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NOTÉ


The images have become too frequent on the evening news: activists on both sides of the issue clashing over the right to an abortion, or lack thereof. Commentators voice their opinions on this topic that has divided people unlike any other issue in recent history. The Supreme Court seems unsure and even contradictory in its abortion decisions since it granted this "fundamental right" in Roe v. Wade. Since that decision, which created what many have articulated as an unbridled right to the procedure, state legislatures have implemented, and the Supreme Court has upheld, statutes that regulate a woman's right to an abortion. What is the proper degree of governmental regulation over a woman's abortion decision? In Planned Parenthood v. Casey, the Supreme Court was presented with an opportunity to clarify the constitutional standard regarding state regulations on abortion.

This Note contains a synopsis of the facts, procedural history, and background against which Casey was decided. An evaluation of Casey's multiple opinions will follow. In analyzing the plurality's joint opinion, this

2. 505 U.S._ , 112 S. Ct. 2791 (1992). The purpose of this Note is not to argue whether abortion is or is not a constitutionally protected right, but rather to analyze the opinion in Casey, given that the current Court finds a constitutional right to an abortion. The analysis will primarily focus on the past precedent the Court purported to adhere to, as well as the new "undue burden" standard the Court enunciated for analyzing the constitutionality of state regulation of abortion. See infra notes 58-59 and accompanying text. One aspect of the opinion that is likely to be criticized is the Court's reliance on stare decisis to uphold the essential holding of Roe while overruling the trimester scheme that Roe established. See infra notes 19, 57 and accompanying text. For insight into the role of precedent in our legal system, see Precedent in Law (Laurence Goldstein ed., 1987); Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 Cornell L. Rev. 401 (1988); Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367 (1988); Henry P. Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723 (1988); James W. Moore & Robert S. Ogleby, The Supreme Court, Stare Decisis and Law of the Case, 21 Tex. L. Rev. 514 (1943); Roscoe Pound, What of Stare Decisis?, 10 Fordham L. Rev. 1 (1941).
3. The plurality opinion was written jointly by Justices O'Connor, Kennedy, and Souter. The opinion enunciated an "undue burden" standard for analyzing state legislative regulations on abortion before viability. Justices Stevens and Blackmun concurred in the plurality's judgment
Note will question and criticize its analysis and propose alternative approaches the Court could have employed.

I. STATEMENT OF THE CASE

Planned Parenthood v. Casey⁴ involved challenges to five provisions of the Pennsylvania Abortion Control Act of 1982 as amended in 1988 and 1989.⁵ First, Section 3205 required a woman to give her informed consent to an abortion after receiving specified information at least twenty-four hours before the procedure was to be performed.⁶ Second, Section 3206 required a minor seeking an abortion to give her informed consent, and to obtain the informed consent of at least one of her parents. In addition, Section 3206 provided a judicial bypass procedure.⁷ Third, Section 3209 provided that in the absence of certain exceptions, a married woman seeking an abortion was required to sign a statement indicating that her husband had been notified of her intent.⁸ Fourth, Section 3203 provided a

that the essential holding of Roe, which recognized a constitutional right to terminate a pregnancy before viability, should be reaffirmed. Casey, 505 U.S. at __, 112 S. Ct. at 2838, 2844.


5. See 18 PA. CONS. STAT. ANN. §§ 3203-3220 (1990). The petitioners were five abortion clinics and a class of physicians. Casey, 505 U.S. at __, 112 S. Ct. at 2796.

6. The joint opinion summarized Section 3205 as follows:
Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Casey, 505 U.S. at __, 112 S. Ct. at 2822-23 (citing 18 PA. CONS. STAT. ANN. § 3205).

7. The joint opinion summarized Section 3206 as follows:
Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

Id. at __, 112 S. Ct. at 2832.

8. The joint opinion summarized Section 3209 as follows:
[E]xcept in cases of medical emergency, ... no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of
definition of "medical emergency" that would excuse compliance with the requirements of the previous three sections.\textsuperscript{9} Finally, Sections 3207(b), 3214(a), and 3214(f) imposed various reporting requirements on physicians and facilities where abortions were performed.\textsuperscript{10} The district court held all of the sections unconstitutional, with the exception of minimal parts of Section 3214(a).\textsuperscript{11} On appeal, the Third Circuit affirmed in part and reversed in part, holding only Section 3209's spousal notification provision unconstitutional.\textsuperscript{12} The Supreme Court granted certiorari\textsuperscript{13} and affirmed the Third Circuit's judgment with respect to all but its holding as to the reporting requirement of Section 3214(a)(12).\textsuperscript{14}

spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages. \textit{Id.} at \_\_\_, 112 S. Ct. at 2826 (citing 18 PA. CONS. STAT. ANN. § 3209).

\textsuperscript{9} "Medical emergency" was defined as follows: That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

\textit{18 PA. CONS. STAT. ANN.} § 3203.

\textsuperscript{10} The joint opinion summarized Sections 3207(b), 3214(a), and 3214(f) as follows: Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public. For each abortion performed, a report must be filed identifying: the physician (and the second physician where required); the facility; the referring physician or agency; the woman's age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether notice was provided [to her husband] or the basis for the failure to give notice [to her husband]. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. \textit{See} 18 PA. CONS. STAT. §§ 3207, 3214 (1990). In all events, the identity of each woman who has had an abortion remains confidential.

\textit{Casey}, 505 U.S. at \_\_\_, 112 S. Ct. at 2832 (citing 18 PA. CONS. STAT. §§ 3207(b), 3214(a), (f)).

\textsuperscript{11} \textit{Id.} at \_\_\_, 112 S. Ct. at 2803 (citing Planned Parenthood v. Casey, 744 F. Supp. 1323, 1396 (E.D. Pa. 1990)).

\textsuperscript{12} \textit{Id.} (citing Planned Parenthood v. Casey, 947 F.2d 682, 687 (3d Cir. 1991)).


