, at 1104.
Dr. Carhart's specification of the location of fetal disarticulation is consistent with other sources. See Medical and Surgical Abortion 135; App. in Nos. 98-3245 and 98-3300(CA8), p. 683, (testimony of Dr. Phillip Stubblefield) ("Q: So you don't actually dismember the fetus in utero, then take the pieces out? A: No").
5. The D & E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications. See 11 F.Supp.2d, at 1110; Gynecologic, Obstetric, and Related Surgery 1045 (D. Nichols & D. Clarke-Pearson eds.2d ed.2000); F. Cunningham et al., Williams Obstetrics 598 (20th ed.1997). Nonetheless studies show that the risks of mortality and complication that accompany the D & E procedure between the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures). See Gynecologic, Obstetric, and Related Surgery, *supra,* at 1046; AMA Report, App. 495, 496; Medical ***927** and Surgical Abortion 139, 142; Lawson, 171 Am. J. Obstet. Gynecol., at 1368.
6. At trial, Dr. Carhart and Dr. Stubblefield described a variation of the D & E procedure, which they referred to as an "intact D & E." See 11 F.Supp.2d, at 1105, 1111. Like other versions of the D & E technique, it begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix "intact," *i.e.,* in one pass, rather than in several passes. *Ibid.* It is used after 16 weeks at the earliest, as vacuum aspiration becomes ineffective and the fetal skull becomes too large to pass through the cervix. *Id.,* at 1105. The intact D & E proceeds in one of two ways, depending on the presentation of the fetus. If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix. *Ibid.* The breech extraction version of the intact D & E is also known commonly as "dilation and extraction," or D & X. *Id.,* at 1112. In the late second trimester, vertex, breech, and traverse/compound (sideways) presentations occur in roughly similar proportions. Medical and Surgical Abortion 135; 11 F.Supp.2d, at 1108.
7. The intact D & E procedure can also be found described in certain obstetric and abortion clinical textbooks, where two variations are recognized. The first, as just described, calls for the physician to adapt his method for extracting the intact fetus depending on fetal presentation. See Gynecologic, Obstetric, and Related Surgery, *supra,* at 1043; Medical and Surgical Abortion 136-137. This is the method used by Dr. Carhart. See 11 F.Supp.2d, at 1105. A slightly different version of the intact D & E procedure, associated with Dr. Martin Haskell, calls for conversion to a breech presentation in all cases. See Gynecologic, Obstetric, and Related ***2608 *928** Surgery, *supra,* at 1043 (citing M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), in 139 Cong. Rec. 8605 (1993)).
8. The American College of Obstetricians and Gynecologists describes the D & X procedure in a manner corresponding to a breech-conversion intact D & E, including the following steps:
"1. deliberate dilatation of the cervix, usually over a sequence of days;
"2. instrumental conversion of the fetus to a footling breech;
"3. breech extraction of the body excepting the head; and
"4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus." American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997) (hereinafter ACOG Statement), App. 599-560.
Despite the technical differences we have just described, intact D & E and D & X are sufficiently

similar for us to use the terms interchangeably.
9. Dr. Carhart testified he attempts to use the intact D & E procedure during weeks 16 to 20 because (1) it reduces the dangers from sharp bone fragments passing through the cervix, (2) minimizes the number of instrument passes needed for extraction and lessens the likelihood of uterine perforations caused by those instruments, (3) reduces the likelihood of leaving infection-causing fetal and placental tissue in the uterus, and (4) could help to prevent potentially fatal absorption of fetal tissue into the maternal circulation. See 11 F.Supp.2d, at 1107. The District Court made no findings about the D & X procedure's overall safety. *Id.*, at 1126, n. 39. The District Court concluded, however, that "the evidence is both clear and convincing that Carhart's ***929** D & X procedure is superior to, and safer than, the ··· other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart." *Id.*, at 1126.
10. The materials presented at trial referred to the potential benefits of the D & X procedure in circumstances involving nonviable fetuses, such as fetuses with abnormal fluid accumulation in the brain (hydrocephaly). See 11 F.Supp.2d, at 1107 (quoting AMA Report, App. 492 (" 'Intact D & X may be preferred by some physicians, particularly when the fetus has been diagnosed with hydrocephaly or other anomalies incompatible with life outside the womb' ")); see also Grimes, The Continuing Need for Late Abortions, 280 JAMA 747, 748 (Aug. 26, 1998) (D & X "may be especially useful in the presence of fetal anomalies, such as hydrocephalus," because its reduction of the cranium allows "a smaller diameter to pass through the cervix, thus reducing risk of cervical injury"). Others have emphasized its potential for women with prior uterine scars, or for women for whom induction of labor would be particularly dangerous. See *Women's Medical Professional Corp. v. Voinovich*, 911 F.Supp. 1051, 1067 (S.D.Ohio 1995); *Evans v. Kelley*, 977 F.Supp. 1283, 1296 (E.D.Mich.1997).
11. There are no reliable data on the number of D & X abortions performed annually. Estimates have ranged between 640 and 5,000 per year. Compare Henshaw, Abortion Incidence and Services in the United States, 1995-1996, 30 Family Planning Perspectives 263, 268 (1998), with Joint Hearing on S. 6 and H.R. 929 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 1st Sess., 46 (1997).

II

The question before us is whether Nebraska's statute, making criminal the performance of a "partial birth abortion," violates the Federal Constitution, as interpreted in ***930** ****2609** *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). We conclude that it does for at least two independent reasons. First, the law lacks any exception " 'for the preservation of the ··· health of the mother.' " *Casey*, 505 U.S., at 879, 112 S.Ct. 2791 (plurality opinion). Second, it "imposes an undue burden on a woman's ability" to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself. *Id.*, at 874, 112 S.Ct. 2791. We shall discuss each of these reasons in turn.

A

The *Casey* plurality opinion reiterated what the Court held in *Roe;* that " 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*' " 505 U.S., at 879, 112 S.Ct. 2791 (quoting *Roe, supra*, at 164-165, 93 S.Ct. 705) (emphasis added).

[5] The fact that Nebraska's law applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability. See *Casey, supra*, at 870, 112 S.Ct. 2791. 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. See *Casey, supra*, at 880, 112 S.Ct. 2791 (majority opinion) (assuming need for health exception previability); see also *Harris v. McRae*, 448 U.S. 297, 316, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).
The quoted standard also depends on the state regulations "promoting [the State's] interest in the potentiality of human life." The Nebraska law, of course, does not directly further an interest "in the potentiality of human life" by saving the fetus in question from destruction, as it regulates only a

method of performing abortion. Nebraska describes its interests differently. It says the law " 'show[s] concern for the life of the unborn,' " "prevent[s] cruelty to partially born children,"***931*** and "preserve[s] the integrity of the medical profession." Brief for Petitioners 48. But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the "health" requirement.

Consequently, the governing standard requires an exception "where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother," Casey, supra, at 879, 112 S.Ct. 2791, 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. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-769, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986); Colautti v. Franklin, 439 U.S. 379, 400, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979); Danforth, 428 U.S., at 76-79, 96 S.Ct. 2831; Doe v. Bolton, 410 U.S. 179, 197, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

[6] Justice THOMAS says that the cases just cited limit this principle to situations where the pregnancy *itself* creates a threat to health. See *post,* at 2651. He is wrong. The cited cases, reaffirmed in Casey, recognize that a State cannot subject women's health to significant risks both in that context, *and also* where state regulations force women to use riskier methods of abortion. Our cases have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks. They make clear that a risk to a women's health is the same whether it happens to arise from regulating a particular method of abortion, or from barring abortion entirely. Our holding does not go beyond those cases, as ratified in Casey.

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Nebraska responds that the law does not require a health exception unless there is a need for such an exception. And here there is no such need, it says. It argues that "safe alternatives remain available" and "a ban on partial-birth abortion/D & X would create no risk to the health of women." Brief for Petitioners 29, 40. The problem for Nebraska is ***932*** that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart. The State fails to demonstrate that banning D & X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D & X would be the safest procedure.

We shall reiterate in summary form the relevant findings and evidence. On the basis of medical testimony the District Court concluded that "Carhart's D & X procedure is ··· safer tha[n] the D & E and other abortion procedures used during the relevant gestational period in the 10 to 20 cases a year that present to Dr. Carhart." 11 F.Supp.2d, at 1126. It found that the D & X procedure permits the fetus to pass through the cervix with a minimum of instrumentation. Ibid. It thereby "reduces operating time, blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix; prevents the most common causes of maternal mortality (DIC and amniotic fluid embolus); and eliminates the possibility of 'horrible complications' arising from retained fetal parts." Ibid.

The District Court also noted that a select panel of the American College of Obstetricians and Gynecologists concluded that D & X " 'may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman.' " Id., at 1105, n. 10 (quoting ACOG Statement, App. 600-601) (but see an important qualification, *infra,* at 2610). With one exception, the federal trial courts that have heard expert evidence on the matter have reached similar factual conclusions. See Rhode Island Medical Soc. v. Whitehouse, 66 F.Supp.2d 288, 314 (D.R.I.1999); A Choice for Women v. Butterworth, 54 F.Supp.2d 1148, 1153, 1156 (S.D.Fla.1998); Causeway Medical Suite v. Foster, 43 F.Supp.2d 604, 613-614 (E.D.La.1999); ***933*** Richmond Medical Center for Women v. Gilmore, 11 F.Supp.2d 795, 827, n. 40 (E.D.Va.1998); Hope Clinic v. Ryan, 995 F.Supp. 847, 852 (N.D.Ill.1998), vacated, 195 F.3d 857 (C.A.7 1999), cert. pending, No. 99-1152; Voinovich, 911 F.Supp., at 1069-1070; Kelley, 977 F.Supp., at 1296; but see Planned Parenthood of Wis. v. Doyle, 44 F.Supp.2d 975, 980 (W.D.Wis.), vacated, 195 F.3d 857 (C.A.7 1999).

Nebraska, along with supporting *amici,* replies that these findings are irrelevant, wrong, or applicable

only in a tiny number of instances. It says (1) that the D & X procedure is "little-used," (2) by only "a handful of doctors." Brief for Petitioners 32. It argues (3) that D & E and labor induction are at all times "safe alternative procedures." *Id.,* at 36. It refers to the testimony of petitioners' medical expert, who testified (4) that the ban would not increase a woman's risk of several rare abortion complications (disseminated intravascular coagulopathy and amniotic fluid embolus), *id.,* at 37; App. 642-644.

The Association of American Physicians and Surgeons et al., *amici* supporting Nebraska, argue (5) that elements of the D & X procedure may create special risks, including cervical incompetence caused by overdilitation, injury caused by conversion of the fetal presentation, and dangers arising from the "blind" use of instrumentation to pierce the fetal skull while lodged in the birth canal. See Brief for Association of American Physicians and Surgeons ****2611** et al. as *Amici Curiae* 21-23; see also Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744, 746 (Aug. 26, 1998).

Nebraska further emphasizes (6) that there are no medical studies "establishing the safety of the partial-birth abortion/D & X procedure," Brief for Petitioners 39, and "no medical studies comparing the safety of partial-birth abortion/D & X to other abortion procedures," *ibid.* It points to, ***934** *id.,* at 35, 7) an American Medical Association policy statement that " 'there does not appear to be any identified situation in which intact D & X is the only appropriate procedure to induce abortion,' " Late Term Pregnancy Termination Techniques, AMA Policy H-5.982 (1997). And it points out (8) that the American College of Obstetricians and Gynecologists qualified its statement that D & X "may be the best or most appropriate procedure," by adding that the panel "could identify no circumstances under which [the D & X] procedure ··· would be the only option to save the life or preserve the health of the woman." App. 600-601.

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We find these eight arguments insufficient to demonstrate that Nebraska's law needs no health exception. For one thing, certain of the arguments are beside the point. The D & X procedure's relative rarity (argument (1)) is not highly relevant. The D & X is an infrequently used abortion procedure; but the health exception question is whether protecting women's health requires an exception for those infrequent occasions. A rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone-the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it. Nor can we know whether the fact that only a "handful" of doctors use the procedure (argument (2)) reflects the comparative rarity of late second term abortions, the procedure's recent development, Gynecologic, Obstetric, and Related Surgery, at 1043, the controversy surrounding it, or, as Nebraska suggests, the procedure's lack of utility.

For another thing, the record responds to Nebraska's (and *amici* 's) medically based arguments. In respect to argument (3), for example, the District Court agreed that alternatives, such as D & E and induced labor, are "safe" but found that the D & X method was significantly *safer* in certain circumstances. 11 F.Supp.2d, at 1125-1126. In respect to ***935** argument (4), the District Court simply relied on different expert testimony-testimony stating that " '[a]nother advantage of the Intact D & E is that it eliminates the risk of embolism of cerebral tissue into the woman's blood stream.' " *Id.,* at 1124 quoting Hearing on H.R. 1833 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 260 (1995) (statement of W. Hern).

In response to *amici* 's argument (5), the American College of Obstetricians and Gynecologists, in its own *amici* brief, denies that D & X generally poses risks greater than the alternatives. It says that the suggested alternative procedures involve similar or greater risks of cervical and uterine injury, for "D & E procedures, involve similar amounts of dilitation" and "of course childbirth involves even greater cervical dilitation." Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 23. The College points out that Dr. Carhart does not reposition the fetus thereby avoiding any risks stemming from conversion to breech presentation, and that, as compared with D & X, D & E involves the same, if not greater, "blind" use of sharp instruments in the uterine cavity. *Id.,* at 23-24.

We do not quarrel with Nebraska's argument (6), for Nebraska is right. There are no general medical studies documenting comparative safety. Neither do we deny the import of the American Medical Association's statement (argument (7))-even though the State does omit the remainder****2612** of that statement: "The AMA recommends that the procedure not be used *unless alternative procedures pose materially greater risk to the woman."* Late Term Pregnancy Termination Techniques, AMA Policy

H-5.982 (emphasis added).
We cannot, however, read the American College of Obstetricians and Gynecologists panel's qualification (that it could not "identify" a circumstance where D & X was the "only" life- or health-preserving option) as if, according to Nebraska's argument (8), it denied the potential health-related need ***936*** for D & X. That is because the College writes the following in its *amici* brief:
"Depending on the physician's skill and experience, the D & X procedure can be the most appropriate abortion procedure for some women in some circumstances. D & X presents a variety of potential safety advantages over other abortion procedures used during the same gestational period. Compared to D & Es involving dismemberment, D & X involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix. There is also considerable evidence that D & X reduces the risk of retained fetal tissue, a serious abortion complication that can cause maternal death, and that D & X reduces the incidence of a 'free floating' fetal head that can be difficult for a physician to grasp and remove and can thus cause maternal injury. That D & X procedures usually take less time than other abortion methods used at a comparable stage of pregnancy can also have health advantages. The shorter the procedure, the less blood loss, trauma, and exposure to anesthesia. The intuitive safety advantages of intact D & E are supported by clinical experience. Especially for women with particular health conditions, there is medical evidence that D & X may be safer than available alternatives." Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 21-22 (citation and footnotes omitted).

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[7] The upshot is a District Court finding that D & X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over ***937*** whether D & X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these medically related evidentiary circumstances, we believe the law requires a health exception.

[8] [9] The word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," 505 U.S., at 879, 112 S.Ct. 2791 (internal quotation marks omitted), cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words "appropriate medical judgment" must embody the judicial need to tolerate responsible differences of medical opinion-differences of a sort that the American Medical Association and American College of Obstetricians and Gynecologists' statements together indicate are present here.
For another thing, the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the ****2613*** issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D & X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.

[10] [11] [12] In sum, Nebraska has not convinced us that a health exception is "never necessary to preserve the health of ***938*** women." Reply Brief for Petitioners 4. Rather, a statute that altogether forbids D & X creates a significant health risk. The statute consequently must contain a health exception. This is not to say, as Justice THOMAS and Justice KENNEDY claim, that a State is prohibited from proscribing an abortion procedure whenever a particular physician deems the procedure preferable. By no means must a State grant physicians "unfettered discretion" in their

selection of abortion methods. *Post,* at 2629 (KENNEDY, J., dissenting). But where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is " 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " 505 U.S., at 879, 112 S.Ct. 2791. Requiring such an exception in this case is no departure from *Casey,* but simply a straightforward application of its holding.

B

[13] The Eighth Circuit found the Nebraska statute unconstitutional because, in *Casey's* words, it has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.,* at 877, 112 S.Ct. 2791. It thereby places an "undue burden" upon a woman's right to terminate her pregnancy before viability. *Ibid.* Nebraska does not deny that the statute imposes an "undue burden" *if* it applies to the more commonly used D & E procedure as well as to D & X. And we agree with the Eighth Circuit that it does so apply.

Our earlier discussion of the D & E procedure, *supra,* at 2606-2607, shows that it falls within the statutory prohibition. The statute forbids "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." Neb.Rev.Stat. Ann. § 28-326 (9) (Supp.1999). We ***939** do not understand how one could distinguish, using this language, between D & E (where a foot or arm is drawn through the cervix) and D & X (where the body up to the head is drawn through the cervix). Evidence before the trial court makes clear that D & E will often involve a physician pulling a "substantial portion" of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus. 11 F.Supp.2d, at 1128; *id.,* at 1128-1130. Indeed D & E involves dismemberment that commonly occurs only when the fetus meets resistance that restricts the motion of the fetus: "The dismemberment occurs between the traction of ··· [the] instrument and the counter-traction of the internal os of the cervix." *Id.,* at 1128. And these events often do not occur until after a portion of a living fetus has been pulled into the vagina. *Id.,* at 1104; see also Medical and Surgical Abortion 135 ("During the mid-second trimester, separation of the fetal corpus may occur when the fetus is drawn into the lower uterine segment, where compression and traction against the endocervix facilitates disarticulation").

****2614** 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. *E.g.,* Kan. Stat. Ann. § 65-6721(b)(1) (Supp.1999). Nor does the statute anywhere suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus. Thus, the dissenters' argument that the law was generally intended to bar D & X can be both correct and irrelevant. The relevant question is *not* whether the legislature wanted to ban D & X; it is whether the law was intended to apply *only* to D & X. The plain language covers both procedures. A rereading of this opinion, *supra,* at 2606-2608, as ***940** well as Justice THOMAS' dissent *post,* at 2637-2639, will make clear why we can find no difference, in terms of *this* statute, between the D & X procedure as described and the D & E procedure as it might be performed. (In particular, compare *post,* at 2637-2638, (THOMAS, J., dissenting), with *post,* at 2638-2640 (THOMAS, J., dissenting).) Both procedures can involve the introduction of a "substantial portion" of a still living fetus, through the cervix, into the vagina-the very feature of an abortion that leads Justice THOMAS to characterize such a procedure as involving "partial birth."

The Nebraska State Attorney General argues that the statute does differentiate between the two procedures. He says that the statutory words "substantial portion" mean "the child up to the head." He consequently denies the statute's application where the physician introduces into the birth canal a fetal arm or leg or anything less than the entire fetal body. Brief for Petitioners 20. He argues further that we must defer to his views about the meaning of the state statute. *Id.,* at 2640-2641.

[14] [15] [16] We cannot accept the Attorney General's narrowing interpretation of the Nebraska statute. This Court's case law makes clear that we are not to give the Attorney General's

interpretative views controlling weight. For one thing, this Court normally follows lower federal-court interpretations of state law. *McMillian v. Monroe County,* 520 U.S. 781, 786, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 500, n. 9, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). It "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Virginia v. American Booksellers Assn., Inc.,* 484 U.S. 383, 395, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). In this case, the two lower courts have both rejected the Attorney General's narrowing interpretation.

[17] [18] For another, our precedent warns against accepting as "authoritative" an Attorney General's interpretation of state law when "the Attorney General does not bind the state courts or local law enforcement authorities." *Ibid.* ***941** Under Nebraska law, the Attorney General's interpretative views do not bind the state courts. *State v. Coffman,* 213 Neb. 560, 561, 330 N.W.2d 727, 728 (1983) (Attorney General's issued opinions, while entitled to "substantial weight" and "to be respectfully considered," are of "no controlling authority"). Nor apparently do they bind elected county attorneys, to whom Nebraska gives an independent authority to initiate criminal prosecutions. Neb.Rev.Stat. Ann. §§ 23-1201(1), 28-328(5), 84-205(3) (Supp. 1999); cf. *Crandon v. United States,* 494 U.S. 152, 177, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (SCALIA, J., concurring in judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference").

****2615** Nor can we say that the lower courts used the wrong legal standard in assessing the Attorney General's interpretation. The Eighth Circuit recognized its "duty to give [the law] a construction ··· that would avoid constitutional doubts." 192 F.3d, at 1150. It nonetheless concluded that the Attorney General's interpretation would "twist the words of the law and give them a meaning they cannot reasonably bear." *Ibid.* The Eighth Circuit is far from alone in rejecting such a narrowing interpretation. The language in question is based on model statutory language (though some States omit any further definition of "partial birth abortion"), which 10 lower federal courts have considered on the merits. All 10 of those courts (including the Eighth Circuit) have found the language potentially applicable to other abortion procedures. See *Planned Parenthood of Greater Iowa, Inc. v. Miller,* 195 F.3d 386 (C.A.8 1999); *Little Rock Family Planning Services v. Jegley,* 192 F.3d 794, 797-798 (C.A.8 1999); *Hope Clinic,* 195 F.3d, at 865-871 (imposing precautionary injunction to prevent application beyond D & X); *id.,* at 885-889 (Posner, C. J., dissenting); *Rhode Island Medical Soc.,* 66 F.Supp.2d, at 309-310; ***942** *Richmond Medical Center for Women,* 55 F.Supp.2d, at 471; *A Choice for Women,* 54 F.Supp.2d, at 1155; *Causeway Medical Suite,* 43 F.Supp.2d, at 614-615; *Planned Parenthood of Central N.J. v. Verniero,* 41 F.Supp.2d 478, 503-504 (D.N.J.1998); *Eubanks v. Stengel,* 28 F.Supp.2d 1024, 1034-1035 (W.D.Ky.1998); *Planned Parenthood of Southern Ariz., Inc. v. Woods,* 982 F.Supp. 1369, 1378 (D.Ariz.1997); *Kelley,* 977 F.Supp., at 1317; but cf. *Richmond Medical Center v. Gilmore,* 144 F.3d 326, 330-332 (C.A.4 1998) (Luttig, J., granting stay).

[19] Regardless, even were we to grant the Attorney General's views "substantial weight," we still have to reject his interpretation, for it conflicts with the statutory language discussed *supra,* at 2614, above. The Attorney General, echoed by the dissents, tries to overcome that language by relying on other language in the statute; in particular, the words "partial birth abortion," a term ordinarily associated with the D & X procedure, and the words "partially delivers vaginally a living unborn child." Neb.Rev.Stat. Ann. § 28-326(9) (Supp. 1999). But these words cannot help the Attorney General. They are subject to the statute's further *explicit statutory definition,* specifying that both terms include "delivering into the vagina a living unborn child, or a substantial portion thereof." *Ibid.* When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning. *Meese v. Keene,* 481 U.S. 465, 484-485, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term"); *Colautti v. Franklin,* 439 U.S., at 392-393, n. 10, 99 S.Ct. 675 ("As a rule, 'a definition which declares what a term "means" ··· excludes any meaning that is not stated' "); *Western Union Telegraph Co. v. Lenroot,* 323 U.S. 490, 502, 65 S.Ct. 335, 89 L.Ed. 414 (1945); *Fox v. Standard Oil Co. of N. J.,* 294 U.S. 87, 95-96, 55 S.Ct. 333, 79 L.Ed. 780 (1935) (Cardozo, J.); see also 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.07, p. 152, and n. 10 (5th ed.1992) (collecting cases). That is to say, the statute, read "as a whole," *post,* at 2644 ***943** THOMAS, J., dissenting), leads the reader to a definition. That definition does not include the Attorney General's restriction-"the child up to the head." Its words, "substantial portion," indicate the contrary.

The Attorney General also points to the Nebraska Legislature's debates, where the term "partial birth abortion" appeared frequently. But those debates hurt his argument more than they help it. Nebraska's legislators focused directly upon the meaning of the word "substantial." One senator asked the bill's sponsor, "[Y]ou said that as small a portion of the fetus as a foot would constitute a substantial portion in your **2616 opinion. Is that correct?" The sponsoring senator replied, "Yes, I believe that's correct." App. 452-453; see also *id.,* at 442-443 (same senator explaining "substantial" would "indicate that more than a little bit has been delivered into the vagina," *i.e.,* "[e]nough that would allow for the procedure to end up with the killing of the unborn child"); *id.,* at 404 (rejecting amendment to limit law to D & X). The legislature seems to have wanted to avoid more limiting language lest it become too easy to evade the statute's strictures-a motive that Justice THOMAS well explains. *Post,* at 2646-2647. That goal, however, exacerbates the problem.

The Attorney General, again echoed by the dissents, further argues that the statute "distinguishes between the overall 'abortion procedure' itself and the separate 'procedure' used to kill the unborn child." Brief for Petitioners 16-18; *post,* at 2641-2642 (opinion of THOMAS, J.), 2633 (opinion of KENNEDY, J.). Even assuming that the distinction would help the Attorney General make the D & E/D & X distinction he seeks, however, we cannot find any language in the statute that supports it. He wants us to read "procedure" in the statute's last sentence to mean "separate procedure," *i.e.,* the killing of the fetus, as opposed to a whole procedure, *i.e.,* a D & E or D & X abortion. But the critical word "separate" is missing. And the same *944 word "procedure," in the same subsection and throughout the statute, is used to refer to an entire abortion procedure. Neb.Rev.Stat. Ann. §§ 28-326(9), 28-328(1)-(4) (Supp.1999); cf. *Gustafson v. Alloyd Co.,* 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks omitted)).

The dissenters add that the statutory words "partially delivers" can be read to exclude D & E. *Post,* at 2640-2641 (opinion of THOMAS, J.), 2632-2633 (opinion of KENNEDY, J.). They say that introduction of, say, a limb or both limbs into the vagina does not involve "delivery." But obstetric textbooks and even dictionaries routinely use that term to describe any facilitated removal of tissue from the uterus, not only the removal of an intact fetus. *E.g.,* Obstetrics: Normal & Problem Pregnancies, at 388 (describing "delivery" of fetal membranes, placenta, and umbilical cord in the third stage of labor); B. Maloy, Medical Dictionary for Lawyers 221 (3d ed. 1960) ("Also, the removal of a [fetal] part such as the placenta"); 4 Oxford English Dictionary 422 (2d ed.1989) (to "deliver" means, *inter alia,* to "disburden (a women) of the foetus"); Webster's Third New International Dictionary (1993) ("[D]elivery" means "the expulsion or extraction of a fetus and its membranes"). In any event, the statute itself specifies that it applies *both* to delivering "an intact unborn child" *or* "a substantial portion thereof." The dissents cannot explain how introduction of a substantial portion of a fetus into the vagina pursuant to D & X is a "delivery," while introduction pursuant to D & E is not.

[20] We are aware that adopting the Attorney General's interpretation might avoid the constitutional problem discussed in this section. But we are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Boos v. Barry,* 485 U.S. 312, 330, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *945 *Gooding v. Wilson,* 405 U.S. 518, 520-521, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). For the reasons stated, it is not reasonable to replace the term "substantial portion" with the Attorney General's phrase "body up to the head." See *Almendarez-Torres v. United States,* 523 U.S. 224, 237-239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (statute must be "genuinely susceptible" to two interpretations).

[21] [22] Finally, the law does not require us to certify the state-law question to the Nebraska Supreme Court. Of course, we lack any authoritative state-court construction. But "we have never held that a **2617 federal litigant must await a state-court construction or the development of an established practice before bringing the federal suit." *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 770, n. 11, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). The Attorney General did not seek a narrowing interpretation from the Nebraska Supreme Court nor did he ask the federal courts to certify the interpretive question. See Brief for State Appellants in Nos. 98-3245 and 98-3300 (CA8); cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Even if we were inclined to certify the question now, we cannot do so. Certification of a question (or abstention) is appropriate only where the statute is "fairly susceptible" to a narrowing construction, see *Houston v. Hill,* 482 U.S. 451, 468-471, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). We

believe it is not. Moreover, the Nebraska Supreme Court grants certification only if the certified question is "determinative of the cause." Neb.Rev.Stat. § 24-219 (1995); see also *Houston v. Hill, supra,* at 471, 107 S.Ct. 2502 ("It would be manifestly inappropriate to certify a question in a case where ··· there is no uncertain question of state law whose resolution might affect the pending federal claim"). Here, it would not be determinative, in light of the discussion in Part II-A, *supra*.
In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The ***946*** result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.
The judgment of the Court of Appeals is
Affirmed.

