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COMMENT


I. Introduction

Almost immediately after President George W. Bush signed the Partial-Birth Abortion Ban Act of 2003 (PBABA)\(^1\) on November 5, 2003, the storm of rhetoric began. Within hours of the signing, federal district courts issued temporary restraining orders against Attorney General John Ashcroft and his agents, ordering them not to enforce the PBABA.\(^2\) A spokesman for the National Right to Life Committee commented that the temporary injunctions would "impede the government's ability to protect these premature infants."\(^3\) On the other side of the debate, an attorney for the American Civil Liberties Union commented, "We're awfully glad to be able to protect women all over the country against this dangerous, inappropriate intrusion by the government into their private, medical decision."\(^4\)

As the cases questioning the constitutionality of the PBABA make their way to the U.S. Supreme Court, the Act's challengers attack the statute on a variety of grounds. First, the challengers focus on the PBABA's failure to exempt by name the most common late-term abortion procedure, commonly called D&E, or even mention the terminology preferred by both those performing abortions

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\(^1\) The views expressed in this article are those of the author and do not reflect the official policy or position of the U.S. Air Force, Department of Defense, or the U.S. Government. The author would like to thank Professor Michael Scaperlanda, Professor Joe Thai, Professor Mary Margaret Penrose, Natalie McNeal, Virginia Hodges, and his "editor-in-chief"/wonderful wife Jamie. The author would also like to dedicate this article to his daughter Madison. She provides a personal reminder that life, even only thirty-one weeks after conception, is beautiful, valuable, and worthy of protection.

2. Associated Press, Gov't Promises to Defend New Abortion Law, FOX NEWS CHANNEL (Nov. 7, 2003), available at http://www.foxnews.com/story/0,2933,102395,00.html. Planned Parenthood announced plans to challenge the PBABA as early as March of 2003: "'Planned Parenthood will file suit as soon as the bill is signed,' its president, Gloria Feldt, said in an interview. 'I mean that minute.'" Robin Toner, As Abortion Battle Escalates, Both Sides Look to the Supreme Court, N.Y. TIMES, Mar. 17, 2003, at A19.
4. Id.
and the Court. Second, the challengers accuse Congress of attempting to circumvent the Supreme Court’s holding in *Stenberg v. Carhart* — which struck down a state statute that attempted to prohibit the same procedure — or otherwise exceeding their congressional authority. Finally, many challenging the PBABA highlight the absence of an exception for a woman’s health. The *Carhart* majority focused on this “flaw” in reviewing the Nebraska statute that was ultimately declared unconstitutional. In *Carhart*, the Court arguably established a broad health exception requirement surpassing the one contemplated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. If read broadly, the *Carhart* precedent creates an insurmountable obstacle for those desiring to regulate abortion in any meaningful manner.

The Supreme Court should dispense with these periphery challenges to confront the central questions presented by the PBABA: (1) whether carefully prohibiting access to one procedure, which is not widely accepted in the medical community, imposes an undue burden on a woman’s constitutional right to access abortion; and (2) whether the *Carhart* health exception requirement is so expansive that it applies even when no arguable benefit to a woman’s health exists. This comment contends that the Court should recognize Congress’s effort to draft a constitutional piece of legislation and decline to simply dismiss the PBABA as contrary to *Carhart*. Further, this comment argues that the Supreme Court should uphold the PBABA and balance the interests of women seeking abortions against the governmental interest in prenatal life in a manner that gives meaning to both. If necessary, the Court should simultaneously limit

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11. *Carhart*, 530 U.S. at 1012 (Thomas, J., dissenting). The Court also focused on whether the definition of partial-birth abortion was too vague. *Id.* at 938-39. As this comment will address, the PBABA should render that argument moot.
12. The Court has clearly recognized that states have an interest in fetal life. *Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992) (finding intervening abortion cases “inconsistent with Roe’s statement that the State has a legitimate interest in promoting the life or potential life of the unborn”). This comment argues that Congress may appropriately invoke
the health exception’s scope to an objective test that only considers demonstrable health risks and benefits, and does not defer to the opinions of individual physicians participating in the economic enterprise of abortion.

Part II of this comment discusses the medical aspects of partial-birth abortion, the background of the PBABA, and the Supreme Court’s reasoning in Carhart. Part III further analyzes the PBABA and its potential constitutional defects. Specifically, Part III addresses concerns over the PBABA’s terminology, protests over its lack of a health exception, and objections to Congress regulating partial-birth abortion. Part IV lays out a recommended framework for how the Supreme Court should review a constitutional challenge to the PBABA. First, Part IV argues that the PBABA can survive application of the holdings in Carhart. Second, Part IV contends that, if necessary, the Court should apply certain aspects of Carhart narrowly — particularly its expansive application of the health exception requirement. In conclusion, Part V summarizes the arguments necessary for the Court to affirm the PBABA.

II. Background of the Partial-Birth Abortion Ban Act of 2003

A. What Is Partial-Birth Abortion?13

To understand the effect of the PBABA, it is important to have an understanding of the medical aspects of partial-birth abortion. Dr. James McMahon is generally credited with developing partial-birth abortion, and he labeled his procedure “intact dilation and evacuation.”14 The procedure first gained notoriety, however, when Dr. Martin Haskell presented a lecture on what he called the dilation and extraction (D&X) abortion procedure at a National Abortion Federation seminar in 1992.15 According to Dr. Haskell’s thorough explanation, physicians perform a partial-birth abortion by first grasping a lower fetal extremity with an instrument.16 He explained that he was able to find a leg

13. This comment will primarily refer to the procedure targeted by this legislation as partial-birth abortion, unless more specific terminology is required. See infra Part III.A.1. There are two reasons for this comment’s language choice, despite the fact that the majority in Carhart prefers the terms dilation and extraction (D&E) and intact dilation and evacuation (D&E), apparently on an interchangeable basis. Carhart, 530 U.S. at 927. First, the subject federal legislation, as well as the legislation that was the subject of Carhart, uses the term partial-birth abortion. Second, the term has several policy implications discussed infra Part III.A.1.


16. Id. at 30.
by watching the fetal movement on a sonogram. After pulling one leg out of the mother, the doctors perform the abortions by using their fingers to pull the rest of the body outside of the mother except for the head.

While Dr. Haskell noted that "[u]sually there is not enough dilation for [the head] to pass through," the question remained about what would happen to an infant who is fully born during the procedure. Congress, in considering this question, found that fully delivered infants marked for abortion were often left to die slowly, whether as a result of undeveloped lungs or by starvation. Consequently, it passed the Born-Alive Infants Protection Act of 2002 to reestablish that fully born infants garner the full protection of the law and deserve the full protection of the medical community. The reality of needing to prohibit clear infanticide provides insight into the arguments supporting the legality of partial-birth abortion discussed throughout this comment. As this discussion of the medical aspects of partial-birth abortion shows, the physical reality of the procedure closely resembles infanticide in that a majority of the fetal body exits the mother's body before death.

After pulling most of the body out of the mother, Dr. Haskell recommended that physicians wrap their fingers around the partially delivered infant’s shoulders. While pulling on the tiny body, the physicians pierce the partially delivered infant’s skull with an instrument. Dr. Haskell suggested a pair of blunt, curved Metzenbaum scissors, while other doctors utilize a hollow metal tube known as a trochar. After piercing the skull, the physician inserts a suction catheter into the hole, which sucks out the fetal brain. This process causes the skull to collapse, allowing complete removal of the body.

A distinct procedure from partial-birth abortion, dilation and evacuation (D&E) is the most common procedure for late-term abortions. According to

17. Id.
18. Id.
19. Id.
23. Id. at 30-31.
24. Id. at 30; Johnson, supra note 14, at 2.
26. Id.
27. Stenberg v. Carhart, 530 U.S. 914, 924 (2000). "Late-term" is an admittedly vague term, but one the Court and others addressing the issue often use. It inarguably excludes all first-trimester abortions, and includes all third-trimester abortions. The gray area is exactly how
Dr. Haskell, physicians usually execute a D&E abortion by dismembering the fetus while it remains inside the uterus and then removing the pieces after completing the dismemberment. On the other hand, Dr. Leroy Carhart, the plaintiff in Carhart, testified that he normally accomplished dismemberment by actually pulling the limbs of the fetus outside of the woman and utilizing the traction that the cervix provides on the rest of the fetal body to effectuate the dismemberment. Nevertheless, there is a clear difference between either form of D&E and partial-birth abortion, where almost the entire living fetus is removed and then killed by a separate act.

The primary concern Dr. Haskell cited for developing an alternative procedure to D&E was the difficulty of dismembering fetuses at later stages of fetal development when their tissue has become tougher. Accordingly, he performed partial-birth abortions on nearly all of his patients who were between twenty and twenty-four weeks pregnant with only limited exceptions. Dr. Carhart claimed that the use of partial-birth abortion over D&E reduced the danger of sharp fetal bone fragments damaging the cervix upon limb extraction, minimized the number of times instruments must be inserted into the woman, and decreased the likelihood of leaving fetal tissues in the uterus.

B. Congressional Justifications for the PBABA

In passing the PBABA, Congress asserted that the significant health risks of partial-birth abortion and the existence of safer alternatives combine to outweigh any necessity for making the procedure available. Because it concluded that


29. Carhart, 530 U.S. at 925.
30. Haskell, supra note 15, at 28. Later in the lecture, Dr. Haskell also listed quickness, ability to perform the surgical outpatient method on a scheduled basis, and the necessity of only local anesthesia as other advantages of the partial-birth abortion procedure. Id. at 33. These were not listed as advantages over D&E, however, and the same advantages would seem to apply to D&E.
31. Id. at 28.
32. Carhart, 530 U.S. at 928.
the procedure is "never necessary to preserve the health of a woman," Congress did not include an exception for the health of the woman within the Act’s prohibition.34 While recognizing that the Supreme Court concluded differently in Carhart, Congress distinguished its conclusion based on its own factual findings.35 In fact, Congress suggested that had the Court not been bound in Carhart to accept the trial court’s findings, the Supreme Court may have agreed that a health exception is superfluous.36 In addition, Congress claimed that even though the Court had accepted distinctly different factual conclusions, the Court’s precedent permitted Congress to reach its own factual findings.37

According to the findings section of the PBABA, Congress compiled a substantial record of evidence during the course of extensive hearings in the 104th, 105th, 107th, and 108th Congresses; thus, Congress considered its judgment very informed.38 Based on the evidence gathered, Congress concluded that no credible medical evidence showed that partial-birth abortions were ever safer than alternative abortion procedures.39 In particular, Congress noted that Dr. Carhart and Dr. Haskell could not identify any situation where it was medically necessary for the woman’s health to perform a partial-birth abortion over an alternative abortion procedure.40 Congress combined these facts with its determination that the procedure actually precipitated serious health risks and concluded that a ban without a health exception would generally advance the health interests of women seeking abortions.41

In addition to advancing women’s health, Congress also recognized the interests in drawing a bright line distinguishing abortion from infanticide,

36. Id. § 2(7), 117 Stat. at 1202.
37. Id. § 2(8), 117 Stat. at 1202.
38. Id. § 2(13), 117 Stat. at 1203-04.
39. Id. § 2(14)(B)-(C), 117 Stat. at 1204.
40. Id. § 2(14)(D)-(E), 117 Stat. at 1204-05. Justice Thomas also referenced the admissions of Haskell and Carhart in his Carhart dissent. Stenberg v. Carhart, 530 U.S. 914, 1015 (2000) (Thomas, J., dissenting). "However, plaintiffs have not demonstrated the existence of any particular situation for these women for whom induction is contraindicated in which an intact D & E would be a doctor’s only option to preserve the life or health of a woman." Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1002 (N.D. Cal. 2004) (emphasis added).
preserving the medical profession’s integrity, and encouraging respect for life.\textsuperscript{42} Indeed, the PBABA asserts that a heightened interest exists in the life of the “partially-born child” because it is only inches away from being born and thus becoming a person.\textsuperscript{43} The Act credits a prominent medical association for recognizing that, once inside the birth canal, the fetus is living and autonomous from the woman’s body.\textsuperscript{44} The recognition of this autonomy calls into question the validity of asserting a woman’s right over her own body as justification for abortion — the assertion at the heart of the argument for the right to abort.\textsuperscript{45} Based on this reasoning, Congress concluded that performing this questionable procedure compromises the medical profession and tarnishes its reputation.\textsuperscript{46} Congress also noted that the practical inability to distinguish partial-birth abortion from infanticide promotes a total disregard for the lives of human infants in general.\textsuperscript{47}

\textbf{C. The PBABA’s Prohibition on Partial-Birth Abortions}

The preceding justifications and conclusions served as Congress’s basis in passing the PBABA, which seeks to prohibit the partial-birth abortion procedure. Section 3 of the PBABA contains the actual prohibition that will be imported into title 18 of the United States Code. Section 3 begins by tying the prohibition on partial-birth abortions to Congress’s Commerce Clause power.\textsuperscript{48} The PBABA next establishes a two-year imprisonment as the maximum punishment for doctors who perform partial-birth abortions.\textsuperscript{49} The Act, however, specifically immunizes the woman obtaining the abortion from any form of prosecution.\textsuperscript{50} In addition to the criminal punishment, the Act imposes civil liability on the physician.\textsuperscript{51}

The PBABA defines partial-birth abortion as follows:

\begin{quote}
the person performing the abortion (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first
\end{quote}

\begin{footnotes}
\item[42.] \textit{id.} § 2(14)(G), 117 Stat. at 1205.
\item[43.] \textit{id.} § 2(14)(H), 117 Stat. at 1205.
\item[44.] \textit{id.} § 2(14)(I), 117 Stat. at 1205. While Congress simply refers to the organization as “a prominent medical association,” Justice Kennedy credits the amicus brief of the Association of American Physicians and Surgeons for the same revelation. \textit{Carhart}, 530 U.S. at 963 (Kennedy, J., dissenting).
\item[45.] Partial-Birth Abortion Ban Act § 2(14)(I), 117 Stat. at 1205.
\item[46.] \textit{id.} § 2(14)(J)-(K), 117 Stat. at 1205.
\item[47.] \textit{id.} § 2(14)(L), 117 Stat. at 1206.
\item[49.] \textit{id.} On the other hand, the Nebraska statute in \textit{Carhart} set the maximum punishment at twenty years. \textit{Carhart}, 530 U.S. at 922.
\item[50.] 18 U.S.C.A. § 1531(a).
\item[51.] \textit{id.}
\end{footnotes}
presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .

The preceding language specifically defines how much of the body must be outside of the woman’s body to fall within the prohibition’s scope. The language also takes care to define the procedure in two discrete steps: (A) the delivery of the body, and (B) the overt act of killing “the partially delivered living fetus.”

Some critics of the PBABA point out that the Act does not contain an exception for the health of the woman. At least one journalist falsely stated that the PBABA does not even provide an exception for a woman’s life that might be endangered by the prohibition of partial-birth abortions. Despite this accusation, the PBABA does provide an exception for those cases in which the inability to obtain a partial-birth abortion might endanger the life of the woman seeking an abortion. In cases where any physical condition, including those arising from the pregnancy itself, jeopardizes a woman’s life, the prohibition does not apply.