\textsuperscript{14} Section 3214(a)(12) required women who failed to notify their husbands as required under Section 3209 to provide their reasons for such failure. \textit{See} 18 PA. CONS. STAT. ANN. § 3214(a)(12).
II. BACKGROUND OF THE LAW

Roe v. Wade\textsuperscript{15} is the landmark Supreme Court case that granted women a constitutionally protected right to privacy "broad enough to encompass a woman’s decision whether or not to terminate her pregnancy."\textsuperscript{16} This right to privacy is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.\textsuperscript{17} In Roe, the Court did not tender an absolute right to obtain an abortion. To the contrary, Roe held that two important state interests qualified this right—maternal health and prenatal life.\textsuperscript{18} Thus, Roe developed an elaborate trimester scheme to balance state interests in maternal health and prenatal life against a woman’s right to an abortion.\textsuperscript{19} At the time, Roe purported to create a right to abortion free from state interference during the first trimester.\textsuperscript{20} Subsequent case law, however, seemed to defy Roe’s literal holding, adopting a more flexible approach to abortion.\textsuperscript{21} As a result, state regulations on abortion have increased since Roe and are generally allowed throughout a woman's pregnancy in varying degrees. The following discussion lays a foundation for the regulations specifically challenged in Casey.

\textsuperscript{16} Roe, 410 U.S. at 153. The Court found this privacy right in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, although the Court recognized past decisions which have found a right to privacy in the First Amendment, the Fourth and Fifth Amendments, the penumbras of the Bill of Rights, and the Ninth Amendment. Id. at 152-53.
\textsuperscript{17} The Due Process Clause provides: "[N]or shall any State deprive any person of life, liberty or property, without due process of law ...." U.S. CONST. amend. XIV, § 1.
\textsuperscript{18} Roe, 410 U.S. at 148-52, 154-55.
\textsuperscript{19} The trimester scheme established:
(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
\textsuperscript{20} See id. at 520; see also Walter Dellinger & Gene Sperling, Abortion and the Supreme Court: The Retreat from Roe v. Wade, 138 U. PA. L. REV. 83 (1989).
A. Informed Consent and Mandatory Waiting Periods

An informed consent provision was upheld in Planned Parenthood v. Danforth.22 In Danforth, the Court reasoned as follows:

The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.23

It appears that Danforth's reasoning was based on a state's interest in maternal health. Danforth defined informed consent as "the giving of information to the patient as to just what would be done and as to its consequences."24 Thus, an informed consent provision was justified during the first trimester of pregnancy despite the apparent contrary holding in Roe.25

Informed consent provisions were again considered in City of Akron v. Akron Center for Reproductive Health, Inc.26 The Court stated that the validity of informed consent provisions "rests on the State's interest in protecting the health of the pregnant woman."27 Akron invalidated those provisions "designed to influence the woman's informed choice between abortion or childbirth" since they did not further the state's interest in maternal health.28 Specifically, those provisions informing a woman about when life begins,29 those requiring a graphically detailed description of the fetus,30 and those describing the abortion procedure as a complex medical procedure31 were invalidated for not furthering a pregnant woman's informed and thoughtful decision.

22. 428 U.S. 52 (1976). The informed consent provision required that a woman, "prior to submitting to abortion during the first 12 weeks of pregnancy, . . . certify[ ] in writing that she consents to the procedure and 'that her consent is informed and freely given and is not the result of coercion.'" Id. at 58 (citation omitted).
23. Id. at 67.
24. Id. at 67 n.8.
25. See supra note 19.
27. Akron, 462 U.S. at 443.
28. Id. at 444. This conclusion was easily derived because Akron reaffirmed Roe in that states may not regulate abortions during the first trimester. See id. at 434, 444-45.
29. Id. (citation omitted).
30. The Court found particularly objectionable the fact that the description of the unborn child's characteristics "must include, but not be limited to, 'appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.'" Id. at 444 n.34 (citation omitted).
31. Physicians were required to state:
In addition to the informed consent provisions, Akron considered the constitutionality of a mandatory waiting period that required women to wait twenty-four hours after signing an informed consent form before an abortion could be performed.32 Despite a lower court's reasoning that a mandatory waiting period may result in a more careful decision,33 Akron held that no legitimate state interest was furthered by an "arbitrary and inflexible waiting period."34

The precedent set forth in Akron was followed in Thornburgh v. American College of Obstetricians & Gynecologists.35 Thornburgh broadly recognized that states may not enact legislation "under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."36 A specific provision requiring women to give their informed consent upon the receipt of printed materials available from the state was declared unconstitutional.37 The printed materials described the fetus at two-week intervals. Utilizing the same reasoning as in Akron,38 Thornburgh noted that fetal descriptions are irrelevant to a woman's decisionmaking process and may actually serve to confuse and punish her.39

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32. Akron, 462 U.S. at 449.
33. Id. at 449-50 (citing Akron, 479 F. Supp. at 1204).
34. Id. at 450. The Court accepted the district court's findings that the waiting period increased the cost of obtaining an abortion by requiring two separate trips to the abortion facility, as well as the fact that scheduling difficulties between the pregnant woman and physician may effectively cause a greater delay, thereby aggravating the risks of an abortion in some cases. See id. at 450 (citing Akron, 479 F. Supp. at 1204)); cf. Hodgson v. Minnesota, 497 U.S. 417 (1990), where a two-parent notification requirement with a judicial bypass option was declared constitutional. Hodgson reached this conclusion despite findings of the district court that delays of more than a week would result should a minor desire a judicial proceeding. Id. at 442 (citing Hodgson v. Minnesota, 648 F. Supp. 756, 764-65 (D. Minn. 1986)).
36. Thornburgh, 476 U.S. at 759 (emphasis added). This holding would appear to be slightly narrower than that of Akron where the word "persuade" was used. See Akron, 462 U.S. at 444.
37. Thornburgh, 476 U.S. at 762. The Court stated that these printed materials were plainly overinclusive no matter how objective they may be. Id.
38. See supra notes 27-28 and accompanying text.
39. Furthermore, the information may serve only "to heighten her anxiety, contrary to accepted medical practice." Thornburgh, 476 U.S. at 762.
In reviewing the Court's decisions regarding informed consent provisions, two main points emerged. First, the Court would likely find informed consent provisions designed to influence a woman from choosing an abortion unconstitutional since this type of information did not further a state's maternal health interest. Second, the rigid trimester scheme declared in Roe appeared to exist in theory only, as a state's interest in maternal health justified informed consent provisions throughout a woman's gestation period.

B. Parental Consent

In a concurring opinion in Danforth, Justice Stewart stated the purpose for involving a minor's parents in their daughter's abortion decision:

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. Despite this rationale, Danforth held a provision that required parental consent unconstitutional. The Court stated, "[T]he State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion for an unmarried minor during the first 12 weeks of pregnancy." The Court reached this conclusion although it acknowledged that there may be significant state interests for requiring parental consent, such as safeguarding the family unit and parental authority.

