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Tamara F. Kushnir

Comment

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*Tamara F. Kushnir**

> The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[1]

I. INTRODUCTION

Mary-Dorothy Line was nineteen weeks pregnant when she found out that there was no hope for her pregnancy; her fetus was growing with a skull filled with fluid instead of a brain.[2] Claudia Crown Ades learned at the twenty-sixth gestational week that her fetus had extensive damage to the brain, heart, and internal organs.[3] Vikki Stella discovered in her thirty-second week of pregnancy that her fetus had nine major anomalies including a fluid-filled skull.[4] All three of these women were advised by their physicians that an intact dilation and evacuation procedure was the best option to terminate their pregnancies safely without compromising their future attempts to bear children.[5] Congress had not yet enacted the Partial-Birth Abortion Ban Act of 2003 ("PBABA"), which would have prevented these women from getting

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1. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

2. *See* Gloria Feldt, *Late-term Abortions Should Not Be Banned* (explaining why abortion bans are harmful to women), *in* THE ABORTION CONTROVERSY 86, 86 (Lynette Knapp ed., 2001).

3. *Id.*

4. *Id.* The fluid-filled skull had no brain tissue at all. *Id.*

5. *Id.* Partial-Birth Abortion Ban Act of 2003 bans the intact dilation and extraction procedure. *See infra* Part II.B.3 (explaining the dilation and extraction procedure, sometimes referred to as intact dilation and evacuation).

the medical attention that their doctors believed was necessary.[6] Since having the procedure, all three women are healthy, and Mary-Dorothy and Vikki both have given birth to healthy children.[7]

On November 5, 2003, President George W. Bush signed into law the PBABA.[8] Signing the bill ended an eight-year struggle by proponents of the bill that Congress twice passed but President William Clinton twice vetoed.[9] The PBABA prohibits a particular late term abortion procedure that some consider cruel or gruesome.[10] Others, however, argue that the law constitutes the first step in an attempt to overrule the fundamental right to abortion guaranteed in *Roe v. Wade*.[11] Thus, as soon as both houses of Congress passed the bill, a debate began regarding whether the bill's limitation on the right to have an abortion was constitutional.[12]

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6. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531) (defining "partial-birth" abortion essentially as the intact dilation and evacuation procedure); *see also infra* Part II.B.2 (discussing abortion techniques used after the first trimester).

7. *See* Feldt, *supra* note 2, at 86 (explaining that the two women later were able to give birth to healthy children because they had access to the abortion procedure banned by the PBABA).

8. Robin Toner, *For G.O.P., It's a Moment*, N.Y. TIMES, Nov. 6, 2003, at A1 (reporting on the Act's enactment and noting that the PBABA represents a "political triumph for the anti-abortion movement"), *available at* LEXIS, News Library, The New York Times File; *see* Partial-Birth Abortion Ban Act § 3(a) (to be codified at 18 U.S.C. § 1531).

9. *See infra* Part III.A (discussing the legislative history of acts to ban partial birth abortion).

10. Partial-Birth Abortion Ban Act § 3(a) (describing the prohibited procedure as "gruesome and inhumane"); *see* Amicus Brief for the United States Catholic Conference et al. at 14, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830) (stating that the protection of other "equally gruesome" procedures does not necessitate protecting this type of abortion procedure), *available at* 2000 WL 223648; STOPP Int'l, *PP To Seek Federal Injunction Against Partial Birth Abortion Ban*, THE RYAN REPORT, June 2003 (opposing Planned Parenthood's support of a "gruesome" and "hideous" abortion procedure), *available at* http://www.all.org/stopp/rr0306.htm (last visited June 15, 2004); *see also* Brief of Family Research Council as Amicus Curiae in Support of Petitioners at 7, *Stenberg* (No. 99-830) (noting that the Family Research Council "championed [the] view" that all abortion procedures are "gruesome"), *available at* 2000 WL 34005434.

11. *See* Raju Chebium, *Supreme Court Throws Out Nebraska Law Banning Controversial Abortion Procedure*, CNN.COM, *at* http://www.cnn.com/2000/LAW/06/28/scotus.partialbirth.02/index.html (June 28, 2000) (quoting President Clinton after the *Stenberg* decision as saying it was the "only decision you could reach consistent with *Roe v. Wade*"). Abortion is defined as "the removal of an embryo or fetus from the uterus in order to end a pregnancy." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 6 (2d ed. 1987). A late term abortion is performed after the first trimester, at approximately twelve to fourteen gestational weeks. *See* WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 38–39 (2003) (outlining methods of abortion by length of pregnancy divided into twelve-week periods), *available at* http://www.who.int/reproductive-health/publications/safe_abortion/Safe_Abortion.pdf (last visited Mar. 26, 2004).

12. Bob Egelko, *Ban on Abortion Method Tested*, S.F. CHRON., Nov. 1, 2003, at A3 (discussing lawsuits planned by those opposed to the PBABA), *available at* 2003 WL 3767084; Debra Rosenberg, *A Firefight over Abortion; In a Dramatic Move, Congress Votes To Ban*

This Comment will argue that the PBABA is unconstitutional and that any further attempt to legislate abortion, in order to be constitutional, must satisfy Justice O'Connor's requirements from *Stenberg v. Carhart*,[13] the most recent Supreme Court decision on this late term abortion procedure.[14] First, Part II of this Comment will explain the history of the right to abortion and the different abortion procedures at issue in the PBABA.[15] Next, Part III will examine the legislative history and statutory language of the PBABA.[16] Part IV of this Comment will demonstrate that the PBABA is unconstitutional because it fails to restrict only the dilation and extraction procedure and does not contain an adequate health exception as Justice O'Connor required in *Stenberg*.[17] Finally, Part V of this Comment will propose possible changes to the PBABA that would fit the law within the constitutional framework of the Fourteenth Amendment's right to privacy as it pertains to abortion.[18]

II. BACKGROUND

The history of abortion law in the United States has followed an often complex and tumultuous path.[19] Accordingly, this Part first explores the major cases through which the right to privacy led to the right to abortion.[20] This Part also explains the most common abortion techniques to provide background on the medical ramifications of

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'Partial Birth' Procedures, Setting the Stage for Judicial Showdown, NEWSWEEK, Nov. 3, 2003, at 44 (discussing the anticipated Planned Parenthood lawsuit contesting the constitutionality of the new law and noting that the Planned Parenthood president commented, "We will be in court before the ink is dry on the President's signature."), *available at* 2003 WL 8640209; *Senate Passes 'Partial Birth' Abortion Ban*, CNN.COM, *at* http://www.cnn.com/2003/ALLPOLITICS/10/21.abortion.ap/index.html (Oct. 21, 2003) (predicting some of the legal issues proponents and opponents of the bill would face once President Bush signed the PBABA into law).

13. Stenberg v. Carhart, 530 U.S. 914, 947–51 (2000) (O'Connor, J., concurring).

14. *See infra* Part II.B.4 (discussing the importance of Justice O'Connor's concurring opinion in *Stenberg v. Carhart*).

15. *See infra* Part II (tracing the history of the right to abortion and explaining the different abortion procedures).

16. *See infra* Part III (showing the evolution of acts to ban partial birth abortions in prior congressional terms and in state law that lead to the current law).

17. *See infra* Part IV (examining the PBABA in detail).

18. *See infra* Part V (proposing changes to the PBABA that make the statute fit a constitutional framework of acceptable prohibitions on abortion procedures).

19. *See generally* Ian Shapiro, *Introduction*, *in* ABORTION: THE SUPREME COURT DECISIONS 1965-2000, at xi–xxxvi (Ian Shapiro ed., 2d ed. 2001) (examining the legal history of abortion through years of legislation and litigation).

20. *See infra* Part II.A (outlining the evolution of the right to abortion as derived from the right to privacy in other areas of life).

limiting or restricting abortions.[21] Finally, this Part outlines the most recent Supreme Court decision regarding the type of abortion that is commonly known as a "partial birth" abortion.[22]

A. The Right to Privacy and Abortion

The right to privacy "encompasses a freedom from intrusion by others" into certain areas of private life.[23] This right, although embodied by the Due Process Clauses of the Fifth and Fourteenth Amendments, did not emerge until the twentieth century.[24] In the twentieth century, the judicial system began to use the Fifth and Fourteenth Amendments to protect the right to privacy and associated this right to privacy with activities and aspects of the human body, namely marriage and reproduction,[25] bodily integrity,[26] and sexuality.[27]

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21. *See infra* Part II.B (discussing the abortion procedures generally used by the medical community).

22. *See infra* Part II.B.3 (examining *Stenberg v. Carhart*, 530 U.S. 914 (2000), and the Court's reasoning in determining that Nebraska's partial birth abortion law was unconstitutional).

23. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 795 (5th ed. 1995). Samuel Warren and Louis Brandeis first discussed the right to privacy in detail in 1890 in their seminal article "The Right to Privacy." *See* Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (explaining that the law was expanding to include private rights related to art, writings, and the right to be let alone). In their article, they explain that in the same way the law of murder was extended to include attempted murder and the law of personal property was extended to include the intangible, the law of newspaper intrusions should expand to include the right to privacy. *Id.* at 193, 213 ("The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, act, and to personal relation, domestic or otherwise."). Louis Brandeis later became a Supreme Court Justice. *See* THE SUPREME COURT HISTORICAL SOC'Y, HISTORY OF THE COURT, *at* http://www.supremecourthistory.org (last visited June 15, 2004) (providing information on former Supreme Court Justices). Even before the Supreme Court declared a formal right to privacy in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), the Supreme Court mentioned the right to privacy in *McCoy v. Union Elevated R..R.*, 247 U.S. 354, 355 (1918). In *McCoy*, the Court was not persuaded that the construction of the elevated trains in Chicago infringed upon the plaintiff's fundamental right to privacy regarding his property. *McCoy*, 247 U.S. at 355 (stating that the plaintiff was claiming rights "including the right of light, air, access, *privacy*, view, etc." (emphasis added)).

24. NOWAK & ROTUNDA, *supra* note 23, at 796.

25. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that the law at issue "runs afoul of the equal protection clause [of the Fourteenth Amendment]" because the law "involves one of the basic civil rights of man," and that "marriage and procreation are fundamental").

26. *See* Cruzan v. Dir., Mo. Dep't. of Health, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.").

27. Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003) (holding that a state may not prohibit homosexual sodomy under the Due Process Clause).

The Fifth and Fourteenth Amendments of the United States Constitution prohibit the federal and state governments, respectively, from depriving any person of "life, liberty, or property, without due process of law."[28] During the first part of the twentieth century, the "liberty" interest of the Fifth and Fourteenth Amendments included the freedom to make choices that did not affect adversely legitimate state interests.[29] Since that time, the Supreme Court has labeled some liberties "fundamental" because of their great importance.[30] When the Court categorizes a liberty as fundamental, it applies strict scrutiny to analyze whether any infringement on that liberty is constitutional; it does not apply the deferential rational relationship test.[31] Under a strict scrutiny analysis, the legislation must further a compelling state interest and be narrowly tailored to fit that objective.[32]

The right to privacy as it exists today emerged from a series of cases classifying certain rights as fundamental, thus allowing the Court to strictly scrutinize any regulation pertaining to them.[33] Beginning with

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28. U.S. CONST. amend. V (guaranteeing that no person shall "be deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV, § 1 (guaranteeing that no state shall "deprive any person of life, liberty, or property, without due process of law").

29. NOWAK & ROTUNDA, *supra* note 23, at 796; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (invalidating a law requiring students to attend public rather than private schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (invalidating a law that prohibited teachers from teaching in any language other than English).

30. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 695 (2001) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW]; *see also infra* notes 33–43 and accompanying text (describing the evolution of particular rights as fundamental).

31. CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 30, at 695. The rational relationship test is the minimal level of scrutiny a court will use to determine a constitutional infringement by a governmental action. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 651 (2d ed. 2002) [hereinafter CHEMERINSKY, PRINCIPLES AND POLICIES]. When using the rational relationship test, courts employ a strong presumption in favor of the government; a law will be upheld if there is any rational relationship to a legitimate public purpose. *Id.* Legitimate purposes are often related to public safety, health, welfare, or morals, but they need not be. *Id.* at 655. "Virtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test." *Id.* For the definition of strict scrutiny, see *infra* note 32 and accompanying text.

32. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (requiring a rational relationship to a legitimate government purpose for the lowest level of scrutiny); Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring a substantial relationship to an important government interest for intermediate scrutiny); CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 30, at 529. The Supreme Court has never defined specifically a "compelling" interest. CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 31, at 767. Nonetheless, the government has the burden of proof with respect to proving the "compelling" interest. *Id.* The law must be narrowly tailored, meaning that there must be no less restrictive means of achieving the government's stated interest. *Id.*

33. *See* NOWAK & ROTUNDA, *supra* note 23, at 796 ("While these decisions might today be grounded on the First Amendment, their existence is important to the growth of the right to privacy.").

Meyer v. Nebraska, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protected the liberty interest to freely make choices that do not adversely affect state interests.[34] The Court held that a law prohibiting teaching students in German was an unconstitutional restriction on education.[35] The fundamental right to choose how one's children will be educated was reaffirmed in *Pierce v. Society of Sisters*.[36] In *Pierce*, the Court held that a law requiring students to go to public school and not permitting any students to attend private school was unconstitutional.[37] Further, in *Skinner v. Oklahoma*, the Court held that a woman has a right to choose whether she wants to give birth and, therefore, a law requiring the sterilization of persons who committed at least two crimes of "moral turpitude" was unconstitutional.[38] These "freedom of choice" cases laid the necessary foundation for the modern right to privacy.[39]

The modern right to privacy first appeared in Justice Harlan's 1961 dissent in *Poe v. Ullman*.[40] Justice Harlan argued that the right to

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34. *Meyer*, 262 U.S. at 403 ("We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state."). At issue in *Meyer* was a law forbidding teaching students in any language except English. *Id.* at 396. The Court reasoned that the Fourteenth Amendment's liberty interest protected the right to teach and learn in languages other than English in schools. *Id.* at 400. The Court held that the law was unconstitutional. *Id.* at 403.

35. *Id.*

36. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). In *Pierce*, two private religious schools alleged that an Oregon law requiring students to attend only public schools was unconstitutional. *Id.* at 530–33. The Court reasoned that parents have a Fourteenth Amendment liberty interest "to direct the upbringing and education of children under their control." *Id.* at 534–35.

37. *Id.* The Court noted that the

> rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.

Id.

38. Skinner v. Oklahoma, 316 U.S. 535, 536, 541 (1942). At issue in *Skinner* was a law permitting the sterilization of "habitual criminals"—those criminals convicted of two or more felonies involving "moral turpitude." *Id.* at 536. The Court held the law unconstitutional because the law infringed on the fundamental liberty interest in procreation. *Id.* at 541.

39. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (identifying "zones of privacy" derived from the penumbral nature of the protections specified in the Bill of Rights).

40. NOWAK & ROTUNDA, *supra* note 23, at 798 (stating that the "right to privacy was given its first exposition by Justice Harlan in his dissent in *Poe v. Ullman*"); *see* Poe v. Ullman, 367 U.S. 497, 536 (1961) (Harlan, J., dissenting).

> [T]he most substantial claim which these married persons press is their right to enjoy the privacy of the marital relations .... I cannot agree that their enjoyment of this privacy is not substantially impinged upon, when they are told that if they use

privacy had a foundation in the Third and Fourth Amendments and that the Connecticut statute prohibiting the use of contraceptives at issue in the case offended the spirit of those Amendments.[41] Justice Harlan further commented that the Fourth Amendment right to be free from unreasonable searches and seizures "protects the privacy of the home against all unreasonable intrusion of whatever character."[42] One year after *Poe*, the Court's majority used Justice Harlan's concept of the right to privacy in its reasoning in *Griswold v. Connecticut*.[43]

1. *Griswold* Led the Way to the Modern Right to Privacy

In *Griswold v. Connecticut*, the Supreme Court clearly elucidated the right to privacy and its origins.[44] At issue in *Griswold* was a Connecticut statute prohibiting any person from using contraceptives or aiding others in using them.[45] The appellants were doctors who had instructed and given advice to married persons regarding the use of

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> contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor.

Id. (Harlan, J., dissenting). At issue in *Poe* was a Connecticut statute prohibiting the use of contraceptives and the dissemination of medical advice on the use of contraceptives. *Id.* at 498. Ultimately, the majority opinion did not discuss the constitutional question because it held that there was no justiciable question presented; the plaintiffs could not show that they were in immediate danger of a direct injury because the statute had not been enforced against them. *Id.* at 504–05.

41. *Poe*, 367 U.S. at 549 (Harlan, J., dissenting).

> [T]his Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home. What the statute undertakes to do, however, is to create a crime which is grossly offensive to this privacy.

Id. (Harlan, J., dissenting). Justice Harlan explained that the right to privacy in the home was provided for explicitly in the Third and Fourth Amendments. *Id.* (Harlan, J., dissenting). The Third Amendment prohibits the quartering of soldiers without the consent of the home owner. U.S. CONST. amend. III. The Fourth Amendment protects the "right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures." *Id.* amend. IV (emphasis added). Justice Harlan commented that "[w]hile these Amendments reach only the Federal Government, this Court has held in the strongest terms, and today again confirms, that the concept of 'privacy' embodied in the Fourth Amendment is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment." *Poe*, 376 U.S. at 549 (Harlan, J., dissenting).

42. *Poe*, 376 U.S. at 550 (Harlan, J., dissenting). *See generally* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment's right to privacy is applicable to the states through the Fourteenth Amendment's Due Process clause).

43. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

44. *See* Debra L. Dippel, *Someone To Watch over Me: Medical Decision Making for Hopelessly Ill Incompetent Adult Patients*, 24 AKRON L. REV. 639, 644 (1991) (explaining how the Supreme Court deduced the right to privacy in *Griswold* and other cases using the protections of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments).

45. *Griswold*, 381 U.S. at 480.

contraceptives.[46] The Court held that the statute was an unconstitutional invasion of the right to privacy.[47] In doing so, the Court noted that this statute was a direct invasion into the intimate relationship between husband and wife and the role that doctors must play in the relationship.[48]

Justice Douglas' opinion, in which a majority of the Court concurred in judgment, was a mere seven pages long and was followed by three concurrences and two dissents.[49] Justice Douglas focused on deducing the right to privacy from the scope of the guarantees in the Bill of Rights.[50] Justice Douglas explained that the First,[51] Third,[52] Fourth,[53] Fifth,[54] and Ninth[55] Amendments all have penumbras through which the right to privacy is derived.[56] For example, while the First Amendment does not mention a freedom of association, the Court explicitly has expanded the First Amendment's right to peaceably assemble to include association.[57] At the end of the opinion, Justice Douglas noted that the right to privacy predates the Bill of Rights and commented that marriage is "intimate to the degree of being sacred."[58] Thus, the Court

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46. *Id.*

47. *Id.* at 485.

48. *Id.* at 482.

49. *See id.* at 480–86; *id.* at 486–99 (Golberg, J., concurring); *id.* at 499–502 (Harlan, J. concurring); *id.* at 502–07 (White, J., concurring); *id.* at 507–27 (Black, J., dissenting); *id.* at 527–31 (Stewart, J., dissenting).

50. *Id.* at 484.

51. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging . . . the right of the people peaceably to assemble."). *See generally Griswold*, 381 U.S. at 483 (explaining that the First Amendment protects forms of association that are not political but rather social, legal, or economic).

52. *Id.* amend. III ("No soldier shall, in time of peace be quartered in any house.").

53. *Id.* amend. IV (affirming the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

54. *Id.* amend. V (providing a freedom from self incrimination).

55. *Id.* amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

56. *Griswold*, 381 U.S. at 484 ("[T]he specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). Thus, the Court explained that each of the Amendments may be extended beyond its literal meaning to protect a right to privacy. *Id.* For example, the Third Amendment prohibition against quartering soldiers "is another facet of that privacy." *Id.* "The Fourth and Fifth Amendments were described . . . as protection against all governmental invasions of the sanctity of a man's home and the privacies of his life." *Id.* (internal quotations and citation omitted).

57. *Id.* at 483 (stating that the "freedom of association was a peripheral First Amendment right" (citing NAACP v. State of Alabama, 351 U.S. 449, 462 (1958))).

58. *Id.* at 486 (stating that the right to privacy is older than the Bill of Rights).

held that the contraception statute was too broad and invaded areas protected by the right to privacy.[59]

Justice Goldberg's concurrence in *Griswold* focused on the language and history of the Ninth Amendment.[60] The Ninth Amendment states that those rights explicitly mentioned in the Constitution do not serve as a complete list of all rights belonging to Americans.[61] While the Ninth Amendment does not *create* new rights, it recognizes that not all rights are enumerated specifically.[62] As such, Justice Goldberg explained that some rights exist that are not listed explicitly in the Bill of Rights, but which the Framers believed deserved protection through the Ninth Amendment.[63] In other words, he contended that the rights enumerated in the Bill of Rights are not an exhaustive list, and that certain rights not listed, such as the right to privacy, are fundamental.[64] Additionally, Justice Goldberg argued that although legislative bodies must be granted some deference to experiment with social laws, that deference does not include experimenting with fundamental rights.[65]

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59. *Id.* at 485–86.

60. *Id.* at 488 (Goldberg, J., concurring).

61. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

62. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 179 (2003).

63. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring). Justice Goldberg further explained James Madison's intent in writing the Ninth Amendment by broadly stating that "[the Ninth Amendment] was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." *Id.* at 488–89 (Goldberg, J., concurring). This idea was not new to Madison; his belief in the limitations of language was expressed in the Federalist Papers when he stated that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas." THE FEDERALIST No. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

64. *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring) ("[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.").

65. *Id.* at 496 (Goldberg, J., concurring) ("I do not believe that [deference to the legislature] includes the power to experiment with the fundamental liberties of citizens."); *see also* Pointer v. Texas, 380 U.S. 400, 413 (1965) (explaining that a state may "serve as a laboratory; and try novel social and economic experiments," but not at the expense of fundamental rights (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)). *See generally infra* Part IV.D (providing an in-depth discussion of the deferential standards Congress believes the Court should use for the PBABA). The Court defers to legislatures' experiments in social laws because the government "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical, 348 U.S. 483, 489 (1955). At issue in *Williamson* was an Oklahoma statute regulating optometrists and ophthalmologists. *Id.* at 484. The Court held that it is for legislature to weigh the advantages and

Justice Harlan's concurrence focused on the language of the Fourteenth Amendment's Due Process Clause and not on the Bill of Rights.[66] While Justice Harlan noted that the Bill of Rights aided his conclusions, he believed that the Connecticut statute was an infringement on a fundamental right guaranteed by the Fourteenth Amendment.[67] In so stating, Justice Harlan emphasized that judicial restraint in interpreting the Due Process Clause should be guided by history, a respect for basic values, and the recognition of the separation of powers.[68]

In the last concurrence, Justice White argued that the statute did not pertain to the legitimate legislative goal of preventing illicit sexual relationships.[69] Because Connecticut could not justify the broad nature of the law, Justice White found that the law violated the Due Process Clause of the Fourteenth Amendment.[70] Justice White explained that criminalizing the use of contraceptives, or creating the offense of aiding and abetting the use of contraceptives in no way promoted the stated legislative goal.[71] Although he agreed that the law violated the Fourteenth Amendment, Justice White did not accede that the Connecticut statute was an invasion of privacy; rather, he contended that Connecticut's statute was overbroad.[72]

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disadvantages of a new social law and determine if the law is necessary. *Id.* at 487. When a legislature determines that a new law is necessary, it is not for the Court to undermine the legislative attempt. *Id.* at 487–88.

66. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring). *See* generally U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

67. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (stating that the law at issue breached the "concept of ordered liberty" guaranteed by the Fourteenth Amendment).

68. *Id.* at 501 (Harlan, J., concurring). Justice Harlan noted that judicial restraint

> will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

Id. (Harlan, J., concurring).

69. *Id.* at 505 (White, J., concurring).

70. *Id.* at 507 (White, J., concurring).

71. *Id.* at 506 (White, J., concurring)

72. *Id.* at 503 (White, J., concurring) (commenting that the examination of the statute provided by the majority "cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy"). Rather, Justice White concluded, "I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law." *Id.* at 507 (White, J., concurring). Although Justice White concurred in *Griswold*, he dissented in *Roe v. Wade*, 410 U.S. 113, 172 (1973). Justice Rehnquist also dissented in *Roe v.*

Justices Black and Stewart each wrote a dissent in *Griswold* and each joined in the other's dissent.[73] These two Justices adopted the view that the Framers intended the Bill of Rights to be taken literally, in that each amendment means exactly what it says and nothing more.[74] Therefore, according to the dissents, the right to privacy does not exist because the Constitution does not provide explicitly for such a right.[75] In addition, Justice Black specifically rejected the notion that the Constitution must change with the times.[76]

Seven years after *Griswold*, the Court in *Eisenstadt v. Baird* found unconstitutional a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons but allowed distribution to married persons.[77] Using the Court's reasoning from *Griswold*, that the government should not intrude into matters such as an individual's decision whether to bear a child, the Court held that the right to privacy applied to single individuals as well as to married persons.[78] Therefore, the Court found that the statute was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment because the statute provided privacy protection for married persons but not single persons.[79] Additionally, the Court agreed with the lower court's warning against a legislative attempt to circumvent the *Griswold*

Wade and commented that the right of "privacy" was not involved in the case. *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).

73. *Griswold*, 381 U.S. at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

74. *Id.* at 527 (Black, J., dissenting) ("So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written . . . ."); *id.* at 528 (Stewart, J., dissenting) ("I can find nothing in any of [the Amendments] to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States."). Orginalists argue that the only fundamental rights are those expressly "stated in the text [of the Constitution] or clearly intended by the framers." CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 30, at 698. In contrast, non-originalists argue that courts have the authority to protect fundamental rights not stated explicitly in the Constitution. *Id.*

75. *Griswold*, 381 U.S. at 530 (Stewart, J., dissenting) ("I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.").

76. *Id.* at 522 (Black, J., dissenting).

77. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972).

78. *Id.* at 453.

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matter so fundamentally affecting a person as the decision whether to bear or beget a child.

Id.

79. *Id.* at 454–55.

ruling.[80] Following *Eisenstadt*, the next major case to discuss the right to privacy was *Roe v. Wade*.[81]

2. The Abortion Cases: *Roe v. Wade*

In 1973, the Supreme Court held that the fundamental right to privacy encompassed a woman's right to choose whether to have an abortion.[82] In *Roe v. Wade*, the Court analyzed a Texas statute banning all abortions except those required to save the woman's life.[83] The Court found the statute unconstitutional under the Due Process Clause of the Fourteenth Amendment, and the Court created a trimester system for regulating abortion.[84]

The *Roe* Court provided an extensive history of abortion beginning with the Persian Empire,[85] moving through the time of Hippocrates,[86] and concluding with an account of the common law precedent.[87] The Court noted that in the classic Hippocratic Oath, which doctors take upon finishing medical school, doctors swear not to give a woman anything that would cause abortion.[88] The Court provided this long

80. *Id.* at 450, *aff'g* 429 F.2d 1398 (1st Cir. 1970).

81. *See infra* Part II.A.2–3 (examining *Roe v. Wade* and subsequent significant abortion cases).

82. Roe v. Wade, 410 U.S. 113, 164 (1973).

83. *Id.* at 118.

84. *Id.* at 164–65. A woman is pregnant for forty weeks counting from the first day of her last menstrual period. Stanley K. Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION 11, 17–18 (Maureen Paul et al. eds., 1999). The first trimester consists of the first twelve weeks of pregnancy. *Id.*

85. *Roe*, 410 U.S. at 130 (noting that "[a]ncient religion did not bar abortion").

86. *Id.* at 131–32 (describing Hippocrates and the history of the Oath).

87. *Id.* at 132–47 (describing the law beginning in the sixteenth century and moving, in detail, to the present). The majority opinion states that "at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140. The move towards prohibiting abortion was justified by three reasons. *Id.* at 142–52. First was a Victorian concern to deter illicit sexual relationships. *Id.* at 148. This justification is not asserted in *Roe*. *Id.* Second, when abortion was first criminalized, "the procedure was a hazardous one for the woman." *Id.* The Court noted that this rationale no longer applied because modern medical techniques are safer than those used in the past. *Id.* at 149. Last, prohibiting abortion stems from the desire to protect prenatal life. *Id.* at 150. This formed the impetus for creating the trimester system. *Id.* at 163.

88. *See* LUDWIG EDELSTEIN, HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION (1943) (translating the oath as stating, "I will not give to a woman an abortive remedy"), *reprinted at* NOVA ONLINE, HIPPOCRATIC OATH—CLASSICAL VERSION, *at* http://www.pbs.org/wgbh/nova/doctors/oath_classical.html (last updated Mar. 2001). Most students graduating from medical school take some form of the Hippocratic Oath. *See* NOVA ONLINE, THE HIPPOCRATIC OATH TODAY, *at* http://www.pbs.org/wgbh/nova/doctors/

oath_today.html (last updated Mar. 2001) (explaining the history and current use of the Hippocratic Oath). The classical Hippocratic Oath doctors take states:

> I swear by Apollo Physician and Asclepius and Hygieia and Panaceia and all the gods and goddesses, making them my witnesses, that I will fulfil [sic] according to my ability and judgment this oath and this covenant:
>
> To hold him who has taught me this art as equal to my parents and to live my life in partnership with him, and if he is in need of money to give him a share of mine, and to regard his offspring as equal to my brothers in male lineage and to teach them this art—if they desire to learn it—without fee and covenant; to give a share of precepts and oral instruction and all the other learning to my sons and to the sons of him who has instructed me and to pupils who have signed the covenant and have taken an oath according to the medical law, but no one else.
>
> I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.
>
> I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art.
>
> I will not use the knife, not even on sufferers from stone, but will withdraw in favor of such men as are engaged in this work.
>
> Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female and male persons, be they free or slaves.
>
> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.
>
> If I fulfil this oath and do not violate it, may it be granted to me to enjoy life and art, being honored with fame among all men for all time to come; if I transgress it and swear falsely, may the opposite of all this be my lot.

EDELSTEIN, *supra*, *reprinted at* NOVA ONLINE, HIPPOCRATIC OATH—CLASSICAL VERSION, *at* http://www.pbs.org/wgbh/nova/doctors/oath_classical.html (last updated Mar. 2001). The Hippocratic Oath is the "nucleus of all medical ethics and was applauded as the embodiment of truth." *Roe*, 430 U.S. at 131; *see also* MATHEW L. HOWARD, *Physician-Patient Relationship* (stating that the "Hippocratic oath can be thought of as a codification of rules governing the [physician-patient relationship] the existence of which suggests that some physicians at least needed to be bound by oath to enforce adherence to the social norm"), *in* ACLME LEGAL MEDICINE 247 (S. Sandy Sanbar et al. eds., 4th ed. 1998). Doctors still take a form of this oath today, though most medical schools use a modern version. *See* NOVA ONLINE, THE HIPPOCRATIC OATH TODAY, *supra* (listing various forms of the modern Hippocratic Oath). The modern form of the Hippocratic Oath does not mention abortion. NOVA ONLINE, HIPPOCRATIC OATH—MODERN VERSION, *at* http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last updated Mar. 2001). The majority of medical schools use some variation on the modern Hippocratic Oath. AM. MED. ASS'N, AMA OATH REGISTRY, *at* http://www.ama-assn.org/ama/pub/category/5573.html (last updated Dec. 9, 2003). Some schools maintain a reference to conception, such as "I will maintain the utmost respect for human life, *from the time of conception*, even under threat, I will not use my medical knowledge contrary to the laws of humanity." *E.g.*, LOYOLA UNIV. CHICAGO STRITCH SCH. OF MED., OATH OF HIPPOCRATES (emphasis added), *reprinted at* AM. MED. ASS'N, OATH REGISTRY, *at* http://www.ama-assn.org/ama/pub/category/5583.html (last updated Dec. 9, 2003); *see* UNIV. OF TEXAS MED. BRANCH AT GALVESTON, DECLARATION OF GENEVA, *reprinted at* AM. MED. ASS'N, OATH REGISTRY, *at* http://www.ama-assn.org/ama/pub/category/6959.html (last updated Dec. 9, 2003). Others do not reference conception or abortion directly such as "I will exercise my art solely for the cure of my patients, and will give no drug, perform no operation for a criminal purpose, even

history to explain the origins of abortion prohibitions and why those reasons do not support a total ban on abortions.[89] The Court explained that at common law, there was no prohibition against performing abortions prior to "quickening."[90] Next, the Court discussed the way English statutory law preserved the quickening time frame by providing lesser penalties for abortion prior to quickening and greater penalties after quickening.[91] The Court noted the enactment of a then recent English law permitting abortions where three physicians agree that carrying the pregnancy to term would cause injury to the woman's physical or mental health.[92] The last section in the historical overview reviewed American law, concluding that at the time of the adoption of the Constitution, there was less negative focus on abortion than current statutory law implies.[93]

The Court then began its overview of the law by discussing the right to privacy and ultimately held that the right of a woman to choose to have an abortion is a fundamental liberty interest protected by the right to privacy.[94] As such, the Court held that any regulation on abortion must be justified by a compelling state interest.[95] In placing abortion under the umbrella of fundamental liberty interests, the Court was careful to recognize that while the State does not have a "compelling" interest in restricting abortions, the State may have an "important"

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if solicited, far less suggest it." *E.g.*, DARTMOUTH MED. SCH., HIPPOCRATIC OATH, *reprinted at* AM. MED. ASS'N, OATH REGISTRY, *at* http://www.ama-assn.org/ama/pub/category/6763.html (last updated Dec. 9, 2003); JOHNS HOPKINS UNIV. SCH. OF MED., THE PHYSICIAN'S OATH, *reprinted at* AM. MED. ASS'N, OATH REGISTRY, *at* http://www.ama-assn.org/ama/pub/category/5581.html (last updated Dec. 9, 2003); UNIV. OF MICH. MED. SCH., HIPPOCRATIC OATH, *reprinted at* AM. MED. ASS'N, OATH REGISTRY, *at* http://www.ama-assn.org/ama/pub/category/5601.html (last updated Dec. 9, 2003).

89. *Roe*, 410 U.S. at 151–52.

90. *Id.* at 132–33. Quickening is defined as "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." *Id.* at 132. Philosophical and theological disciplines adopted the quickening standard because it was at that point that the fetus is "recognizably human." *Id.* at 133.

91. *Id.* at 136.

92. *See id.* at 137.

93. *Id.* at 138–47. "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect." *Id.* at 140. This section detailed when various states adopted abortion prohibitions. *Id.* at 138. The Court explained that "in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased." *Id.* at 139.

94. *Id.* at 153 (stating that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

95. *Id.* at 155.

interest in restricting abortions to protect potential lives.[96] Therefore, the Court noted that two competing interests existed: a woman's fundamental right to choose to have an abortion and the State's important concern for potential life.[97] The Court decided that the competing interests produced a qualified right to privacy concerning abortion; this qualified right ultimately led the Court to create the trimester system.[98]

In creating the trimester system, the Court looked to the text of the Constitution and its use of the word "person."[99] The Constitution does not define the word "person."[100] In previous cases, the Court insisted that because the Fourteenth Amendment uses the word "person," its protections must be afforded to noncitizens, including illegal aliens, as well as citizens.[101] However, the Court noted that no constitutional reference to "person" encompasses the unborn.[102] Therefore, the Court in *Roe* adopted viability, the point at which the fetus can sustain life outside the womb, as the point when a state's interest becomes compelling and the State thus may prohibit abortion.[103] The Court considered the physical and psychological well-being of the woman seeking the abortion when creating the trimester system.[104] In sum, the Court held that during the first trimester the State may not regulate abortion;[105] during the second trimester, the State may regulate aspects of abortion that pertain to the preservation and protection of the

96. *Id.* at 154. A woman's right to choose abortion emerged because the State's interest was "important" but not "compelling." *Id. But see* Korematsu v. United States, 323 U.S. 214, 221 (1944) (holding that when a state does have a compelling interest, a fundamental right may be suspended).

97. *Roe*, 410 U.S. at 154.

98. *Id.* at 163–64. The first trimester includes weeks one through twelve, the second trimester includes weeks thirteen through twenty-six, and the third trimester includes weeks twenty-seven through forty-two. ABOUT.COM, THREE TRIMESTER GUIDE TO PREGNANCY, *at* http://pregnancy.about.com/cs/trimesterguide/ (last visited Apr. 10, 2004).

99. *Roe*, 410 U.S. at 158.

100. *Id.* at 157.

101. Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.").

102. *Roe*, 410 U.S. at 158.

103. *Id.* at 163.

104. *Id.* at 153. ("Psychological harm may be imminent. Mental and physical health may be taxed by child care."). A similar point was made by the majority opinion in the companion case to *Roe*. *See* Doe v. Bolton, 410 U.S. 179, 191–92 (1973) (maintaining that a health exception includes mental health). At issue in *Doe* was a Georgia abortion prohibition statute. *Id.* at 181–82. The *Doe* opinion commented that a patient's health included "physical, emotional, [and] psychological" components, which all play a part in a physician's medical judgment. *Id.* at 192. Thus, the Court concluded that doctors may determine whether to perform an abortion based on their "best clinical judgment." *Id.* at 191.

105. *Id.* at 163.

woman's[106] health;[107] and in the third trimester, post viability, the State may proscribe abortion generally but must permit abortions necessary for the "life or health" of the woman.[108]

The *Roe* majority explained that its holding defended the rights of a physician to provide medical attention and advice according to medical judgment.[109] Because abortion is a medical procedure, the Court stated that responsibility for abortions must remain with physicians.[110] Also, the Court made clear that a doctor still would be subject to the penalties of the traditional medical community to prevent abuse.[111]

The dissent in *Roe*, authored by Justice Rehnquist, began by criticizing the majority for formulating a broad constitutional law in response to a narrow question.[112] Justice Rehnquist explained that the woman who brought suit in this case might have been in her third trimester at the time of filing and that therefore the law would not apply to her.[113] Thus, Justice Rehnquist admonished the majority for permitting virtually no restrictions on first trimester abortions based on

106. I will not refer to "maternal" health in this Comment because that phrase implies that a pregnant woman is already a mother. *See* THE AMERICAN HERITAGE DICTIONARY 772 (2d college ed. 1991) (defining maternal as "[r]elating to or characteristic of a mother or motherhood").

107. *Roe*, 410 U.S. at 163 (noting that proper second trimester regulations relate to the qualifications of the person who will perform the abortion and the location where the procedure will take place).

108. *Id.* at 163–64 (stating that a state may prohibit all abortions after the third trimester "except when it is necessary to preserve the life or health of the [woman]").

109. *Id.* at 166.

110. *Id.*; *see also Doe v. Bolton*, 410 U.S. 179, 191 (1973) (noting that physicians must be permitted to use their clinical judgment to make abortion determinations).

111. *Roe*, 410 U.S. at 166 (stating that if a doctor "abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available").

112. *Id.* at 172 (Rehnquist, J., dissenting) (stating that "the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'r of Emigration, 113 U.S. 33, 39 (1885))). Justice Rehnquist disagreed with the majority because the Court did not know what stage of pregnancy the plaintiff was in when she filed suit. *Id.* at 171 (Rehnquist, J., dissenting). She would have standing to litigate the issue presented only if she were in her first trimester at some point during the lawsuit. *Id.* at 172 (Rehnquist, J., dissenting). Thus, Justice Rehnquist argued that the Court's majority was incorrect in "impos[ing] virtually no restrictions on medical abortions performed during the first trimester" when it seemed to him to be a hypothetical question presented to the Court and not one capable of litigation. *Id.* (Rehnquist, J., dissenting).

113. *Id.* at 171 (Rehnquist, J., dissenting) (noting that the record was silent as to how long the plaintiff had been pregnant when she brought the suit). The Court stated that it knew only "that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed." *Id.* (Rehnquist, J., dissenting).

a woman who could have been in her third trimester when she brought the suit.[114]

Next, Justice Rehnquist focused on the absence of any explicit mention of a right to privacy in the Constitution.[115] Justice Rehnquist commented that the majority was acting as a legislator and not as the judiciary.[116] Justice Rehnquist further argued that the drafters of the Fourteenth Amendment[117] could not have intended it to be applied to state abortion regulation because thirty-six states and territories had already enacted their own laws limiting abortion at the time the Fourteenth Amendment was adopted.[118] Thus, Justice Rehnquist concluded that the drafters of the Fourteenth Amendment did not intend to take away state power to legislate the issue of abortion.[119]

3. The Abortion Cases: Moving Beyond *Roe*

Following *Roe*, the Supreme Court addressed various topics related to abortion and the Due Process Clause, such as abortion procedures,[120] parental consent for minors seeking abortion,[121] abortion funding,[122]

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114. *Id.* at 172 (Rehnquist, J., dissenting).

115. *Id.* (Rehnquist, J., dissenting); *see also supra* Part II.A.1 (explaining that the right to privacy noted in Justice Goldberg's concurrence in *Griswold* is derived and not explicit in the Constitution).

116. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (stating that the "decision here to break pregnancy into three distinct terms . . . partakes more of judicial legislation that it does of a determination of the intent of the drafters of the Fourteenth Amendment").

117. Representative John Bingham of Ohio drafted the first section of the Fourteenth Amendment, except for the first sentence. CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 346 (1997). There is great controversy regarding Representative Bingham's original intent as to how much of the Bill of Rights the Fourteenth Amendment was supposed to incorporate. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (explaining in detail the controversy over the Fourteenth Amendment and its origins).

118. *Roe*, 410 U.S. at 175–76 (Rehnquist, J., dissenting).

119. *Id.* at 177 (Rehnquist, J., dissenting).

120. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 79 (1976) (holding that banning saline amniocentesis was an unconstitutional restriction on a woman's right to choose to have an abortion).

121. *See* Bellotti v. Baird, 443 U.S. 622, 651 (1979) (invalidating a Massachusetts statute that required a minor to obtain the consent of both parents before obtaining an abortion); *see also Planned Parenthood*, 428 U.S. at 74 (stating that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent" with regard to a parental consent requirement). *But see* Hodgson v. Minnesota, 497 U.S. 417, 423 (1990) (upholding a parental notification requirement in Minnesota because it included a procedure for judicial waiver).

122. *See* Maher v. Roe, 432 U.S. 464, 480 (1977) (upholding a law that prohibited the use of public funds for abortions, except where "medically necessary"). In *Maher*, two indigent woman brought suit seeking public funding for abortions. *Id.* at 467. The two women could not get

anti-abortion literature,[123] and access to abortion clinics.[124] In *Planned Parenthood v. Danforth*, the Supreme Court, for the first time, looked at a prohibition against a particular abortion procedure.[125] At issue was the use of saline amniocentesis in first trimester abortions.[126] The Court held a ban on this particular procedure unconstitutional, despite the legislative finding that performing the procedure was harmful to the woman's health.[127] After examining the facts and figures related to the procedure, the Court determined that a ban on this termination method would be dangerous to a woman's health because it could require her to choose a more dangerous method.[128] The Court concluded that the legislature's decision to make this procedure illegal created an "unreasonable" regulation "designed to inhibit," and, thus, the legislation had to be struck down as a violation of the Court's holding in *Roe*.[129]

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certificates qualifying their abortions as a "medical necessity." *Id.* The Court held that denying indigent women funding for abortions did not contradict the holding in *Roe* because "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475. The Court focused its analysis on the legislative intent to protect potential life and encourage natural childbirth where it will not harm the woman. *Id.* at 478.

123. *See* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444 (1983) (invalidating those provisions of a city ordinance that required doctors to give their patients anti-abortion information, including telling them that "the unborn child is a human life from the moment of conception"). This case was ultimately overruled by *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

124. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (upholding provisions of a Florida injunction that created a thirty-six-foot buffer zone outside the entrance to a reproductive health clinic and prohibited anti-abortion protesters from making noise that could be heard by patients inside the clinic). *But see* Schenck v. Pro-Choice Network, 519 U.S. 357, 385 (1997) (invalidating a provision in a New York injunction that created a fifteen-foot "floating" buffer zone around any person or vehicle seeking access to or leaving a clinic).

125. *Planned Parenthood*, 428 U.S. at 79 (finding unconstitutional a complete ban on performing abortions using saline amniocentesis).

126. *Id.* at 75–76. At issue in *Planned Parenthood v. Danforth* was a Missouri law prohibiting doctors from using the saline amniocentesis method of abortion during the first trimester. *Id.* at 76. At the time of the decision, doctors used saline amniocentesis for approximately seventy percent of the first trimester abortions. *Id.* In a saline amniocentesis abortion, the doctor withdraws the amniotic fluid and replaces it with "saline or other fluid" in the amniotic sac. *Id.* There were other abortion-related questions in *Danforth*, but the restriction on a particular abortion procedure is crucial for analysis of the issues discussed in this Comment. *See infra* Part IV.B.3 (explaining the role of *Danforth* in understanding the PBABA).

127. *Planned Parenthood*, 428 U.S. at 76 (stating that the procedure was "deleterious to maternal health").

128. *Id.* at 79 (stating that "as a practical matter, it forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed").

129. *Id.* at 76–79.

