University of Miami Law Review

Volume 63
Number 1 *Volume 63 Number 1 (October 2008)*

Article 8

10-1-2008

Gonzales v. Carhart: The Partial Termination of the Right to Choose

Laura J. Tepich

Gonzales v. Carhart: The Partial Termination of the Right To Choose

LAURA J. TEPICH†

† Executive Editor, *University of Miami Law Review*; J.D. candidate, 2009, University of Miami School of Law; B.A., 2006, Carthage College. I would like to thank my parents, to whom I owe everything, and whose unwavering support is my daily inspiration. I also thank Professor Carolyn Hudson and Professor Ellen Hauser, whose classrooms shaped the person I am and taught me invaluable lessons I carry with me every day. Thank you to Nancy Millar for her insightful guidance, to Todd Allison for his vivacious and constant friendship, and to both, for being my mentors and for setting the standard from Day One and always inspiring me to (try to) meet it. Lastly, thank you to Miranda Walker and Matea Varvodic for their perpetual, shrewd, and galvanizing encouragement.

I. INTRODUCTION

> For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.
>
> —Justice Harry Blackmun*

> Women in much of the world lack support for fundamental functions of a human life. . . . [O]bstacles often impede their effective participation in political life. In many nations women are not full equals under the law . . . . In all these ways, unequal social and political circumstances give women unequal human capabilities.
>
> —Martha Nussbaum‡

In April of 2007, the United States Supreme Court reminded the nation that "[a]bortion continues to be a highly contentious issue in the United States, with few signs of abatement."[1] In a decision that "promises to reframe the abortion debate,"[2] *Gonzales v. Carhart*[3] "upheld as constitutional the federal Partial-Birth Abortion Ban Act of 2003, codified at 18 U.S.C. § 1531."[4] This decision is the latest in evolving Supreme Court abortion jurisprudence that began with the "landmark 1973 ruling"[5] of *Roe v. Wade*,[6] which gave women the right to have an abortion.[7] In upholding the Partial-Birth Abortion Ban Act of 2003 against a facial attack for unconstitutionality,[8] the majority opinion by Justice Kennedy concluded that the Act is "not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."[9]

---

* Webster v. Reproductive Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part and dissenting in part).

‡ MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 1 (2000).

1. John P. Hoffmann & Sherrie Mills Johnson, *Attitudes Toward Abortion Among Religious Traditions in the United States: Change or Continuity?*, 66 SOC. RELIGION 161, 161 (2005).

2. Linda Greenhouse, *In Reversal of Course, Justices, 5–4, Back Ban on Abortion Method*, N.Y. TIMES, Apr. 19, 2007, at A1.

3. 127 S. Ct. 1610 (2007).

4. Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 331 (6th Cir. 2007).

5. Sara Lipka, *After* Roe, ATLANTIC ONLINE, May 2, 2006, http://www.theatlantic.com/doc/print/200605u/abortion-interview.

6. 410 U.S. 113 (1973).

7. Jeanette M. Soares, *Abortion*, 7 GEO. J. GENDER & L. 1099, 1099 (2006).

8. *Carhart*, 127 S. Ct. at 1619.

9. *Id.* at 1627.

This note argues that, in spite of its relatively narrow and seemingly innocuous holding, *Gonzales v. Carhart* (also referred to as *Carhart II*[10]) is ultimately an "alarming"[11] "setback to a woman's right to choose"[12] that gave "anti-choice activists 'the long-awaited victory they expected from a more conservative bench'"[13] and "will inflame political controversy rather than diminish it."[14] Part II discusses the extensive precedent upon which the decision is founded, including both abortion jurisprudence and Commerce Clause jurisprudence, as well as the legislative history of the Partial-Birth Abortion Ban Act of 2003. Part III introduces the cases that gave rise to *Gonzales v. Carhart* and deconstructs the decision itself, including the majority opinion by Justice Kennedy, the concurrence by Justice Thomas, and the dissent by Justice Ginsburg. Part III also offers a critique of the decision, and ultimately argues that the majority opinion "abandons core principles"[15] of and represents "a sharp reversal from"[16] fundamental abortion jurisprudence.[17] Part III will also address the possible ramifications of the Act in the medical profession,[18] the abandonment "of the *Casey/Carhart* undue burden test for facial challenges,"[19] the troubling and paternalistic language of Jus-

10. *See* Justin Weinstein-Tull, Comment, *Expanding Congressional Power in* Gonzales v. Carhart, 93 VA. L. REV. IN BRIEF 165, 165 (2007), http://www.virginialawreview.org/inbrief/2007/07/23/weinsteintull.pdf. This designation as *"Carhart II"* is to distinguish *Gonzales v. Carhart* from the Supreme Court case of *Stenberg v. Carhart*, 530 U.S. 914 (2000), known as *Carhart I*. *See* Weinstein-Tull, *supra*, at 165.

11. *Carhart*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

12. Weinstein-Tull, *supra* note 10, at 165.

13. Posting of Jill Filipovic to Huffington Post, http://www.huffingtonpost.com (Apr. 19, 2007, 21:43 EST).

14. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 432 (2007).

15. Posting of Jason Harrow to SCOTUSblog, http://www.scotusblog.com/wp (Apr. 18, 2007, 18:17 EST).

16. *Id.*

17. *Id.* Bonnie Scott Jones, a senior attorney at the Center for Reproductive Rights, stated that the holding of the Supreme Court in *Gonzales v. Carhart* "abandons core principles of *Roe v. Wade* and *Planned Parenthood v. Casey*," *id.*, both of which are among the most important cases in abortion jurisprudence.

18. It has been predicted by a number of professionals that the ruling in *Gonzales v. Carhart*, while supposedly confined to banning intact dilation and extraction (also called "dilation & extraction") abortion procedures, will have a "chilling effect" on the few doctors who actually perform abortions after twelve weeks. *See, e.g.*, Bruce Kessler, *Abortion: Supreme Court Upholds Partial-Birth Abortion Ban Act Against Facial Challenge*—Gonzales v. Carhart, 33 AM. J.L. & MED. 523, 526 (2007); *Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States*, GUTTMACHER POL'Y REV., Spring 2007, at 19, 19; Lynn Harris, *Supreme Court Upholds Ban on "Partial-Birth" Abortion*, SALON, Apr. 19, 2007, http://www.salon.com/mwt/feature/2007/04/19/scotus_ban/print.html; Posting of Jill Filipovic to Huffington Post, *supra* note 13.

19. Posting of Marty Lederman to SCOTUSblog, http://www.scotusblog.com/wp (Apr. 18, 2007, 10:43 EST).

tice Kennedy,[20] the implications of Justice Kennedy's references to "ethical and moral concerns,"[21] and the unprecedented absence of a health exception in the Partial-Birth Abortion Ban Act.[22] Lastly, Part III will explore the possible arguments and outcome of challenging the Partial-Birth Abortion Ban Act under the Commerce Clause. Part IV will then examine the direction various courts appear to be taking since *Gonzales v. Carhart* was decided in April in relation to "partial-birth" abortion bans in an effort to determine the direction of future abortion jurisprudence.

II. THE DISTINCT HISTORIES OF THE COMMERCE CLAUSE AND THE RIGHT TO CHOOSE

A. *A Brief History of Commerce Clause Jurisprudence*

1. THE EVOLUTION OF THE COMMERCE CLAUSE

While the text of the Commerce Clause may be "facially clear-cut,"[23] the Commerce Clause jurisprudence of the United States Supreme Court "has been surprisingly inconsistent over the last ten years."[24] After a period of time from 1937 to 1995, during which "not one statute was struck down on the grounds that it exceeded Congress's Commerce power,"[25] the "Supreme Court handed down two . . . decisions intended to restore the balance between congressional Commerce Clause legislation and state police power regulations."[26] These two decisions, *United States v. Lopez*[27] and *United States v. Morrison*,[28] have been said to signal "a federalist revolution in Commerce Clause jurisprudence, in which the Court seemed to be drawing lines around the types

20. There have been numerous observations and criticisms of Justice Kennedy's use of paternalistic language in the majority opinion of *Gonzales v. Carhart*. *See, e.g.*, Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007, at A18; Anita L. Allen, *Atmospherics: Abortion Law and Philosophy* (Univ. of Pa. Law Sch. Scholarship at Penn Law, Paper No. 180, 2007), *available at* http://lsr.nellco.org/upenn/wps/papers/180; Dahlia Lithwick, *Father Knows Best: Dr. Kennedy's Magic Prescription for Indecisive Women*, SLATE, Apr. 18, 2007, http://www.slate.com/id/2164512; Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com (Apr. 19, 2007, 14:50 EST).

21. Greenhouse, *supra* note 2.

22. *Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States*, *supra* note 18, at 19.

23. David L. Luck, Note, *Guns, Drugs, and . . . Federalism?*—Gonzales v. Raich *Enfeebles the Rehnquist Court's* Lopez-Morrison *Framework*, 61 U. MIAMI L. REV. 237, 252 (2006).

24. Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted To Embrace Federalism*, 75 FORDHAM L. REV. 301, 302 (2006).

25. *Id.*

26. Luck, *supra* note 23, at 238.

27. 514 U.S. 549 (1995).

28. 529 U.S. 598 (2000).

of areas that Congress can regulate."[29] This seeming revolution, however, "appears to have been short-lived,"[30] based on the apparent divergence from that jurisprudence in *Gonzales v. Raich*,[31] which has been argued "to mark a move back toward . . . a heavy emphasis on deference to congressional judgment, paired with an expansive understanding of the Commerce power and the national market economy."[32]

The basic paradigm under which we understand the Commerce powers of Congress is that "[t]he Constitution creates a Federal Government of enumerated powers,"[33] named in Article I, Section 8. The Commerce Clause delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[34] This power may be also combined with the Necessary and Proper Clause.[35]

When discussing Commerce Clause jurisprudence, scholarship has divided the decisions of the Supreme Court into "distinct chronological-thematic eras."[36] The nature of Congress's power to regulate Commerce was first defined by Chief Justice Marshall in *Gibbons v. Ogden* in 1824 as "describ[ing] the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[37] The Court continued by saying that the commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."[38] Even with this broad definition, however, the Court recognized inherent limitations of the Commerce power, including restricting "the word 'among' . . . to "that

29. Goldberg, *supra* note 24, at 302.

30. *Id.*

31. 545 U.S. 1 (2005).

32. Goldberg, *supra* note 24, at 302.

33. United States v. Lopez, 514 U.S. 549, 552 (1995).

34. U.S. CONST. art. I, § 8, cl. 3.

35. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). The Necessary and Proper Clause states that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

36. Luck, *supra* note 23, at 238. Those eras are recognized as: "(1) Broad Commerce Power, but Largely Undefined—Inception–1888; (2) Narrowly Defined to Promote Laissez-Faire Capitalism—1888–1936; (3) Broadly Defined to Further the New Deal—1937–1995." *Id.* (emphasis omitted) (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 163–225 (7th ed. 2004)). At times, a fourth era is also recognized: "(4) Broadly Defined, but Somewhat Circumscribed to Foster Dual Federalism—1995–present." *Id.* (emphasis omitted).

37. 22 U.S. (9 Wheat.) 1, 189–90 (1824).

38. *Id.* at 196.

commerce which concerns more States than one."[39]

Following the Supreme Court decision in *Gibbons*, and indeed for the first century of our history, the Court dealt with cases in which the Commerce Clause served as a limitation on the power of state legislation that may or may not have impeded or discriminated against interstate commerce or that once had been permissible.[40] The nature of Commerce Clause jurisprudence changed with the advent of "rapid industrial development and an increasingly interdependent national economy,"[41] during which Congress "ushered in a new era of federal regulation under the commerce power."[42] In 1935, the Supreme Court drew a "distinction between direct and indirect effects of intrastate transactions upon interstate commerce"[43] in *A.L.A. Schechter Poultry Corp. v. United States*.[44]

Two years later, in 1937, the new era of Commerce Clause jurisprudence began,[45] and the Supreme Court "departed from the distinction between 'direct' and 'indirect' effects" in the "watershed"[46] case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[47] In upholding the National Labor Relations Act against a Commerce Clause challenge, "[t]he Court held that intrastate activities that 'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' are within Congress' power to regulate."[48] After *Jones*, it had become "clear that broad commerce power proponents had prevailed,"[49] a trend that would continue with the Supreme Court's next major Commerce Clause decision.

In that decision, *Wickard v. Filburn*,[50] the Court explicitly rejected

---

39. *Id.* at 194.

> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . [A]nd the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.

Id. at 194–95.

40. *See* Gonzales v. Raich, 545 U.S. 1, 16 (2005); United States v. Lopez, 514 U.S. 549, 553–54 (1995).

41. *Raich*, 545 U.S. at 16.

42. *Id.*

43. *Lopez*, 514 U.S. at 555.

44. 295 U.S. 495 (1935).

45. Luck, *supra* note 23, at 251.

46. *Lopez*, 514 U.S. at 555.

47. 301 U.S. 1 (1937).

48. *Lopez*, 514 U.S. at 555 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 37).

49. Luck, *supra* note 23, at 255.

50. 317 U.S. 111 (1942).

the earlier-made "distinctions between direct and indirect effects on interstate commerce"[51] and established the Aggregation Principle.[52] *Wickard* has been called "the broadest Commerce Clause case to date"[53] and "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."[54] In *Wickard*, a wheat farmer named Filburn sought to enjoin enforcement of certain amendments to the Agricultural Adjustment Act of 1938[55] that "were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices."[56] Filburn argued that his wheat could not be governed by regulations promulgated under the Commerce Clause because it was "not intended in any part for commerce but wholly for consumption on the farm."[57] In spite of this argument, the Court upheld the applications of the amendments, stating that,

> [e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[58]

Thus, *Wickard* "establishe[d] that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[59] Ultimately, it has been stated that *Jones*, *Darby*, and *Wickard* "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."[60]

2. *LOPEZ*, *MORRISON*, AND *RAICH*: THE CONTEMPORARY COMMERCE CLAUSE

The trend toward expansion of congressional powers under the Commerce Clause was brought to a rather abrupt halt in 1995. In *United States v. Lopez*, a twelfth-grade student in Texas was arrested and charged with possession of a firearm on school premises.[61] The day after

51. *Lopez*, 514 U.S. at 556.
52. Luck, *supra* note 23, at 255.
53. *Id.*
54. *Lopez*, 514 U.S. at 560.
55. 317 U.S. at 113.
56. Gonzales v. Raich, 545 U.S. 1, 17 (2005).
57. *Wickard*, 317 U.S. at 118.
58. *Id.* at 125.
59. *Raich*, 545 U.S. at 18.
60. United States v. Lopez, 514 U.S. 549, 556 (1995).
61. *Id.* at 551.

his arrest, federal agents charged Lopez with violating the Gun-Free School Zone Act of 1990,[62] in which Congress prohibited "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[63]

In examining the history of its Commerce Clause jurisprudence, the Court "identified three broad categories of activity that Congress may regulate under its commerce power."[64]

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulat[e] and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . .[65]

Within this final category of activity, the Court also concluded "that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"[66] in order to be within Congress's power to regulate the activity under the Commerce Clause.