41. The parental consent provision stated that no abortion could be performed during the first 12 weeks of pregnancy without "the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother." Id. at 85 (citation omitted).
42. Id. at 74; see also City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), overruled in part, Planned Parenthood v. Casey, 505 U.S. —, 112 S. Ct. 2791, 2823 (1992) (blanket determination that all minors under the age of 15 are too immature to make an abortion decision or that an abortion may never be in the minor's best interests without parental approval was unconstitutional).
43. Danforth, 428 U.S. at 75. The Court was not persuaded that a strengthening of the family unit would occur from absolute parental power to overrule a daughter's decision to terminate a pregnancy. Nor did the Court recognize that parental authority would be enhanced when a minor and her parent(s) were in such conflict. Id.
Thus, in *Bellotti v. Baird*, the Court stated, "[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." At this alternative proceeding, a minor would obtain authorization for the procedure provided she could show either that she is sufficiently mature and informed to make a decision of this nature or that an abortion would be in her best interests.

### C. Spousal Notification

*Roe* declined to consider a father's constitutional rights, if any, with respect to an abortion decision. However, in *Danforth*, a provision requiring a husband's consent before an abortion could be performed during the first trimester was ruled unconstitutional. The Court reasoned that since *Roe* did not allow a state to regulate or proscribe abortion during the first trimester, a state should not be allowed to "delegate" this veto power to a spouse. Although the Court recognized a husband's concern for his wife's pregnancy and the fetus she is carrying, it stated that any disagreement over the abortion decision must be decided by the woman "as it is [she] who physically bears the child and who is the more directly and immediately affected by the pregnancy."

### D. "Medical Emergency"

The purpose for a medical emergency definition is to excuse compliance with state abortion regulations if the mother's health is in such danger that an immediate abortion is necessary. *Roe* held that a state may not prohibit

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44. 443 U.S. 622 (1979).
45. Id. at 643 (footnote omitted). This is commonly referred to as a judicial bypass procedure. The Court stated that this "alternative procedure" could involve a determination by a judicial proceeding or an administrative agency. Id. n.22. In Hodgson v. Minnesota, 497 U.S. 417 (1990), the Court, under a similar rationale, held unconstitutional a two parent notice requirement that did not have a judicial bypass option; cf. H.L. v. Matheson, 450 U.S. 398 (1981) (no judicial bypass option necessary when the Court found constitutional a parental notice statute since parents could not exercise an absolute veto over their daughter's abortion decision).
48. It should be noted that the joint opinion in *Casey* relies heavily on the spousal consent provision considered in *Danforth*. See infra notes 80, 139-42 and accompanying text. However, the issue in *Casey* concerned spousal notice, not consent.
49. *Danforth*, 428 U.S. at 69 (citation omitted).
50. Id. at 71.
abotions "necessary to preserve the life or health of the mother." Thus, it appears from Roe that any regulation which delays or prevents an abortion must also contain an exception in case of a medical emergency.

E. Recordkeeping and Reporting Requirements

In Danforth, the constitutionality of requiring health facilities and physicians to keep records and statistics relating to abortions performed under their care was considered and upheld. Although the information to be recorded was never clearly articulated, the Court held that maternal health was furthered through proper utilization of this information since medical knowledge, experience, and judgment would be advanced. Thus, the Court stated that "[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible."55

III. Evaluation of the Case

A. The Joint Opinion

In Planned Parenthood v. Casey, Justices O'Connor, Kennedy, and Souter expressly overruled the rigid trimester scheme of Roe and enunciated...
ated an "undue burden" standard\textsuperscript{58} for testing the constitutionality of all state regulations on abortion before fetal viability. Specifically, a regulation will amount to an undue burden when:

[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. A statute with this purpose is invalid because the 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. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.\textsuperscript{59}

The "undue burden" standard recognizes that before viability a state's interest in the potential life of a fetus is not strong enough to support a prohibition of abortion.\textsuperscript{60}

Utilizing the "undue burden" standard, the joint opinion upheld the informed consent and twenty-four hour waiting period provisions of Section
Moreover, the joint opinion overruled Akron and Thornburgh to the extent that "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" was constitutional, even if persuasive to a woman regarding her abortion decision.

The joint opinion held that informing women of the availability of materials relating to the consequences to the fetus as a result of an abortion was constitutional and was supported by both the state's interest in maternal health as well as its interest in potential life. The opinion noted that a state's interest in maternal health required fully informed consent and that most women would consider this information relevant to their decisionmaking process. Furthermore, the opinion argued that the state's interest in protecting the potential life of the unborn "is a reasonable measure to insure an informed choice."

Included in Pennsylvania's informed consent statute was the requirement that women seeking abortions wait twenty-four hours after giving their informed consent. The joint opinion's analysis of the waiting period was two-fold. First, on a theoretical level, the opinion acknowledged that a mandatory waiting period would allow time for a woman to reflect on the information she had been required to receive. Therefore, the waiting period was reasonably related to a state's interest in protecting the potential life of a fetus. Second, on a practical level, the opinion rejected arguments that a waiting period amounted to a substantial obstacle in the path of a woman seeking an abortion. Thus, the waiting period did not amount to an "undue burden."

61. See id. at __, 112 S. Ct. at 2822-26.
62. Id. at __, 112 S. Ct. at 2823. The Court justified this statement by recognizing a state's important interest in potential life and maternal health. Id.
63. See id. at __, 112 S. Ct. at 2823-24. This particular information was not mandatorily presented to women. See 18 PA. CONS. STAT. ANN. § 3205(a)(2)(i) (1990).
64. See Casey, 505 U.S. at __, 112 S. Ct. at 2823-24. Note that this statement is no different than precedent. See Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976); see also supra note 23 and accompanying text.
65. Casey, 505 U.S. at __, 112 S. Ct. at 2824.
66. 18 PA. CONS. STAT. ANN. § 3205.
67. Casey, 505 U.S. at __, 112 S. Ct. at 2825.
68. The district court made the following findings of fact regarding the effect of the waiting period:
[B]ecause of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. . . . [I]n many instances this will increase the exposure of women seeking abortion to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic."
The joint opinion also upheld the parental consent provision of Section 3209.\(^6^9\) Relying on precedent,\(^7^0\) the opinion held that a state may require parental (or guardian) consent for minors seeking an abortion, provided an adequate judicial bypass procedure existed.\(^7^1\) The petitioners argued that parental consent provisions were unconstitutional since they required informed parental consent. The joint opinion, however, disposed of this argument using the same rationale set forth in its analysis of Section 3205’s informed consent provision.\(^7^2\)