52. Id. § 1531(b)(1).
53. Id.
54. See, e.g., Glidewell, supra note 8, at 1135; see also Holsinger, supra note 5, at 614.
56. 18 U.S.C.A. § 1531(a) (exempting “a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself”). One might question how a procedure that can never benefit the health of the woman could be used to save the life of the woman. A more consistent approach would have been for Congress not to allow any exceptions because of its determination that the procedure offered no possible health benefit. Of course the interest in life is mandated by the language of the Fourteenth Amendment and would most likely be required. See Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).
57. 18 U.S.C.A. § 1531(a). Considering the potentially broad definition of health discussed infra Part III.A.2, there is an important distinction to be made between an exception when the woman’s life is in danger and an exception that allows for partial-birth abortions when only the
D. Stenberg v. Carhart

The PBABA would not be the first ban on partial-birth abortions considered by the Supreme Court. By 2000, more than thirty states had enacted some type of prohibition against partial-birth abortions. Dr. Carhart brought an action challenging the partial-birth abortion ban in Nebraska, one of the states in which he performed the procedure. The Nebraska ban prohibited all partial-birth abortions except when necessary to save a woman’s life. In Carhart, the Supreme Court held that Nebraska’s statute violated a woman’s constitutional right to access an abortion. The majority in Carhart found that the law contained three main defects. For the purpose of later analyzing the constitutionality of the PBABA, it is important to identify and understand these defects perceived by the Court.

1. Nebraska Failed to Sufficiently Define the Procedure So As to Exclude D&E

In Carhart, Nebraska conceded that if the partial-birth abortion legislation applied to the D&E procedure, it would be unconstitutional under Casey’s undue burden analysis. In Planned Parenthood v. Danforth, the Supreme Court invalidated abortion legislation in part because it prohibited a very common abortion procedure, thus forcing women to undergo more obscure and perhaps more dangerous methods of abortion. The Nebraska statute defined partial-birth abortion as a procedure in which a person “deliver[s] into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person . . . knows will kill the unborn child.” The Court in Carhart construed the statute’s “delivery” and “substantial portion of the child” language to encompass D&E, which sometimes involves pulling a limb through the cervix and outside of the woman to dismember the fetus. Therefore, because the Court determined that the prohibition’s scope included

woman’s “health” is at risk.

59. Id. at 922.
60. Id. at 921-22.
61. Id. at 920-21.
62. Id. at 938. This would be so because physicians performing second-term abortions most commonly use the D&E procedure. See, e.g., id. at 951 (O’Connor, J., concurring).
64. Id. at 78-79. The Court invalidated a ban on one abortion method because it was “designed to inhibit . . . the vast majority of abortions after the first 12 weeks.” Id.
65. Carhart, 530 U.S. at 938 (quoting NEB. REV. STAT. ANN. § 28-326(9) (Michie Supp. 1999)).
66. Id. at 938-40.
D&E, the ban was an unconstitutional undue burden on a woman’s right to choose.\textsuperscript{67}

In dissent, Justices Scalia, Kennedy, and Thomas all argued that, even if the statute was ambiguous, the Court should uphold it under the reasonably deferential standard of review normally applied to statutes.\textsuperscript{68} In most cases, the Court reviews a statute according to its plain meaning and, if necessary, will even interpret the statute narrowly to uphold it.\textsuperscript{69} Whereas the Nebraska law sought to regulate partial-birth abortion by banning a killing act after substantial delivery of the fetal body, the D&E procedure sometimes involves pulling individual limbs into the birth canal.\textsuperscript{70} The \textit{Carhart} dissenters disagreed with the inclusion of fetal disarticulation within the definition of delivery.\textsuperscript{71} They also objected to the majority’s refusal to consider the statute as only prohibiting those abortions where delivery is distinct from the killing process.\textsuperscript{72} The dissenting Justices contended that a different conclusion about either definitional issue clearly removed the D&E procedure from the statute’s scope.\textsuperscript{73} Despite these arguments, the majority held that the statute exposed doctors using the D&E method to potential prosecution, and that such exposure placed an unconstitutional undue burden on a woman’s right to abort.\textsuperscript{74} Apparently responding to the dissent’s arguments decrying the Court’s unforgiving construction of the statute, the majority opined that the legislators should have explicitly excluded D&E from the prohibition’s scope.\textsuperscript{75}

\textit{2. Nebraska Failed to Provide a Health Exception to the Ban on Partial-Birth Abortion}

In \textit{Carhart}, the Court seemingly held that all legislation regulating or proscribing abortion must contain an exception for the health of the mother.\textsuperscript{76} Nebraska made the argument that its partial-birth prohibition did not need a health exception because the circumstances surrounding the procedure did not require one.\textsuperscript{77} Specifically, the State argued that equally safe alternatives to the procedure existed; therefore, the statute’s prohibition posed no risk to a

\begin{itemize}
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} \textit{Id.} at 954, 973-74, 983 (Scalia, J., dissenting; Kennedy, J., dissenting; Thomas, J., dissenting).
  \item \textsuperscript{69} \textit{Id.} at 983 (Thomas, J., dissenting).
  \item \textsuperscript{70} \textit{Id.} at 938 (quoting \textit{NEB. REV. STAT. ANN.} § 28-326(9)).
  \item \textsuperscript{71} \textit{Id.} at 974-75, 990-91 (Kennedy, J., dissenting; Thomas, J., dissenting).
  \item \textsuperscript{72} \textit{Id.} at 974-76, 990-92 (Kennedy, J., dissenting; Thomas, J., dissenting).
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{Id.} at 945-46.
  \item \textsuperscript{75} \textit{Id.} at 939.
  \item \textsuperscript{76} \textit{Id.} at 921 (quoting \textit{Planned Parenthood v. Casey}, 505 U.S. 833, 879 (1992)).
  \item \textsuperscript{77} \textit{Id.} at 931.
\end{itemize}
woman’s health.\textsuperscript{78} In fact, Nebraska argued that because the partial-birth abortion procedure was more likely to harm a woman’s health, the ban actually produced an overall health benefit to women.\textsuperscript{79}

The Supreme Court, however, ultimately rejected these arguments based on the lower court’s findings.\textsuperscript{80} Although the Court acknowledged that the State’s findings were well supported by expert medical opinion,\textsuperscript{81} it accepted the district court’s conclusion that, according to Dr. Carhart, the partial-birth abortion procedure was safer than D&E for a small number of abortions that he performed.\textsuperscript{82} The majority in Carhart conceded, however, that a division of opinion existed among medical experts, as well as a lack of controlled medical studies that definitively compared the relative safety of these two procedures.\textsuperscript{83}

The Supreme Court concluded that the division among medical experts actually weighed against the constitutionality of the statute because of the Court’s construction of the word “necessary.”\textsuperscript{84} In Roe v. Wade\textsuperscript{85} and Casey, the Supreme Court held that a state may regulate or even proscribe abortion after fetal viability unless the abortion “is necessary” to preserve a woman’s life or health.\textsuperscript{86} According to the Carhart majority’s analysis, the belief that the partial-birth abortion procedure possesses health advantages in some situations means that the absence of a health exception places a woman at “an unnecessary risk of tragic health consequences.”\textsuperscript{87} Carhart further implied that the State could not reasonably object to including a health exception because, even if the State was correct about the lack of medical necessity, no one would invoke the exception.\textsuperscript{88} Trusting the medical opinion of individual physicians who perform abortions instead of the State’s perspective on overall health benefits, the majority opinion placed the burden squarely on the State and determined that Nebraska fatally failed to show that an exception to the partial-birth abortion ban

\textsuperscript{78} Id.
\textsuperscript{79} Id. at 933-34.
\textsuperscript{80} Id. at 932.
\textsuperscript{81} Id. at 933-35.
\textsuperscript{82} Id. at 932.
\textsuperscript{83} Id. at 936-37.
\textsuperscript{84} Id. at 937.
\textsuperscript{85} 410 U.S. 113 (1973).
\textsuperscript{87} Carhart, 530 U.S. at 937.
\textsuperscript{88} Id.
is "never necessary" for a woman's health.\textsuperscript{89}

3. \textit{Nebraska's Asserted Interests in Proscribing Partial-Birth Abortion Were Invalid}

The majority in \textit{Carhart} only cursorily examined the State's interests and, in combination with the concurring opinions of Justices Stevens and Ginsburg, seemed to summarily dismiss them.\textsuperscript{90} After quoting the standard from \textit{Casey} and \textit{Roe} — that states may proscribe or otherwise regulate abortion after fetal viability to promote their "interest in the potentiality of human life"\textsuperscript{91} — the \textit{Carhart} majority quickly concluded that "of course" the Nebraska law did not directly further an interest in the potentiality of human life because the statute only regulated a particular method of abortion and did not attempt to save the unborn life.\textsuperscript{92} The Court reached this conclusion despite Nebraska's clear declaration that one of the law's purposes was to "show concern for the life of the unborn."\textsuperscript{93} In dismissing these interests, the \textit{Carhart} Court went beyond rejecting \textit{Casey}'s promise to give more consideration and weight to state interests\textsuperscript{94} by placing states in the unusual predicament of having to convince a majority of the Court that their explicitly stated interest in unborn life is sincere.

Not only did the \textit{Carhart} Court frustrate Nebraska's ability to express an interest in fetal life, it also seemed to inhibit the State's ability to express other valid interests. Likewise, the Court dismissed Nebraska's efforts to prevent cruelty and uphold the medical profession's integrity.\textsuperscript{95} Indeed, Justice Kennedy argued in dissent that, even if Nebraska's interests were not the interests listed in \textit{Roe}, they were valid and the Court should recognize them under \textit{Casey}.\textsuperscript{96} Nevertheless, the Court seemed to consider any interest regulating abortion invalid other than preventing abortion or protecting the mother's health.\textsuperscript{97}

\textsuperscript{89} \textit{Id.} at 932, 937-38. The Court made the statements that Nebraska must show that a health exception is never necessary and that a split in judgment shows a need for a health exception. In combination, these statements imply that there must be a unanimous opinion that a health exception is not needed in order for one to be absent. \textit{Id.} at 937.

\textsuperscript{90} \textit{Id.} at 962 (Kennedy, J., dissenting).

\textsuperscript{91} \textit{Casey}, 505 U.S. at 879 (quoting \textit{Roe}, 410 U.S. at 164-65).

\textsuperscript{92} \textit{Carhart}, 530 U.S. at 930.

\textsuperscript{93} \textit{Id.}.

\textsuperscript{94} \textit{Id.} at 961-62 (Kennedy, J., dissenting).

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} at 960-62 (Kennedy, J., dissenting).

\textsuperscript{97} \textit{Id.} at 930-31. Some scholars interpreted the resulting precedent to hold that the only legitimate interest before viability is women's health, and after viability women's health is still the controlling interest. Glidewell, \textit{supra} note 8, at 1100-02. \textit{Contra Case}, 505 U.S. at 886 (States may, even before viability, "favor childbirth over abortion, even if those measures do not further a health interest.").
In their concurring opinion, Justices Stevens and Ginsburg stated even more clearly the majority’s implication that Nebraska’s distinction between partial-birth and any other abortion procedure is “irrational.”98 Justice Stevens could not even fathom a state having a legitimate interest in prohibiting any type of abortion.99 According to Justice Stevens, the choice of what type of abortion procedure to use should rest solely on the discretion of the doctor without any state interference.100 Hopefully, this view will remain a minority opinion among the members of the Court for two reasons.

First, Justice Stevens’s view seems like a distortion of the constitutional right to abortion that was conferred to a woman, not her physician.101 The second reason requires a bit of background. In a 2003 case decided by the Sixth Circuit, *Women’s Medical Professional Corp. v. Taft*,102 opponents of a new Ohio ban on partial-birth abortions expressed their preference for an abortion procedure in which they could fully deliver a completely intact, living infant and then destroy it.103 They argued that the process would involve no insertion of sharp instrumentation into the woman and would not pose any of the D&E risks identified by those who favor partial-birth abortion.104 In the Ohio case, the discretion of the physicians, to which Justice Stevens gives much credibility, allowed for clear infanticide. If taken to its extreme conclusion, Justice Stevens’s view might hold Congress’s action prohibiting infanticide of premature infants “marked for abortion” unconstitutional.105

98. *Carhart*, 530 U.S. at 946-47 (Stevens, J., concurring).
99. *Id.* at 946 (Stevens, J., concurring).
100. *Id.* “[It is] impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.” *Id.* (emphasis added).
101. Justice Stevens’s characterization of the state illegitimately burdening the discretion of the doctor seems at odds with the normal characterization of the right to abortion. See BARBARA MILBAUER & BERT N. ORENZ, THE LAW GIVETH: LEGAL ASPECTS OF THE ABORTION CONTROVERSY 122 (1983) (arguing that abortion law inappropriately “yoked abortion to the physician’s acquiescence”).
102. 353 F.3d 436 (6th Cir. 2003).
103. *Id.* at 450.
104. *Id.*
105. Born Alive Infants Protection Act of 2002, Pub. L. No. 107-207, 116 Stat. 926. Justice Stevens is not alone in his views of extreme deference on matters of abortion, which seem to permit postbirth infanticide. See 146 CONG. REC. H8154 (daily ed. Sept. 26, 2000) (statement of Rep. Canady). Peter Singer, who made the argument for killing young infants under certain circumstances, is an extreme figure; however, there are more mainstream examples. General Wesley Clark, who was a candidate for the 2004 Democratic presidential nomination, made the comment in the heat of his election campaign that “life begins with the mother’s decision.” E-mail from The Federalist, 04-02 Brief (Jan. 16, 2004). Clark’s statement, if taken to its logical extreme, would seem to condone a postbirth decision by a woman deciding that the life of her newborn baby had not begun. Without clear distinctions and parameters for what the
Similar to Justice Stevens, Justice Ginsburg could not perceive a valid state interest in Carhart and insisted that Nebraska’s ban on partial-birth abortions could only be motivated by a desire to “chip away” at the abortion right established in Roe. She relied on Judge Posner’s dissent in Hope Clinic v. Ryan, which argued that two state partial-birth prohibitions were solely the vehicles “legislators have chosen for expressing their hostility” to abortion rights, and that the only interest underlying the prohibition was the state’s desire “to make a statement of opposition to constitutional doctrine.” The Carhart majority seemed slightly more restrained than the concurring justices in its reaction to the State’s asserted interests, but still dismissed them as not being genuine in their concern for unborn life. The Court reached this conclusion despite Nebraska’s explicit statements to the contrary.

Combined with prior precedent, the Court’s standard for expressing an interest in unborn life creates a Scylla and Charybdis dilemma. On one hand, a statute that actually seeks to “save any fetus from destruction” would almost certainly be considered an undue burden and a de facto attempt to “strike at the right [of abortion] itself,” therefore clearly violating Casey. On the other hand, the subtler attempt to express concern for unborn life by prohibiting the extremely questionable partial-birth abortion procedure also fails to meet the Court’s demand for a legitimate interest. After Carhart, the question remains as to what avenues, if any, are left for states to express their interest in unborn or potential life.

Constitution requires with regard to abortion jurisprudence, the possibility of infanticide is really no longer just a slippery slope argument.

107. 195 F.3d 857 (7th Cir. 1999).
108. Id. at 881 (Posner, J., dissenting).
110. Id. (stating Nebraska’s declaration that one of the law’s purposes was to “show concern for the life of the unborn”).
111. The Scylla and Charybdis have been defined as
a huge, dangerous rock on the coast of Italy, supposed to be the abode of the mythical monster, Scylla, which seized and wrecked passing vessels. Just across the narrow Straits of Messina, near Sicily, was a dangerous whirlpool, thought to be the home of another monster, Charybdis; for a vessel to avoid one meant the risk of falling into the clutches of the other.