The Court continued with its analysis of the Gun-Free School Zone Act, concluding that if § 922(q) was to be sustained, it would have to be under the third category of activities Congress could regulate: "an activity that substantially affects interstate commerce."[67] The majority opinion then goes forth to list criteria to assess the impact on interstate commerce:

> (i) [W]hether the regulated activity was economic or non-economic; (ii) whether there was a jurisdictional element tying the regulated activity to interstate commerce so as to permit a case-by-case inquiry when the connection to interstate commerce was not apparent; (iii) whether the statute was accompanied by congressional findings describing the connection of the regulated activity to interstate commerce; (iv) whether the regulation was part of a nationwide regulatory scheme whose efficacy would be undermined if Congress could not reach the activity; and (v) whether accepting arguments regarding the connection of interstate activity would mean, as a practical mat-

62. *Id.* The Gun-Free School Zone Act of 1990 was codified at 18 U.S.C. § 922 (1988 & Supp. V 1993).

63. 18 U.S.C. § 922(q)(1)(A), *invalidated by Lopez*, 514 U.S. 549. The Gun-Free School Zone Act further defines "school zone" as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25)(A)–(B) (2000).

64. *Lopez*, 514 U.S. at 558.

65. *Id.* at 558–59 (citations omitted).

66. *Id.* at 559.

67. *Id.*

ter, that the commerce power had no enforceable limit.[68]

Using those criteria to evaluate the Gun-Free School Zone Act, the Court concluded that "[t]he Act neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."[69] In spite of Justice Souter's arguments that the "commerce power . . . is plenary"[70] and that, "when faced with two plausible interpretations of a federal criminal statute, [the Court] generally will take the alternative that does not force [it] to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States,"[71] the majority opinion held "that the Act exceed[ed] the authority of Congress" under the Commerce Clause.[72]

The dissenters, "shocked by what they perceived as a return to the . . . distinction between direct and indirect effects and the Court's abandonment of its prior commitment to reviewing Commerce Clause legislation from a 'rational basis' perspective,"[73] argued that the statute fell "well within the scope of the commerce power as [the] Court has understood that power over the last half century."[74] The dissent further stated that "[u]pholding this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns in or near schools and (through their effect on

68. Brannon P. Denning, Gonzales v. Carhart*: An Alternate Opinion*, 2006–2007 CATO SUP. CT. REV. 167, 172.

69. *Lopez*, 514 U.S. at 551. The majority opinion, written by Chief Justice Rehnquist, "first withheld application of the Aggregation Principle and noted the absence of a jurisdictional element linking the firearm in issue to interstate commerce." Luck *supra* note 23, at 258. The Chief Justice also noted that § 922(q) "has nothing to do with 'commerce' or any sort of economic enterprise"; nor was it "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561. Second, the majority opinion reiterated that "§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* Lastly, the Chief Justice noted the absence of "congressional findings regarding the effects . . . of gun possession in school zones" on interstate commerce, *id.* at 562, and ultimately stated that the Court was unwilling to "pile inference upon inference" in order to connect the regulated activity with interstate commerce, *id.* at 567.

70. *Lopez*, 514 U.S. at 609 (Souter, J., dissenting).

71. *Id.* at 610.

72. *Id.* at 551 (majority opinion).

73. Luck, *supra* note 23, at 259 (footnote omitted); *see, e.g.*, *Lopez*, 514 U.S. at 616–17 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.) ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words *'rational basis'* capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the 'regulated activity sufficiently affected interstate commerce,' but rather, whether Congress could have had *'a rational basis'* for so concluding." (first emphasis added) (citation omitted)).

74. *Lopez*, 514 U.S. at 615 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.).

education) the interstate and foreign commerce they threaten."[75] Ultimately, the dissent argued, this would "permit 'Congress . . . to act in terms of economic . . . realities.'"[76]

The Court "reaffirmed [its] commitment to *Lopez* in *Morrison*."[77] *United States v. Morrison* considered the constitutionality of the Violence Against Women Act (VAWA), codified at 42 U.S.C. § 13981, which "provide[d] a federal civil remedy for the victims of gender-motivated violence."[78] The Supreme Court, in a majority opinion written by Chief Justice Rehnquist, "held that the VAWA exceeded the Commerce Clause's scope, and in doing so clarified the *Lopez* framework."[79] The framework outlined in *Lopez* and *Morrison* follows:

> (1) [D]oes the case involve "substantial effects" legislation; (2) if so, is the regulatory subject matter commercial or non-commercial; (3) is there a jurisdictional element ensuring a connection to interstate commerce; (4) are there congressional findings demonstrating a connection to interstate commerce; and (5) is the purported effect on interstate commerce attenuated—is it predicated upon an inference upon an inference?[80]

The Court, in spite of the "mountain of data"[81] compiled by Congress tending to show "the serious impact that gender-motivated violence has on victims and their families"[82] and "the interstate commercial effects of gender-motivated crimes of violence,"[83] concluded that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[84] In striking down the statute as unconstitutional, "[t]he Court clarified that the economic or non-economic nature of the regulated activity was 'central to [its] decision in' *Lopez*"[85] and also noted the "importance of the jurisdictional element."[86]

The dissent made it clear that they viewed the decision as a marked divergence from traditional Commerce Clause jurisprudence, remarking that § 13981 "would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995."[87] That time, the dissent stated, was "a period

75. *Id.* at 631.
76. *Id.* (alterations in original).
77. Luck, *supra* note 23, at 259.
78. 529 U.S. 598, 601–02 (2000).
79. Luck, *supra* note 23, at 259.
80. *Id.* at 259–60.
81. *Morrison*, 529 U.S. at 662 (Breyer, J., dissenting).
82. *Id.* at 614 (majority opinion).
83. *Id.* at 662 (Breyer, J., dissenting).
84. *Id.* at 614 (majority opinion).
85. Denning, *supra* note 68, at 173 (quoting *Morrison*, 529 U.S. at 610).
86. *Id.* (citing *Morrison*, 529 U.S. at 611–12).
87. *Morrison*, 529 U.S. at 637 (Souter, J., dissenting).

in which the law enjoyed a stable understanding that congressional power under the Commerce Clause . . . extended to all activity that, when aggregated, has a substantial effect on interstate commerce."[88]

Thus, the Supreme Court appeared to have embraced a more restrictive view of the Commerce Clause power of Congress in both *Lopez* and *Morrison*. Perhaps, because these two cases appeared to have such striking precedential value[89] in that they were "intended to provide an ongoing analytical framework"[90] for legislation generated under the Commerce Clause, the Court's decision in *Gonzales v. Raich*[91] has been said to encircle the "*Lopez-Morrison* framework in a cloud of uncertainty."[92]

Gonzales v. Raich involved a challenge to the federal Controlled Substances Act (CSA), 21 U.S.C. § 801, in a case that arose over the use of medical marijuana.[93] California became the "first State to authorize limited use of [marijuana] for medicinal purposes"[94] when it enacted the Compassionate Use Act of 1996.[95] The Act "was designed to ensure that 'seriously ill' residents of the State have access to marijuana for medical purposes."[96] The Act created "an exemption from criminal prosecution for" doctors, patients, and primary caregivers "who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician."[97]

Although noting that the respondents' challenge to the CSA was "quite limited,"[98] the Supreme Court held that the "CSA [was] a valid exercise of federal power, even as applied to the troubling facts of this

88. *Id.*

89. Luck, *supra* note 23, at 280.

90. *Id.*

91. 545 U.S. 1 (2005).

92. Luck, *supra* note 23, at 279.

93. *See Raich*, 545 U.S. at 6–7.

94. *Id.* at 5.

95. CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005).

96. *Raich*, 545 U.S. at 5–6.

97. *Id.* at 6.

98. *Id.* at 15. Indeed, Justice Stevens attempts to distinguish *Lopez* and *Morrison* from *Gonzales v. Raich* by emphasizing that in *Raich* "respondents ask us to excise individual applications of a concededly valid statutory scheme." *Id.* at 23. Justice Stevens states,

> [T]he statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."

Id. (second alteration in original).

case."[99] The majority opinion, written by Justice Stevens, posited that the "Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."[100] The Court emphasized that "case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce,"[101] and, no matter the nature of the activity, "it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce."[102] Reviewing its Commerce Clause jurisprudence and likening the instant case to *Wickard v. Filburn*, the Court ultimately concluded that in both cases, "the regulation [was] squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[103]

Addressing contentions that the instant case did not appear to follow the recent cases of *Lopez* and *Morrison*, the majority opinion proceeded to distinguish those cases from the situation in *Gonzales v. Raich*. The Court called the respondents' reliance on those two cases "myopic" because the respondents "overlook[ed] the larger context of modern-era Commerce Clause jurisprudence preserved by those cases."[104] The Court distinguished *Lopez* by saying that that "Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity"[105] and said that the statutory scheme at issue in *Raich* was "at the opposite end of the regulatory spectrum."[106] Likewise, the Court distinguished *Morrison* by stating that the statute in that case was unconstitutional because it did not regulate economic activity and was essentially a criminal statute.[107]

Thus, the Court appeared to distinguish *Raich* from *Lopez* and *Morrison* through a number of small nuances.[108] Justice Stevens' majority in

99. *Id.* at 9.
100. *Id.* at 16.
101. *Id.* at 17.
102. *Id.*
103. *Id.* at 19.
104. *Id.* at 23.
105. *Id.*
106. *Id.* at 24.
107. *Id.* at 25.
108. For example, Justice Stevens attempts to distinguish *Raich* from *Lopez* and *Morrison* by arguing that Raich and Monson, the respondents, brought limited, as-applied challenges to a statutory scheme and that the Court lacked the authority to strike these "individual applications of a concededly valid statutory scheme." *Id.* at 23; *see also* Luck, *supra* note 23, at 280–81 (discussing respondents' challenge to the statute). Additionally, as previously mentioned, the

Raich openly likened the case to that of *Wickard v. Filburn*, which was called "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."[109] Ultimately, it has been argued that the decision in *Gonzales v. Raich* was a somewhat striking divergence from *Lopez* and *Morrison* and that the "resulting conception of the *Lopez-Morrison* framework is . . . 'little more than a drafting guide.'"[110] At the least, "*Raich* appears to mark a move back toward the post-New Deal method of interpreting the Commerce Clause, with a heavy emphasis on deference to congressional judgment, paired with an expansive understanding of the Commerce power and the national market economy."[111]

3. THE INTERSECTION OF ABORTION REGULATION AND THE COMMERCE CLAUSE

In the past, Congress has used the Commerce Clause to legislate in "areas that appear to be only tenuously connected with interstate commerce, such as racial discrimination, environmental protection, and violence against women."[112] While Congress never directly regulated abortion before the decision of *Roe v. Wade* in 1973,[113] Congress has recently begun to regulate abortion under its Commerce Clause powers.

In determining whether abortion can be regulated by Congress under the Commerce Clause, there are many unsettled questions. Abortion could potentially be regulated in a number of different ways, and "[t]he constitutionality of federal laws regulating abortion may depend upon whether Congress attempts to regulate the procedures for providing abortions, access to abortion services, or the type of person who is able to provide or receive abortions,"[114] as well as by whether a court employs a *Lopez/Morrison* or *Raich* methodology.[115] Abortion would

---

majority opinion distinguishes *Lopez* and *Morrison* by arguing that the statutes involved in those cases were criminal statutes that had nothing to do with commerce. *See supra* text accompanying note 107.

109. United States v. Lopez, 514 U.S. 549, 560 (1995). The Court's reliance on *Wickard* is also notable because in that case, the farmer was a commercial farmer, which enabled Chief Justice Rehnquist to state that, "in every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, the regulated activity was of an apparent commercial character." United States v. Morrison, 529 U.S. 598, 611 n.4 (2000) (citation omitted). In *Raich*, in direct comparison, the two women were sick patients using medical marijuana for their own ailments, who did not participate in the commercial market for marijuana. *See Raich*, 545 U.S. at 6–7.

110. Luck, *supra* note 23, at 283.

111. Goldberg, *supra* note 24, at 302.

112. *Id.* at 322.

113. *Id.* at 323.

114. *Id.* at 326.

115. *Id.* at 328.

appear to fall within the categories mentioned in Justice Kennedy's concurrence in *Lopez* and in Justice O'Connor's dissent in *Raich* because "it has traditionally been regulated by the states, not by the federal government, both because it is a part of the practice of medicine and because it is a social issue often thought best left to the states."[116]

The Freedom of Access to Clinic Entrances Act of 1994 (FACE)[117] provides a useful example of Congress passing an abortion-related statute after *Raich*. FACE is legislation designed to facilitate access to reproductive-health-clinic entrances without undue interference or intimidation.[118] The purpose of FACE was "to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services."[119] "FACE regulated the actions of protestors outside abortion clinics and reproductive health facilities, and was intended to protect clinics that the states were unable or unwilling to protect."[120] FACE has repeatedly been challenged and upheld,[121] and thus can be argued to provide a useful example for how courts uphold legislation after *Raich* that is related to abortion[122]: "As of 2005, eight circuit courts have upheld FACE on the grounds that abortion services substantially affect interstate commerce and therefore that obstructing

116. *Id.* (footnote omitted).