The spousal notification requirement of Section 3209 was declared unconstitutional.\(^7^3\) The joint opinion’s analysis was two-fold. First, it concluded that the statute would have the effect of preventing a significant number of women from obtaining an abortion, thus imposing a substantial obstacle and undue burden.\(^7^4\) The opinion found particularly troublesome the physical and psychological abuse that some women would be subjected to by their respective spouses upon notification.\(^7^5\) In making this determination, the joint opinion relied on the district court’s findings,\(^7^6\) as supported by a plethora of studies, statistics, and literature.\(^7^7\) The opinion acknowledged that Section 3209 may affect only a small percentage of women.\(^7^8\) Nevertheless, it stated that “[t]he proper focus of constitutional in-

\(^{69}\) Id. at __, 112 S. Ct. at 2825 (quoting Planned Parenthood v. Casey, 744 F. Supp. 1323, 1351 (E.D. Pa. 1990)).

\(^{70}\) See supra notes 40-46 and accompanying text.

\(^{71}\) Casey, 505 U.S. at __, 112 S. Ct. at 2832.

\(^{72}\) Id.; see supra notes 61-65.

\(^{73}\) See Casey, 505 U.S. at __, 112 S. Ct. at 2826-31.

\(^{74}\) Id. at __, 112 S. Ct. at 2829.

\(^{75}\) Id.

\(^{76}\) Casey, 505 U.S. at __, 112 S. Ct. at 2826-27.

\(^{77}\) The joint opinion found particularly troublesome the fact that the spousal notification provision contained a bodily injury exception that would only apply to women having reasonable fears of physical abuse upon themselves. The opinion stated:

[Women] may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement.

\(^{78}\) Id.

\(^{77}\) Casey, 505 U.S. at __, 112 S. Ct. at 2829.

\(^{78}\) The joint opinion did not take issue with the respondents’ argument that only 20% of all abortions are attributable to married women, and of those women, typically about 95% would notify their husbands. Thus, the respondents concluded that the spousal notification provision would affect one percent of women seeking abortions. See id.
quiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."\(^7\)

The second phase of the joint opinion's analysis determined, despite the troublesome effects of possible abuse, whether a husband's interest in the fetus would nevertheless validate the spousal notification requirement. The opinion concluded that a husband's interest in the fetus his wife was carrying was not as great as the mother's liberty interest in deciding whether to obtain an abortion.\(^8\) Therefore, the husband's interest in the fetus was not sufficient to validate the spousal notification provision.\(^8\)

*Casey* upheld the definition of medical emergency in Section 3203.\(^8\) The petitioners argued that the definition was too narrow because it would not allow an immediate abortion in light of some significant health risks.\(^8\) The joint opinion deferred construction of Section 3203 to the court of appeals, which did not construe the statute so narrowly. The Court stated, "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman."\(^8\)

The joint opinion applied the standard set forth in *Danforth* to uphold most of the reporting and recordkeeping provisions of the Pennsylvania statute.\(^8\) The opinion reasoned that the requirements were reasonably related to the preservation of maternal health in that they provided beneficial medical research which utilized actual patient information.\(^8\) The opinion acknowledged that the reporting and recordkeeping requirements may increase the cost of obtaining an abortion. However, due to a lack of factual

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79. Id.

80. The joint opinion based its rationale on two factors. First, the opinion realized that a husband's interest in the child may be equal upon birth. However, before birth, the woman is the one primarily affected, and state regulation will affect "the very bodily integrity of the pregnant woman." *Id.* at __, 112 S. Ct. at 2830. The opinion cited *Danforth* as further support for this proposition, noting that when spouses disagree on abortion, the balance must weigh in the wife's favor due to the fact that the woman is "more directly and immediately affected by the pregnancy, as between the two." *Id.* (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976)); see also supra notes 48-50. Second, the joint opinion did not want to enable the husband to "wield an effective veto over his wife's decision." *Id.* at __, 112 S. Ct. at 2831. To allow this would not comport with the modern understanding that women have an equal and independent role within the family. *Id.*

81. Id.

82. *Id.* at __, 112 S. Ct. at 2822.

83. *Id.* Specifically, the district court found three health risks not covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. *Id.* (citation omitted).

84. *Id.* (quoting Planned Parenthood v. Casey, 947 F.2d 682, 701 (3d Cir. 1991)).

85. *Id.* at __, 112 S. Ct. at 2832-33; see also supra notes 53-55 and accompanying text.

86. *Casey*, 505 U.S. at __, 112 S. Ct. at 2832-33.
findings, the opinion could not conclude that such costs placed a substantial obstacle in the path of a woman seeking an abortion. The joint opinion did, however, invalidate Section 3214(a)(12), which required a woman seeking an abortion to state her "reason for failure to provide notice" to her husband if she did not provide notice as required under Section 3209.87

B. Stevens's Opinion

Justice Stevens disagreed with the joint opinion's decision regarding the mandatory waiting period as well as portions of the informed consent provisions. In so doing, Stevens weighed the state's interest in potential life against the woman's liberty interest in obtaining an abortion. Stevens concluded, like the plurality of the joint opinion, that a state may express a preference for childbirth.88 However, he seriously criticized attempts to influence a woman's choice. Relying on precedent,89 he argued that information concerning the availability of printed materials describing the unborn child, lists of agencies offering alternatives to abortion, and benefits which accrue to the mother upon birth were particularly offensive and thereby unconstitutional.90 Stevens recognized that "[d]ecisional autonomy must limit the state's power to inject into a woman's most personal deliberations its own view of what is best."91

Justice Stevens also disagreed with the joint opinion's decision to uphold the twenty-four hour waiting period. He conceded that a mandatory delay might decrease the number of abortions performed.92 However, he maintained that the state's interest in potential human life could not justify a delay as a matter of course since any state coercion which decreased the amount of abortions would then be justified.93 In addition, Stevens argued that a state's interest in maternal health could not justify a waiting period because there was a lack of evidence that a mandatory delay would benefit

87. See 18 PA. CONS. STAT. ANN. § 3214(a)(12). The joint opinion stated:
This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason.
Casey, 505 U.S. at __, 112 S. Ct. at 2833.