Justice STEVENS, with whom Justice GINSBURG joins, concurring.
Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a *reason* to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of "potential life" than the equally gruesome procedure Nebraska claims it still allows. Justice GINSBURG and Judge Posner have, I believe, correctly diagnosed the underlying reason for the enactment of this legislation-a reason that also explains much of the Court's rhetoric directed at an objective that extends well beyond the narrow issue that this case presents. The rhetoric is almost, but not quite, loud enough to obscure the quiet fact that during the past 27 years, the central holding of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That holding-that the word "liberty" in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision-makes it impossible for me 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. But one need not even approach this view today to conclude that Nebraska's law must fall. For the notion that either of these two equally gruesome procedures performed at this late stage of gestation is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but ***947*** not the other, is simply irrational. See U.S. Const., Amdt. 14.

Justice O'CONNOR, concurring.
The issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that, as the Court recognizes, involve "virtually irreconcilable***2618*** points of view." *Ante,* at 2604. The specific question we face today is whether Nebraska's attempt to proscribe a particular method of abortion, commonly known as "partial birth abortion," is constitutional. For the reasons stated in the Court's opinion, I agree that Nebraska's statute cannot be reconciled with our decision in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and is therefore unconstitutional. I write separately to emphasize the following points.
First, the Nebraska statute is inconsistent with *Casey* because it lacks an exception for those instances when the banned procedure is necessary to preserve the health of the mother. See *id.,* at 879, 112 S.Ct. 2791 (plurality opinion). Importantly, Nebraska's own statutory scheme underscores this constitutional infirmity. As we held in *Casey,* prior to viability "the woman has a right to choose to terminate her pregnancy." *Id.,* at 870, 112 S.Ct. 2791. After the fetus has become viable, States may substantially regulate and even proscribe abortion, but any such regulation or proscription must contain an exception for instances " 'where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " *Id.,* at 879, 112 S.Ct. 2791 (quoting *Roe v. Wade,* 410 U.S. 113, 165, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)). Nebraska has recognized this constitutional limitation in its separate statute generally proscribing postviability abortions. See Neb.Rev.Stat. Ann. § 28-329 (Supp.1999). That statute provides that "[n]o abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, *except when necessary to* ***948*** *preserve the life or health of the mother." Ibid.* (emphasis added). 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. *Ante,* at 2609. 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." Neb.Rev.Stat. Ann. § 28-328(1) (Supp.1999). This lack of a health exception necessarily renders the statute unconstitutional.

Contrary to the assertions of Justice KENNEDY and Justice THOMAS, the need for a health exception does not arise from "the individual views of Dr. Carhart and his supporters." *Post,* at 2629 (KENNEDY, J., dissenting); see also *post,* at 2652-2653 (THOMAS, J., dissenting). Rather, as the majority explains, where, as here, "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," *ante,* at 2613, then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the mother." Accordingly, our precedent requires that the statute include a health exception.

Second, Nebraska's statute is unconstitutional on the alternative and independent ground that it imposes an undue burden on a woman's right to choose to terminate her pregnancy before viability. Nebraska's ban covers not just the dilation and extraction (D & X) procedure, but also the dilation and evacuation (D & E) procedure, "the most commonly used method for performing previability second trimester abortions." *Ante,* at 2617. The statute defines the banned procedure as "deliberately and intentionally delivering into the vagina a living unborn child, *or a substantial portion* ***949** *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 ****2619** child." Neb.Rev.Stat. Ann. § 28-326(9) (Supp.1999) (emphasis added). As the Court explains, the medical evidence establishes that the D & E procedure is included in this definition. Thus, it is not possible to interpret the statute's language as applying only to the D & X procedure. Moreover, it is significant that both the District Court and the Court of Appeals interpreted the statute as prohibiting abortions performed using the D & E method as well as the D & X method. See 192 F.3d 1142, 1150 (C.A.8 1999); 11 F.Supp.2d 1099, 1127-1131 (D.Neb.1998). We have stated on several occasions that we ordinarily defer to the construction of a state statute given it by the lower federal courts unless such a construction amounts to plain error. See, *e.g., Bishop v. Wood,* 426 U.S. 341, 346, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion"); *The Tungus v. Skovgaard,* 358 U.S. 588, 596, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). Such deference is not unique to the abortion context, but applies generally to state statutes addressing all areas of the law. See, *e.g., UNUM Life Ins. Co. of America v. Ward,* 526 U.S. 358, 368, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999) ("notice-prejudice" rule in state insurance law); *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 499, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (moral nuisance law); *Runyon v. McCrary,* 427 U.S. 160, 181, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (statute of limitations for personal injury actions); *Bishop v. Wood, supra,* at 346, n. 10, 96 S.Ct. 2074 (city employment ordinance). Given this construction, the statute is impermissible. Indeed, Nebraska conceded at oral argument that "the State could not prohibit the D & E procedure." Tr. of Oral Arg. 10. By proscribing the most commonly used method for previability second trimester abortions, see *ante,* at 2606, the statute creates a "substantial obstacle to a woman seeking an abortion," *Casey, supra,* at 884, 112 S.Ct. 2791, and therefore imposes ***950** an undue burden on a woman's right to terminate her pregnancy prior to viability.

It is important to note that, unlike Nebraska, some other States have enacted statutes more narrowly tailored to proscribing the D & X procedure alone. Some of those statutes have done so by specifically excluding from their coverage the most common methods of abortion, such as the D & E and vacuum aspiration procedures. For example, the Kansas statute states that its ban does not apply to the "(A) [s]uction curettage abortion procedure; (B) suction aspiration abortion procedure; or (C) dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the pregnant woman." Kan.Stat. Ann. § 65-6721(b)(2) (Supp.1998). The Utah statute similarly provides that its prohibition "does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion." Utah Code Ann. § 76-7-310.5(1)(a) (1999). Likewise, the Montana statute defines the banned procedure as one in which "(A) the living fetus is removed intact from the uterus until only the head remains in the uterus; (B) all or a part of the intracranial contents of the fetus are evacuated; (C) the head of the fetus is compressed; and (D) following fetal demise, the fetus is removed from the birth canal." Mont.Code Ann. § 50-20-401(3)(c)(ii) (Supp.1999). By restricting their prohibitions to the D & X procedure exclusively, the Kansas, Utah, and Montana statutes avoid a

principal defect of the Nebraska law.
If Nebraska's statute limited its application to the D & X procedure and included an exception for the life and health of the mother, the question presented would be quite different from the one we face today. As we held in *Casey,* an abortion regulation****2620** constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." ***951*** 505 U.S., at 877, 112 S.Ct. 2791. 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." *Id.,* at 884, 112 S.Ct. 2791. Thus, a ban on partial birth 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.
Nebraska's statute, however, does not meet these criteria. It contains no exception for when the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother; and it proscribes not only the D & X procedure but also the D & E procedure, the most commonly used method for previability second trimester abortions, thus making it an undue burden on a woman's right to terminate her pregnancy. For these reasons, I agree with the Court that Nebraska's law is unconstitutional.

Justice GINSBURG, with whom Justice STEVENS joins, concurring.
I write separately only to stress that amidst all the emotional uproar caused by an abortion case, we should not lose sight of the character of Nebraska's "partial birth abortion" law. As the Court observes, this law does not save any fetus from destruction, for it targets only "a *method* of performing abortion." *Ante,* at 2609. Nor does the statute seek to protect the lives or health of pregnant women. Moreover, as Justice STEVENS points out, *ante,* at 2617 (concurring opinion), the most common method of performing previability second trimester abortions is no less distressing or susceptible to gruesome description. Seventh Circuit Chief Judge Posner correspondingly observed, regarding similar bans in Wisconsin and Illinois, that the law prohibits the D & X procedure "not because the procedure kills the fetus, not because it risks worse complications for the woman ***952*** than alternative procedures would do, not because it is a crueler or more painful or more disgusting method of terminating a pregnancy." *Hope Clinic v. Ryan,* 195 F.3d 857, 881 (C.A.7 1999) (dissenting opinion). Rather, Chief Judge Posner commented, the law prohibits the procedure because the state legislators seek to chip away at the private choice shielded by *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), even as modified by *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). 195 F.3d, at 880-882.
A state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" violates the Constitution. *Casey,* 505 U.S., at 877, 112 S.Ct. 2791 (plurality opinion). Such an obstacle exists if the State stops a woman from choosing the procedure her doctor "reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty." *Ante,* at 2617 (STEVENS, J., concurring); see *Casey,* 505 U.S., at 877, 112 S.Ct. 2791 ("means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it"). Again as stated by Chief Judge Posner, "if 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." *Hope Clinic,* 195 F.3d, at 881.

Chief Justice REHNQUIST, dissenting.

I did not join the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and continue to believe that case is wrongly decided. Despite my ****2621** disagreement with the opinion, under the rule laid down in *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), the *Casey* joint opinion represents the holding of the Court in that case. I believe Justice KENNEDY and Justice THOMAS have correctly applied *Casey's* principles and join their dissenting opinions.

953 Justice SCALIA, dissenting.

I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott.* The method of killing a

human child-one cannot even accurately say an entirely unborn human child-proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception"-which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)-is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, ··· and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

Even so, I had not intended to write separately here until the focus of the other separate writings (including the one I have joined) gave me cause to fear that this case might be taken to stand for an error different from the one that it actually exemplifies. Because of the Court's practice of publishing dissents in the order of the seniority of their authors, this writing will appear in the United States Reports before those others, but the reader will not comprehend what follows unless he reads them first.

* * *

The two lengthy dissents in this case have, appropriately enough, set out to establish that today's result does not follow from this Court's most recent pronouncement on the matter of abortion, *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). It would be unfortunate, however, ***954** if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey.* It is not that, but is *Casey's* logical and entirely predictable consequence. To be sure, the Court's construction of this statute so as to make it include procedures other than live-birth abortion involves not only a disregard of fair meaning, but an abandonment of the principle that even ambiguous statutes should be interpreted in such fashion as to render them valid rather than void. *Casey* does not permit *that* jurisprudential novelty-which must be chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue. It is of a piece, in other words, with *Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, also decided today.

But the Court gives a second and independent reason for invalidating this humane (not to say anti-barbarian) law: That it fails to allow an exception for the situation in which the abortionist believes that this live-birth method of destroying the child might be safer for the woman. (As pointed out by Justice THOMAS, and elaborated upon by Justice KENNEDY, there is no good reason to believe this is ever the case, but-who knows?-it sometime *might* be.)

I have joined Justice THOMAS's dissent because I agree that today's decision is an "unprecedented expansio[n]" of our prior cases, *post,* at 2652, "is not mandated" by *Casey's* "undue-burden" test, *post,* at 2651, ****2622** and can even be called (though this pushes me to the limit of my belief) "obviously irreconcilable with *Casey's* explication of what its undue-burden standard requires," *post,* at 2636. But I never put much stock in *Casey's* explication of the inexplicable. 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 cannot be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects (or believes society ought to respect) ***955** the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today's majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised-a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"- *i.e.,* goes too far.

In my dissent in *Casey,* I wrote that the "undue burden" test made law by the joint opinion created a standard that was "as doubtful in application as it is unprincipled in origin," *Casey,* 505 U.S., at 985, 112 S.Ct. 2791; "hopelessly unworkable in practice," *id.,* at 986, 112 S.Ct. 2791; "ultimately standardless," *id.,* at 987, 112 S.Ct. 2791. Today's decision is the proof. As long as we are debating

this issue of necessity for a health-of-the-mother exception on the basis of Casey, it is really quite impossible for us dissenters to contend that the majority is *wrong* on the law-any more than it could be said that one is *wrong in law* to support or oppose the death penalty, or to support or oppose mandatory minimum sentences. The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of Casey, but with its *existence.* Casey must be overruled.
While I am in an I-told-you-so mood, I must recall my bemusement, in Casey, at the majority opinion's expressed belief***956*** that Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," Casey, 505 U.S., at 867, 112 S.Ct. 2791, and that the decision in Casey would ratify that happy truce. It seemed to me, quite to the contrary, that " Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since"; and that, "by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana,* that the Court's new majority decrees." Id., at 995-996, 112 S.Ct. 2791. Today's decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism-as well it should. I cannot understand why those who *acknowledge* that, in the opening words of Justice O'CONNOR's concurrence, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society," *ante,* at 2617, persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can ****2623*** resolve that contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people-where the Constitution, by its silence on the subject, left it-and let *them* decide, State by State, whether this practice should be allowed. Casey must be overruled.

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

For close to two decades after Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (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 ***957*** 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, 112 S.Ct. 2791, 120 L.Ed.2d 674 (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, 112 S.Ct. 2791 (plurality opinion). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus.
The Court's decision today, in my submission, repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right. The legislation is well within the State's competence to enact. Having concluded Nebraska's law survives the scrutiny dictated by a proper understanding of Casey, I dissent from the judgment invalidating it.

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 2605. 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 2606; but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient. Repeated references ***958*** 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 ****2624** 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 limb from ***959** 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 ***960** 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 (D.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 ****2625** 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, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), had "given [state interests] too little acknowledgment and implementation." 505 U.S., at 871, 112 S.Ct. 2791 (plurality opinion). 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, 112 S.Ct. 2791, and rejected a strict scrutiny standard of review as "incompatible***961** with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876, 112 S.Ct. 2791. "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, 112 S.Ct. 2791.

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, 112 S.Ct. 2791 (plurality opinion).

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***962** 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, 112 S.Ct. 2791 (majority opinion).

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 ****2626** assistance of others. *Ibid.*; *Washington v. Glucksberg*, 521 U.S. 702, 730-734, 117 S.Ct. 2258, 138 L.Ed.2d 772 (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 procedures 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 ***963** 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 ***964** 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. ****2627** 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 ***965** 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 from forbidding 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 2650-2653. *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, 112 S.Ct. 2791. We decided the issue against the State, holding that a woman cannot be deprived of the opportunity to make reproductive decisions. *Id.,* at 860, 112 S.Ct. 2791. *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, 112 S.Ct. 2791 (plurality opinion). 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, 112 S.Ct. 2791. 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] ***966** would be the only option to save the life or preserve the health of the woman." App. 600-601. The AMA agrees, stating the "AMA's expert panel, which included an ACOG representative, could not find 'any' identified circumstance***2628** 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 ***967** courtroom 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 (C.A.4 1998); Hope Clinic v. Ryan, 195 F.3d 857, 871 (C.A.7 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 ReproductiveHealth, Inc., 462 U.S. 416, 467, 103 S.Ct. 2481, 76 L.Ed.2d 687 (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, 112 S.Ct. 2791 (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***968** health differences which are, at ****2629** best, marginal, do not amount to a substantial obstacle to the abortion right. *Id.,* at 874, 876, 112 S.Ct. 2791 (plurality opinion). 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, 103 S.Ct. 2481 (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, 103 S.Ct. 2481. 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, 103 S.Ct. 2481. 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 ***969** 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, 103 S.Ct. 2481. Dispositive for the Court was that the law was an "intrusion upon the discretion of the pregnant woman's physician." *Id.*, at 445, 103 S.Ct. 2481. 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 or she 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, 112 S.Ct. 2791 (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, 112 S.Ct. 2791. 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***2630** ··· regulation by the State" and would receive the "same solicitude it receives in other contexts." *Ibid.* In other contexts, the State is entitled***970** 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, 117 S.Ct.2072, 138 L.Ed.2d 501 (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, 117 S.Ct. 2072. 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, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983)); see also *Collins v. Texas*, 223 U.S. 288, 297-298, 32 S.Ct. 286, 56 L.Ed. 439 (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, 47 S.Ct. 210, 71 L.Ed. 422 (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, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974) (recognizing "there is no agreement among members of the medical profession" (internal quotation marks omitted)); *United States v. Rutherford*, 442 U.S. 544, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979) (discussing regulatory approval process for certain drugs). Instructive is *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (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 ***971** seems best." *Id.*, at 26, 25 S.Ct. 358. 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, 25 S.Ct. 358. 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 ***2631** 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 ***972** 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, 25 S.Ct. 358 (quoting *Viemeister 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 2620. 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 2613 (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 departments of government can the court review this action of the legislature?" *Jacobson, supra,* at 31, 25 S.Ct. 358. 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. ***973** 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 2640-2648. 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
****2632** "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***974** 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 (C.A.8 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, 51 S.Ct. 340, 75 L.Ed. 816 (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 2616, 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"***975** 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 (W.D.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 2613, 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 2616, 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.
****2633** 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 ***976** 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 2616. 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, 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (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, 117 S.Ct. 2072 ("[W]e have traditionally left to legislators the task of defining terms of a medical ***977*** 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, 106 S.Ct. 2169, 90 L.Ed.2d 779 (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, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (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***2634*** to the construction offered by the Nebraska Attorney General. *Ante,* at 2616-2617. For the reasons here discussed, the statute is susceptible to the construction; 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 2615. 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 & X. 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***978*** 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, 108 S.Ct. 2495, 101 L.Ed.2d 420 (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, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (opinion of REHNQUIST, C.J.); *id.,* at 525, 109 S.Ct. 3040 (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 further. 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,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). 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 ***979** 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 (1999). 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 ****2635** 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 the 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.

***980** Justice THOMAS, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

In 1973, this Court struck down an Act of the Texas Legislature that had been in effect since 1857, thereby rendering unconstitutional abortion statutes in dozens of States. *Roe v. Wade*, 410 U.S. 113, 119, 93 S.Ct. 705, 35 L.Ed.2d 147. As some of my colleagues on the Court, past and present, ably demonstrated, that decision was grievously wrong. See, *e.g.*, *Doe v. Bolton*, 410 U.S. 179, 221-223, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (White, J., dissenting); *Roe v. Wade, supra*, at 171-178, 93 S.Ct. 705 (REHNQUIST, J., dissenting). Abortion is a unique act, in which a woman's exercise of control over her own body ends, depending on one's view, human life or potential human life. Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.
In the years following *Roe*, this Court applied, and, worse, extended, that decision to strike down numerous state statutes that purportedly threatened a woman's ability to obtain an abortion. The Court voided parental consent laws, see *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 75, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), legislation requiring that second-trimester abortions take place in hospitals, see *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), and even a requirement that both parents of a minor be notified before their child has an abortion, see *Hodgson v. Minnesota*, 497 U.S. 417, 455, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990). It was only a slight exaggeration when this Court described, in 1976, a right to abortion "without interference from the State." *Danforth, supra*, at 61, 96 S.Ct. 2831. The Court's expansive application of *Roe* in this period, even more than *Roe* itself, was fairly described as the "unrestrained imposition of [the Court's] own, extraconstitutional value preferences" on the American people. ***981** *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (White, J., dissenting).
It appeared that this era of Court-mandated abortion on demand had come to an end, first with our decision in *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), see *id.*, at 557, 109 S.Ct. 3040 (Blackmun, J., concurring in part and dissenting in part) (lamenting that the plurality had "discard[ed]" *Roe*), and then finally (or so we were told) in our decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Although in *Casey* the separate opinions of The Chief Justice ****2636** and Justice

SCALIA urging the Court to overrule *Roe* did not command a majority, seven Members of that Court, including six Members sitting today, acknowledged that States have a legitimate role in regulating abortion and recognized the States' interest in respecting fetal life at all stages of development. See 505 U.S., at 877, 112 S.Ct. 2791 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.); *id.*, at 944, 112 S.Ct. 2791 (REHNQUIST, C.J., joined by White, SCALIA, and THOMAS, JJ., concurring in judgment in part and dissenting in part); *id.*, at 979, 112 S.Ct. 2791 (SCALIA, J., joined by REHNQUIST, C.J., and White and THOMAS, JJ., concurring in judgment in part and dissenting in part). The plurality authored by Justices O'CONNOR, KENNEDY, and SOUTER concluded that prior case law "went too far" in "undervalu[ing] the State's interest in potential life" and in "striking down ··· some abortion regulations which in no real sense deprived women of the ultimate decision." *Id.*, at 875, 112 S.Ct. 2791. [FN1] *Roe* and subsequent cases, according to the plurality, had wrongly "treat[ed] all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted," a treatment that was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy." *Id.*, at 876, 112 S.Ct. 2791. Accordingly, the plurality held that so ***982** long as state regulation of abortion furthers legitimate interests-that is, interests not designed to strike at the right itself-the regulation is invalid only if it imposes an undue burden on a woman's ability to obtain an abortion, meaning that it places a *substantial obstacle* in the woman's path. *Id.*, at 874, 877, 112 S.Ct. 2791.

> FN1. Unless otherwise noted, all subsequent cites of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), are to the joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.

My views on the merits of the *Casey* joint opinion have been fully articulated by others. *Id.*, at 944, 112 S.Ct. 2791 (REHNQUIST, C.J., concurring in judgment in part and dissenting in part); *id.*, at 979, 112 S.Ct. 2791 (SCALIA, J., concurring in judgment in part and dissenting in part). I will not restate those views here, except to note that the *Casey* joint opinion was constructed by its authors out of whole cloth. The standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace. Even assuming, however, as I will for the remainder of this dissent, that *Casey's* fabricated undue-burden standard merits adherence (which it does not), today's decision is extraordinary. Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe. *Ante,* at 2605. This holding cannot be reconciled with *Casey's* undue-burden standard, as that standard was explained to us by the authors of the plurality opinion, and the majority hardly pretends otherwise. In striking down this statute-which expresses a profound and legitimate respect for fetal life and which leaves unimpeded several other safe forms of abortion-the majority opinion gives the lie to the promise of *Casey* that regulations that do no more than "express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose" whether or not to have an abortion. ***983** 505 U.S., at 877, 112 S.Ct. 2791. Today's decision is so obviously irreconcilable with *Casey's* explication of what its undue-burden standard requires, let alone the Constitution, that it should be seen for what it is, a reinstitution of the pre-****2637** *Webster* abortion-on-demand era in which the mere invocation of "abortion rights" trumps any contrary societal interest. If this statute is unconstitutional under *Casey*, then *Casey* meant nothing at all, and the Court should candidly admit it.

To reach its decision, the majority must take a series of indefensible steps. The majority must first disregard the principles that this Court follows in every context but abortion: We interpret statutes according to their plain meaning, and we do not strike down statutes susceptible of a narrowing construction. The majority also must disregard the very constitutional standard it purports to employ, and then displace the considered judgment of the people of Nebraska and 29 other States. The majority's decision is lamentable, because of the result the majority reaches, the illogical steps the majority takes to reach it, and because it portends a return to an era I had thought we had at last abandoned.

I

In the almost 30 years since *Roe,* this Court has never described the various methods of aborting a second- or third-trimester fetus. From reading the majority's sanitized description, one would think that this case involves state regulation of a widely accepted routine medical procedure. Nothing could be further from the truth. The most widely used method of abortion during this stage of pregnancy is so gruesome that its use can be traumatic even for the physicians and medical staff who perform it. See App. 656 (testimony of Dr. Boehm); W. Hern, Abortion Practice 134 (1990). And the particular procedure at issue in this case, "partial birth abortion," so closely borders on infanticide that 30 States have attempted to ban it. I will begin with a discussion of the methods of abortion available to ***984*** women late in their pregnancies before addressing the statutory and constitutional questions involved.[FN2]

FN2. In 1996, the most recent year for which abortion statistics are available from the Centers for Disease Control and Prevention, there were approximately 1,221,585 abortions performed in the United States. Centers for Disease Control and Prevention, Abortion Surveillance-United States, 1996, p. 1 (July 30, 1999). Of these abortions, about 67,000-5.5%-were performed in or after the 16th week of gestation, that is, from the middle of the second trimester through the third trimester. *Id.,* at 5. The majority apparently accepts that none of the abortion procedures used for pregnancies in earlier stages of gestation, including "dilation and evacuation" (D & E) as it is practiced between 13 and 15 weeks' gestation, would be compromised by the statute. See *ante,* at 2613-2614 (concluding that the statute could be interpreted to apply to instrumental dismemberment procedures used in a later term D & E). Therefore, only the methods of abortion available to women in this later stage of pregnancy are at issue in this case.

1. The primary form of abortion used at or after 16 weeks' gestation is known as "dilation and evacuation" or "D & E." 11 F.Supp.2d 1099, 1103, 1129 (D.Neb.1998). When performed during that stage of pregnancy, the D & E procedure requires the physician to dilate the woman's cervix and then extract the fetus from her uterus with forceps. *Id.,* at 1103; App. 490 (American Medical Association (AMA), Report of the Board of Trustees on Late-Term Abortion). Because of the fetus' size at this stage, the physician generally removes the fetus by dismembering the fetus one piece at a time.[FN3] 11 F.Supp.2d, at 1103-1104. The doctor grabs a fetal extremity, such as an arm or a leg, with forceps and "pulls it through the cervical os ··· tearing ··· fetal parts from the fetal body ··· by means of traction." *Id.,* at 1104. See App. 55 (testimony of Dr. Carhart). In other words, the physician will grasp the fetal parts and "basically tear off pieces of the fetus and pull them out." *Id.,* at 267 (testimony of Dr. Stubblefield). See also *id.,* at 149 (testimony of ****2638*** ***985*** Dr. Hodgson) ("[Y]ou grasp the fetal parts, and you often don't know what they are, and you try to pull it down, and its ··· simply all there is to it"). The fetus will die from blood loss, either because the physician has separated the umbilical cord prior to beginning the procedure or because the fetus loses blood as its limbs are removed. *Id.,* at 62-64 (testimony of Dr. Carhart); *id.,* at 151 (testimony of Dr. Hodgson).[FN4] When all of the fetus' limbs have been removed and only the head is left in utero, the physician will then collapse the skull and pull it through the cervical canal. *Id.,* at 106 (testimony of Dr. Carhart); *id.,* at 297 (testimony of Dr. Stubblefield); *Causeway Medical Suite v. Foster,* 43 F.Supp.2d 604, 608 (E.D.La.1999). At the end of the procedure, the physician is left, in respondent's words, with a "tray full of pieces." App. 125 (testimony of Dr. Carhart).

FN3. At 16 weeks' gestation, the average fetus is approximately six inches long. By 20 weeks' gestation, the fetus is approximately eight inches long. K. Moore & T. Persaud, The Developing Human 112 (6th ed.1998).

FN4. Past the 20th week of gestation, respondent attempts to induce fetal death by injection prior to beginning the procedure in patients. 11 F.Supp.2d, at 1106; App. 64.

2. Some abortions after the 15th week are performed using a method of abortion known as induction. 11 F.Supp.2d, at 1108; App. 492 (AMA, Report of the Board of Trustees on Late-Term Abortion). In an induction procedure, the amniotic sac is injected with an abortifacient such as a saline solution or a solution that contains prostaglandin. 11 F.Supp.2d, at 1108. Uterine contractions typically follow,

causing the fetus to be expelled. *Ibid.*

3. A third form of abortion for use during or after 16 weeks' gestation is referred to by some medical professionals as "intact D & E." There are two variations of this method, both of which require the physician to dilate the woman's cervix. Gynecologic, Obstetric, and Related Surgery 1043 (D. Nichols & D. Clarke-Pearson eds., 2d ed.2000); App. 271 (testimony of Dr. Stubblefield). The first variation is used only in vertex presentations, that is, when the fetal head is presented first. To perform a vertex-presentation intact D & E, the doctor will insert an instrument into the fetus' ***986** skull while the fetus is still in utero and remove the brain and other intracranial contents. 11 F.Supp.2d, at 1111; Gynecologic, Obstetric, and Related Surgery, *supra,* at 1043; App. 271 (testimony of Dr. Stubblefield). When the fetal skull collapses, the physician will remove the fetus.