117. Pub. L. No. 103-259, 108 Stat. 694 (codified at 18 U.S.C. § 248 (2000)).

118. In relevant part, 18 U.S.C. § 248 states,

> (a) PROHIBITED ACTIVITIES.—Whoever—
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> (2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

18 U.S.C. § 248(a).

119. § 2, 108 Stat. at 694.

120. Goldberg, *supra* note 24, at 324.

121. *Id.* at 333.

122. *E.g.*, *id.* at 332.

the entrance to a clinic is an obstruction of commerce that can be reached under the Commerce power."[123]

FACE has been challenged "under circumstances in which protestors were accused of physically obstructing abortion services facilities."[124] Even before *Lopez* was decided in 1995, the Fourth Circuit in *American Life League, Inc. v. Reno* stated that "[a] federal statute is valid under the Commerce Clause if Congress (1) rationally concluded that the regulated activity affects interstate commerce and (2) chose a regulatory means reasonably adapted to a permissible end."[125] Because "violence, threats of force, and physical obstructions aimed at persons seeking or providing reproductive health services affect interstate commerce,"[126] the Court held that FACE was "within the commerce power of Congress."[127]

"Even after *Lopez* and *Morrison*, every circuit [court] to address FACE has upheld it."[128] The courts to uphold FACE have emphasized "that their role is to 'decide whether a rational basis exists for concluding that [the] regulated activity substantially affects interstate commerce,'"[129] and have concluded that such a basis does indeed exist. After *Lopez* and *Morrison* struck down statutes because the activity being regulated was "non-economic," the courts have upheld FACE by reasoning that although the activity being regulated—protesting outside of reproductive-health-care facilities—is not economic per se, "the fact that the activity was aimed at preventing or threatening commerce made the statute sufficiently related to 'economic activity' to fall within Congress's power."[130] Thus, the courts that have upheld FACE against Commerce Clause challenges have generally used a *Raich*-like analysis of giving deference to Congress's rational basis for enacting legislation.

---

123. *Id.* at 333; *see also* United States v. Bird, 401 F.3d 633, 634 (5th Cir. 2005) ("[T]his Court held that the Freedom of Access to Clinic Entrances Act (FACE) is a valid exercise of Congress's authority under the Commerce Clause."); Norton v. Ashcroft, 298 F.3d 547, 559 (6th Cir. 2002) (upholding FACE under a challenge to Congress's Commerce Clause power); United States v. Gregg, 226 F.3d 253, 261–67 (3d Cir. 2000) (same); United States v. Weslin, 156 F.3d 292, 295–96 (2d Cir. 1998) (per curiam) (same); United States v. Bird, 124 F.3d 667, 672–82 (5th Cir. 1997) (same); Hoffman v. Hunt, 126 F.3d 575, 582–88 (4th Cir. 1997) (same); Terry v. Reno, 101 F.3d 1412, 1415–18 (D.C. Cir. 1996) (same); United States v. Unterburger, 97 F.3d 1413, 1415–16 (11th Cir. 1996) (same); United States v. Dinwiddie, 76 F.3d 913, 919–21 (8th Cir. 1996) (same); United States v. Wilson, 73 F.3d 675, 679–88 (7th Cir. 1995) (same).

124. Goldberg, *supra* note 24, at 333.

125. 47 F.3d 642, 647 (4th Cir. 1995).

126. *Id.*

127. *Id.* at 645.

128. Goldberg, *supra* note 24, at 333.

129. *Id.* (alteration in original) (quoting United States v. Wilson, 73 F.3d 675, 680 (7th Cir. 1995)).

130. *Id.* at 334.

Ultimately, the "question of whether an abortion procedure itself is commerce has yet to be entirely settled,"[131] and the Supreme Court has never addressed the issue. In light of *Raich*, however, which held that "Congress need have only a rational basis for believing that an activity has a substantial effect on interstate commerce and not[ed] that in cases where the activity is 'economic,' no particularized findings are necessary,"[132]

> [i]f abortion or abortion services are to be regulated under the Commerce Clause, they would have to be understood to fit within one of the last two [*Lopez*] categories, as commerce that can be regulated even though the threat may come only from intrastate activities or as activities that can be regulated even though they are not themselves interstate commerce because they have a substantial relation to interstate commerce.[133]

B. *The Birth of the Right To Choose*

1. *GRISWOLD*, AND THE PENUMBRAS OF THE BILL OF RIGHTS

One of the oldest fundamental rights recognized by the law is the right to bodily integrity.[134] This notion of bodily integrity is "most commonly associated with the Fourteenth Amendment and substantive due process, under which it is closely tied to the concept of personal autonomy."[135] The "autonomy" cases are "epitomized by the Supreme Court's reproductive-rights jurisprudence."[136] While the autonomy cases

> originally viewed the right at stake as having as much to do with protecting one's health and making medical treatment choices in consultation with a physician as with more abstract autonomy rights[,] . . . [i]n their present incarnation, the autonomy cases have come to stand for constitutional protection of certain dignity and equality interests.[137]

The right to choose an abortion, which was established in *Roe v. Wade* in 1973,[138] was grounded "in the right to privacy found in the penum-

131. *Id.* at 328.

132. *Id.*

133. *Id.* at 327 (internal quotation marks and footnote omitted) (quoting United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

134. *See, e.g.*, Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 480 (D.C. Cir. 2006) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *125, *127, *130), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1069 (2008); *In re* Cincinnati Radiation Litig., 874 F. Supp. 796, 816–18 (S.D. Ohio 1995) (detailing Supreme Court decisions dating back to 1884 regarding the right to be free from bodily intrusions).

135. B. Jessie Hill, *The Constitutional Right To Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 305 (2007) (footnote omitted).

136. *Id.*

137. *Id.* at 305–06.

138. Soares, *supra* note 7, at 1099.

bras of the Bill of Rights as first recognized in *Griswold v. Connecticut* and *Eisenstadt v. Baird*."[139] This "right to have an abortion . . . has become an established and accepted legal principle"[140] in the thirty-five years since *Roe v. Wade* was decided.

One important case in the line of "autonomy" cases[141] is *Griswold v. Connecticut*.[142] *Griswold* concerned a challenge to a Connecticut statute prohibiting the use of contraceptives and prohibiting any other individual from helping another to obtain contraceptives.[143] The Court began by reviewing a line of cases implicating the Due Process Clause of the Fourteenth Amendment.[144] The Court then concluded that the cases discussed "suggest[ed] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[145] In striking down the Connecticut statute, the Court stated that "[t]he present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"[146]: a "right of privacy older than the Bill of Rights."[147] For the Court, "specific guarantees in the Bill of Rights . . . [are] formed by emanations from [the guarantees of the Bill of Rights] that help give them life and substance."[148]

Justice Goldberg's concurrence also reinforced the notion that there are fundamental rights not explicitly mentioned in the Bill of Rights. The right of privacy, contended Justice Goldberg, "is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"[149] The concurrence noted that the Supreme Court had "never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically men-

139. *Id.* at 1102 (footnote omitted).

140. *Id.* at 1099.

141. *See* Hill, *supra* note 135, at 306–07 (discussing *Griswold* and describing the case as the "first autonomy case dealing with a right to make medical treatment choices").

142. 381 U.S. 479 (1965).

143. In relevant part, the statutes challenged in *Griswold* stated, "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* at 480 (quoting CONN. GEN. STAT. § 53-32 (1958)). Additionally, section 54-196 of the statute provided that "[a]ny person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.*

144. *Id.* at 481–82.

145. *Id.* at 484.

146. *Id.* at 485.

147. *Id.* at 486.

148. *Id.* at 484.

149. *Id.* at 494 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting)).

tions"[150] and asserted that "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."[151] Indeed, the very existence of the 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. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.[152]

For those reasons, Justice Goldberg concluded that

> [t]o hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.[153]

Responding to concerns that protecting unenumerated rights as fundamental may be difficult and might vest judges with "unrestricted personal discretion,"[154] Justice Goldberg also supplied useful criteria for identifying fundamental rights: Judges

> must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[155]

2. *ROE V. WADE*: THE HALLMARK OF ABORTION JURISPRUDENCE

The next major Supreme Court decision relating to privacy rights, and more specifically to abortion rights, was *Roe v. Wade*[156] in 1973. It can be stated with confidence that "*Roe v. Wade* is one of the most significant Supreme Court decisions in our nation's history."[157] Indeed, it has been argued that "[f]ew decisions have had a greater effect on

150. *Id.* at 486 n.1.
151. *Id.* at 490.
152. *Id.* at 492.
153. *Id.* at 491.
154. *Id.* at 494 n.7.
155. *Id.* at 493 (alterations in original) (citation omitted).
156. 410 U.S. 113 (1973).
157. Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 939 (1999).

legal doctrine, on legal process, and on legal culture than *Roe*,"[158] and that the case "is one of the most important, if not the single most significant, defining events in the socio-cultural life of the current generation of Americans."[159] In his majority opinion, "Justice Blackmun did not turn to any protection for bodily integrity, but rather staked his opinion on"[160] the right to privacy stemming from the penumbras of the Bill of Rights and from the Fourteenth Amendment's Due Process Clause that were found in *Griswold* and earlier cases[161] to hold that "the right to personal privacy guaranteed by the Constitution included a woman's right to determine whether or not to terminate her pregnancy."[162]

Roe v. Wade involved a challenge to Texas statutes,[163] first enacted in 1854,[164] that made "it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'"[165] Jane Roe,[166] an unmarried and pregnant woman living in Texas, instituted a federal action in March of 1970 alleging that she wished to terminate her pregnancy by an abortion performed by a "physician, under safe, clinical conditions."[167] Roe claimed that the Texas statutes prohibiting her from procuring an abortion were "unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[168] After concluding that Jane Roe had standing as a single pregnant woman "thwarted by the Texas criminal abortion laws"[169] and that the case was not moot,[170] the majority opinion, written by Justice Blackmun,[171] proceeded to the merits of the case.

---

158. *Id.*

159. *Id.* at 940.

160. Seth F. Kreimer, *Rejecting "Uncontrolled Authority over the Body": The Decencies of Civilized Conduct, the Past, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 431 (2007) (footnote omitted).

161. *See Roe*, 410 U.S. at 129 ("Appellant would discover this right [to terminate her pregnancy] in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras . . . ." (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965))).

162. Soares, *supra* note 7, at 1099–1100.

163. The Texas statutes involved were articles 1191–1194 and 1196 of the State's Penal Code.

164. *Roe*, 410 U.S. at 119. After the first statutes criminalizing abortion were enacted in Texas in 1854, the statutes were modified soon after and then remained essentially the same until this challenge was brought in 1970. *Id.* at 119–20.

165. *Id.* at 117–18.

166. This name was a pseudonym. *Id.* at 120 n.4.

167. *Id.* at 120.

168. *Id.*

169. *Id.* at 124.

170. *Id.* at 125.

171. *Id.* at 116.

Justice Blackmun began by reviewing the history of abortion legislation and restrictions, dating back even to the Greek and Roman empires.[172] From this examination, the majority opinion concluded 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,"[173] and that a woman "enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."[174] Additionally, the Court reviewed the three reasons that had traditionally been advanced to explain "the enactment of criminal abortion laws in the 19th century and to justify their continued existence"[175]: (1) a "social concern to discourage illicit sexual conduct,"[176] (2) concerns with abortion being hazardous as a medical procedure,[177] and (3) the State's interest in "protecting prenatal life."[178]

The Court then proceeded with its discussion of the right of privacy, in which the right to terminate a pregnancy was ultimately found. Acknowledging that "[t]he Constitution does not explicitly mention any right of privacy,"[179] Justice Blackmun stated that, nonetheless, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution"[180] in a line of decisions arguably dating back to 1891.[181] This right of privacy was recognized by the Court to have roots in the First, Fourth, Fifth, and Ninth Amendments as well as in the penumbras of the Bill of Rights and in the "concept of liberty guaranteed" by the Fourteenth Amendment.[182] Most importantly, the Court concluded that

> [t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state

172. *See id.* at 129–41.

173. *Id.* at 140.

174. *Id.*

175. *Id.* at 147.

176. *Id.* at 148.

177. *See id.* at 148–49. The Court concluded that "any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared," *id.* at 149, but that "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," *id.* at 150.

178. *Id.* at 150.

179. *Id.* at 152.

180. *Id.*

181. *See, e.g.*, Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'").

182. *See Roe*, 410 U.S. at 152.

> action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[183]

Taking into consideration the aforementioned interests purported to justify the criminal abortion statutes, however, the Court determined that, while "the right of personal privacy includes the abortion decision,"[184] "[t]he privacy right involved . . . cannot be said to be absolute,"[185] and that it "must be considered against important state interests in regulation."[186] Thus, the Court established a trimester framework to govern the right to terminate a pregnancy. In the first trimester, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[187] After the first trimester, during the second trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health"[188] due to "the State's important and legitimate interest in the health of the mother."[189] After viability, during the third trimester, a State could propose legislation aimed at the protection of fetal life and may even "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother,"[190] because "the fetus then presumably has the capability of meaningful life outside the mother's womb,"[191] thus making state regulation protecting potential fetal life after viability justifiable both logically and biologically.[192]

The concurrence by Justice Stewart reemphasized the argument that there are liberties protected by the Due Process Clause of the Fourteenth Amendment that are not explicitly mentioned therein.[193] Reasoning that, "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed,"[194] Justice Stewart cites Justice Harlan in concluding,

> [T]he full scope of the liberty guaranteed by the Due Process Clause

183. *Id.* at 153.
184. *Id.* at 154.
185. *Id.*
186. *Id.*
187. *Id.* at 163.
188. *Id.*
189. *Id.*
190. *Id.* at 163–64.
191. *Id.* at 163.
192. *See id.*
193. *See id.* at 168–69 (Stewart, J., concurring).
194. *Id.* at 168 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972)).

> cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.[195]

Ultimately, it has been said that *Roe* "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."[196]

3. THE EVOLUTION BEGINS, BUT THE HOLDING IS REAFFIRMED: *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY*

While retaining and ultimately reaffirming the essential holding of *Roe v. Wade*,[197] the Supreme Court "reversed its position on several [issues in *Roe*] in 1992 when it altered abortion jurisprudence by announcing and applying a new standard of review"[198] in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[199] In this "seminal case . . . the Court affirmed the right to choose but discarded *Roe*'s trimester framework because it misconceived the theoretical nature of the woman's interest and undervalued the State's interest in potential life in practice."[200] *Casey*, instead of focusing as much on *Roe*'s right of privacy encompassing the right to terminate a pregnancy (within the trimester framework), made "paramount" the "decisional autonomy rationale"[201]: a "right of autonomy over one's own body as well as autonomy in making certain important decisions."[202] The opinions of O'Connor, Souter, Kennedy, Blackmun, and Stevens all "invoked a right to 'bodily integrity' enumerated in no clause of the Constitution."[203] Thus, *Casey* represented a shift from *Roe* in embracing "a more general autonomy and right to choose, grounded in the Fourteenth Amendment's Due Pro-

195. *Id.* at 169 (first and third alterations in original) (quoting Poe v. Ullman, 367 U.S. 497, 543 (Harlan, J., dissenting)).

196. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

197. *Id.* at 846.

198. Soares, *supra* note 7, at 1101.

199. 505 U.S. 833.

200. Soares, *supra* note 7, at 1101.

201. Hill, *supra* note 135, at 310.

202. *Id.* at 311.

203. Kreimer, *supra* note 160, at 438.

cess Clause's guarantee of liberty."[204]

Casey, taken at face value, concerned a challenge to five provisions of the Pennsylvania Abortion Control Act of 1982.[205] Beyond this superficial challenge, however, *Casey* also concerned a challenge to overturn the basic tenet of *Roe v. Wade*, guaranteeing the right to have an abortion. This prompted the Court to begin by stating that the Court's "obligation is to define the liberty of all, not to mandate our own moral code,"[206] and then to discuss, at length, the reasons for upholding *Roe v. Wade* as valuable and legitimate precedent,[207] ultimately concluding that "[i]t is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today."[208]

Drawing a line at viability,[209] the joint opinion restated that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy"[210] and that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty [the Court] cannot renounce."[211] The joint opinion was willing, however, to reject the trimester framework articulated in *Roe*, which it did not consider to be a part of *Roe*'s essential holding.[212] The Court in *Casey* also made another significant divergence from *Roe* in changing the standard of review for abortion restrictions and legislation, which arguably "made abortion more susceptible to regulation and restriction."[213] The joint opinion declared that

---

204. Soares, *supra* note 7, at 1102.

205. 18 PA. CONS. STAT. §§ 3203–3220 (1990).

206. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

207. *See id.* at 854–69. The joint opinion listed a series of considerations designed to test "the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case," *id.* at 854; noted that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973," *id.* at 857; stated that, while *Roe* "has engendered disapproval, it has not been unworkable," *id.* at 860; emphasized the need for the Court to retain its legitimacy through adherence to precedent, *id.* at 866; and ultimately concluded that "[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's Commitment to the rule of law," *id.* at 869.

208. *Id.* at 869.

209. *Id.* at 870 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). A line was drawn at viability for two reasons: because of (1) the doctrine of *stare decisis* and because (2)

> the concept of viability . . . is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.

Id.

210. *Id.* at 869.

211. *Id.* at 871.

212. *Id.* at 873.

213. Soares, *supra* note 7, at 1104.

"[o]nly where state regulation imposes an *undue burden* on a woman's ability to make [the decision to have an abortion] does the power of the State reach into the heart of liberty protected by the Due Process Clause."[214]

The new "undue burden" standard articulated by the joint opinion was determined to be "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[215] A finding of an undue burden was defined by the joint opinion as "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."[216] Thus, combining the aforementioned discussion of drawing a line at viability and discussion of the change in the standard of review to that of an undue burden, the joint opinion summarized that an undue burden exists, and a provision of law would be invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[217]

While the Court in *Casey* did reject the trimester framework of *Roe* and did change the standard of review to the undue-burden standard, it is important to note what was reaffirmed and kept intact in the decision. Even with the adoption of the undue-burden standard, the Court is explicit in noting that that "does not disturb the central holding of *Roe v. Wade*, and [it] reaffirm[s] that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[218] Additionally, the joint opinion is explicit in upholding another central tenet of *Roe*, so much so as to use *Roe*'s exact language in reaffirming the holding: that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[219] The fact that the Court in *Casey*, while still making significant changes to the doctrine propounded in *Roe v. Wade*, thought to explicitly retain *Roe*'s "health or life" exception will become very important in the later discussion of *Gonzales v. Carhart*.[220] Not only does the Court in *Casey* unambiguously reaffirm *Roe*'s health or

214. *Casey*, 505 U.S. at 874 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (emphasis added); *see also* Soares, *supra* note 7, at 1101–02.

215. *Casey*, 505 U.S. at 876 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

216. *Id.* at 877.

217. *Id.* at 878.

218. *Id.* at 879.

219. *Id.* (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

220. 127 S. Ct. 1610 (2007).

life exception, but the Court goes further to reiterate that one of the essential holdings of *Roe* forbids state interferences with a woman's choice to undergo an abortion procedure if continuing the pregnancy would be a threat to her health.[221]

Despite having changed the standard of review to the undue-burden standard, the Court is careful to emphasize that "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects,"[222] and that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[223] The Court in *Casey* also went to great lengths to refocus the discussion of the rights involved to emphasize "the right of autonomy over one's own body as well as autonomy in making certain important decisions."[224] In discussing one of the challenged Pennsylvania provisions—the spousal notification requirement—the Court emphasized that, "[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion."[225] The Court also stated that views regarding women as the "center of home and family life"[226] or as having "no legal existence separate from her husband"[227] and thus "preclud[ing] full and independent legal status under the Constitution"[228] "are no longer consistent with our understanding of the family, the individual, or the Constitution."[229] Thus, the Court struck down the spousal notification provision, reasoning that it "embodies a view of marriage . . . repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry."[230]

The concurrence written by Justice Blackmun, the author of the majority opinion in *Roe v. Wade*, went even further to emphasize the autonomy rationale. In a passionate concurrence in part, concurrence in the judgment in part, and dissent in part, Justice Blackmun stated that, "when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has

221. *See Casey*, 505 U.S. at 880 (citing *Roe*, 410 U.S. at 164).
222. *Id.* at 894.
223. *Id.*
224. Hill, *supra* note 135, at 311; *see supra* text accompanying notes 201–04.
225. *Casey*, 505 U.S. at 896 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
226. *Id.* at 897 (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).
227. *Id.* (quoting Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)).
228. *Id.*
229. *Id.*
230. *Id.* at 898.

deemed central to the right of privacy."[231] Amplifying the argument, Justice Blackmun posited that restrictions on the right of a woman to terminate her pregnancy "implicate constitutional guarantees of gender equality,"[232] by compelling them to continue a pregnancy they might otherwise terminate and therefore "conscript[ing] women's bodies into [State] service."[233] The assumption that women can be forced into constructive service to the State by compelling them to produce children when their rights to have an abortion are limited, Justice Blackmun concludes, "appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause."[234] Thus, in recognizing that "women's ability 'to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives,'"[235] "*Casey* linked the abortion right to the constitutional prohibition against government assigning women the traditional, gendered social roles of wife and mother—a prohibition that is increasingly understood to lie at the heart of equal protection."[236]

Finally, it is important to note another aspect of Justice Blackmun's concurrence, as it comes to play a role in the Court's decision in *Gonzales v. Carhart* in 2007. Justice Blackmun is prescient in his critique of the dissent's advocacy for the use of the rational-basis test for abortion regulations,[237] as well as for the use of "an insurmountable requirement for facial challenges: Petitioners must 'show that no set of circumstances exists under which the [provision] would be valid.'"[238] Ironically, in *Gonzales v. Carhart*, fifteen years later, the Court reasons that the absence of a health exception in the Partial-Birth Abortion Ban Act does not render the statute unconstitutional on its face because "respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases."[239] While the language used in the dissent in *Casey* and in the majority opinion in *Carhart* is not identical, both appear to ignore *Casey*'s rule that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for

231. *Id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

232. *Id.* at 928.

233. *Id.*

234. *Id.*

235. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 945 (2007) (quoting *Casey*, 505 U.S. at 835).

236. *Id.* at 945–46.

237. *See Casey*, 505 U.S. at 941 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

238. *Id.* at 942 (alteration in original).

239. 127 S. Ct. 1610, 1639 (2007).

whom the law is irrelevant"[240] by focusing instead on hypothetical subsets of the population for which the statute would not be unconstitutional.

4. LAST DANCE BEFORE *GONZALES V. CARHART*: *STENBERG V. CARHART* AND HEALTH EXCEPTIONS

The last major Supreme Court decision concerning abortion regulation before *Carhart*, and the one most closely related to *Gonzales v. Carhart*, is the 2000 decision of *Stenberg v. Carhart*.[241] *Stenberg* involved a challenge to a Nebraska law banning so-called partial birth abortion,[242] which the Court ultimately held to be unconstitutional.[243] The Court noted the "controversial nature"[244] of the abortion issue, but stated that they would not "revisit [the] legal principles"[245] of a woman's right to choose, but rather would use three established principles to determine the case:

> First, before "viability . . . the woman has a right to choose to terminate her pregnancy."
>
> Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before

240. *Casey*, 505 U.S. at 894.

241. 530 U.S. 914 (2000).

242. *Id.* at 921–22. These statutes ban "so-called" partial birth abortions because, in actuality, there is no medical term called "partial birth abortion." Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything To Lose*, HARPER'S MAG., Nov. 2004, at 33, 33. In relevant part, the statute is described in detail by the Court as follows:

> "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."
>
> The statute defines "partial birth abortion" as:
>
> "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."
>
> It further defines "partially delivers vaginally a living unborn child before killing the unborn child" to mean
>
> "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."
>
> The law classifies violation of the statute as a "Class III felony" carrying a prison term of up to 20 years, and a fine of up to $25,000. It also provides for the automatic revocation of a doctor's license to practice medicine in Nebraska.

Stenberg, 530 U.S. at 921–22 (citations omitted) (quoting NEB. REV. STAT. ANN. §§ 28-105, 28-326(9), 28-328(1)–(2), 28-328(4) (LexisNexis Supp. 1999)).

243. *Stenberg*, 530 U.S. at 922.

244. *Id.* at 920.

245. *Id.* at 921.

> fetal viability" is unconstitutional. An "undue burden is . . . shorthand for the conclusion that a state regnlation [*sic*] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."
>
> Third, "'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[246]

The Court then proceeded to describe in detail the various abortion procedures that are performed during the second trimester of pregnancy, including the one banned by the Nebraska statute: a variation of a standard dilation and evacuation (D&E)[247] procedure called "intact D&E," or "dilation and extraction" (D&X).[248] To summarize briefly, the D&E procedure involves the dilation of the cervix and, after the fifteenth week of pregnancy, "the potential need for . . . disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus"[249] with medical instruments. The majority opinion, written by Justice Breyer, was careful to note that the D&E procedure carries certain risks: "The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal-bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications."[250] An effort to avoid these risks is made by attempting to use the procedure banned by the Nebraska statute: the intact D&E procedure.

Like the standard D&E procedure, intact D&E begins with the dilation of the cervix, at which point the procedure "involves removing the fetus from the uterus through the cervix 'intact,' *i.e.*, in one pass, rather than in several passes."[251] The procedure is used after the sixteenth week of pregnancy, at which point the fetal skull has become too large to pass through the cervix. Thus, depending on the presentation of the fetus, the intact D&E procedure proceeds in one of two ways. "If the fetus

246. *Id.* (citations omitted).

247. The standard D&E procedure is the "most commonly used procedure" during the second trimester of pregnancy. *Id.* at 924. This standard procedure "involves (1) dilation of the cervix; (2) removal of at least some fetal tissue using nonvacuum instruments, and (3) (after the 15th week) the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus." *Id.* at 925.

248. The Court states that "intact D&E and D&X are sufficiently similar for us to use the terms interchangeably." *Id.* at 928. In contrast to the standard D&E procedure, intact D&E "involves removing the fetus from the uterus 'intact,' *i.e.*, in one pass, rather than in several passes. It is used after 16 weeks at the earliest." *Id.* at 927 (citation omitted).

249. *Id.* at 925.

250. *Id.* at 926.

251. *Id.* at 927.

presents head first[,] . . . the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix."[252] "If the fetus presents feet first[,] . . . the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix."[253] The potential benefits of using the intact D&E procedure include "reduc[ing] the dangers from sharp bone fragments passing through the cervix, . . . minimiz[ing] the number of instrument passes needed for extraction and lessen[ing] the likelihood of uterine perforations caused by those instruments, . . . reduc[ing] the likelihood of leaving infection-causing fetal and placental tissue in the uterus,"[254] and the possibility of "prevent[ing] potentially fatal absorption of fetal tissue into the maternal circulation,"[255] in addition to potential benefits "in circumstances involving nonviable fetuses" for women with prior uterine scars,[256] "or for women for whom induction of labor would be particularly dangerous."[257] In light of these benefits, the Court notes that the District Court had concluded that "the evidence is both clear and convincing that [the intact D&E] procedure is superior to, and safer than, the . . . other abortion procedures used during the relevant gestational period."[258]

The Court, after summarizing the medical procedures involved in the Nebraska statute, proceeded quickly to conclude that the statute violated the Constitution for at least two independent reasons. The first of those reasons was because "the law lacks any exception 'for the preservation of the . . . health of the mother,'"[259] and the second was because it "'imposes an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself."[260]

The independent reason for striking down the Nebraska statute based on the lack of a health exception is highly significant and, indeed, is certainly emphasized and expounded in impressive detail by the majority opinion. The Court cites *Casey* for its reiteration of *Roe* that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abor-

252. *Id.*

253. *Id.*

254. *Id.* at 928.

255. *Id.*

256. *Id.* at 929.

257. *Id.*

258. *Id.* at 928–29 (quoting Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914).