88. For Justice Stevens, a state may express its views favoring childbirth "by creating and maintaining alternatives to abortion, and by espousing the virtues of family." Id. at __, 112 S. Ct. at 2840-41.

89. Justice Stevens cited Thornburgh and Akron. Id.

90. Id. at __, 112 S. Ct. at 2841.

91. Id. at __, 112 S. Ct. at 2840.

92. See id. at __, 112 S. Ct. at 2841.

93. Id.
women in reaching a more informed and thoughtful decision. To the contrary, Stevens noted that a stigma would be attached to women resting on "outmoded and unacceptable assumptions about the[ir] decisionmaking capacity."

C. Blackmun's Opinion

Justice Blackmun disagreed with the "undue burden" standard and argued for the application of the strict scrutiny standard when analyzing the constitutionality of abortion regulations. Under this standard, Blackmun would have invalidated all of the Pennsylvania provisions because they violated a woman's right to privacy.

94. Id.

95. Id. at __, 112 S. Ct. at 2841-42.

96. The strict scrutiny standard was applied in Roe v. Wade, 410 U.S. 113, 155 (1973), aff'd in part, overruled in part, Planned Parenthood v. Casey, 505 U.S. __, 112 S. Ct. 2791, 2818 (1992). Questions arise as to whether the "undue burden" test replaced the strict scrutiny standard in Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). See, e.g., James Bopp, Jr. et al., Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule Roe v. Wade?, 1 SETON HALL CONST. L.J. 55, 73-82 (1990); Randall D. Eggert et al., "Of Winks and Nods"-Webster's Uncertain Effect on Current and Future Abortion Legislation, 55 Mo. L. REV. 163 (1990); Lynn D. Wardle, "Time Enough": Webster v. Reproductive Health Services and the Prudent Pace of Justice, 41 FLA. L. REV. 881 (1989). Under the strict scrutiny standard, the state must demonstrate that the regulation of an abortion "is both necessary and narrowly tailored to serve a compelling governmental interest." Casey, 505 U.S. at __, 112 S. Ct. at 2847 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)); see also Roe, 410 U.S. at 155. Blackmun noted that strict scrutiny of restrictions on a woman's right to abortion does not mean the right is absolute. Rather, abortion regulations can be upheld "if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives." Casey, 505 U.S. at __, 112 S. Ct. at 2847 n.5. The strict scrutiny standard is more demanding than the "undue burden" standard. Under the "undue burden" standard, any valid state interest, as opposed to a compelling state interest, may allow regulation of abortions provided it is not a substantial obstacle in the path of a woman seeking an abortion. See supra text accompanying note 59.

97. Although Blackmun stated that all the challenged provisions would be invalidated under a strict scrutiny standard, he joined the joint opinion in upholding the medical emergency provision. Casey, 505 U.S. at __, 112 S. Ct. at 2845. Whether Blackmun is referring to Section 3203, which defines medical emergency, is therefore unclear.

98. Justice Blackmun first argued that restrictive abortion laws infringe upon a woman's right to bodily integrity by imposing "substantial physical intrusions and significant risks of physical harm." Id. at __, 112 S. Ct. at 2846. Moreover, Blackmun argued that abortion regulations "deprive[ ] a woman of the right to make her own decision about reproduction and family planning," choices central to the right of privacy. Id. Finally, Blackmun noted that restricting a woman's right to an abortion implicates constitutional guarantees of gender equality because an implicit assumption exists that women will be forced to accept their status as a mother. Id. at __, 112 S. Ct. at 2846-47 (citations omitted).
Blackmun found parts of Section 3205 to be biased.99 Furthermore, he was persuaded by the district court’s findings of fact concerning the twenty-four hour waiting period,100 and argued it was thereby unconstitutional. He also took issue with the parental consent provision of Section 3206, stating that the judicial bypass procedure could not cure a violation that was unconstitutional to begin with.101 Finally, Blackmun would have invalidated all of the reporting requirements because they did not further a state’s interest in maternal health.102

D. Rehnquist’s Opinion103

In an opinion joined by Justices White, Scalia, and Thomas, Chief Justice Rehnquist disagreed with the joint opinion’s “undue burden” standard and argued that abortion regulations which are rationally related to any legitimate state interest must be upheld.104 Under this reasoning, Rehnquist would have held all of the challenged provisions of the Pennsylvania statute constitutional and rationally related to a legitimate state interest.105

99. The printed materials were particularly objectionable to Blackmun in that they “describe the fetus and provide information about medical assistance for childbirth, information about child support from the father, and a list of agencies . . . that provide adoption and other services as alternatives to abortion.” Id. at __, 112 S. Ct. at 2850 (relying heavily on the analysis set forth in Thornburgh).

100. See supra note 68. Blackmun was also concerned that women would be subject to obviously slanted information for a longer period of time, thus improperly influencing their decisions. Casey, 505 U.S. at __, 112 S. Ct. at 2851-52.

101. Blackmun relied on the district court’s finding that in order to comply with this section, an in-person visit by the parent to the facility would be necessary, thus causing delays of up to several weeks. See Casey, 505 U.S. at __, 112 S. Ct. at 2852 n.10 and accompanying text.

102. One interest the state does further, according to Blackmun, is the public’s right to know how its tax dollars are spent. Id. at __, 112 S. Ct. at 2852.

103. The importance of discussing Rehnquist’s opinion cannot be understated. In Casey, Rehnquist boldly stated, “We believe that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases.” Id. at __, 112 S. Ct. at 2855. Rehnquist only needs concurrence from one more member of the Court, and as Justice Blackmun stated, “I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today.” Id. at __, 112 S. Ct. at 2854-55.

104. The “rational relation” test is less demanding than the “undue burden” test. Because Rehnquist believes that the right to abortion is not fundamental, there should not be a stringent test to determine the constitutionality of abortion regulations. See Roe, 410 U.S. at 173 (Rehnquist, J., dissenting); see also Maher v. Roe, 432 U.S. 464, 467-78 (1977) (laws funding childbirth but not abortion impinge upon no fundamental right and are rationally related to the legitimate state interest of protecting potential life).

The Chief Justice argued that the informed consent provisions were justified by a state's maternal health interest, a state's interest in potential life, or both. Furthermore, Rehnquist stated that the mandatory waiting period was rationally related to both of these state interests because the added time for reconsideration and reflection would help ensure that a woman's decision to obtain an abortion was fully informed.