The Supreme Court again focused on the Due Process Clause of the Fourteenth Amendment in its decision in *Hodgson v. Minnesota*.[130] At issue in *Hodgson* was a Minnesota statute requiring that minors obtain the consent of both parents before getting an abortion.[131] However, the State did create a judicial bypass if the minor was mature, or if it was in her best interest not to obtain consent.[132] In finding the consent requirement unconstitutional, the Court focused on the liberty interest of every woman to decide whether to bear children.[133] In dicta, the Court emphasized that the Due Process Clause "protects the woman's right to make such decisions independently and privately . . . free of unwarranted governmental intrusion."[134] While the State may encourage childbirth over abortion by making public funds unavailable for abortion, it may not substitute a woman's decision with its own;[135] if the State makes the decision for the woman, then the liberty interest in the Due Process Clause will become a "nullity."[136] Thus, *Hodgson* continued the Supreme Court's reverence for the Due Process Clause and the Fourteenth Amendment's protection of a woman's right to choose.[137]

Over the years, the Supreme Court continued to hand down many abortion decisions;[138] however, commentators contend that none were

130. Hodgson v. Minnesota, 497 U.S. 417, 435 (1990). *See generally* Katheryn D. Katz, *The Pregnant Child's Right to Self-determination*, 62 ALB. L. REV. 1119, 1139–41 (1999) (discussing the details of the Court's decision in *Hodgson* as it pertains to the larger question of parental notification requirements).

131. *Hodgson*, 497 U.S. at 424.

132. *Id.* at 427.

133. *Id.* at 434 ("A woman's decision to conceive or bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution."); *see also* Roe v. Wade, 410 U.S. 113, 169–70 (1973) (Stewart, J., concurring) (emphasizing the right of every woman to determine for herself whether to bear or beget a child).

134. *Hodgson*, 497 U.S. at 434.

135. *Id.* at 435.

136. *Id.* (maintaining that a state may not justify "substituting a state decision for an individual decision that a woman has a right to make herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity.").

137. *See id.* at 435 (comparing the right to have an abortion to the right to travel and the right to marry).

138. *E.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 490 (1989) (including only a minority of the Court (four Justices) voting to reaffirm *Roe*); City of Akron v. Akron Ctr. for Reprod. Health Serv., 462 U.S. 416, 457 (1983) (invalidating provisions of a city ordinance that required physicians to give patients anti-abortion information, imposed a twenty-four hour waiting period, and mandated parental consent for a minor to obtain an abortion); Planned Parenthood v. Danforth, 428 U.S. 52, 77 (1976) (finding unconstitutional both a requirement for spousal consent for abortion and the prohibition against saline amniocentesis as a method for abortion).

as legally and politically potent as *Planned Parenthood v. Casey*.[139] At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982.[140] In *Casey*, the Supreme Court, with Justice O'Connor writing for the majority, reaffirmed the essential holding of *Roe* while revamping the timetable for acceptable abortion regulations.[141] The Court focused on *Roe's* central holding that a state may proscribe abortions post viability because its interest in potential life becomes compelling at that point.[142] In doing so, the Court adopted the "undue burden" standard, which holds that a state may not place an undue burden, defined as a substantial obstacle, in the path of a woman seeking a pre-viability abortion.[143] The Court adopted that standard because the vital issue in *Casey* concerned a woman's liberty, which the Court regarded as "unique to the human condition and so unique to law."[144] The Court recognized the importance of abortion law in protecting the right to bodily integrity valued in this country.[145] The Court rejected *Roe*'s trimester framework, stating that the trimester plan did not consider sufficiently the State's substantial interest in protecting potential life.[146] However, in dicta, the majority warned that courts

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139. NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES 143 (1996); *see* Planned Parenthood v. Casey, 505 U.S. 833 (1992); *see also* Sandra Lynn Tholen, Note and Comment, *Con Law Is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 1044–46 (1995) (concluding that abortion is a "hot-button" topic and the ramifications of *Casey*, both legal and political, are still emerging).

140. *Casey*, 505 U.S. at 844. Those five provisions included requirements that (1) there be a twenty-four hour waiting period from the time informed consent is given to the time an abortion is performed, (2) a minor have the informed consent of at least one parent to obtain an abortion, and (3) a married woman seeking an abortion notify her husband of her intentions. *Id.* Additionally, the fourth and fifth provisions concerned regulations on performing abortions and reporting requirements for abortion facilities. *Id.*

141. *Id.* at 846 (stating that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

142. *Id.* at 860.

143. *Id.* at 877.

144. *Id.* at 852.

145. *Id.* at 857 ("*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."); *see* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 264 (1990) (asserting the right to bodily integrity in end-of-life questions); Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976) (emphasizing women's right to bodily integrity by invalidating a law requiring spousal consent); *see also* Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 201 (2003) (discussing a woman's right to bodily integrity when she becomes pregnant through artificial insemination).

146. *Casey*, 505 U.S. at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulation must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue.").

must not evaluate abortion laws based on personal moral aversions to abortion.[147] Thus, the majority upheld and restated the critical elements of *Roe* while also revamping the method for evaluating abortion regulations.[148] Furthermore, the *Casey* Court reaffirmed that the Constitution promises a right to privacy, which encompasses a sphere of liberty free from government intrusion.[149]

The dissenting justices in *Casey* focused on two arguments: first, that *Roe v. Wade* was wrongly decided;[150] and second, that a constitutionally protected right to privacy does not exist.[151] Chief Justice Rehnquist, in his dissent, contended that *Roe v. Wade* was decided wrongly because there was no historical evidence that abortion was a fundamental right.[152] Chief Justice Rehnquist stated that the holding in *Roe* misapplied "right to privacy" holdings to abortion.[153] Abortion must be analyzed differently from other privacy cases, he explained, because abortion decisions affect not only the woman, but also the fetus.[154] Chief Justice Rehnquist and Justice Scalia also criticized the majority's limited use of stare decisis, noting that the majority retained the central holding from *Roe* but rejected the other major components of that decision.[155] Finally, Chief Justice Rehnquist argued that *Casey* did not require a discussion or reaffirmation of *Roe*

147. *See id.* at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.").

148. *Id.* at 846.

149. *Id.* at 847 (stating that the liberty interest in privacy "is a promise of the Constitution that there is a realm of personal liberty which the government may not enter").

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

151. *Id.* at 951 (Rehnquist, C.J., concurring in part and dissenting in part) (explaining that prior opinions on marriage, child rearing, and contraception did not create an "all encompassing" right to privacy).

152. *Id.* at 952–53 (Rehnquist, C.J., concurring in part and dissenting in part); *see also* Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 133 n.216 (explaining Justice Rehnquist's dissent in *Casey*).

153. *Casey*, 505 U.S. at 953 (Rehnquist, C.J., concurring in part and dissenting in part) (commenting that the Court in *Roe* should not have analogized abortion to the privacy rights in *Pierce*, *Meyer*, *Loving*, and *Griswold*); *see supra* Part II.A.1 (discussing this history of the critical right of privacy cases).

154. *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in part and dissenting in part) ("One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.").

155. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) (commenting on the "newly minted variation on *stare decisis*"); *id.* at 993 (Scalia, J., concurring in part and dissenting in part) ("The Court's reliance upon *stare decisis* can best be described as contrived.").

because the issue in *Casey* was an abortion "regulation" and not an abortion "prohibition."[156]

The undue burden standard from *Casey* defines the way courts currently analyze abortion regulations.[157] The undue burden standard applies both to obstacles in "obtaining an abortion once abortion has been chosen" and obstacles that "undermine a woman's decision whether to have an abortion" at all.[158] The Supreme Court used this standard in *Stenberg v. Carhart* when it invalidated Nebraska's law banning "partial birth abortions."[159] Before outlining the details of *Stenberg*, this Comment will briefly explain the various abortion procedures available during each trimester that are necessary to understand the Court's decision.[160]

B. Abortion Procedures in Medicine and Law

1. First Trimester

According to medical opinion, in the beginning weeks of pregnancy, a woman can choose to use medical abortion as opposed to surgical

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

157. *See, e.g.*, Planned Parenthood v. Lawall, 307 F.3d 783, 786 (9th Cir. 2002) (retaining the use of the undue burden standard for reviewing abortion regulations); A Woman's Choice—E. Side Women's Clinic v. Newman, 305 F.3d 684, 688 (7th Cir. 2002) (using the undue burden test as defined in *Stenberg v. Carhart* to analyze an abortion regulation); Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens, 287 F.3d 910, 919 (10th Cir. 2002) (maintaining that the undue burden standard in *Casey* is appropriate in abortion cases).

158. Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895, 911 (2001).

159. Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000).

160. *See infra* Part II.B.1–2 (outlining the abortion options for the first and second trimesters). In discussing these abortion procedures, this Comment will employ the medical language used in the majority opinion in *Stenberg*. The majority explained its decision to use this language by stating:

> 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.

Stenberg, 530 U.S. at 923. It should be noted, however, that Justice Kennedy, in his dissent, criticized the majority's discussion, arguing that "[w]ords invoked by the majority, such as 'transcervical procedures,' 'osmotic dilators,' 'instrumental disarticulation,' and 'paracervical block,' may be accurate and are to some extent necessary, but for citizens who seek to know why laws on this subject have been enacted across the Nation, the words are insufficient." *Id.* at 957 (Kennedy, J., dissenting).

abortion.[161] Medical abortion involves inducing abortion through the introduction of a medication; this can be done safely until the sixty-third day of gestation.[162] The advantage to medical abortion is that there are few medical complications associated with the procedure.[163] The disadvantage is that a woman must be willing to undergo surgical abortion if medical abortion is not successful and the abortion is incomplete.[164]

During the first trimester, the most common and safest form of surgical abortion is dilation and suction curettage ("D & C");[165] in some texts this method is called vacuum aspiration.[166] To perform this procedure, the doctor dilates the cervix and inserts a small pointed vacuum, which extracts the contents of the uterus.[167] The second method of first trimester surgical abortion, dilation and curettage, is generally not practiced where vacuum aspiration is available.[168] In this procedure, the doctor dilates the cervix and scrapes the uterine wall using sharp metal curettes.[169] The risks associated with dilation and curettage, such as puncturing the uterine wall and infection, are reduced by using the vacuum aspiration method.[170]

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161. *See* Mitchell D. Creinen & Elizabeth Aubény, *Medical Abortion in Early Pregnancy* (explaining the history and technique of medical abortion), *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 91, 91.

162. *Id.* at 98–99. However, it is important to note that the surgical method may be preferable for women with pregnancies over forty-nine days' gestation. *Id.* at 99. Gestational age is calculated "from the first day of the last menstrual period . . . or 2 weeks before the estimated date of conception." Henshaw, *supra* note 84, at 17.

163. Creinen & Aubény, *supra* note 161, at 97. Furthermore, "[w]omen are not optimal candidates for medical abortion if they do not wish to participate in their abortion or take responsibility for their care, are anxious to have the abortion over quickly, cannot return for follow-up visits, or cannot understand the instructions because of language or comprehension barriers." *Id.*

164. *Id.*

165. *See generally* Creinen & Aubény, *supra* note 161, at 91; Jerry Edwards et al., *Surgical Abortion in the First Trimester* (explaining medical and surgical abortion in the earliest stages of pregnancy), *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 107.

166. *See* WORLD HEALTH ORG., *supra* note 11, at 32 (explaining the vacuum aspiration method); *see also* Stenberg v. Carhart, 530 U.S. 914, 923 (2000) (explaining that vacuum aspiration is a particularly safe procedure).

167. *See* Edwards et al., *supra* note 165, at 111–12 (describing the vacuum aspiration procedure).

168. Carole Joffe, *Abortion in Historical Perspective*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 3, 5.

169. *Id.*; *see also* JONATHAN B. IMBER, ABORTION AND THE PRIVATE PRACTICE OF MEDICINE 58 (1986) (noting that prior to 1973, dilation and curettage was the most frequently used method of surgical abortion but the vacuum aspirator method has since proven safer).

170. IMBER, *supra* note 169, at 58.

2. After the First Trimester

In second trimester abortions, generally at thirteen to twenty-four weeks gestation, the safest procedure is dilation and evacuation ("D & E").[171] In this procedure, a doctor dilates the woman's cervix, sometimes over a two-day period.[172] The use of dilators for the day or two prior to the surgical procedure may cause fetal death.[173] After dilation, the doctor uses forceps to extract the contents of the uterus; this procedure requires insertion of the forceps repeatedly unless an intact D & E is performed.[174] With an intact D & E, the doctor extracts the fetus intact, not in separated parts.[175] An intact D & E is a safer procedure because it is less likely to puncture the uterine wall or cause infection by repeated instrument passes.[176] Removing the fetus intact allows a physician to examine fetal abnormalities, and patients may find comfort in seeing the intact fetus.[177] D & E offers an abortion technique that is relatively comfortable, private, safe, and not cost prohibitive.[178] Of the 1% of abortions performed in the United States after twenty weeks gestation, 80% of them are performed using both intact and non-intact D & E, leaving 0.2% of all abortions to other late term methods.[179]

Doctors can also use the labor-induction method after the first trimester, although most medical professionals agree that the D & E

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171. W. Martin Haskell, *Surgical Abortion After the First Trimester*, *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 123–24 [hereinafter Haskell, *Surgical Abortion*]; *see also* Stenberg v. Carhart, 530 U.S. 914, 924 (2000) ("The most commonly used procedure is called dilation and evacuation."); Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortion* (explaining that another procedure generally is performed after twenty weeks gestational age, before which D & E usually is performed), *reprinted in* 139 CONG. REC. E1092 (daily ed. Apr. 29, 1993).

172. Haskell, *Surgical Abortion*, *supra* note 171, at 127–28. The cervix must be dilated so the fetal skull, the largest part of the fetus, can pass through. *Id.* Following the *Roe* decision, mortality rates associated with D & E dropped from 10.4 per 100,000 (for the years 1972 to 1976) to 3.3 per 100,000 (for the years 1977 to 1982). *Id.* at 124.

173. *Id.* at 131. *See generally Stenberg*, 530 U.S. at 924 (explaining the details of the D & E procedure).

174. Haskell, *Surgical Abortion*, *supra* note 171, at 135.

175. *Id.*

176. *Id.*

177. *Id.* at 136 ("Intactness allows unhampered evaluation of structural abnormalities and can be an aid to patients grieving a wanted pregnancy by providing the opportunity for a final act of bonding.").

178. *Id.* at 137.

179. *Id.* at 123. However, no one is exactly sure of statistical numbers showing the frequency of this or any other abortion procedure. *See Media Matters: Partial Truths* (PBS television broadcast, Jan. 1997) (discussing the biases of the news media in reporting on abortion), *transcript available at* http://www.pbs.org/wnet/mediamatters99/transcript2.html (last visited June 16, 2004).

procedure is safer.[180] For labor induction, doctors administer a medication that causes labor to begin.[181] Usually the fetus is aborted within twenty-four hours, although studies show that the length of time varies.[182] The risks associated with labor induction include damage to the uterus and cervix, hemorrhaging, infection, and failed induction.[183]

Hysterotomy is another method available beyond the first trimester, although doctors almost never use this method because of its high mortality rate.[184] In layman's terms, hysterotomy is like a pre-term caesarian section.[185] D & E usually is a safer choice unless there is an emergency situation.[186]

The abortion method at issue in *Stenberg v. Carhart* and the PBABA is called dilation and extraction ("D & X").[187] It is nearly identical to D & E except that D & X is used when the fetal skull is too large to fit through the cervix, so the doctor drains the fluid in the skull before completing the intact D & E.[188]

3. *Stenberg* and the "Partial Birth" Abortion

The Nebraska statute in *Stenberg* focused on the abortion method of D & X.[189] In D & X, a doctor pulls the fetal body through the cervix, then removes the contents of the fetal skull and continues to perform a

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180. Paul D. Blumenthal et al., *Abortion by Labor Induction* ("Compared to induction abortion, dilation and evacuation (D&E) has generally been recognized as the safest and most expeditious means of pregnancy termination for similar gestational ages, especially prior to 20 weeks."), *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 139.

181. *Id.* at 143–45 (explaining some of the various medications used to induce labor, including hypertonic saline, hyperosmolar urea, oxytocin, and prostaglandins).

182. *Id.* at 144.

183. *Id.*

184. Haskell, *Surgical Abortion*, *supra* note 171, at 126 (noting that fatality rates are thirteen times higher for hysterotomy). *See generally* Janeen F. Berkowitz, Stenberg v. Carhart*: Women Retain Their Right To Choose*, 91 J. CRIM. L. & CRIMINOLOGY 337, 354 (2000) (explaining the hysterotomy and the hysterectomy procedures).

185. *See* Karen E. Walther, *Partial-Birth Abortion: Should Moral Judgment Prevail over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693, 697–701 (2000) (explaining the various abortion procedures).

186. Haskell, *Surgical Abortion*, *supra* note 171, at 126 (explaining that "hysterotomy/hysterectomy may be the best choice in life-threatening medical crises such as unremitting hemorrhage associated with placenta accreta, massive disseminated intravascular coagulation (DIC), or severe forms of preemclapsia").

187. *See generally infra* Part II.B.3 (explaining D & X and its application in *Stenberg*).

188. *See generally infra* note 190 (noting the description of D & X used by the Supreme Court).

189. *See* Stenberg v. Carhart, 530 U.S. 914, 928 (2000).

delivery of a dead but intact fetus.[190] This procedure commonly is known as "partial birth" abortion, although almost all medical books and journals do not use the term.[191] Instead, the term emerged in the 1990s, when abortion opponents used the term "partial birth" abortion to describe the D & X method and promote their viewpoint.[192]

In *Stenberg*, a five-member majority of the Supreme Court held a Nebraska statute banning partial birth abortion unconstitutional.[193] The

190. *Id.* (noting a statement issued by the American College of Obstetricians and Gynecologists Executive Board and describing the procedure as "partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus").

191. Gail Glidewell, Note, *"Partial Birth" Abortion and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?*, 28 FORDHAM URB. L.J. 1089, 1095 (2001) (stating that "'partial birth' abortion . . . is not a medically recognized term" (citing Planned Parenthood of S. Ariz., Inc. v. Woods, 982 F. Supp. 1369, 1376 (D. Ariz. 1997))). *But see* MERRIAM-WEBSTER MEDICAL DICTIONARY (2003) (defining "partial-birth abortion" as "an abortion in the second or third trimester of pregnancy in which the death of the fetus is induced after it has passed partway through the birth canal"), *available at* http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=partial-birth%20abortion (last visited June 16, 2004).

192. Glidewell, *supra* note 191, at 1095. To promote opposition to abortion, abortion opponents also have asked questions such as, "Is little Samuel's hand the hand of a person . . . or is it the hand of a piece of property?" Sheryl Gay Stolberg, *Senate Approves Bill To Prohibit Type of Abortion*, N.Y. TIMES, Oct. 23, 2003, at A32, *available at* LEXIS, News Library, The New York Times File; *see also* PRO-LIFE AM., HOMEPAGE—FACTS ON ABORTION, *at* http://www.prolife.com (last visited Apr. 12, 2004) (publishing pictures of the various stages of fetal development to defend the "pro-life" standpoint). The National Right to Life organization equates the media's use of the phrase "partial birth abortion" to define a particular abortion procedure with the use of the term "heart attack" to "define myocardial infarction." Letter from Douglas Johnson, Legislative Director, National Right to Life Committee, The Partial Birth Abortion Ban Act—Misconceptions and Realities (Nov. 5, 2003) [hereinafter Johnson Letter], *reprinted at* NAT'L RIGHT TO LIFE, THE PARTIAL BIRTH ABORTION BAN ACT—MISCONCEPTIONS AND REALITIES, *at* http://www.nrlc.org/abortion/pba/PBAall110403.html (last visited Apr. 12, 2004).

193. *Stenberg*, 530 U.S. at 922. Justice Breyer delivered the opinion of the Court, which Justices Stevens, O'Connor, Souter, and Ginsburg joined. *Id.* at 919. Justices Stevens, O'Connor, and Ginsburg filed concurring opinions. *Id.* Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas filed dissenting opinions. *Id.* at 919. Justice Stevens's concurrence focused on upholding the central tenants of *Roe*. *Id.* at 946 (Stevens, J., concurring). In addition, Justice Stevens stated that "it [is] 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." *Id.* (Stevens, J., concurring). Justice Ginsburg emphasized in her concurrence that the banned procedure was not any more gruesome than the procedures permitted by the State and therefore could not be banned. *Id.* at 951 (Ginsburg, J., concurring). Chief Justice Rehnquist dissented, briefly arguing that *Casey* was wrongly decided and then concurring with Justice Kennedy's and Justice Thomas's dissents. *Id.* at 952 (Rehnquist, C.J., dissenting). Justice Scalia dissented, reiterating his disagreement with *Casey* and further explaining that the "undue burden" standard was misapplied here. *Id.* at 953–56 (Scalia, J., dissenting). Justice Kennedy also dissented, focusing his argument on Nebraska's right, under *Casey*, to value the potential life of the fetus. *Id.* at 957 (Kennedy, J., dissenting). Justice Thomas's dissent was premised on his opinion that

Court listed two reasons for finding the law unconstitutional: first, the law lacked a proper exception to provide for the health of the woman; and second, the language of the law applied to both D & X and D & E procedures and therefore posed an undue burden on a woman's right to choose the D & E procedure.[194] The Court began by noting that *Casey* requires that all abortion regulations, whether pre- or post viability, include a health exception.[195] Including a health exception would not hinder the State's articulated goals of "prevent[ing] cruelty to partially born children" or "preserv[ing] the integrity of the medical profession," the Court explained.[196] However, the State of Nebraska proffered eight reasons why its statute did not need a health exception, each of which the Court found insufficient.[197]

Nebraska first argued that its statute did not need a health exception because women rarely use the procedure.[198] The Court, however, rejected this argument, explaining that a state cannot legislate against a particular treatment simply by maintaining that most people do not need it.[199] Second, Nebraska contended that very few doctors use D & X.[200] The Court responded that the number of doctors who perform this abortion method is not related to whether it is necessary for the health of the woman.[201] Third, Nebraska argued that D & E and labor induction are always safe alternative procedures.[202] However, the Court deferred to the record and amicus briefs maintaining that there were times when D & X was a safer procedure for particular women.[203] Fourth, Nebraska asserted that banning the procedure would not increase the

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Roe was wrongly decided and that the Court here misapplied the *Casey* standard. *Id.* at 980–81 (Thomas, J., dissenting).

194. *Id.* at 930.

195. *Id. See generally supra* Part II.A.3 (discussing Casey).

196. Brief for Petitioners at 48, *Stenberg* (No. 99-880).

197. *Stenberg*, 530 U.S. at 933–34.

198. *Id.* at 933.

199. *Id.* at 934.

200. *Id.* at 933.

201. *Id.* at 934.

202. *Id.* at 933.