112. Carhart, 530 U.S. at 951 (Ginsburg, J., concurring).

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Congress can only hope that when the Court addresses the PBABA, it will take a far less dismissive view of Congress’s findings and intent than it took of the Nebraska legislature’s in Carhart. While the preceding discussion of Carhart may seem to show that no ban on partial-birth abortion can withstand judicial review, several avenues for regulation still remain. As discussed in the next section, the concurring opinion of Justice O’Connor plainly explained at least one of these avenues.115

III. Analysis of the Partial-Birth Abortion Ban Act of 2003

A. Why Congress Did Not Follow Justice O’Connor’s Tip

Although the Supreme Court struck down Nebraska’s legislative prohibition against partial-birth abortions, it did not completely foreclose the possibility of any regulation of this procedure. Sometimes, a judge or justice who drafts a concurring opinion in a judicial decision will inform the case’s hapless losers what they can do the next time to swing that jurist’s vote to their side. Especially with regard to a five-four vote, such recommendations can provide valuable information to legislators hoping to pass constitutional muster the next time around. Justice O’Connor seemingly provided such a tip in her Carhart concurrence, explaining 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 my view.”116 While the PBABA’s sponsors in Congress felt that they responded to these concerns in the legislation,117 they clearly did not take the course of action Justice O’Connor intended for them to take. The following sections discuss Congress’s decision, along with its possible justifications.

1. What’s in a Name?

The Carhart majority and Justice O’Connor’s concurrence offered an apparently simple solution to one of the flaws in the Nebraska law. Both suggested that the statutory language define the partial-birth abortion procedure by using the “medical” term D&X and by specifically excluding the D&E

115. Carhart, 530 U.S. at 951 (O’Connor, J., concurring).
116. Id. at 951 (O’Connor, J., concurring).
117. 149 CONG. REC. S2522 (daily ed. Feb. 14, 2003) (statement of Sen. Santorum); see also Charles Lane, Courting O’Connor: Why the Chief Justice Isn’t the Chief Justice, WASH. POST, July 4, 2004 (Magazine), at W10. "‘We were certainly cognizant of Justice O'Connor's opinions,' particularly in the Nebraska case, says Rep. Steve Chabot (R-Ohio), the law's chief sponsor in the House. 'We really carefully crafted the bill, trying to do all we could to withstand a constitutional challenge.'" Id.
procedure by name.\textsuperscript{118} Some jurists have concluded that legislators use partial-birth abortion terminology as a way to arouse more public emotion and subsequent support.\textsuperscript{119} Despite such argument, however, Congress's decision not to use the terminology recommended by Justice O'Connor is not a flaw of constitutional magnitude. In fact, the term "partial-birth abortion" possesses several legitimate advantages over any other term preferred by doctors who perform these types of abortions.

First, as Justice Thomas pointed out in his Carhart dissent, partial-birth abortion is actually a more descriptive term than D&X.\textsuperscript{120} For example, D&E also involves the dilation of the cervix and the extraction of fetal parts; thus, the law's enforcers could much more easily confuse D&E with D&X.\textsuperscript{121} On the other hand, partial-birth abortion connotes something totally separate from simply dilating the cervix and extracting fetal parts. In fact, Justice Thomas contended that the accuracy and descriptiveness of the term might be what the majority found so objectionable.\textsuperscript{122} He further noted that the "term 'partial birth abortion' may express a political or moral judgment," but this fact should not invalidate legislation utilizing the term.\textsuperscript{123} Justice Thomas analogized Congress's use of the term partial-birth abortion with its use of the term "assault weapon."\textsuperscript{124} While the National Rifle Association and firearm manufacturers rejected the term "assault weapon," Congress established its use as a matter of law, and the Court subsequently used and accepted this term.\textsuperscript{125}

 Ironically, the second advantage of the PBABA terminology arises from a close analysis of the Carhart decision. The majority assumed in the opinion that the Nebraska law would prohibit D&X and force physicians to resort to D&E.\textsuperscript{126} This conclusion somewhat contradicted the Court's holding that the statute was unconstitutionally vague because it would apply to both partial-birth abortion


\textsuperscript{119} See Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436, 439 (6th Cir. 2003) (commenting that "efforts by the parties and amici to fortify their arguments by the use of labels . . . [were] obviously employed for revulsive or obfuscating effect").

\textsuperscript{120} Carhart, 530 U.S. at 1000 (Thomas, J., dissenting). To compare the legitimacy of the terms D&X and partial-birth abortion, this comment will necessarily have to alternate between the two terms in this section. Cf. supra note 13.

\textsuperscript{121} Id.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 1001 n.16 (Thomas, J., dissenting).

\textsuperscript{124} Id.

\textsuperscript{125} Id.; Bopp & Cook, supra note 27, at 20.

\textsuperscript{126} Carhart, 530 U.S. at 932.
and D&E.\textsuperscript{127} Another contradiction in the \textit{Carhart} opinion occurred when the majority adopted Dr. Carhart’s practice of using the term “intact D&E” as a synonym for partial-birth abortion or D&X.\textsuperscript{128} Obviously, then, statutory language that simply states that the prohibition does not apply to D&E is insufficient because a physician such as Dr. Carhart could continue using his intact D&E procedure even though it is substantially the same procedure that the legislature attempted to abolish.\textsuperscript{129}

Third, the terms “intact D&E” and “D&X” are both under and overinclusive regarding the actual practice that the legislature seeks to ban.\textsuperscript{130} In the writings that coined these abortion procedure terms, the authors also referred to procedures that would clearly not fall within the legislation’s scope, such as extracting an already dead fetus.\textsuperscript{131} On the opposite end of the spectrum, the term D&X is underinclusive if the legislature relies on the American College of Obstetricians and Gynecologists (ACOG) definition of D&X referenced in \textit{Carhart}\textsuperscript{132} because a physician could avoid prosecution simply by performing the partial-birth abortion on a fetus already in the breech position.\textsuperscript{133} In fact, because this definition seems to limit D&X to cases where suctioning the brain out of the skull actually kills the partially born infant, it would cover almost no partial-birth abortions because the fetus usually dies when its skull is punctured.\textsuperscript{134}

\textsuperscript{127} \textit{Id.} at 939.

\textsuperscript{128} \textit{Id.} at 928 (explaining that “intact D&E and D&X are sufficiently similar for us to use the terms interchangeably”).

\textsuperscript{129} \textit{Id.} at 1002 (Thomas, J., dissenting); see also Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 972, 1000 (N.D. Cal. 2004) (equating D&E with partial-birth abortion and using the term intact D&E for the latter).

\textsuperscript{130} See Bopp & Cook, \textit{supra} note 27, at 21; Johnson, \textit{supra} note 14, at 2-3.

\textsuperscript{131} Bopp & Cook, \textit{supra} note 27, at 21; Johnson, \textit{supra} note 14, at 2.

\textsuperscript{132} In 1997, the ACOG defined D&X as follows:

1. deliberate dilatation of the cervix, usually over a sequence of days; 2. instrumental conversion of the fetus to a footling breech; 3. breech extraction of the body excepting the head; and 4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

\textit{Carhart}, 530 U.S. at 928 (quoting \textit{AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, ABORTION POLICY I} (Jan. 12, 1997) (on file with the \textit{Oklahoma Law Review})).

\textsuperscript{133} \textit{Id.}; Bopp & Cook, \textit{supra} note 27, at 21. The ACOG definition came about rather late in the game, after both Congress and several states had attempted to regulate the procedure, referring to it as partial-birth abortion.

\textsuperscript{134} \textit{Carhart}, 530 U.S. at 928; Johnson, \textit{supra} note 14, at 2-3.
Finally, in addition to the legislatures of over half of the states and the U.S. Congress, many members of the medical profession, including the American Medical Association (AMA), are quite comfortable with the term partial-birth abortion. The Merriam-Webster Medical Dictionary provides a definition for the term “partial-birth abortion,” while notably omitting any definition of “dilation and extraction” or “intact dilation and evacuation.” In fact, some in the medical profession feel that “partial-birth” is the only medically recognized terminology for the procedure. The Court should not give any weight to the fact that those administering or supporting the legality of partial-birth abortion prefer the use of euphemistic terminology. Arguably, the term partial-birth abortion conveys more information, is a more accurate term, and has a more commonly understood application. Given that “there is no requirement that Congress . . . draft statutes using morally agnostic terminology,” the Court should place no constitutional significance on the legislature’s use of the term partial-birth abortion.

2. Congressional Fear of the Health Exception

An examination of the history of the health exception must precede a discussion of why Congress chose not to include one. The Supreme Court stated in Roe, when creating the right to abortion, that the right is not absolute. The Court held that states can regulate and even prohibit abortion after viability “except where it is necessary, in appropriate medical judgment, for the

135. Carhart, 530 U.S. at 994 (Thomas, J., dissenting) (noting that “the term 'partial birth abortion' has been used in state legislation on 28 occasions and by Congress twice” before the PBABA).
137. MERRIAM-WEBSTER MEDICAL DICTIONARY, at http://www.intelihealth.com/IH/ihtIH/WSIHWO00/9276/9276.html (last visited Aug. 21, 2004) (defining partial birth abortion as “an abortion in the second or third trimester of pregnancy in which the death of the fetus is induced after it has passed partway through the birth canal”).
139. Contra Women’s Med. Prof’l Corp. v. Taft, 353 F.3d 436, 439 (6th Cir. 2003) (“[W]e reject the efforts by the parties and amici to fortify their arguments by the use of labels . . . obviously employed for revulsive or obfuscating effect.”). The Sixth Circuit apparently fails to realize that the procedure itself is revulsive, not the terminology used to describe it.
140. Carhart, 530 U.S. at 1001 n.16 (Thomas, J., dissenting).
preservation of the life or health of the mother.”142 The provision ultimately became known as the health exception requirement. When conjoined with the term “life,” the requirement seems like a reasonable protection of women and balancing of the competing interests. The health exception, however, has arguably taken on a meaning drastically different from what its linguistic connection to the preservation of a woman’s life originally implied. The Carhart majority asserted in dicta that including a health exception, even when evidence showed that the exception did not benefit a woman’s health and was not necessary, posed no negative consequences.143 Thus, this section analyzes possible negative consequences of including a health exception in a piece of legislation proscribing a method of abortion.

Doe v. Bolton,144 the companion case to Roe, is sometimes relied upon for an additional explication of the health exception requirement.145 This reliance is somewhat logical considering that Justice Blackmun, who authored the majority opinions of both Roe and Doe, warned that the former must be read in light of the latter.146 As shown below, however, the Court seemed to stray away from the Roe standard and inappropriately applied Doe with regard to what abortion regulations states could enact without running afoul of the health exception requirement.

The majority in Doe upheld a Georgia requirement that doctors could only legally perform abortions after they determined that it was necessary to preserve the woman’s life or health.147 In upholding this restriction, the Court adopted the district court’s broad interpretation that, under the Georgia statute, “medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman’s age — relevant to the well-being of the patient.”148 On its face, the Doe holding does not appear to demand that a state’s

142. Id. at 165.
143. Carhart, 530 U.S. at 937.
146. Roe, 410 U.S. at 165.
147. Doe, 410 U.S. at 191-92. Doe issued holdings on essentially three main issues. First, the Court held that Georgia’s abortion requirements of state residency for women seeking abortions, accreditation for hospitals performing abortions, procedure approval by hospital staff, and independent examinations by two other physicians unconstitutionally infringed on the right to abortion. Id. at 193-200. Second, the Court rejected appellant’s argument that Georgia’s laws violated the equal protection clause because it discriminated against the poor. Id. at 200-01. Finally, the Court rejected appellant’s argument that the requirement that abortions be performed only when it is necessary in the judgment of the physician was unconstitutionally vague. Id. at 191-92. Instead, the Court found that this requirement was constitutional as interpreted to allow a physician to consider all factors related to health. Id.
148. Id. at 192.
regulation of abortion must consider the ultimate impact of all of these factors on a woman’s health.\textsuperscript{149} Nevertheless, \textit{Doe} has been interpreted to require a broad and amorphous health exception for all abortion regulations. For example, the U.S. Court of Appeals for the Sixth Circuit felt bound by the Supreme Court’s precedent to find an Ohio ban on partial-birth abortions unconstitutional because the health exception only accounted for physical health conditions, but failed to consider mental or emotional health risks.\textsuperscript{150} Over the dissenting opinion of Justice Thomas — in which Chief Justice Rehnquist and Justice Scalia joined — the Court did not grant certiorari.\textsuperscript{151} Justice Thomas argued that the Court’s holding in \textit{Doe} provides no support for a rule requiring mental health exceptions.\textsuperscript{152} Nonetheless, the Court’s unwillingness to review the Sixth Circuit’s decision leaves the impression that a majority of the Supreme Court may apply such a rule.

In addition to the Sixth Circuit’s interpretation of \textit{Doe}, the Supreme Court has also made statements reinforcing the idea that mental health may be a judicially required component of any health exception. The \textit{Casey} plurality opinion of Justices O’Connor, Kennedy, and Souter stated that “psychological well-being” was unquestionably a component of health.\textsuperscript{153} In the pre-\textit{Casey} decision of \textit{Harris v. McRae},\textsuperscript{154} the Court referenced the psychological and physical aspects of health just before opining that “it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in [\textit{Roe v.] Wade].”\textsuperscript{155}

If the broad, overarching considerations listed in \textit{Doe} constitute minimum requirements, then an appropriate health exception, or the manner in which a court will interpret and apply a health exception, will truly swallow any rule prohibiting abortion.\textsuperscript{156} The mere burden of giving birth to a child can profoundly impact the mother in regard to emotional and familial concerns, especially if the mother or father does not want the child.\textsuperscript{157} Therefore, potential


\textsuperscript{150} \textit{Voinovich I}, 130 F.3d at 209.

\textsuperscript{151} \textit{Voinovich II}, 523 U.S. at 1036.

\textsuperscript{152} \textit{Id.} at 1039.


\textsuperscript{154} 448 U.S. 297 (1980).

\textsuperscript{155} \textit{Id.} at 316.

\textsuperscript{156} ROBERT A. DESTRO, \textit{Abortion and the Constitution: The Need for a Life-Protective Amendment}, in PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION 708-09 (Proposed Constitutional Amendments on Abortion, Series No. 46, app. 1976).