Rehnquist articulated that the constitutionality of the parental consent provision was based upon a state's "strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." Furthermore, the Chief Justice argued that parental consent provisions were rationally related to this state interest since "in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature."

Rehnquist stated that the spousal notification requirement was rationally related to two legitimate state interests. First, the state has a legitimate interest in protecting the concerns of the father, who has an interest in procreation within marriage and the potential life of a child. The spousal notification provision would thus allow husbands to participate in the abortion decision of his wife. Second, the state has a legitimate interest in promoting marital integrity by improving communication between husband and wife and encouraging "collaborative decisionmaking."

106. These provisions required a doctor to disseminate information regarding the abortion procedure, risks, and alternatives. Rehnquist asserted that these provisions are rationally related to a state's legitimate interest in assuring that a woman's decision to abort is fully informed. Id. at __, 112 S. Ct. at 2867. It is this author's opinion that this distinction is one of form only since the reason the state does have an interest in a fully informed abortion decision is to further maternal health. See id.; Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 760 (1986), overruled in part, Casey, 505 U.S. at __, 112 S. Ct. at 2823; City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 446 (1983), overruled in part, Casey, 505 U.S. at __, 112 S. Ct. at 2823; Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976).

107. These provisions included the required disclosure of information regarding the availability of child support from the father, as well as state-funded alternatives for women who decide to carry a child to term. Casey, 505 U.S. at __, 112 S. Ct. at 2868.

108. These provisions included information describing the gestational age of the fetus as well as the risks of carrying a fetus to term. Id. at __, 112 S. Ct. at 2867.

109. Id. at __, 112 S. Ct. at 2868.

110. Id. at __, 112 S. Ct. at 2869 (quoting Hodgson v. Minnesota, 497 U.S. 417, 444 (1990)).

111. Id. (quoting Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990)).

112. Id. at __, 112 S. Ct. at 2871.

113. Id.

114. Id.
Rehnquist conceded that this provision may be unnecessary at times, he stated that it did not imply the provision was irrational.\(^{115}\)

Rehnquist asserted that the various reporting requirements of the Pennsylvania statute were rationally related to a number of legitimate state interests. These interests included advancing medical knowledge, gathering statistics on patients, ensuring compliance with other provisions, and informing taxpayers what their tax dollars were servicing and who they benefited.\(^{116}\)

Finally, the Chief Justice stated that the definition of medical emergency in Section 3203 was entirely reasonable. Thus, the provision should be upheld accordingly.\(^{117}\)

**IV. Analysis**

**A. Informed Consent and Mandatory Waiting Periods**

The joint opinion recognized that truthful, nonmisleading information is an important decisionmaking tool for women who are considering whether to obtain an abortion.\(^{118}\) In addition, the opinion stated that informed consent provisions were supported by a state’s interest in both maternal health and fetal life.\(^{119}\) The primary flaw in this reasoning, however, is that the state’s interest in fetal life before viability is elevated above that of maternal health. This is particularly disturbing considering that no Court has ever held that a state’s interest in fetal life should take precedence over maternal health during the period before viability.\(^{120}\) The flaw can be coherently examined by considering the effect of materials that inform a woman consid-

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115. *Id.* at __, 112 S. Ct. at 2871-72.
116. *Id.* at __, 112 S. Ct. at 2872.
117. Rehnquist noted the upholding of an almost identical medical emergency definition in *Thornburgh*. *Id.* at __, 112 S. Ct. at 2873.
119. *See supra* note 63.
120. This is necessarily so because the Supreme Court has never interpreted the Constitution to recognize a fetus as a human being deserving protection under the Fourteenth Amendment. *See* Roe v. Wade, 410 U.S. 113, 156-59, 162 (1973), *aff’d in part, overruled in part*, Planned Parenthood v. Casey, 505 U.S. __, 112 S. Ct. 2791, 2818 (1992); *Thornburgh* v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring), *overruled in part*, Planned Parenthood v. Casey, 505 U.S. __, 112 S. Ct. 2791, 2823 (1992); *Webster* v. Reproductive Health Servs., 492 U.S. 490, 569 n.13 (1989) (Stevens, J., concurring in part and dissenting in part). Justice Stevens even acknowledged that implicit in the joint opinion’s analysis was the notion that a state’s interest in maternal health must take precedence over a state’s interest in potential human life since the Constitution has never been interpreted as recognizing an unborn fetus as a person under the Fourteenth Amendment. *Casey*, 505 U.S. at __, 112 S. Ct. at 2839 (Stevens, J., concurring in part and dissenting in part).
ering an abortion of the consequences to a nonviable fetus as a result of the procedure.\footnote{121}

A woman’s abortion decision is often stressful and emotional,\footnote{122} and information describing the effects of abortion on a fetus during this stressful time may be particularly disturbing to women. These women already know that an abortion will ultimately result in the end of a potential life. Therefore, additional information that describes the specific effects on the fetus may only serve to confuse and punish the woman.\footnote{123} The joint opinion held that “a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest,”\footnote{124} as long as they are truthful and nonmisleading. However, by confusing and punishing women through information relating to the consequences to the fetus, women may suffer detrimental effects upon their physical, emotional, and mental health. This contradicts a state’s competing, and more important, maternal health interest.\footnote{125} Thus, when analyzing the constitutionality of materials relating to the consequences to the fetus, the joint opinion appears to allow situations to arise which elevate a state’s interest in fetal life above that of maternal health.