203. *Id.* at 934; *see* Amicus Brief of American College of Obstetricians et al. in Support of Respondent at 22–23, *Stenberg* (No. 94-830) [hereinafter ACOG Brief] ("D & X may also be the most appropriate abortion method in the presence of certain fetal . . . abnormalities, such as hydrocephalus because it entails reducing the size of the fetal skull 'to allow a smaller diameter to pass through the cervix, thus reducing risk of cervical injury.'"), *available at* 2000 WL 340117; *see also* Amicus Brief of NARAL Foundation et al. at 26, *Stenberg* (No. 94-830) [hereinafter NARAL Brief] (emphasizing that "[t]he right to choose to have an abortion includes the right to choose the safest procedure available for each individual woman"), *available at* 2000 WL 340123.

risk of abortion complications.[204] Contrary to Nebraska's assertions, the Court relied on expert testimony showing that banning the procedure could increase a woman's risk of several rare abortion complications.[205] Fifth, Nebraska claimed that D & X might create some risks that are not present in other procedures.[206] Conversely, Dr. Carhart's amicus brief claimed that other procedures involve similar or greater risks that also arise from sharp instruments in the uterus.[207] Sixth, the State argued there were no medical studies showing the safety of the D & X procedure.[208] The Court did not disagree with the argument concerning whether studies had been conducted on the topic of D & X, but the fact that there were no studies did not persuade the Court to permit the prohibition of the procedure.[209] Seventh, Nebraska directed the Court's attention to an American Medical Association policy statement that confirmed that there were no times when D & X would be the only appropriate medical abortion procedure.[210] In response, the Court simply stated that the law required a health exception because there was conflicting medical testimony on the issue.[211] Lastly, Nebraska put forth a statement by the American College of Obstetricians and Gynecologists claiming that circumstances never require D & X as the only option to save the woman's life.[212]

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204. *Stenberg*, 530 U.S. at 933.

205. *Id.* at 934–35. *See generally supra* note 203 and accompanying text (noting the risks associated with prohibiting D & X).

206. *Stenberg*, 530 U.S. at 933.

207. *Id.* at 935. The brief discusses the risks associated with changing the position of the fetus, with performing a nonintact D & E, and with the amount of dilation required to remove the fetus intact. ACOG Brief, *supra* note 203, at 23–24. However, as the brief further explains, Dr. Carhart did not change the position of the fetus during a D & X. *Id.* Additionally, the amount of dilation is not dangerous in and of itself because it is still a lesser dilation than is required during birth. *Id.*

208. *Stenberg*, 530 U.S. at 933.

209. *Id.* at 935.

210. *Id.* at 934. For the complete language of the American Medical Association policy, see AM. MED. ASS'N, LATE TERM PREGNANCY TERMINATION TECHNIQUES (AMA Policy H-5.982 1997), *available at* http://www.ama-assn.org (last visited May 18, 2004). The policy states,

> According to the scientific literature, there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion, and ethical concerns have been raised about intact D&X. The AMA recommends that the procedure not be used unless alternative procedures pose materially greater risk to the woman. The physician must, however, retain the discretion to make that judgment, acting within standards of good medical practice and in the best interest of the patient.

Id.

211. *Stenberg*, 530 U.S. at 935. The Court commented that although the beginning of the AMA statement steered away from allowing D & X, the remainder of the statement provided an important exception for when alternatives posed greater risks to the woman. *Id.*

212. *Id.* at 934.

The Court replied that because the testimony was inconclusive concerning whether D & X was *ever* a better option for a woman seeking an abortion, the Court could not proscribe it without a health exception.[213] Thus, Nebraska failed in arguing that the late term abortion ban was valid as written.[214]

The Court in *Stenberg* rejected the notion that the Nebraska law did not need a health exception and in fact used the health requirement reasoning from *Casey*.[215] In *Casey*, the Court defined the health exception as "necessary, in appropriate medical judgment" for the health of the woman seeking the abortion.[216] Yet, this phrase does not mean that all doctors must agree on whether a D & X abortion is necessary for a particular woman.[217] Instead, the Court commented that it must rule with the uncertainty of the medical field in mind; as the Court noted, the worst case scenario was that the exception proved unnecessary.[218]

The Supreme Court also held that the Nebraska law was unconstitutional because, using the *Casey* standard, it imposed an undue burden on a woman choosing abortion.[219] The Court explained that the statute imposed an undue burden because the language of the statute rendered it applicable to both the D & X and D & E procedures.[220] The dissent argued that the legislature intended the law to apply only to the D & X procedure and, therefore, it did not unduly burden a woman's

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213. *Id.* at 937.

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

Id.

214. *See generally supra* notes 195–213 (explaining the step-by-step analysis and rejection of Nebraska's arguments).

215. *Stenberg*, 530 U.S. at 938.

216. Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

217. *See* Barry L. Bostrom, 16 ISSUES L. & MED. 179, 181 (2000) (stating that "'necessary, in appropriate medical judgment, for the . . . health of the mother' cannot refer to absolute proof or require unanimity of medical opinion" (citation omitted)).

218. *See id.* (discussing the *Stenberg* majority's reasoning about the uncertainty of medical evidence).

219. *Stenberg*, 530 U.S. at 938; *see also supra* notes 139–59 (discussing the Court's adoption of the undue burden standard in *Casey* and its application to all abortion prohibitions); *supra* note 157 and accompanying text (showing how the courts have maintained the undue burden standard since *Casey*).

220. *Stenberg*, 530 U.S. at 938.

right to choose the D & E procedure.[221] However, the majority rejected this argument, stating that the intent was irrelevant and that courts must evaluate statutes on their plain meaning.[222]

The Court further noted that the statute was overbroad because it did not explain adequately why the statute would not apply to D & E.[223] The Court noted that when a doctor performs D & E, the doctor will pull a limb of a still-living fetus through the cervix, fulfilling the "substantial portion" requirement the law prohibits.[224] The Nebraska law did not define "substantial portion," and the Court declined to rely on the argument of the Attorney General that it meant fetal body "up to the head."[225] Intact D & E is nearly indistinguishable from D & X, the Court explained, and at times doctors prefer the D & X abortion method.[226] On the rare occasions that doctors perform the late term intact procedure, it is often used because a fetus has been found to have a disease that is incompatible with life outside the womb.[227] In sum, the Court stated that arguments for upholding the law did not explain how bringing the fetus through the vagina in D & X is a "delivery" while performing the same act in D & E is not.[228] Thus, Nebraska's arguments failed to persuade the majority that the Nebraska statute

221. *Id.* at 939 ("[T]he dissenters' argument that the law was generally intended to bar D & X can be both correct and irrelevant . . . . The plain language covers both procedures."); *see id.* at 989 (Thomas, J., dissenting) ("I think it is clear that the Nebraska statute does not prohibit the D & E procedure.").

222. *Id.* at 939.

223. *Id.* at 943 (stating that the language of the Nebraska statute seemed to apply to both D & X and D & E).

224. *Id.* at 939 (stating 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" (quoting the district court's opinion, Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1128 (D. Neb. 1998))). *See generally infra* notes 340–42 and accompanying text (describing the "substantial portion" requirement at issue in the PBABA).

225. *Id.* at 943 (stating that the Attorney General's interpretation of the statute, that the statute refers only to the fetal body "up to the head," is contrary to the "substantial portion" requirement of the statute).

226. *Id.* at 928–29.

227. *Id.* at 929 ("[I]ntact 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." (citing the district court's opinion *Carhart v. Stenberg*, 11 F. Supp. 2d at 1107, which quoted a report issued by the American Medical Association)); *see also* Haskell, *supra* note 171, at 124 (giving examples of fetal anomalies that may necessitate collapsing the skull of a fetus that otherwise could not sustain live outside the womb).

228. *Stenberg*, 530 U.S. at 944.

banning one method of abortion was constitutional and did not impose an undue burden on a woman's right to choose.[229]

4. Justice O'Connor's Concurrence in *Stenberg*

Justice O'Connor's concurrence echoed the majority, finding the Nebraska law inconsistent with *Casey*.[230] Justice O'Connor explicitly mentioned that an exception in the bill did not qualify as a health exception.[231] However, Justice O'Connor noted that other states enacted laws proscribing D & X in a constitutionally acceptable manner.[232] Justice O'Connor stated that she would uphold a ban on late term abortion procedures if the ban explicitly described the D & X procedure, prohibited only the D & X procedure, and included an exception for the life or health of the woman.[233] In effect, Justice O'Connor gave legislators a blueprint for a constitutional ban on D & X.[234]

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229. *Id.* at 945–46 ("All those who perform abortion procedures using that method must fear prosecution, conviction and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.").

230. *Id.* at 947 (O'Connor, J., concurring). *See generally supra* notes 139–59 (discussing *Casey*).

231. *Stenberg*, 530 U.S. at 948 (O'Connor, J., concurring) (maintaining that the law's language excepting those procedures "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury" was not sufficient to render the law constitutional (quoting NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999))). Justice O'Connor does not explain what would constitute a proper health exception, although many have put forth ideas. *See infra* notes 492–96 and accompanying text (explaining what might constitute a proper health exception).

232. *Stenberg*, 530 U.S. at 950 (O'Connor, J., concurring). Kansas has a statute banning "partial birth abortion on a viable fetus." KAN. STAT. ANN. § 65-6721 (2002). The statute's language specifically excepts vacuum aspiration ("suction curettage" in the language of the statute), D & C, and D & E. *Id.* Utah has a similar provision excepting the same three abortion procedures from the prohibition. UTAH CODE ANN. § 76-7-310.5 (2003). Montana takes a different approach and lists the step-by-step abortion process to explain the exact procedure that is prohibited. MONT. CODE ANN. § 50-20-401 (2003).

233. *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring) (stating that "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").

234. *Id.* at 951 (O'Connor, J., concurring); *see* CHEMERINSKY, PRINCIPLES AND POLICIES, *supra* note 31, at 807 ("Through her concurrence, Justice O'Connor sent a message to legislators about how to draft a constitutional ban."). The vote in *Stenberg* was 5-4; thus, a legislative attempt to rewrite a prohibition on abortion would be found constitutional if Justice O'Connor were to vote with the dissenters from *Stenberg*. *See Stenberg*, 530 U.S. at 922. In contrast to Justice O'Connor's opinion, Justices Souter, Ginsburg, Breyer, and Stevens did not make such explicit statements concerning the possibility of upholding a law proscribing D & X. *Id.* at 920. In fact, Justice Ginsburg's concurrence, in which Justice Stevens joined, heeded a warning from Judge Posner that the ban on abortion procedures is an attempt to slowly remove the right to privacy encompassing abortion safeguarded by *Roe v. Wade*. *Id.* at 952 (Ginsburg, J., concurring) (stating that bans on abortion procedures are intended to "chip away at the private choice shielded

III. DISCUSSION

In 2003, after several unsuccessful attempts, Congress finally passed the PBABA, which prohibits a physician from performing the act commonly known as "partial birth" abortion.[235] Specifically, this Act prohibits the late term D & X procedure that requires a physician to intentionally deliver a living fetus through the cervix to perform an act that kills the fetus.[236] The law exempts any termination that is necessary to save a woman's life arising from any physical condition.[237] This Part first details the history of the PBABA in Congress, including the findings from four previous attempts to pass a similar bill.[238] Next, this Part explains selected state law history leading up to the PBABA.[239] Last, this Part examines and explores the PBABA and each of its components.[240]

A. History: Congressional Precedent

One or both houses of Congress passed bills similar to the PBABA in each of the four previous congressional sessions, and President Clinton twice vetoed the bills.[241] Representative Charles T. Canady from

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by *Roe v. Wade*"); *see also* Hope Clinic v. Ryan, 195 F.3d 857, 881–82 (7th Cir. 1999) (Posner, J., dissenting) (asserting that the ban on D & X was in place "not because the procedure kills the fetus, not because it risks worse complications for the woman than alterative procedures would do, not because it is a crueler or more painful or more disgusting method of terminating a pregnancy," but because the State wished to prohibit abortion), *vacated* by 530 U.S. 1271 (2000).

235. Ron Hutcheson, *Bush Oks Law Limiting Abortion; Supporters Cheered, but the Law Banning a Controversial Type of Late-term Abortion Procedure Was Quickly Challenged in Neb., N.Y. and Calif.*, PHILA. INQ., Nov. 6, 2003, at A01, *available at* 2003 WL 66945843.

236. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206–07 (to be codified at 18 U.S.C. § 1531(b)(1)(A)). The statute prohibits the procedure whereby a doctor

> deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

Id. See generally supra Part II.B.2 (explaining the D & X procedure).

237. Partial-Birth Abortion Ban Act § 3(a) (providing an exemption for an abortion "that is necessary to save the life of a [woman] 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").

238. *See infra* Part III.A (discussing the congressional precedent for the PBABA).

239. *See infra* Part III.B (discussing state law precedent for the PBABA).

240. *See infra* Part III.C (discussing components of the PBABA).

241. *See* Partial-Birth Abortion Ban Act of 2002, H.R. 4965, 107th Cong. § 1531 (2002) (passed by the House of Representatives); Partial-Birth Abortion Ban Act of 2000, H.R. 3660, 106th Cong. § 1531 (2000) (passed by the House of Representatives); Partial-Birth Abortion Ban Act of 1999, S. 1692, 106th Cong. § 1531 (1999) (passed by the Senate); Partial-Birth Abortion

Florida first introduced the bill known as the "Partial-Birth Abortion Ban Act of 1995."[242] Media attention accompanied the bill as it went through committees in both houses of Congress, analyzing whether Congress could override a presidential veto.[243] Ultimately, the House passed the bill by a veto-proof margin of 288-139,[244] but the Senate was unable to pass it by such a margin, voting only 54-44 to pass the bill.[245] President Clinton vetoed this bill, contending that it did not contain a proper exception for the life and health of the woman seeking an abortion.[246] Opponents of the bill applauded President Clinton's veto, saying it would protect a woman's right to choose and prevent "back alley" abortions.[247] However, others argued that if Congress added President Clinton's health exception to the law, the law would allow

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Ban Act of 1997, H.R. 1122, 105th Cong. § 1531 (1997) (vetoed by President Clinton); Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. § 1531 (1996) (vetoed by President Clinton).

242. Bill Summary & Status, H.R. 1122, 105th Cong. (1997), *at* http://thomas.loc.gov.

243. *See* Ann Maclean Massie, *So-called "Partial-Birth Abortion" Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 323 n.97 (1998) (listing articles that discuss past versions of the PBABA).

244. Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 756, *at* http://clerk.house.gov/cgi-bin/vote.exe?year=1995&rollnumber=756 (last visited May 18, 2004).

245. Senate Bill Clerk, U.S. Senate Roll Call Votes 104th Congress, 1st Session, *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=1&vote=00596 (last visited May 17, 2004). *See generally* U.S. CONST. art. I, § 7, cl. 2 (providing Congress the ability to override a presidential veto by a two-thirds vote of the members of both houses); Massie *supra* note 243, at 323–27 (explaining in detail the way the first two Partial-Birth Abortion Ban Acts were passed).

246. *See* Carol Jouzaitis, *Clinton Vetoes Late-term Abortion Curb*, CHI. TRIB., Apr. 11, 1996, at 3 (noting President Clinton's position against the bill because of its lack of a health exception), *available at* 1996 WL 2660913; *see also Alter Bill To Allow Late Abortion if Woman's Health at Risk, Clinton Asks*, CHI. TRIB., Feb. 29, 1996, at 8 [hereinafter *Alter Bill*] (paraphrasing President Clinton's writings that "he would support the measure if it were amended to make clear that the ban would not apply if a doctor considered the abortion method necessary to preserve the life of the woman or avert serious health consequences to the woman" (internal quotations omitted)), *available at* 1996 WL 2648091.

247. Ann Devroy, *Late-term Abortion Ban Vetoed; 'Small but Vulnerable' Group of Women Needs Procedure Clinton Says*, WASH. POST, Apr. 11, 1996, at S8 (noting that pro-choice groups applauded the President's veto in the wake of a congressional desire to return women to the "back alleys"), *available at* 1996 WL 3073599; *see also* Webster v. Reproductive Health Servs., 492 U.S. 490, 557 (1989) (Blackmun, J., concurring in part and dissenting in part) (warning that the result of regulating abortion would be "that every year hundreds of thousands of women, in desperation, would defy the law, and place their health and safety in the unclean and unsympathetic hands of back-alley abortionists, or they would attempt to perform abortions upon themselves, with disastrous results"); Harris v. McRae, 448 U.S. 297, 338 (1980) (Marshall, J. dissenting) (commenting that if women are not permitted to get the abortions they need, they will have to resort to "back alley butchers" or attempt to induce abortion on themselves using "crude and dangerous methods").

late term abortions to be "performed for depression and other purely psychological reasons and on healthy underage mothers."[248]

The second time both houses passed the bill, it suffered the same fate: the Senate was unable to provide the two-thirds vote required to overturn a presidential veto.[249] Again, President Clinton vetoed the bill because it lacked a health exception.[250]

The third attempt at passing a form of this controversial bill came in the 106th Congress, when both Houses of Congress passed the bill but in different versions.[251] The Senate version of the bill, passed in 1999 at the first session of the term, included "Findings" sections agreeing to uphold the *Roe* decision.[252] The House version had no "Findings"

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248. *Alter Bill*, *supra* note 246 (quoting the anti-abortion group, the National Right to Life Committee); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992) (noting that prohibitions on abortion post viability are permitted "provided the life and or health of the mother is not at stake").

249. Bill Summary & Status, H.R. 1122, 105th Cong. (1997), *at* http://thomas.loc.gov (showing all major committee and full house votes pertaining to the bill). This timeline also shows that Congress could not override the Presidential veto. *Id.* The House of Representatives voted initially to pass the bill 295-136 and then was able to override the veto 295-131. *Id.* The Senate initially voted 64-36 to pass the bill. *Id.* With the identical vote after the Presidential veto, the Senate was three votes short of the ability to override a veto. *Id.* Representative Gerald Solomon introduced the bill. *Id.*

250. Alissa J. Rubin, *Bill To Ban Abortion Method Vetoed*, L.A. TIMES, Oct. 11, 1997, at A22 (noting the statute's lack of a health exception), *available at* 1997 WL 13988747.

251. *See* An Act To Amend Title 18, United States Code, To Ban Partial-Birth Abortions, H.R. 3660, 106th Cong. (2000) (providing the House version of the Partial-Birth Abortion Ban Act of 2000, passed in the second session of the 106th term), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h3660eh.txt.pdf (last visited May 18, 2004); An Act To Amend Title 18, United States Code, To Ban Partial-Birth Abortions, S. 1692, 106th Cong. (1999) (providing the Senate version of the Partial-Birth Abortion Ban Act of 1999, passed in the first session of the 106th term, including a findings section that had not been included in either of the prior two bills sent to President Clinton), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s1692es.txt.pdf (last visited May 18, 2004). The findings section makes explicit reference to a commitment to uphold the *Roe* decision. S. 1692. Senator Rick Santorum sponsored the bill. Bill Summary & Status, S. 1692, 106th Cong. (1999), *at* http://thomas.loc.gov.

252. S. 1692 §§ 3–5, at 4–6.

> SEC. 3. SENSE OF CONGRESS CONCERNING ROE V. WADE AND PARTIAL BIRTH ABORTION BANS.
>
> (a) FINDINGS- Congress finds that—
>
> (1) abortion has been a legal and constitutionally protected medical procedure throughout the United States since the Supreme Court decision in *Roe v. Wade* (410 U.S. 113 (1973)); and
>
> (2) no partial birth abortion ban shall apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury.
>
> (b) SENSE OF CONGRESS— It is the sense of the Congress that partial birth abortions are horrific and gruesome procedures that should be banned.

section.[253] Public consternation about the bill did not die out as the presidential campaigns increased in the 2000 election year.[254]

The fourth attempt to pass a version of this bill occurred in the 107th Congress in 2002.[255] This House bill, like its Senate predecessor from the 106th Congress, contained a findings section, though this time the section was far more extensive than the brief paragraphs[256] offered by

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SEC. 4. SENSE OF CONGRESS CONCERNING A WOMAN'S LIFE AND HEALTH.

It is the sense of the Congress that, consistent with the rulings of the Supreme Court, a woman's life and health must always be protected in any reproductive health legislation passed by Congress.

SEC. 5. SENSE OF CONGRESS CONCERNING ROE V. WADE.

(a) FINDINGS- Congress finds that—

(1) reproductive rights are central to the ability of women to exercise their full rights under Federal and State law;

(2) abortion has been a legal and constitutionally protected medical procedure throughout the United States since the Supreme Court decision in *Roe v. Wade* (410 U.S. 113 (1973));

(3) the 1973 Supreme Court decision in *Roe v. Wade* established constitutionally based limits on the power of States to restrict the right of a woman to choose to terminate a pregnancy; and

(4) women should not be forced into illegal and dangerous abortions as they often were prior to the *Roe v. Wade* decision.

(b) SENSE OF CONGRESS- It is the sense of the Congress that—

(1) *Roe v. Wade* was an appropriate decision and secures an important constitutional right; and

(2) such decision should not be overturned.

Id.

253. H.R. 3660; *see also* 146 CONG. REC. H1773 (daily ed. Apr. 5, 2000) (statement of Rep. Lee) (noting Congresswoman Jackson Lee's desire to amend the bill and her statement that she was "distressed that this committee refused to even consider any amendments to such a momentous piece of legislation that would essentially eradicate a women's [sic] freedom of choice as we have known it for over 25 years"); 146 CONG. REC. H1772 (daily ed. Apr. 5, 2000) (statement of Rep. Paul) (noting Congressman Paul's disagreement with the *Roe* decision, stating, "[W]e are indeed on the slippery slope toward euthanasia and human experimentation. Although the real problem lies within the hearts and minds of the people, the legal problems of protecting life stems from the ill-advised *Roe v. Wade* ruling, a ruling that constitutionally should never have occurred.").

254. *See generally* Ellen Goodman, Editorial, *The Votes We Need To Count in November*, BOSTON GLOBE, June 30, 2000, at A23 (discussing the importance of the late term abortion issue in the 2000 presidential election), *available at* 2000 WL 3332708; Loraine Kenny, Editorial, *My Views Distorted on 'Viable' Abortion*, WALL. ST. J., May 15, 2000, at A51 (responding to other letters to the editor defining the word "viable" as it pertains to abortion), *available at* 2000 WL-WSJ 3029396; Mark Salo, Opinion, *The Abortion Battle Is Not About Substance*, SAN DIEGO UNION TRIB., Apr. 25, 2000, at B7:2 (expressing concern over the not-yet-decided *Stenberg* decision's ability to overturn *Roe*), *available at* 2000 WL 13961097.

255. *See* Partial-Birth Abortion Ban Act of 2002, H.R. 4965, 107th Cong. §1531 (2002).

256. *See supra* note 252 and accompanying text (discussing the previous findings sections).

the Senate in the 106th Congress.[257] However, the session ended before the Senate voted on the 2002 bill.[258]

Finally, the 108th Congress passed the PBABA with the necessary votes to override a presidential veto in the House but not the Senate, though no override was necessary as President Bush signed the bill into law.[259] The PBABA included findings nearly identical to those in the 2002 House bill.[260]

B. History: State Law Precedent

As the congressional debate carried on regarding a ban on the D & X procedure, thirty state legislatures banned the late term abortion.[261] Prior to the *Stenberg* decision, the federal circuits were split as to the constitutionality of these laws.[262] The Sixth and Eighth Circuits held the bans unconstitutional, while the Seventh and Fourth Circuits held the laws acceptable.[263] The Supreme Court's holding in *Stenberg* overruled the Seventh Circuit's decision.[264] However, because the Fourth Circuit had never determined whether the State's partial birth abortion act was applicable to the defendants in the case, *Stenberg*

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257. H.R. 4965, 107th Cong. (2002).