The second variation of intact D & E is the procedure commonly known as "partial birth abortion." [FN5] 11 F.Supp.2d, at 1106; Gynecologic, Obstetric, and Related Surgery, *supra,* at 1043; App. 271 (testimony of Dr. Stubblefield). This procedure, which is used only rarely, is performed on mid-to late-second-trimester (and sometimes***2639** third-trimester) fetuses. [FN6] Although there are variations, it is generally performed***987** as follows: After dilating the cervix, the physician will grab the fetus by its feet and pull the fetal body out of the uterus into the vaginal cavity. 11 F.Supp.2d, at 1106. At this stage of development, the head is the largest part of the body. Assuming the physician has performed the dilation procedure correctly, the head will be held inside the uterus by the woman's cervix. *Ibid.;* H.R. 1833 Hearing 8. While the fetus is stuck in this position, dangling partly out of the woman's body, and just a few inches from a completed birth, the physician uses an instrument such as a pair of scissors to tear or perforate the skull. 11 F.Supp.2d, at 1106; App. 664 (testimony of Dr. Boehm); Joint Hearing on S. 6 and H.R. 929 before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 1st Sess., 45 (1995) (hereinafter S. 6 and H.R. 929 Joint Hearing). The physician will then either crush the skull or will use a vacuum to remove the brain and other intracranial contents from the fetal skull, collapse the fetus' head, and pull the fetus from the uterus. 11 F.Supp.2d, at 1106.[FN7]

FN5. There is a disagreement among the parties regarding the appropriate term for this procedure. Congress and numerous state legislatures, including Nebraska's, have described this procedure as "partial birth abortion," reflecting the fact that the fetus is all but born when the physician causes its death. See *infra* this page and 2639. Respondent prefers to refer generically to "intact dilation and evacuation" or "intact D & E" without reference to whether the fetus is presented head first or feet first. One of the doctors who developed the procedure, Martin Haskell, described it as "Dilation and Extraction" or "D & X." See The Partial-Birth Abortion Ban Act of 1995, Hearing on H.R. 1833 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 5 (1995) (hereinafter H.R. 1833 Hearing). The Executive Board of the American College of Obstetricians and Gynecologists (ACOG) refers to the procedure by the hybrid term "intact dilation and extraction" or "intact D & X," see App. 599 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)), which term was adopted by the AMA, see *id.,* at 492 (AMA, Report of the Board of Trustees on Late-Term Abortion). I will use the term "partial birth abortion" to describe the procedure because it is the legal term preferred by 28 state legislatures, including the State of Nebraska, and by the United States Congress. As I will discuss, see *infra,* at 2645-2646, there is no justification for the majority's preference for the terms "breech-conversion intact D & E" and "D & X" other than the desire to make this procedure appear to be medically sanctioned.

FN6. There is apparently no general understanding of which women are appropriate candidates for the procedure. Respondent uses the procedure on women at 16 to 20 weeks' gestation. 11 F.Supp.2d, at 1105. The doctor who developed the procedure, Dr. Martin Haskell, indicated that he performed the procedure on patients 20 through 24 weeks and on certain patients 25 through 26 weeks. See H.R. 1833 Hearing 36.

FN7. There are, in addition, two forms of abortion that are used only rarely: hysterotomy, a procedure resembling a Caesarean section, requires the surgical delivery of the fetus through an incision on the uterine wall, and hysterectomy. 11 F.Supp.2d, at 1109.

Use of the partial birth abortion procedure achieved prominence as a national issue after it was publicly described by Dr. Martin Haskell, in a paper entitled "Dilation and Extraction for Late Second Trimester Abortion" at the National Abortion Federation's September 1992 Risk Management Seminar. In that paper, Dr. Haskell described his version of the procedure as follows:
"With a lower [fetal] extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower ***988*** extremity, then the torso, the shoulders and the upper extremities.
"The skull lodges at the internal cervical os. Usually there is not enough dilation for it to pass through. The fetus is oriented dorsum or spine up.
"At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and 'hooks' the shoulders of the fetus with the index and ring fingers (palm down).
"[T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
"[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
"The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient." H.R. 1833 Hearing 3, 8-9.
In cases in which the physician inadvertently dilates the woman to too great a degree, the physician will have to hold the fetus inside the woman so that he can perform the procedure. *Id.,* at 80 (statement of Pamela Smith, M.D.) ("In these procedures, one basically relies on cervical entrapment of the head, along with a firm ****2640*** grip, to help keep the baby in place while the practitioner plunges a pair of scissors into the base of the baby's skull"). See also S. 6 and H.R. 929 Joint Hearing 45 ("I could put dilapan in for four or five days and say I'm doing a D & E procedure and the fetus could just fall out. But that's not really the point. The point here is you're attempting to do an abortion ···· Not to see how do ***989*** I manipulate the situation so that I get a live birth instead") (quoting Dr. Haskell).

II

Nebraska, along with 29 other States, has attempted to ban the partial birth abortion procedure. Although the Nebraska statute purports to prohibit only "partial birth abortion," a phrase which is commonly used, as I mentioned, to refer to the breech extraction version of intact D & E, the majority concludes that this statute could also be read in some future case to prohibit ordinary D & E, the first procedure described above. According to the majority, such an application would pose a substantial obstacle to some women seeking abortions and, therefore, the statute is unconstitutional. The majority errs with its very first step. I think it is clear that the Nebraska statute does not prohibit the D & E procedure. The Nebraska partial birth abortion statute at issue in this case reads as follows:
"No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb.Rev.Stat. Ann. § 28-328(1) (Supp.1999).
"Partial birth abortion" is defined in the statute 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. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means 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 ***990*** procedure knows will kill the unborn child and does kill the unborn child." § 28-326(9).

A

Starting with the statutory definition of "partial birth abortion," I think it highly doubtful that the statute could be applied to ordinary D & E. First, the Nebraska statute applies only if the physician "partially *delivers* vaginally a living unborn child," which phrase is defined to mean "deliberately and intentionally *delivering* into the vagina a living unborn child, or a substantial portion thereof." § 28-326(9) (emphases added). When read in context, the term "partially delivers" cannot be fairly

interpreted to include removing pieces of an unborn child from the uterus one at a time.
The word "deliver," particularly delivery of an "unborn child," refers to the process of "assist[ing] in giving birth," which suggests removing an intact unborn child from the womb, rather than pieces of a child. See Webster's Ninth New Collegiate Dictionary 336 (1991) (defining "deliver" as "to assist in giving birth; to aid in the birth of"); Stedman's Medical Dictionary 409 (26th ed. 1995) ("To assist a woman in childbirth"). Without question, one does not "deliver" a child when one removes the child from the uterus piece by piece, as in a D & E. Rather, in the words of respondent and his experts, one "remove[s]" or "dismember[s]" the child in a D & E.App. 45, 55 (testimony of Dr. Carhart) (referring to the act of removing the fetus in a D & E); *id.,* at 150 (testimony of Dr. Hodgson) (same); *id.,* at 267 (testimony of Dr. Stubblefield) (physician "dismember[s]" the fetus). See also H.R. 1833 Hearing 3, ***2641** 8 (Dr. Haskell describing "delivery" of part of the fetus during a D & X). The majority cites sources using the terms "deliver" and "delivery" to refer to removal of the fetus and the placenta during birth. But these sources also presume an intact fetus, rather than dismembered fetal parts. See Obstetrics: Normal & Problem Pregnancies 388 (S. Gabbe, J. Niebyl, & J. Simpson eds., 3d ***991** ed. 1996) ("After delivery [of infant and placenta], the placenta, cord, and membranes should be examined"); 4 Oxford English Dictionary 421, 422 (2d ed. 1989) ("To disburden (a woman) of the foetus, to bring to childbirth"); B. Maloy, Medical Dictionary for Lawyers 221 (2d ed. 1989) ("To aid in the process of childbirth; to bring forth; to deliver the fetus, placenta"). The majority has pointed to no source in which "delivery" is used to refer to removal of first a fetal arm, then a leg, then the torso, etc. In fact, even the majority describes the D & E procedure without using the word "deliver" to refer to the removal of fetal tissue from the uterus. See *ante,* at 2613-2614 (" *pulling* a 'substantial portion' of a still living fetus" (emphasis added)); *ibid.* ("portion of a living fetus has been *pulled* into the vagina" (emphasis added)). No one, including the majority, understands the act of pulling off a part of a fetus to be a "delivery."
To make the statute's meaning even more clear, the statute applies only if the physician "partially delivers vaginally a living unborn child *before* killing the unborn child and completing the delivery." The statute defines this phrase to mean that the physician must complete the delivery " *for the purpose of* performing a procedure" that will kill the unborn child. It is clear from these phrases that the procedure that kills the fetus must be subsequent to, and therefore separate from, the "partia[l] deliver[y]" or the "deliver[y] into the vagina" of "a living unborn child or substantial portion thereof." In other words, even if one assumes, *arguendo,* that dismemberment-the act of grasping a fetal arm or leg and pulling until it comes off, leaving the remaining part of the fetal body still in the uterus-is a kind of "delivery," it does not take place "before" the death-causing procedure or "for the purpose of performing" the death-causing procedure; it *is* the death-causing procedure. Under the majority's view, D & E is covered by the statute because when the doctor pulls on a fetal foot until it tears off he has "delivered" a substantial portion of the unborn child and has performed ***992** a procedure known to cause death. But, significantly, the physician has not "delivered" the child *before* performing the death-causing procedure or "for the purpose of" performing the death-causing procedure; the dismemberment "delivery" is itself the act that causes the fetus' death.[FN8]

> FN8. The majority argues that the statute does not explicitly require that the death-causing procedure be separate from the overall abortion procedure. That is beside the point; under the statute the death-causing procedure must be separate from the *delivery.* Moreover, it is incorrect to state that the statute contemplates only one "procedure." The statute clearly uses the term "procedure" to refer to both the overall abortion procedure ("partial birth abortion" is "an abortion procedure") as well as to a component of the overall abortion procedure ("for the purpose of performing a procedure ··· that will kill the unborn child").

Moreover, even if removal of a fetal foot or arm from the uterus incidental to severing it from the rest of the fetal body could amount to delivery *before,* or *for the purpose of,* performing a death-causing procedure, the delivery would not be of an "unborn child, or a substantial portion thereof." And even supposing that a fetal foot or arm could conceivably be a "substantial portion" of an unborn child, both the common understanding of "partial birth abortion" and the principle that statutes will be interpreted to avoid constitutional difficulties would require one to read "substantial" otherwise. See *infra,* at 2643-2644.

****2642** B

Although I think that the text of § 28-326(9) forecloses any application of the Nebraska statute to the D & E procedure, even if there were any ambiguity, the ambiguity would be conclusively resolved by reading the definition in light of the fact that the Nebraska statute, by its own terms, applies only to "partial birth abortion," § 28-328(1). By ordinary rules of statutory interpretation, we should resolve any ambiguity in the specific statutory definition to comport with the common understanding of "partial birth abortion," for that term itself, no less than the specific definition, is part of the statute. ***993** *United States v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984) ("We do not ··· construe statutory phrases in isolation; we read statutes as a whole").[FN9]

> FN9. It is certainly true that an undefined term must be construed in accordance with its ordinary and plain meaning. *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). But this does not mean that the ordinary and plain meaning of a term is wholly irrelevant when that term is defined.

"Partial birth abortion" is a term that has been used by a majority of state legislatures, the United States Congress, medical journals, physicians, reporters, even judges, and has never, as far as I am aware, been used to refer to the D & E procedure. The number of instances in which "partial birth abortion" has been equated with the breech extraction form of intact D & E (otherwise known as "D & X") [FN10] and explicitly contrasted with D & E, are numerous. I will limit myself to just a few examples.

> FN10. As noted, see n. 5, *supra*, there is no consensus regarding which of these terms is appropriate to describe the procedure. I assume, as the majority does, that the terms are, for purposes here, interchangeable.

First, numerous medical authorities have equated "partial birth abortion" with D & X. The AMA has done so and has recognized that the procedure is "different from other destructive abortion techniques because the fetus ··· is killed *outside* of the womb." AMA Board of Trustees Factsheet on H.R. 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1. Medical literature has also equated "partial birth abortion" with D & X as distinguished from D & E. See Gynecologic, Obstetric, and Related Surgery, at 1043; Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998); Bopp & Cook, Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence, 14 Issues in Law and Medicine 3 (1998). Physicians have equated "partial birth abortion" with D & X. See *Planned Parenthood v. Doyle*, 44 F.Supp.2d 975, 979 (W.D.Wis.1999) (citing testimony); ***994** *Richmond Medical Center for Women v. Gilmore*, 55 F.Supp.2d 441, 455 (E.D.Va.1999) (citing testimony). Even respondent's expert, Dr. Phillip Stubblefield, acknowledged that breech extraction intact D & E is referred to in the lay press as "partial birth abortion." App. 271.

Second, the lower courts have repeatedly acknowledged that "partial birth abortion" is commonly understood to mean D & X. See *Little Rock Family Planning Services v. Jegley*, 192 F.3d 794, 795 (C.A.8 1999) ("The term 'partial-birth abortion,' ··· is commonly understood to refer to a particular procedure also known as intact dilation and extraction"); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 195 F.3d 386, 387 (C.A.8 1999) ("The [Iowa] Act prohibits 'partial-birth abortion,' a term commonly understood to refer to a procedure called a dilation and extraction (D & X)"). The District Court in this case noted that "[p]artial-birth abortions" are "known medically as intact dilation and extraction or D & X." 11 F.Supp.2d, at 1121, n. 26. Even the majority notes that "partial birth abortion" is a term "ordinarily associated with the D & X procedure." *Ante*, at 2615.

Third, the term "partial birth abortion" has been used in state legislation on 28 occasions and by Congress twice. The ****2643** term "partial birth abortion" was adopted by Congress in both 1995 and 1997 in two separate pieces of legislation prohibiting the procedure.[FN11] In considering the legislation, ***995** Congress conducted numerous hearings and debates on the issue, which repeatedly described "partial birth abortion" as a procedure distinct from D & E. The Congressional Record contained numerous references to Dr. Haskell's procedure. See, *e.g.*, H.R. 1833 Hearing 3, 17, 52, 77; S. 6 and H.R. 929 Joint Hearing 45. Since that time, debates have taken place in state legislatures across the country, 30 of which have voted to prohibit the procedure. With only two

exceptions, the legislatures that voted to ban the procedure referred to it as "partial birth abortion." FN12 These debates also referred to Dr. Haskell's procedure as D & X. Both the evidence before the legislators and the legislators themselves equated "partial birth abortion" with D & X. The fact that 28 States adopted legislation banning "partial birth abortion," defined it in a way similar or identical to Nebraska's definition, FN13 and, ***996*** in doing so, repeatedly referred to the breech extraction form of intact D & E and repeatedly distinguished it from ordinary D & E, makes it inconceivable that the term "partial birth abortion" could reasonably be interpreted to mean D & E.

FN11. Congressional legislation prohibiting the procedure was first introduced in June 1995, with the introduction of the Partial Birth Abortion Ban Act, H.R. 1833. This measure, which was sponsored by 165 individual House Members, passed both Houses by wide margins, 141 Cong. Rec. 35892 (1995); 142 Cong. Rec. 31169 (1996), but was vetoed by President Clinton, see *id.*, at 7467. The House voted to override the veto on September 19, 1996, see *id.*, at 23851; however, the Senate failed to override by a margin of 13 votes, see *id.*, at 25829. In the next Congress, 181 individual House cosponsors reintroduced the Partial Birth Abortion Ban Act as H.R. 929, which was later replaced in the House with H.R. 1122. See H.R. 1122, 105th Cong., 1st Sess. (1997). The House and Senate again adopted the legislation, as amended, by wide margins. See 143 Cong. Rec. H1230 (Mar. 20, 1997); *id.*, at S4715 (May 20, 1997). President Clinton again vetoed the bill. See *id.*, at H8891 (Oct. 10, 1997). Again, the veto override passed in the House and fell short in the Senate. See 144 Cong. Rec. H6213 (July 23, 1998); *id.*, at S10564 (Sept. 18, 1998).

FN12. Consistent with the practice of Dr. Haskell (an Ohio practitioner), Ohio referred to the procedure as "dilation and extraction," defined as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain." Ohio Rev.Code Ann. § 2919.15(A) (1997). Missouri refers to the killing of a "partially-born" infant as "infanticide." Mo. Stat. Ann. § 565.300 (Vernon Supp.2000).

FN13. For the most part, these States defined the term "partial birth abortion" using language similar to that in the 1995 proposed congressional legislation, that is "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." See H.R. 1833 Hearing 210. See, *e.g.*, Alaska Stat. Ann. § 18.16.050 (1998); Ariz.Rev.Stat. Ann. § 13-3603.01 (Supp.1999); Ark.Code Ann. § 5-61-202 (1997); Fla. Stat. § 390.011 (Supp.2000); Ill. Comp. Stat., ch. 720, § 513/5 (1999); Ind.Code Ann. § 16-18-2-267.5 (West Supp.1999); Mich. Comp. Laws Ann. § 333.17016(5)(c) (West Supp.2000); Miss.Code Ann. § 41-41-73(2)(a) (Supp.1998); S.C.Code Ann. § 44-41-85(A)(1) (1999 Cum.Supp.). Other States, including Nebraska, see Neb.Rev.Stat. Ann. § 28-326 (Supp.1999), defined "partial-birth abortion" using language similar to that used in the 1997 proposed congressional legislation, which retained the definition of partial birth abortion used in the 1995 bill, that is "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery," but further defined that phrase to mean "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion there of, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." See Partial Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong., 1st Sess. (1997). See, *e.g.*, Idaho Code § 18-613(a) (Supp.1999); Iowa Code Ann. § 707.8A(1)(c) (Supp.1999); N.J. Stat. Ann. § 2A:65A-6(e) (West Supp.2000); Okla. Stat. Ann., Tit. 21, § 684 (Supp.2000); R.I. Gen. Laws § 23-4.12-1 (Supp.1999); Tenn.Code Ann. § 39-15-209(a)(1) (1997).

C

Were there any doubt remaining whether the statute could apply to a D & E ****2644*** procedure, that

doubt is no ground for invalidating the statute. Rather, we are bound to first consider whether a construction of the statute is fairly possible that would avoid the constitutional question. *Erznoznik v. Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"); *Frisby v. Schultz,* 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties"). This principle is, as Justice O'CONNOR has said, so "well-established" that failure to apply is "plain error." *Id.,* at 483, 108 S.Ct. 2495. Although our interpretation of a Nebraska law is of course not binding on Nebraska courts, it is clear, as *Erznoznik* and *Frisby* demonstrate, that, absent a conflicting interpretation by Nebraska (and there is none here), we should, if the text permits, adopt such a construction.

***997** The majority contends that application of the Nebraska statute to D & E would pose constitutional difficulties because it would eliminate the most common form of second-trimester abortions. To the extent that the majority's contention is true, there is no doubt that the Nebraska statute is susceptible of a narrowing construction by Nebraska courts that would preserve a physicians' ability to perform D & E. See *State v. Carpenter,* 250 Neb. 427, 434, 551 N.W.2d 518, 524 (1996) ("A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done"). For example, the statute requires that the physician "deliberately and intentionally delive[r] into the vagina a living unborn child, or a substantial portion thereof," before performing a death-causing procedure. The term "substantial portion" is susceptible to a narrowing construction that would exclude the D & E procedure. One definition of the word "substantial" is "being largely but not wholly that which is specified." Webster's Ninth New Collegiate Dictionary, at 1176. See *Pierce v. Underwood,* 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (describing different meanings of the term "substantial"). In other words, "substantial" can mean "almost all" of the thing denominated. If nothing else, a court could construe the statute to require that the fetus be "largely, but not wholly," delivered out of the uterus before the physician performs a procedure that he knows will kill the unborn child. Or, as I have discussed, a court could (and should) construe "for the purpose of performing a procedure" to mean "for the purpose of performing a separate procedure."

III

The majority and Justice O'CONNOR reject the plain language of the statutory definition, refuse to read that definition in light of the statutory reference to "partial birth abortion," and ignore the doctrine of constitutional avoidance. In so doing, they offer scant statutory analysis of their own. See *ante,* at 2613-2614 (majority opinion); cf. *ante,* at 2614-2617 ***998** majority opinion); *ante,* at 2618-2619 (O'CONNOR, J., concurring). In their brief analyses, the majority and Justice O'CONNOR disregard all of the statutory language except for the final definitional sentence, thereby violating the fundamental canon of construction that statutes are to be read as a whole. *United States v. Morton,* 467 U.S., at 828, 104 S.Ct. 2769 ("We do not ··· construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase") (footnote omitted); *United States v. Heirs of Boisdore,* 8 How. 113, 122, 12 L.Ed. 1009 (1849) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); ****2645** *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) ("[A] word is known by the company it keeps").[FN14] In lieu of analyzing the statute as a whole, the majority and Justice O'CONNOR ***999** offer five principal arguments for their interpretation of the statute. I will address them in turn.

FN14. The majority argues that its approach is supported by *Meese v. Keene,* 481 U.S. 465, 487, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987), in which the Court stated that "the statutory definition of [a] term excludes unstated meanings of that term." But this case provides no support for the approach adopted by the majority and Justice O'CONNOR. In *Meese,* the Court addressed a statute that used the term "political propaganda." *Id.,* at 470, 107 S.Ct. 1862. The Court noted that there were two commonly understood meanings to the term "political propaganda," *id.,* at 477, 107 S.Ct. 1862, and, not

surprisingly, chose the definition that was most consistent with the statutory definition, *id.*, at 485, 107 S.Ct. 1862. Nowhere did the Court suggest that, because "political propaganda" was defined in the statute, the commonly understood meanings of that term were irrelevant. Indeed, a significant portion of the Court's opinion was devoted to describing the effect of Congress' use of that term. *Id.*, at 477-479, 483-484, 107 S.Ct. 1862. So too, *Colautti v. Franklin*, 439 U.S. 379, 392-393, n. 10, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414 (1945), support the proposition that when there are two possible interpretations of a term, and only one comports with the statutory definition, the term should not be read to include the unstated meaning. But here, there is only one possible interpretation of "partial birth abortion"-the majority can cite no authority using that term to describe D & E-and so there is no justification for the majority's willingness to entirely disregard the statute's use of that term.

First, the majority appears to accept, if only obliquely, an argument made by respondent: If the term "partial birth abortion" refers to only the breech extraction form of intact D & E, or D & X, the Nebraska Legislature should have used the medical nomenclature. See *ante,* at 2615-2616 (noting that the Nebraska Legislature rejected an amendment that would replace "partial birth abortion" with "dilation and extraction"); Brief for Respondent 4-5, 24.

There is, of course, no requirement that a legislature use terminology accepted by the medical community. A legislature could, no doubt, draft a statute using the term "heart attack" even if the medical community preferred "myocardial infarction." Legislatures, in fact, sometimes use medical terms in ways that conflict with their clinical definitions, see, *e.g.*, *Barber v. Director*, 43 F.3d 899, 901 (C.A.4 1995) (noting that the medical definition of "pneumoconiosis" is only a subset of the afflictions that fall within the definition of "pneumoconiosis" in the Black Lung Act), a practice that is unremarkable so long as the legal term is adequately defined. We have never, until today, suggested that legislature may only use words accepted by every individual physician. Rather, "we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Kansas v. Hendricks*, 521 U.S. 346, 359, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). And we have noted that "[o]ften, those definitions do not fit precisely with the definitions employed by the medical community." *Ibid.*

Further, it is simply not true that the many legislatures, including Nebraska's, that prohibited "partial birth abortion" chose to use a term known only in the vernacular in place of a term with an accepted clinical meaning. When the Partial-Birth Abortion Ban Act of 1995 was introduced in Congress, the term "dilation and extraction" did not appear in any medical dictionary. See, *e.g.*, Dorland's Illustrated ***1000** Medical Dictionary 470 (28th ed.1994); Stedman's Medical Dictionary, at 485; Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing, & Allied Health 460 (6th ed.1997); The Sloane-Dorland Annotated Medical-Legal Dictionary 204 (1987); I. Dox, J. Melloni, & G. Eisher, The HarperCollins Illustrated Medical Dictionary 131 (1993). The term did not appear in descriptions of abortion methods in leading medical textbooks. See, *e.g.*, G. ****2646** Cunningham et al., Williams Obstetrics 579-605 (20th ed.1997); Obstetrics: Normal & Problem Pregnancies, at 1249-1279; W. Hern, Abortion Practice (1990). Abortion reference books also omitted any reference to the term. See, *e.g.*, Modern Methods of Inducing Abortion (D. Baird, D. Grimes, & P. Van Look eds.1995); E. Glick, Surgical Abortion (1998). FN15

FN15. Nor, for that matter, did the terms "intact dilation and extraction" or "intact dilation and evacuation" appear in textbooks or medical dictionaries. See *supra,* at 2645 and this page. In fact, respondent's preferred term "intact D & E" would compound, rather than remedy, any confusion regarding the statute's meaning. As is evident from the majority opinion, there is no consensus on what this term means. Compare *ante,* at 2607 (describing "intact D & E" to refer to both breech and vertex presentation procedures), with App. 6 (testimony of Dr. Henshaw) (using "intact D & E" to mean only breech procedure), with *id.*, at 275 (testimony of Dr. Stubblefield) (using "intact D & E" to refer to delivery of fetus that has died in utero).

Not only did D & X have no medical meaning at the time, but the term is ambiguous on its face. "Dilation and extraction" would, on its face, accurately describe any procedure in which the woman is

"dilated" and the fetus "extracted," including D & E. See *supra,* at 2637-2638. In contrast, "partial birth abortion" has the advantage of faithfully describing the procedure the legislature meant to address because the fact that a fetus is "partially born" during the procedure is indisputable. The term "partial birth abortion" is completely accurate and descriptive, which is perhaps the reason why the majority finds it objectionable. Only a desire to find fault at any cost could explain the Court's willingness to penalize the Nebraska Legislature for failing to replace a ***1001*** descriptive term with a vague one. There is, therefore, nothing to the majority's argument that the Nebraska Legislature is at fault for declining to use the term "dilation and extraction." FN16

> FN16. The fact that the statutory term "partial birth abortion" may express a political or moral judgment, whereas "dilation and extraction" does not, is irrelevant. It is certainly true that technical terms are frequently empty of normative content. (Of course, the decision to use a technical term can itself be normative. See *ante, passim* (majority opinion)). But, so long as statutory terms are adequately defined, there is no requirement that Congress or state legislatures draft statutes using morally agnostic terminology. See, *e.g.,* 18 U.S.C. § 922(v) (making it unlawful to "manufacture, transfer, or possess a semiautomatic assault weapon"); Kobayashi & Olson et al., *In re 101 California Street:* A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons," 8 Stan. L. & Pol'y Rev. 41, 43 (1997) ("Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of 'assault rifles' so as to allow an attack on as many additional firearms as possible on the basis of undefined 'evil' appearance"). See also *Meese,* 481 U.S., at 484-485, 107 S.Ct. 1862.

Second, the majority faults the Nebraska Legislature for failing to "track the medical differences between D & E and D & X" and for failing to "suggest that its application turns on whether a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head as opposed to a process that would dismember the fetus." *Ante,* at 2614. I have already explained why the Nebraska statute reflects the medical differences between D & X and D & E. To the extent the majority means that the Nebraska Legislature should have "tracked the medical differences" by adopting one of the informal definitions of D & X, this argument is without merit; none of these definitions would have been effective to accomplish the State's purpose of preventing abortions of partially born fetuses. Take, for example, ACOG's informal definition of the term "intact D & X." According to ACOG, an "intact D & X" consists of the following four steps: (1) deliberate dilation of ***1002*** the cervix, usually over a sequence of days; (2) instrumental conversion of the fetus to a footling breach; (3) breech extraction of the body ****2647*** excepting the head; and (4) partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus. App. 599-600 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)). ACOG emphasizes that "unless all four elements are present in sequence, the procedure is not an intact D & X." *Id.,* at 600. Had Nebraska adopted a statute prohibiting "intact D & X," and defined it along the lines of the ACOG definition, physicians attempting to perform abortions on partially born fetuses could have easily evaded the statute. Any doctor wishing to perform a partial birth abortion procedure could simply avoid liability under such a statute by performing the procedure, as respondent does, only when the fetus is presented feet first, thereby avoiding the necessity of "conversion of the fetus to a footling breech." *Id.,* at 599. Or, a doctor could convert the fetus without instruments. Or, the doctor could cause the fetus' death before "partial evacuation of the intracranial contents," *id.,* at 600, by plunging scissors into the fetus' heart, for example. A doctor could even attempt to evade the statute by chopping off two fetal toes prior to completing delivery, preventing the State from arguing that the fetus was "otherwise intact." Presumably, however, Nebraska, and the many other legislative bodies that adopted partial birth abortion bans, were not concerned with whether death was inflicted by injury to the brain or the heart, whether the fetus was converted with or without instruments, or whether the fetus died with its toes attached. These legislative bodies were, I presume, concerned with whether the child was partially born before the physician caused its death. The legislatures' evident concern was with permitting a procedure that resembles infanticide and threatens to dehumanize the fetus. They, therefore, presumably declined to adopt a ***1003*** ban only on "intact D & X," as defined by ACOG, because it would have been ineffective to that purpose. Again, the majority is faulting Nebraska for a

legitimate legislative calculation.