As a result, courts interpreting the joint opinion are likely to be confused and uncertain in their decisions.\footnote{126} Information describing the consequences to a fetus can be objectively presented such that it is truthful and

\footnote{121. The joint opinion referred to Pennsylvania’s informed consent provision that required information regarding “the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term.” \textit{Casey}, 505 U.S. \textemdash, 112 S. Ct. at 2824. However, the joint opinion also stated that “informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.” \textit{Id.} at \textemdash, 112 S. Ct. at 2823-24. This analysis will focus on the impact of this latter statement. Therefore, the consequences to a fetus as a result of an abortion could include such information as the amount of pain the fetus may be subjected to during the procedure. \textit{See supra} note 30 and accompanying text; \textit{see also} \textit{Charles} v. \textit{Carey}, 627 F.2d 772, 782 (7th Cir. 1980) (statute requiring women to read statements regarding organic pain to fetus as a result of abortion held unconstitutional).}

\footnote{122. \textit{See supra} note 23 and accompanying text; \textit{see also} \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2846 (Blackmun, J., dissenting) (restrictive abortion laws force women to endure physical invasions to bodily integrity at a time when women are already exposed to a wide range of health consequences).}

\footnote{123. \textit{See Thornburgh}, 476 U.S. at 762; \textit{see also supra} note 39 and accompanying text.}

\footnote{124. \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2825.}

\footnote{125. \textit{See supra} note 120 and accompanying text.}

\footnote{126. Chief Justice Rehnquist stated the uncertainty of abortion jurisprudence as follows: \textquote{[T]he state of our post-\textit{Roe} decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court’s decisions, the reexamination undertaken today leaves the Court no less divided than beforehand.} \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2855.}
nonmisleading, as the joint opinion required. Nevertheless, the same information may have serious implications for the woman and her decision to abort. Thus, despite possible adverse effects on women, future courts may be handcuffed by increasingly graphic, but truthful, descriptions about fetal consequences and will be unable to invalidate them in light of the joint opinion.\(^{127}\)

In response to this analysis, the Court could have considered an alternative while still maintaining its holding that truthful, nonmisleading information is constitutional. Although a state may require information to be given to a woman considering an abortion, this information could be strictly limited to that which has the most direct effect on the woman's body, such as the medical procedures to be performed upon her and the risks therein.\(^{128}\) Information indirectly related to a woman's health, such as fetal consequences, would not be presented and thus would not be subject to the interpretation that a state's interest in fetal life before viability is greater than a state's interest in maternal health. In other words, the woman would be assured that the state's interest in her health is greater than the state's interest in the fetus.

The joint opinion's analysis of the twenty-four hour waiting period presents other difficulties. Under the opinion's practical analysis,\(^{129}\) the validity of the waiting period was considered and upheld independently of the other informed consent provisions.\(^{130}\) Section 3205 is structured, however, such that the waiting period is not severable from the remaining informed consent provisions.\(^{131}\) Therefore, the joint opinion should have considered whether the waiting period, in conjunction with the other informed consent

\(^{127}\) One may argue that Casey's holding applies only to materials that are made available to women, and not materials that are to be mandatorily presented. See supra note 63 and accompanying text. Since the joint opinion did not address this distinction, it appears that future courts will be required to apply the "undue burden" test to mandatorily presented information. However, the Court seemed to suggest that an application of the "undue burden" test would not invalidate mandatorily presented information relating to fetal consequences. The joint opinion stated by way of example, "We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself." Id. at __, 112 S. Ct. at 2823. The very terms of the example indicate that risks to the donor will be mandatorily presented to the recipient. The same analysis can justify future courts in upholding mandatorily presented materials that describe the risks and consequences to the fetus as a result of an abortion.

\(^{128}\) See supra note 24 and accompanying text. Stevens advocated the constitutionality of those sections that informed the woman both of the risks of abortion and of carrying a child to term, since these provisions were neutral in nature. Casey, 505 U.S. at __, 112 S. Ct. at 2841.

\(^{129}\) See supra note 68 and accompanying text.

\(^{130}\) See Casey, 505 U.S. at __, 112 S. Ct. at 2825-26; see also supra notes 66-68 and accompanying text.

\(^{131}\) See 18 PA. CONS. STAT. ANN. § 3205(a) (1990).
provisions, amounted to an undue burden under its practical analysis.\textsuperscript{132} This type of analysis is necessary because, although the joint opinion was meticulous in dissecting the constitutionality of each Pennsylvania provision at issue, women faced with such a difficult decision are not likely to employ a similarly thorough evaluation. Moreover, states will be able to manipulate the "undue burden" standard by creating a variety of regulations that individually do not amount to a substantial obstacle in the path of a woman seeking an abortion.\textsuperscript{133} In practice, however, quite the opposite may be true when these same regulations are taken as a whole.\textsuperscript{134}

B. Parental Consent

The Supreme Court has been explicit throughout the years in stating that a parental consent provision is constitutional, provided an adequate judicial bypass option exists.\textsuperscript{135} The judicial bypass option of Section 3206 allows a minor to obtain an abortion without her parent's consent provided she can show that she is mature and capable of giving her informed consent to the abortion procedure, or if a court determines an abortion would be in the pregnant minor's best interest.\textsuperscript{136} However, since Section 3206 requires informed consent, the same deficiencies exist as were stated in the analysis of Section 3205's requirement that all women give their informed consent to obtain an abortion.\textsuperscript{137}

C. Spousal Notification

In striking down the spousal notification provision, the joint opinion is relying on precedent that does not apply.\textsuperscript{138} To arrive at a conclusion that the joint opinion found consistent with the precedent established in Danforth should be our guides today." \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2831.

\begin{itemize}
  \item \textsuperscript{132} See \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2825-26.
  \item \textsuperscript{133} See \textit{id.} at \textemdash, 112 S. Ct. at 2848 (Blackmun, J., dissenting).
  \item \textsuperscript{134} The Section 3206 parental consent requirement is a good illustration of this point. Parental consent contains three types of regulations on abortion. First, a parent must consent to the procedure, provided that the minor does not elect the bypass procedure. Second, the parent and the minor must give their informed consent to the procedure. Third, the minor is subject to a waiting period. See 18 PA. CONS. STAT. ANN. § 3206 (1990). How many regulations can be placed on a woman's abortion decision before they amount to an undue burden? According to the joint opinion's analysis, there will be no undue burden if each regulation individually does not amount to an undue burden.
  \item \textsuperscript{135} See supra notes 44-46 and accompanying text.
  \item \textsuperscript{136} 18 PA. CONS. STAT. ANN. § 3206 (1990).
  \item \textsuperscript{137} See supra notes 120-25 and accompanying text.
  \item \textsuperscript{138} See supra notes 48-50, 80; \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2869-70 (Rehnquist, C.J., dissenting); H.L. v. Matheson, 450 U.S. 398, 411 n.17 (1981). The precedent that the joint opinion relied on was boldly stated, "The principles that guided the Court in \textit{Danforth} should be our guides today." \textit{Casey}, 505 U.S. at \textemdash, 112 S. Ct. at 2831.
\end{itemize}
the opinion concluded that the findings of fact set forth by the district court would control a woman's decision to forgo an abortion.\footnote{139} In actuality, the effect of the joint opinion's analysis in many circumstances would not amount to an appreciable difference than an analysis under Danforth. Specifically, if the woman's perception of her husband's reaction will act to prevent her choice of abortion, the husband has in effect "wield[ed] an effective veto over his wife's decision."\footnote{140} However, the veto power in Danforth was found unconstitutional for a different reason. Danforth was concerned with the husband's reasons, if any, for not consenting to his wife's decision to choose an abortion.\footnote{141} The joint opinion, however, changed the focus of the constitutional inquiry from the husband's reasons for preventing his wife's abortion decision to his wife's perceptions of how he may act upon notification of her abortion decision.