258. Bill Summary & Status, H.R. 4965, 107th Cong. (2002), *at* http://thomas.loc.gov (noting that the Senate received the bill, but that no other action was taken).

259. Bill Summary & Status, S. 3, 108th Congress (2003), *at* http://thomas.loc.gov.

260. *Compare* 18 U.S.C. § 1531 (West Supp. 2003), *with* H.R. 4965, 107th Cong. (2002).

261. *See* Walther, *supra* note 185, at 707 nn.120–21 (listing states that have bans using the nonmedical phrase "partial-birth abortion" as of 2000). The states listed in Walther's article are as follows: Alaska, Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Vermont. *Id.* Some of these states have since changed the language of their laws to exclude the phrase "partial-birth." For example, Missouri's law currently is the Infant's Protection Act, MO. REV. STAT. § 565.300 (Supp. 2002), Montana's law is the Control and Practice of Abortion, MONT. CODE ANN. § 50-20-109 (1999), and Vermont does not have a law pertaining to "partial-birth" abortion.

262. Walther, *supra* note 185, at 708.

263. *Compare* Planned Parenthood of Greater Iowa, Inc. v. Miller, 195 F.3d 386, 388 (8th Cir. 1999) (holding unconstitutional an Iowa ban on "partial birth abortion"), *and* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 190 (6th Cir. 1997) (holding unconstitutional an Ohio ban on the D & X procedure mentioned by name in the statute), *with* Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326, 332 (4th Cir. 1998) (granting deference to the legislature's ability to draft a bill that is constitutional and therefore upholding the bill, but noting that the procedures the doctors in *Gilmore* provided were not those banned by the law), *and* Hope Clinic v. Ryan, 195 F.3d 857, 861 (7th Cir. 1999) (finding that the Illinois, Indiana, and Wisconsin laws against partial birth abortions "can be applied in a constitutional manner"), *overruled by* Stenberg v. Carhart, 530 U.S. 914 (2000).

264. *See* Stenberg v. Carhart, 530 U.S. 914, 951 (2000), *overruling* Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999)). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

technically did not overrule the Fourth Circuit.[265] Post-*Stenberg*, state legislative attempts to ban abortion procedures decreased by eighty-four percent.[266]

Most recently, the Sixth Circuit upheld an Ohio ban on partial birth abortion.[267] This was the first challenge of a state D & X ban since the PBABA became law.[268] The Sixth Circuit carefully reviewed the requirements of *Roe*, *Casey*, and *Stenberg* and concluded that the Ohio statute's health exception, which did not provide explicitly for mental health,[269] was adequate,[270] and the law properly differentiated between the D & E and D & X procedures.[271]

C. *The Partial-Birth Abortion Ban Act of 2003*

1. Text of the Law

The PBABA prohibits any physician from performing a "partial-birth abortion" while affecting interstate commerce.[272] The statute defines a

265. *Gilmore*, 144 F.3d at 332 (stating that the plaintiff doctors had not established that the banned procedure was the procedure they performed and vacating the injunction against the ban).

266. NARAL & NARAL FOUND., WHO DECIDES?: A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS, at x (10th ed. 2001) (noting that in 2000 there were nine abortion-related bills introduced, as compared to fifty-eight such bills introduced in 1999). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

267. Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436, 438 (6th Cir. 2003).

268. *Id.*

269. *See* OHIO REV. CODE ANN. § 2919.151(B) (2000). *But cf.* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 209 (6th Cir. 1997) (representing the last time the Sixth Circuit looked at a similar law and found it unconstitutional because the health exception did not contain an exception for the mental health of the woman seeking the abortion).

270. *Taft*, 353 F.3d at 449 (noting that the Ohio law permits the procedure when "necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function" (quoting OHIO REV. CODE ANN. § 2919.151(B)–(C))). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion); *supra* Part II.A.2 (discussing the *Roe* opinion); *supra* Part II.A.3 (discussing the *Casey* opinion).

271. *See Taft*, 353 F.3d at 451 (listing the exact steps and sequential order of a doctor's actions in performing the banned partial birth abortion procedure). *See generally supra* Part II.B.3 (explaining the D & X procedure).

272. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206 (listing the prohibition as applying when a physician "in or affecting interstate or foreign commerce, knowingly performs a partial birth abortion and thereby kills a human fetus"). The Commerce Clause states that Congress has the power "[t]o regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8. Under the Commerce Clause, the federal government is permitted to pass laws involving an intercourse among the intermingling states. *See* CHEMERINSKY, POLICIES AND PRINCIPLES, *supra* note 31 (explaining the definitions of "Commerce" and "Among the States"). *But see* David B. Kopel and Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 105-06 (1997) (arguing that the Partial-Birth Abortion Ban Act of 1997 is not an appropriate use of Congress's power to control matters affecting interstate commerce).

partial birth abortion as a procedure in which a physician intentionally delivers a living fetus through the cervix until, in a breach position, only the head remains in the uterus, or, in a head-first presentation, the entire fetal skull is outside the body of the woman and the physician subsequently performs some act killing the live fetus.[273] The statute includes an exception for any "partial birth abortion that is necessary to save the life of a mother whose life is endangered by a *physical* disorder, *physical* illness, or *physical* injury."[274] Following the statute's definition of "physician"[275] and the penalties for violating the PBABA[276] is a section addressing "Congressional Findings."[277]

2. Findings of Congress

At the conclusion of the statutory language of the PBABA, Congress included a section of findings and declarations.[278] The Congressional Findings section follows statutory language that states that there is a "moral, medical, and ethical consensus" for prohibiting the late term abortion procedure at issue.[279] The findings section does not explain the moral or ethical arguments, but it does include multiple paragraphs

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273. Partial-Birth Abortion Ban Act § 3(a). The statute describes the act prohibited as occurring when a physician

> deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and . . . performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .

Id. In the breech position, the fetus's feet will be the first to come through the cervix, and in a head first position, the head comes through first. ARLENE EISENBERG ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING 237–38 (1996).

274. Partial-Birth Abortion Ban Act § 3(a) (emphasis added). The complete language of the statute states that "[t]his subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.*

275. *Id.* The PBABA defines "physician" as "a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform Abortions." *Id.*

276. *Id.* The penalties provided in the state include "money damages for all injuries, psychological and physical" and "statutory damages equal to three times the cost of the partial-birth abortion." *Id.*

277. *Id.*; *see also infra* Part III.C.2–3 (discussing the findings and declarations of Congress included in the PBABA).

278. Partial-Birth Abortion Ban Act § 2.

279. *Id.*; *see also infra* Part III.C.2–3 (discussing the findings and declarations of Congress included in the PBABA).

concerning the medical consensus.[280] In the PBABA, Congress took note of the *Stenberg* findings[281] but commented that extensive legislative hearings post-*Stenberg* came to the opposite conclusion: the D & X procedure is *never* necessary to save the life of a woman.[282] Congress further noted within the Congressional Findings section that the factual findings that the Supreme Court had been required to adopt in *Stenberg*, under the deferential standard of review, were "questionable."[283] Congress then dedicated five paragraphs of the Congressional Findings section to exploring the highly deferential standard that the Supreme Court should use in reviewing the legislative factual findings in the PBABA.[284] Congress specifically mentioned *Anderson v. Bessemer City*,[285] *Katzenbach v. Morgan*,[286] and *Turner*

280. Partial-Birth Abortion Ban Act § 2. The only ethics argument the findings section specifically addresses is the argument that physicians may confuse their ethical duties to "preserve and promote life" because in a partial birth abortion the doctor "acts directly against the physical life of a child." *Id.* § 2(14)(J). While other arguments are not addressed in the section, abortion opponents assert that abortion is morally wrong because a fetus is a person from the moment of conception. *See, e.g.*, John T. Noonan, Jr., *Abortion Is Morally Wrong*, *in* THE ABORTION CONTROVERSY: 25 YEARS AFTER *ROE V. WADE* 207 (Louis P. Pojman & Francis J. Beckwith eds., 1998). Others argue that abortion is immoral because the fetus belongs to the human species, and thus killing a fetus is the equivalent of a homicide. Philip Devine, *The Scope of the Prohibition Against Killing*, *in* THE ABORTION CONTROVERSY: 25 YEARS AFTER *ROE V. WADE*, *supra*, at 234, 236.

281. *See* Stenberg v. Carhart, 530 U.S. 914, 923 (2000) (noting that the Supreme Court drew upon the findings of the trial court, including testimony and medical texts that the court examined). The trial court concluded that there are times when the D & X procedure is preferred by physicians. Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1125 (D. Neb. 1998) (stating that "the D & X procedure has been shown by medical evidence to be the safest procedure used by mainstream medical professionals like Dr. Carhart in certain circumstances").

282. Partial-Birth Abortion Ban Act § 2(5).

> [S]ubstantial evidence presented at the *Stenberg* trial and overwhelming evidence presented and compiled at extensive congressional hearings, much of which was compiled after the district court hearing in *Stenberg*, and thus not included in the *Stenberg* trial record, demonstrates that a partial-birth abortion is *never* necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care.

Id. (emphasis added). *But see* Haskell, *Surgical Abortion*, *supra* note 171, at 135 (noting that the intact D & E procedure, D & X, is preferable because there are fewer instrument passes and therefore a decreased chance of infection or other complications).

283. Partial-Birth Abortion Ban Act § 2(7) ("Thus, in *Stenberg*, the United States Supreme Court was required to accept the very questionable findings issued by the district court judge . . . .").

284. *Id.* § 2(9)–(13).

285. Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985) (holding that a clearly erroneous standard of review does not allow the reviewing court to substitute its own judgment for that of the trial court).

286. Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (employing a highly deferential standard of review for congressional findings of fact relating to the Voting Rights Act of 1965).

Broadcasting Systems, Inc. v. FCC[287] in support of the standard that Congress wanted the Court to use in evaluating this legislation.[288]

Congress discussed the rule of law articulated in *Anderson* concerning the "clearly erroneous" standard of review.[289] At issue in *Anderson* was whether the Fourth Circuit correctly applied the "clearly erroneous" standard of review to a civil rights claim.[290] The petitioner applied for a job as a recreation director, and she believed that she was not hired for the position because she was a woman.[291] The trial court held in the petitioner's favor, concluding that based on its findings of fact, the petitioner was the most qualified candidate.[292] The appellate court held that the trial court's findings were "clearly erroneous" and reversed the decision based on its own findings of fact.[293] The Supreme Court held that the appellate court had misapplied the clearly erroneous standard and that the trial court's determinations were correct.[294] The Supreme Court reviewed the prominent case law on the clearly erroneous standard of review and concluded that it was highly deferential to the finder of fact.[295] Ultimately, the Court held that a reviewing court must accept the trial court's findings of fact unless the reviewing court has a "firm conviction" that the trial court's findings were clearly erroneous.[296] The reviewing court must not take on the task of the trial court even if, had it been sitting as the trier of fact, it would have decided the case differently.[297] Congress emphasized this

287. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) [hereinafter Turner I] (indicating that substantial deference be given to predictive judgments of Congress); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) [hereinafter Turner II] (using a highly deferential standard of review in holding that Congress may require cable companies to reserve channels for local broadcasting).

288. *See* Partial-Birth Abortion Ban Act § 2(6), (9), (11).

289. *Id.*

290. *Anderson*, 470 U.S. at 566.

291. *Id.* at 567.

292. *Id.* at 570 (stating that the "petitioner was the most qualified candidate, that the committee had been biased against hiring a woman, and that the committee's explanations for its choice of [another candidate] were pretextual").

293. *Id.* at 571.

294. *Id.* at 580–81.

295. *Id.* at 573.

296. *Id.* (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

297. *Id.* at 573–74 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." (citing United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949))).

deferential "clearly erroneous" standard of review when it included *Anderson* in the findings section of the PBABA.[298]

The next case Congress included in the PBABA's findings section, *Katzenbach*, dealt with the constitutionality of the Voting Rights Act of 1965's prohibition on states imposing a literacy requirement on voters.[299] The Supreme Court stated that it was Congress' responsibility to evaluate and weigh the competing interests of encouraging Spanish speakers to learn English and providing Spanish speakers access to their fundamental right to vote.[300] The Court further commented that it was not the place of the Supreme Court to review the conclusions Congress reached regarding these factors.[301] Ultimately, the Court held that the law was constitutional and deferred to congressional conclusions regarding the purpose of the statute.[302] Congress mentioned *Katzenbach* in the findings of the PBABA as an example of the highly deferential standard the Court used in reviewing other congressional determinations.[303]

The last cases the PBABA cites in the Congressional Findings section are the two *Turner Broadcasting Systems, Inc. v. FCC* cases ("*Turner I*" and "*Turner II*").[304] At issue in both *Turner* cases was the constitutionality of the "must carry" provision of the Cable Television Consumer Protection and Competition Act ("Cable Act"), which

298. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(6), 117 Stat. 1201, 1202.

299. Katzenbach v. Morgan, 384 U.S. 641, 643 (1966). *Katzenbach* quotes the entire statute at issue; however, the relevant portion is as follows: "Congress hereby declares that . . . it is necessary to prohibit the States from conditioning the right to vote of [persons educated in schools where the primary instruction was not in English] on ability to read, write, understand, or interpret any matter in the English Language." *Id.* at 643 n.1.

300. *Id.* at 655–56 ("Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting . . . it was Congress' prerogative to weigh these competing considerations." (footnote omitted)).

301. *Id.* at 653.

302. *Id.* at 657–58.

> [T]he congressional choice to limit the relief effected in [the statute] may, for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools, a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools, and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.

Id. (footnotes omitted).

303. Partial-Birth Abortion Ban Act § 2(9) (noting that under *Katzenbach* there is a "highly deferential review of congressional factual findings").

304. *Id.* § 2(11) (stating that the "Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality" of the *Turner* cases).

required cable companies to carry a certain number of local television stations.[305] Congress enacted the law after it conducted three years of hearings related to the cable television industry.[306] These hearings led Congress to include the conclusions of the fact-finding process, listing them in the law itself.[307] Congress passed the statute to protect the survival of free local broadcast television.[308] The Court in *Turner I* held that the Cable Act was a constitutional restriction on free speech.[309] The Court asserted that courts generally must afford great deference to the "predictive judgments of Congress."[310] In *Turner II*, the Court once again afforded great deference to Congress' findings in upholding the statute.[311] By including the *Turner* cases in addition to *Anderson* and *Katzenbach* in the Congressional Findings section of the PBABA, Congress reiterated that congressional fact-finding should be afforded a deferential standard of review.[312]

3. Declarations of Congress

Following the statutory language of the PBABA and congressional findings from the 104th, 105th, 107th, and 108th Congresses, the

305. Turner I, 512 U.S. 622, 630 (1994). This discussion will cite to the facts from the first *Turner* case, as the second *Turner* case discusses only an abbreviated set of facts. *See* Turner II, 520 U.S. 180, 185 (1997) (stating that "[a]n outline of the Cable Act, Congress' purposes in adopting it, and the facts of the case are set out in detail in our first opinion").

306. *Turner I*, 512 U.S. at 632.

307. *Id.* According to *Turner I*, "[t]he conclusions Congress drew from its factfinding process are recited in the text of the Act itself." *Id.* Such a statutory construction is similar to the PBABA, in which Congress also included its legislative findings in the text. *See* Partial-Birth Abortion Ban Act § 2.

308. *Turner I*, 512 U.S. at 634 (quoting 47 U.S.C. § 535(2)(a)(16) (1992)).

309. *Id.* at 657 ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

310. *Id.* at 665.

311. Turner II, 520 U.S. 180, 195 (1997) ("In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.' Our sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" (citing *Turner I*)). *But cf.* Dickerson v. United States, 530 U.S. 428, 437 (2000) (relying on *City of Boerne v. Flores* in holding that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress does not have unlimited power, "and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution"). *See generally infra* Part IV.D.2. (contending that the standard used in *Boerne* and *Dickerson* is the appropriate standard of review to apply to the PBABA).

312. Partial-Birth Abortion Ban Act § 2(11) ("The Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.").

PBABA makes fifteen declarations about partial birth abortion generally.[313] The first three declarations concern (a) medical facts relating to the danger of the procedure, (b) the lack of adequate medical studies regarding the procedure, and (c) a comment from a "prominent medical association" that the D & X procedure is outside the bounds of appropriate medical care.[314] The next four declarations explain that both medical testimony on the bill in Congress and testimony given during *Stenberg* agree that the procedure is never necessary to save the life of a woman and, further, that the procedure borders on infanticide.[315] The next five declarations explain why a ban on partial

313. *See id.* § 2(14)(A)–(O) (listing each declaration separately).

314. *Id.* § 2(14)(A)–(C).

> (A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: An increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, 'there are very few, if any, indications for . . . other than for delivery of a second twin'; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the case of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.
>
> (B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Indeed, unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.
>
> (C) A prominent medical association has concluded that partial-birth abortion is 'not an accepted medical practice', that it has 'never been subject to even a minimal amount of the normal medical practice development,' that 'the relative advantages and disadvantages of the procedure in specific circumstances remain unknown,' and that 'there is no consensus among obstetricians about its use'. The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is 'ethically wrong,' and 'is never the only appropriate procedure'.

Id.

315. *See id.* § 2(D)–(G).

> (D) Neither the plaintiff in *Stenberg v. Carhart*, nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.
>
> (E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

birth abortion is consistent with *Roe v. Wade* and *Planned Parenthood v. Casey*.[316] These declarations defend the statute, noting that the

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(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) In light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

Id.

316. *Id.* § 2(H)–(L).

(H) Based upon *Roe v. Wade* . . . and *Planned Parenthood v. Casey* . . . a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in *Roe* when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child 'in a state of being born and before actual birth,' was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a 'person' under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a 'person'. Thus the government has a heightened interest in protecting the life of the partially-born child.

(I) This, too, has not gone unnoticed in the medical community, where a prominent medical association has recognized that partial-birth abortions are 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb'. According to this medical association, the 'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body'.

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, to end that life. Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

Id. *See generally supra* Part II.A.2 (stating that the trimester system in *Roe* took into consideration the governmental interest in protecting a viable fetus); *supra* Part II.A.3 (discussing the way the *Casey* opinion modified the trimester system to account for the governmental interest in post-viability abortion).

banned procedure concerns a fetus that is not completely in utero.[317] The last three declarations discuss fetal pain, describe the procedure as inhumane, and conclude that Congress should ban the procedure.[318]

IV. ANALYSIS

This Part examines the PBABA and argue that it is unconstitutional.[319] This Part first explains why the law does not properly limit only the D & X procedure.[320] Next, this Part shows that the PBABA does not provide an adequate exception for the health of the woman seeking an abortion.[321] This Part then demonstrates why the PBABA is an undue burden on a woman's right to choose to have an abortion pre-viability because Congress intended the statute to operate as a stepping stone to overturn *Roe v. Wade*.[322] Finally, this Part

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317. Partial-Birth Abortion Ban Act § 2. The statute distinguishes between prohibitions against regulating abortion when the fetus is completely in utero and prohibitions on abortion procedures used when the fetus is partially outside the womb. *Id.*

318. *Id.* § 2(M)–(O).

> (M) The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.
>
> (N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.
>
> (O) For these reasons, Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additionally health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

Id.

319. *See infra* Part IV.A–D (arguing that the Supreme Court will find the PBABA an unconstitutional infringement on a woman's right to choose abortion).

320. *See infra* Part IV.A.1 (explaining how the D & E procedure is encompassed in the bill). *See generally supra* Part II.B.1–3 (explaining the various abortion procedures).

321. *See infra* Part IV.B (explaining the requirements of a proper health exception in abortion legislation based on prior case law); *see also supra* Part II.A.3 (describing the health exception requirements under *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

322. *See infra* Part IV.C (analyzing Congress's findings as based on "moral" reasoning).

demonstrates that the legislative findings do not adequately avoid a conflict with *Stenberg*.[323]

A. *The Partial-Birth Abortion Ban Act of 2003 Erroneously Applies to and Prohibits Safe and Necessary Pre-viability Abortion Procedures*

The PBABA does not mention any medical procedure by name.[324] Instead, the law explains an abortion procedure in layman's terms and prohibits doctors from using this procedure.[325] The problem with this explanation is that it is vague.[326] The language of the law—"performing an overt act that [the doctor] knows will kill the partially delivered living fetus"[327]—fails to give doctors an adequate explanation, in medical terms, of what they can and cannot do.[328] Therefore, due to the vagueness in the PBABA's language, the statute appears to apply to abortion procedures that courts traditionally have viewed as constitutional.[329] This will have a chilling effect on abortions because doctors will fear prosecution.[330]

1. The Law Could Apply to D & E in Violation of *Stenberg*

The PBABA could apply to D & E, thereby violating *Stenberg*'s holding that a ban on pre-viability D & E is an unconstitutional burden

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323. *See infra* Part IV.D (examining the deferential standard used by the Court and arguing that such a standard will not be a shield against constitutional scrutiny).

324. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206–07 (to be codified at 18 U.S.C. § 1531). *See generally supra* Part III.C (discussing a procedure the statute calls "partial-birth" abortion). *But see* UTAH CODE ANN. § 76-7-310.5 (2003) (using the term "dilation and extraction" as synonymous with "partial birth abortion" and then defining the steps of the procedure).

325. Partial-Birth Abortion Ban Act § 3(a). *See generally supra* Part III.C (discussing the adoption of the PBABA without using medical terminology to describe the banned procedure).

326. *See* Massie, *supra* note 243, at 332–39 (commenting on the constitutional question of vagueness and abortion legislation and concluding that the Partial-Birth Abortion Ban Act of 1997 was unconstitutionally vague).

327. Partial-Birth Abortion Ban Act § 3(a).

328. *See* Massie, *supra* note 243, at 334 (quoting congressional testimony on the Partial-Birth Abortion Ban Act of 1997 that stated that "the name [partial-birth abortion] did not exist until someone who wanted to ban abortions made it up"); *see also supra* notes 191–92 and accompanying text (explaining that partial birth abortion is not a medical term).

329. *See* Melissa C. Holsinger, *The Partial-Birth Abortion Ban Act of 2003: The Congressional Reaction to* Stenberg v. Carhart, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 603, 609 (2002) (explaining that the "bill easily could have been drafted to exclude D & E by specifically limiting the prohibition of either D & X or post-viability procedures"); *see also* Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (holding that an abortion ban that prohibits D & E pre-viability is unconstitutional).

330. Massie, *supra* note 243, at 334 ("The bill's vagueness will have a chilling effect on the availability of abortion services.").

on a woman's right to choose abortion.[331] In a standard D & E, the doctor disarticulates the fetus in utero, which requires the doctor to repeatedly insert tools in the uterus to remove the disarticulated fetus.[332] After a certain point, which varies for each woman, the doctor must drain the fetal skull for the skull to pass though the cervix.[333] The procedure for draining the skull and collapsing it is exactly the same as the procedure that doctors use for D & X, only the fetus is not always intact in a D & E.[334]

To disarticulate the fetus in D & E, the doctor may pull the majority of the fetus through the cervix, and the fetus may be alive until the doctor completes the disarticulation.[335] Yet, the PBABA prohibits a doctor from "performing an overt act that [the doctor] knows will kill the partially delivered living fetus."[336] Therefore, because the doctor knows that when she pulls the fetus into the cervix it may be alive until she disarticulates it, the D & E procedure directly violates the language

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331. *See* Holsinger, *supra* note 329, at 609 (explaining how the PBABA could apply to D & E). *See generally Stenberg*, 530 U.S. at 930; *supra* Part II.B.3 (discussing the *Stenberg* holding).