\textsuperscript{157} See, e.g., MARY ANN GLENDON, \textit{ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN
parents who do not want their child can invoke an appropriately broad mental health exception to any law that attempts to keep them from obtaining an abortion. This interpretation of the health exception requirement nullifies Roe's promise that postviability prohibitions can be constitutional.\footnote{\textit{Failure, European Challenges} 88-90 (1987); \textit{Ernest Hemingway, Hills Like White Elephants, in Men Without Women} 73-74 (1927); CIC Scott A. Hodges, Note, \textit{Abortion in America: Is Compromise Possible?}, 10 U.S. Air Force Acad. J. of L. Studies 175, 176-77 (2000).}

While the preceding interpretation of \textit{Roe} and \textit{Doe} seems contradictory and unsustainable, the fear that the Supreme Court and lower courts would apply a health exception in this manner may have very well motivated Congress not to include a health exception at all.\footnote{Roe v. Wade, 410 U.S. 113, 163-64 (1973).} In debating the bill, U.S. Senators expressed concern that doctors justified every one of the 182 partial-birth abortions performed in Kansas based on mental health reasons.\footnote{Stenberg v. Carhart, 530 U.S. 914, 983 (2000) (Thomas, J., dissenting).} Congressional opponents of the PBABA further precipitated objections to a health exception by arguing that seeing the partially born infant intact constituted a health advantage of partial-birth abortion.\footnote{149 Cong. Rec. S3560, S3605 (daily ed. Mar. 12, 2003) (statement of Sen. DeWine).} The argument relied on the assertion that the ability to see the dead body speeds up the grieving process and provides greater access to information regarding hereditary illnesses or anomalies.\footnote{149 Cong. Rec. S3383, S3386 (daily ed. Mar. 10, 2003) (statement of Sen. Boxer).} No prohibition of abortion can really stand if abortion legislation must provide an exception for the impact felt merely by carrying through with delivery, or for such justifications as wanting to see the aborted baby intact. Indeed, a warning from the early days of abortion precedent seems to lurk on the horizon of a health exception under these circumstances: "[s]uch a broad definition of health should not survive . . . unless it is made absolutely clear that the practical effect of such a definition is to establish abortion-on-demand for the full nine months of pregnancy . . . ."\footnote{Carhart, 530 U.S. 953 (Scalia, J., dissenting) (statement of Sen. Boxer).} Justice Scalia identified another problem with \textit{Carhart}'s framing of the health exception requirement when, in dissent, he noted that the exception "requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others."\footnote{Carhart, 530 U.S. at 953 (Scalia, J., dissenting).} In the arena of abortion, the Court apparently often prefers deferring to physicians, whom they trust are
“good,” rather than deferring to legislatures.\textsuperscript{165} This deference appears unmitigated by the fact that those performing the abortions are the only individuals involved who possess an economic incentive to go through with the abortion and choose a process that they prefer, even if others find it morally abhorrent or detrimental to the woman’s health. In several other pre-\textit{Casey} abortion decisions, the Supreme Court implied that if a physician considered an otherwise illegal abortion method to be safer than a legal alternative, the state must allow the physician to use it.\textsuperscript{166} \textit{Casey}, however, acknowledged that the prior abortion case law insufficiently recognized the states’ interests in fetal life at all stages of development.\textsuperscript{167} Accordingly, Justice Thomas’s dissent in \textit{Carhart} noted “only a slight exaggeration when this Court described, in 1976, a right to abortion ‘without interference from the State.’”\textsuperscript{168}

While \textit{Casey} seemed to reject the type of abortion law that would require a comparative health exception, \textit{Carhart} clearly resurrected the requirement in some form.\textsuperscript{169} Requiring a comparative health exception based on the judgment of individual doctors who perform abortions, however, can easily invalidate any legislation prohibiting certain abortion procedures.\textsuperscript{170} In the case of Dr. Carhart, the partial-birth abortion procedure was the more appropriate procedure, in his medical judgment, for every abortion he performed after fifteen weeks gestational age, regardless of medical indications or findings of the U.S. Congress or state legislatures to the contrary.\textsuperscript{171} A health exception based on the judgment of individual physicians would have allowed Dr. Carhart to continue killing partially born infants in the partial-birth manner he preferred for every pregnant woman who came to him.

Furthermore, this type of comparative health exception could even justify nullifying Congress’s prohibition on the killing of fully born infants.\textsuperscript{172} As previously mentioned, some physicians feel that postbirth destruction of the infant bears health advantages over other traditional abortion methods.\textsuperscript{173} In the

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  \item 165. Doe v. Bolton, 410 U.S. 179, 197 (1973) (“[W]e trust that most physicians are ‘good.’”).
  \item 167. Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992); see also \textit{Carhart}, 530 U.S. at 960, 981 (Kennedy, J., dissenting; Thomas, J., dissenting).
  \item 168. \textit{Carhart}, 530 U.S. at 980 (Thomas, J., dissenting) (quoting \textit{Danforth}, 428 U.S. at 61).
  \item 169. \textit{Id.} at 937-38; see supra Part II.D.2.
  \item 171. \textit{Carhart}, 530 U.S. at 972 (Kennedy, J., dissenting).
  \item 173. Women’s Med. Prof’l Corp. v. Taft, 353 F.3d 436, 450 (6th Cir. 2003) (physicians

https://digitalcommons.law.okstate.edu/olr/vol57/iss3/5
Born Alive Infants Protection Act of 2002, the Senate unanimously banned this type of infanticide.\textsuperscript{174} A view of the health exception that would justify judicial nullification of the Born Alive Infants Protection Act seems illegitimate to say the least.

The preceding discussion demonstrates two negative consequences and, therefore, two policy justifications for excluding an unnecessary health exception, despite the assertion in \textit{Carhart} that including a health exception could have no negative results.\textsuperscript{175} First, a court may interpret a health exception to provide an exemption for an illegal partial-birth abortion obtained by a woman on the basis of an insignificant justification, such as the tax on her mental health from providing childcare.\textsuperscript{176} Second, a court may exempt a physician from prosecution if the court determines that, in the physician’s independent judgment, the illegal procedure provides marginal health benefits.\textsuperscript{177} Such a determination could prevent prosecution even if it directly conflicts with the legislature’s findings or substantial medical authority on the subject.\textsuperscript{178} Therefore, Congress can reasonably argue for the necessity of excluding a health exception from a ban on partial-birth abortions.

\textbf{B. Other Potential PBABA Defects}

Three other potential defects that the Supreme Court may find with the PBABA warrant brief discussion. The first issue concerns whether Congress can simply rely on its own contradictory factual conclusions and expect the Supreme Court to defer to its findings.\textsuperscript{179} The second problem area concerns whether the Court will view the PBABA as an illegitimate end-run around \textit{Carhart}.\textsuperscript{180} Third, the Court may question whether Congress has the constitutional authority to regulate abortion in this manner.\textsuperscript{181} As the following


\textsuperscript{175} Carhart, 530 U.S. at 937.

\textsuperscript{176} Glidewell, supra note 8, at 1100; see Taft, 353 F.3d at 454-55 (Tarnow, J., dissenting); see also Women’s Med. Prof’l Corp. v. Voinovich, 130 F.3d 187, 209 (6th Cir. 1997), cert. denied, 523 U.S. 1036 (1998) (Voinovich I).

\textsuperscript{177} See supra notes 164, 170 and accompanying text.

\textsuperscript{178} Carhart, 530 U.S. at 953-54 (Scalia, J., dissenting); see supra Part II.D.2.

\textsuperscript{179} Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1010 (N.D. Cal. 2004); see also Holsinger, supra note 5, at 609-10.

\textsuperscript{180} Holsinger, supra note 5, at 609-14.

\textsuperscript{181} Judge Guido Calabresi recently drew a comparison between the PBABA and the Violence Against Women Act of 1994 — struck down in \textit{United States v. Morrison}, 529 U.S. 598 (2000) — claiming that it was hypocritical to allow one and not the other. Guido Calabresi, Federal and State Courts: Restoring a Workable Balance, Address at the James Madison Lecture on Constitutional Law at New York University School of Law (Oct. 15, 2002), in 78
discussion shows, the Court should easily dispense with these periphery challenges in favor of upholding the PBABA.

Congress acknowledged in its PBABA findings that the Supreme Court found substantial medical authority suggesting that a partial-birth abortion may be beneficial in some instances, but insisted that this conclusion relied on faulty lower court findings.\(^{182}\) Congress pointed to *Katzenbach v. Morgan*\(^{183}\) and *Turner Broadcasting System, Inc. v. FCC*\(^{184}\) as examples of judicial deference to congressional findings of fact.\(^{185}\) *Turner* is particularly instructive because the Court addressed a constitutional issue and determined that its "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress's factual predictions with our own."\(^{186}\) Part of the Court's justification for deference relied on the fact that Congress remains admittedly better equipped than courts to gather and evaluate large amounts of data in a more comprehensive fashion.\(^{187}\) One scholar has argued, however, that the above analogies fail because the congressional findings preceded the Court's review of those cases, whereas the PBABA's findings followed the Court's acceptance of the contrary district court findings.\(^{188}\) While the Court may therefore choose to defer in only a limited fashion and not accept Congress's assertion that a health exception will never benefit women, it should still uphold the PBABA by giving a narrower reading of the health exception requirement.\(^{189}\)

The Court may simply consider the PBABA as an affront to its role as ultimate constitutional interpreter\(^{190}\) in the same manner that it recently

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N.Y.U. L. REV. 1293, 1297 (2003). While people do not generally get paid to assault women, they do, however, get paid to perform partial-birth abortions. Additionally, while women do not travel between states to purchase an assault, they do travel between states to purchase abortions. Furthermore, in the absence of the statute, the sale of partial-birth abortions would be a perfectly legal economic transaction with the imposition of taxes and other characteristics of interstate commerce. Thus, partial-birth abortion clearly constitutes interstate commerce while assault does not.

184. 512 U.S. 622 (1994) (*Turner I*).
185. Partial-Birth Abortion Ban Act § 2(9), (11), 117 Stat. at 1202-03.
188. Holsinger, *supra* note 5, at 611-12. Holsinger also argues that *Katzenbach* is not applicable because the legislation did not address a Supreme Court ruling on a constitutional right. *Id.*
189. *See infra* Part IV.B.
190. Cooper v. Aaron, 358 U.S. 1 (1958). Some would argue that Congress has a role — even an equal role — in constitutional interpretation. This comment, however, will leave that
considered another federal statute in *Dickerson v. United States*.\(^{191}\) Although Congress did not directly capitulate to the Court's demands for a health exception and the use of "medical" terminology,\(^{192}\) it had legitimate reasons for the statutory framework that it ultimately chose.\(^{193}\) Whereas the federal statute considered in *Dickerson* did not follow from any additional factual findings and directly contravened *Miranda v. Arizona*,\(^{194}\) Congress made an effort to satisfy *Carhart* by making additional findings and further defining the banned procedure.\(^{195}\) The Court should subordinate any injured pride that it might experience when faced with the approach Congress selected in the PBABA to the greater good of answering a question of national controversy.\(^{196}\)

Finally, in regard to the PBABA, the doctrinal question arises of whether the federal government may invoke the interests that both *Casey* and *Roe* conferred to states, namely an interest in fetal life and a woman's health. Congress possesses a legitimate interest in regulating the interstate commerce of partial-birth abortions that entitles it to advance other goals through regulation of that industry.\(^{197}\) Clearly, the abortion industry consists of economic activity given

argument aside.

192. *See supra* Part II.B.
193. *See supra* Part III.A.
195. *See supra* Part II.B; *infra* Part IV.A. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court finally overruled a congressional statute that was passed in direct reaction to *Miranda*. The statute sought to reestablish a due process model for whether a custodial interrogation was unconstitutional. *Id.* at 436-37. This action was in direct violation of the *Miranda* holding, and would have effectively overruled it had it been enforced and allowed to stand. *Id.* at 436.

196. As to the Court's pride, some have argued that its holding in *Planned Parenthood v. Casey* was purely authoritarian:

Those who disapprove of the Court's "results" . . . but who, as all good and virtuous citizens should, in the Court's view, "nevertheless struggle to accept it" are to be commended and protected, because they have been "tested" and found loyal to the Court. They have accepted what they believe is wrong "because they respect the rule of law" — a concept the Court finds identical with its own decisions . . . . The Court in *Casey* wants us to know just how important it is to love Big Brother.


that physicians render a service in exchange for monetary compensation.\textsuperscript{198} While it is difficult to ascertain exactly how much money physicians earn for performing abortions, Planned Parenthood's total revenues in 2003 of $766.6 million, with a profit of $36.6 million, exemplifies the immense amount of money involved in just one segment of the abortion industry.\textsuperscript{199}

In addition, the economic activity that stems from abortions crosses state lines. For example, Dr. Carhart traveled between Nebraska and Ohio to perform abortions.\textsuperscript{200} As recently as 2003, the Court acknowledged that abortions impact interstate commerce.\textsuperscript{201} When arguing in a 1993 case that the Ku Klux Act should apply to demonstrators in front of abortion clinics, Justice Stevens commented on the substantial number of those seeking abortions who travel in interstate commerce.\textsuperscript{202} Consequently, abortions in general, and partial-birth abortions specifically, impact interstate commerce.\textsuperscript{203}

Thus, the PBABA should withstand any constitutional challenge based on the preceding three assertions. Refusing to decide the unique constitutional issues raised in the PBABA, and instead determining the case on one of the previously mentioned tangential grounds, would amount to the Court skirting the role that it assumed as the final federal and state authority on the constitutionality of abortion law.\textsuperscript{204}

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1531(a) (West Supp. 2004); 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 4.10 (West 3d ed. 1999) (stating that "Congress' motive did not have to be commercial because the interstate commerce power was plenary").

198. Simply because some abortions are executed at no monetary cost to the woman does not diminish the overall economic nature of the abortion industry. Some opponents of the PBABA may invoke comparisons to United States v. Lopez, 514 U.S. 549 (1995), in addition to Morrison. However, there is no actual economic activity involved with the act of carrying guns into schools. On the other hand, providing partial-birth abortions is an economic activity. See supra note 181.


203. It is perhaps indicative of the weakness of the opposing argument that the only discussion of it in the three district court cases striking down the PBABA was when one court pointed out that the plaintiffs did not even make the argument. Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 439 n.1 (S.D.N.Y. 2004).

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C. The First Look at the PBABA

All three federal district courts where challengers sought injunctions of the PBABA completed their constitutional review of the legislation and issued their decisions, and all three courts found the PBABA unconstitutional. The ruling issued by Judge Phyllis Hamilton of the U.S. District Court for the Northern District of California provides the most useful point of analysis because it unashamedly states the concepts and presuppositions underlying all three decisions and wholeheartedly accepts all the arguments of the Act’s opposition. The court found that the Act was an undue burden on a woman’s right to seek an intact D&E before viability, was unconstitutionally vague, and lacked a health exception that was constitutionally required under the facts and circumstances of the case.

When discussing the district court’s conclusions or analysis, the testimony of the experts for each side and how their position affected the court’s factual findings becomes extremely important. The court found the plaintiff’s experts to be qualified to testify as experts and to be very credible witnesses. In contrast, the court generally dismissed the testimony of the government’s witnesses for two interesting reasons. First, the court considered it damming that the government’s experts did not perform partial-birth abortions themselves. Second, the court considered the government’s experts’ objections to “entirely legal and acceptable abortion procedures” as another disqualifying factor.


206. The other two judges were more subdued. For example, Judge Richard Casey of the Southern District of New York seemed to be the most reluctant to invalidate the ban. While admitting that “D & X is a gruesome, brutal, barbaric, and uncivilized medical procedure,” he also felt that “Stenberg obligates this Court and Congress to defer...” Nat’l Abortion Fed’n, 330 F. Supp. 2d at 479, 493. In addition, Judge Casey limited his holding to invalidating the PBABA for lacking a health exception and did not make any “constitutional rulings... unnecessary to the resolution of the case.” Id. at 482-83. In Carhart, Judge Richard Kopf limited his injunction to those situations where the fetus was at least disputably not viable. Carhart, 331 F. Supp. 2d at 1003.