Third, the majority and Justice O'CONNOR argue that this Court generally defers to lower federal courts' interpretations of state law. *Ante,* at 2614 (majority opinion); *ante,* at 2618-2619 (O'CONNOR, J., concurring). However, a decision drafted by Justice O'CONNOR, which she inexplicably fails to discuss, *Frisby v. Schultz,* 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), makes clear why deference is inappropriate here. As Justice O'CONNOR explained in that case: "[W]hile we ordinarily defer to lower court constructions of state statutes, we do not invariably do so. We are particularly reluctant to defer when the lower courts have fallen into plain error, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Id.,* at 483, 108 S.Ct. 2495 (citations omitted).

Frisby, then, identifies exactly why the lower courts' opinions here are not entitled to deference: The lower courts failed to identify the narrower construction that, consistent with the text, would avoid any constitutional difficulties.

Fourth, the majority speculates that some Nebraska prosecutor may attempt to stretch the statute to apply it to D & E. But a state statute is not unconstitutional on its face merely because we can imagine an aggressive prosecutor who would attempt an overly aggressive application of the statute. We have noted that " '[w]ords inevitably contain germs of uncertainty.' " *Broadrick v. Oklahoma,* 413 U.S. 601, 608, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). We do not give statutes the broadest definition imaginable. Rather, we ask whether "the ordinary ***1004** person exercising ordinary common sense can sufficiently understand and comply with [the statute]." *Ibid.* (quoting ****2648** *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 579, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)). While a creative legal mind might be able to stretch the plain language of the Nebraska statute to apply to D & E, "citizens who desire to obey the statute will have no difficulty in understanding it." *Colten v. Kentucky,* 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (internal quotation marks omitted).

Finally, the majority discusses at some length the reasons it will not defer to the interpretation of the statute proffered by the Nebraska Attorney General, despite the Attorney General's repeated representations to this Court that his State will not apply the partial birth abortion statute to D & E. See Brief for Petitioners 11-13; Tr. of Oral Arg. 10-11. The fact that the Court declines to defer to the interpretation of the Attorney General is not, however, a reason to give the statute a contrary representation. Even without according the Attorney General's view any particular respect, we should agree with his interpretation because it is undoubtedly the correct one. Moreover, Justice O'CONNOR has noted that the Court should adopt a narrow interpretation of a state statute when it is supported by the principle that statutes will be interpreted to avoid constitutional difficulties as well as by "the representations of counsel ··· at oral argument." *Frisby v. Schultz, supra,* at 483, 108 S.Ct. 2495. Such an approach is particularly appropriate in this case because, as the majority notes, Nebraska courts accord the Nebraska Attorney General's interpretations of state statutes "substantial weight." See *State v. Coffman,* 213 Neb. 560, 561, 330 N.W.2d 727, 728 (1983). Therefore, any renegade prosecutor bringing criminal charges against a physician for performing a D & E would find himself confronted with a contrary interpretation of the statute by the Nebraska Attorney General, and, I assume, a judge who both possessed common ***1005** sense and was aware of the rule of lenity. See *State v. White,* 254 Neb. 566, 575, 577 N.W.2d 741, 747 (1998). FN17

FN17. The majority relies on Justice SCALIA's observation in *Crandon v. United States,* 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990), that "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Id.,* at 177, 110 S.Ct. 997. But Justice SCALIA was commenting on the United States Attorney General's overly broad interpretation of a federal statute, deference to which, as he said, would "turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity." *Id.,* at 178, 110 S.Ct. 997. Here, the Nebraska Attorney General has adopted a *narrow* view of a criminal statute, one that comports with the rule of lenity (not to mention the statute's plain meaning).

Having resolved that Nebraska's partial birth abortion statute permits doctors to perform D & E abortions, the question remains whether a State can constitutionally prohibit the partial birth abortion procedure without a health exception. Although the majority and Justice O'CONNOR purport to rely on the standard articulated in the *Casey* joint opinion in concluding that a State may not, they in fact disregard it entirely.

A

Though Justices O'CONNOR, KENNEDY, and SOUTER declined in *Casey,* on the ground of *stare decisis,* to reconsider whether abortion enjoys any constitutional protection, 505 U.S., at 844-846, 854-869, 112 S.Ct. 2791 (majority opinion); *id.,* at 871, 112 S.Ct. 2791 (plurality opinion), *Casey* professed to be, in part, a repudiation of *Roe* and its progeny. The *Casey* plurality expressly noted that prior case law had undervalued the State's interest in potential life, 505 U.S., at 875-876, 112 S.Ct. 2791, and had invalidated regulations of abortion that "in no real sense deprived women of the ultimate decision," *id.,* at 875, 112 S.Ct. 2791. See *id.,* at 871, 112 S.Ct. 2791 ("*Roe v. Wade* speaks with clarity in establishing ··· the State's 'important**2649 and legitimate interest in potential life.' That portion*1006 of the decision in *Roe* has been given too little acknowledgment" (citation omitted)). The plurality repeatedly recognized the States' weighty interest in this area. See *id.,* at 877, 112 S.Ct. 2791 ("State ··· may express profound respect for the life of the unborn"); *id.,* at 878, 112 S.Ct. 2791 ("the State's profound interest in potential life"); *id.,* at 850, 112 S.Ct. 2791 (majority opinion) ("profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage"). And, the plurality expressed repeatedly the States' legitimate role in regulating abortion procedures. See *id.,* at 876, 112 S.Ct. 2791 ("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"); *id.,* at 875, 112 S.Ct. 2791 ("Not all governmental intrusion [with abortion] is of necessity unwarranted"). According to the plurality: "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.,* at 874, 112 S.Ct. 2791.

The *Casey* plurality therefore adopted the standard: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Ibid.* A regulation imposes an "undue burden" only if it "has the effect of placing a substantial obstacle in the path of a woman's choice." *Id.,* at 877, 112 S.Ct. 2791.

B

There is no question that the State of Nebraska has a valid interest-one not designed to strike at the right itself-in prohibiting partial birth abortion. *Casey* itself noted that States may "express profound respect for the life of the unborn." *Ibid.* States may, without a doubt, express this profound respect by prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life. The AMA has recognized that this procedure is "ethically different from other destructive abortion *1007 techniques because the fetus, normally twenty weeks or longer in gestation, is killed *outside* the womb. The 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." AMA Board of Trustees Factsheet on H.R. 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons et al. as *Amici Curiae* 1. Thirty States have concurred with this view.

Although the description of this procedure set forth above should be sufficient to demonstrate the resemblance between the partial birth abortion procedure and infanticide, the testimony of one nurse who observed a partial birth abortion procedure makes the point even more vividly:

"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, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

"The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp." H.R. 1833 Hearing 18 (statement of Brenda Pratt Shafer).

The question whether States have a legitimate interest in banning the procedure does not require additional authority. See *ante,* at 2625-2627 (KENNEDY, J., dissenting).[FN18] In a civilized*1008

society, the ***2650** answer is too obvious, and the contrary arguments too offensive, to merit further discussion. But see *ante,* at 2617 (STEVENS, J., concurring) (arguing that the decision of 30 States to ban the partial birth abortion procedure was "simply irrational" because other forms of abortion were "equally gruesome"); *ante,* at 2620 (GINSBURG, J., concurring) (similar).[FN19]

FN18. I read the majority opinion to concede, if only implicitly, that the State has a legitimate interest in banning this dehumanizing procedure. The threshold question under *Casey* is whether the abortion regulation serves a legitimate state interest. 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Only if the statute serves a legitimate state interest is it necessary to consider whether the regulation imposes a substantial obstacle to women seeking an abortion. *Ibid.* The fact that the majority considers whether Nebraska's statute creates a substantial obstacle suggests that the Members of the majority other than Justice STEVENS and Justice GINSBURG have rejected respondent's threshold argument that the statute serves no legitimate state purpose.

FN19. Justice GINSBURG seems to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has the *purpose* of imposing an undue burden. Justice GINSBURG's view is, apparently, that we can presume an unconstitutional purpose because the regulation is not designed to save any fetus from "destruction" or protect the health of pregnant women and so must, therefore, be designed to "chip away at ··· *Roe.*" *Ante,* at 2620. This is a strange claim to make with respect to legislation that was enacted in 30 individual States and was enacted in Nebraska by a vote of 45 to 1, Nebraska Legislative Journal, 95th Leg., 1st Sess., 2609 (1997). Moreover, in support of her assertion that the Nebraska Legislature acted with an unconstitutional purpose, Justice GINSBURG is apparently unable to muster a single shred of evidence that the Nebraska legislation was enacted to prevent women from obtaining abortions (a purpose to which it would be entirely ineffective), let alone the kind of persuasive proof we would require before concluding that a legislature acted with an unconstitutional intent. In fact, as far as I can tell, Justice GINSBURG's views regarding the motives of the Nebraska Legislature derive from the views of a dissenting Court of Appeals judge discussing the motives of legislators of other States. Justice GINSBURG's presumption is, in addition, squarely inconsistent with *Casey,* which stated that States may enact legislation to "express profound respect for the life of the unborn," 505 U.S., at 877, 112 S.Ct. 2791, and with our opinion in *Mazurek v. Armstrong,* 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) *(per curiam),* in which we stated:

"[E]ven assuming ··· that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right ··· could render the Montana law invalid-there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, *e.g., Washington v. Davis,* 426 U.S. 229, 246, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); much less do we assume it when the results are harmless." *Id.,* at 972, 117 S.Ct. 1865 (emphases in original).

***1009** C

The next question, therefore, is whether the Nebraska statute is unconstitutional because it does not contain an exception that would allow use of the procedure whenever " ' "necessary, in appropriate medical judgment, for the preservation of the ··· health of the mother." ' " *Ante,* at 2609 (majority opinion) (quoting *Casey,* 505 U.S., at 879, 112 S.Ct. 2791 in turn quoting *Roe,* 410 U.S., at 164-165, 93 S.Ct. 705) (emphasis deleted). According to the majority, such a health exception is required here because there is a "division of opinion among some medical experts over whether D & X is generally safer [than D & E], and an absence of controlled medical studies that would help answer these medical questions." *Ante,* at 2612. In other words, unless a State can conclusively establish that an abortion procedure is no safer than other procedures, the State cannot regulate that procedure

without including a health exception. Justice O'CONNOR agrees. *Ante,* at 2617-2618 (concurring opinion). The rule set forth by the majority and Justice O'CONNOR dramatically expands on our prior abortion cases and threatens to undo *any* state regulation of abortion procedures.

The majority and Justice O'CONNOR suggest that their rule is dictated by a straightforward application of *Roe* and *Casey. Ante,* at 2608-2609 (majority opinion); *ante,* at 2617-2618 (O'CONNOR, J., ****2651*** concurring). But that is simply not true. In *Roe* and *Casey,* the Court stated that the State may "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." *Roe, supra,* at 165, 93 S.Ct. 705; *Casey,* 505 U.S., at 879, 112 S.Ct. 2791. *Casey* said that a health exception must be available if " *continuing her pregnancy* would constitute a threat" to the woman. *Id.,* at 880, 112 S.Ct. 2791 (majority opinion) (emphasis added). Under these cases, if a State seeks to prohibit abortion, even if only temporarily or under particular circumstances, as *Casey* says that it may, ***1010** *id.,* at 879, 112 S.Ct. 2791 (plurality opinion), the State must make an exception for cases in which the life or health of the mother is endangered by continuing the pregnancy. These cases addressed only the situation in which a woman must obtain an abortion because of some threat to her health from continued pregnancy. But *Roe* and *Casey* say nothing at all about cases in which a physician considers one prohibited method of abortion to be preferable to permissible methods. Today's majority and Justice O'CONNOR twist *Roe* and *Casey* to apply to the situation in which a woman desires-for whatever reason-an abortion and wishes to obtain the abortion by some particular method. See *ante,* at 2608-2609 (majority opinion); *ante,* at 2617-2618 (concurring opinion). In other words, the majority and Justice O'CONNOR fail to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion (for whatever reason) to prefer one method over another.

It is clear that the Court's understanding of when a health exception is required is not mandated by our prior cases. In fact, we have, post-*Casey,* approved regulations of methods of conducting abortion despite the lack of a health exception. *Mazurek v. Armstrong,* 520 U.S. 968, 971, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) *(per curiam)* (reversing Court of Appeals holding that plaintiffs challenging requirement that only physicians perform abortions had a " 'fair chance of success' "); *id.,* at 979, 117 S.Ct. 1865 (STEVENS, J., dissenting) (arguing that the regulation was designed to make abortion more difficult). And one can think of vast bodies of law regulating abortion that are valid, one would hope, despite the lack of health exceptions. For example, physicians are presumably prohibited from using abortifacients that have not been approved by the Food and Drug Administration even if some physicians reasonably believe ***1011** that these abortifacients would be safer for women than existing abortifacients.[FN20]

> FN20. As I discuss below, the only question after *Casey* is whether a ban on partial birth abortion without a health exception imposes an "undue burden" on a woman seeking an abortion, meaning that it creates a "substantial obstacle" for the woman. I assume that the Court does not discuss the health risks with respect to undue burden, and instead suggests that health risks are relevant to the necessity of a health exception, because a marginal increase in safety risk for some women is clearly not an undue burden within the meaning of *Casey.* At bottom, the majority is using the health exception language to water down *Casey's* undue-burden standard.

The majority effectively concedes that *Casey* provides no support for its broad health exception rule by relying on pre-*Casey* authority, see *ante,* at 2609, including a case that was specifically disapproved of in *Casey* for giving too little weight to the State's interest in fetal life. See *Casey, supra,* at 869, 882, 112 S.Ct. 2791 (overruling the parts of *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), that were "inconsistent with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn," 505 U.S., at 870, 112 S.Ct. 2791); *id.,* at 893, 112 S.Ct. 2791 (majority opinion) (relying on ****2652** *Thornburgh, supra,* at 783, 106 S.Ct. 2169 (Burger, C.J., dissenting), for the proposition that the Court was expanding on *Roe* in that case). Indeed, Justice O'CONNOR, who joins the Court's opinion, was on the Court for *Thornburgh* and was in dissent, arguing that, under the undue-burden standard, the statute at issue was constitutional. See 476 U.S., at 828-832, 106 S.Ct. 2169 (arguing that the challenged state statute was not "unduly burdensome"). The majority's resort to this case proves my point that the holding today assumes that the standard set

forth in the *Casey* joint opinion is no longer governing.
And even if I were to assume that the pre-*Casey* standards govern, the cases cited by the majority provide no support for the proposition that the partial birth abortion ban must ***1012** include a health exception because some doctors believe that partial birth abortion is safer. In *Thornburgh, Danforth,* and *Doe,* the Court addressed health exceptions for cases in which *continued pregnancy* would pose a risk to the woman. *Thornburgh, supra,* at 770, 106 S.Ct. 2169; *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Doe v. Bolton,* 410 U.S., at 197, 93 S.Ct. 739. And in *Colautti v. Franklin,* 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), the Court explicitly declined to address whether a State can constitutionally require a tradeoff between the woman's health and that of the fetus. The broad rule articulated by the majority and by Justice O'CONNOR are unprecedented expansions of this Court's already expansive pre-*Casey* jurisprudence. As if this state of affairs were not bad enough, the majority expands the health exception rule articulated in *Casey* in one additional and equally pernicious way. Although *Roe* and *Casey* mandated a health exception for cases in which abortion is "necessary" for a woman's health, the majority concludes that a procedure is "necessary" if it has any comparative health benefits. *Ante,* at 2612. In other words, according to the majority, so long as a doctor can point to support in the profession for his (or the woman's) preferred procedure, it is "necessary" and the physician is entitled to perform it. *Ibid.* See also *ante,* at 2620 (GINSBURG, J., concurring) (arguing that a State cannot constitutionally "sto[p] a woman from choosing the procedure her doctor 'reasonably believes' " is in her best interest). But such a health exception requirement eviscerates *Casey's* undue-burden standard and imposes unfettered abortion on demand. The exception entirely swallows the rule. In effect, no regulation of abortion procedures is permitted because there will always be *some* support for a procedure and there will always be some doctors who conclude that the procedure is preferable. If Nebraska reenacts its partial birth abortion ban with a health exception, the State will not be able to prevent physicians like Dr. Carhart from using partial birth abortion as a routine abortion procedure. This Court has now expressed ***1013** its own conclusion that there is "highly plausible" support for the view that partial birth abortion is safer, which, in the majority's view, means that the procedure is therefore "necessary." *Ante,* at 2612. Any doctor who wishes to perform such a procedure under the new statute will be able to do so with impunity. Therefore, Justice O'CONNOR's assurance that the constitutional failings of Nebraska's statute can be easily fixed, *ante,* at 2619-2620, is illusory. The majority's insistence on a health exception is a fig leaf barely covering its hostility to any abortion regulation by the States-a hostility that *Casey* purported to reject.[FN21]

FN21. The majority's conclusion that health exceptions are required whenever there is any support for use of a procedure is particularly troubling because the majority does not indicate whether an exception for physical health only is required, or whether the exception would have to account for "all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well being of the patient." *Doe v. Bolton,* 410 U.S. 179, 192, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). See also *Voinovich v. Women's Medical Professional Corp.,* 523 U.S. 1036, 1037, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998) (THOMAS, J., joined by REHNQUIST, C. J., and SCALIA, J., dissenting from denial of certiorari).

****2653** D

The majority assiduously avoids addressing the *actual* standard articulated in *Casey*-whether prohibiting partial birth abortion without a health exception poses a substantial obstacle to obtaining an abortion. 505 U.S., at 877, 112 S.Ct. 2791. And for good reason: Such an obstacle does not exist. There are two essential reasons why the Court cannot identify a substantial obstacle. First, the Court cannot identify any real, much less substantial, barrier to any woman's ability to obtain an abortion. And second, the Court cannot demonstrate that any such obstacle would affect a sufficient number of women to justify invalidating the statute on its face.

1

The *Casey* joint opinion makes clear that the Court should not strike down state regulations of

abortion based on the ***1014*** fact that some women might face a marginally higher health risk from the regulation. In *Casey,* the Court upheld a 24-hour waiting period even though the Court credited evidence that for some women the delay would, in practice, be much longer than 24 hours, and even though it was undisputed that any delay in obtaining an abortion would impose additional health risks. *Id.,* at 887, 112 S.Ct. 2791; *id.,* at 937, 112 S.Ct. 2791 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) ("The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks"). Although some women would be able to avoid the waiting period because of a "medical emergency," the medical emergency exception in the statute was limited to those women for whom delay would create "serious risk of substantial and irreversible impairment of a major bodily function." *Id.,* at 902, 112 S.Ct. 2791 (appendix to joint opinion) (internal quotation marks omitted). Without question, there were women for whom the regulation would impose some additional health risk who would not fall within the medical emergency exception. The Court concluded, despite the certainty of this increased risk, that there was no showing that the burden on any of the women was substantial. *Id.,* at 887, 112 S.Ct. 2791.

The only case in which this Court has overturned a State's attempt to prohibit a particular form of abortion also demonstrates that a marginal increase in health risks is not sufficient to create an undue burden. In *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court struck down a state regulation because the State had outlawed the method of abortion used in 70% of abortions and because alternative methods were, the Court emphasized, "significantly more dangerous and critical" than the prohibited method. *Id.,* at 76, 96 S.Ct. 2831. Like the *Casey* 24-hour waiting period, and in contrast to the situation in *Danforth,* any increased health risk to women imposed by the partial birth abortion ban is minimal ***1015*** at most. Of the 5.5% of abortions that occur after 15 weeks (the time after which a partial birth abortion would be possible), the vast majority are performed with a D & E or induction procedure. And, for any woman with a vertex presentation fetus, the vertex presentation form of intact D & E, which presumably shares some of the health benefits of the partial birth abortion procedure but is not covered by the Nebraska statute, is available. Of the remaining women-that is, those women for whom a partial birth abortion procedure would be considered and who have a breech presentation fetus-there is no showing that any one faces a significant health risk from the partial birth abortion ban. A select committee of ACOG "could identify no circumstances***2654*** under which this procedure ··· would be the only option to save the life or preserve the health of the woman." App. 600 (ACOG Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)). See also *Hope Clinic v. Ryan,* 195 F.3d 857, 872 (C.A.7 1999) (en banc) (" 'There does not appear to be any identified situation in which intact D & X is the only appropriate procedure to induce abortion' " (quoting Late Term Pregnancy Techniques, AMA Policy H-5.982 W.D. Wis.1999)); *Planned Parenthood of Wis. v. Doyle,* 44 F.Supp.2d, at 980 (citing testimony of Dr. Haskell that "the D & X procedure is never medically necessary to ··· preserve the health of a woman"), vacated, 195 F.3d 857 (C.A.7 1999). And, an ad hoc coalition of doctors, including former Surgeon General Koop, concluded that there are no medical conditions that require use of the partial birth abortion procedure to preserve the mother's health. See App. 719.

In fact, there was evidence before the Nebraska Legislature that partial birth abortion *increases* health risks relative to other procedures. During floor debates, a proponent of the Nebraska legislation read from and cited several articles by physicians concluding that partial birth abortion procedures are risky. App. in Nos. 98-3245, 98-3300 (C.A.8), ***1016*** p. 812. One doctor testifying before a committee of the Nebraska Legislature stated that partial birth abortion involves three "very risky procedures": dilation of the cervix, using instruments blindly, and conversion of the fetus. App. 721 (quoting testimony of Paul Hays, M.D.).[FN22]

FN22. Use of the procedure may increase the risk of complications, including cervical incompetence, because it requires greater dilation of the cervix than other forms of abortion. See Epner, Jonas, & Seckinger, Late-term Abortion, 280 JAMA 724, 726 (Aug. 26, 1998). Physicians have also suggested that the procedure may pose a greater risk of infection. See *Planned Parenthood of Wis. v. Doyle,* 44 F.Supp.2d 975, 979 (W.D.Wis.1999). See also Sprang & Neerhof, Rationale for Banning Abortions Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998) ("Intact D & X poses serious medical risks to the mother").

There was also evidence before Congress that partial birth abortion "does not meet medical standards set by ACOG nor has it been adequately proven to be safe nor efficacious." H.R. 1833 Hearing 112 (statement of Nancy G. Romer, M. D.); see *id.,* at 110-111.[FN23] The AMA supported the congressional ban on partial birth abortion, concluding that the procedure is "not medically indicated" and "not good medicine." See 143 Cong. Rec. S4670 (May 19, 1997) (reprinting a letter from the AMA to Sen. Santorum). And there was evidence before Congress that there is "certainly no basis upon which to state the claim that [partial birth abortion] is a safer or even a preferred procedure." Partial Birth Abortion: The Truth, S. 6 and H.R. 929 Joint Hearing 123 (statement of Curtis Cook, M. D.). This same doctor testified that ***1017** "partial-birth abortion is an unnecessary, unsteady, and potentially dangerous procedure," and that "safe alternatives are in existence." *Id.,* at 122.

> FN23. Nebraska was entitled to rely on testimony and evidence presented to Congress and to other state legislatures. Cf. *Erie v. Pap's A. M.*, 529 U.S. 277, 296-297, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). At numerous points during the legislative debates, various members of the Nebraska Legislature made clear that that body was aware of, and relying on, evidence before Congress and other legislative bodies. See App. in Nos. 98-3245, 98-3300(CA8), pp. 846, 852-853, 878-879, 890-891, 912-913.

The majority justifies its result by asserting that a "significant body of medical opinion" supports the view that partial birth abortion may be a safer abortion procedure. *Ante,* at 2612-2613. I find this assertion puzzling. If there is a "significant body of medical opinion" supporting this procedure, no one in the majority has identified it. In fact, it is uncontested that although this procedure has been used since at least 1992, no formal studies have compared partial birth abortion with other ***2655** procedures. 11 F.Supp.2d, at 1112 (citing testimony of Dr. Stubblefield); *id.,* at 1115 (citing testimony of Dr. Boehm); Epner, Jonas, & Seckinger, Late-term Abortion, 280 JAMA 724 (Aug. 26, 1998); Sprang & Neerhof, Rationale for Banning Abortion Late in Pregnancy, 280 JAMA 744 (Aug. 26, 1998). Cf. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (observing that the reliability of a scientific technique may turn on whether the technique can be and has been tested; whether it has been subjected to peer review and publication; and whether there is a high rate of error or standards controlling its operation). The majority's conclusion makes sense only if the undue-burden standard is not whether a "significant body of medical opinion" supports the result, but rather, as Justice GINSBURG candidly admits, whether *any* doctor could reasonably believe that the partial birth abortion procedure would best protect the woman. *Ante,* at 2620.

Moreover, even if I were to assume credible evidence on both sides of the debate, that fact should resolve the undue-burden question in favor of allowing Nebraska to legislate. Where no one knows whether a regulation of abortion poses any burden at all, the burden surely does not amount to a "substantial obstacle." Under *Casey,* in such a case we should defer to the legislative judgment. We have said:

***1018** "[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes ··· .[W]hen a legislature undertakes to act in areas fraught with medical and scientific uncertainty, legislative options must be especially broad ····" *Kansas v. Hendricks*, 521 U.S., at 360, n. 3, 117 S.Ct. 2072 (internal quotations marks omitted).

In Justice O'CONNOR's words:

"It is ··· difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S., at 456, 103 S.Ct. 2481 (dissenting opinion).

See *id.,* at 456, n. 4, 112 S.Ct. 2791 ("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"); *Webster v. Reproductive Health Services*, 492 U.S., at 519, 109 S.Ct. 3040 (plurality opinion) (Court should not sit as an *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States (internal quotations

marks omitted)); *Jones v. United States,* 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983) ("The lesson we have drawn is not that government may not act in the face of this [medical] uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments"). The Court today disregards these principles and the clear import of *Casey.*

2

Even if I were willing to assume that the partial birth method of abortion is safer for some small set of women, such ***1019** a conclusion would not require invalidating the Act, because this case comes to us on a facial challenge. The only question before us is whether respondent has shown that " 'no set of circumstances exists under which the Act would be valid.' " *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (quoting *Webster v. Reproductive Health Services, supra,* at 524, 109 S.Ct. 3040 (O'CONNOR, J., concurring in part and concurring in judgment)). Courts may not invalidate on its face a state statute regulating abortion "based upon a worst-case analysis that ***2656** may never occur." 497 U.S., at 514, 110 S.Ct. 2972. Invalidation of the statute would be improper even assuming that *Casey* rejected this standard *sub silentio* (at least so far as abortion cases are concerned) in favor of a so-called " 'large fraction' " test. See *Fargo Women's Health Organization v. Schafer,* 507 U.S. 1013, 1014, 113 S.Ct. 1668, 123 L.Ed.2d 285 (1993) (O'CONNOR, J., joined by SOUTER, J., concurring) (arguing that the "no set of circumstances" standard is incompatible with *Casey*). See also *Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174, 1177-1179, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996) (SCALIA, J., dissenting from denial of certiorari). In *Casey,* the Court was presented with a facial challenge to, among other provisions, a spousal notice requirement. The question, according to the majority, was whether the spousal notice provision operated as a "substantial obstacle" to the women "whose conduct it affects," namely, "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." 505 U.S., at 895, 112 S.Ct. 2791. The Court determined that a "large fraction" of the women in this category were victims of psychological or physical abuse. *Ibid.* For this subset of women, according to the Court, the provision would pose a substantial obstacle to the ability to obtain an abortion because their husbands could exercise an effective veto over their decision. *Id.,* at 897, 112 S.Ct. 2791.

None of the opinions supporting the majority so much as mentions the large fraction standard, undoubtedly because ***1020** the Nebraska statute easily survives it. I will assume, for the sake of discussion, that the category of women whose conduct Nebraska's partial birth abortion statute might affect includes any woman who wishes to obtain a safe abortion after 16 weeks' gestation. I will also assume (although I doubt it is true) that, of these women, every one would be willing to use the partial birth abortion procedure if so advised by her doctor. Indisputably, there is no "large fraction" of these women who would face a substantial obstacle to obtaining a safe abortion because of their inability to use this particular procedure. In fact, it is not clear that *any* woman would be deprived of a safe abortion by her inability to obtain a partial birth abortion. More medically sophisticated minds than ours have searched and failed to identify a single circumstance (let alone a large fraction) in which partial birth abortion is required. But no matter. The "ad hoc nullification" machine is back at full throttle. See *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 814, 106 S.Ct. 2169 (O'CONNOR, J., dissenting); *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 785, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (SCALIA, J., concurring in judgment in part and dissenting in part).

* * *

We were reassured repeatedly in *Casey* that not all regulations of abortion are unwarranted and that the States may express profound respect for fetal life. Under *Casey,* the regulation before us today should easily pass constitutional muster. But the Court's abortion jurisprudence is a particularly virulent strain of constitutional exegesis. And so today we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result.

I respectfully dissent.