332. *See supra* Part II.B.2 (explaining the method doctors use to perform non-intact D & E).

333. Haskell, *Surgical Abortion*, *supra* note 171, at 135; *see also* ACOG Brief, *supra* note 203, at 5–6 (explaining that the cervix is dilated only to twenty percent so the fetal skull cannot pass through); *supra* Part II.B.2 (explaining the medical reasons a doctor must collapse the fetal skull to pull it through the cervix in both D & E and D & X).

334. Haskell, *Surgical Abortion*, *supra* note 171, at 135 (explaining the way a doctor collapses the fetal skull when performing a D & E or an intact D & E (or a D & X)). *See generally supra* Part II.B.2 (explaining D & E and D & X).

335. Haskell, *Surgical Abortion*, *supra* note 171, at 135 ("When cervical dilation is adequate but not generous, numerous instrument passes may be necessary . . . ."); *see also supra* Part II.B.2 (explaining the disarticulation process in D & E).

336. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206 (to be codified at 18 U.S.C. § 1531). By performing the exact D & E procedure Congress insists is not banned, a doctor could violate the PBABA. *See infra* note 346 and accompanying text (explaining the rational difficulty in distinguishing between the death dilemma portion of a D & X and a non-intact D & E).

of PBABA.[337] The *Stenberg* Court made clear that a limitation on D & E is constitutionally impermissible.[338]

Moreover, the PBABA's description of the point at which doctors face criminal liability does not render the PBABA inapplicable to the D & E procedure.[339] In *Stenberg*, the Court found the law unconstitutional partly because of its vague phrase "substantial portion," referring to how much of the fetal body had to be outside the woman's body for the prohibition to take effect.[340] The Attorney General wanted the "substantial portion" language replaced with "body up to the head," but the Court could not find any justification for that narrow interpretation.[341] In contrast, the PBABA defines exactly what portion of the fetal body must be outside the woman's body.[342]

Yet, the more descriptive words Congress used did not solve the critical error of the Nebraska law; the change in language was merely cosmetic.[343] Though the PBABA defines more clearly at what point a doctor will be criminally liable for her actions,[344] it does not go far

337. *See* Haskell, *Surgical Abortion*, *supra* note 171, at 131 (discussing techniques used to cause fetal demise); *see also* ACOG Brief, *supra* note 203, at 12 (noting that "the moment at which fetal demise occurs is 'extremely variable'" (quoting Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1118 (D. Neb. 1998) (quoting the testimony of Dr. Hodgson))). *But see* Johnson Letter, *supra* note 192 (explaining that the PBABA does not apply to D & E because the law applies only to procedures in which the fetus is not dismembered). However, some D & E procedures do involve an intact fetus because such a procedure is safer than disarticulating fetus. *See supra* note 176 and accompanying text (explaining why intact D & E is a safer procedure); *see also infra* Part IV.A.2 (explaining why the PBABA can apply to first trimester abortions performed on an intact fetus).

338. Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (holding a Nebraska law unconstitutional as an undue burden on a woman's right to choose the D & E abortion method); *see also supra* Part II.B.3 (discussing the *Stenberg* opinion and its holding).

339. *See supra* notes 336–37 and accompanying text (arguing that the PBABA proscribes D & E).

340. *Stenberg*, 530 U.S. at 940 (describing different ways to read "substantial portion"). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

341. *Stenberg*, 530 U.S. at 944–45 (noting that the Court refused to read the language of the Nebraska bill differently from its literal meaning). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

342. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206–07 (to be codified at 18 U.S.C. § 1531(b)(1)(A)) ("In the case of a head-first presentation, the entire fetal head is outside the body of the [woman], or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the [woman] . . . .").

343. *Stenberg*, 530 U.S. at 939 (commenting that the disarticulation of the fetus occurs when the fetus meets resistance, and if the resistance is not met until the majority of the fetus is through the cervix, then the doctor will violate the Nebraska statute though intending to perform a D & E).

344. *See id.* at 939 (noting that a "substantial portion" could mean "an arm or leg").

enough.[345] The way the law is written, it can apply to many types of abortion procedures, including those performed in the first trimester.[346] If Congress did not intend the law to apply to D & E, it could have written so explicitly in the law.[347] Thus, the language of the law could apply to D & E in violation of the parameters set out in *Stenberg*.[348]

2. The Law Could Unintentionally Ban First Trimester Abortion Procedures

The language of the PBABA also wrongly prohibits first trimester abortion procedures because the fetus may pass through the cervix intact in many of these procedures.[349] For instance, in the common D & C procedure, the fetus will pass through the cervix, albeit through a cannula, either intact or disarticulated, which will cause fetal death.[350] The PBABA language prohibits "deliberately and intentionally vaginally deliver[ing] a living fetus until . . . the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother" to purposefully kill the fetus.[351] Therefore, this language would prohibit D & C because the doctor would perform a procedure whereby the fetus passed through the cervix intact, through a cannula, and the doctor intended to cause fetal death.[352]

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345. *See* Haskel, *Surgical Abortion*, supra note 171, at 135 (explaining that the procedures for D & E and D & X are very similar). *See generally supra* Part II.B.1–2 (explaining the exact steps of the different abortion techniques and noting that in more than one the fetus passes through the cervix intact).

346. *See* ACOG Brief, *supra* note 203, at 16.

> [T]here is no rational way to distinguish the 'death-causing' portion of a D & X (the use of an instrument to decompress the fetal skull) from the 'death-causing' portion of a non-intact D & E (the use of an instrument to disarticulate the fetus or collapse its skull, as is often necessary in a non-intact D & E).

Id.

347. *See* Holsinger, *supra* note 329, at 609 ("Given the drafters' stated intention to exclude D & E procedures from the bill's scope, one can only speculate why they did not simply exclude such procedures on the face of the bill.").

348. *See supra* notes 220, 229 and accompanying text (noting the holding in *Stenberg* regarding the fact that it is unconstitutional for a law to proscribe both D & X and D & E).

349. *See supra* Part II.B.1 (explaining that in a D & C the doctor will use suction to remove the contents of the uterus, possibly intact). The PBABA prohibits a doctor from performing a procedure whereby the doctor intends to cause the death of an intact fetus partially removed from the uterus. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206–07 (to be codified at 18 U.S.C. § 1531(b)(1)(A)).

350. *See supra* Part II.B.1 (explaining the details of the D & C procedure).

351. Partial-Birth Abortion Ban Act § 3(a).

352. *Id.* (prohibiting physicians from bringing a fetus through the vagina for the purpose of performing an act that the physician knows will cause the fetus to die).

Moreover, the statute does not explain adequately why it would not ban induction, which doctors sometimes use during the first trimester.[353] When doctors use the induction procedure, it is possible for the fetal head to become lodged in the cervix or the umbilical cord to become tangled.[354] When this happens, the majority of the fetal body may be outside the woman's body, and the doctor must perform actions that he or she knows will cause the death of a fetus with a still-beating heart.[355] These actions directly violate the prohibition in the PBABA despite the fact that they are performed during the first trimester.[356]

There is nothing in the Congressional Record to support the notion that Congress intended to criminalize first trimester abortions or the labor and induction method.[357] Yet, as in *Stenberg*, the Court cannot adopt a narrowed interpretation of a statute that is not supported by the text of the statute itself.[358] When an offender has committed the required elements of a prohibited act, he or she will, or at least should be, prosecuted and convicted.[359] Under the PBABA, this means that a doctor performing a first trimester abortion using the safest procedures available could be prosecuted.[360] The language of the statute renders a

353. *See* ACOG Brief, *supra* note 203, at 14 n.21 (noting that during this first trimester procedure, the fetus may be in the vaginal cavity intact); *see also supra* Part III.C.1 (discussing the language of the statute prohibiting a doctor from performing an overt act knowing it will kill the fetus).

354. *Id.* (citing Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1110 (D. Neb. 1998)) (noting that separating the fetus from the placenta will cause fetal demise). *See generally supra* Part II.B.2 (explaining the labor-induction method).

355. *Id. See generally supra* Part II.B.2 (explaining the labor-induction method).

356. Partial-Birth Abortion Ban Act § 3(a) (prohibiting physicians from bringing the fetus through the cervix intact and performing and action that will kill it but failing to mention at what gestational age the actions are prohibited); *see* ACOG Brief, *supra* note 203, at 12–13 (explaining that Nebraska's ban on partial birth abortions reaches many safe abortion procedures because the law refers to a "living unborn fetus," which could include a fetus during the first twelve gestational weeks); *see also supra* Part III.C.1 (discussing the language of the statute prohibiting a doctor from delivering an intact fetus and performing an overt act intended to kill it).

357. *See generally* Bill Summary & Status, S. 3, 108th Cong. (2003), *at* http://thomas.loc.gov. (providing the complete congressional record for the PBABA).

358. Stenberg v. Carhart, 530 U.S. 914, 944–45 (2000) ("[W]e are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." (quoting Boos v. Barry, 485 U.S. 312, 330 (1988))). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion's explanation of statutory construction).

359. *See generally* MODEL PENAL CODE § 2.02 (1962) (explaining that a criminal need only perform each material element of a crime to be convicted of that crime).

360. *Cf.* ACOG Brief, *supra* note 203, at 16 n.25 (explaining the medical details of how Nebraska's ban on partial birth abortions could be interpreted to include first trimester procedures); NARAL Brief, *supra* note 203, at 21 (explaining that "a legislature's failure to clarify the meaning of 'partial birth' abortion indicates the legislature's intent to prohibit more than one procedure"). *See generally supra* notes 180–83 and accompanying text (describing

physician criminally liable if she simply brings the fetus through the cervix intact and alive and then performs an act that will kill it.[361] This is exactly what is done in vacuum aspiration abortions during the first trimester, where the doctor removes the contents of the uterus using a suction.[362] Therefore, the PBABA could prohibit abortion techniques used in the first trimester.[363]

B. The PBABA Does Not Adequately Provide an Exception for the Life and Health of the Woman[364]

The PBABA does not provide an exception for the life *and health* of the woman seeking abortion as *Casey* requires.[365] The exception provision in the PBABA allows for partial birth abortions only where the life of the woman is in danger if she cannot get such an abortion.[366] The exception in the Act is not sufficient because the alternatives are not safer procedures,[367] medical decisions should be left to doctors and not legislators,[368] and appropriate health exceptions must take into consideration the mental health of the woman seeking the abortion.[369]

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abortion by induction, the elements of which could satisfy the prohibition in the PBABA because the doctor induces labor with the intent to abort the fetus).

361. Partial-Birth Abortion Ban Act § 3(a) (stating that "the term 'partial-birth abortion' means an abortion in which the person performing the abortion . . . deliberately and intentionally vaginally delivers a living fetus . . . for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"); *see also supra* Part III.C.1 (discussing the language of the statute).

362. *See supra* Part II.B.1 (explaining the methods of first trimester abortions including bringing the fetus through the cervix intact in a vacuum aspiration procedure).

363. *See* Partial-Birth Abortion Ban Act § 3(a) (prohibiting doctors from bringing the fetus through the vagina for the purpose of performing an act the doctor knows will kill the fetus); *see also supra* note 346 and accompanying text (explaining that under the statutory language D & E and D & X are indistinguishable).

364. Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992) (stating that "prohibitions [on abortion] are permitted provided the life or health of the [woman] is not at stake").

365. *Id.* at 879 (stating that at the point in fetal development where legislatures may regulate abortion, their legislation must include an exception for the "life or health" of a woman seeking an abortion).

366. Partial-Birth Abortion Ban Act § 3(a) (stating that the law "does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury").

367. *See infra* Part IV.B.1 (explaining the risks of alternative procedures).

368. *See infra* Part IV.B.2 (explaining that legislators are not equipped to write laws that will affect doctors' decision-making processes).

369. *See infra* Part IV.B.3 (explaining the necessity for a mental health exception when prohibiting an abortion procedure).

1. Alternatives Are Not Safer Procedures

Women seeking abortions may undergo abortions involving procedures other than the D & X procedure prohibited by the PBABA, but these alternatives offer a greater risk of infection or injury to the woman.[370] For example, hysterotomy offers an alternative late term abortion procedure, however, a hysterotomy is a pre-term caesarian section.[371] Because a hysterotomy is a surgical procedure, it includes many risks such as infection and even death.[372] Some doctors also use the induction method of abortion as an alternative.[373] The doctor injects fetocidal medication causing fetal death and administers medication to induce labor.[374] Complications from induction can include damage to the uterus or cervix, bleeding, and infection.[375] An additional risk associated with induction is that the doctor could accidentally inject the woman with the drug intended to cause fetal demise, which can lead to convulsions, coma, and even death.[376]

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370. *See* WORLD HEALTH ORG., *supra* note 11, at 34 (commenting that other procedures, such as hysterotomy, should not be used in contemporary abortion practice because of high morbidity and mortality rates); *see also* Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1109 (D. Neb. 1998) (citing the American Medical Association report stating that "maternal mortality and morbidity associated with [hysterectomy and hysterotomy] are significantly greater than those associated with other procedures used to induce abortion"); Amy M. Autry et al., *A Comparison of Medical Induction and Dilation and Evacuation for Second-trimester Abortion*, AM. J. OBSTETRICS & GYNECOLOGY, Aug. 2002, at 393 (concluding that D & E is the safest method of second-trimester abortion).

371. Walther, *supra* note 185, at 701.

372. *See* E. Steve Lichtenberg et al., *Abortion Complications Prevention and Management* (providing a graph on mortality rates for hysterotomy as compared with other types of abortion that shows a 51% hysterotomy mortality rate compared to a 3.7% mortality rate for D & E procedures, including the intact procedure, after thirteen weeks gestation), *in* A CLINICIANS GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 197, 198; *see also supra* notes 184–86 and accompanying text (describing hysterotomies). Additionally, the National Right to Life Committee recognized that hysterotomy offers the highest risk to the physical health of the woman seeking the abortion because of the potential for uterine rupture in subsequent pregnancies. NAT'L RIGHT TO LIFE COMM., ABORTION: SOME MEDICAL FACTS, *at* http://www.nrlc.org/abortion/ASMF/asmf11.html (last visited Apr. 7, 2004).

373. *See* Blumenthal et al., *supra* note 180, at 139 (explaining the labor-induction method of abortion); *see also supra* notes 180–83 and accompanying text (describing the induction procedure).

374. Blumenthal et al., *supra* note 180, at 144.

375. *See id.* at 142–43 (explaining the dangerous effects of the labor and induction method); *see also supra* notes 180–83 and accompanying text (describing the induction procedure and noting its dangers).

376. *See* Blumenthal et al., *supra* note 180, at 144 (commenting that "[p]roper needle placement . . . can be difficult" and noting the risks of hemorrhaging and blood clots associated with induction); Lichtenberg, *supra* note 372, at 198 (explaining risks of hysterotomy, in particular with the use of hypertonic saline). *See generally supra* notes 180–83 and accompanying text (describing the labor-induction procedure and noting its dangers).

Another alternative to the specific procedure prohibited by the PBABA is to inject the fetus with fetocidal medication to kill it before completing the D & X procedure.[377] This would ensure that the fetus is dead at the time of the procedure and, thus, would prevent prosecution under the PBABA.[378] Usually fetal demise occurs when the woman initially is dilated, a day before the D & E or D & X procedure actually takes place.[379] However, to ensure the death of the fetus before the intracranial fluid is drained, a doctor would have to inject the fetus by passing a needle through the abdomen of the woman.[380] Doctors do not prefer extra needle injections if they can perform safe procedures without them.[381] In the end, guaranteeing fetal demise before any abortion procedure would add an extra health risk to the woman.[382]

The new law puts doctors in a precarious position.[383] To comply with the new law, a doctor would have to ensure fetal demise prior to the abortion using either hysterotomy or induction, or injecting fetocidal medication into the fetus.[384] Doing so would violate medical ethics guidelines for performing procedures using the safest method.[385] Thus,

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377. Blumenthal et al., *supra* note 180, at 144.

378. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206–07 (requiring a "living" fetus at the start of the procedure to satisfy the elements of the crime).

379. *See* Haskell, *Surgical Abortion*, *supra* note 171, at 128 (describing the use and effect of osmotic dilators). While some doctors claim that the use of osmotic dilators can cause cervical incompetence, the American College of Obstetrics and Gynecology disagrees. *See* Amicus Brief for the Association of American Physicians and Surgeons et al. in Support of Petitioners at 22–23, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 94-830) (stating that "[t]he threat of cervical incompetence is related to the amount of cervical dilation. Cervical incompetence consequent to intact D&X may make it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term"), *available at* 2000 WL 228448. *But see* ACOG Brief, *supra* note 203, at 23 (explaining that a general D & E requires the same amount of cervical dilation, often over a few day period, and childbirth involves greater dilation than the D & X procedure). Further, the repeated use of sharp instruments required by the nonintact D & E poses a greater risk to the woman's health than the intact D & X which uses only one sharp instrument pass. *Id.* at 24.

380. Blumenthal et al., *supra* note 180, at 144 (describing the difficulty of accurate needle placement).

381. Interview with Allison A. Cowett, MD, Northwestern University Feinberg School of Medicine, Department of Obstetrics and Gynecology, in Chicago, Ill. (Dec. 22, 2003).

382. Blumenthal et al., *supra* note 180, at 144 (discussing concerns about appropriate needle placement so as not to harm the woman in the process of causing fetal demise).

383. *See infra* notes 384–86 and accompanying text (explaining that in order for a doctor to comply with the new law while performing an intact D & E, the doctor would have to inject the fetus with fetocidal medication, which is contrary to medical ethical guidelines requiring the doctor to use safest possible procedure).

384. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, §3(a), 117 Stat. 1201, 1206–07 (noting that the prohibition is only for performing abortions on living fetuses).

385. *See* Charlotte Ellerston & Carolyn Westhoff, *Procedure Selection* (explaining the role of a medical counselor in helping a woman decide which procedure is best for her, including

forcing doctors to comply with the PBABA would put patients at a greater health risk and put doctors at risk of losing their licenses.[386]

2. Taking Choice Away from Doctors Is Not Good Medical Policy

The PBABA improperly intrudes into medical decisions best made by doctors, which endangers women's health.[387] The medical profession has long been regulated through licensing of doctors and credentialing of medical facilities.[388] Even with governmental regulations in place to ensure the quality of medicine, "the law has not heretofore attempted to tell qualified physicians what surgical procedures they may or may not engage in for the purpose of achieving valid medical objectives (in this case, abortions)."[389] At the time that Congress passed the PBABA, the National Abortion and Reproductive Rights Action League ("NARAL") planned to air television advertisements decrying "the first federal ban on safe medical procedures" and stating, "Who knows what they will do next?"[390] Other groups have also noted that this law represents the first time that Congress has ever outlawed a specific medical procedure.[391]

Outlawing a specific medical procedure is dangerous for many reasons; for instance, it may interfere with a physician's best judgment and intrude into private medical decisions.[392] While the PBABA creates an exception, allowing partial birth abortion when necessary to

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consideration of personal preferences and the medical opinion of the doctor and noting that the counselor helps determine the safest possible procedure for a woman), *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 63, 63.

386. *See* ACOG Brief, *supra* note 203, at 30 (stating that "[e]ven physicians who act in good faith in a medical emergency risk imprisonment and loss of license if their decisions are later second-guessed"); *see also* Martin B. Flamm, *Medical Malpractice and the Physician Defendant*, *in* S. SANDY SANBAR ET AL., LEGAL MEDICINE 123 (4th ed. 1998) (noting that physicians must adhere to a certain standard of medical care and diligence in treating their patients).

387. *See infra* note 392 and accompanying text (explaining that taking medical decisions away from doctors is dangerous to a woman's health).

388. *See* Massie, *supra* note 243, at 372 (noting that although doctors have long been regulated through licensing and disciplinary procedures, the regulations never specified what surgical procedures doctors may or may not perform); *see, e.g.*, Barry R. Furrow et al., The Rise of Hospital Corporate Liability 927 (2001) (explaining procedures in place to ensure quality aid in hospitals).

389. Massie, *supra* note 243, at 372; *see also* Hutcheson, *supra* note 235 (quoting President Bush as saying that the "right to life cannot be granted or denied by government, because it does not come from government—it comes from the creator of life").

390. Sheryl Gay Stolberg, *The War over Abortion Moves to a Smaller Stage*, N.Y. TIMES, Oct. 26, 2003, at D4, *available at* LEXIS, News Library, The New York Times File.

391. Feldt, *supra* note 2, at 86–87.

392. *Id.* at 87 (arguing that if Congress passes a late term abortion ban, it "would endanger women's health, overrule the best judgment of physicians, and set a dangerous precedent for government intrusion into private medical decisions").

save the life of the woman seeking the abortion,[393] Congress failed to consider adequately other medical reasons regarding why a woman may need this procedure.[394] For example, there are circumstances when the D & X procedure is preferable so that a woman may safely have children in the future.[395] A woman may survive any abortion procedure, making D & X unnecessary to save her life, but D & X may preserve her ability to have children in the future.[396] The PBABA prevents doctors from performing a D & X abortion where the doctor chooses that procedure to ensure that a woman will be able to have successful pregnancies in the future.[397]

Further, the PBABA speaks to doctors in legislative terms rather than medical terms.[398] Legislators should not step into the shoes of doctors.[399] Laws pertaining to medical practice must be written so that doctors know from a practical standpoint the prohibitions around which they are working.[400]

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393. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206 (to be codified at 18 U.S.C. § 1531(a)) (stating that a doctor may perform the otherwise prohibited procedure if it is necessary to save a woman's life).

394. *See* Feldt, *supra* note 2, at 86 (describing the conditions of two women who were carrying fetuses that could not sustain life outside the womb); *see also infra* notes 402–03 and accompanying text (explaining the reasons why the Supreme Court required a "health" exception and not just a "life" exception).

395. *See supra* notes 2–7 and accompanying text (telling Mary-Dorothy Line's story about how she was able to have children because she and her doctor chose to use the D & X procedure on her fetus, which could not have sustained life outside the womb).

396. *See supra* notes 2–7 and accompanying text (explaining that two women in particular were able to carry successful pregnancies because they chose to terminate prior pregnancies using D & X). But see Nancy Romer et al., *Partial Birth Abortion Is Bad Medicine*, WALL ST. J., Sept. 19, 1996, at A22, *available at* 1996 WL-WSJ 11799005, wherein five doctors who are founding members of the Physicians' Ad Hoc Coalition for Truth state, "Contrary to what abortion activists would have us believe, partial-birth abortion is never medically indicated to protect a woman's health or her fertility. In fact, the opposite is true: The procedure can pose a significant and immediate threat to both the pregnant woman's health and her fertility." However, according the American College of Obstetrics and Gynecology, "no reliable medical evidence supports the claims . . . that D & X endangers maternal health." ACOG Brief, *supra* note 203, at 23.