259. *Id.* at 930 (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

260. *Id.* (quoting *Casey*, 505 U.S. at 874 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

tion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*"[261] The fact that the same language is being used by the Court in *Stenberg* that was used in both *Casey* and in *Roe* is arguably demonstrative of its significance in abortion jurisprudence, since it had been retained and recited for twenty-seven years at the time *Stenberg* was decided; clearly, the importance of a health exception had not escaped the attention of the Court. Justice Breyer emphasizes that point by stating that, "[s]ince the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation,"[262] both of which were impacted by the Nebraska statute at issue.

In noting that the Nebraska statute does not actually promote a State interest in the potentiality of human life because it does not save a single fetus from destruction, but rather regulates only a method of performing abortion,[263] the Court concludes that

> the governing standard requires an exception "where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother," for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion.[264]

Additionally, the Court dismisses Nebraska's claim that a health exception is not required "unless there is a need,"[265] which is not the case here because there are safe alternatives available, by concluding that "[t]he State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure."[266] Most significantly, perhaps, the Court notes that the District Court found that "a select panel of the American College of Obstetricians and Gynecologists concluded that D&X may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a

---

261. *Id.* (quoting *Casey*, 505 U.S. at 879 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973))).

262. *Id.*

263. *Id.*

264. *Id.* at 931 (citation omitted) (quoting *Casey*, 505 U.S. at 879 (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

265. *Id.*

266. *Id.* at 932. For example, the District Court found that the procedure "reduces operating time, blood loss and risk of infection; reduces complications from bony fragments; reduces instrument-inflicted damage to the uterus and cervix; prevents the most common causes of maternal mortality (DIC and amniotic fluid embolus); and eliminates the possibility of 'horrible complications' arising from retained fetal parts." *Id.* (quoting Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1126 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914).

woman."[267]

Further, the Court concluded that the infrequency of the D&X procedure did not justify Nebraska's lack of a health exception and that the procedure's relative rarity was "not highly relevant."[268] Reasoning that "the health exception question is whether protecting women's health requires an exception for those infrequent occasions,"[269] the Court concludes that "[a] rarely used treatment might be necessary to treat a rarely occurring disease that could strike anyone—the State cannot prohibit a person from obtaining treatment simply by pointing out that most people do not need it."[270] Further, the Court stated that "[t]he word 'necessary' in *Casey*'s phrase 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,' cannot refer to an absolute necessity or to absolute proof";[271] "[n]either can that phrase require unanimity of medical opinion."[272] Instead,

> [w]here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.[273]

In determining that Nebraska had failed to convince the Court that a health exception was never necessary, the Court again reiterated the importance of a health exception. Dismissing the dissent's concern that health exceptions give doctors "unfettered discretion" in the selection of abortion procedures, Justice Breyer concluded that, "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[274]

Justice O'Connor's concurrence also emphasized the essential need

---

267. *Id.* (internal quotation marks omitted) (quoting *Carhart*, 11 F. Supp. 2d at 1105 n.10).
268. *Id.* at 934.
269. *Id.*
270. *Id.*
271. *Id.* at 937 (citation omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).
272. *Id.*
273. *Id.*
274. *Id.* at 938 (internal quotation marks omitted).

for a health exception in abortion regulations. O'Connor arguably took the argument requiring a health exception a step further than the majority, explicitly stating that, "[b]ecause *even a postviability proscription of abortion would be invalid absent a health exception*, Nebraska's ban on previability partial birth abortions . . . must include a health exception as well, since the State's interest in regulating abortions before viability is 'considerably weaker' than after viability."[275] Thus, Justice O'Connor is stating that "she would not consider a ban on partial-birth abortion constitutional without a health exception."[276] Significantly, even when Justice O'Connor provided clear instructions for legislators were they to try to pass a similar statute in the future—by 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 in [her] view"[277]—Justice O'Connor still emphasized the need for a health exception.

Compared to its highly detailed and thorough examination of the absolute need for a health exception and the explanation of why the Nebraska statute failed in the absence of one, the majority opinion added another rationale for striking down the statute based on the undue-burden standard in what appears to be a jurisprudential afterthought. Because the language of the statute is vague, thus making it difficult to distinguish between the D&E and D&X, and because the language of the statute does not choose to remedy this deficiency by tracking the medical differences between the two procedures, the Court concludes that the plain language of the statute is meant to encompass both procedures.[278] Further supporting this conclusion, the language in question was based upon model statutory language that had been found by ten lower federal courts to be "potentially applicable to other abortion procedures" other than D&X.[279]

Thus, the Court's decision in *Stenberg* in 2000 left little doubt that the need for a health exception was "of special import."[280] Essentially, "*Stenberg* declared that all abortion regulations must contain exceptions for the health of the mother in order to be found constitutional."[281] Indeed, in all three Supreme Court cases addressing the constitutionality

275. *Id.* at 948 (O'Connor, J., concurring) (emphasis added).

276. Alex Gordon, Recent Development, *The Partial-Birth Abortion Ban Act of 2003*, 41 HARV. J. ON LEGIS. 501, 512 (2004).

277. *Stenberg*, 530 U.S. at 951 (O'Connor, J., concurring) (emphasis added).

278. *Id.* at 939 (majority opinion).

279. *Id.* at 941.

280. Note, *After* Ayotte*: The Need To Defend Abortion Rights with Renewed "Purpose,"* 119 HARV. L. REV. 2552, 2557 (2006).

281. Soares, *supra* note 7, at 1118.

of abortion regulations lacking a health exception, the Court has held "that a health exception must be provided when a law restricts access to abortion."[282] It is against that background that we proceed to examine the Federal Partial-Birth Abortion Ban Act of 2003: a statute that lacks the exact type of health exception required by the Supreme Court in *Stenberg*, *Casey*, and *Roe*.

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

It has only been little more than a decade since the legality of late-term abortions began to generate controversy.[283] The federal Partial-Birth Abortion Ban Act of 2003 (PBABA) was the "third time in eight years that Congress attempted to ban the procedure referred to as 'partial-birth abortion,'"[284] and was signed into law by President G.W. Bush in 2003.[285] The PBABA bans a variation of the standard D&E procedure, which is the most common abortion procedure during the second trimester.[286] The banned variation "of this procedure involves a physician partially delivering the fetus intact until part of it passes the vagina, where it is then aborted."[287] This procedure is inaccurately termed "partial-birth abortion" in the PBABA and by anti-choice activists, but is referred to either "intact D&E" or "intact D&X" in the medical community.[288]

Under the PBABA, "any physician who, in or affecting interstate commerce, knowingly performs a partial-birth abortion, and thereby kills a human fetus, shall be fined, imprisoned for not more than two years, or both."[289] The PBABA defines partial-birth abortion as when "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."[290] Significantly, following *Carhart*, this was the "first [time] in

282. *Id.* at 1111. These cases were *Stenberg*, 530 U.S. 914; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

283. *See* Soares, *supra* note 7, at 1114.

284. Gordon, *supra* note 276, at 501. President Clinton vetoed similar bills passed by Congress in 1996 and 1997. *Id.*; *see also* Center for Reproductive Rights: Legislative History of the Federal Abortion Ban, http://www.reproductiverights.org/hill_pri_pba.html (last visited Oct. 12, 2008) (detailing history of federal abortion laws).

285. Kessler, *supra* note 18, at 524.

286. Gonzales v. Carhart, 127 S. Ct. 1610, 1620 (2007).

287. Kessler, *supra* note 18, at 523.

288. *Id.* at 523–24.

289. Gordon, *supra* note 276, at 502.

290. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 3, 117 Stat. 1201, 1206–07 (to be codified at 18 U.S.C. § 1531(b)).

which the [C]ourt has upheld a ban on a specific method of abortion."[291] Even more significantly, and similarly to the unconstitutional Nebraska statute in *Stenberg*,[292] the PBABA does not contain a health exception,[293] and therefore also represents the first time in which the Court has "ruled that an abortion restriction is constitutional despite the lack of a health exception" since *Roe*.[294]

Legal challenges to the PBABA "began almost immediately."[295] The three federal trials challenging the PBABA began on March 29, 2004.[296] All three of those federal courts "found the statute unconstitutional because it lacked a health exception,"[297] and one of the courts also struck down the statute "because it imposed an undue burden and was too vague."[298] Two of those federal cases, *Carhart v. Gonzales*[299] and *Planned Parenthood Federation of America, Inc. v. Gonzales*,[300] gave rise to the Supreme Court case of *Gonzales v. Carhart*.[301]

III. *GONZALES V. CARHART*: UNPRECEDENTED DIRECTIONS IN ABORTION JURISPRUDENCE

A. *The Cases Giving Rise to* Gonzales v. Carhart: *The Factual Underpinnings*

Carhart v. Gonzales is the first of the two federal cases that gave rise to the Supreme Court decision of *Gonzales v. Carhart*. In *Carhart v. Gonzales*, a group of plaintiff doctors who performed the banned abortion procedure filed suit in the United States District Court for the District of Nebraska seeking an injunction against enforcement of the PBABA.[302] The district court held the PBABA unconstitutional[303] and granted a permanent injunction prohibiting "the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable."[304] Primarily using the Supreme Court's decision in

291. Greenhouse, *supra* note 2.
292. Hill, *supra* note 135, at 319.
293. *E.g.*, Soares, *supra* note 7, at 1118.
294. *After* Gonzales v. Carhart*: The Future of Abortion Jurisprudence*, PEW F., June 14, 2007, http://pewforum.org/events/?EventID=149 (transcribing statement of Eve Gartner, Senior Staff Attorney, Planned Parenthood Federation of America).
295. Gordon, *supra* note 276, at 513.
296. Gorney, *supra* note 242, at 34.
297. Soares, *supra* note 7, at 1119.
298. *Id.*
299. 413 F.3d 791 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007).
300. 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom. Carhart*, 127 S. Ct. 1610.
301. 127 S. Ct. 1610.
302. *See* 413 F.3d at 792.
303. *Id.*
304. *Carhart*, 127 S. Ct. at 1619.

Stenberg, the Eighth Circuit affirmed the lower court's decision and held the PBABA unconstitutional.[305]

Throughout the opinion, the Eighth Circuit relied primarily on the fact that the PBABA lacks a health exception to hold the statute unconstitutional. The court cited and agreed with the Fourth Circuit in declaring that "*Stenberg* established the health exception requirement as a per se constitutional rule"[306] for "all abortion statutes, without regard to precisely how the statute regulates abortion."[307] The court concluded that the record in the instant case was similar to the record in *Stenberg* "in all significant respects."[308] *Stenberg*, concluded the Eighth Circuit, requires "a health exception whenever 'substantial medical authority' supports the medical necessity of the prohibited procedure."[309] Thus, the court reasoned, since *Stenberg* established that "'substantial medical authority' supports the conclusion that the banned procedures obviate health risks in certain situations,"[310] even where "no consensus exists in the medical community,"[311] a health exception is required, and PBABA is unconstitutional in its absence.

The other case that gave rise to *Gonzales v. Carhart* was *Planned Parenthood Federation of America, Inc. v. Gonzales*.[312] In this case, the Planned Parenthood entities filed suit in the United States District Court for the Northern District of California seeking "to enjoin enforcement of the Act."[313] In affirming the lower court's ruling, the Ninth Circuit held that the PBABA was "unconstitutional for three distinct reasons, each of which [was] sufficient to justify the district court's holding"[314]: (1) "the Act lack[ed] the constitutionally required health exception,"[315] (2) "it impose[d] an undue burden on women's ability to obtain previability abortions,"[316] and (3) "it [was] unconstitutionally vague, depriving physicians of fair notice of what it prohibits and encouraging arbitrary enforcement."[317]

The Ninth Circuit emphasized that "*Stenberg* reaffirms *Casey*'s

305. *Carhart*, 413 F.3d at 792.

306. *Id.* at 796 (internal quotation marks and emphasis omitted) (quoting Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 625 (4th Cir. 2005)).

307. *Id.*

308. *Id.* at 803.

309. *Id.* at 797.

310. *Id.* at 801–02.

311. *Id.* at 802.

312. 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

313. *Carhart*, 127 S. Ct. at 1619.

314. *Planned Parenthood*, 435 F.3d at 1171.

315. *Id.*

316. *Id.*

317. *Id.* at 1171–72.

holding that the Constitution requires that any abortion regulation must contain such an exception if the use of the otherwise regulated procedure may in some instances be necessary to preserve a woman's life *or health*."[318] The court noted that there was no medical consensus as to whether the intact D&E procedure is in fact "'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[319] Addressing this lack of consensus, the court cited *Stenberg* for the proposition that "as long as there is a lack of consensus in [the medical] community, any regulation of an abortion method must contain a health exception."[320] Thus, even in light of congressional findings that "the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman," and that a "moral, medical, and ethical consensus" exists that partial-birth abortion is "never medically necessary and should be prohibited,"[321] a health exception is required because "[t]he record before Congress clearly demonstrates that no such consensus exists, as do the congressional findings themselves,"[322] and, "[w]ithout a medical consensus, . . . it is impossible for a legislative body to determine that 'a health exception is never necessary to preserve the health of women,' and, in such circumstance, any abortion regulation the legislature enacts without a health exception is unconstitutional."[323]

The court, indeed, seemed particularly bothered by the congressional findings in the PBABA that a medical consensus exists when, in fact, one does not. The Ninth Circuit noted that "[e]ven the most cursory review of the [PBABA] and the congressional record"[324] reveals that "[t]he evidence of the lack of medical consensus is replete . . . and is confirmed in a significant statutory finding."[325] The court concludes that "[t]he evidence before Congress at the time it passed the [PBABA] . . . has led every court that has considered the statute's constitutionality to conclude that no medical consensus exists that the abortion procedures outlawed by the [PBABA] are never necessary to preserve the health of a woman—and we agree."[326]

The Ninth Circuit also explained that the PBABA failed because it places an undue burden on a woman's ability to choose a previability abortion. Again referring to *Stenberg*, the court states that a statute fail-

318. *Id.* at 1172.
319. *Id.* at 1171.
320. *Id.* at 1172.
321. *Id.* at 1169 (emphasis omitted).
322. *Id.* at 1174.
323. *Id.* at 1172–73.
324. *Id.* at 1175.
325. *Id.* at 1174.
326. *Id.* at 1174–75.

ing to distinguish between intact D&Es and non-intact D&Es in its statutory language would constitute an undue burden because "it would prohibit most second trimester abortions."[327] Indeed, the court states that PBABA "fails to differentiate between [intact D&Es and non-intact D&Es] sufficiently clearly to permit doctors to perform the latter procedure without fear of prosecution."[328] The court contends that, since Congress, in drafting the PBABA, deliberately failed to follow Justice O'Connor's roadmap for legislatures wishing to avoid the problems of the Nebraska statute[329] and gave no explanation for doing so,[330] the PBABA is unconstitutional because it would allow prosecutors to pursue physicians performing non-intact D&Es and would have a chilling effect on abortion providers.[331]

Lastly, and related to Congress's failing to adequately distinguish between intact D&Es and non-intact D&Es in its statutory language, the court concludes that the PBABA is also unconstitutionally vague.[332] Because the "need to avoid vagueness is particularly acute when the statute imposes criminal penalties, or when it implicates constitutionally protected rights,"[333] the PBABA is unconstitutionally vague because "the language of the statute, taken as a whole, is not sufficiently clear regarding what it permits and prohibits to guide the conduct of those affected by its terms, specifically medical practitioners."[334] Ultimately concluding that, "[h]ere, Congress, notwithstanding existing Supreme Court law and the multiple opportunities it was given to limit the Act's scope, passed an overly broad ban that it was aware likely violated the Constitution as construed by the Court,"[335] the court upheld the permanent injunction against the PBABA.[336]

Following the rulings of the Eighth Circuit and the Ninth Circuit, both holding the PBABA unconstitutional, the Supreme Court granted certiorari for both cases, and addressed them together in *Gonzales v. Carhart*.