530 U.S. 914, 120 S.Ct. 2597, 68 USLW 4702, 2000 Daily Journal D.A.R. 6977, 147 L.Ed.2d 743, 00 Cal. Daily Op. Serv. 5252, 2000 CJ C.A.R. 3802

Briefs and Other Related Documents (Back to top)

- 2000 WL 486737, 68 USLW 3684 (Oral Argument) Oral Argument (Apr. 25, 2000)
- 2000 WL 432363 (Appellate Brief) REPLY BRIEF OF PETITIONERS (Apr. 17, 2000)
- 2000 WL 340108 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT (Mar. 29, 2000)
- 2000 WL 340111 (Appellate Brief) BRIEF OF AMICI CURIAE SENATOR BARBARA BOXER AND REPRESENTATIVE NITA M. LOWEY AND OTHER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT LEROY H. CARHART, M.D. (Mar. 29, 2000)
- 2000 WL 340112 (Appellate Brief) BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA ATTORNEY GENERAL BILL LOCKYER IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340114 (Appellate Brief) BRIEF OF PLANNED PARENTHOOD OF WISCONSIN, FREDERIK F. BROEKHUIZEN, M.D., GARY T. PROHASKA, M.D., GAVIN JACOBSON, M.D., NEVILLE SENDER, M.D. AND THE PLANNED PARENTHOOD FEDERATION OF AMERICA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340115 (Appellate Brief) BRIEF OF AMICI CURIAE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, FIFTY-THREE OTHER RELIGIOUS ORGANIZATIONS AND RELIGIOUSLY AFFILIATED ORGANIZATIONS, AND FOURTEEN CLERGY AND LAYPERSONS IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340117 (Appellate Brief) BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL WOMEN'S ASSOCIATION, NATIONAL ABORTION FEDERATION, PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH, AND AMERICAN NURSES ASSOCIATION IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340118 (Appellate Brief) BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION; EMW WOMEN'S SURGICAL CENTER, P.S.C.; SAMUEL G. EUBANKS, M.D.; MARK I. EVANS, M.D.; MARILYNN CONNERS FREDERIKSEN, M.D.; NORMAN A. GINSBERG, M.D.; CASSING HAMMOND, M.D.; HERBERT HOLMES, M.D.; TH E HOPE CLINIC; TIMOTHY R.B. JOHNSON, M.D.; ERNEST W. MARSHALL, M.D.; RHODE ISLAND MEDICAL SOCIETY; PABLO RODRIGUEZ, M.D.; DUANE ST. CLAIR, M.D.; LAUREN STREICHER, M.D.; GERSON WEISS, M.D.; GLENN H. WEYHRICH, M.D.; AND DAVID ZBARAZ, M.D., IN SUPPORT O (Mar. 29, 2000)
- 2000 WL 340119 (Appellate Brief) BRIEF OF THE STATE OF NEW YORK, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340122 (Appellate Brief) BRIEF AMICI CURIAE OF SEVENTY-FIVE ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340123 (Appellate Brief) BRIEF OF THE NARAL FOUNDATION, THE FEMINIST MAJORITY FOUNDATION, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE NATIONAL WOMEN'S LAW CENTER AND PEOPLE FOR THE AMERICAN WAY FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 340275 (Appellate Brief) BRIEF OF RESPONDENT (Mar. 29, 2000)
- 2000 WL 353087 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT (Mar. 29, 2000)
- 2000 WL 235233 (Appellate Brief) Motion to File a Brief Amicus Curiae and Brief Amicus Curiae of Texas Black Americans for Life and L.E.A.R.N. (the Life Education And Resource Network) in support of Petitioner Stenberg (Feb. 29, 2000)
- 2000 WL 245519 (Appellate Brief) MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37.3(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF ART ICLE 3, |2 FEDERAL SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11%rTH%r AMENDMENT, WATSON V. BUCK, y313 U.S. 387 (1941)yr2000067520;0003;1941123747;RP;;780;r; YOUNGER V. HARRIS, y401 U.S. 37 (1971) yr2000067520;0004;;RP;401US3 (Feb. 29, 2000)
- 2000 WL 228442 (Appellate Brief) BRIEF AMICUS CURIAE OF FAMILY FIRST, IN SUPPORT OF PETITIONERS (Feb. 28, 2000)
- 2000 WL 228448 (Appellate Brief) BRIEF AMICI CURIAE of Association of American Physicians and

Surgeons, Illinois State Medical Society, Physicians' Ad hoc Coalition for Truth, Christian Medical and Dental Society, Catholic Medical Association, Physicians Resource Council of Focus on the Family, Pennsylvania Physicians Resource Council, Physicians Research Council of the Indiana Family Institute, New Jersey Physicians Resource Council, Oklahoma Physicians Resource Council, Texas Physicians Resource Council, Wisconsin Physicians (Feb. 28, 2000)

• 2000 WL 228457 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF ON BEHALF OF NATIONAL ASSOCIATION OF PROLIFE NURSES, INC. IN SUPPORT OF PETITIONERS (Feb. 28, 2000)

• 2000 WL 228461 (Appellate Brief) BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS (Feb. 28, 2000)

• 2000 WL 228464 (Appellate Brief) Brief of Amici Curiae U.S. Rep. Charles T. Canady and Other Members of Congress in Support of Petitioners (Feb. 28, 2000)

• 2000 WL 228466 (Appellate Brief) BRIEF AMICUS CURIAE OF VIRGINIA, ALABAMA, IDAHO, ILLINOIS, IOWA, MICHIGAN, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, THE GOVERNOR OF RHODE ISLAND, THE GOVERNOR OF WEST VIRGINIA, AND THE STATE LEGISLATURE OF NEW JERSEY IN S UPPORT OF PETITIONERS (Feb. 28, 2000)

• 2000 WL 228468 (Appellate Brief) BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AND THE THOMAS MORE CENTER FOR LAW & JUSTICE AS AMICI SUPPORTING PETITIONERS (Feb. 28, 2000)

• 2000 WL 228476 (Appellate Brief) BRIEF AMICUS CURIAE OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS (Feb. 28, 2000)

• 2000 WL 228478 (Appellate Brief) BRIEF OF FAMILY RESEARCH COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Feb. 28, 2000)

• 2000 WL 228493 (Appellate Brief) Brief on the Merits of Amicus Curiae the State of Texas in Support of Petitioners (Feb. 28, 2000)

• 2000 WL 228496 (Appellate Brief) Brief of Amici Curiae National Right to Life Committee, Christian Legal Society, Concerned Women for America, The Southern Center for Law and Ethics, and Focus on the Family in Support of Petitioners (Feb. 28, 2000)

• 2000 WL 228615 (Appellate Brief) BRIEF OF PETITIONERS (Feb. 28, 2000)

• 2000 WL 245512 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AMICUS CURI%8A AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION FOR THE PROTECTION OF UNBORN CHILDREN IN SUPPORT OF PETITIONER (Feb. 28, 2000)

• 2000 WL 245517 (Appellate Brief) MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF AMICUS CURIAE OF RIGHT TO LIFE ADVOCATES, INC. IN SUPPORT OF THE PETITIONERS (Feb. 28, 2000)

• 2000 WL 228483 (Appellate Brief) BRIEF OF AMICI CURIAE LOUISIANA AND MISSISSIPPI IN SUPPORT OF PETITIONERS (Feb. 25, 2000)

• 2000 WL 228491 (Appellate Brief) BRIEF OF THE STATE OF WISCONSIN AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Feb. 25, 2000)

• 2000 WL 223648 (Appellate Brief) BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE; NEBRASKA CATHOLIC CONFERENCE; ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; GREEK ORTHODOX ARCHDIOCESE OF AMERICA; CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ; THE LUTHERAN CHURCH-MISSOURI SYNOD; AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS (Feb. 23, 2000)

• 2000 WL 228471 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Feb. 23, 2000)

• 2000 WL 34005434 (Appellate Petition, Motion and Filing) Brief of Family Research Council as Amicus Curiae in Support of Petitioners (Feb. 20, 2000) Original Image of this Document (PDF)

• 2000 WL 207161 (Appellate Brief) BRIEF AMICI CURIAE OF FEMINISTS FOR LIFE OF AMERICA; MASSACHUSETTS CITIZENS FOR LIFE, INC.; PRO-LIFE LEGAL DEFENSE FUND, INC.; and UNIVERSITY FACULTY FOR LIFE IN SUPPORT OF PETITIONERS (Feb. 17, 2000)

• 2000 WL 207160 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF BY LEGAL DEFENSE FOR UNBORN CHILDREN IN SUPPORT OF THE PETITIONERS (Feb. 14, 2000)

• 2000 WL 33979623 (Appellate Petition, Motion and Filing) Motion for Leave to File and Brief of Amici Curiae Alabama, Iowa, Louisiana, New Jersey Legislature%n*%n, Pennsylvania, Virginia, South Carolina, South Dakota, Utah, and West Virginia Gov. Cecil Underwood in Support of Petitioners (Jan. 04, 2000) Original Image of this Document (PDF)

• 1999 WL 33611364 (Appellate Petition, Motion and Filing) Reply to Brief in Opposition (Dec. 22,

1999) Original Image of this Document (PDF)
• 1999 WL 33611416 (Appellate Petition, Motion and Filing) Brief of Amici Curiae Alabama, Iowa, Louisiana, New Jersey General Assembly%n*%n, Pennsylvania, Virginia, South Carolina, South Dakota, Utah, and West Virginia Gov. Cecil Underwood in Support of Petitioners (Dec. 15, 1999) Original Image of this Document (PDF)
• 1999 WL 33611438 (Appellate Petition, Motion and Filing) Respondent's Brief in Opposition (Dec. 14, 1999) Original Image of this Document with Appendix (PDF)
• 1999 WL 33611376 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari (Nov. 15, 1999) Original Image of this Document with Appendix (PDF)
• 1999 WL 33632659 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari (Nov. 15, 1999) Original Image of this Document (PDF)
END OF DOCUMENT

West Reporter Image (PDF)

EXHIBIT 3

West Reporter Image (PDF)

210 F.3d 1025, 2000 Daily Journal D.A.R. 4407

Briefs and Other Related Documents

United States Court of Appeals,
Ninth Circuit.
Murray WEINER, Plaintiff-Appellant,
v.
SAN DIEGO COUNTY, Defendant-Appellee.
No. 98-55752.
Argued and Submitted Dec. 9, 1999
Filed April 27, 2000

Accused brought § 1983 action against county for wrongful prosecution and defamation after he was acquitted by jury of murder, and also sought damages for defamation under state law. County moved for summary judgment. The United States District Court for the Southern District of California, Marilyn L. Huff, Chief District Judge, granted motion. Accused appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that: (1) district attorney acted as state, rather than county, official when he decided to proceed with criminal prosecution of accused following grant of new trial; (2) prosecutor's post-acquittal statement was protected opinion; and (3) allegedly defamatory statement made by prosecutor about accused did not violate any federal right of accused, and thus did not support § 1983 liability against county.
Affirmed.

West Headnotes

[1] KeyCite Notes

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
(Formerly 78k206(3))

Local government may be liable under § 1983 for constitutional torts committed by its officials according to municipal policy, practice, or custom. 42 U.S.C.A. § 1983.

[2] KeyCite Notes

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1351 Governmental Ordinance, Policy, Practice, or Custom
78k1351(1) k. In General. Most Cited Cases
(Formerly 78k206(3))

To hold a local government liable for an official's conduct under § 1983, a plaintiff must establish that the official (1) had final policymaking authority concerning the action alleged to have caused the particular constitutional or statutory violation at issue, and (2) was the policymaker for the local governing body for the purposes of the particular act. 42 U.S.C.A. § 1983.

[3] KeyCite Notes

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk411 k. Constitutional and Civil Rights in General; Waiver. Most Cited Cases

Determination of whether, for § 1983 purposes, district attorney acted as county official or state official when he decided to proceed with criminal prosecution was dependent upon state law. 42 U.S.C.A. § 1983.

[4] KeyCite Notes

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1348 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k206(2.1))

Under California law, district attorney acted as state, rather than county, official when he decided to proceed with criminal prosecution of accused granted new trial, given that Attorney General, rather than county, had authority to oversee district attorney's conduct with respect to investigation and prosecution of crimes; therefore, county could not be liable to accused under § 1983 for alleged wrongful prosecution. 42 U.S.C.A. § 1983; West's Ann.Cal. Const. Arts. 5, § 13, 11, §§ 1(b), 1 note; West's Ann.Cal.Gov.Code §§ 100(b), 3060, 3073, 12524, 12550, 24000(a), 24001, 25300, 25303.

[5] KeyCite Notes

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1345 k. Acts of Officers and Employees in General; Vicarious Liability and Respondeat Superior in General. Most Cited Cases
(Formerly 78k206(2.1))

170B Federal Courts KeyCite Notes
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk411 k. Constitutional and Civil Rights in General; Waiver. Most Cited Cases

In determining municipality's § 1983 liability for conduct of official, official's actual function in particular area at issue, as defined by state law, must be evaluated to determine whether official acts for the state or the county. 42 U.S.C.A. § 1983.

[6] KeyCite Notes

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(1) k. Highest Appellate Court. Most Cited Cases

The California Supreme Court is the ultimate interpreter of California state law.

[7] KeyCite Notes

131 District and Prosecuting Attorneys
131k7 Representation of State or County in General
131k7(1) k. In General. Most Cited Cases

California district attorney is a state officer when deciding whether to prosecute an individual.

[8] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

237 Libel and Slander KeyCite Notes
237I Words and Acts Actionable, and Liability Therefor
237k7 Words Imputing Crime and Immorality
237k7(6) k. Assault, Burglary, Robbery and Homicide. Most Cited Cases

Statement made by prosecutor after jury acquitted accused of murder, suggesting that verdict proved that "cases, unlike fine wine, get worse rather than better, with age," was opinion protected under First Amendment, and thus could not be basis for accused's defamation action under California law. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(5) k. Libel and Slander; False Reports. Most Cited Cases

Opinions, or statements that cannot reasonably be interpreted as stating actual facts, are protected by the First Amendment and, as a result, cannot be the basis of a state-law defamation claim. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of Language Used. Most Cited Cases

In determining whether a statement is a statement of opinion or of fact, courts look to the totality of the circumstances in which the statement was made, including (1) the broad context of the statement, (2) the specific context and content of the statement, and (3) whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

[11] KeyCite Notes

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k19 k. Construction of Language Used. Most Cited Cases

In examining the specific context and content of a statement for purposes of determining whether it is statement of fact or opinion, for defamation purposes, courts consider the extent of the figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.

[12] KeyCite Notes

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1034 k. Common Law or State Law Torts. Most Cited Cases
(Formerly 78k112)

To establish a civil rights claim under § 1983, a plaintiff must assert more than a violation of state tort law; he must show that the defendant deprived him of an interest protected by the Constitution or federal law. 42 U.S.C.A. § 1983.

[13] KeyCite Notes

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1038 k. Defamation. Most Cited Cases
(Formerly 78k115)

Allegedly defamatory statement made by prosecutor about accused, after accused was acquitted of murder, did not violate any federal right of accused, and thus did not support § 1983 liability against county. 42 U.S.C.A. § 1983.

***1026** Thomas R. Laube, Sandler, Lasry, Laube, Byer & Valdez, San Diego, California, for the plaintiff-appellant.
Deborah Peterson, Deputy County Counsel, San Diego, California, for the defendant-appellee.
Appeal from the United States District Court for the Southern District of California Marilyn L. Huff, District Judge, Presiding. D.C. No. CV-97-00349-MLH.

Before: B. FLETCHER, KOZINSKI and THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

OVERVIEW

In 1994, the Appellant Murray Weiner was tried and convicted of murder in California state court. He was granted a new trial. Before the retrial, the district attorney's office for San Diego County (the "County") allegedly hid blood evidence from Weiner's defense team. In addition, a new blood test undermined the prosecution's original theory of the case. The district attorney's office, nonetheless, continued with the second trial. The trial was before a jury and Weiner was acquitted. After Weiner's acquittal, the district attorney, responding to a query from the press, stated that "[t]his case just proves that cases, unlike fine wine, get worse rather than better, with age."

Weiner then filed the present action in the federal district court against the County. He sought damages under 42 U.S.C. § 1983 for what he alleged was a wrongful prosecution and defamation in violation of his civil rights. He also sought damages for defamation under state law. The district court granted the County's motion for summary judgment. Weiner appeals that judgment.

We have jurisdiction under 28 U.S.C. § 1291. We conclude that the district attorney acted on behalf of the state, not the County, in deciding to prosecute Weiner, and as a result Weiner's § 1983 claim ***1027** against the County for his alleged wrongful prosecution fails. With regard to the defamation claims, the alleged defamatory statement-that implied Weiner was acquitted only because the case against him became stale-was the expression of an opinion and as such it will not support a defamation action under California law. Insofar as Weiner attempted to predicate a § 1983 claim on the allegedly defamatory statement, that claim fails because Weiner made no showing of a violation of the Constitution or federal law. *See Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir.1988). Accordingly, we affirm the district court.

BACKGROUND

In November 1992, Weiner was arrested and charged with the murder of Robert Evans. At trial, the prosecution theorized that Weiner lured Evans into a shed rented by Weiner, killed him, cut his body into pieces, and disposed of the pieces in a field a few miles away.

The prosecution, in its case-in-chief, relied on four of thirty-nine blood spots found in Weiner's shed. The prosecution tested three of the four blood spots by blood grouping, a test which cannot conclusively determine whether the tested blood comes from a particular individual. The test revealed that the three spots had the same 1.1, 1.1 characteristic as Evans's blood. The prosecution tested the fourth blood spot using an RFLP test, which, unlike the blood grouping test, can determine whether blood comes from a particular individual. The RFLP test determined that the fourth blood spot was not from Evans. The prosecution chose not to test the fourth spot for blood grouping to determine whether it had the same 1.1, 1.1 characteristic as the other three blood spots.

Because only two to four percent of the population has the 1.1, 1.1 characteristic, Weiner asserted that if all four blood spots had that characteristic, then all four were probably from the same person, which the RFLP test on the fourth blood spot had determined was not Evans. Although it had not conducted a blood grouping test on the fourth spot, the prosecution argued at trial that the fourth blood spot was not from the same individual as the other three. On February 16, 1994, Weiner was found guilty of murdering Evans.

The trial court, however, granted Weiner a new trial. Weiner asserts that before the second trial the prosecution hired a blood spatter expert who concluded that all four blood spots were from the same person. Further, Weiner contends the prosecution attempted to hide this expert from him and hid the fourth blood spot to prevent Weiner from testing it for the 1.1, 1.1 characteristic. The fourth blood spot was eventually tested and was found to have the same 1.1, 1.1 characteristic as the other three. Because the fourth blood spot came from someone other than Evans, this meant the other three spots probably also came from someone other than Evans and left the prosecutor without blood evidence that Evans was ever in Weiner's shed.

Despite these new findings, the district attorney decided to go forward with the second trial. On August 15, 1996, a jury in the second trial found Weiner not guilty of Evans's murder. After the verdict, a reporter interviewed Weiner's defense counsel, Kathleen Coyne, who expressed her frustration with the district attorney's office because it had ignored the new scientific evidence and had gone ahead with the second trial. The reporter's article went on to state that:

District Attorney Paul Pfingst vehemently disagreed with Coyne's evaluation of the genetic evidence. He said the case was essentially the same as the first trial and that to dismiss the charges would have been ridiculous, given the first jury's verdict. "This just proves that cases, unlike fine wine, get worse rather than better, with age," Pfingst said.

On February 28, 1997, Weiner filed the present action against the County seeking damages under 42

U.S.C. § 1983 for ***1028** wrongful prosecution, and for defamation caused by Pfingst's statement to the press. Weiner also sought damages for defamation under California law. The district court granted summary judgment in favor of the County on all claims, and this appeal followed.

ANALYSIS

I. Standard of Review

We review de novo a district court's decision to grant summary judgment. *See Underwager v. Channel 9 Australia,* 69 F.3d 361, 365 (9th Cir.1995).

II. Section 1983 Liability for Wrongful Prosecution

[1] [2] [3] [4] Pursuant to 42 U.S.C. § 1983, a local government may be liable for constitutional torts committed by its officials according to municipal policy, practice, or custom. *See Monell v. Department of Social Servs.,* 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority "concerning the action alleged to have caused the particular constitutional or statutory violation at issue" and (2) was the policymaker for the local governing body for the purposes of the particular act. *McMillian v. Monroe County Alabama,* 520 U.S. 781, 785, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997) (internal quotation marks omitted) (noting that an official can be the policymaker for the state for one type of act and the policymaker for the local government for another type of act). In this case, the parties concede the district attorney is the final decision-maker in determining whether to proceed with a criminal prosecution. The question, therefore, is whether the district attorney acted as a county official or as a state official when he decided to proceed with Weiner's criminal prosecution. The answer to that question is dependent on state law. *See id.* at 786, 117 S.Ct. 1734.

[5] In *McMillian,* the Court stated that a state's statement that an individual is a state or county official without analyzing his actual role does not settle the question for Section 1983 purposes. Rather, the official's "actual function ··· in a particular area," as defined by state law, must be evaluated to determine whether he acts for the state or the county. *Id.* Accordingly, the Court in *McMillian* reviewed Alabama's constitution, statutes, and case law to determine whether a county sheriff was a state or county official for purposes of § 1983 liability. *See id.* at 787-93, 117 S.Ct. 1734. The Court found it significant that Alabama amended its constitution to list county sheriffs as executive officers who could be impeached by the State Supreme Court upon the order of the governor, which was the same procedure used for other state officials. *See id.* at 788, 117 S.Ct. 1734. Further, the Court stated it was critical that the Alabama Supreme Court had similarly interpreted Alabama's constitution as prohibiting county liability predicated upon the doctrine of *respondeat superior. See id.* at 789, 117 S.Ct. 1734. The Court also focused on the fact that sheriffs in Alabama were given complete authority to enforce state criminal laws in the county and that county commissions could not instruct them in these duties.

On balance, the Court determined that, under Alabama law, a county sheriff was a state official when carrying out his law enforcement duties even though the county paid his salary and provided his equipment, the county's citizens elected him, the Alabama code listed him as a county official, and his jurisdiction was limited to the county's borders. *See id.* at 791-93, 117 S.Ct. 1734.

[6] In *Pitts v. County of Kern,* 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920 (1998), the California Supreme Court, following *McMillian,* analyzed California law and held that a district attorney was a state official for purposes of § 1983 liability while acting in his prosecutorial capacity. *See id.* at 928-34. The California Supreme Court is the ultimate interpreter ***1029** of California state law. *See Johnson v. Fankell,* 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997). This does not mean, however, that we must blindly accept its balancing of the different provisions of state law in determining liability under § 1983. In *McMillian,* the Court stated that "our inquiry is dependent on an

analysis of state law," which does not mean "that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But *our* understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's function under relevant state law." *McMillian,* 520 U.S. at 785, 117 S.Ct. 1734 (emphasis added). We must, therefore, examine California's constitution, statutes, and case law.

Article XI, section 1(b) of California's constitution, entitled "Counties; subdivisions of state; formation, consolidation and boundary change; removal of county seat; powers; officers and employees" states that the state legislature "shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county." District attorneys were added to the list in a 1986 Amendment. *See* Cal. Const. art. XI, § 1(b), historical notes.

Article V, section 13 of California's constitution states that the Attorney General has

> direct supervision over every district attorney ··· in all matters pertaining to the duties of the respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions···· Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

Turning to California's statutory law, there are provisions that weigh both for and against concluding that the district attorney is a state officer. Those provisions indicating that district attorneys are state officers provide that (1) all suits are to be conducted under the name of the state of California, *see* Cal. Gov't Code § 100(b); (2) any county authority to review a district attorney's conduct "shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall not ··· obstruct the investigative and prosecutorial function of the district attorney of a county," Cal. Gov't Code § 25303; (3) the "Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted in their charge" and may assist the district attorney or take full charge of any investigation or prosecution, Cal. Gov't Code § 12550; and (4) the Attorney General can "call into conference the district attorneys ··· for the purpose of discussing the duties of their office[ ], with the view of uniform and adequate enforcement of" state laws, Cal. Gov't Code § 12524.

On the other hand, there are California statutory provisions that weigh in favor of concluding that district attorneys are county officers: (1) district attorneys are listed as county officers, *see* Cal. Gov't Code § 24000(a); (2) counties set district attorneys' salaries, *see* Cal. Gov't Code § 25300; (3) district attorneys must be registered to vote in their respective counties, *see* Cal. Gov't Code § 24001; (4) counties supervise the district attorneys' conduct and use of public funds, *see* Cal. Gov't Code § 25303; and (5) district attorneys can be removed ***1030** from office following the same procedures as applied to district, county, and city officers, i.e., a grand jury submitting a written accusation to the state court, *see* Cal. Gov't Code §§ 3060 & 3073.

Balancing the foregoing constitutional and statutory factors leads us toward the conclusion that under California law a county district attorney acts as a state official when deciding whether to prosecute an individual. The fact that California statutory law lists district attorneys as county officers is not dispositive because, as discussed in *McMillian,* the function of the district attorney, including who can control the district attorney's conduct is the issue. *See McMillian,* 520 U.S. at 792 n. 7, 117 S.Ct. 1734 (giving little weight to fact that the Alabama code listed sheriffs as county officers because the state court had held that the constitution made sheriffs executive officers). Further, in *McMillian,* the Court acknowledged the relevance of the requirements that sheriffs be elected locally and live and vote in the county, but found that these factors were not controlling. *See id.* at 791-92, 117 S.Ct. 1734. Moreover, while California statutory law gives a county some authority to oversee a district attorney's conduct, it expressly excludes conduct related to the investigation and prosecution of crimes, giving that authority instead to the Attorney General. *See* Cal. Gov't Code §§ 26303 & 12550. Therefore, the only significant differences between California law applicable in this case and Alabama law applicable in *McMillian* are that under California law the county sets the district attorney's salary and the district attorney can be removed from office in a fashion similar to other county employees. These differences are not sufficient to produce a result in this case different from the result in

McMillian.

With regard to a California county's ability to set a district attorney's salary, the California Supreme Court stated in *Pitts,* that this " 'does not translate into control over him····' " *Pitts,* 70 Cal.Rptr.2d 823, 949 P.2d at 934, (quoting *McMillian,* 520 U.S. at 791, 117 S.Ct. 1734). In addition, although California Government Code section 25303 authorizes a county through its Board of Supervisors to "supervise the district attorney's official conduct and in particular his or her use of public funds," that section precludes a county from obstructing "the investigative and prosecutorial function of the district attorney of a county." *Id.* (quoting Cal. Gov't Code § 25303).

With regard to the fact that district attorneys in California can be removed from office in the same fashion as other county officers, this does not mean they are within the control of the county. The removal process authorizes a county grand jury to vote to remove a district attorney from office, but requires the appointment by the state court of a prosecutor to "conduct the proceedings." Cal. Gov't Code § 3073.

In addition to California's constitutional and statutory law, we also consider its case law, giving due respect to decisions by the California Supreme Court as the ultimate interpreter of California state law. *See Johnson,* 520 U.S. at 916, 117 S.Ct. 1800. All relevant California cases, including *Pitts,* have held that district attorneys are state officers for the purpose of investigating and proceeding with criminal prosecutions. In 1894, the California Supreme Court held that the district attorney is "the law officer of the county and the public prosecutor" and that "[w]hile, in the former capacity, he represents the county, and is largely subordinate to and under the control of the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state." *Modoc County v. Spencer,* 103 Cal. 498, 37 P. 483, 484 (1894); *see also Graham v. Municipal Court,* 123 Cal.App.3d 1018, 177 Cal.Rptr. 172, 174 (1981) ("A county district attorney prosecuting a criminal action within a county, acts as a state officer exercising ultimately powers which may not be abridged by a county board of supervisors.").

***1031** [7] We conclude that a California district attorney is a state officer when deciding whether to prosecute an individual. A conclusion to the contrary is not compelled by *Gobel v. Maricopa County,* 867 F.2d 1201 (9th Cir.1989). There, we held that a plaintiff might establish that an Arizona district attorney is a county officer when pursuing a criminal prosecution. *Gobel,* however, was decided before the Supreme Court issued its opinion in *McMillian.* In deciding *Gobel,* we relied on several aspects of Arizona law that the Supreme Court in *McMillian* discounted. In particular, in *Gobel* we noted that Arizona's constitution labeled the district attorney as a county officer, the district attorney was elected by county voters, his budget was set by the county board, and his jurisdiction was limited to the county's borders. *See id.* at 1209. In *McMillian,* however, the Court held that the fact that the sheriff was elected by the county's citizens and his authority was limited to the county's borders was insufficient to establish that the sheriff was a state officer. *See McMillian,* 520 U.S. at 791, 117 S.Ct. 1734. Further, the Court rejected the idea that simply labeling an officer as a state or county officer resolves the issue, *see id.* at 786, 117 S.Ct. 1734. The Court also stated that the power to set an officer's salary "does not translate into control over him····" *Id.*

Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes. *See Modoc County,* 37 P. at 484 (acknowledging that in certain instances a district attorney in California is a county officer). In the present case, however, the San Diego County district attorney was acting as a state official in deciding to proceed with Weiner's criminal prosecution. Weiner's § 1983 claim against the County, therefore, fails. The County was not the actor; the state was.