397. *See* Partial-Birth Abortion Ban Act § 3(a) (noting that the only exception allowing a partial birth abortion is to save the woman's life).

398. *See supra* notes 191–92 and accompanying text (explaining that partial birth abortion is not a medical term).

399. *See* Feldt, *supra* note 2, at 87 ("I am still amazed by those who would look into the eyes of a woman in crisis and say, 'We're not doctors and we're not your family, but we'll decide what you can or cannot do.'"); *cf.* IMBER, *supra* note 169, at xiii (commenting on a physician's inability to discuss the major elements of foundational abortion cases and stating that "[t]he practice of medicine was not a series of intellectual debates about ethics and law but a way of acting with patients, colleagues, and, importantly, family").

400. *See* Lichtenberg et al., *supra* note 372, at 231 (stating that "legislators and courts must ensure that abortion restrictions are clear so individual practitioners know their responsibilities to their patients and to the governmental authorities regulating their health practice").

3. To Provide Adequately for the Health of the Woman, the Law Must Account for Mental Health Concerns

The PBABA improperly failed to account for the mental health of women seeking abortions, as precedent requires.[401] The Supreme Court in *Roe* clearly emphasized that abortion law should consider the psychological harm that prohibiting abortions could cause.[402] The Supreme Court stated in *Roe*, and reaffirmed in *Casey*, that at the point in fetal development where legislatures may regulate abortion, their legislation must include an exception "to preserve the life or health" of the woman seeking an abortion.[403] The Court in *Danforth* relied on *Roe's* holding that any regulation on abortion must take into account the health of the woman.[404] In *Danforth*, the Court did not defer to legislative findings that the banned procedure was "deleterious" to the woman's health.[405] Likewise, *Stenberg* focused on the health of the woman as its "paramount concern."[406] Therefore, Supreme Court

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401. *See* Partial-Birth Abortion Ban Act § 3(a) (stating that the only time a doctor may use the D & X procedure is when the woman's life is at risk due to "physical disorder, physical illness, or physical injury").

402. Roe v. Wade, 410 U.S. 113, 153 (1973) ("Psychological harm may be imminent. Mental and physical health may be taxed by childcare."); *see also supra* Part II.A.2 (discussing the mental health component mentioned in *Roe v. Wade*).

403. *Roe*, 410 U.S. at 164; Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (quoting the language used in *Roe*); *see* Glidewell, *supra* note 191, at 1145 (discussing the ramifications of life or health requirements in abortion regulation cases).

404. Planned Parenthood v. Danforth, 428 U.S. 52, 76 (1976) (discussing the Court's questions regarding whether the law "reasonably relates" to the health of the woman seeking the abortion); *see also supra* notes 121–29 and accompanying text (discussing the *Danforth* decision); *supra* Part II.A.2 (discussing the decision in *Roe v. Wade*, including mental health components).

405. *Planned Parenthood*, 428 U.S. at 76–79; *see also supra* notes 121–29 and accompanying text (discussing the *Danforth* holding, which was contrary to the legislative findings). The Sixth Circuit required a mental health exception for abortion bans in *Women's Medical Professional Corp. v. Voinovich*. Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 207 (6th Cir. 1997). There the Sixth Circuit held that a health exception under *Roe* and *Doe* required both physical and mental health components. *Id.*; *see also supra* note 104 and accompanying text (discussing the requirements for abortion legislation under *Roe* and *Doe*). Recently, however, in *Women's Medical Professional Corp. v. Taft*, the Sixth Circuit narrowed its opinion on mental health exceptions, requiring a "partial birth" abortion ban to provide an exception for "health" and not specifically "mental health." Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436, 449–50 (6th Cir. 2003). The court upheld an Ohio statute banning the D & X procedure. *Id.* at 453. The Sixth Circuit commented that its previous mental health holding was limited to "serious," "non-temporary," "severe," and "irreversible" threats and that the new Ohio law satisfied the requirements of *Casey* and *Stenberg*. *Id.* at 449; *see supra* Part II.B.3 (discussing the *Stenberg* Court's requirement that a ban on a abortion procedure must contain an exception for the life and health of the woman).

406. Glidewell, *supra* note 191, at 1138; *see also* Stenberg v. Carhart, 530 U.S. 914, 931 (2000) (stating that "this Court has made clear that a State may promote but not endanger a

precedent makes clear that a health exception, in addition to an exception for the life of the woman, is a necessary requirement for a valid prohibition on an abortion procedure.[407]

In selecting an abortion procedure, doctors take into consideration the difficult emotional process the woman is going through in addition to her physical medical needs.[408] According to the leading textbook on abortion, holding the fetus after abortion can be an important step in the grieving process, particularly when the doctor performed an abortion on a fetus that could not have sustained life outside the womb.[409] It is only by using the intact D & X procedure that the woman could have this important moment to grieve.[410]

Moreover, even many of those who argue that no health exception is necessary in a ban on an abortion procedure agree that a health exception is proper in the case of rape or incest.[411] The *Casey* Court

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woman's health when it regulates the methods of abortion"). *See generally supra* Part II.B.3 (discussing the *Stenberg* decision).

407. *See supra* notes 402–06 and accompanying text (laying out the Supreme Court precedent for a health exception); *infra* note 409 and accompanying text (noting that the leading textbook on abortion provides an important mental health rationale for using D & X). *But see* CTR. FOR HEALTH & ENV'T, KANSAS DEP'T OF HEALTH & ENV'T, ABORTIONS IN KANSAS 1999, PRELIMINARY ANALYSIS 11 (1999) (showing that all of the 182 "partial-birth" abortions performed in the State of Kansas were performed on viable fetuses for reasons pertaining to the substantial and irreversible mental impairment of a major bodily function), *available at* http://www.kdhe.state.ks.us/hci/99itop1.pdf. (last visited June 17, 2004). However, it is important to note that the study asked different questions for the partial birth abortion section than it did of any other abortion procedure in the study. *See id.* at 10.

408. *See* Haskell, *Surgical Abortion*, supra note 171, at 125 (explaining the factors that influence doctors to prefer one method of abortion over another).

409. *See id.* ("Grieving is important for the parents of an anomalous fetus, and seeing and holding the fetus are important components of healing. Their needs may be better met with an intact fetus . . . .").

410. *Id.*; *cf.* Glidewell, *supra* note 191, at 1149 ("Courts commit a grave disservice to women when they put politics before maternal health. Courts also commit a grave disservice to the Constitution and preceding case law, especially *Roe* and *Casey*, when they deny women the freedom to have an abortion for health reasons.").

411. *See* Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle over Late-term Abortion*, 10 YALE J.L. & FEMINISM 397, 430 n.165 (1998) (commenting that "there is a prevailing and documented sense that women who are pregnant because of unwanted sexual encounters (rape and incest) should be allowed access to abortion"); *see also* Richard Collin Mangrum, Stenberg v. Carhart*: Poor Interpretivist Analysis, Unreliable Expert Testimony, and The Immorality of the Court's Invalidation of Partial-Birth Abortion Legislation*, 34 CREIGHTON L. REV. 549, 603 (2001) (stating that in the case of rape, abortion might be acceptable, but suggesting that the woman should still have the procedure performed prior to the time when only a late term procedure may be used); LaShunda R. Rowe, Note, *An Inside Look at Partial Birth Abortion*, 24 T. MARSHALL L. REV. 327, 340 (1999).

> Georgia law proscribed an abortion except as performed by a duly licensed Georgia physician when necessary in 'his best clinical judgment' because continued pregnancy

commented that no matter what the result of the philosophical debate on abortion procedures, victims of rape or incest must be given access to abortions, despite their *physical* ability to carry the pregnancy to term.[412] Also, the World Health Organization asserts that women who become pregnant as a result of rape need special medical and psychological care.[413] The PBABA does not include any exception for victims of rape or incest.[414]

Accordingly, a statute that prohibits a particular abortion procedure must include an exception for both the life and health, including mental health, of the woman seeking the abortion.[415] When a woman has made the very difficult decision to get an abortion, legislators should not force her to change her mind because they think she has made the wrong choice.[416] The Due Process Clause provides a liberty interest for a woman's right to choose abortion.[417] If the Due Process Clause is to maintain any significance, then the legislative branch cannot gloss over

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would endanger a pregnant woman's life or injure her health; the fetus would likely be born with a serious defect; or the pregnancy resulted from rape.

Rowe, *supra*, at 340.

412. Planned Parenthood v. Casey, 505 U.S. 833, 850–51 (1992).

> [U]nderlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape.

Id. *See generally supra* notes 139–58 and accompanying text (discussing the *Casey* decision).

413. *See* WORLD HEALTH ORG., *supra* note 11, at 68 (stating that the standards used in rape cases "should ideally also be part of comprehensive norms and standards for the overall management of survivors of rape, covering physical and psychological care"); *see also* Carol J. Rowland Hogue et al., *Answering Questions About Long-term Outcomes* (explaining the difficulties of abortion in the case of rape or incest), *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 217, 224. In describing the difficult question of whether to abort a fetus conceived through rape, the author states, "If the woman destroys the embryo, she destroys part of herself. If she protects the embryo, she nurtures part of her attacker. The experience of carrying the pregnancy or abortion is likely to be psychologically difficult in these circumstances." *Id.*

414. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206 (to be codified at 18 U.S.C § 1531(a)) (providing an exception only for abortions necessary to save the life of the woman seeking an abortion).

415. *See* Glidewell, *supra* note 191, at 1144 ("In sum, courts should interpret the meaning of 'health' broadly to encompass verifiable mental, emotional, and physical health risks, including pre-existing risks and risks arising out of the pregnancy.").

416. *Casey*, 505 U.S. at 919 (discussing mandatory twenty-four-hour waiting periods before abortions and stating, "A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.").

417. Hodgson v. Minnesota, 497 U.S. 417, 435 (1990); *see supra* notes 130–37 and accompanying text (discussing *Hodgson* and a woman's liberty interest in abortion).

the liberty interest in abortion.[418] The liberty interest in abortion cannot be severed from the health exception because the case law is clear: a woman has the right to choose abortion, and protecting a woman's health requires far more than an exception to save her life.[419]

C. *The PBABA Is an Undue Burden on a Woman Seeking a Pre-viability Abortion and Constitutes the First Step in an Attempt To Overrule* Roe v. Wade

There is an old joke that governmental interest in children begins at conception and ends at birth.[420] President Bush exemplified that statement when during election debates he stated, "We need to ban partial birth abortions . . . [doing so] would be a positive step toward reducing the number of abortions in America."[421] However, seeking to reduce the number of abortions by banning them is exactly the definition of an undue burden that the Court adopted in *Casey*.[422] The *Casey* opinion unequivocally explains that to further the State's interest in potential life, the State must "inform the woman's free choice, not hinder it."[423] Simply prohibiting an abortion procedure does not "inform" the woman but rather hinders her choice by forcing her to use

418. *See supra* notes 130–37 and accompanying text (arguing that if a woman is not permitted to choose abortion, than the Due Process Clause will become a "nullity").

419. Stenberg v. Carhart, 530 U.S. 914, 936–37 (2000) (noting that the health of the woman is of paramount importance in abortion regulation); *Casey*, 505 U.S. at 879 (requiring abortion prohibitions to include an exception for the life *or health* of the woman seeking abortion); Roe v. Wade, 410 U.S. 113, 153 (1973) (discussing the psychological ramifications of limiting a woman's right to seek abortion);.

420. *See* Bonnie Erbe, Editorial, *Late-term Abortion Language on Women's Health Would Prevent Veto*, THE PLAIN DEALER (Cleveland, Ohio), Mar. 28, 1997, at 11B (quoting the joke and stating, "Truer words were never spoken. If they cared about taking care of babies and protecting the helpless, they would not be so driven to cut government programs that help the poor, nor obsessively focused on tax cuts."), *available at* 1997 WL 6586804; Don Feder, *In Abortion Debate, Who Cares for Kids?*, Editorial, BOSTON HERALD, Mar. 12, 1992, at 39 ("These right-to-lifers care exclusively for children in gestation. Where is their concern for them after birth? U.S. Rep. Barney Frank, D-Mass., another terribly witty liberal, used to say that for anti-abortion forces life begins at conception and ends at birth."), *available at* 1992 WL 4050897.

421. Glidewell, *supra* note 191, at 1089; *see also* Ann Devroy, *Late-term Abortion Ban Vetoed; 'Small but Vulnerable' Group of Women Needs Procedure, Clinton Says*, WASH. POST, Apr. 11, 1996, at A1, (explaining that when President Clinton vetoed a bill virtually identical to the PBABA in 1996, he was surrounded by five women whose lives had been saved because they had access to the late term abortion procedure), *available at* 1996 WL 3073599. In contrast, when President Bush signed the bill into law he was surrounded by six male lawmakers. Hutcheson, *supra* note 235.

422. *Casey*, 505 U.S. at 877 ("A finding of an undue burden is a 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.").

423. *Id.*

a less safe procedure.[424] Thus, a statute designed to encourage a woman to carry a fetus to term would be constitutional so long as it did not create an undue burden on a woman's right to have an abortion generally.[425]

A further example of the congressional interest in taking steps towards banning abortion is the attempt to attach an amendment to the PBABA asserting an intention to uphold *Roe v. Wade*.[426] However, Congress did not pass this amendment or subsequent legislative attempts to include a similar statement, which could leave many constituents to deduce that Congress will seek to overrule *Roe v. Wade*.[427] Congress dedicated nearly half of the PBABA's legislative findings section to reasons that a court should uphold the PBABA, rather than to reasons that the law is actually good legislative policy.[428] The first finding mentions that the procedure is "gruesome," but in *Casey*, the Court warned against making decisions based on whether a judge, or in this case a legislator, finds the procedure objectionable.[429] Furthermore, whether legislators find an abortion procedure gruesome should not be the deciding factor in banning it and disregarding a woman's fundamental liberty interest in abortion.[430]

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424. *Id.* ("Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted . . . ."); *see* Massie, *supra* note 243, at 345–46 (explaining that regulations to encourage live birth are permissible so long as they are not an undue burden).

425. *Casey*, 505 U.S. at 878.

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

Id.

426. Bill Summary & Status, S.Amdt.260, 108th Cong. (2003), *at* http://thomas.loc.gov.

427. *See* 143 CONG. REC. 64, S4614–15 (daily ed. May 15, 1997) (statement of Sen. Daschle) (proposing an amendment in the 105th Congress' Partial Birth Abortion Ban Act requesting that *Roe v. Wade* be reaffirmed in the text of the law). *See generally supra* Part II.A.2 (discussing the *Roe* opinion and the fact that it affirmed the fundamental right to abortion).

428. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(3)–(13), 117 Stat. 1201, 1201–03 (listing justifications for why a court should defer to the congressional findings in the PBABA); *see also supra* Part III.C.2 (discussing the findings section included in the statute).

429. *See Casey*, 505 U.S. at 850 (noting that personal preferences should not carry any weight in evaluating the constitutionality of a statute); *supra* Part III.C.2 (discussing the findings included in the statute, which describe D & X as gruesome). *See generally supra* Part II.A.3 (discussing the *Casey* opinion generally).

430. Stenberg v. Carhart, 530 U.S. 914, 946 (2000) (Stevens, J., 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

President Bush sought to reduce the number of abortions in America by enacting the PBABA.[431] Yet, doctors have used the procedure restricted by the PBABA in only .17% of all abortions, approximately 2200 per year,[432] often when a fetus could not sustain life outside the womb.[433] In her concurrence in *Stenberg*, Justice Ginsburg warned against passing legislation for the purpose of getting a foot in the door to overruling the fundamental right to abortion.[434] The legitimate goal of reducing the number of abortions in this country should not be brought about by banning an abortion procedure that can and has saved the lives of women.[435] Rather, Congress may encourage women to carry pregnancies to term but may not interfere with a woman's right to choose to have an abortion.[436]

D. Congress' Findings Cannot Shield the PBABA from an Appropriate Constitutional Analysis

The PBABA contains a series of findings that its drafters concluded solved the problem of meeting the *Stenberg* requirements for a valid ban on an abortion procedure.[437] Congress relied on the findings and testimony heard during prior attempts to pass a late term abortion ban to

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respectful of "potential life" than the equally gruesome procedure Nebraska claims it still allows.

Id. (Stevens, J., concurring); *see also* David M. Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 HARV. J.L. & PUB. POL'Y 815, 827 (2001) (discussing Justice Stevens's comments on the "gruesome" abortion procedure); Richard Stith, *Location and Life: How* Stenberg v. Carhart *Undercut* Roe v. Wade, 9 WM. & MARY J. WOMEN & L. 255, 256 (2003) (explaining Justices Stevens's and Ginsburg's reasoning in *Stenberg* that D & X is no more gruesome than any other abortion procedure and so should not be banned on that premise).

431. *See supra* note 421 and accompanying text (asserting that President Bush simply wanted to reduce the number of abortions performed and that banning partial birth abortion would help reduce the number of abortions performed in America).

432. *See* Mary Ellen Schneider, *Bush Signs Partial-Birth Abortion Ban*, OB. GYN. NEWS, Dec. 1, 2003, at 1 (discussing abortion statistics collected by the Guttmacher Institute).

433. *See supra* note 227 and accompanying text (noting that the use of D & X is often for hydrocephalus, a condition whereby the fetus cannot sustain life outside the womb).

434. *See Stenberg*, 530 U.S. at 952 (quoting Judge Posner, who postulated that these types of laws are passed to "chip away at the private choice shielded by *Roe v. Wade*"); *see also supra* Part II.B.4 (discussing Justice O'Connor's concurrence in *Stenberg*).

435. *See supra* notes 2–6 and accompanying text (discussing the stories of women who used D & X). *But see* Lori Brannigan Kelly, *Selective Abortion Is Immoral* (arguing that aborting a fetus because it does not conform to an ideal is immoral), *in* THE ABORTION CONTROVERSY, *supra* note 2, at 20, 24; Robert R. Reilly, *Abortion Is Immoral* (equating abortion with Nazi Germany), *in* THE ABORTION CONTROVERSY, *supra* note 2, at 17, 17–19.

436. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992).

437. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(3), 117 Stat. 1201, 1201 (noting the Court's holding in *Stenberg* concerning the vagueness of the procedure banned in the Nebraska statute and the lack of a health exception in the statute).

write the findings included in the PBABA.[438] In fact, both the Congress that enacted the PBABA and the Supreme Court in *Stenberg* relied on the same testimony regarding previous partial birth abortion bills.[439] Even in relying on the same testimony, some legislators may come out on opposite sides of the argument,[440] but when the debate pertains to health, courts should give deference to doctors, not legislators.[441] Moreover, even if the Supreme Court gives deference to the legislative findings of the PBABA, the PBABA still fails the constitutional test that Justice O'Connor set forth in *Stenberg*.[442]

1. Congress Erroneously Concluded in the PBABA's Findings Section That a Deferential Standard of Review Is Appropriate for the PBABA

In the same way that reviewing courts defer to trial courts' findings of fact,[443] courts also defer to legislative fact finding.[444] Generally,

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438. *See* H.R. REP. NO. 108-58, at 12–13 (2003) (citing to testimony taken during the 104th Congress' hearings on partial birth abortion).

439. *See id.* (citing to testimony taken during the congressional hearings on partial birth abortion); *see also Stenberg*, 530 U.S. at 929 (commenting on testimony given in the 105th Congress).

440. *E.g.*, Bill Summary & Status, 108th Cong. (2003), *at* http://thomas.loc.gov (noting that the roll call votes for each term are not unanimous). *Compare* ACOG Brief, *supra* note 203, at 20 (noting that D & X is within the proper standard of medical care for some patients), *with* Brief of Amici Curiae of Association of American Physicians and Surgeons et al. at 17, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830) (noting that D & X is outside the proper standard of care for patients), *available at* 2000 WL 228448.

441. *See* Schneider, *supra* note 432, at 1 (noting that legislators drafted the PBABA in a way that doctors who provide abortions cannot readily apply because it is not written in medical terminology); *see* Kathryn Kolber et al., *Legal Issues Related to Abortion in the United States* (discussing the importance of legislators and doctors working together on abortion laws to ensure that "abortion restrictions are clear so individual practitioners know their responsibilities to their patients and to the governmental authorities regulating their health practice"), *in* A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, *supra* note 84, at 231, 231.

442. *See infra* Part IV.D.3 (examining Justice O'Connor's requirements for a constitutional ban on an abortion procedure).

443. *E.g.*, FED. R. CIV. P. 52(a); Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 856 (1982). In judicial matters, a reviewing court must defer to the findings of the trier of fact; reviewing courts must use the "clearly erroneous" standard of deferential review when analyzing the facts presented initially to the trial court. *Inwood Lab.*, 456 U.S. at 856. Moreover, the reviewing court may not reverse the judgment merely because it would have decided the case another way. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) ("The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court."). Thus, in *Stenberg*, the Court deferred to the trial court's findings of fact. Stenberg v. Carhart, 530 U.S. 914, 936–37 (2000) (discussing the district court findings and evidence in the record supporting a health exception requirement). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion). While the Supreme Court also read thirty-six amicus briefs and heard oral argument, ultimately it reached the same conclusion as the trial court. *See generally Stenberg*, 530 U.S at 946 (affirming the decision of the appellate court); Carhart v. Stenberg, 192 F.3d

courts defer to congressional findings because, in evaluating and writing legislation, Congress is the finder of fact.[445] The PBABA explicitly details the deferential standard that courts should use when reviewing congressional findings.[446] The PBABA explains that in *Katzenbach v. Morgan* and *Turner Broadcasting, Inc. v. FCC*, the Supreme Court was highly deferential to congressional findings.[447] However, if the Supreme Court reviews the PBABA, it should not employ the deferential standards used in these cases because the cases are distinguishable.[448]

In *Katzenbach* the Court noted that voting was a fundamental right and that congressional findings that sought to expand the right to vote to more citizens were permissible.[449] However, the Court commented that when a law *denies* (rather than expands) a fundamental right, that law is subject to the strictest scrutiny.[450] While *Katzenbach* involved an

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1142, 1152 (8th Cir. 1999) (affirming the decision of the trial court); Carhart v. Stenberg, 972 F. Supp. 507, 531 (D. Neb. 1997) (granting the petitioner's request for an injunction against enforcement of Nebraska's late term abortion law); Transcript of Oral Arguments, *Stenberg* (No. 99-830), *available at* 2000 WL 486737.

444. *See* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (stating that judging the constitutionality of an act of Congress is "the gravest and most delicate duty that this Court is called upon to perform"). The Court went on to say that "the fact that th[e] Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government" compels it to be "particularly careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Id.* at 68; *see also* Katzenbach v. Morgan, 384 U.S. 641, 653 (1966) (employing a high degree of deference to congressional findings of fact).

445. Turner I, 512 U.S. 622, 665 (1994) (stating that "Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue").

446. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(9), 117 Stat. 1201, 1202 (discussing the deferential standard of review the Supreme Court used in *Katzenbach*); *see supra* Part III.C.2 (discussing the Congressional Findings section included in the PBABA).