The effect of this change in inquiry shows the limitations of the "undue burden" standard. In a certain sense, the application of the "undue burden" standard is creating its own undue burden by considering irrelevant issues. Instead of ending the constitutional inquiry by simply stating that the husband can not effectuate a woman's decision for her, as in Danforth, the joint opinion's "undue burden" standard further inquires into the woman's perceptions of possible abuse. This is an irrelevant step under Danforth, which the joint opinion boldly stated to be adhering to.\footnote{142}

Moreover, the joint opinion shifted its inquiry back to the husband by determining whether the husband's interest in the fetus nevertheless would validate the spousal notification provision. It is unclear how the "undue burden" test is meant to operate with respect to the husband's interest in the potential fetus. The very terms of the "undue burden" standard preclude legitimate state interests from consideration once an undue burden has been found.\footnote{143} Thus, any legitimate interest the state may have with respect to the husband is irrelevant after the spousal notification provision was held an undue burden. Is this same analysis to be extended when solely considering the husband's interest in the fetus, independent of any state interest? If so, the joint opinion's inquiry into the husband's interest in the fetus would appear to be another irrelevant consideration.

\footnotesize{139. See supra notes 76-77 and accompanying text.}
\footnotesize{140. Casey, 505 U.S. at \ldots, 112 S. Ct. at 2831; see also supra note 80.}
\footnotesize{141. See Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976); see also supra note 48 and accompanying text.}
\footnotesize{142. See supra note 138.}
\footnotesize{143. See supra note 59 and accompanying text.}
D. "Medical Emergency"

As stated earlier, Section 3203's definition of medical emergency would excuse compliance with the other statutory provisions. This holding is consistent with Casey's reaffirmation of Roe's holding which "forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."  

One issue with respect to a statute defining a medical emergency is whether that statute would be interpreted more narrowly by lower courts, thus subjecting a woman to state interference if the health risk is not interpreted to reach the threshold where the definition would apply. As long as the definition is broadly construed, there does not appear to be a problem with such definitions. However, the joint opinion was clear in its analysis that the interpretation of such statutes will usually be deferred to more local courts that are better able to interpret the laws of their respective states. The effect of this deference may accord lower courts powers beyond that which Casey desires them to have. But as a practical matter, the Court cannot rule on every issue that could come before it.

E. Recordkeeping and Reporting Requirements

The joint opinion held all but one recordkeeping and reporting requirement of the Pennsylvania statute to be constitutional, based on a state's interest in maternal health. It cannot be questioned that the science of medicine is continually reaching new breakthroughs, allowing all of us to achieve better lifestyles and longer lifespans. Recordkeeping requirements designed to further these ends have never been questioned by the Court.

The joint opinion held Section 3214(a)(12) unconstitutional. This section is related to the spousal notification provision (Section 3209) and required a woman to state her "reason for failure to provide notice" to her husband if Section 3209 was violated. The joint opinion invalidated Section 3214(a)(12) because it amounted to an undue burden. Since the

144. See supra note 9 and accompanying text.
146. Id. (citation omitted).
147. See supra notes 14, 85-86 and accompanying text.
149. See supra note 87 and accompanying text.
Joint opinion held the husband notification provision to be an undue burden and thereby unconstitutional, it would appear that analyzing Section 3214(a)(12) in terms of the "undue burden" standard is wholly irrelevant. In effect, the validity of the reporting requirement is not severable from the spousal notification provision and should have been invalidated for that reason alone.\(^{151}\)

V. Conclusion

Abortion remains a hotly divided, political, religious, and moral issue in America. It is not an issue that lends itself to an easy solution, or any solution at all. The division over the issue is most evident when reading the opinions of nine of the brightest legal and constitutional scholars our society has to offer. We cannot expect the Court to embrace every competing view over such a sharply divided issue. What we should expect from the Court, however, is a constitutional decision regarding a woman's right to obtain an abortion that is not subject to legal, political, religious, or moral influences.

In *Planned Parenthood v. Casey*,\(^{152}\) the Court was presented with an opportunity to clarify its position on abortion and aid lower courts in their decisions.\(^{153}\) What emerged was a plurality opinion that enunciated a completely new standard as controlling law for invalidating abortion regulations. The full effect and interpretation of *Casey* has yet to be realized. However, one immediate effect of *Casey* and its "undue burden" standard is

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151. Pennsylvania law provided a severability clause as follows:

The provisions of this Act are severable. If any word, phrase or provision of this Act or its application to any person or circumstance is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this Act which can be given effect without the invalid word, phrase, provision or application.

1989 Pa. Laws 592, 603, § 6. Since the spousal notification provision was held unconstitutional, there appears to be no rational reason for Section 3214(a)(12)'s requirement that women seeking abortions must state their reasons for failing to provide notice to their husbands of their intentions. A severability provision will not supply a rational reason for allowing Section 3214(a)(12) to remain in effect.


153. Less than three months after *Casey* was decided, the first federal appellate decision applying the "undue burden" test was handed down. In *Sojournner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), a Louisiana abortion statute made it a crime to "administer . . . or prescrib[e] any drug, potion, medicine, or any other substance to a female" or to "us[e] any instrumental or external force whatsoever on a female . . . with the specific intent of terminating a pregnancy." *Id.* at 29 (citation omitted). The statute did provide certain exceptions when the mother's or unborn child's life was in danger and in pregnancies resulting from rape or incest. In a succinct opinion, the court held the statute plainly unconstitutional on its face, utilizing the "undue burden" test. The court noted that under *Casey*, a state's interests are not strong enough to support a prohibition of abortion before viability. *Id.* at 30.
clear; it has continued the slow erosion of the principles of *Roe v. Wade.* With the complete overturning of *Roe* as close as the vote of one Justice, society must brace itself for the final ruling that may forever leave *Roe* a relic in time and history.

JON D. ANDERSON

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