III. State Law Defamation

[8] [9] [10] The First Amendment limits "the types of speech that may give rise to a defamation action under state law." *Gilbrook v. City of Westminster,* 177 F.3d 839, 861 (9th Cir.1999), *cert. denied,* 528 U.S. 1061, 120 S.Ct. 614, 145 L.Ed.2d 509 (1999). Opinions, that is "statements that cannot reasonably be interpreted as stating actual facts," are protected by the First Amendment and, as a result, cannot be the basis of a state-law defamation claim. *Id.* (internal quotation marks omitted). In determining whether a statement is a statement of opinion or of fact,

we look to the "totality of the circumstances in which [the statement] was made" including (1) the broad context of the statement, (2) the specific context and content of the statement, and (3) "whether the statement itself is sufficiently factual to be susceptible of being proved true or false." *Underwager,* 69 F.3d at 366.

In *Underwager,* the plaintiff and defendant were experts on child witness reliability and had testified on opposite sides of a well-publicized case. After the completion of the case, the defendant conducted a workshop during which he expressed his disagreement with the plaintiff's opinions. He also played a tape of other individuals who similarly disagreed with the plaintiff. We held that because the plaintiff and defendant had clearly opposite views on the issue of child witness reliability, "the general context and tenor of [the defendant's] workshop make clear that the comments about [the plaintiff] by him and by those who spoke on the tape were expressions of the speakers' professional points of view (opinions) rather than factual assertions." *Id.* at 366-67.

In the present case, the broad context of District Attorney Pfingst's fine wine statement was in response to Coyne's assertion that the district attorney's office should not have proceeded with Weiner's case. Considering Coyne's role as a defense attorney and Pfingst's as the District Attorney, it is not surprising that each would ***1032** have different views as to why Weiner was acquitted in the second trial. The broad context of the statement, therefore, weighs in favor of concluding that Pfingst's statement was one of opinion, not fact.

[11] In examining the specific context and content of a statement, we consider "the extent of the figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation." *Id.* at 366. Pfingst's analogy of Weiner's case to fine wine was figurative language used to explain why he believed Weiner was acquitted. Pfingst's audience would likely view his statement as an attempt to explain that it was not because the prosecution did a bad job that the case was lost. Pfingst, after all, was an elected public official who one would assume would try to cast the best possible light on his office. The specific context and content of the statement point toward classifying it as a statement of opinion.

Finally, we consider whether Pfingst's statement was "sufficiently factual to be proved true or false." *See Id.* Weiner asserts that Pfingst's statement implies he was guilty, which he contends is a factual matter. But Pfingst did not say Weiner was guilty. Indeed, the jury had just decided he wasn't. Pfingst said the trial's outcome "just proves that cases, unlike fine wine, get worse rather than better, with age." That was not a statement of fact. It was Pfingst's opinion of why the case was lost. A case can be lost for any number of reasons, among them, poor preparation, poor presentation, unexpected occurrences at trial, a better lawyer or more appealing facts on the other side, or even staleness. In Pfingst's opinion, staleness caused the loss. That face-saving statement was not sufficiently factual to be a statement of fact.

Because all three of the *Underwager* factors weigh in favor of classifying Pfingst's statement as an opinion and not a statement of fact, we agree with the district court that the statement will not support a claim for defamation under California law.

IV. Section 1983 Claim Predicated on Defamation

[12] [13] To establish a civil rights claim under 42 U.S.C. § 1983, a plaintiff must assert more than a violation of state tort law-he must show that the defendant deprived him of an interest protected by the Constitution or federal law. *See Paul v. Davis,* 424 U.S. 693, 700-01, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Johnson v. Barker,* 799 F.2d 1396, 1399 (9th Cir.1986). Weiner failed to make this showing. Therefore, even if Pfingst acted as a county official when he made the fine wine statement, and even if in some circumstance the expression of an opinion might support a civil rights claim under § 1983, summary judgment in favor of the County on Weiner's § 1983 claim was proper. Weiner made no showing of a violation "of some right, privilege, or immunity protected by the Constitution or laws of the United States." *Leer,* 844 F.2d at 632-33; *see Williams v. Gorton,* 529 F.2d 668, 670 (9th Cir.1976) ("[D]efamation itself does not establish a cause of action under [§ 1983]. It is the deprivation of constitutional rights for which the [Civil Rights] Act creates a remedy.")

CONCLUSION

We hold the district court properly granted summary judgment in favor of the County. Weiner's claim against the County for wrongful prosecution under 42 U.S.C. § 1983 fails because the district attorney, Pfingst, acted in his capacity as a state official, not a county official, when he decided to proceed with Weiner's criminal prosecution. Weiner's California state law defamation claim fails because Pfingst's statement was an opinion. Weiner's § 1983 claim predicated on the alleged defamatory statement fails because Weiner made no showing of a violation of the Constitution or federal law.
AFFIRMED.
Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works C.A.9 (Cal.),2000.
Weiner v. San Diego County
210 F.3d 1025, 2000 Daily Journal D.A.R. 4407

Briefs and Other Related Documents (Back to top)

• 1998 WL 34103972 (Appellate Brief) Appellee's Brief (Nov. 09, 1998) Original Image of this Document (PDF)
• 98-55752 (Docket) (Apr. 30, 1998)
END OF DOCUMENT

West Reporter Image (PDF)

EXHIBIT 4

West Reporter Image (PDF)

418 U.S. 539, 94 S.Ct. 2963, 71 O.O.2d 336, 41 L.Ed.2d 935

Briefs and Other Related Documents

Supreme Court of the United States
Charles WOLFF, Jr., etc., et al., Petitioners,
v.
Robert O. McDONNELL, etc.
No. 73-679.
Argued April 22, 1974.
Decided June 26, 1974.

Civil rights action was brought challenging administrative procedures and practices at Nebraska penal and correctional complex. From an order of the United States District Court for the District of Nebraska, 342 F.Supp. 616, plaintiff and defendants appealed. The Court of Appeals for the Eighth Circuit, 483 F.2d 1059, affirmed in part, reversed in part, and remanded, and certiorari was granted. The Supreme Court, Mr. Justice White, held, inter alia, that actual restoration of good-time credits could not be ordered in civil rights action, but that declaratory judgment with respect to procedures for imposing loss of good-time, as a predicate to a damage award, would not be barred; that due process required that prisoners in procedure resulting in loss of good-time or in imposition of solitary confinement be afforded advance written notice of claimed violation, written statement of fact findings, and right to call witnesses and present documentary evidence where such would not be unduly hazardous to institutional safety or correctional goals; that confrontation, cross-examination and counsel were not constitutionally required; that due process requirements were not to be applied retroactively so as to require that prison records containing determinations of misconduct not in accord with required procedures be expunged; that mail from attorneys to inmates could be opened by prison officials in the presence of the inmates; and that in considering adequacy of legal assistance available to inmates, it was necessary that capacity of the single legal advisor appointed by the warden be assessed in the light of demand for assistance in civil rights actions as well as in the preparation of habeas writs.
Affirmed in part and reversed in part.
Mr. Justice Douglas filed opinion dissenting in part and concurring in the result in part.
Mr. Justice Marshall, with whom Mr. Justice Brennan joined, concurred in part and dissented in part and filed opinion.

West Headnotes

[1] KeyCite Notes

- 170B Federal Courts
  - 170BIX District Courts
    - 170BIX(B) Three-Judge Courts
      - 170Bk991 k. When Required or Appropriate in General. Most Cited Cases
        (Formerly 106k101.5(1))

Where practices, rules and regulations of state prison under constitutional challenge were in force only at that institution and were drafted by the warden and not by the Director of Correctional Services, there was no need to convene a three-judge court.

[2] KeyCite Notes

- 78 Civil Rights

78III Federal Remedies in General
78k1448 k. Judgment and Relief in General. Most Cited Cases
(Formerly 78k261, 78k13.16)

Actual restoration of good-time credits to prisoners in action under civil rights statute was foreclosed, but where damage claim was also properly before the court, the procedures for depriving prisoners of good-time credits could be considered in the civil rights action. 42 U.S.C.A. § 1983.

[3] KeyCite Notes

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak203 k. Federal Officers and Boards. Most Cited Cases

Though restoration to state prisoners of good-time improperly taken is foreclosed in action under civil rights statute since habeas corpus is the proper remedy, with the concomitant requirement of exhausting state remedies, declaratory judgment as a predicate to a damage award is not barred in a civil rights action. 42 U.S.C.A. § 1983.

[4] KeyCite Notes

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1454 k. Criminal Law Enforcement; Prisons. Most Cited Cases
(Formerly 78k265, 78k13.2(1))

Though injunction restoring to prisoners good-time improperly taken is foreclosed in civil rights action, prisoner with standing is not precluded from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations. 42 U.S.C.A. § 1983.

[5] KeyCite Notes

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k272 Execution of Sentence
92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases
(Formerly 92k272)

Though rights of prisoner may be diminished by the needs and exigencies of the institutional environment, he is not wholly without the protections of the Constitution and the due process clause. U.S.C.A.Const. Amends. 1, 14.

[6] KeyCite Notes

310 Prisons
310k13 Custody and Control of Prisoners
310k13(6) k. Disciplinary, Classification, and Grievance Proceedings; Composition of Tribunal.

Most Cited Cases
(Formerly 310k13)

Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such a prosecution does not apply; rather, there must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

[7] KeyCite Notes

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k272 Execution of Sentence
92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases
(Formerly 92k272)

Though the Constitution does not guarantee good-time credit for satisfactory behavior while in prison and though the due process clause does not require a hearing in every conceivable case of government impairment of private interest, where state created right to good-time and recognized that its deprivation was a sanction authorized for major misconduct, prisoner's interest therein was sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state-created right was not arbitrarily abrogated. R.S.Supp.Neb.1972, §§ 83-185, 83-1,107; R.R.S.Neb.1943, 83-1,109; R.S.Supp.Neb.1973, § 83-176; U.S.C.A.Const. Amend. 14.

[8] KeyCite Notes

92 Constitutional Law
92XII Due Process of Law
92k254.1 k. Liberties and Liberty Interests Protected. Most Cited Cases
(Formerly 92k255(1))

Some kind of hearing is required at some time before a person is finally deprived of his liberty, even when the liberty itself is a statutory creation of the state. U.S.C.A.Const. Amend. 14.

[9] KeyCite Notes

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k272 Execution of Sentence
92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases
(Formerly 92k272)

Disciplinary procedures in Nebraska prison which could result in loss of good-time credit or imposition of solitary confinement and which involved (1) a preliminary conference with chief correction supervisor and charging party at which prisoner was informed of misconduct charge and engaged in preliminary discussion on its merits, (2) preparation of a conduct report and hearing held before adjustment committee, at which report was read to inmate, and (3) opportunity at hearing to ask questions of the charging party were not fully adequate to satisfy due process requirements. U.S.C.A.Const. Amend. 14.

[10] KeyCite Notes 

310 Prisons
310k13 Custody and Control of Prisoners
310k13(6) k. Disciplinary, Classification, and Grievance Proceedings; Composition of Tribunal. Most Cited Cases
(Formerly 310k13)

The full range of procedures mandated for parole and probation revocation hearings need not in all respects be followed in disciplinary cases in state prisons. U.S.C.A.Const. Amend. 14.

[11] KeyCite Notes 

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k272 Execution of Sentence
92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases
(Formerly 92k272)

Satisfaction of minimum requirements of procedural due process in Nebraska prison disciplinary proceedings resulting in loss of good-time credit or imposition of solitary confinement required modification of procedures to afford written notice of claimed violation, at least 24 hours in advance of appearance before adjustment committee; written statement of factfinders as to evidence relied on and reason for disciplinary action taken, except that certain items of evidence could be excluded when personal or institutional safety would be implicated, if statement indicated the fact of the omission; and opportunity to call witnesses and present documentary evidence in defense when permitting inmate to do so would not be unduly hazardous to institutional safety or correctional goals. U.S.C.A.Const. Amend. 14.

[12] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.3 k. Nature or Stage of Proceeding. Most Cited Cases
(Formerly 110k662(1))

410 Witnesses KeyCite Notes 
410III Examination
410III(B) Cross-Examination
410k266 k. Right to Cross-Examine and Re-Examine in General. Most Cited Cases

Confrontation and cross-examination are essential in criminal trials or where a person may lose his job, but are not rights universally applicable to all hearings. U.S.C.A.Const. Amend. 14.

[13] KeyCite Notes 

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.3 k. Nature or Stage of Proceeding. Most Cited Cases
(Formerly 110k662(1))

310 Prisons KeyCite Notes
310k13 Custody and Control of Prisoners
310k13(7) Requisites of Proceedings
310k13(7.1) k. In General. Most Cited Cases
(Formerly 310k13(7), 310k13)

Constitution at the present time does not impose requirement of confrontation and cross-examination in prison disciplinary proceedings. U.S.C.A.Const. Amend. 14.

[14] KeyCite Notes

310 Prisons
310k13 Custody and Control of Prisoners
310k13(7) Requisites of Proceedings
310k13(9) k. Counsel and Witnesses. Most Cited Cases
(Formerly 310k13)

At the present stage of development of prison disciplinary procedures, inmates do not have a constitutional right to either retained or appointed counsel, but where an illiterate inmate is involved or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate or, if that is forbidden, to have adequate substitute aid in the form of help from the staff or from sufficiently competent inmate designated by the staff. U.S.C.A.Const. Amend. 14.

[15] KeyCite Notes

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k272 Execution of Sentence
92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases
(Formerly 92k272)

Adjustment committee which conducted required hearings at Nebraska prison complex and which determined whether to revoke good-time was not shown to be insufficiently impartial to satisfy due process clause. U.S.C.A.Const. Amend. 14.

[16] KeyCite Notes

310 Prisons
310k13 Custody and Control of Prisoners
310k13(6) k. Disciplinary, Classification, and Grievance Proceedings; Composition of Tribunal.

Most Cited Cases
(Formerly 310k13)

As the nature of prison disciplinary process changes in future years, circumstances may exist which will require further consideration of procedures which are constitutionally required in prison disciplinary proceedings.

[17] KeyCite Notes

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases

Due process requirements in prison disciplinary proceedings are not to be applied retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged.

[18] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.2 Offenses, Tribunals, and Proceedings Involving Right to Counsel
110k641.2(2) k. Criminal Nature of Proceeding, in General. Most Cited Cases
(Formerly 110k641.2)

Sixth Amendment reaches only to protect the attorney-client relationship from intrusion in criminal setting. U.S.C.A.Const. Amend. 6.

[19] KeyCite Notes

310 Prisons
310k4 Regulation and Supervision
310k4(10) Access to Courts and Public Officials
310k4(12) k. Communication with Courts, Officers, or Counsel. Most Cited Cases
(Formerly 310k4)

State may require that communications of attorney to prisoner be specially marked as originating from attorney, with his name and address given, if they are to receive special treatment, and may require that a lawyer desiring to correspond with a prisoner first identify himself and his client to the prison officials to assure the letters marked "privileged" are actually from members of the bar.

[20] KeyCite Notes

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications

92k82(13) k. Prisoners. Most Cited Cases
(Formerly 92k82)

92 Constitutional Law KeyCite Notes
92XII Due Process of Law
92k256 Criminal Prosecutions
92k272 Execution of Sentence
92k272(2) k. Imprisonment and Incidents Thereof. Most Cited Cases
(Formerly 92k272)

110 Criminal Law KeyCite Notes
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.3 Stage of Proceedings as Affecting Right
110k641.3(4) k. Particular Proceedings or Occasions. Most Cited Cases
(Formerly 110k641.2)

Requirement that mail from attorneys to prisoners be opened in the presence of the inmates, without being read by prison officials, does not infringe prisoners' First, Sixth, and Fourteenth Amendment rights. U.S.C.A.Const. Amends. 1, 6, 14.

[21] KeyCite Notes

310 Prisons
310k4 Regulation and Supervision
310k4(10) Access to Courts and Public Officials
310k4(11) k. Access to Counsel; Paralegal Counsel and Inmate Assistance. Most Cited Cases
(Formerly 310k4)

In assessing adequacy of legal assistance available to prisoners under regulation appointing one inmate as a legal advisor, applying standard that inmates cannot be barred from furnishing assistance to each other if the state does not provide some reasonable alternative, capacity of the inmate advisor is to be assessed in light of demand for assistance in civil rights actions as well as in the preparation of habeas writs.

****2966** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***539** Respondents, on behalf of himself and other inmates at a Nebraska prison, filed a complaint for damages and injunctive relief under 42 U.S.C. s 1983, in which he alleged that disciplinary proceedings at the prison violated due process; that the inmate legal assistance program did not meet constitutional standards; and that the regulations governing inmates' mail were unconstitutionally restrictive. After an evidentiary hearing, the District Court granted partial relief. Though rejecting respondent's procedural due process claim, the court held that the prison's policy of inspecting all attorney-prisoner mail was improper but that restrictions on inmate legal assistance were not constitutionally defective. The Court of Appeals reversed with respect to the due process

claim, holding that the procedural requirements outlined in the intervening decisions in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, should be generally followed in prison disciplinary hearings, but leaving the specific requirements (including the circumstances in which counsel might be required) to be determined by the District Court on remand. The Court of Appeals further held that Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439, forbade restoration of good-time credits in a s 1983 suit but ordered expunged from prison records misconduct determinations reached in proceedings that had not comported with due process. The court generally affirmed the District Court's judgment respecting correspondence with attorneys, but added some additional prescriptions and ordered further proceedings to determine whether the State was meeting its burden under Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718, to provide legal assistance to prisoners, a duty the court found to extend to civil rights cases as well as habeas corpus proceedings. Under Nebraska's disciplinary scheme forfeiture or withholding of good-time credits or confinement in a disciplinary ***2967** cell is provided for serious misconduct and deprivation of privileges for less serious misconduct. To establish misconduct (1) a preliminary conference is held with the chief corrections supervisor and the charging party, where the ***540** prisoner is orally informed of the charge and preliminarily discusses the merits; (2) a conduct report is prepared and a hearing held before the prison's disciplinary body, the Adjustment Committee (composed of three prison officials), where (3) the inmate can ask questions of the charging party. Held:

1. Though the Court of Appeals correctly held that restoration of good-time credits under s 1983 is foreclosed under Preiser, supra, damages and declaratory and other relief for improper revocation of good-time credits are cognizable under that provision. Pp. 2973-2974.

2. A prisoner is not wholly stripped of constitutional protections, and though prison disciplinary proceedings do not implicate the full panoply of rights due a defendant in a criminal prosecution, such proceedings must be governed by a mutual accommodation between institutional needs and generally applicable constitutional requirements. Pp. 2974-2975.

3. Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the procedure for determining whether such misconduct has occurred must observe certain minimal due process requirements (though not the full range of procedures mandated in Morrissey, supra, and Scarpelli, supra, for parole and probation revocation hearings) consonant with the unique institutional environment and therefore involving a more flexible approach reasonably accommodating the interests of the inmates and the needs of the institution. Pp. 2975-2982.

(a) Advance written notice of charges must be given to the disciplinary action inmate, no less than 24 hours before his appearance before the Adjustment Committee. Pp. 2978-2979.

(b) There must be 'a written statement by the factfinders as to the evidence relied on and reasons for (the disciplinary action).' Morrissey v. Brewer, supra, 408 U.S., at 489, 92 S.Ct., at 2604. P. 2979.

(c) The inmate should be allowed to call witnesses and present documentary evidence in his defense if permitting him to do so will not jeopardize institutional safety or correctional goals. Pp. 2979-2980.

(d) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, such procedures in the current environment, where prison disruption remains a serious concern, being discretionary with the prison officials. Pp. 2980-2981.

(e) Inmates have no right to retained or appointed counsel ***541** in such proceedings, although counsel substitutes should be provided in certain cases. P. 2981.

(f) On the record here it cannot be concluded that the Adjustment Committee is not sufficiently impartial to satisfy due process requirements. P. 2982.

4. The Court of Appeals erred in holding that the due process requirements in prison disciplinary proceedings were to be applied retroactively by requiring the expunging of prison records of improper misconduct determinations. Morrissey, supra, 408 U.S., at 490, 92 S.Ct., at 2604. P. 2983.

5. The State may constitutionally require that mail from an attorney to a prisoner be identified as such and that his name and address appear on the communication; and-as a protection against contraband-that the authorities may open such mail in the inmate's presence. A lawyer desiring to correspond with a prisoner may also be required first to identify himself and his client to the prison officials to ensure that letters marked 'privileged' are actually from members of the bar. Other restrictions on the attorney-prisoner mail procedure ***2968** required by the courts below are disapproved. Pp. 2983-2985.

6. The District Court, as the Court of Appeals suggested, is to assess the adequacy of the legal assistance available for preparation of civil rights actions, applying the standard of Johnson v. Avery, supra, 393 U.S., at 490, 89 S.Ct., at 751, that 'unless and until the State provides some reasonable

alternative to assist inmates in the preparation of petitions for post-conviction relief,' inmates could not be barred from furnishing assistance to each other. Pp. 2985-2986.
483 F.2d 1059, affirmed in part, reversed in part, and remanded.

Melvin Kent Kammerlohr, Lincoln, Neb., for petitioners.
***542** Solicitor Gen. Robert H. Bork for the United States, as amicus curiae, by special leave of Court.
Douglas F. Duchek, Lincoln, Neb., for respondent pro hac vice, by special leave of Court.

Mr. Justice WHITE delivered the opinion of the Court.
We granted the petition for writ of certiorari in this case, 414 U.S. 1156, 94 S.Ct. 913, 39 L.Ed.2d 108 (1974), because it raises important questions concerning the administration of a state prison.

[1] Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under42 U.S.C. s 1983[FN1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent ***543** allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Fourteenth Amendment to the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards, and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondent requested damages and injunctive relief.

> FN1. The practices, rules, and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See Board of Regents v. New Left Education Project, 404 U.S. 541, 92 S.Ct. 652, 30 L.Ed.2d 697 (1972).

After an evidentiary hearing, the District Court granted partial relief. 342 F.Supp. 616 (Neb.1972). Considering itself bound by prior Circuit authority, it rejected the procedural due process claim; but it went on to hold that the prison's policy of inspecting all incoming and outgoing mail to and from attorneys violated prisoners' rights of access to the courts and that the restrictions placed on inmate legal assistance were not constitutionally defective.[FN2]

> FN2. The District Court also determined that contrary to state statutory provisions certain good time had been taken away for violations which were not 'flagrant or serious' within the meaning of the controlling state statute, see n. 5, infra, and ordered that good time be restored for all such offenses. The Court of Appeals affirmed the holding (though not the remedy, see infra at 2969). Petitioners do not challenge that holding in this Court.
>
> Certain issues originally in contest in this litigation were settled by stipulation and order in the District Court. These concerned such matters as processing inmate letters to sentencing judges, the provision for postage to mail such letters, the adequacy of and access to the prison library, and the availability of a notary service. Others were decided by the District Court, after trial, and were not taken up on appeal to the Court of Appeals. These issues included the denial of use of typewriters to inmates, reprisals against inmates who petition the courts, the number of inmates who could use the prison library at one time, the length of time which could be spent in the library, delay in receiving mail, censorship of letters to the news media and public officials, and limitations on numbers of letters which can be written. None of these issues is raised here.

***544** The Court of Appeals reversed, 483 F.2d 1059 (CA8 1973), with respect to ****2969** the due process claim, holding that the procedural requirements outlined by this Court in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), decided after the District Court's opinion in this case, should be generally followed in prison disciplinary hearings but left the specific requirements, including the circumstances in which counsel might be required, to be determined by the District Court on remand.

With respect to a remedy, the court further held that Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), forbade the actual restoration of good-time credits in this s 1983 suit but ordered expunged from prison records any determinations of misconduct arrived at in proceedings that failed to comport with due process as defined by the court. The court generally affirmed the judgment of the District Court with respect to correspondence with attorneys,[FN3] but ordered further proceedings to determine whether the State was meeting its burden under Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), to provide legal assistance to prison inmates, the court holding that the State's duty extended to civil rights cases as well as to habeas corpus proceedings.[FN4]

FN3. No issues are raised here, nor were they in the Court of Appeals, as to the ruling in the District Court on restrictions on outgoing mail.

FN4. The Court of Appeals found that the only person allowed to render legal assistance was the 'Legal Advisor,' and that the Warden did not allow prisoners to consult with other inmates. That finding, which disagreed to some extent with the District Court's, is not challenged by petitioners.

I

We begin with the due process claim. An understanding of the issues involved requires a detailing of the prison disciplinary regime set down by Nebraska statutes and prison regulations. ***545** Section 16 of the Nebraska Treatment and Corrections Act, as amended, Neb.Rev.Stat. s 83-185 (Cum.Supp.1972),[FN5] provides that the chief executive officer of each penal facility is responsible for the discipline of inmates ***546** in a particular institution. The statute provides for a range of possible disciplinary action. 'Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in ****2970** section 83-1,107 (good-time credit[FN6]) be forfeited or withheld and ***547** also that the person be confined in a disciplinary cell.' Each breach of discipline is to be entered in the person's file together with the disposition or punishment therefor.

FN5. That statutory provision provides, in full:

'(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

'(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83-1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

'(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

'(4) The chief executive officer may recommend to the Director of Corrections that a person who is considered to be incorrigible by reason of frequent intentional breaches of

discipline, or who is detrimental to the discipline or the morale of the facility be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of section 83-176.'

At the time this litigation was commenced, the statute gave examples of 'flagrant or serious misconduct'-'assault, escape, attempt to escape.' Neb.Rev.Stat. s 83-185 (1971). This was the definition employed by the District Court in deciding that certain offenses were not serious within the meaning of the Act. See n. 2, supra. The statutory change does not affect the issues in this litigation.

FN6. Section 83-1,107, Neb.Rev.Stat. (Cum.Supp.1972), which provides for the allowance and

'(1) The chief executive officer of a facility

'(1) The chief executive officers of a facility shall reduce, for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, for parole purposes, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

'(a) From his minimum term, to determine the date of his eligibility for release on parole; and

'(b) From his maximum term, to determine the date when his release on parole becomes mandatory under the provisions of section 83-1,111.

'(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.

'(3) Good time or other reductions of sentence granted under the provisions of any law prior to July 6, 1972 may be forfeited, withheld, or restored in accordance with the terms of this act.'

Special provisions are set up by statute dealing with the transfer of minors. See Nebraska Treatment and Corrections Act s 7, as amended by LB 57, Session Laws 1973, s 1, Neb.Rev.Stat. s 83-176 (Supp.1973).

Certain changes made in s 83-1,107, between time suit was brought and now, as related in the prior version of the provision, Neb.Rev.Stat. s 83-1,107 (1971), are not important to the issues in dispute here.

Determinations of loss of good time are directly relevant to receiving parole. Under Neb.Rev.Stat. s 83-1,109 (1971), all reductions are to be reported to and considered by parole authorities.

By prison regulation, prisoners may also earn 'blood time.' The pertinent regulation provides:

'Anyone who donates blood to the American Red Cross receives good time credits for their donations. Anyone under the age of 18 must have the Warden's approval. Those over 18 may voluntarily give blood on the following scheduled months: MAY, AUGUST

and DECEMBER. The Red Cross Bloodmobile unit is generally scheduled for the first full week of the months mentioned above.

'You will reduce from your sentence, via the Board of Parole approval, five days for the first donation, ten days for the second donation, and fifteen days for every donation thereafter.

'Should you receive a disciplinary report or below average work report any time between donations, you will be credited only five days the next time you donate blood to the Red Cross as a result of the disciplinary action.'

Since 'blood time' operates like good time to reduce the term of sentence, and since it represents only an additional way to accumulate good time, it is considered to be included within the meaning of that term.

As the statute makes clear, there are basically two kinds of punishment for flagrant or serious misconduct. The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disciplinary cell, involves alteration of the conditions of confinement. If the misconduct is less than flagrant or serious, only deprivation of privileges results.[FN7]

FN7. The record does not disclose what specific sanctions are employed at the Complex under the general heading of 'deprivation of privileges.'