---

327. *Id.* at 1176.

328. *Id.* at 1180.

329. *See id.* at 1177.

330. *Id.* at 1177–78.

331. *See id.* at 1177 ("Because the Act, like the statute invalidated in *Stenberg*, would allow prosecutors to pursue physicians who 'use [non-intact] D & E procedures, the most commonly used method for performing previability second trimester abortions' and would cause all doctors performing those procedures to 'fear prosecution, conviction, and imprisonment,' it too is unconstitutional." (alteration in original) (citation omitted)).

332. *Id.* at 1181.

333. *Id.* (citation omitted).

334. *Id.* at 1181–82.

335. *Id.* at 1189.

336. *Id.* at 1184–85.

B. *Justice Kennedy's Majority Opinion: A Lesson in Ignoring Both Reality and Precedent*

1. JUSTICE KENNEDY, JUST GETTING STARTED . . .

The majority opinion, written by Justice Kennedy, begins in much the same way as the lower federal court decisions holding the PBABA unconstitutional—by describing in full detail the various abortion procedures involved in the litigation.[337] After explaining the standard D&E (non-intact D&E) procedure in unnecessarily graphic detail,[338] and then summarizing the procedural history in the lower courts,[339] Justice Kennedy began the majority's discussion of the merits of the case.

Wasting no time in rejecting the conclusions of the lower courts, Justice Kennedy states that a central premise of *Casey*—"that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals."[340] The majority opinion offers a succinct summary of the three essential parts of *Roe*'s holding that were reaffirmed in *Casey*: all three of which are "implicated in the instant cases."[341] The three-part holding of *Roe* that is affirmed states,

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict

337. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1620–23 (2007).

338. Throughout the opinion, Justice Kennedy uses arguably loaded and suggestive language that is atypical of descriptions involving medical procedures to describe the abortion procedures involved in the litigation. *See* Allison Stevens, *A Major Blow to* Roe, Ms., Summer 2007, at 34, 35 ("Writing for the Supreme Court majority, Justice Anthony Kennedy peppered his ruling with language sympathetic to the anti-choice position . . . ."). This language includes talking about friction that "causes the fetus to tear apart," *Carhart*, 127 S. Ct. at 1621; legs being "ripped off the fetus," *id.*; doctors being able to "kill the fetus," *id.*; a doctor "ripping [the fetus] apart," *id.* at 1622; a prolonged transcription of a nurse's emotion-laden reaction to observing an intact D&E procedure, recalling the "baby's little fingers . . . clasping and unclasping," and describing the procedure as "suck[ing] the baby's brains out," *id.*; and physicians "crush[ing] a fetus' skull," *id.* at 1623.

339. *See Carhart*, 127 S. Ct. at 1625–26.

340. *Id.* at 1626.

341. *Id.*

one another; and we adhere to each.[342]

While all three parts of *Roe*'s essential holding are cited by the Court, Justice Kennedy appears to gloss over the first two to stress that "it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."[343] This is an especially ironic statement to begin the majority opinion's discussion of the merits in light of the fact that the majority opinion is examining the constitutionality of a statute that "saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[344] Apparently missing this irony, the Court continues its review of abortion jurisprudence by assuming various principles set forth in *Casey*.[345] This is perhaps the first sign that Justice Kennedy is prepared to minimize the impact and effect of abortion precedent: The fact that "the central holdings of *Roe* and *Casey*—that a woman has a right to make the ultimate decision to terminate a pregnancy prior to viability, and that the state may not impose an undue burden on that right—were only 'assumed' by the majority, not stated as controlling law."[346]

The Court proceeds with its examination of the PBABA, concluding that "[a] straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regulates and proscribes, with exceptions or qualifications . . . the intact D & E procedure."[347] Notwithstanding protests by the Respondents that "the Act is void for vagueness because its scope is indefinite," the Court concludes that "the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face."[348]

2. RAMIFICATIONS FOR THE MEDICAL PROFESSION: SAVING DOCTORS FROM THEMSELVES

The majority opinion states that the PBABA "defines the unlawful abortion in explicit terms,"[349] and "provides doctors 'of ordinary intelli-

342. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)).

343. *Id.*

344. *Id.* at 1647 (Ginsburg, J., dissenting); *see also* Posting of Geoffrey R. Stone to Huffington Post, http://www.huffingtonpost.com (Apr. 20, 2007, 14:45 EST) ("It is important to note that the prohibition of intact D & E has nothing to do with preserving the life of a fetus.").

345. *Carhart*, 127 S. Ct. at 1626.

346. Posting of Jason Harrow to SCOTUSblog, *supra* note 15.

347. *Carhart*, 127 S. Ct. at 1627.

348. *Id.*

349. *Id.* These "explicit terms" are (1) "the person performing the abortion must 'vaginally delive[r] a living fetus,'" *id.* at 1627; (2) by definition "partial-birth abortion requires the fetus to be delivered '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

gence a reasonable opportunity to know what is prohibited,'"[350] thus defeating the void-for-vagueness requirement that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[351] Thus, the respondents failed to show that the Act should be invalidated on its face due to the void-for-vagueness doctrine and additionally "failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement."[352] Unfortunately, while this sentiment is certainly convenient to support the Court's conclusions, it does not appear to reflect reality, or the findings of the courts below. Indeed, the Ninth Circuit in *Planned Parenthood* stated explicitly that, "[b]ecause the Act, like the statute invalidated in *Stenberg* . . . would cause all doctors performing those procedures to 'fear prosecution, conviction, and imprisonment,' it too is unconstitutional."[353] Additionally, there is abundant evidence that doctors of ordinary intelligence, indeed, do not clearly understand what is and what is not within the parameters of the PBABA.[354]

Ultimately, if a criminal statute banning a specific medical procedure is unclear or vague, it will have serious repercussions for the medical profession. As the Ninth Circuit found, the PBABA's vagueness will cause doctors to "fear prosecution, conviction, and imprisonment."[355] An added complication in this situation is the fact that doctors are never able to "predict beforehand whether they will be able ultimately to remove the fetus intact."[356] For the potential health risks discussed,[357] abortion providers not only *might*, but *should*, try to remove the fetus using as few instrument passes as possible. Thus, it is feasible that, in a procedure in which the doctor does not actually believe it is possible to

---

outside'" the mother's body, *id.*; (3) "to fall within the Act, a doctor must perform an 'overt act, other than completion of delivery, that kills the partially delivered living fetus,'" *id.*; and (4) "the Act contains scienter requirements concerning all the actions involved in the prohibited abortion," *id.* at 1628.

350. *Id.* at 1628.

351. *Id.*

352. *Id.* at 1629.

353. Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1177 (9th Cir. 2006) (citation omitted), *rev'd sub nom. Carhart*, 127 S. Ct. 1610.

354. *See, e.g.*, Stevens, *supra* note 338, at 34 (interviewing a doctor, who reported that he recommended an alternative abortion method to a patient than what he felt most appropriate because he "feared that . . . he might be *perceived* as violating" the PBABA); Harris, *supra* note 18 ("One thing that could complicate clinics' 'compliance strategy' is the ruling's convoluted language about exactly what is outlawed.").

355. *Planned Parenthood*, 435 F.3d at 1177.

356. *Id.* at 1168.

357. *See infra* note 409.

perform an intact D&E, thus removing that doctor from the parameters of the PBABA, the doctor will actually end up performing an intact D&E inadvertently simply in trying to minimize the number of passes into the uterus with instruments for the sake of the comfort and safety of the patient, and because doctors cannot be sure how much the cervix will dilate.

Justice Kennedy attempts to address this concern by saying that this reasoning "does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D & E."[358] Justice Kennedy then distinguishes doctors who may perform the procedure accidentally, who are exempt from criminal prosecution, from doctors of the type who testified at trial, whom Justice Kennedy claims "begin every D & E abortion with the objective of removing the fetus as intact as possible."[359] Thus, on one hand, a doctor who performs an intact D&E "accidentally" will be free and clear of any criminal liability; on the other hand, a doctor who makes the conscious decision to perform an intact D&E will be subject to the criminal penalties of the PBABA. In this scenario, no abortion provider would actually be willing to admit they intended to perform an intact D&E, even if one were to occur during the procedure. Justice Kennedy's distinctions, then, encourage abortion providers to add another level of bureaucracy to their practice and to obscure the truth behind their decisions in medical procedures. Feasibly, abortion providers could continue performing intact D&Es, if only they suspend the integrity Justice Kennedy seems so intent in protecting[360] to lie about their intention in doing so. If they are all performed without the requisite "intent," the PBABA indeed fails to proscribe intact D&Es, and fails in accomplishing much of anything other than jeopardizing the integrity of the medical profession in allowing doctors the freedom to make educated decisions about medical procedures.

Additionally, if criminal penalties hinge on the "intent" of the doctor in choosing to perform the intact D&E procedure, how would that standard be enforceable? As mentioned previously, doctors would have an incentive to lie, even when performing an intact D&E by choice. Would third parties be able to accuse abortion providers of intending to perform intact D&Es in spite of the doctors' hypothetical protests that she or he did not intend the procedure? Would this result in a Salem-witch-hunt prosecution of doctors who may or may not be intentionally performing intact D&Es by anti-abortion activists and interest groups? How would this intent, or lack thereof, be proven in court? The inconsis-

358. *Carhart*, 127 S. Ct. at 1631.

359. *Id.* at 1632.

360. *See infra* text accompanying notes 376–78.

tent and erratic nature of this standard is clearly troubling and problematic at best and certainly does not appear to provide "doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited.'"[361] Given these circumstances, it would be natural for doctors to shy away from performing *any* procedure that might even be construed as being within the parameters of the PBABA, resulting in an overall "chilling" effect among abortion providers. Indeed, this appears to be what is happening.[362]

3. TURNING OVER A NEW LEAF: ABANDONMENT OF THE *CASEY* UNDUE-BURDEN STANDARD FOR FACIAL CHALLENGES

The majority opinion next considered whether the PBABA constitutes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. Although already having answered its own question by stating that the PBABA defines the unlawful abortion procedure in "explicit terms," the Court reiterates that "[a] review of the statutory text discloses the limits of its reach"[363]: The PBABA "prohibits intact D & E; and, notwithstanding respondents' arguments, it does not prohibit the D & E procedure in which the fetus is removed in parts."[364] The majority opinion compares the PBABA to the Nebraska statute struck down in *Stenberg* and concludes that the PBABA "departs in material ways from the statute in *Stenberg*"[365] enough to justify the PBABA being constitutional, whereas the Nebraska statute was not, despite claims that they banned the same procedure. For example, the Court argues that the PBABA's language, "unlike the statute in *Stenberg*, expresses the usual meaning of 'deliver' when used in connection with 'fetus,'"[366] and, thus, "the language does not require a departure from the ordinary meaning," as the Court claims was required in *Stenberg*.[367] Additionally, the Court argues that the PBABA is further differentiated from the Nebraska statute because the PBABA includes "[t]he identification of specific anatomical landmarks to which the fetus must be partially delivered,"[368] and because PBABA "makes the distinction the Nebraska statute failed to draw . . . by differentiating between the overall partial-birth abortion and the distinct overt

361. *Carhart*, 127 S. Ct. at 1628.

362. *See, e.g.*, Kessler, *supra* note 18, at 526; Stevens, *supra* note 338, at 34; *Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States*, *supra* note 18, at 19.

363. *Carhart*, 127 S. Ct. at 1629.

364. *Id.*

365. *Id.* at 1630.

366. *Id.*

367. *Id.*

368. *Id.*

act that kills the fetus."[369]

In the event that any or all of these differentiations drawn by the Court could be refuted, which indeed they were by the lower federal courts that considered the constitutionality of the PBABA,[370] the Court offers one last justification: the "canon of constitutional avoidance," which "extinguishes any lingering doubt as to whether the Act covers the prototypical D & E procedure."[371] Ignoring the observation by the Ninth Circuit in *Planned Parenthood* that the "need to avoid vagueness is particularly acute when the statute imposes criminal penalties, or when it implicates constitutionally protected rights,"[372] the Court instead posits, "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."[373]

The majority opinion further concludes that the PBABA does not impose an undue burden and is thus not unconstitutional on those grounds. Once again ignoring the fact that the statute does not further a state's interest in the potentiality of human life because it does not prevent any abortions, Justice Kennedy issues the empty declaration that "[t]he Act expresses respect for the dignity of human life,"[374] and states that the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman."[375] Additionally, Justice Kennedy posits that the government "has an interest in protecting the integrity and ethics of the medical profession"[376] and that "[i]t was reasonable for Congress to think that partial-birth abortion, more than standard D & E, '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.'"[377] Unfortunately, this self-proclaimed noble effort to protect the medical profession from itself ignores the fact that a great number of doctors who testified at trial found the intact D&E procedure preferable, more appropriate, and safer in some circumstances.[378] Thus, the medical profession's integrity might be better preserved by providing the safest and most

369. *Id.* at 1630–31. The Court argues that "[t]his distinction matters because, unlike intact D & E, standard D & E does not involve a delivery followed by a fatal act." *Id.* at 1631.