208. Id. at 978.

209. Id. at 1034.

210. Id. at 998.


212. Planned Parenthood, 320 F. Supp. 2d at 998. The court also doubted the credibility of government witnesses for the mysterious reason that some had testified before Congress. Id.
The court's tendency to accept the testimony of only one side as legitimate obviously colors all of the resulting factual conclusions.213 In particular, the Supreme Court should not take seriously the district court's conclusion that "the majority of highly-qualified experts on the subject believe intact D & E to be the safest, most appropriate procedure under certain circumstances."214 In the same way that a court considering the constitutionality of a statute criminalizing insider trading should not solely consider the testimony of those who had performed the targeted conduct, the district court was wrong to dismiss otherwise qualified experts because they did not perform partial-birth abortions.215

In light of the district court's attitude toward the government's witnesses and the case in general, it is not totally surprising that the court found Congress's limited language as potentially encompassing not only all D&Es, but also inductions and even the medical treatment of spontaneous miscarriages.216 The court came to its conclusion despite the Act's careful physiological definitions and explicit scienter requirements to the contrary.217 The court went even further, however, insisting that even if the Act only applied to partial-birth abortion, it would create an undue burden because it applied to previability and postviability abortions.218 Judge Hamilton claimed that the failure to distinguish between previability and postviability abortions violated Roe and Casey.219 The undue burden test, however, only applies to previability abortion regulation.220 Therefore, a statute that does not distinguish between previability and postviability procedures does not automatically fail, but merely suffers the

at 1019-20. Being invited to testify before Congress would seem like a qualifying instead of a disqualifying factor.

213. Indeed, the court used the same reasoning to dismiss the factual findings of Congress. Id. at 1025-26.

214. Id. at 1034.

215. One example of the absurdity of only accepting the opinion of those engaged in the economic enterprise of partial-birth abortion is when the court stated that "all of the doctors who actually perform intact D&Es concluded that in their opinion and clinical judgment, intact D&Es remain the safest option for certain individual women . . . ." Id. at 1001 (emphasis added). It seems obvious that these individuals would have a motive to provide such a justification when they have already admitted engaging in the conduct. See also Carhart, 331 F. Supp. 2d at 1011 (stating "Congress arbitrarily . . . disregarded the views of doctors who had significant and relevant experience with these procedures").

216. Planned Parenthood, 320 F. Supp. 2d at 975.


218. Planned Parenthood, 320 F. Supp. 2d at 975.

219. Id.

220. Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992). "An undue burden exists, and therefore a provision of law is 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." Id.
application of the test. Despite appearances of federal court review of abortion legislation to the contrary, the undue burden test does not automatically strike down a statute as unconstitutional. 221

In analyzing the comparative health benefits of partial-birth abortion and ultimately rebuffing Congress’s conclusions on the issue, the district court performed quite a slight of hand. The court began by considering that in 5-15% of the D&E abortions performed, physicians are able to remove the fetus intact up to its head and then perform a partial-birth abortion. 222 The court seemed to decide that this option somehow becomes compulsory upon physicians. The court’s decision treated the existence of the option to perform a partial-birth abortion as transforming all D&E abortions into potential partial-birth abortions. 223

In equating D&E to partial-birth abortion, the court also appeared to intentionally misconstrue the language of the statute. Judge Hamilton stated that the statute could prohibit a physician from bringing part of the fetus, “[which] is ‘part of the fetal trunk past the navel,’ ” out of the woman during a D&E. 224 In other words, the court implied that simply bringing an arm of the fetus outside of the woman might fall under the prohibition. The PBABA clearly limits this language, however, to a procedure involving delivery of a fetus in the breech position, and would thus require the entire body up to the specified part on the fetal trunk to be outside of the womb. 225 This should not occur during a standard D&E.

After clouding the statutory and practical distinctions between partial-birth abortion and other abortion procedures, the district court easily found the statute unconstitutionally vague. 226 Most strikingly, the court concluded that the PBABA could proscribe physicians from performing other abortions despite the statutory requirement that the physician “knowingly performs a partial-birth abortion.” 227 Therefore, the court questionably treated partial-birth abortion as


222. Planned Parenthood, 320 F. Supp. 2d at 965. This option arises when the cervix dilates more than usual. Id.

223. Id. at 965, 977-78; see also Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1018 (Neb. 2004) (Judge Kopf making a finding of fact that “intact D&E or D&X (the banned procedure) is merely a variant of the standard D&E”).


226. Planned Parenthood, 320 F. Supp. 2d at 974-78.

227. 18 U.S.C.A. § 1531(a). While Judge Hamilton seemed to ignore the Act’s intent
a variant of a D&E, and considered the two as synonymous for purposes of comparative health advantages.\textsuperscript{228}

Whereas the district court’s analysis should have exclusively compared the supposed health advantages of partial-birth abortion over D&E and other abortion types, the court oftentimes used the health advantages of the standard type of D&E as its basis of comparison.\textsuperscript{229} Both sides have accepted that D&E is the most common form of second-trimester abortion.\textsuperscript{230} For the court to infer, however, that Congress or the government was referring to all D&E abortions when it made its findings about the lack of health advantages reveals an apparent bias against the PBABA.\textsuperscript{231} From the preceding seriously flawed premises, the court proceeded to draw conclusions about the necessity of a health exception in the PBABA.\textsuperscript{232} Hopefully, when the PBABA is challenged before the Supreme Court, the Court will avoid the analytical pitfalls the district court allowed itself to fall into, and reject its conclusion concerning the necessity of a health exception.

\textsuperscript{228} Planned Parenthood, 320 F. Supp. 2d at 965-66, 971-73, 990-95, 999-1000. Notably, the district court’s approach of equating D&E with partial-birth abortion certainly would have voided any attempt by Congress to explicitly exempt D&E from the coverage of the statute.

\textsuperscript{229} \textit{Id.} at 990-93, 999-1001. In this instance, Judge Kopf went even further than Judge Hamilton by deciding to use the dangers of full-term childbirth as the baseline for comparing health advantages. \textit{Carhart}, 331 F. Supp. 2d at 1018. This seems inappropriate considering Congress’s attempt to ban a single, rarely used method of abortion.

\textsuperscript{230} Stenberg v. Carhart, 530 U.S. 914, 924 (2000) (finding that about 95% of second-trimester abortions were D&E).

\textsuperscript{231} \textit{Planned Parenthood}, 320 F. Supp. 2d at 1000. “[S]tudies consistently show that D&E is as safe or even significantly safer than induction, and both procedures are greatly safer than either hysterotomy or hysterectomy. . . . Intact D&E is not a separate procedure, but rather, simply a variant of the established D&E technique.” Id.

\textsuperscript{232} \textit{Id.} at 1000-01.
IV. How the Supreme Court Should Decide National Abortion Federation v. Ashcroft

A. The PBABA Conforms with the Court’s Abortion Jurisprudence, Including Carhart

When the PBABA arrives before the U.S. Supreme Court, the Court will be asked to make a determination on an issue remarkably similar to the one addressed just a few years earlier in Carhart. Despite these similarities, the Court should realize that Congress is not simply asking it to reconsider Carhart, nor attempting to circumvent that decision. While Congress chose not to directly adopt the framework recommended by some of the justices in the Carhart majority, the Court should uphold the PBABA because it conforms with the Court’s abortion jurisprudence.

For the valid reasons discussed previously, Congress chose neither to exempt the D&E procedure by name, nor to limit the prohibition’s coverage to procedures falling under the term D&X. Nevertheless, the PBABA defines the abortion procedure in sufficient detail to negate the Carhart argument that the procedure could be confused with a standard D&E. Whereas the Carhart majority argued that an arm or leg pulled out of a woman’s womb while performing a D&E could alone constitute a “substantial portion” of the fetus under the Nebraska law, this type of D&E would never fall under the PBABA’s definition. The Act’s language clearly limits its scope to procedures removing either the entire fetal head or the entire lower half of the fetal body. Any argument that a D&E could involve this much extraction would seem like a disingenuous last-ditch effort to frustrate the legislation.

Additionally, Congress carefully defined partial-birth abortion as a distinct, overt act that kills a living fetus. In this respect, the PBABA provides two forms of protection for physicians that wish to continue performing D&E

233. 330 F. Supp. 2d 436 (S.D.N.Y. 2004). This is one of the three district court cases finding the PBABA unconstitutional and may be the case to which the Supreme Court grants certiorari.


236. See supra Part III.A.1.


239. 18 U.S.C.A. § 1531(a).


abortions: (1) the physician must perform an overt killing act besides the pulling of the fetal body outside of the woman, and (2) the fetus must be alive when the physician performs the act. The scienter requirements of the Act are an additional aspect that prevent the prosecution of those performing D&E abortions. For the PBABA to apply, the first intent requirement demands that the physician “knowingly performs a partial-birth abortion.” The second intent requirement states that the physician must “deliberately and intentionally” commit the overt act that kills the partially delivered fetus.

The Court should ignore the imaginative hypothesizing of the PBABA’s opponents who argue that police officers might haul innocent doctors — those performing D&E abortions — off to jail. If physicians perform a procedure that fits under Congress’s careful definition and scienter requirements and still call the procedure D&E, they can either choose to modify their procedure or bear the risk of prosecution. A policy of assumed risk seems particularly just if physicians perform such a procedure with the knowledge that they are performing a partial-birth abortion, and with the specific intent to commit the overt lethal act.

The Court in Carhart adopted and reaffirmed the undue burden framework used in Casey, although it focused its analysis on whether Nebraska’s partial-birth abortion legislation would impact the commonly used D&E procedure. Clearly, a D&E abortion performed within generally accepted guidelines would not violate the PBABA. Therefore, because the PBABA regulates only one procedure, which few physicians use for reasons unrelated to medical necessity, and does not precipitate any substantial obstacle to a woman making the ultimate choice to abort, the limitation cannot be considered an undue burden under Casey or Carhart.

242. Id.
243. Id.
244. Id.
245. Id.
246. The specific intent requirement seemingly would even allow physicians to use partial-birth abortion methods if it became necessary during an abortion, as long as the doctors did not intend to perform a partial-birth abortion when they began. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1033 (Neb. 2004).
248. See, e.g., supra Parts II.B, III.A.2; infra Part IV.B; see also NewsHour, supra note 138 (Dr. Cook commenting that the PBABA “really just impacts a very small number of what I would consider to be rogue physicians”).
249. Planned Parenthood v. Casey, 505 U.S. 833, 877-78 (1992). “What is at stake is the woman’s right to make the ultimate decision . . . .” Id. at 877. “An undue burden exists, and therefore a provision of law is 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.” Id. at 878. Previability abortion regulation must satisfy the undue burden test, while strict scrutiny no
Casey specifically stated "that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." In fact, a physician can avoid performing a partial-birth abortion by ensuring that the fetus is dead before extracting the fetal body otherwise in accordance with the partial-birth abortion procedure. A physician can execute in utero fetal death by taking the additional step of injection, severance of the umbilical cord or some other lethal act. Assuming there are any valid concerns that weigh against performing a D&E in a particular case, this additional step could resolve the concerns while also eliminating the infanticide similarity of partial-birth abortion.

Even Dr. Carhart and Dr. Haskell admit that, while they prefer to use the partial-birth abortion procedure in some circumstances, it never represents the only safe alternative. The Court made it clear in Casey that, even with regard to previability regulation, the liberty that it sought to protect was a woman’s ability to make the ultimate decision of whether to abort. Because safe and easily obtainable alternatives to partial-birth abortion remain, the ban on partial-birth abortion would not impact this ultimate decision. In her Carhart concurrence, Justice O’Conner stated that, as long as a safe and adequate abortion alternative remains, a prohibition on partial-birth abortion, even before viability, will probably not constitute an undue burden. Even assuming that

longer applies to abortion regulation. Id. at 876-77; Connell, supra note 221, at 14.

250. Casey, 505 U.S. at 874.

251. Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 995 (N.D. Cal. 2004); Bopp & Cook, supra note 27, at 51. The district court offered unconvincing arguments against this simple solution. It stated that some patients simply prefer the fetus to be alive when its brain is evacuated, and also mentioned minor health risks, such as those associated with any injection. Planned Parenthood, 320 F. Supp. 2d at 995-96; see also Carhart, 331 F. Supp. 2d at 1028 (asserting that it is actually impossible to kill the fetus in some situations before extraction).


254. Casey, 505 U.S. at 877.

255. The fact that a doctor has difficulty tearing apart fetuses inside a woman at this late gestational stage does not constitute an undue burden on the woman. Haskell, supra note 15, at 28; see also Bopp & Cook, supra note 27, at 56 (“[T]he partial-birth abortion procedure has not been proven safer than other abortion methods, just more convenient for the physician.”); NewsHour, supra note 138 (Dr. Cook noting the lack of any “demonstration anywhere in any medical literature or any expert’s testimony that this procedure in any way enhances or protects a woman’s health versus any other procedure”).

a woman pursuing a late-term abortion may be marginally safer undergoing a partial-birth abortion because of the fetal size and advanced tissue development, the woman’s decision to wait until this late point to obtain an abortion should minimize her ability to put forth an undue burden argument. As previously discussed, almost all partial-birth abortions currently performed are elective, so invocations of emergency circumstances should not defeat the preceding argument. Thus, a limitation on partial-birth abortion creates only a slight burden, if any, on a woman’s ability to obtain abortions.

Therefore, the Supreme Court should uphold the PBABA because it does not impose an undue burden on a woman’s right to abort, and the partial-birth abortion procedure is never “necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.” Despite strong evidence against any necessity for a health exception, however, it seems that the Carhart standard may still not allow for the absence of a health exception. Even in Carhart, “medically sophisticated minds . . . searched and failed to identify a single circumstance . . . in which partial birth abortion is required.” Therefore, while the Court should plainly conclude that Congress’s PBABA resolved the Carhart issue of vagueness, the health exception dilemma still looms. If the Court construes the health exception requirement in the same expansive way as it did in Carhart and refuses to accept Congress’s finding that an exception to the PBABA is never required, these determinations could independently doom the Act.

Id.

257. See Ronald Dworkin, Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 169 (1993) (stating that “a pregnant woman has usually had ample opportunity to reflect upon and decide whether she believes it best and right to continue her pregnancy or to terminate it”).

258. See supra Part III.A.2.

259. See Casey, 505 U.S. at 877-78 (considering the undue burden test and its application); see also supra Part IV.A (noting that the burden is not undue).


261. Carhart, 530 U.S. at 1020 (Thomas, J., dissenting); see also Nat’l Abortion Fed’n v. Ashcroft, 330 F. Supp. 2d 436, 480 (S.D.N.Y. 2004) (stating that the plaintiffs could not point to any “specific patient or actual circumstance in which D&X was necessary to protect a woman’s health”).

B. The Carhart Health Exception Requirement Should Be Read Narrowly

The PBABA can survive a reasonable application of the health exception requirement stated in Carhart, whereas a broad reading of this precedent clearly defeats the Act. Beyond insisting that any law prohibiting or regulating the ability to obtain an abortion contain a health exception, Carhart held that the legislation must also have a health exception when merely restricting a single abortion procedure.\(^{263}\) The Carhart reading thus expands the requirement beyond the Roe standard restated by the Court in Casey.\(^{264}\)

Part of the Casey opinion, joined by a majority of the Court, explained that Roe’s “essential holding” required a health exception if the woman “continuing her pregnancy would constitute a threat to her health.”\(^{265}\) In other words, the only concern of a health exception, if narrowly read, is that the woman can safely terminate the pregnancy when necessary to preserve her health as opposed to a concern over the safest method of termination. The Carhart majority opinion, however, rejected this view and insisted that the health exception requirement forced states to allow a woman to use the least risky method of abortion.\(^{266}\) Nevertheless, the congressional findings of the PBABA meet this expanded requirement by definitively determining that partial-birth abortion is never the safest method of abortion.\(^{267}\)

Beyond merely requiring a health exception when prohibiting a rarely used procedure, Carhart also appears to have essentially flipped Roe and Casey’s health exception requirement on its head. Instead of requiring a state to include a health exception when necessary, the Court demanded that Nebraska prove that a health exception is never necessary.\(^{268}\) The difference is slight on its face, but extremely consequential in application. Requiring states to include a health exception when necessary would give a modicum of deference to the government, while still requiring it to show the lack of necessity for an exception. The government could weigh the medical evidence and opinion, determine that a health exception is not necessary, and meet the burden on its face. In the extreme, the language in Roe could be interpreted as placing the burden on the statute’s challenger to show an absolute necessity for a health

\(^{263}\) Carhart, 530 U.S. at 930.