***548** The only statutory provision establishing procedures for the imposition of disciplinary sanctions which pertains to good time, s 38 of the Nebraska Treatment and Corrections Act, as amended, Neb.Rev.Stat. s 83-1,107 (Cum.Supp.1972), merely requires that an inmate be 'consulted regarding the charges of misconduct' in connection with the forfeiture, withholding, or restoration of credit. But prison authorities have framed written regulations dealing with procedures and policies for controlling inmate misconduct. [FN8]

FN8. The regulations, in full, are:

'Policy: In the interest of treatment-oriented discipline, it is necessary that inmates and staff members maintain high standards of behavior, courtesy and personal conduct. It is the policy of this institution, in administering discipline, to gain voluntary acceptance of certain limitations by the inmate body. Discipline must be realistically administered in order to maintain the general welfare of the institution community and conformance to specified standards and regulations, while at the same time implementing treatment of the offender.

'Purpose: To set forth the institutional policy and procedures for the administration of discipline to insure that disciplinary processes are carried out as an integral part of the total treatment program, and to establish professional standards for all employees in fulfilling this responsibility.

'Sandards of Conduct. The institution population will be kept informed through the orientation process and by written orders and memorandums as to the standards of conduct expected. When it becomes necessary to regulate and control a man's conformance to the prescribed standards, disciplinary measures consistent with treatment of the individual will be applied in appropriate degree and in an impersonal, impartial manner.

'Misconduct.

'a. Major Misconduct: Major misconduct if a serious violation and will be reported formally

to the Adjustment Committee on the Misconduct Report Form and/or detailed narrative.

'b. Minor Misconduct: Minor misconduct is a less serious violation which may be resolved immediately and informally by the inmate's supervisor or formally reported on the Misconduct Report Form. Repeated minor misconduct should be formally reported.

'Misconduct Reports:

'a. Preparation: In reporting misconduct on the Misconduct Report Form, the report should be prepared carefully and accurately so as to describe events exactly as they happen. The accurate preparation of a Misconduct Report is a major contributing factor in accurate evaulation of the misconduct by the Adjustment Committee. The initial statement on the report should be a brief statement of the charge or charges, followed by a detailed report of the incident. Articles of evidence should always accompany the report.

'b. Processing of Misconduct Reports: Completed Misconduct Reports along with any articles of evidence, should be forwarded to the Chief Correction Supervisor's office for investigation. The Shift Lieutenant will conduct an investigation, note his findings, and submit to the Chief Corrections Supervisor. The Chief Corrections Supervisor will review the report, conduct additional investigation if necessary, interview the Shift Lieutenant and officer submitting report, and verify the accuracy, proper preparation of the report and assemble all information and articles regarding the misconduct report. Upon completion of this investigation, all information will be noted on the space provided on the Misconduct Report, then submitted to the Chairman of the Adjustment Committee so the case may be promptly scheduled for a committee hearing.

'Administration of Discipline: The administration of discipline is hereby delegated as follows:

'a. All employees will resolve immediately and informally minor violations by any inmate under their observation and/or supervision.

'b. The Chief Corrections Supervisor will initiate prompt investigation on all misconduct reports and will maintain control of any adverse situation and its inmate participants.

'c. Adjustment Committee will receive reports of misconduct, conduct hearings, and make findings and impose disciplinary actions.

'The Adjustment Committee:

'a. Organization: The Adjustment Committee is composed as follows: Associate Warden Custody, Chairman; Correctional Industries Superintendent, Member; Reception Center Director, Member.

'Note: The Adjustment Committee is responsible for the preparation of meeting agenda, recording, distribution, and filing of all reports as necessary for institution requirements. Further, the committee will answer directly to the Administrative Assistant on matters of discipline, adjustment, and investigations conducted relative to the daily processing of Misconduct Reports.

'b. Committee Functions:

'(1) The Adjustment Committee will meet daily at 8:00 a.m. in the office of the Associate Warden Custody and/or the Adjustment Center, as required.

'(2) The Committee will review and evaluate all misconduct reports as to the underlying causes for the adverse behavior and will carefully consider all possible courses of action

before reaching a decision. Disciplinary action in all cases will be treatment oriented.

'(3) The Committee is authorized to conduct investigations, make findings, impose disciplinary actions, refer cases for further diagnosis, recommend program changes and take any other actions deemed necessary to insure decision effectiveness.

'(4) The Committee will concern itself with institution policies and procedures which effect discipline, strive to maintain consistence in its actions, and continually evaluate the effectiveness of its decisions by appropriate follow-up.

'(5) The Committee will maintain accurate records and assure the prompt and proper completion of all required reports and forms.

'(6) The Committee will review each week or more often, the progress of all inmates housed in the Adjustment Center and initiate or recommend program changes when indicated. The Committee will document all actions, reviews, and program changes so as to provide the Classification Committee with a clear, concise picture of individual inmate adjustment.

'Adjustment Committee Actions:

'a. General Principles:

'(1) The decisions and recommendations of the Committee will be the result of group consensus and judgment.

'(2) Full consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals.

'(3) Disciplinary meansures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior with acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge.

'(4) Action will be taken as soon after the occurrence as circumstances permit.

'(5) Work assignments and program changes will not be used as disciplinary measures.

'(6) The use of corporal punishment is strictly prohibited.

'(7) Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center, withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.

'Use of Segregation: Inmates may be placed in segregation for any one of the following reasons, and documentation on either the Misconduct Report Form or in narrative must be sent to the Associate Warden Custody in each case.

'a. To insure immediate control and supervision.

'b. To protect potential victims.

'c. To insure witnesses against intimidation.

'd. As a punishment for some major institutional infraction.

'e. To control those whose violent emotions are out of control.

'f. To insure their safety or the safety of others.

'g. To insure the safety and security of the institution.

'h. Demonstrated defiance of personnel acting in the line of duty.

'i. Willful refusal to obey orders.

'Note: Inmates awaiting action of the Adjustment Committee will not routinely be placed in the Adjustment Center unless one or more of the above reasons are evident.

'No man should remain in the Adjustment Center longer than necessary, and special care must be taken to insure that this unit does not become a haven for those who persistently fail to solve their problems.

'The Adjustment Committee will conduct a review each week or more often, of all cases in the Adjustment Center in discipline, to consider possible treatment alternatives.

'In addition to this, the institution counselor will maintain a progress file on long-term confinement cases. The Counselor has the responsibility to maintain contact with those inmates who are housed in segregation and report their progress or lack of progress to the Adjustment Committee. These progress reports are prepared at the end of each month and are used as a tool in determining further action by the Adjustment Committee.'

****2972** By regulation, misconduct is ***549*** classified into two categories: major misconduct is a 'serious violation' and must be formally reported to an Adjustment Committee, composed of the Associate Warden ***550*** Custody, the Correctional Industries Superintendent, and the Reception Center Director. This Committee is directed to 'review and evaluate all misconduct reports' ***551*** and, among other things, to 'conduct investigations, make findings, (and) impose disciplinary actions.' If only minor misconduct, 'a less serious violation,' is involved, ***552*** the problem may either be resolved informally by the inmate's supervisor or it can be formally reported for action to the Adjustment Committee. Repeated minor misconduct must be reported. The Adjustment Committee has available a wide range of sanctions. 'Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center (the disciplinary cell), withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.'[FN9]

FN9. When a prisoner is isolated in solitary confinement, there appear to be two different types of conditions to which he may be exposed. He may be incarcerated alone in the usual 'disciplinary cell,' with privileges severely limited, for as long as necessary, or he may be put in a 'dry cell,' which unlike regular cells, contains no sink or toilet.

****2973** Additional procedures have been devised by the Complex governing the actions of the Adjustment Committee. Based on the testimony, the District Court found, 342 F.Supp., at 625-626, that the following procedures were in effect when an inmate is written up or charged with a prison violation: [FN10]

FN10. The Warden testified that a great number of cases are resolved without contest, and that in many instances the inmates admits his guilt to the investigating officer.

'(a) The chief correction supervisor reviews the 'write-ups' on the inmates by the officers of the Complex daily;
553 '(b) the convict is called to a conference with the chief correction supervisor and the charging party;

'(c) following the conference, a conduct report is sent to the Adjustment Committee;
'(d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;
'(e) if the inmate denies charge he may ask questions of the party writing him up;
'(f) the Adjustment Committee can conduct additional investigations if it desires;
'(g) punishment is imposed.'

II

This class action brought by respondent alleged that the rules, practices, and procedures at the Complex which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment. Respondent sought three types of relief: (1) restoration of good time; (2) submission of a plan by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.[FN11]

FN11. The prayer of the amended complaint asked the court to '(a)djudicate that under the rules, practices and procedures at the Complex the taking of statutory prisoner good time from the inmates constitutes an increase in the inmates' sentence without due process of law in violation of Amendment XIV . . ..' It asked the court to 'order the defendants to restore to the plaintiff Robert O. McDonnell that amount of good time taken' from him, and to '(o)rder defendants to submit a plan' which provided '(f)or a hearing procedure in connection with withholding and forfeiture of good time which complies with the requirements of due process . . ..' It further sought damages in the sum of $75,000 for the deprivation of the various constitutional rights involved in litigation, necessarily including the right to due process.

***554** [2] [3] [4] At the threshold is the issue whether under Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the validity of the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. s 1983. In Preiser, state prisoners brought a s 1983 suit seeking an injunction to compel restoration of good-time credits. The Court held that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U.S., at 500, 93 S.Ct., at 1841, with the concomitant requirement of exhausting state remedies. But the Court was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under s 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. 411 U.S., at 494, 498-499, 93 S.Ct., at 1838, 1840-1841.
****2974** The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under s 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S., at 499 n. 14, 93 S.Ct., at 1841.[FN12] Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct.***555** Such a declaratory judgment as a predicate to a damages award would not be barred by Preiser; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

FN12. One would anticipate that normal principles of res judicata would apply in such circumstances.

We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.[FN13]

FN13. It is suggested that the Court of Appeals wholly excluded the matter of good time from the proceedings on remand. It is true that the court's opinion is arguably ambiguous; but as we understand it, the District Court on remand was to determine the validity of the procedures for disciplinary hearings that may result in serious penalties, including good time, and that appropriate remedies were to be fashioned short of actual restoration of good time.

III

[5] Petitioners assert that the procedure for disciplining prison inmates for serious misconduct is a mater of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.' Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain ***556** drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). They retain right of access to the courts. Younger v. Gilmore, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971), aff'g Gilmore v. Lynch, 319 F.Supp. 105 (ND Cal.1970); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968). Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

**2975 [6] Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. Cf. U.S. Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf. Morrissey v. Brewer, 408 U.S., at 488, 92 S.Ct., at 2603. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

[7] We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures***557** is not included in that 'liberty' protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation

of credits for good behavior, and it is true that the Due Process Clause does not require a hearing 'in every conceivable case of government impairment of private interest.' Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In Haines v. Kerner, supra, the state prisoner asserted a 'denial of due process in the steps leading to (disciplinary) confinement.' 404 U.S., at 520, 92 S.Ct., at 595. We reversed the dismissal of the s 1983 complaint for failure to state a claim. In Preiser v. Rodriguez, supra, the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding. This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property ***558*** interests. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), the revocation of licenses, In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), the operation of state dispute-settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held, absent 'cause' for termination, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Arnett v. Kennedy, 416 U.S. 134, 164, 94 S.Ct. 1633, 1649, 40 L.Ed.2d 15 (1974) (Powell, J., concurring); id., at 171, 94 S.Ct., at 1652 (White, J., concurring in part and dissenting in part); id., at 206, 94 S.Ct., at 1670 (Marshall, J., dissenting). Cf. Stanley v. Illinois, 405 U.S. 645, 652-654, 92 S.Ct. 1208, 1213-1214, ****2976*** 31 L.Ed.2d 551 (1972); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

[8] We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

IV

[9] [10] As found by the District Court, the procedures employed are: (1) a preliminary conference with the Chief Corrections Supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits; (2) the preparation of a conduct report and a hearing before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and ***559*** (3) the opportunity at the hearing to ask questions of the charging party. The State contends that the procedures already provided are adequate. The Court of Appeals held them insufficient and ordered that the due process requirements outlined in Morrissey and Scarpelli be satisfied in serious disciplinary cases at the prison.

Morrissey held that due process imposed certain minimum procedural requirements which must be satisfied before parole could finally be revoked. These procedures were:

'(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.' 408 U.S., at 489, 92 S.Ct., at 2604.

The Court did not reach the question as to whether the parolee is entitled to the assistance of retained counsel or to appointed counsel, if he is indigent. Following the decision in Morrissey, in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the Court held the requirements of due process established for parole revocation were applicable to probation revocation proceedings. The Court added to the required minimum procedures of Morrissey the right to counsel, where a probationer makes a request, 'based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation ***560** is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.' Id., at 790, 93 S.Ct., at 1764. In doubtful cases, the agency was to consider whether the probationer appeared to be capable of speaking effectively for himself, id., at 790-791, 93 S.Ct., at 1763-1764, and a record was to be made of the grounds for refusing to appoint counsel.

We agree with neither petitioners nor the Court of Appeals: the Nebraska procedures are in some respects constitutionally deficient but the Morrissey-Scarpelli procedures need not in all respects be followed in disciplinary cases in state prisons.

***2977** We have often repeated that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' Cafeteria & Restaurant Workers v. McElroy, 367 U.S., at 895, 81 S.Ct., at 1748. '(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Ibid.; Morrissey, 408 U.S., at 481, 92 S.Ct., at 2600. Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless 'inflicts a 'grievous loss' on the parolee and often on others.' Morrissey, Id., at 482, 92 S.Ct., at 2601. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, ***561** the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance. But it is qualitatively and quantitatively different from the revocation of parole or probation.

In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by Morrissey for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing. That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses-at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who ***562** have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

It is against this background that disciplinary proceedings must be structured ***2978** by prison authorities; and it is against this background that we must make our constitutional judgments,

realizing that we are dealing with the maximum security institution as well as those where security considerations are not paramount. The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process.

Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates ***563*** sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. FN14 In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account as we now examine in more detail the Nebraska procedures that the Court of Appeals found wanting.

FN14. See generally A. Bandura, Principles of Behavior Modification (1969); L. Krasner & L. Ullmann, Research in Behavior Modification (1965); B. Skinner, Science and Human Behavior (1953).

V

[11] Two of the procedures that the Court held should be extended to parolees facing revocation proceedings are not, but must be, provided to prisoners in the Nebraska Complex if the minimum requirements of procedural due process are to be satisfied. These are advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken. As described ***564*** by the Warden in his oral testimony, on the basis of which the District Court made its findings, the inmate is now given oral notice of the charges against him at least as soon as the conference with the Chief Corrections Supervisor and charging party. A written record is there compiled and the report read to the inmate at the hearing before the Adjustment Committee where the charges are discussed and pursued. There is no indication that the inmate is ever given a written statement by the Committee as to the evidence or informed in writing or otherwise as to the reasons for the disciplinary action taken.

Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact. See In re Gault, 387 U.S. 1, 33-34, and n. 54, 87 S.Ct. 1428, 1446-1447, 18 L.Ed.2d 527 (1967). Neither of these functions was performed by the notice described by the ****2979*** Warden. Although the charges are discussed orally with the inmate somewhat in advance of the hearing, the inmate is sometimes brought before the Adjustment Committee shortly after he is orally informed of the charges. Other times, after this initial discussion, further investigation takes place which may reshape the nature of the charges or the evidence relied upon. In those instances, under procedures in effect at the time of trial, it would appear that the inmate first receives notice of the actual charges at the time of the hearing before the Adjustment Committee. We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

We also hold that there must be a 'written statement by the factfinders as to the evidence relied on

and reasons' for the disciplinary action. ***565** Morrissey, 408 U.S., at 489, 92 S.Ct., at 2604. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered 'to be incorrigible by reason of frequent intentional breaches of discipline,' Neb.Rev.Stat. s 83-185(4) (Cum.Supp.1972), and the certainly likely to be considered by the state parole authorities in making parole decisions.[FN15] Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.[FN16]

FN15. See n. 8, supra.

FN16. A Survey of Prison Disciplinary Practices and Procedures of the American Bar Association's Commission on Correctional Facilities and Services (1974), reveals that 98% of the 49 prison systems of the States and the United States answering the questionnaire provided written notice of the charges to an inmate. The Survey shows that 91% of the systems, out of 34 responses, make a record of the hearings.

566** We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance*2980** the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional ***567** impediments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.

[12] [13] Confrontation and cross-examination present greater hazards to institutional interests.[FN17] If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), or where a person may lose his job in society, Greene v. McElroy, 360 U.S. 474,

496-497, 79 S.Ct. 1400, 1413-1414, 3 L.Ed.2d 1377 (1959). But they are not rights universally applicable to all hearings. See Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). Rules of procedure may be shapped by consideration of the risks of error, In re Winship, 397 U.S. 358, 368, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring); Arnett v. Kennedy, supra, 416 U.S., at 171, 94 S.Ct., at 1652 (White, J., concurring in part and dissenting in part), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings,[FN18] we are not apprised of the conditions under which ***568** the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.

> FN17. We note that though Nebraska does not as a general matter allow cross-examination of adverse witnesses at the hearing before the Adjustment Committee, the inmate is allowed to ask the charging party questions about the nature of the charges. He is also allowed to speak freely in his own defense.
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> FN18. The Survey, see n. 16, supra, discloses that cross-examination of witnesses is 'allowed' in 28 States, 57% of the 49 systems responding, but the Survey also discloses, that even in these 28 States-the federal system does not allow cross-examination-certain limitations are placed on the use of the procedure. Id., at 19-20.

Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska, and the Federal Government to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American**2981 adversary trial presumes contestants who are able to cope with the presures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least, the Constitution, as we interpret it today, does not require the contrary assumption. Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.

We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by ***569** cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments. The better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons.

[14] KC As to the right to counsel, the problem as outlined in Scarpelli with respect to parole and probation revocation proceedings is even more pertinent here:

'The introduction of counsel into a revocation proceeding will alter significanctly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions

and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in Morrissey as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative ***570** needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State-for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review-will not be insubstantial.' 411 U.S., at 787-788, 93 S.Ct., at 1762 (footnote omitted).

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.

****2982** Where an illiterate inmate is involved, however, or whether the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, however, for there is no claim that the named respondent, McDonnell, is within the class of inmates entitled to advice or help from others in the course of a prison disciplinary hearing.

[15] Finally, we decline to rule that the Adjustment Committee which conducts the required hearings at the Nebraska ***571** Prison Complex and determines whether to revoke good time is not sufficiently impartial to satisfy the Due Process Clause. The Committee is made up of the Associate Warden Custody as chairman, the Correctional Industries Superintendent, and the Reception Center Director. The Chief Corrections Supervisor refers cases to the Committee after investigation and an initial interview with the inmate involved. The Committee is not left at large with unlimited discretion. It is directed to meet daily and to operate within the principles stated in the controlling regulations, among which is the command that '(f)ull consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals,' as well as the direction that 'disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge.' We find no warrant in the record presented here for concluding that the Adjustment Committee presents such a hazard of arbitrary decisionmaking that it should be held violative of due process of law.

[16] Our conclusion that some, but not all, of the procedures specified in Morrissey and Scarpelli must accompany the deprivation of good time by state prison authorities[FN19] is ***572** not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[FN20]

FN19. Although the complaint put at issue the procedures employed with respect to the deprivation of good time, under the Nebraska system, the same procedures are employed where disciplinary confinement is imposed. The deprivation of good time and imposition of 'solitary' confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural

safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.

FN20. The Court of Appeals, which have ruled on procedures required in prison disciplinary proceedings, have been split. Two Circuits have required written notice in advance, Clutchette v. Procunier, 497 F.2d 809 (CA9 1974); United States ex rel. Miller v. Twomey, 479 F.2d 701 (CA7 1973), while two have held that oral notice is sufficient, Meyers v. Alldredge, 492 F.2d 296 (CA3 1974); Braxton v. Carlson, 483 F.2d 933 (CA3 1973); Sostre v. McGinnis, 442 F.2d 178 (CA2 1971) (en banc), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972). The Ninth Circuit, Clutchette v. Procunier, supra, has held that a written statement of reasons and a written record of the proceedings must be provided, while the Second and Third Circuits have held to the contrary, Braxton v. Carlson, supra; Sostre v. McGinnis, supra. Two Circuits have held that there is no right to present witnesses at a hearing, Braxton v. Carlson, supra; Sostre v. McGinnis, Ginnis, supra, while one has held that there must be an opportunity to request the calling of witnesses, United States ex rel. Miller v. Twomey, supra. Only the Ninth Circuit, Clutchette v. Procunier, supra, has held that there is the full power and right of an inmate to call witnesses. As to cross-examination, two Circuits have stated that due process does not require this procedure, Braxton v. Carlson, supra; Sostre v. McGinnis, supra. The First Circuit has held, that where prison authorities had already extended the right to confront and cross-examine witnesses, there is no reason to force the authorities to call adverse witnesses when the inmate could have, Palmigiano v. Baxter, 487 F.2d 1280 (1973). Only the Ninth Circuit, Clutchette v. Procunier, supra, has held that there is a general right of cross-examination, but even that case helds that the right may be limited where there is a legitimate fear that retribution will result. As to counsel, two Circuits have held that there is no right even to lay substitutes, Braxton v. Carlson, supra; Sostre v. McGinnis, supra, while the Third Circuit, Meyers v. Alldredge, supra, has held that there is no right to counsel where counsel substitute is provided. The First Circuit, Palmigiano v. Baxter, supra, holds there is a right to retained counsel, even where a staff assistant is available, while the Ninth Circuit, Clutchette v. Procunier, supra, envisions some sanctions at disciplinary proceedings calling for provision of counsel, and has determined that counsel must be provided where a prison rule violation may be punishable by state law. An impartial hearing board has been required, to the extent that a member of the board may not participate in a case as an investigating or reviewing officer, or be a witness, Clutchette v. Procunier, supra; Braxton v. Carlson, supra; United States ex rel. Miller v. Twomey, supra. The Third Circuit, Meyers v. Alldredge, supra, has also held, in the context of the federal system where a prisoner whose good time is taken away goes first to a disciplinary committee and then to the Good Time Forfeiture Board, that an associate warden could not sit on both committees.

***573** VI

[17] The Court of Appeals held that the due process requirements in prison ****2983** disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point.

The question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in Morrissey that the due process requirements there announced were to be 'applicable to future revocations of parole,' 408 U.S., at 490, 92 S.Ct., at 2604 (emphasis supplied). Despite the fact that procedures are related to the integrity of the factfinding ***574** process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country,

and the reliance prison officials placed, in good faith, on prior law not requiring such procedures. During 1973, the Federal Government alone conducted 19,000 misconduct hearings, as compared with 1,173 parole revocation hearings, and 2,023 probation revocation hearings. If Morrissey-Scarpelli rules are not retroactive out of consideration for the burden on federal and state officials, this case is a fortiori. We also note that a contrary holding would be very troublesome for the parole system since performance in prison is often a relevant criterion for parole. On the whole, we do not think that error was so pervasive in the system under the old procedures as to warrant this cost or result.

VII

The issue of the extent to which prison authorities can open and inspect incoming mail from attorneys to inmates, has been considerably narrowed in the course of this litigation. The prison regulation under challenge provided that '(a)ll incoming and outgoing mail will be read and inspected,' and no exception ***2984** was made for attorney-prisoner mail. The District Court held that incoming mail from attorneys might be opened if normal contraband detection techniques failed to disclose contraband, and if there was a reasonable possibility that contraband would be included in the mail. It further held that if an incoming letter was marked 'privileged,' thus identifying it as from an attorney, the letter could not be opened except in the presence of the inmate. Prison authorities were not to read the mail from attorneys. The Court of Appeals affirmed the District Court order, ***575** but placed additional restrictions on prison authorities. If there was doubt that a letter was actually from an attorney, 'a simple telephone call should be enough to settle the matter,' 483 F.2d at 1067, the court thus implying that officials might have to go beyond the face of the envelope, and the 'privileged' label, in ascertaining what kind of communication was involved. The court further stated that 'the danger that a letter from an attorney, an officer of the court, will contain contraband is ordinarily too remote and too speculative to justify the (petitioners') regulation permitting the opening and inspection of all legal mail.' Ibid. While methods to detect contraband could be employed, a letter was to be opened only 'in the appropriate circumstances' in the presence of the inmate.
Petitioners now concede that they cannot open and read mail from attorneys to inmates, but contend that they may open all letters from attorneys as long as it is done in the presence of the prisoners. The narrow issue thus presented is whether letters determined or found to be from attorneys may be opened by prison authorities in the presence of the inmate or whether such mail must be delivered unopened if normal detection techniques fail to indicate contraband.

[18] Respondent asserts that his First, Sixth, and Fourteenth Amendment rights are infringed, under a procedure whereby the State may open mail from his attorney, even though in his presence and even though it may not be read. To begin with, the constitutional status of the rights asserted, as applied in this situation, is far from clear. While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), this Court has not yet recognized First ***576** Amendment rights of prisoners in this context, cf. Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal. As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from intrusion in the criminal setting, see Black v. United States, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966); O'Brien v. United States, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967); see also Coplon v. United States, 89 U.S.App.D.C. 103, 191 F.2d 749 (1951), while the claim here would insulate all mail from inspection, whether related to civil or criminal matters. Finally, the Fourteenth Amendment due process claim based on access to the courts, Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); Younger v. Gilmore, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971), has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint. Moreover, even if one were to accept the argument that inspection of incoming mail from an attorney placed an obstacle to access to the court, it is far from clear that this burden is a substantial one. We need not decide, however, which, if any, of the asserted rights are operative here, for the question is whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State.

[19] [20] In our view, the approach of the Court of Appeals is unworkable and none of the above rights is infringed by **2985 the procedures petitioners now accept. If prison officials had to check in each case whether a communication was from an attorney before opening it for inspection, a near impossible task of administration would be imposed. We think it entirely appropriate that the State require any such communications to be specially marked as originating from an attorney, with his name and address being given, if they are to receive special treatment. It would also certainly be permissible that prison authorities require *577 that a lawyer desiring to correspond with a prisoner, first identify himself and his client to the prison officials, to assure that the letters marked privileged are actually from members of the bar. As to the ability to open the mail in the presence of inmates, this could in no way constitute censorship, since the mail would not be read. Neither could it chill such communications, since the inmate's presence insures that prison officials will not read the mail. The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials' opening the letters. We disagree with the Court of Appeals that this should only be done in 'appropriate circumstances.' Since a flexible test, besides being unworkable, serves no arguable purpose in protecting any of the possible constitutional rights enumerated by respondent, we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires.

VIII

The last issue presented is whether the Complex must, make available, and if so has made available, adequate legal assistance, under Johnson v. Avery, supra, for the preparation of habeas corpus petitions and civil rights actions by inmates. The issue arises in the context of a challenge to a regulation providing, in pertinent part:

'Legal Work

'A legal advisor has been appointed by the Warden for the benefit of those offenders who are in need of legal assistance. This individual is an offender who has general knowledge of the law procedure. He is not an attorney and can not represent you as such.

'No other offender than the legal advisor is permitted to assist you in the preparation of legal documents*578 unless with the specific written permission of the Warden.'

Respondent contended that this regulation was invalid because it failed to allow inmates to furnish assistance to one another. The District Court assumed that the Warden freely gave permission to inmates to give assistance to each other, and that Johnson v. Avery, supra, was thereby satisfied. The Court of Appeals found that the record did not support the assumption and that permission has been denied solely because of the existence of the inmate legal advisor, one of the inmates specially approved by the prison authorities. It decided, therefore, to remand the case to decide whether the one advisor satisfied the requirements of Johnson v. Avery. In so doing, the court stated that in determining the need for legal assistance, petitioners were to take into account the need for assistance in civil rights actions as well as habeas corpus suits.

In Johnson v. Avery, an inmate was diciplined for violating a prison regulation which prohibited inmates from assisting other prisoners in preparing habeas corpus petitions. The Court held that 'unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief,' inmates could not be barred from furnishing assistance to each other. 393 U.S., at 490, 89 S.Ct., at 751. The court emphasized that the writ of habeas corpus was of fundamental importance in our constitutional scheme, and since the basic purpose of the writ 'is to enable those unlawfully incarcerated to obtain their freedom, it **2986 is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.' Id., at 485, 89 S.Ct., at 749. Following Avery, the Court, in Younger v. Gilmore, supra, affirmed a three-judge court judgment which required state officials to provide indigent*579 inmates with access to a reasonably adequate law library for preparation of legal actions.