370. *See* discussion *supra* Part III.A.

371. *Carhart*, 127 S. Ct. at 1631.

372. Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163, 1181 (9th Cir. 2006) (citation omitted), *rev'd sub nom. Carhart*, 127 S. Ct. 1610.

373. *Carhart*, 127 S. Ct. at 1631 (alteration in original) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

374. *Id.* at 1633.

375. *Id.*

376. *Id.* (internal quotation marks omitted) (quoting Washington v. Glucksburg, 521 U.S. 702, 731 (1997)).

377. *Id.* at 1635.

378. *See id.* at 1644–46 (Ginsburg, J., dissenting).

appropriate medical treatments rather than deferring to the preferences of legislators.

Later in the majority opinion, Justice Kennedy makes his complete disregard for the *Casey* undue-burden standard more explicit by stating that "facial attacks should not have been entertained in the first instance," and that "the proper means to consider exceptions is by as-applied challenge."[379] This is certainly a surprising statement, considering that facial challenges have been "how virtually every lawsuit challenging abortion restrictions since *Roe* has been brought and the court has never before suggested that facial challenges were an inappropriate way of bringing those challenges."[380] This is initially "perplexing given that, in materially identical circumstances [the Court] held that a statute lacking a health exception was unconstitutional on its face."[381] Bringing as-applied challenges as opposed to facial challenges to abortion restrictions are accompanied by a host of problems for those hoping to protect abortion rights, including "mak[ing] litigation to protect a woman's reproductive freedom much more expensive and difficult" and "hav[ing] the perverse effect of making the fact that abortion regulations almost invariably have much more impact on poor, rural women an argument in their *favor*."[382]

This new standard becomes even more troubling, however, when one realizes how far it strays from the precedent established in *Casey*. *Casey* is known for establishing the undue-burden standard, which is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[383] While claiming to use the undue-burden standard in *Carhart*, Justice Kennedy in fact employs rational-basis review[384]: a much weaker standard of review, and one that has not been used in relation to abortion regulations since *Roe v. Wade* was decided in 1973. This did not escape the attention of Justice Ginsburg, who wrote that, "[i]nstead of the heightened scrutiny we have previously

379. *Id.* at 1638 (majority opinion).

380. *After* Gonzales v. Carhart*: The Future of Abortion Jurisprudence*, *supra* note 294 (transcribing statement of Eve Gartner, Senior Staff Attorney, Planned Parenthood Federation of America).

381. *Carhart*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting).

382. Posting of Scott Lemieux to Lawyers, Guns and Money, http://lefarkins.blogspot.com (Apr. 18, 2007, 13:57 EST); *see also* Scott Lemieux, *Endangering* Roe, AM. PROSPECT, Dec. 2, 2005, http://www.prospect.org/cs/articles?articleId=10682 (noting possible impact on poor women).

383. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

384. *See Carhart*, 127 S. Ct. at 1633 ("Where it has a *rational basis* to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." (emphasis added)).

applied, the Court determines that a 'rational' ground is enough to uphold the Act."[385] This casual use of a completely different and markedly lessened standard of review to examine an abortion regulation is, in effect, the complete "evisceration"[386] of the *Casey* undue-burden standard.

4. JUSTICE KENNEDY'S "MOTHER AND CHILD REUNION": INJECTING PATERNALISM AND MORAL CONCERNS INTO THE CONSTITUTION

Justice Kennedy then takes the opportunity to lapse into what appears to be an unconnected and completely unsubstantiated reflection about motherhood. There has been considerable discussion regarding the use of paternalistic language by Justice Kennedy throughout the majority opinion,[387] and the way it "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[388] Declaring, completely without support, that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child,"[389] the majority concludes that while the Court "*find*[*s*] *no reliable data to measure the phenomenon*, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained,"[390] and that "[s]evere depression and loss of esteem can follow."[391] In doing so, Justice Kennedy not-so-subtly suggests that "a pregnant woman who chooses abortion falls away from true womanhood."[392] Because "[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used,"[393] which is "likely the case with the abortion procedures here in issue,"[394] the Court concludes that the State has an interest in "ensuring so grave a choice is well informed."[395] Justice Kennedy declares that

> [i]t is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more

385. *Id.* at 1650 (Ginsburg, J., dissenting).

386. Posting of Marty Lederman to SCOTUSblog, *supra* note 19; *see also* NAT'L WOMEN'S LAW CTR., *GONZALES V. CARHART*: THE SUPREME COURT TURNS ITS BACK ON WOMEN'S HEALTH AND ON THREE DECADES OF CONSTITUTIONAL LAW 2 (2007), *available at* http://www.nwlc.org/pdf/GonzalesvCarhart2.pdf (noting the weakening of the undue-burden standard).

387. *See, e.g.*, Greenhouse, *supra* note 20; Lithwick, *supra* note 20.

388. *Carhart*, 127 S. Ct. at 1649 (Ginsburg, J., dissenting).

389. *Id.* at 1634 (majority opinion).

390. *Id.* (emphasis added).

391. *Id.*

392. Greenhouse, *supra* note 20.

393. *Carhart*, 127 S. Ct. at 1634.

394. *Id.*

395. *Id.*

> profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[396]

Revealingly, this same rhetoric that claims "[w]omen . . . don't really understand what they are doing when they decide to have abortions" has also been used by Operation Outcry: an anti-choice abortion group.[397] Its purpose is to "undermine the notion that women exercise any kind of choice when they decide to have abortions"[398]: a proposition that has clearly been demonstrated to not have any substantial or factual support.[399] This entire speculative discussion drips with what has been referred to as the "new paternalism": "[E]ither a woman is crazy when she undergoes an abortion, or she will become crazy later on."[400] Thus, the Court, in ignoring *Casey*'s statement that the Court's "obligation is to define the liberty of all, not to mandate our own moral code,"[401] instead chooses to criminalize an abortion procedure to protect women from themselves: a shift in discourse that has been called "enormous" and "beyond Alice in Wonderland."[402]

Moreover, while the natural and proper remedy for this situation might appear to be "to inform the woman and then let her decide if she wants to undergo the intact D&E procedure,"[403] the Court instead concludes that the procedure should just be banned. In this regard, Justice Kennedy's opinion "blossoms from the premise that if all women were as sensitive as he is about the fundamental awfulness of this procedure, they'd all refuse to undergo it. Since they aren't, he'll decide for them."[404] This argument "suggests that the state could take the lesser step of requiring doctors to inform the woman about all the details of the D&E procedure she will have to undergo and about what will happen to the fetus," which might have the consequence of opening "the door for states to pass increasingly unreasonable versions of abortion restrictions designed to frighten, manipulate, and discomfit women under the guise of providing informed consent."[405]

---

396. *Id.*

397. *See* Posting of Jack Balkin to Balkinization, *supra* note 20.

398. *Id.*

399. *See generally* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005) (studying the various reasons women decide to have abortions).

400. Posting of Jack Balkin to Balkinization, *supra* note 20.

401. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

402. Greenhouse, *supra* note 20.

403. Posting of Jack Balkin to Balkinization, *supra* note 20.

404. Lithwick, *supra* note 20.

405. Posting of Jack Balkin to Balkinization, *supra* note 20. For example, states could

It remains a mystery to this author and to countless other bystanders, including Justice Ginsburg, where exactly Justice Kennedy came up with these sweeping conclusions about the nature and moral nuances of motherhood.[406] Perhaps this moral meandering through the realm of motherhood was merely intended to distract the reader from one of the most disturbing elements of the *Carhart* decision discussed immediately after: The lack of a health exception, and the fact that this striking absence did not render the PBABA unconstitutional.

5. *STENBERG* WHO?: NO NEED FOR A HEALTH EXCEPTION

Casually addressing the absence of a health exception, despite the fact that no abortion regulation had been passed without such an exception since *Roe v. Wade* in 1973, Justice Kennedy states that "[t]he prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks.'"[407] In spite of "evidence that intact D & E may be the safest method of abortion" presented by the respondents,[408] as well as testimony by abortion providers concerning the various health benefits of intact D&E[409] and testimony that "intact D & E was safer for women with certain medical conditions or women with fetuses that had certain anomalies,"[410] the Court concludes that precedent "instruct[s] that the

> pass a wide range of new laws under the rubric of "informed consent" that would require doctors to show women the results of ultrasound imaging of the fetus before it is aborted, to describe in gruesome detail how the fetus will be terminated, dismembered and removed, to offer the state's views on the existence of any pain the fetus might feel when it is destroyed; and, in general, ratchet up the emotional anxiety of women who are about to undergo abortions.

Id.

406. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1647–48 (2007) (Ginsburg, J., dissenting) ("[T]he concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life."); *id.* at 1648 ("[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices . . . ."); *id.* at 1648 n.7 (disputing the existence of a so-called "post-abortion syndrome"); Gonzales v. Carhart*: An Alarming Nod to "Woman-Protective" Anti-Choice Advocates*, Law Professor Blog Network, http://lawprofessors.typepad.com (Apr. 20, 2007) (observing that Justice Kennedy "suddenly waxes nostalgic about motherhood"); Lithwick, *supra* note 20 ("With a stirring haiku[,] . . . the justice interpolates himself between every one of those mothers and every child she might have bear."); Posting of Jack Balkin to Balkinization, *supra* note 20 (calling this discussion "purple prose about the natural bonds of love between mothers and children" and calling "it Kennedy's 'mother and child reunion' speech").

407. *Carhart*, 127 S. Ct. at 1635 (second and third alterations in original).

408. *Id.*

409. *Id.* These benefits include the fact that "intact D & E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp," and "intact D & E . . . reduces the risks that fetal parts will remain in the uterus" and "takes less time to complete." *Id.*

410. *Id.*

Act can survive this facial attack."[411]

The majority opinion acknowledged the existence of medical uncertainty over whether the Act's prohibition would ever impose significant health risks on women, which would make the prohibition unconstitutional. The majority opinion, however, simply concludes that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[412] This approach is in stark contrast to the Court's methodology in *Stenberg*, in which the majority stated that "uncertainty mean[t] a significant likelihood that those who believe that [intact D&E] is a safer abortion method in certain circumstances may turn out to be right,"[413] and that therefore, "[w]here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary."[414] Thus, whereas in *Stenberg* the Court concluded that, "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[415] In spite of the acknowledged lack of medical consensus in *Carhart*, the Court reached the very different conclusion that "[t]he medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."[416]

Justice Kennedy also diverges from *Stenberg* in using the existence of alternate forms of abortion as a reason to conclude that the Act does not impose an undue burden. Due to the acknowledged medical uncertainty over whether and when intact D&E may be best for the patient, the Court in *Stenberg* concluded that "[t]he State fails to demonstrate that banning [intact D&E] without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, [intact D&E] would be the safest procedure."[417] "[A] State cannot subject women's health to significant risks . . . [by] forc[ing]

411. *Id.* at 1636.

412. *Id.*

413. Stenberg v. Carhart, 530 U.S. 914, 937 (2000).

414. *Id.*

415. *Id.* at 938.

416. *Carhart*, 127 S. Ct. at 1637.

417. *Stenberg*, 530 U.S. at 932.

women to use riskier methods of abortion."[418] The Court in *Stenberg* even went so far as to note that its cases "have repeatedly invalidated statutes that in the process of regulating the *methods* of abortion, imposed significant health risks."[419] In contrast, Justice Kennedy uses the existence of alternate methods of abortion to conclude that the PBABA "does not construct a substantial obstacle to the abortion right,"[420] even though medical uncertainty persists over whether those methods are more dangerous for women.

Ultimately, Justice Kennedy concludes that *Stenberg*'s emphasis on the inclusion of a health exception has encouraged lower courts "to leave no margin of error for legislatures to act in the face of medical uncertainty,"[421] thus enacting "too exacting a standard" on the legislative power.[422] Despite acknowledging that "some recitations in the Act are factually incorrect,"[423] the Court still curiously gives the benefit of the doubt to the legislature, even after *Stenberg*'s extensive discussion of the virtually per se requirement of a health exception in light of medical uncertainty over the relative safety of medical procedures.

C. *Justice Thomas's Concurrence: Make Them an Offer They Can't Refuse*

At first glance, Justice Thomas's short concurrence appears to be something that might easily be glossed over, seeing as how it is a mere four sentences long. Not wanting to break with tradition, Justice Thomas takes the opportunity to reiterate that "the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution."[424] So far, this is nothing exceptional. The truly interesting part of the concurrence, however, comes in the third and fourth sentences, in which Justice Thomas notes that "whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it."[425] Could it be true? Is Justice Thomas inviting us to wonder what would happen if

418. *Id.* at 931.
419. *Id.*
420. *Carhart*, 127 S. Ct. at 1637.
421. *Id.* at 1638.
422. *Id.*
423. *Id.* at 1637–38.
424. *Id.* at 1639 (Thomas, J., concurring) (citation omitted). Justice Thomas has made a regular habit of reiterating his argument that *Roe* and *Casey* should be overturned. *See, e.g.*, *Stenberg*, 530 U.S. at 980–83 (Thomas, J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979, 983 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.).
425. *Carhart*, 127 S. Ct. at 1640 (Thomas, J., concurring).

a Commerce Clause challenge were brought against the PBABA, while at the same time insinuating that such a challenge might have been successful in striking down the statute?[426]

1. TAKING THE BAIT: WHAT'S THE WORST THAT COULD HAPPEN?

The possibility of a Commerce Clause challenge being able to strike down the PBABA has been mentioned as one possible way to attack the statute.[427] In light of the extensive damage done to abortion jurisprudence by the majority's ruling, as discussed above, perhaps it would behoove those who wish to protect the right to have an abortion to examine what could possibly happen if a Commerce Clause challenge had been brought against the PBABA.