\(^{264}\) Id. at 921 (quoting Casey, 505 U.S. at 879).

\(^{265}\) Casey, 505 U.S. at 880; Carhart, 530 U.S. at 1009 (Thomas, J., dissenting).

\(^{266}\) Carhart, 530 U.S. at 931.


\(^{268}\) Carhart, 530 U.S. at 937-38.
exception.\textsuperscript{269} At the very least, under \textit{Casey}, the determination of whether a health exception is necessary could be objectively shown and determined.\textsuperscript{270}

The requirement that a state show that a health exception is never necessary, however, which was seemingly adopted by \textit{Carhart}, demands far more.\textsuperscript{271} Under an expansive reading of \textit{Carhart}, the Court defers to the judgment of individual physicians.\textsuperscript{272} Even though \textit{Carhart} specifically rejected a need for unanimity of medical opinion,\textsuperscript{273} this subjective requirement seems to demand it.\textsuperscript{274} In fact, it is impossible to surmise another manner in which a state or the federal government can prove that an exception is never required in the judgment of the physician seeking to perform an abortion.\textsuperscript{275} In short, the net rule places an insurmountable burden on the government to prove that no physician in the jurisdiction would believe, in their "appropriate medical judgment," that the target of the legislation would ever provide a better alternative in regard to the broadly defined health of their patient.\textsuperscript{276} Justice Kennedy believes that this unnecessary deference to doctors performing abortions clearly indicates a return to the abortion-on-demand jurisprudence embodied by \textit{Akron v. Akron Center for Reproductive Health, Inc.},\textsuperscript{277} even though \textit{Casey} specifically rejected such decisions as insufficiently valuing state interests by employing strict scrutiny.\textsuperscript{278} \textit{Akron} found an informed consent requirement unconstitutional because of the inconvenience and interference it imposed upon the physician.\textsuperscript{279} \textit{Carhart} also seemed to defer to the needs and

\textsuperscript{269} Schmutz, supra note 149, at 556; Roe v. Wade, 410 U.S. 113, 163-64 (1973).

\textsuperscript{270} Bopp & Cook, supra note 27, at 49. "In other words, the issue is whether taking into account both the mother and the child’s interests, the health of the mother is capable of being preserved following the legislative ban, and not whether a particular means of abortion remains available." \textit{Id.}

\textsuperscript{271} \textit{See Carhart}, 530 U.S. at 1009 (Thomas, J., dissenting) ("[U]nless a State can conclusively establish that an abortion procedure is no safer than other procedures, the State cannot regulate that procedure without including a health exception.").

\textsuperscript{272} \textit{Id.} at 968 (Kennedy, J., dissenting).

\textsuperscript{273} \textit{Id.} at 937 ("Neither can that phrase require unanimity of opinion.").

\textsuperscript{274} \textit{Id.} ("Nebraska has not convinced us that a health exception is never necessary.") (internal quotations and citations omitted).

\textsuperscript{275} \textit{Id.} at 937. "If a doctor could decide without regard to the statute whether he felt it was necessary to perform the D&X procedure, it would make the statute meaningless." Gauthier, \textit{supra} note 170, at 662.


\textsuperscript{277} 462 U.S. 416 (1983).

\textsuperscript{278} \textit{Casey}, 505 U.S. at 870-72 (rejecting Akron and Thornburgh v. American College of Obstetricians & Gynecologists as "inconsistent with \textit{Roe}'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn").

\textsuperscript{279} Akron, 462 U.S. at 442-45; \textit{see also Carhart}, 530 U.S. at 968-69 (Kennedy, J.,
concerns of the physician, who makes an economic profit on the practice, and thus risked destroying any state ability to regulate abortion.280

Perhaps the Carhart Court did not seriously intend to require a state to show that an exception is never necessary, despite the way in which it framed the statement. 281 The Court made two word choices when discussing the health exception that give some hope for the PBABA’s proponents. First, the Court cited a "significant" body of medical opinion supporting the proposition that the partial-birth abortion procedure is safer, as grounds for necessitating a health exception. 282 Second, the Court stated that Casey requires a health exception when "substantial" medical authority suggests that eliminating the particular abortion procedure could endanger a woman’s health. 283 Even the U.S. District Court for the Northern District of California identified this substantial medical authority requirement as the health exception holding of Carhart. 284 Although under this interpretation the comparative health advantage still presents an extension of Casey, 285 legislators can objectively satisfy the burden. At a minimum, the Court should clarify the health exception requirement stated in Carhart to one that is only invoked when challengers of the legislation make an objective showing of overall health benefits and a correlating need for an exception. Clearly, an accurate legislative showing that the regulation never requires a health exception would satisfy such a requirement. 286

During extensive findings over the course of six years, Congress definitively concluded that a ban on partial-birth abortion does not require a health

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280. See Carhart, 530 U.S. at 968-69 (Kennedy, J., dissenting).
281. See supra Part IV.B.
282. Carhart, 530 U.S. at 937.
283. Id. at 938.
284. Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 978 (N.D. Cal. 2004); see also Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1004 (Neb. 2004) (citing a requirement for substantial medical authority as part of the core legal principle of Carhart); Nat’l Abortion Fed’n v. Ashcroft, 330 F. Supp. 2d 436, 480 (S.D.N.Y. 2004) (citing the significant body of medical opinion language). One should keep in mind, however, that after quoting the same “significant body of medical opinion” language, all three courts essentially required unanimity of opinion regarding the lack of necessity for a health exception by pointing to any disagreement on the question as grounds for requiring the exception. Carhart, 331 F. Supp. 2d at 1008 (asking whether substantial evidence existed showing the banned procedure is “never necessary”); Nat’l Abortion Fed’n, 330 F. Supp. 2d at 491-92 (explaining that the standard is easy for the physicians to overcome); Planned Parenthood, 320 F. Supp. 2d at 1009 (stating that Carhart held “that the existence of a division of medical opinion supported the need for an exception”).
285. See Carhart, 530 U.S. at 937-38; Bopp & Cook, supra note 27, at 49.
exception. In fact, Congress found no credible medical evidence, let alone significant medical authority, that indicated partial-birth abortions were safer than alternative procedures. Even the U.S. District Court for the Southern District of New York found that many of the purported health advantages of partial-birth abortion were merely "theoretical" and did not "rise above the realm of hypothetical." Furthermore, beyond the fact that a safe alternative to partial-birth abortion always exists, evidence shows that physicians rarely use partial-birth abortions for health reasons. As one example, Dr. Haskell stated that 80% of the partial-birth abortions he performed were purely elective. Furthermore, even in those abortions performed for health reasons, the validity of that label is often doubtful. For example, Dr. McMahon considered genetic deformities, along

287. Id. § 2(5), (14), 117 Stat. at 1202-06.
288. Id. § 2(14)(B), 117 Stat. at 1206.
289. Nat'l Abortion Fed'n, 330 F. Supp. 2d at 480. This court also emphasized that the plaintiffs could not point "to a specific patient or actual circumstance in which D&X was necessary to protect a woman's health." Id. It is revealing, however, that after making these findings the court still thought the health exception requirement crafted in Carhart made the PBABA unconstitutional. Id. at 480-81, 491-92.
290. See 149 Cong. Rec. S3560 (daily ed. Mar. 12, 2003) (statement of Sen. DeWine); Bopp & Cook, supra note 27, at 9. Many in the media quickly adopted and purveyed previous suggestions by advocates of the legality of partial-birth abortion that the procedure is rare and only used when medically necessary. See, e.g., M. Greg Bloche, When Science and Politics Mix, WASH. POST, Nov. 16, 2003, at B5 (claiming that some physicians think the procedure is medically necessary in rare circumstances); Douglas Johnson, Infants Are Being Killed, USA TODAY, Oct. 23, 2003, at A14 (discussing a September 2003 Planned Parenthood press release describing partial-birth abortion as an "emergency abortion" procedure); Jeremy Zemliski, Legal Battle Looms Over New Statute, BUFF. NEWS, Nov. 6, 2003, at A12 (claiming that partial-birth abortions are rare and sometimes the only option to protect the woman's health); NewsHour, supra note 138 (describing partial-birth abortion as "a rare and medically necessary operation"). Unfortunately, those claims are inaccurate. See, e.g., Partial-Birth Abortion Ban Act § 2(4)-(5), (13)-(14), 117 Stat. at 1202-06 (establishing through extensive congressional investigation that partial-birth abortions are never medically necessary); Bopp & Cook, supra note 27, at 56 (noting that partial-birth abortion is not medically indicated); Johnson, supra note 289 (discrediting the Planned Parenthood claim that partial-birth abortion is an "emergency abortion" procedure); NewsHour, supra note 138 (noting the lack of any demonstrated benefit to women's health). Ron Fitzsimmons — who was then executive director of the National Coalition of Abortion Providers — later admitted that his well-publicized assertions concerning the rarity and necessity of partial-birth abortions were patently false. David Stout, An Abortion Rights Advocate Says He Lied About Procedure, N.Y. TIMES, Feb. 26, 1997, at A12; see also Bopp & Cook, supra note 27, at 14 (discussing Fitzsimmons' repudiation and noting that 3000 to 5000 partial-birth abortions is a more accurate annual figure).
291. Bopp & Cook, supra note 27, at 9. The other 20% were for genetic reasons. Id.
with "depression, minor maternal complication, and even a small pelvis as separate 'health' indications to kill the baby in advanced gestation."  

To summarize the foregoing crucial points, partial-birth abortions are not normally performed for health reasons, nor are they ever necessary to protect a woman's health. Additionally, prior abortion decisions provided Congress with reasonable concern that the courts would expansively require an included health exception in such a manner as to obstruct appropriate enforcement of the ban. Therefore, based on congressional findings and the facts surrounding partial-birth abortions, the Court should uphold the PBABA as validly omitting a health exception under this narrower and more reasonable reading of Carhart.

C. The PBABA Advances Important and Legitimate Interests

The PBABA advances important and legitimate interests, thus providing another reason why it should survive a constitutional challenge. While the Carhart holding did not explicitly depend on an assertion of insufficient state interests, such a determination underlies the Court's reasoning. In fact, the majority opinion asserted that the "interest-related differences" did not matter in regard to the question at hand. The Court's dismissal of Nebraska's interests as illegitimate seemed to contribute to the Court's dismissive view toward the State's findings regarding the lack of necessity for a health exception and toward the State's attempt to define the procedure that it wished to prohibit. If the Court applies the previability undue burden test to the PBABA, the validity of the state interests will become directly relevant.

The Court in Casey clearly implied that the state interest in previability fetal life is significantly less than in postviability fetal life. In fact, states may regulate abortion so as to create an undue burden on the right to choose an abortion, as long as that regulation only impacts postviability abortion. The majority in Carhart concluded that the Nebraska partial-birth abortion ban would apply both before and after viability, posing a difficult constitutional

292. Id. at 11.
293. See supra Part III.A.2.
295. Id. at 931.
296. See supra Parts II.D.1, II.D.2.
297. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult . . . to procure an abortion cannot be enough to invalidate it." Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (emphasis added).
298. Id. at 846.
299. "An undue burden exists, and therefore a provision of law is 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." Id. at 878 (emphasis added).
question in light of *Casey*. In prejudicial fashion, Justice O'Conner simply referred to the statute as "Nebraska's ban of previability partial-birth abortions," thus invoking the undue burden standard. Although the language of the PBABA does not limit its application to postviability procedures, partial-birth abortion was designed for later term procedures when the fetus is more likely viable. The previously discussed views of Justices Stevens and Ginsburg, however, reject any state interest in regulating partial-birth abortion regardless of fetal viability.

While the Justices in the *Carhart* majority seemingly could not perceive legitimate interests advanced by these state legislative bodies, Justice Thomas and Congress each pointed to the concern of "permitting a procedure that resembles infanticide and threatens to dehumanize the fetus." An expert that testified before Congress and the U.S. District Court for the Northern District of California explained the ethical objection "to any situation where the act that killed the fetus occurred outside of the body of the mother," thus lacking the foundational constitutional justification of the woman's bodily integrity. Even the majority opinion in *Carhart* admitted that one goal of prohibiting partial-birth abortion was to preserve the integrity of the medical profession — an interest the Court had recognized in at least one prior Supreme Court opinion. The Sixth Circuit acknowledged that the Supreme Court also found a legitimate relationship between an interest in prenatal life and the other interests that the Nebraska legislature attempted to advance. The Association of American

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300. *Carhart*, 530 U.S. at 930.
301. *Id.* at 948 (O'Conner, J., concurring).
303. *Carhart*, 530 U.S. at 924-29; Haskell, * supra* note 15, at 28. Dr. Haskell generally performs the partial-birth abortion procedure between twenty and twenty-four weeks gestational age, and sometimes up to twenty-six weeks. *Carhart*, 530 U.S. at 987 n.6 (Thomas, J., dissenting). Dr. Haskell also noted in his lecture that physicians can suitably use the procedure, with some other refinements, up to thirty-two weeks gestational age or more. Haskell, * supra* note 15, at 33. Congress found that, according to the AMA, the procedure is generally performed at twenty weeks or later. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(I), 117 Stat. 1201. While a precise definition for viability does not exist, infants have a substantial chance for survival outside the womb at twenty-three weeks — a chance that increases to over 70% by twenty-six weeks. Bopp & Cook, * supra* note 27, at 22-23.
309. Women's Med. Prof'l Corp. v. Tafi, 353 F.3d 436, 443 (6th Cir. 2003); *Carhart*, 530 U.S. at 931. Nevertheless, it seems the Court might have implicitly dismissed these state
Physicians and Surgeons and the AMA wrote amicus briefs for the Carhart Court in support of Nebraska’s position. They did this precisely because they felt that there was an ethical distinction between killing a fetus inside the womb and killing one mostly outside of the womb. Justice Kennedy also recognized the moral significance of the distinction and felt that the “Court’s refusal to recognize Nebraska’s right to declare a moral difference between the [D&E and partial-birth abortion procedures] is a dispiriting disclosure of the illogic and illegitimacy of the Court’s approach to the entire case.”

The interests explicitly advanced by the PBABA resemble those advanced by the Nebraska law struck down in Carhart: (1) drawing a bright line between abortion and infanticide; (2) preserving the integrity of the medical profession; and (3) preventing brutality toward a partially born infant. Nevertheless, the Court should not automatically dismiss these interests as illegitimate for several reasons. First, the PBABA expounds on Congress’s interests and the underlying rationale behind those interests in convincing detail. More importantly, at least according to the Court in Roe and Casey, the PBABA specifically seeks to advance the health interests of women who desire to obtain abortions. In Roe, the Court established a rule that seemed to only allow states to further an interest in health with regard to any second-trimester abortion regulation. In Casey, the Court acknowledged that a state always possesses an interest in furthering the health and safety of women seeking abortions. Finally, in Carhart, the Court reaffirmed a state’s interest in promoting women’s health. The PBABA advances an interest in health by protecting women from the grievous health risks associated with partial-birth abortions, including the ultimate risk of death. Furthermore, the PBABA also points out that partial-birth abortions possess no health advantages over alternative, available abortion procedures.
Abortion advocates like Ronald Dworkin incorrectly argue that the interests opposing abortion in general are "essentially religious" values and are, thus, illegitimate. First, while many religious people value fetal life and place great value on all life, this ethos crosses into many secular sectors of American society and other societies as well. Second, even if legislators based the interests in protecting the sanctity of life on religious values, religious values often underlie legislation and such interests do not become illegitimate merely because the regulation impacts a constitutional right. The presence of religious underpinnings may ultimately win the day for those who oppose the legislation, but it should not disqualify the interest per se.