[21] Petitioners contend that Avery is limited to assistance in the preparation of habeas corpus petitions and disputes the direction of the Court of Appeals to the District Court that the capacity of the inmate adviser be assessed in light of the demand for assistance in civil rights actions as well as in the preparation of habeas petitions. Petitioners take too narrow a view of that decision.

First, the demarcation line between civil rights actions and habeas petitions is not always clear. The

Court has already recognized instances where the same constitutional rights might be redressed under either form of relief. Cf. Preiser v. Rodriquez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971). Second, while it is true that only in habeas actions may relief be granted which will shorten the term of confinement, Preiser, supra, it is more pertinent that both actions serve to protect basic constitutional rights. The right of access to the courts, upon which Avery was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ. The recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts. Although there may be additional burdens on the Complex, if inmates may seek help from other inmates, or from the inmate adviser if he proves adequate, in both habeas and civil rights actions, this should not prove overwhelming. At ***580** present only one inmate serves as legal adviser and it may be expected that other qualified inmates could be found for assistance if the Complex insists on naming the inmates from whom help may be sought.

Finding no reasonable distinction between the two forms of actions, we affirm the Court of Appeals on this point, and as the Court of Appeals suggested, the District Court will assess the adequacy of legal assistance under the reasonable-alternative standard of Avery.

Affirmed in part, reversed in part.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, concurring in part and dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see Procunier v. Martinez, 416 U.S. 396, 422, 94 S.Ct. 1800, 1815, 40 L.Ed.2d 224 (1974) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also implicated here, I do not see how any of these constitutional rights are infringed to any significant extent by the mere inspection of mail in the presence of the inmate.

My disagreement with the majority is over its disposition of the primary issue ****2987** presented by this case, the extent of the procedural protections required by the Due Process Clause of the Fourteenth Amendment in prison disciplinary proceedings. I have previously stated my ***581** view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process protection.[FN1] But, in my view, the content which the Court gives to this due process protection leaves these noble holdings as little more than empty promises. To be sure, the Court holds that inmates are constitutionally entitled to advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting the disciplinary board's decision. Apparently, an inmate is also constitutionally entitled to a hearing and an opportunity to speak in his own defense. These are valuable procedural safeguards, and I do not mean for a moment to denigrate their importance.

FN1. The Court defines the liberty interest at stake here in terms of the forfeiture of good time as a disciplinary measure. Since it is only loss of good time that is at issue in this case, this definition is of course quite appropriate here. But lest anyone be deceived by the narrowness of this definition, I think it important to note that this is obviously not the only liberty interest involved in prison disciplinary proceedings which is protected by due process. Indeed, the Court later observes that due process requires the same procedural protection when solitary confinement is at issue. Ante, at 2982, n. 19. The Court apparently holds that inmates' 'liberty' is protected by due process whenever 'a major change in the conditions of confinement' is imposed as punishment for misconduct. Ibid. I agree. See Palmigiano v. Baxter, 487 F.2d 1280, 1284 (CA1 1973).

But the purpose of notice is to give the accused the opportunity to prepare a defense, and the purpose of a hearing is to afford him the chance to present that defense. Today's decision deprives an accused inmate of any enforceable constitutional right to the procedural tools essential to the presentation of any meaningful defense, and makes the required notice and hearing formalities of little utility. Without the enforceable right ***582** to call witnesses and present documentary evidence, an accused inmate is not guaranteed the right to present any defense beyond his own word. Without any right to confront and cross-examine adverse witnesses, the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way. The hearing will thus amount to little more than a swearing contest, with each side telling its version of the facts-and, indeed, with only the prisoner's story subject to being tested by cross-examination. In such a contest, it seems obvious to me that even the wrongfully charged inmate will invariably be the loser. I see no justification for the Court's refusal to extend to prisoners these procedural safeguards which in every other context we have found to be among the 'minimum requirements of due process.' Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972) (emphasis added).

The Court states that it is 'of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.' Ante, at 2979. Since the Court is not ordinarily in the business of giving neighborly advice to state correctional authorities, I think it fair to assume that this statement represents the considered judgment of the Court that the Constitution requires that an accused inmate be permitted to call defense witnesses and present documentary evidence. Still, the Court hardly makes this clear, and ends up deferring to the discretion of prison officials to the extent that the right recognized is, as my Brother DOUGLAS demonstrates, post, at 2994-2995, practically unenforceable.

****2988** I would make clear that an accused inmate's right to present witnesses and submit other evidence in his ***583** defense is constitutionally protected and, if nnecessarily abridged, judicially enforceable. As we said only last Term: 'Few rights are more fundamental than that of an accused to present witnesses in his own defense.' Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the (hearing body) so it may decide where the truth lies.' Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

See also Morrissey v. Brewer, supra, 408 U.S., at 489, 92 S.Ct., at 2604; In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948). The right to present the testimony of impartial witnesses and real evidence to corroborate his version of the facts is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard. See Clutchette v. Procunier, 497 F.2d 809, 818 (CA9 1974); ABA Commission on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures 19 (1974) (hereinafter ABA Survey).

I see no persuasive reason to justify the Court's refusal to afford this basic right to an accused inmate. The majority cites the possible interference with 'swift punishment.' But how often do we have to reiterate that the Due Process Clause 'recognizes higher values than speed and efficiency'? Fuentes v. Shevin, 407 U.S. 67, 90-91, n. 22, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972). Surely the brief prolongation of disciplinary hearings required to hear the testimony of a few witnesses before reaching what would otherwise seem to be a pre-ordained decision provides no support whatever for refusal to give accused inmates this right. Nor do I see the 'obvious potential for disruption' that ***584** the majority relies upon in the context of an inmate's right to call defense witnesses.

But even if the majority's fear in this regard is justified, the point that must be made clear is that the accused prisoner's right to present witnesses is the constitutional rule and that the needs of prison security must be accommodated within a narrowly limited exception to that rule. The inmate's right to call witnesses should, of course, be subject to reasonable limitation by the disciplinary board to prevent undue delay caused by an inmate's calling numerous cumulative witnesses or witnesses whose contributions would be of marginal relevance. The right to call a particular witness could also justifiably be limited if necessary to protect a confidential informant against a substantial risk of reprisal. I agree with the Court that there is this much flexibility in the due process requirement. But

in my view the exceptions made to the constitutional rule must be kept to an absolute minimum, and each refusal to permit witnesses justified in writing in the disciplinary file, a rule the majority finds 'useful' but inexplicably refuses to prescribe. Ante, at 2980. And if prison authorities persist in a niggardly interpretation of the inmates' right to call witnesses, it must ultimately be up to the courts to exercise their great responsibility under our constitutional plan and enforce this fundamental constitutional right.

With respect to the rights of confrontation and cross-examination, the gulf between the majority opinion and my views is much wider. In part, this disagreement appears to stem from the majority's view that these rights are just not all that important. Thus, the Court states-not surprisingly, without citation of authority, other than Mr. Justice White's separate opinion in Arnett v. Kennedy, 416 U.S. 134, 171, 94 S.Ct. 1633, 1652, 40 L.Ed.2d 15 (1974)-that confrontation and cross-examination 'are **2989 not rights universally *585 applicable to all hearings.' Ante, at 2980. And the Court suggests that while these procedures may be essential in situations where 'serious deprivations' like loss of employment are at stake, they are not so essential here. I suppose the majority considers loss of a job to be a more serious penalty than the imposition of an additional prison sentence-on this record, ranging up to 18 months-which is the effective result of withdrawal of accummulated good time.

I could not disagree more, both with respect to the seriousness of the deprivation involved here and the importance of these rights. Our decisions flatly reject the Court's view of the dispenability of confrontation and cross-examination. We have held that '(i)n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). And in Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), we found that the view that cross-examination and confrontation must be permitted whenever 'governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings' was one of the 'immutable' principles of our jurisprudence-immutable, that is, until today. See also Arnett v. Kennedy, supra, 416 U.S., at 215, 94 S.Ct., at 1668 (Marshall, J., dissenting); Chambers v. Mississippi, supra, 410 U.S., at 294-295, 93 S.Ct., at 1045-1046; Morrissey v. Brewer, 408 U.S., at 489, 92 S.Ct., at 2604; In re Gault, 387 U.S. 1, 56-57, 87 S.Ct. 1428, 1458-1459, 18 L.Ed.2d 527 (1967). Surely confrontation and cross-examination are as crucial in the prison disciplinary context as in any other, if not more so. Prison disciplinary proceedings will invariably turn on disputed questions of fact, see Landman v. Royster, 333 F.Supp. 621, 653 (ED Va.1971), and, in addition to the usual need for cross-examination to reveal mistakes of identity, faulty perceptions, or cloudy memories, there is a significant potential *586 for abuse of the disciplinary process by 'persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy,' Greene v. McElroy, supra, 360 U.S., at 496, 79 S.Ct., at 1413, whether these be other inmates seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control. See also Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). I can see no rational means for resolving these disputed questions of fact without providing confrontation and cross-examination.

The majority, however, denies accused prisoners these basic constitutional rights, and leaves these matters for now to the 'sound discretion' of prison officials. Since we already know how Nebraska authorities, at least, have chosen to exercise this discretion, the Court necessarily puts its stamp of approval on the State's failure to provide confrontation and cross-examination. I see no persuasive justification for this result. The Court again cites concern for administrative efficiency in support of its holding: 'Proceedings would inevitably be longer and tend to unmanageability.' Ante, at 2980. I can only assume that these are makeweights, for I refuse to believe that the Court would deny fundamental rights in reliance on such trivial and easily handled concerns.

A more substantial problem with permitting the accused inmate to demand confrontation with adverse witnesses is the need to preserve the secrecy of the identity of inmate informers and protect them from the danger of reprisal. I am well aware of the seriousness of this problem, and I agree that in some circumstances this confidentiality must prevail over the accused's right of confrontation. 'But this concern for the safety of inmates does not justify a wholesale denial of the right to confront and cross-examine adverse witnesses.' **2990 Clutchette v. Procunier, 497 F.2d, at 819. The need to keep the identity of informants confidential will exist in only *587 a small percentage of disciplinary cases. Whether because of the 'inmates' code' or otherwise, the disciplinary process is rarely initiated by a fellow inmate and almost invariably by a correctional officer. I see no legitimate need to keep confidential the identity of a prison guard who files charges against an inmate; indeed, Nebraska, like

most States, routinely informs accused prisoners of the identity of the correctional officer who is the charging party, if he does not already know. In the relatively few instances where inmates press disciplinary charges, the accused inmate often knows the identity of his accuser, as, for example, where the accuser was the victim of a physical assault.

Thus, the Court refuses to enforce prisoners' fundamental procedural rights because of a legitimate concern for secrecy which must affect only a tiny fraction of disciplinary cases. This is surely permitting the tail to wag the constitutional dog. When faced with a similar problem in Morrissey v. Brewer, supra, we nonetheless, held that the parolee had the constitutional right to confront and cross-examine adverse witnesses, and permitted an exception to be made 'if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed.' 408 U.S., at 487, 92 S.Ct., at 2603. In my view, the same approach would be appropriate here.

Aside from the problem of preserving the confidentiality of inmate informers, the Court does not require confrontation and cross-examination of known accusers, whether inmates or guards, and indeed does not even require cross-examination of adverse witnesses who actually testify at the hearing. Yet, as The Chief Justice recently observed, '(c)ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested,' Davis v. Alaska, supra, 415 U.S., at 316, 94 S.Ct., at 1110, and "(t)he main and essential purpose of confrontation*588 is to secure for the opponent the opportunity of cross-examination." Id., at 315-316, 94 S.Ct., at 1110. I see little basis for the Court's refusal to recognize the accused inmate's rights in these circumstances.

The Court apparently accepts petitioners' arguments that there is a danger that such cross-examination will produce hostility between inmate and guard, or inmate and inmate, which will eventually lead to prison disruption; or that cross-examination of a guard by an inmate would threaten the guard's traditional role of absolute authority; or that cross-examination would somehow weaken the disciplinary process as a vehicle for rehabilitation.

I do not believe that these generalized, speculative, and unsupported theories provide anything close to an adequate basis for denying the accused inmate the right to cross-examine his accusers. The State's arguments immediately lose most of their potential force when it is observed that Nebraska already permits inmates to question the correctional officer who is the charging party with respect to the charges. See ante, at 2980, n. 17. Moreover, by far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool. President's Commission on Law Enforcement and the Administration of Justice Task Force Report: Corrections 13, 82-83 (1967); ABA Survey, 20-22; see Landman v. Royster, 333 F.Supp., at 653.

'Time has proved . . . that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard **2991 that authority.*589 There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.'

Palmigiano v. Baxter, 487 F.2d 1280, 1283 (CA1 1973).

As The Chief Justice noted in Morrissey v. Brewer, 408 U.S., at 484, 92 S.Ct., at 2602, 'fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.' Significantly, a substantial majority of the States do permit confrontation and cross-exmination in prison disciplinary proceedings, and their experience simply does not bear out the speculative fears of Nebraska authorities. See ABA Survey 21-22. The vast majority of these States have observed 'no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been 'upgraded' and that some of the inmate feelings of powerlessness and frustration had been relieved.' Id., at 21. The only reported complaints have been, not the theoretical problems suggested by petitioners, but that these procedures are time consuming and have slowed down the disciplinary process to some extent. these are small costs to bear to achieve significant gains in procedural fairness.

Thus, in my view, we should recognize that the accused prisoner has a constitutional right to confront and cross-examine adverse witnesses, subject to a limited exception when necessary to protect the identity of a confidential inmate informant. This does not mean that I would not permit the disciplinary board to rely on written reports concerning the charges against a prisoner. Rather, I would think this constitutional right sufficiently protected if the accused had the power to compel the attendance of an adverse witness so that his story can be tested by cross-examination. See *590 Clutchette v. procunier, supra, 497 F.2d, at 819; Palmigiano v. Baxter, supra, 487 F.2d, at 1290.

Again, whenever the right to confront an adverse witness is denied an accused, I would require that this denial and the reasons for it be noted in writing in the record of the proceeding. I would also hold that where it is found necessary to restrict the inmate's right of confrontation, the disciplinary board has the constitutional obligation to call the witness before it in camera and itself probe his credibility, rather than accepting the unchallenged and otherwise unchallengeable word of the informer. See ibid.; cf. Birzon v. King, 469 F.2d 1241 (CA2 1972). And, again, I would make it clear that the unwarranted denial of the right to confront adverse witnesses, after giving due deference to the judgment of prison officials and their reasonable concerns with inmate safety and institutional order, would be cause for judicial intervention.

The Court next turns to the question of an accused inmate's right to counsel, and quotes a long passage from our decision last Term in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), in support of its conclusion that appointed counsel need not be provided and retained counsel need not be permitted in prison disciplinary proceedings at this time. The Court seemingly forgets that the holding of Scarpelli was that fundamental fairness requires the appointment of counsel in some probation revocation or parole revocation proceedings and overlooks its conclusion that

'the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in ***591** presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex ****2992** documentary evidence.' Id., at 786-787, 93 S.Ct., at 1762.

Plainly, these observations are at least as appropriate in the context of prison disciplinary proceedings. We noted in Johnson v. Avery, 393 U.S. 483, 487, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969), that 'penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited'; the same considerations provide the motivating force for the holding today in Part VIII of the Court's opinion.

In view of these considerations, I think it is clear that, at least in those serious disciplinary cases meeting the Scarpelli requirements, see 411 U.S., at 790, 93 S.Ct., at 1763, any inmate who seeks assistance in the preparation of his defense must be constitutionally entitled to have it. But, although for me the question is fraught with great difficulty, I agree with the Court that it would be inappropriate at this time to hold that this assistance must be provided by an appointed member of the bar.[FN2] There is considerable force to the argument that counsel on either side would be out of place in these disciplinary proceedings, and the practical problems of providing appointed counsel in these proceedings may well be insurmountable. But ***592** the controlling consideration for me is my belief that, in light of the types of questions likely to arise in prison discipline cases, counsel substitutes should be able to provide sufficiently effective assistance to satisfy due process. At least 41 States already provide such counsel substitutes, ABA Survey 22, reflecting the nearly universal recognition that for most inmates, this assistance with the preparation of a defense, particularly as disciplinary hearings become more complex, is absolutely essential. Thus, I would hold that any prisoner is constitutionally entitled to the assistance of a competent fellow inmate or correctional staff member-or, if the institution chooses, such other alternatives as the assistance of law students-to aid in the preparation of his defense.

> FN2. On the record in this case, no question is presented with respect to the presence of retained counsel at prison disciplinary proceedings, and I think it inappropriate for the Court to reach out and decide this important issue without the benefit of a concrete factual situation in which theissue arises. I would reserve for another day the questions whether the Constitution requires that an inmate able to afford counsel be permitted to bring counsel into the disciplinary hearing, or whether the Constitution allows a State to permit the presence of retained counsel when counsel is not appointed for indigents. Cf. Gagnon v. Scarpelli, 411 U.S. 778, 783 n. 6, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973).

Finally, the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decisionmaker is a fundamental requirement

of due process in a variety of relevant situations, see, e.g., Morrissey v. Brewer, 408 U.S., at 485-486, 92 S.Ct., at 2602-2603; Goldberg v. Kelly, 397 U.S., at 271, 90 S.Ct., at 1022, and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board composed of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting any possibility that subtle institutional pressures may affect the outcome of disciplinary pressures may effect the outcome of disciplinary may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case. See Clutchette v. Procunier, 497 F.2d, at 820; ***593** United States ex rel. Miller v. Twomey, 479 F.2d 701, 716, 718 (CA7 1973); Landman v. Royster, 333 F.Supp., at 653. I find it impossible to determine on the present record whether this standard of impartiality has been ****2993** met, and I would leave this question open for the District Court's consideration on remand.

Thus, it is my conclusion that the Court of Appeals was substantially correct in its holding that the minimum due process procedural requirements of Morrissey v. Brewer are applicable in the context of prison disciplinary proceedings. To the extent that the Court is willing to tolerate reduced procedural safeguards for accused inmates facing serious punishment which do not meet the standards set out in this opinion, I respectfully dissent.

Mr. Justice DOUGLAS, dissenting in part, concurring in the result in part.

The majority concedes that prisoners are persons within the meaning of the Fourteenth Amendment, requiring the application of certain due process safeguards to prison disciplinary proceedings, if those proceedings have the potential of resulting in the prisoner's loss of good time or placement in solitary confinement, ante, at p. 2982 n. 19. But the majority finds that prisoners can be denied the right to cross-examine adverse witnesses against them, and sustains the disciplinary board's right to rely on secret evidence provided by secret accusers in reaching its decision, on the ground that only the prison administration can decide whether in a particular case the danger of retribution requires shielding a particular witness' identity. And in further deference to prison officials, the majority, while holding that the prisoner must usually be accorded the right to present witnesses on his own behalf, appears to leave the prisoner no remedy against a prison board which unduly restricts that right in the name of 'institutional safety.' Respondent***594** thus receives the benefit of some of the constitutional rights of due process that the Fourteenth Amendment extends to all 'persons.' In my view, however, the threat of any substantial deprivation of liberty within the prison confines, such as solitary confinement, is a loss which can be imposed upon respondent prisoner and his class only after a full hearing with all due process safeguards.

I

I agree that solitary confinement is a deprivation requiring a due process hearing for its imposition. Due process rights are required whenever an individual risks condemnation to a "grievous loss," Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (Frankfurter, J., concurring). Thus due process is required before the termination of welfare benefits, Goldberg, supra; revocation of parole or probation, Morrissey, supra, and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656; revocation of a driver's license, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; and attachment of wages, Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349. Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration, and therefore the imposition of any serious punishment within the prison system requires procedural safeguards. Of course, a hearing need not be held before a prisoner is subjected to some minor deprivation, such as an evening's loss of television privileges. Placement in solitary confinement, however, is not in that category. Prisoners are sometimes placed in solitary or punitive segregation for months or even years. Bryant v. Harris, 465 F.2d 365; Sostre v. McGinnis, 442 F.2d 178; ***595** Adams v. Carlson, 368 F.Supp. 1050; Landman v. Royster, 333 F.Supp. 621, and such confinement inevitably results in depriving the prisoner of other privileges as well as those which are ordinarily

available to the general prison population, **2994 La-Reau v. MacDougall, 473 F.2d 974; Wright v. McMann, 387 F.2d 519. Moreover, the notation in a prisoner's file that he has been placed in such punitive confinement may have a seriously adverse effect on his eligibility for parole, a risk which emphasizes the need for prior due process safeguards, Clutchette v. Procunier, 497 F.2d 809.

II

I would start with the presumption that cross-examination of adverse witnesses and confrontation of one's accusers are essential rights which ought always to be available absent any special overriding considerations. In Morrissey v. Brewer, supra, we held that the right to confront and cross-examine adverse witnesses is a minimum requirement of due process which must be accorded parolees facing revocation of their parole 'unless the hearing officer specifically finds good cause for not allowing confrontation.' 408 U.S., at 489, 92 S.Ct., at 2604. 'Because most disciplinary cases will turn on issues of fact . . . the right to confront and cross-examine witnesses is essential.' Landman v. Royster, supra, 333 F.Supp., at 653.

'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where *596 the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.' Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377.

The decision as to whether an inmate should be allowed to confront his accusers should not be left to the unchecked and unreviewable discretion of the prison disciplinary board. The argument offered for that result is that the danger of violent response by the inmate against his accusers is great, and that only the prison administrators are in a position to weigh the necessity of secrecy in each case. But it is precisely this unchecked power of prison administrators which is the problem that due process safeguards are required to cure. 'Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power . . ..' Covington v. Harris, 136 U.S.App.D.C. 35, 39, 419 F.2d 617, 621. Likewise the prisoner should have the right to cross-examine adverse witnesses who testify at the hearing. Opposed is the view that the right may somehow undermine the proper administration of the prison, especially if accused inmates are allowed to put questions to their guards. That, however, is a view of prison administration *597 which is outmoded and indeed anti-rehabilitative, for it supports the prevailing pattern of hostility between inmate and personnel which generates an 'inmates' code' of noncooperation, thereby preventing the rapport necessary for a successful rehabilitative program. The goal is to reintegrate inmates into a society where men are supposed to be treated fairly by the government, not arbitrarily. The opposed procedure will be counterproductive. A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the **2995 'basic hurdle (to reintegration) is the concept of a prisoner as a nonperson and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules . . . maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have . . ..' F. Cohen, The Legal Challenge to Corrections 65 (1969). We recognized this truth in Morrissey, where we noted that society has an interest in treating the parolee fairly in part because 'fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.' 408 U.S., at 484, 92 S.Ct., at 2602. The same principle applies to inmates as well.

The majority also holds that 'the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.' Ante, at 2979. Yet, while conceding that 'the right to present evidence is basic to a fair hearing.' ibid., the Court again chooses to leave the matter to the discretion of prison officials, who are not even required to state their reasons for refusing a prisoner his right to call a witness, although the Court finds that such a statement of

reasons would be *598 'useful.' Ante, at 2980. Thus, although the Court acknowledges the prisoner's right, it appears to leave him with no means of enforcing it.

As the Court itself agrees in holding that the disciplinary board must provide a statement of reasons for its ultimate determination on the merits, ante, at 2979, such a written statement is crucial not only to provide a basis for review, but to ensure that the board 'will act fairly.' Ibid. Of course even in a criminal trial the right to present one's own witnesses may be limited by the trial judge's finding that the evidence offered is irrelevant, incompetent, or needlessly repetitious, and certainly the same restrictions may apply in the prison setting. But when the judge makes such a ruling it is a matter in the record which may be challenged on appeal. Nebraska may not provide any channel for administrative appeal of the Board's ruling, but because "(t)he fundamental requisite of due process of law is the opportunity to be heard," Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287, some possibility must remain open for judicial oversight. Here as with the rights of confrontation and cross-examination, I must dissent from the Court's holding that the prisoner's exercise of a fundamental constitutional right should be left within the unreviewable discretion of prison authorities.

Our prisons are just now beginning to work their way out of their punitive heritage. The first American penitentiary was established in Philadelphia in 1790; it contained 24 individual cells for the solitary confinement of hardened offenders. P. Tappan, Crime, Justice and Correction 605-606 (1960). Under this 'Pennsylvania System' the prisoner was continuously confined to solitary and all communication was forbidden, with the exception of religious advisors and official visitors. M. Wilson, The Crime of Punishment, 219-220 (1931). New *599 York experimented with this approach but found it too severe, and adopted instead a compromise solution known as the 'auburn' or 'silent' system, in which inmates were allowed to work in shops with others during the day, although under a strict rule of silence, and then returned to solitary confinement at night. Prisoners were marched around in military lock-step with their eyes cast on the ground, and the violations of any rules resulted in the immediate infliction of corporal punishment by the guards. Tappan, supra, at 609-610. Although the harsh treatment produced an orderly prison, it came under criticism because of its inhumanity, with particular emphasis on the unfettered discretion of the guards to impose punishment on the basis of **2996 vague charges that were never subjected to detached or impartial evaluation. Introductory Report to the Code of Reform and Prison Discipline 8, printed in E. Livingston, A System of Penal Law for the United States (1828).

We have made progress since then but the old tradition still lingers. Just recently an entire prison system of one State was held so inhumane as to be a violation of the Eighth Amendment bar on cruel and unusual punishment. Holt v. Sarver, 309 F.Supp. 362, aff'd, 442 F.2d 304. The lesson to be learned is that courts cannot blithely defer to the supposed expertise of prison officials when it comes to the constitutional rights of inmates.

'Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary or maximum security or lose accrued 'good time' on the basis of a single, unreviewed report of a guard. When the courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices. This is the central evil in prison . . . the unreviewed administrative*600 discretion granted to the poorly trained personnel who deal directly with prisoners.' Hirschkop & Millemann, The Unconstitutionlity of Prison Life, 55 Va.L.Rev. 795, 811-812 (1969).

The prisoner's constitutional right of confrontation should not yield to the so-called expertise of prison officials more than is necessary. The concerns of prison officials in maintaining the security of the prison and of protecting the safety of those offering evidence in prison proceedings are real and important. But the solution cannot be a wholesale abrogation of the fundamental constitutional right to confront one's accusers. The danger of retribution against the informer is not peculiar to the prison system; it exists in every adversary proceeding, and the criminal defendant out on bail during his trial might present a greater threat to the witness hostile to his interests than the prison inmate who is subject to constant surveillance. See Preiser v. Rodriguez, 411 U.S. 475, 492, 93 S.Ct. 1827, 1837, 36 L.Ed.2d 439. If there is an 'inmates' code' of the prison, resulting from hostility to the authorities, which proscribes inmate cooperation with prison officials in disciplinary proceedings, it is probably based upon the perceived arbitrariness of those proceedings. That ethic, which is clearly anti rehabilitative, must be ferreted out, but I do not see how the petitioners can rely on their current failure to correct this evil for the perpetration of an additional one-the denial of the right of confrontation. In some circumstances it may be that an informer's identity should be shielded. Yet in criminal trials the rule has been that if the informer's information is crucial to the defense, then the

government must choose between revealing his identity and allowing confrontation, or dismissing the charges. Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639. And it is the court, not the prosecutor, who determines the defendant's need for the information. We ***601** should no more place the inmate's constitutional rights in the hands of the prison administration's discretion than we should place the defendant's right in the hands of the prosecutor.

Insofar as the Court affirms the judgment of the Court of Appeals I concur in the result. But the command of the Due Process Clause of the Fourteenth Amendment compels me to dissent from that part of the judgment allowing prisoners to continue to be deprived of the right to confront and cross-examine their accusers, and leaving the right to present witnesses in their own behalf in the unreviewable discretion of prison officials.

III

Finally, the Court again, as earlier this term in Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224, sidesteps the issue of the First Amendment rights of prisoners to send and receive mail. I adhere to the views expressed by my Brother Marshall and ****2997** myself earlier this Term in our separate opinions in Procunier. I agree, however, with the Court that the prisoners' First Amendment rights are not violated by inspection of their mail for contraband, so long as the mail is not read and the inspection is done in the prisoner's presence so that he can be assured that the privacy of his communications is not breached. Such a procedure should adequately serve the prison administration's interest in ensuring that weapons, drugs, and other prohibited materials are not unlawfully introduced into the prison, while preserving the prisoner's First Amendment right to communicate with others through the mail.

Wolff v. McDonnell

418 U.S. 539, 94 S.Ct. 2963, 71 O.O.2d 336, 41 L.Ed.2d 935

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thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
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