447. Partial-Birth Abortion Ban Act § 2(9); *see also* Katzenbach v. Morgan, 384 U.S. 641, 657 (explaining the Court's reasoning in holding the Voting Rights Act constitutional); James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 115 (2000) (stating that in *Katzenbach*, the Court "took a decidedly deferential view of Congress' powers"). *See generally supra* Part III.C.2 (discussing the Congressional Findings section of the PBABA).

448. *See generally* Holsinger, *supra* note 329, at 612–14 (distinguishing the deferential standard used in the cases Congress mentioned, such as *Turner I* and *Turner II* from others that the Supreme Court could use, such as *City of Boerne v. Flores*).

449. *Katzenbach*, 384 U.S. at 646; *see also* Holsinger, *supra* note 329, at 611 (explaining that the deference that the Supreme Court should give to the findings of the PBABA is distinguishable from the deference the Supreme Court gave in *Katzenbach*).

450. *See Katzenbach*, 384 U.S. at 657 (stating that when evaluating the Voting Rights Act, "the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the

attempt to enforce and expand a constitutional right, the PBABA is an attempt to limit a constitutional right.[451] Therefore, although Congress included *Katzenbach* in the PBABA's findings section, *Katzenbach*'s deferential standard is inapplicable to the PBABA.[452]

Likewise, in the PBABA's findings section, Congress included a discussion of the deferential standard used in *Turner Broadcasting Systems, Inc. v. FCC*.[453] In *Turner Broadcasting*,[454] the Court applied a highly deferential standard to the findings of Congress regarding the continuity of local broadcast television.[455] However, like *Katzenbach*, these legislative findings differ from the PBABA because they were not written in response to a previous Supreme Court decision.[456] Thus, although the PBABA mentions cases that do in fact use a deferential standard, those cases are not appropriate for use in evaluating the PBABA.[457]

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franchise"); *see also* Rostker v. Goldberg, 453 U.S. 57, 69 n.6 (1981) (stating that great deference is given to Congress for matters pertaining to *military* needs).

451. Holsinger, *supra* note 329, at 611 (stating "the Voting Rights Act was an attempt by Congress to enforce a constitutional right; by contrast, PBABA represents a congressional effort to limit a constitutional right that has been articulated by the Supreme Court").

452. *Id.* at 611 (stating that "the congressional enactment considered by the *Katzenbach* Court is easily distinguishable from PBABA"); *see supra* Part III.C.2 (discussing the PBABA's Congressional Findings section and its reference to *Katzenbach* and the deferential standard of review used in that case).

453. Partial-Birth Abortion Ban Act of 2003, Pub. No. L. 108-105, § 2(11), 117 Stat. 1201, 1203 (noting that the "Court [in *Turner*] continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992"); *see supra* Part III.C.2 (discussing PBABA's Congressional Findings section and its reference to *Turner* and the deferential standard of review used in that case).

454. Turner II, 520 U.S. 180, 185 (1997); Turner I, 512 U.S. 622, 626 (1994).

455. *Turner I*, 512 U.S. at 665–66 (noting that Congress is better equipped than the Court in amassing and evaluating information concerning the legislation and that the role of the Court is to determine whether Congress made "reasonable inferences based on substantial evidence," not to review the information de novo).

456. *See* Holsinger, *supra* note 329, at 612; Partial-Birth Abortion Ban Act § 2(7)–(8) (noting that the Findings section in the PBABA was included to avoid the deference given in *Stenberg* that led the Court to reject Nebraska's law). *But see* City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (explaining that Congress cannot alter the constitutionality of a law). *See generally supra* Part III.C.2 (discussing the Congressional Findings section of the PBABA).

457. *See* Holsinger, *supra* note 329, at 610–13 (explaining why the congressional findings are not accurate analyses of the deferential standards that should be used to evaluate the PBABA). *See generally supra* Part III.C.2 (discussing the Congressional Findings section of the PBABA).

2. The Supreme Court Should Not Give Deference to the Congressional Findings Included in the PBABA Because the Findings Are an Attempt To Supercede a Judicial Constitutional Holding

A more appropriate look at deferential standards and congressional findings is in *City of Boerne v. Flores*, where the Supreme Court held that Congress may not overrule a Constitutional provision using legislative findings.[458] The Court explained that Congress' role is limited to devising legislation in accordance with judicial interpretation, not the other way around.[459] The Supreme Court relied on *Flores* in deciding *Dickerson v. United States*.[460] At issue in *Dickerson* was whether Congress intended to overrule the Court's prior decision in *Miranda v. Arizona*[461] when it enacted a law on the admissibility of confessions.[462] The Court held that because *Miranda* had announced a

458. *See City of Boerne*, 521 U.S. at 529 (describing the role of Congress as determining the need for legislation, but not its constitutionality). *See generally* Holsinger, *supra* note 329, at 612 (explaining the use of *City of Boerne* in relation to the PBABA).

459. *City of Boerne*, 521 U.S. at 519 (stating that Congress does not have the power to decree the substance of the Constitution's restrictions on the states' authority). At issue in *Flores* was whether Congress had the authority to enact the Religious Freedom Restoration Act ("RFRA"). *Id.* at 511. Congress enacted RFRA in response to the Supreme Court's decision in *Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *Id.* at 512. In *Smith*, Native Americans brought a suit for unemployment benefits after they lost their jobs because they used peyote. *Smith*, 494 U.S at 874. The Court held that denying benefits was appropriate here because their action was "socially harmful." *Id.* at 885. The Court in *Flores* held that congressional enforcement power is not unlimited and that enacting RFRA was outside the scope of congressional authority. *Flores*, 521 U.S. at 519 (stating that Congress "has been given the power to enforce, not the power to determine what constitutes a constitutional violation" (internal quotations omitted)). Ultimately, the Court noted that to maintain a proper separation of powers, Congress must be confined to its constitutional authority. *Id.* at 536 ("Broad as the power of Congress is . . . RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."); *see also* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM L. REV. 237, 304 (2002) (stating that the "Court rebuffed Congress's attempts and stated unequivocally its view that it is supreme in its interpretation of the Constitution"); Leonard, *supra* note 447, at 117–18 ("Congress had no power to define constitutional violations. Rather, Congress' role . . . was limited to devising legislation to enforce . . . rights as the courts determined them.").

460. Dickerson v. United States, 530 U.S. 428, 437 (2000) (citing to *Flores*, stating that "Congress may not legislatively supercede our decisions interpreting and applying the Constitution").

461. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

462. 18 U.S.C. § 3501 (2000); *see* Dickerson v. United States, 530 U.S. 428 (2000) (finding 18 U.S.C. § 3501 to be unconstitutional).

"constitutional rule," Congress could not supercede the judicial holding.[463]

Similarly, when evaluating the PBABA, the Supreme Court should use the *Boerne* and *Dickerson* standard of judicial deference[464] because the Court in *Stenberg* also announced a constitutional rule concerning late term abortion procedures.[465] Additionally, in *Eisenstadt v. Baird*, the Court warned against creating legislation specifically intended to circumvent the right to privacy ruling in *Griswold*.[466] Another warning is found in *Griswold*, in which Justice Goldberg commented that deferential standards are not meant to infringe on fundamental rights.[467] Furthermore, the *Stenberg* majority concluded that banning "partial birth abortion" was an undue burden on a woman's right to choose, in violation of *Casey*.[468] In *Stenberg*, the Court made it abundantly clear that regulations on an abortion procedure could not infringe on the life *or health* of the woman, and that a regulation could not ban the D & E procedure because such a ban would be an undue burden on a woman's right to choose to have an abortion.[469] Therefore, the Supreme Court should not defer to the congressional findings included in the PBABA, for the findings section of the PBABA cannot supercede the judicial holding in *Stenberg* any more than congressional findings could in *Dickerson* or *Boerne*.[470]

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463. *Dickerson*, 530 U.S. at 444; *see also* Barkow, *supra* note 459, at 308 (explaining that Congress cannot overrule the Supreme Court on a constitutional issue).

464. *See* Holsinger, *supra* note 329, at 612–13 (discussing the applicability of the rationale of *City of Boerne* and *Dickerson*).

465. Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (stating that "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" (internal quotations omitted)). *See generally supra* Part II.B.3 (discussing the *Stenberg* decision).

466. Eisenstadt v. Baird, 405 U.S. 438, 450 (1972) (stating that "the legislature . . . merely made what it thought to be the precise accommodation necessary to escape the *Griswold* ruling"). *See generally supra* Part II.A.1 (discussing the right to privacy cases including *Griswold* and *Eisenstadt*).

467. Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) ("I do not believe that this [deferential standard] includes the power to experiment with the fundamental liberties of citizens."). *See generally supra* Part II.A.1 (discussing the *Griswold* opinion).

468. *Stenberg*, 530 U.S. at 930; *see also supra* Part II.B.3 (discussing the *Stenberg* opinion).

469. *Stenberg*, 530 U.S. at 930 (noting that the Nebraska law banning partial birth abortion is unconstitutional for two reasons, first because the law lacks a health exception, and second because the law imposes an undue burden on a woman's right to choose abortion). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

470. *See* Stephanie D. Schmutz, *Infanticide or Civil Rights for Women: Did the Supreme Court Go Too Far in* Stenberg v. Carhart*?*, 39 HOUS. L. REV. 529, 562–63 (2002) (stating that "if the Partial-Birth Abortion Ban Act is signed into law, and then challenged, the Court will most likely follow the principle articulated in *Dickerson* and find the Act unconstitutional"). *See*

3. Justice O'Connor's Requirements Are Not Met Even Under a Deferential Standard

A careful reading of Justice O'Connor's concurring opinion in *Stenberg* will show that banning "partial birth" abortion may not require a health exception.[471] However, the majority in *Stenberg* held that a health exception was required under *Casey*.[472] Justice O'Connor wrote separately to state that a health exception would be necessary only if there was no safe alternative; prohibiting D & X is not, in and of itself, an "undue burden" she concluded.[473] Because the ruling in *Stenberg* was by a narrow five-to-four margin, Justice O'Connor's unique concurrence may be crucial when the PBABA reaches the Supreme Court.[474] Justice O'Connor has been described as a "hero" for maintaining a consistent opinion predicated on free choice in life-defining matters.[475] In an evaluation of the PBABA, Justice O'Connor likely will retain her heroine status.[476]

Justice O'Connor advanced two requirements for a constitutional abortion procedure ban: first, the law must not be vague as to the procedure it bans, and second, where there do not seem to be adequate alternatives, the law must contain a health exception.[477] The PBABA

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generally supra Part II.B.3 (discussing the *Stenberg* opinion that held a Nebraska law banning partial birth abortion unconstitutional based on the fact-finding of the trial court).

471. *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring) (stating that "[i]f 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" violate *Casey*). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

472. *Stenberg*, 530 U.S. at 930 (citing *Casey* for the two reasons the Nebraska law was unconstitutional: the law did not distinguish between the D & X and D & E, and the law did not provide an exception for the health of the woman seeking the abortion).

473. *Id.* at 951 (O'Connor, J., concurring); *see* Glidewell, *supra* note 191, at 1115 ("It is revealing that Justice O'Connor's pointed statements did not make it into the majority opinion."). *See generally supra* Part II.B.4 (discussing Justice O'Connor's concurring opinion in *Stenberg* and her willingness to reconsider her position on future abortion cases if her requirements are met).

474. *See* Davis & Gilligan, *supra* note 158, at 904–14 (explaining Justice O'Connor's voting record with respect to Due Process cases and commenting that it is possible that Justice O'Connor will rule against abortion rights in some contexts). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

475. Davis & Gilligan, *supra* note 158, at 895 (stating that Justice O'Connor is a hero for her "constitutional scheme . . . of uncoerced decision making about such life-defining matters as marriage, procreation, parenting, and the manner of one's death").

476. *See infra* notes 478–84 and accompanying text (explaining why Justice O'Connor will not likely vote in favor of upholding the PBABA).

477. *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring) (stating that "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"). *See generally supra* Part II.B.3 (discussing the *Stenberg* opinion).

meets neither of these requirements.[478] As explained above, the law does not explicitly ban only the D & X procedure.[479] Congress could have drafted the law in another way to do just that, but it did not.[480] Moreover, the PBABA explicitly denies women a health exception, despite the fact that Justice O'Connor explicitly mentioned a requirement for the "life and health" of the woman seeking an abortion.[481] The Congressional Findings section of the PBABA asserts that a health exception is not necessary.[482] However, Justice O'Connor argued that for her to consider an abortion ban constitutional, such an exception would be necessary where alternatives are not adequate.[483] For these two reasons, when the Supreme Court reviews the PBABA, Justice O'Connor is not likely to change her opinion on the validity of a ban on the D & X abortion procedure, even if the Supreme Court applies the deferential standard advocated by the congressional findings.[484]

V. PROPOSAL

Legislators must not undermine a woman's right to choose abortion because they believe that they know more than doctors medically and more than Supreme Court justices legally.[485] D & X is a medical procedure that some women in certain circumstances need.[486]

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478. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3(a), 117 Stat. 1201, 1206–07 (providing no health exception); *supra* Part IV.A (discussing the PBABA's applicability to pre-viability procedures).

479. *See supra* Part IV.A (discussing the PBABA's applicability to pre-viability procedures).

480. *See* Holsinger, *supra* note 329, at 609 (describing how easy it would have been for Congress to state that the PBABA prohibited only D & X).

481. *See* Partial-Birth Abortion Ban Act §3(a); *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring); *see also* Glidewell *supra* note 191, at 1144 (stating that "[n]ot including an exception for when a woman's mental, emotional, or other kind of health is at risk is decidedly contrary to the goal of preserving women's health").

482. Partial-Birth Abortion Ban Act § 2(5) (stating in the findings section that "a partial-birth abortion is never necessary to preserve the health of a woman"). *See generally supra* Part III.C.2 (discussing the findings section included in the PBABA).

483. *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring). *See generally supra* Part IV.B.1 (explaining why alternatives to D & X are not safer procedures); *supra* Part II.B.4 (discussing Justice O'Connor's concurring opinion in *Stenberg* and her willingness to find an abortion ban constitutional premised on health considerations).

484. *See Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring) (stating two requirements for a constitutional ban on D & X).

485. *See supra* Part IV.B.2 (explaining that legislators must not create medical legislation in legal terminology and that doctors and legislators should work together to create any ban on medical procedures).

486. *See supra* notes 2–6 and accompanying text (telling the story of two women whose doctors found that they needed the procedure Congress banned in the PBABA); *see also* ACOG Brief, *supra* note 203, at 19 ("The unbroken tie that binds this Court's abortion cases is the

Furthermore, any ban on the D & X procedure must include an exception for the life *and health* of the woman seeking the abortion.[487] Congress should have written a law that both emphasized the role of doctors in performing abortion and provided doctors with information that is useful medically; a law must provide an exception for the health of the woman seeking abortion, as determined in conjunction with her doctor.[488]

To date, the only legally effective way to ban a late term abortion procedure is to define it medically and include the medical details of how doctors perform the procedure.[489] Therefore, for the PBABA to be constitutional, Congress should have specified that the law only renders the post-viability D & X procedure illegal.[490] Further, Congress must

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preeminence accorded to women's health, which derives from the inescapable fact that pregnancy is fraught with health risks—including a risk of death . . . that the woman alone must bear."); Walther, *supra* note 185, at 735 ("The procedure should be an available alternative for doctors to rely on if and when the patient's needs indicate that D & X would be beneficial.").

487. Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992) (reiterating *Roe*'s requirement that any regulation on abortion have an exception for the life and health of the woman).

488. *Cf.* Partial Birth Feticide, OHIO REV. CODE ANN. § 2919.151(B)–(C) (West Supp. 2004) (providing an example of a constitutional ban on an abortion procedure).

489. *E.g.*, *id.* § 2919.151 (explaining the medical procedure known in Ohio as "partial-birth feticide" by listing medical elements that must be performed in sequence to constitute a violation of the law). The Ohio statute specifically notes that D & C and D & E are not prohibited. *Id.* Furthermore, the statute excepts any procedure necessary for the purpose of maintaining the life or health of the woman pre- or post viability. *Id.* *See generally supra* Part IV.A (arguing that the PBABA is vague and could be applied to many procedures).

490. *See* Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436, 441 (2003) (comparing the constitutional Ohio law with the unconstitutional provisions from the statute in *Stenberg*). The Ohio statute contains a provision for the "life or health" of the woman seeking an abortion both pre- and post viability. OHIO REV. CODE ANN. § 2919.151(B)–(C). Furthermore, the Ohio law states explicitly what it does and does not prohibit in a step-by-step explanation, naming the medical procedures. *Women's Med. Prof'l Corp.*, 353 F.3d at 452–53. The Ohio Code provides:

> (A) As used in this section:
>
> (1) "Dilation and evacuation procedure of abortion" does not include the dilation and extraction procedure of abortion.
>
> (2) "From the body of the mother" means that the portion of the fetus' body in question is beyond the mother's vaginal introitus in a vaginal delivery.
>
> (3) "Partial birth procedure" means the medical procedure that includes all of the following elements in sequence:
>
> (a) Intentional dilation of the cervix of a pregnant woman, usually over a sequence of days;
>
> (b) In a breech presentation, intentional extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus from the body of the mother, or in a cephalic presentation, intentional extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother;
>
> (c) Intentional partial evacuation of the intracranial contents of the fetus, which procedure the person performing the procedure knows will cause the

use medical terms to describe the procedure in a step-by-step analysis making clear to doctors exactly what procedure is prohibited.[491]

Moreover, any ban on an abortion procedure should contain a health exception with both subjective and objective components.[492] The statute must take into account the varied amount of medical materials and supplies among medical facilities and the varying expertise among

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death of the fetus, intentional compression of the head of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, or performance of another intentional act that the person performing the procedure knows will cause the death of the fetus;

(d) Completion of the vaginal delivery of the fetus.

(4) "Partially born" means that the portion of the body of an intact fetus described in division (A)(3)(b) of this section has been intentionally extracted from the body of the mother.

(5) "Serious risk of the substantial and irreversible impairment of a major bodily function" means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function.

(6) "Viable" has the same meaning as in section 2901.01 of the Revised Code.

(B) When the fetus that is the subject of the procedure is viable, no person shall knowingly perform a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.

(C) When the fetus that is the subject of the procedure is not viable, no person shall knowingly perform a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.

(D) Whoever violates division (B) or (C) of this section is guilty of partial birth feticide, a felony of the second degree.

(E) A pregnant woman upon whom a partial birth procedure is performed in violation of division (B) or (C) of this section is not guilty of committing, attempting to commit, complicity in the commission of, or conspiracy in the commission of a violation of those divisions.

(F) This section does not prohibit the suction curettage procedure of abortion, the suction aspiration procedure of abortion, or the dilation and evacuation procedure of abortion.

(G) This section does not apply to any person who performs or attempts to perform a legal abortion if the act that causes the death of the fetus is performed prior to the fetus being partially born even though the death of the fetus occurs after it is partially born.

OHIO REV. CODE ANN. § 2919.151.

491. *See supra* note 490 (detailing the elements of a constitutional ban on an abortion procedure).

492. *See* Glidewell, *supra* note 191, at 1147 (arguing that an ideal health exception provision will account for both objective and subjective standards); *see also supra* Part IV.B (arguing that a ban on an abortion procedure must have a health exception).

doctors.[493] However, the law must also allow for doctors to exercise their own good faith medical determinations.[494] A doctor's medical judgment can include mental health as well as physical well-being.[495] Thus, a prohibition on a medical procedure should leave room for the doctor to provide for the patient's health and best interest.[496] Prohibitions against abortion procedures must ensure that doctors are not afraid to perform abortions because of vague congressional instructions.[497] If doctors are afraid to treat their patients properly, then there will be an undue burden on a woman's ability to choose pre-viability abortion.[498]

Accordingly, if Congress insists on passing a post-viability partial birth abortion ban, Congress must outline explicitly the exact procedure it prohibits in a step-by-step framework.[499] Further, Congress must provide an exception for the life and health of the woman seeking the abortion, including a mental health exception and an exception for victims of rape and incest.[500] Thus, an exception for only physical well-being is insufficient.[501] A woman's destiny should not be in the

493. *Id.*; *cf.* Roe v. Wade, 410 U.S. 113, 166 (1973) (noting the intraprofessional remedies for doctors who abuse medical privileges); Glidewell, *supra* note 191, at 1148 ("If physicians are not accountable to any outside authority, the medical world will be as dangerous and impractical as a world where doctors are required to get approval for every move they make.").

494. *See* Glidewell, *supra* note 191, at 1147; *see also supra* Part IV.B (arguing that a ban on an abortion procedure must have a health exception).

495. *See supra* Part III.B.3 (examining the mental health exception requirement); *see also supra* Part IV.B (arguing that a ban on an abortion procedure must have a health exception).

496. Walther, *supra* note 185, at 735 (commenting that the validity of a ban on an abortion procedure "should relieve the physician from liability for performing a post-viability D & X abortion when necessary to protect the life or health of the [woman]").

497. *See* Massie, *supra* note 243, at 334 (explaining the chilling effect on the number of abortion procedures performed that will result from doctors' fear of prosecution under a vague law).

498. *See* Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (noting that if the statute at issue applied to D & E, as the Court held it did, it would be an undue burden on a woman's ability to choose pre-viability abortion).

499. *E.g.*, OHIO REV. CODE ANN. § 2919.151 (West Supp. 2004) (providing an example of a constitutional ban on an abortion procedure); *see also* Walther, *supra* note 185, at 734 (explaining that pre-viability, a ban on D & X should be found unconstitutional because D & X "has demonstrable benefits to women's health"); *supra* Part IV.A (arguing that the PBABA is vague and does not state explicitly what is prohibited).

500. *See supra* Part III.B.3 (examining the health exception requirements); *supra* Part IV.B (explaining that a constitutional ban on an abortion procedure must contain an adequate exception for the health of the woman).

501. *See* Walther, *supra* note 185, at 734 (stating that the "health exception should be broad enough to allow the doctor to evaluate mental health concerns in addition to physical health"); *supra* Part IV.B (explaining that a constitutional ban on an abortion procedure must contain an adequate exception for the health of the woman).

hands of legislators but rather in the hands of her physician and her family.

VI. CONCLUSION

A woman's right to choose to have an abortion arises from the fundamental right to privacy. It cannot be taken away because a group of legislators on Capitol Hill believe that an abortion method is gruesome. *Roe* and *Casey* created a specific framework through which the government can achieve its legislative goal of reducing the number of abortions. But to do so at the expense of women's health is outrageous. The Partial-Birth Abortion Ban Act of 2003 does not satisfy the general requirements set forth by the Court in *Stenberg* or by Justice O'Connor in her concurrence. A proper ban on a medical procedure must include exceptions to allow doctors the latitude to use their medical expertise. Congress has never before banned a safe medical procedure, and Congress should not have done so now; therefore, the Supreme Court is likely to declare the PBABA unconstitutional.