321. DWORKIN, supra note 256, at 155-56.

322. Dworkin's implication that only religious people believe life has inherent value is ridiculous, based on any concrete definition of religion. Clearly, nonreligious people place inherent value on life, as all secular societies prohibit some form of murder. Additionally, Dworkin contradicts his assertion that the interest in opposing abortion is a religious or illegitimate one, instead labeling the interest as "the legitimate interest in maintaining a moral environment in which decisions about life and death are taken seriously and treated as matters of moral gravity." Id. at 168.

323. The Ten Commandments and the Levitical law were among the earliest examples of codified law. Additionally, these religious laws laid the foundation for the laws of many subsequent civilizations. While religious values provide the stimulus for many laws, or historically underlie society's view of appropriate conduct, legislators often point to valid secular purposes instead. There are some examples, however, of explicit invocation of religious values by legislators. See, e.g., 4 U.S.C. § 4 (2000) (adding "under God" to the pledge of allegiance); 10 U.S.C. § 502 (2000) (ending the Armed Forces enlistment oath like many other statutory oaths with "So help me God"); 10 U.S.C. § 802 (placing "I will trust in my God" in the Code of Conduct for Members of the Armed Forces); 36 U.S.C. § 119 (2000) (giving the President the authority to set aside a national day of prayer); 36 U.S.C. § 302 (declaring the national motto as "In God we trust").


325. Contra Lawrence v. Texas, 539 U.S. 558, 571 (2003). "The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" Id. (quoting Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)). Of course the very issue in this case would be, as it was in Lawrence, the Court substituting its own moral code for the people's, without a clear constitutional mandate to do so.
Thus, PBABA advances important and legitimate interests. According to Justice Kennedy, the Court held in *Casey* that the judiciary need not, and in fact should not, provide an exclusive list of interests that states may invoke when legislating abortion. In fact, contrary to the sentiment implied by the Justices in the *Carhart* majority, *Casey* seems to validate any interest whose purpose is not to diminish the constitutional right to an abortion. Therefore, when examining the PBABA, the Court should give credence to its precedent and the valid interests Congress has expressed. In the words of the Sixth Circuit, “these important and legitimate interests warrant[] a measure of deference, rather than the virtual assumption of unconstitutionality that has led federal courts . . . to invalidate the efforts of at least 20 states to exercise their limited sovereign authority to regulate abortions and abortion methods.”

Unlike the *Carhart* approach, once the Supreme Court recognizes the importance of the governmental interests in regulating partial-birth abortion, it can appropriately review and uphold the PBABA.

**D. If Necessary, the Court Should Ignore the Holdings of Carhart That Seem to Weigh Against Upholding the PBABA**

Acknowledging the similarity of the PBABA to the Nebraska law in *Carhart* naturally leads to a discussion of how the Court should deal with precedent in the abortion context. *Casey* focused heavily on the importance of precedent. On such a politically divisive issue, the Court reasoned that any reversal of its previous case law would give the appearance of capitulation and threaten the institution’s legitimacy. In this sense, *Casey* established an unusually high threshold for overruling *Roe* because *Roe* was a watershed decision and was intended to resolve an intensely divisive issue. *Roe*’s significance, however,
should not provide a shield around all other Supreme Court decisions regarding abortion and should certainly not give the Court justification to so grossly expand its abortion precedent as it did in Carhart.332

The Casey plurality’s argument for bestowing Roe with higher precedential authority only pertained to Roe’s central holdings and principles.333 Even in Casey, for example, the Court rejected a portion of Roe by eliminating its trimester framework after determining that Roe contradicted its own framework and required its abandonment.334 Casey also expressly ignored the holdings of some intervening abortion cases.335 The Court chose to value the precedent of Roe over the later abortion cases.336 In a similar manner to those intervening cases, Carhart surpassed the tenets that Roe and Casey established, and actually contradicted them.337 If the trimester framework created by Roe failed to “fulfill Roe’s own promise that the State has an interest in protecting fetal life or potential life,” the Court explicitly rejecting the state’s express interests in potential life, coupled with the Court protecting a procedure so similar to infanticide, fails to fulfill Roe to an even greater extent.338

Roe’s author, Justice Blackmun, established a fairly high standard for overruling a prior holding. After acknowledging the importance of stare decisis, he found that the Court can properly overrule a prior case when it “has bred confusion or been a derelict or led to anomalous results.”339 While this comment has already argued that the PBABA should withstand an application of Carhart, one could also argue that Carhart should be read broadly to invalidate the Act. If read this broadly, however, Carhart qualifies for overruling under Justice Blackmun’s standard. A broad reading of Carhart is derelict and breeds confusion on the issue of whether states’ interests will truly be allocated any weight in constitutionality determinations regarding abortion legislation.

Additionally, the strict scrutiny flavor of the Carhart opinion directly contradicts Casey, which rejected strict scrutiny in favor of the undue burden test for previability abortion regulation and deferential treatment of postviability

disruption . . . that the Court’s new majority decrees.” Casey, 505 U.S. at 995-96 (Scalia, J., dissenting).

332. “Mere precedent is a dangerous source of authority, and should not be regarded as [singly] deciding questions of constitutional power . . . .” ABRAHAM LINCOLN, SPEECHES & WRITINGS 394 (1959).
333. Casey, 505 U.S. at 872.
334. Id.
335. Id. at 872; see, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986); Akron, 462 U.S. 416.
336. Casey, 505 U.S. at 871 (choosing “to rely upon Roe, as against the later cases”).
337. See supra Part IV.
338. Casey, 505 U.S. at 876.
regulation.\textsuperscript{340} While the \textit{Carhart} Court made no mention of compelling interests or narrowly tailored means, its unforgiving statutory interpretation and expansive requirement for a health exception is strictly fatal in fact.\textsuperscript{341} The above aspects of \textit{Carhart} defy the determination first announced in \textit{Roe} and more strongly restated in \textit{Casey} that states have important interests that limit the constitutional right to obtain an abortion.\textsuperscript{342} Invalidating the PBABA would be a derelict and anomalous result, which is out of step with \textit{Roe} and \textit{Casey}. Any part of \textit{Carhart} that seems to demand such a derelict result deserves overruling. Therefore, in areas where \textit{Roe} and \textit{Carhart} conflict, the Court should rely, as it did in \textit{Casey}, on \textit{Roe}'s central holding instead of \textit{Carhart}'s errant reasoning.

The PBABA presents additional reasons for the Court to ignore the expansive and errant reasoning of \textit{Carhart}. One compelling reason that Congress's ban on partial-birth abortions must withstand judicial review lies in the fact that a human being can only accurately be called partially born at the point when the doctor pierces its skull.\textsuperscript{343} In addition to the falsity of the conclusion that the PBABA targets previability abortions, some scholars argue that this claim becomes irrelevant in light of the reality of the procedure.\textsuperscript{344} In general, the partial-birth abortion procedure involves the removal of the partially born infant to the point where only the head remains within the womb.\textsuperscript{345} Partially born may seem like an odd distinction, but referring to this human being as being unborn is unrealistic.\textsuperscript{346} The infant is mostly out of the womb and, therefore, more born at this point than not.

For those who may object to the partially born label as semantic gymnastics, \textit{Roe} is to thank for essentially drawing a magical personhood line at a woman’s cervix.\textsuperscript{347} Despite the Court’s rhetoric, it could not have decided \textit{Roe} without making some determination regarding the beginning of at least personhood, if not life.\textsuperscript{348} The Supreme Court definitively chose birth as the line for personhood.\textsuperscript{349} While ironically arguing for constitutional protection of the

\textsuperscript{340} \textit{Casey}, 505 U.S. at 872 (rejecting strict scrutiny); \textit{id.} at 878 (explaining the undue burden test and its application after viability).

\textsuperscript{341} \textit{See} Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (characterizing “conventional strict scrutiny” as “fatal in fact”); \textit{see also supra} Parts II.D.1, II.D.2.


\textsuperscript{344} Bopp & Cook, \textit{supra} note 27, at 26-30.

\textsuperscript{345} \textit{id.} at 26; \textit{see} Haskell, \textit{supra} note 15, at 30.

\textsuperscript{346} Bopp & Cook, \textit{supra} note 27, at 26.

\textsuperscript{347} \textit{id.} at 26-30; \textit{see, e.g.}, \textit{Roe}, 410 U.S. at 157.

\textsuperscript{348} “We need not resolve the difficult question of when life begins.” \textit{Roe}, 410 U.S. at 159.

\textsuperscript{349} Bopp & Cook, \textit{supra} note 27, at 45.
partial-birth abortion procedure, even Judge Posner acknowledged that "the line between feticide and infanticide is birth" and went so far as saying that "no possible concern for the mother's life or health justifies killing the baby" after it emerges from the womb.\textsuperscript{350} By ignoring the constitutional status of the partially born infant, the Court seriously undermined the legitimacy of its abortion precedent.\textsuperscript{351} Despite the precedent of \textit{Carhart}, the Court should not make the same mistake when analyzing the PBABA, but should instead respect the definition of personhood it established in \textit{Roe}.\textsuperscript{352} Therefore, when a living human being has mostly crossed the personhood line, the Court must give some constitutional recognition to this fact to maintain any consistency and legitimacy on the issue.\textsuperscript{353}

\textbf{E. The Court Should Not Interfere with the People's Right to Ban Partial-Birth Abortion}

While the Supreme Court's jurisprudence references the competing interests in fundamental rights issues as the state or governmental interests, the Court could perhaps better understand the competing interests in terms of the people who compose these governing bodies.\textsuperscript{354} Democracy relies on the premise that people have the ability and the right to govern themselves.\textsuperscript{355} The Supreme Court seems to have forgotten that legislative bodies and the laws that they pass are not just rivals that the Court must slay in its chivalrous defense of fundamental liberties.\textsuperscript{356} In fact, legislative bodies, though they often fail in the endeavor, are designed to represent the interests, ethics, and morality of their constituency.\textsuperscript{357}

\begin{itemize}
\item \textsuperscript{350} Hope Clinic v. Ryan, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting).
\item \textsuperscript{351} Stenberg v. Carhart, 530 U.S. 914, 920-46 (2000). Justice Scalia asserted that the Court has an "inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." \textit{Id.} at 954 (Scalia, J., dissenting).
\item \textsuperscript{352} \textit{Roe}, 410 U.S. at 157.
\item \textsuperscript{353} \textit{See} Bopp & Cook, \textit{supra} note 27, at 45.
\item \textsuperscript{354} "The civic body [the politeuma, or body of persons established in power by the polity] is everywhere the sovereign of the state; in fact the civic body is the polity (or constitution) itself." ARISTOTLE, \textit{The Politics of Aristotle} 110 (Ernest Barker trans., Oxford University Press 1958).
\item \textsuperscript{355} "In democratic states, for example, the people [or demos] is sovereign: in oligarchies, on the other hand, the few [or oligoi] have that position . . . ." \textit{Id.} at 110.
\item \textsuperscript{356} See also Michael A. Scaperlanda, \textit{Replies to Professor Chemerinsky: The Undiluted Values of Justices Versus the Justice of Undiluted Values}, 54 OKLA. L. REV. 17, 41 (2001) ("[T]he framers attempted to temper majority rule, but they also attempted to destroy the possibility of minority rule.").
\item \textsuperscript{357} \textit{See}, e.g., Scaperlanda, \textit{supra} note 324, at 1615-21.
\end{itemize}
For example, the Court’s denial of a state or the federal government’s ability to prohibit slavery would certainly be an injustice.\textsuperscript{358} Beyond the gross injustice to the enslaved, judicial usurpation would also prevent citizens from enforcing their moral disgust of slavery, forcing them to tolerate its ugly presence all around them.\textsuperscript{359} In fact, in a situation where society would not recognize the enslaved population as persons entitled to life and liberty under the Constitution, the slavery opponents could only put forth arguments based on their moral opposition to the slaveholders choosing to enslave others.\textsuperscript{360} The opposition would insist that the forced continuance of slavery would place a burden of condemnation on the society as a whole.\textsuperscript{361} The only just solution seems to be for courts to allow laws embodying this moral opposition to withstand judicial review.

Regulation of partial-birth abortion presents the Court with a dilemma unique from other legislative attempts to regulate abortion. The issue is unique because, although the nation remains closely divided on whether some right to an

\textsuperscript{358} See, e.g., DWORKIN, supra note 257, at 123, 128 ("[I]t is a preconditio\n\n\of legitimate democracy that government is required to treat individual citizens as equals, and to respect their fundamental liberties and dignity .... Taken at face value, [the Bill of Rights] command[s] nothing less than that government treat everyone .... with equal concern and respect ....").

\textsuperscript{359} Slavery provides a very useful comparison for this topic. Immediately before the Civil War, there was an intense division over the issue, ultimately boiling down to stark differences of moral opinion regarding the value and worth of a slave’s life. The Missouri Compromise sought to limit the evil of slavery if it could not actually abolish it. The Court struck down that compromise in \textit{Dred Scott v. Sanford}, 60 U.S. (19 How.) 393 (1857), relying on a substantive due process right to property that could not yield in any way to the interests of a democracy. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28-31 (1990).

\textsuperscript{360} "The child in the womb, under the Supreme Court \textit{Roe v. Wade} decision, is property .... It is the same case. It is \textit{Dred Scott}, and for some reason we just choose not to see it." 149 CONG. REC. S3560, S3606 (daily ed. Mar. 12, 2003) (statement of Sen. Santorum); see also Planned Parenthood v. Casey, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting) (recognizing the common substantive due process underpinnings). \textit{Roe} and the decisions reaffirming it are equal in their audacity and abuse of judicial office to \textit{Dred Scott} .... Just as \textit {Dred Scott} forced a southern pro-slavery position on the nation, \textit{Roe} is nothing more than the Supreme Court’s imposition on us of the morality of the elites." ROBERT H. BORK, SLOUCHING TOWARDS COMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 173-74 (1996).

\textsuperscript{361} See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 174-75 (J.W. Randolph 1853) (1787). President Jefferson stated:

\begin{quote}
And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever ....
\end{quote}

\textit{Id.}
abortion exists, a supermajority of Americans favor banning partial-birth abortion.\textsuperscript{362} To be exact, a Gallup poll found that 70\% of Americans support banning the procedure except when necessary to preserve the life of the woman.\textsuperscript{363} Because the Court is the only branch powerless to enforce its determinations, it relies on its legitimacy and support, both popular and intergovernmental.\textsuperscript{364} In practical terms, when recognizing a fundamental right clearly not contained in the text of the Constitution,\textsuperscript{365} the Court can only reject the views of a certain number of Americans before it loses all the legitimacy and support crucial to its very existence.