Under the framework laid out in *Lopez* and *Morrison*, in which the Court "spoke of the need for Congress to regulate economic activity which substantially affects interstate commerce," "the constitutionality of the PBABA is debatable."[428] This is indeed the approach taken by Professor Brannon Denning, who conducted his own analysis of the PBABA under the Commerce Clause to conclude that it would not be a valid exercise of power if one were to focus on the principles of *Lopez* and *Morrison*.[429] Asking whether the PBABA is more like the statutes invalidated in *Lopez* and *Morrison* or more like the Controlled Substances Act upheld in *Raich*, Professor Denning, writing his Supreme Court opinion as Chief Justice Roberts, concludes that because the PBABA is being challenged on its face, rather than in an as-applied challenge, as was the case in *Raich*, that the Act should be analyzed under the *Lopez/Morrison* framework.[430]

Indeed, the activity regulated by the PBABA—intact D&Es—would have to be analyzed under the third broad class of activity that Rehnquist concluded that Congress could regulate under the Commerce Clause in *Lopez*: "intrastate activities that nevertheless 'substantially affect' interstate commerce."[431] Therefore, "if the Act is to be upheld, it must satisfy the *Lopez* and *Morrison* factors used to determine whether intrastate activity nevertheless substantially affected commerce such that it could be reached by Congress."[432] Thus, one would need to proceed

426. *See* Eminent Domain, http://eminentdomain.blogspot.com (Apr. 18, 2007, 16:45 EST).

427. *E.g.*, Reynolds Holding, *The Court's Pro-Choice Silver Lining*, TIME.COM, Apr. 18, 2007, http://www.time.com/time/nation/article/0,8599,1612338,00.html.

428. Neal Devins, *How Congress Paved the Way for the Rehnquist Court's Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN'S J. LEGAL COMMENT. 461, 464 (2007).

429. Denning, *supra* note 68, at 168.

430. *Id.* at 171.

431. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 558–59 (1995)).

432. *Id.* at 172.

by examining the criteria listed in *Lopez* by which the impact on interstate commerce could be assessed,[433] and observing that the "economic or non-economic nature of the regulated activity was 'central to [the Court's] decision' in *Lopez*."[434]

Under the criterion of whether or not the regulated activity of the PBABA is economic or non-economic, an argument could be made in either direction. The "question of whether an abortion procedure itself is commerce has yet to be entirely settled,"[435] and the Supreme Court has never addressed the issue. In this instance, it is helpful to consider *Raich*'s definition of "economics," which the Court defined as "the production, distribution, and consumption of commodities."[436] It can be argued that the PBABA "regulates only the noneconomic part of the transaction, namely, the performance of the medical procedure,"[437] and that the PBABA is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms,"[438] thus making it an unconstitutional exercise of power under the Commerce Clause.

Most likely, under *Lopez* and *Morrison*, the PBABA would be an unconstitutional exercise of Congress's Commerce Clause power. If the Court is able to strike down statutes that regulate guns in school zones and gender-motivated violence coupled with mountains of congressional evidence detailing the impact of this violence on interstate commerce, it is likely that it could find that the very small subset of abortion procedures represented by intact D&E procedures do not constitute activities that substantially affect interstate commerce. Additionally, Congress included no findings with the PBABA detailing its impact on interstate commerce; indeed "none of the findings address the connection between partial-birth abortions and the economy or interstate commerce, much less describing how, even in the aggregate, partial-birth abortions 'sub-

433. These criteria are

> (i) whether the regulated activity was economic or non-economic; (ii) whether there was a jurisdictional element tying the regulated activity to interstate commerce so as to permit a case-by-case inquiry when the connection to interstate commerce was not apparent; (iii) whether the statute was accompanied by congressional findings describing the connection of the regulated activity to interstate commerce; (iv) whether the regulation was part of a nationwide regulatory scheme whose efficacy would be undermined if Congress could not reach the activity; and (v) whether accepting arguments regarding the connection of interstate activity would mean, as a practical matter, that the commerce power had no enforceable limit.

Id.

434. *Id.* at 173 (citing United States v. Morrison, 529 U.S. 598, 610–11 (2000)).

435. Goldberg, *supra* note 24, at 328.

436. Gonzales v. Raich, 545 U.S. 1, 25 (2005).

437. Denning, *supra* note 68, at 176.

438. United States v. Lopez, 514 U.S. 549, 561 (1995).

stantially affect' the latter."[439]

However, with the Supreme Court's movement away from *Lopez* and *Morrison* in *Raich* in 2005, it has been argued that the Court would have no problem in upholding a statute like the PBABA:

> Since getting an abortion—which generally involves paying someone for a service, and sometimes involves crossing state lines to do so—is far *more* plausibly called economic activity than growing pot in your backyard, there's no chance that the Court would strike down a federal abortion law on these grounds.[440]

Since the Supreme Court has never decided whether abortion procedures constitute commerce, and abortion procedures involve payments to providers, as well as the travel of women over state lines to obtain abortion services, it could also be argued that these services might constitute "the production, distribution, and consumption of commodities" as *Raich* defined an "economic" activity.

2. ON SECOND THOUGHT, MAYBE WE'D BETTER NOT: WHY IT WAS A BETTER DECISION TO AVOID A COMMERCE CLAUSE CHALLENGE IN *GONZALES V. CARHART*

Ultimately, it was probably a very wise decision for the legal counsels involved in the litigation in *Gonzales v. Carhart* not to challenge the PBABA on Commerce Clause grounds. While it could be debated whether the PBABA could be upheld in light of the Supreme Court's decisions and apparent inconsistencies in *Lopez*, *Morrison*, and *Raich*, it is also quite possible that a Commerce Clause argument might "spell the end to federal laws like the one barring picketing of abortion clinics."[441] Indeed, it has been argued that "pursuing this strategy in court could set precedent foreclosing important protections for women's reproductive rights, such as protection for clinics, as well as other important social legislation enacted by Congress, including environmental and civil rights legislation, by constricting congressional power to address national problems."[442] Not bringing up the challenge to the Commerce Clause was not evidence that, as some scholars suggest, "neither pro-choice nor right-to-life interests had any incentive to talk about such mundane issue as whether abortion regulations are 'economic' and whether the aggregate impact of partial birth abortions 'substantially affects interstate commerce,'"[443] but rather evidence that perhaps there

439. Denning, *supra* note 68, at 180 (emphasis omitted).

440. Posting of Scott Lemieux to Lawyers, Guns and Money, http://lefarkins.blogspot.com (Sept. 13, 2005, 13:22 EST).

441. Holding, *supra* note 427.

442. Goldberg, *supra* note 24, at 305 (footnotes omitted).

443. Devins, *supra* note 428, at 468.

was *too much* at stake for both sides if these arguments were indeed raised.

D. *Justice Ginsburg's Dissent: Rightfully Alarmed*

Because so many of the main themes of Justice Ginsburg's impassioned dissent have been covered in the critique of Justice Kennedy's majority opinion, it will suffice to reiterate her main points and note the grave warning that she issues for the survival of abortion rights if the Court continues down its current path.

Justice Ginsburg is, at the least, justifiably disturbed by the Court's failure to acknowledge the gender-rights implications in its decision in *Carhart*. Emphasizing that "at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny,'"[444] and that legal challenges to undue restrictions on abortion procedures "center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature,"[445] Justice Ginsburg concludes that this decision "deprives women of the right to make an autonomous choice, even at the expense of their safety."[446]

Justice Ginsburg continues to declare, rightfully, that "[t]oday's decision is alarming," at least in part because "for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health."[447] Because "the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health,"[448] and, because, "[i]n *Stenberg*, [the Court] expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception,"[449] Justice Ginsburg concludes that in this case, too, a health exception should be required. Because it does not contain a health exception, Justice Ginsburg concludes that the PBABA is unconstitutional. Justice Ginsburg is even more disturbed by the Court's deference to the legislature's decision that a health exception was not needed in the PBABA because "the evidence 'very clearly demonstrate[d] the opposite'"[450] under the standards employed in *Stenberg* and *Casey*.

Lastly, Justice Ginsburg is rightfully disturbed by the Court's confession that "moral concerns" are at work. These "moral concerns," Jus-

444. Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992)).

445. *Id.*

446. *Id.* at 1649.

447. *Id.* at 1641.

448. *Id.*

449. *Id.* at 1642.

450. *Id.* at 1644 (alteration in original).

tice Ginsburg observes, are "untethered to any ground genuinely serving the Government's interest in preserving life,"[451] which was the claimed justification used by the Court to uphold the PBABA: The Act, indeed, "saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[452] Additionally, the dissent is justifiably alarmed and troubled by the unsubstantiated claims of the majority that women who have abortions come to regret their decisions, thus justifying upholding a ban on certain abortion procedures. Indeed, the dissent reminds us that there is "no reliable evidence" for this "antiabortion shibboleth"[453] invoked by the Court and that the entire discussion ultimately "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[454] For these reasons, the dissent concludes, rightfully, that the majority opinion "refuses to take *Casey* and *Stenberg* seriously,"[455] and that "[t]he Court's hostility to the right *Roe* and *Casey* secured is not concealed."[456]

IV. THE FUTURE OF ABORTION JURISPRUDENCE: LEARNING TO COPE

In light of all the dire predictions of various abortion-rights scholars and the pro-choice legal community, as well as the alarming sense of impending doom communicated by Justice Ginsburg, this author fully expected some dramatic fall-out of the collapse of abortion rights in the wake of *Gonzales v. Carhart*. Indeed, while "critics sounded the alarm that women would be harmed, physicians would be jailed, and state legislators would be energized to pass similar laws,"[457] it appears that these fears may have been a bit preemptive: "Six months later . . . [there were] no prosecutions on the federal or state level, little legislative action, and quiet adjustments in abortion procedures that have so far kept doctors on the safe side of the law."[458]

Where is the backlash anticipated by the scholars studying the impact of *Gonzales v. Carhart*? Have there simply been no new cases challenging state statutes that are analogous to the PBABA? The latter question is answered more readily than the former, because there have been multiple challenges to state statutes analogous to the PBABA since

451. *Id.* at 1647.
452. *Id.*
453. *Id.* at 1648.
454. *Id.* at 1649.
455. *Id.* at 1641.
456. *Id.* at 1650.
457. Tony Mauro, *Abortion Ban Back at 4th Circuit*, LAW.COM, Oct. 29, 2007, http://www.law.com/jsp/article.jsp?id=1193389426200.
458. *Id.*

the April 2007 of *Gonzales v. Carhart*. Given the unprecedented reading of the PBABA by the Supreme Court in concluding that the statute was constitutional, it might be expected that the analogous state statutes would be upheld as well in challenges subsequent to the *Carhart* decision. This, however, has not proven to be the case. For example, the United States District Court of Appeals for the Sixth Circuit read *Carhart* "narrowly in striking down a Michigan ban,"[459] ultimately holding that "Michigan's law fails to comply with the explicit limitations that the Supreme Court has established for statutes regulating abortion"[460] because "its restrictions went beyond those included in the federal ban."[461] Likewise, it was predicted in October 2007 that when the Fourth Circuit reconsidered Virginia's 'partial-birth' abortion ban, perhaps the strictest ban in the country, that it would see the law as "substantially broader and vaguer than the federal statute, and, therefore, unconstitutional,"[462] even after *Carhart*. And, indeed, Judge M. Blane Michael informed the Virginia Solicitor General that simply relying on *Carhart* would not "quite get [him] home," implying that the panel might have been "more receptive to abortion rights attorneys' arguments that the Supreme Court's decision was a narrow one and did not authorize more far-reaching state restrictions."[463] Lastly, the Wisconsin Attorney General wrote in June of 2007, after the *Carhart* decision, that the state's ban on partial-birth abortion "likely cannot be enforced because the law is based on a stricken Nebraska law and not the federal law that was recently upheld by the U.S. Supreme Court."[464]

Thus, it appears that the federal courts are proceeding with caution when it comes to applying the principles set forth in *Gonzales v. Carhart*. Perhaps because of the stark and sometimes startling differences between *Carhart* and the Supreme Court's previous abortion jurisprudence, lower federal courts are hesitant to implement any major changes to their own abortion jurisprudence until further proof of the direction the Supreme Court will be taking in the future emerges. While this should provide some degree of relief to abortion-rights supporters, because it is perhaps suggestive that *Carhart* may not have the catastrophic results that were predicted, the fact remains that *Gonzales v.*

459. Posting of David S. Cohen to Feminist Law Professors, http://feministlawprofs.law.sc.edu (Oct. 29, 2007, 10:02 EST).

460. Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 327 (6th Cir. 2007).

461. Robert Barnes, *Judges Appear Hesitant on Virginia 'Partial Birth' Abortion Ban*, WASH. POST, Nov. 2, 2007, at A10.

462. Mauro, *supra* note 457.

463. Barnes, *supra* note 461.

464. *Wisconsin Abortion Ban Cannot Be Enforced Despite U.S. Supreme Court Ruling, State AG Says*, KAISERNETWORK.ORG, June 4, 2007, http://www.kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=45312.

Carhart still represents a "stunning sacrifice of women's health and physician judgment"[465]: One that is "alarming," as noted by Justice Ginsburg, and one that "abandons core principles of *Roe v. Wade* and *Planned Parenthood v. Casey*."[466] Lest one become too enthusiastic or reassured by the reactions of the lower federal courts, one must be mindful that "abortion opponents won big"[467] in *Gonzales v. Carhart*. Additionally, the Court's willingness to diverge from its abortion precedent could be argued to be a "signal that it's willing to reconsider other precedents in this area and perhaps even *Roe*."[468] Ultimately, one thing is clear: Fulfilling Justice O'Connor's observation in *Stenberg* that "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society,"[469] "*Carhart* will inflame political controversy rather than diminish it."[470]

465. Posting of Jason Harrow to SCOTUSblog, *supra* note 15.
466. *Id.*
467. Holding, *supra* note 427.
468. Harris, *supra* note 18.
469. Stenberg v. Carhart, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring).
470. Post & Siegel, *supra* note 14, at 432.