In addition to the overwhelming number of people opposed to partial-birth abortion, \textit{Carhart} recognized that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child . . . ."\textsuperscript{366} After also stating the pro-choice position fearing a ban on abortion, the \textit{Carhart} majority made the somewhat surprising assertion that it took into account both of these "irreconcilable" points of view.\textsuperscript{367} Those on the Court who support an expansive application of the principles underlying the \textit{Carhart} decision have come to two conclusions fatal to the ideals of the previously referenced "millions of Americans." First, they have determined that the viewpoints of those who place great value on fetal life and those who desire to have a right to abort fetal life are irreconcilable.\textsuperscript{368} Second, they have concluded that only the interest in having an abortion is protected by the Constitution, and that it therefore subordinates all competing values.\textsuperscript{369}

\begin{itemize}
  \item \textsuperscript{362} See, e.g., NBC News/Wall Street Journal Poll (Nov. 8-10, 2003), \textit{at} http://www.pollingreport.com/abortion.htm (noting that 53\% favored the broad right to abortion, while 44\% always opposed abortion or wanted it legal only in cases of rape, incest, or when the woman's life is in danger); CNN/USA Today/Gallup Poll (Oct. 24-26, 2003), \textit{at} http://www.pollingreport.com/abortion.htm (stating that the nation is divided equally, with 44\% pro-life and 44\% pro-choice).
  \item \textsuperscript{363} "By an overwhelming margin of 70 percent to 25 percent, according to this week's Gallup Poll, voters favor making it illegal to perform a specific procedure 'in the last six months of pregnancy known as partial birth abortion, except to save the life of the mother.'" Shields, \textit{supra} note 196.
  \item \textsuperscript{364} See \textit{THE FEDERALIST} NO. 78 (Alexander Hamilton).
  \item \textsuperscript{365} Obviously the Constitution does not mention abortion or privacy. The "right to privacy," invoked in \textit{Roe v. Wade} as protecting abortion, was recognized by the Court in \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965), as residing in the penumbra, or shadow, of several constitutional amendments.
  \item \textsuperscript{366} Stenberg v. Carhart, 530 U.S. 914, 920 (2000).
  \item \textsuperscript{367} \textit{Id.} at 921.
  \item \textsuperscript{368} \textit{Id.}
  \item \textsuperscript{369} \textit{Id.}
\end{itemize}
Ever since *Roe*, these “millions of Americans” have felt “despair[] that their government, at its highest level, sanctioned what they took to be the destruction of human life at its most vulnerable stage.” In light of this debate, the Court stated in *Roe*, “[W]e do not agree that, by adopting one theory of life, [a state] may override the rights of the pregnant woman that are at stake.”

The expansive abortion jurisprudence that threatens the PBABA gives the impression that the Court has now adopted its own theory of life: whatever may be in the womb is legally and morally insignificant until the point that its mother or a physician deems it to be significant. In this vein, the Court’s decision to protect partial-birth abortion, in its *Carhart* decision, extended the mother’s and physician’s quasi-divine prerogative even beyond the womb. No other explanation justifies nullifying states’ interests in protecting the life of a partially born human being.

The mistake that the Court has made regarding abortion is that, while recognizing a constitutional right to privacy that encompasses abortion, it has failed to give constitutional weight to the countervailing interests. These interests include the states’ interest in providing for community morality, which is an interest arguably embodied in the Tenth Amendment of the Constitution. States should retain the ability to distinguish between the morality of destroying a life inside the womb from the morality of destroying a life being delivered from the womb.

The right to life presents another countervailing interest with constitutional weight. Justice Blackmun concluded in *Roe* that if “personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.” President Ronald Reagan contended, “[U]ntil someone can prove the unborn human is not

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372. See Carhart, 530 U.S. at 930-31, 946 (Stevens, J., concurring); Hodges, supra note 157, at 180. Again, the physician is deciding whether to sell his partial-birth abortion services and, thus, is not the most neutral party.
373. Carhart, 530 U.S. at 946 (Stevens, J., concurring) (concluding that Nebraska may not prohibit partial-birth abortion).
374. Roe, 410 U.S. at 153 (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . [or] 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.”).
375. Of course the Tenth Amendment could not be construed to provide the federal government any interest or right, but the argument does go to discredit the holding of Carhart.
376. Carhart, 530 U.S. at 962 (Kennedy, J., dissenting).
alive . . . it should be entitled to life, liberty and the pursuit of happiness."

Although *Roe* clearly stated that a life inside of the womb is not a person, the Fifth and Fourteenth Amendments to the U.S. Constitution provide constitutional reinforcement to the federal government and states' interest in preserving the sanctity of life. Admittedly, these interests are not expressly tied to the Constitution, at least with regard to a private actor taking the life of a human being that the Court does not define as a person. Of course, neither is any right to abortion found in the text of the Constitution. Furthermore, the Justices need not even look to the penumbra of the Constitution to identify the constitutional governmental interests in regulating abortion. The foundation for these countervailing interests, at least, appears in the actual text of the constitutional amendments.

While this comment does not propose that the abortion issue should boil down to a battle of which interests are more constitutional, the government's interests in regulating abortion are certainly significant, if not actually compelling, and deserve proper consideration. Instead of raising their figurative hands in surrender and concluding that the pro-choice and pro-life points of view are irreconcilable, the Court should at least make an honest attempt to achieve a compromise.

379. *Roe*, 410 U.S. at 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").
381. One constitutional scholar pointed out that "the Court's assertion is false. The Fourteenth Amendment does not guarantee a right to life — it guarantees only that life cannot be taken by the state without due process of law." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 252 (1993). While the claim may not be as strong as that stated in *Roe*, the Constitution's recognition of the value of life should still carry legal clout. *Roe*, 410 U.S. at 156-57.
382. The Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), discovered the "right to privacy" in the penumbra, or shadow, of several constitutional amendments. This same right to privacy was found to be broad enough to encompass a woman's right to abort an unborn life. *Roe*, 410 U.S. at 153.
383. *See* U.S. CONST. amends. X, XIV.
384. Supreme Court precedent does not concretely define compelling interests. Recently, however, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court concluded that "student body diversity is a compelling state interest." *Id.* at 325. Under this standard, the preservation of life, adult women's health, and the morality of the community all seem to be sufficiently compelling interests.
385. Long before *Carhart*, the federal courts clearly showed their hand regarding how they valued the competing interests of pro-life and pro-choice groups. "Abortion litigation in district courts is a lopsided affair . . . . [C]ivil-rights groups prevailed in 87 percent of the cases they were involved in, and Planned Parenthood . . . prevailed in 82.4 percent of their cases. The pro-life groups . . . prevail[ed] in only 46 percent . . . ." BARBARA M. YARNOLD, ABORTION
Roe established the basic premise that "the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still another important and legitimate interest in protecting the potentiality of human life."386 Casey seemed to promise that future decisions would give true weight to these interests.387 In fact, seven Justices in Casey "acknowledged that States have a legitimate role in regulating abortion and recognized the States' interest in respecting fetal life at all stages of development."388 An application of Carhart that would invalidate the PBABA, however, seems to render these promises pure rhetoric.389

In his Carhart dissent, Justice Scalia explained his disbelief "that this Court, armed with neither constitutional text nor accepted tradition, can resolve [the] contention and controversy [surrounding abortion] rather than be consumed by it."390 Regardless of the validity of his argument, the Court will not likely overturn Roe in such a manner that abortion will no longer receive constitutional protection.391 The PBABA, however, certainly does not contradict Roe, but rather achieves a balanced compromise that is democratically uncontroversial.

Politics in the Federal Courts 116 (1995). The bias against the pro-life position continues in the federal courts. In March 2004, the U.S. Court of Appeals for the Seventh Circuit determined that the government’s request for redacted medical records concerning partial-birth abortions was an undue burden, partly because the medical information had a limited probative value. See Northwestern Mem’l Hosp. v. Ashcroft, 362 F.3d 923 (7th Cir. 2004). This is a somewhat surprising conclusion considering that a focal issue of the PBABA-Carhart controversy focuses on the health advantages of partial-birth abortion. Moreover, in 2004, the U.S. District Court for the Northern District of California also exemplified this bias in numerous ways, such as blatantly disregarding the government’s witnesses. See Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 967-68 (N.D. Cal. 2004).

387. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) ("[T]he 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.").
389. Id. at 983.
390. Id. at 956 (Scalia, J., dissenting); see also Hodges, supra note 157, at 187 ("[T]he Court should return the abortion decision to the democratic process, and not try to settle this difficult question for all fifty states.").
391. Based on the composition of the majority in Casey and Carhart, at least six of the current justices favor upholding Roe v. Wade in some manner. With certain Senators’ current litmus test for judicial appointments, and their extreme use of filibustering in enforcing that test, it is also doubtful that the Court will become any more pro-life. "Abortion has become a sacred cause for the Court, before which neither the Constitution nor the Court’s previous decisions can stand. The abortion right has survived many changes in the Court’s personnel and . . . abortion virtually on demand and for any reason seems secure for the foreseeable future." ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 73 (2003).
and should be constitutionally uncontroversial.\textsuperscript{392} To retain its legitimacy, the Court must honor its promise in \textit{Casey} and balance the interests on both sides of the abortion debate in a manner that attempts to respect both sides' positions instead of clearly capitulating to the pro-choice\textsuperscript{393} movement.\textsuperscript{394} A balanced and reasonable judicial review of the PBABA will surely result in its validation.

To allow for a true balancing of the important and legitimate interests on both sides of the abortion debate, the Court must withdraw from an expansive understanding of the health exception requirement. The health exception should not be an amorphous and expansive requirement that serves to nullify any supposed ability to regulate abortion.\textsuperscript{395} By interpreting the health exception narrowly, as recommended above,\textsuperscript{396} and resuscitating \textit{Casey}'s acknowledgment of governmental interests,\textsuperscript{397} the Court can return some balance and legitimacy to its role in the abortion debate.

Some skeptics of the balancing of interests in reviewing abortion legislation have posed two concerns, which warrant discussion. First, some have argued that such balance will open the "floodgates of litigation."\textsuperscript{398} Holdings that either reject \textit{Carhart}'s formulation of the health exception or find the PBABA proper under \textit{Carhart} could indeed invite more legislation attempting to regulate abortion and corresponding litigation challenging it. As undesirable as these results may be, the Court wholeheartedly opened this Pandora's box with its decision in \textit{Roe}.\textsuperscript{399} Essentially, the Court has three options regarding abortion:

\textsuperscript{392} See Sheryl Gay Stolberg, \textit{The War Over Abortion Moves to a Smaller Stage}, N.Y. TIMES, Oct. 26, 2003, § 4, at 4 ("[T]he new ban represents, not a watershed, but a kind of equilibrium, a resting place in the 30-year national conflict over \textit{Roe}."); see also Shields, supra note 196.

\textsuperscript{393} While terms ranging from anti-choice to pro-killing are sometimes used, this comment refers to the respective positions concerning the desirability of legalized abortion by their respectively preferred names, the pro-choice and pro-life movements. ANN COULTER, SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT 198 (2002); NAT'L ABORTION & REPROD. RIGHTS ACTION LEAGUE, WHO DECIDES?: A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS (10th ed. 2001); Family Research Council Symposium, \textit{The Pro-Life Movement at Thirty: A Political Assessment} 19-20 (Jan. 16, 2003), available at http://www.frc.org/get.cfm?i=PD03601.

\textsuperscript{394} See Schmutz, supra note 149, at 529, 546 ("[T]he Supreme Court of the United States entered the abortion battleground and rendered an opinion which left the pro-life movement wounded and the pro-choice movement victorious.").

\textsuperscript{395} \textit{See supra} Part II.A.2.

\textsuperscript{396} \textit{See supra} Part IV.B.

\textsuperscript{397} \textit{See supra} Part IV.C.


As in . . . cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will
(1) to take Justice Scalia’s suggested approach and defer to the legislative bodies; \(^{400}\) (2) to determine “that the woman’s right [to abortion] is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses”; \(^{401}\) or (3) to recognize abortion as a constitutional right immersed in a divisive controversy with important and valid interests on both sides of the debate. The first two options would certainly decrease the opportunities for legislation or litigation. The Court, however, has repeatedly rejected the first option, \(^{402}\) and the second is clearly invalid, unjust, and contrary to both the Court’s precedent \(^{403}\) and the desires of an overwhelming majority of this country. \(^{404}\) Therefore, regardless of the litigious results, the

invariably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be “compelling.”

Roe, 410 U.S. at 174. Justice Scalia has also commented on political pressures facing the court: How upsetting it is, that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it. That cause permeates today’s opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls “reasoned judgment,” . . . which turns out to be nothing but philosophical predilection and moral intuition.


400. Casey, 505 U.S. at 1002 (Scalia, J., dissenting) (“We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”).

401. Roe, 410 U.S. at 153. “[I]n these extreme democracies, each man lives as he likes . . . . This is a mean conception of liberty. To live by the rule of the constitution ought not be regarded as slavery, but rather as salvation.” ARISTOTLE, supra note 354, at 234.

402. Stenberg v. Carhart, 530 U.S. 914, 946 (2000) (Stevens, J., concurring). “The rhetoric is almost, but not quite, loud enough to obscure the quiet fact that during the past 27 years, the central holding of Roe v. Wade . . . has been endorsed by all but 4 of the 17 Justices who have addressed the issue.” Id.

403. See, e.g., Casey, 505 U.S. at 887 (noting that not even the broadest reading of Roe supports abortion on demand); Maher v. Roe, 432 U.S. 464, 473 (1977) (asserting that Roe did not declare an unqualified right to an abortion); Roe v. Wade, 410 U.S. 113, 155 (1973) (“[T]he right . . . is not absolute and is subject to some limitations.”); Doe v. Bolton, 410 U.S. 179, 189 (1973) (“[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand.”).

Court must consider the governmental interests promised by its precedent and demanded by justice.

Second, critics have also argued that a balanced regulation of certain abortion procedures is inappropriate because no other medical procedure bears statutory restrictions similar to those placed on abortion.\textsuperscript{405} Instead, most medical decisions vest solely with patients in consultation with their physicians.\textsuperscript{406} Even in \textit{Doe}, Justice Blackmun compared abortions to other "voluntary medical or surgical procedure[s]" and seemed confused why Georgia would have a different requirement for one procedure over the other.\textsuperscript{407} It is unreasonable, however, to equate abortion with mere medical procedures. Such reasoning reveals an overwhelming blindness to the countervailing interests in the abortion debate. No other medical procedure terminates the existence of something that would otherwise — barring any unusual occurrence — leave its mother's womb as a person endowed with the same rights as its mother and all other persons in the United States.

\textit{V. Conclusion}

The scales of justice can only adequately resolve the divisive controversy over abortion if the Supreme Court recognizes the weighty interests on both sides of the debate and gives more than lip service to the countervailing government interests.\textsuperscript{408} Ideally, the Court should find that the PBABA passes constitutional muster under \textit{Carhart}.\textsuperscript{409} Congress clearly (1) defined the prohibited procedure so as to avoid imposing an undue burden on the constitutional right to abort, (2) based its prohibition on legitimate and important interests, and (3) adequately justified its decision not to include a health exception.\textsuperscript{410} In the alternative, \textit{Carhart}'s broad explication of the health exception requirement should be read narrowly and in accordance with the

\begin{footnote}{405} \textit{See NewsHour}, \textit{supra} note 138 (Dr. Paula Hillard characterizing the PBABA as placing "the government between a woman and her physician"); \textit{see also} Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1015 (N.D. Cal. 2004) ("Dr. Robinson reiterated his belief that Congress should not legislate how doctors practice medicine."); \textit{cf.} MILBAUER \& OBRENTZ, \textit{supra} note 101, at 122 (questioning why physicians have such a primary role in the abortion decision-making process).

406. \textit{Contra NewsHour}, \textit{supra} note 138 (quoting Dr. Cook as noting that "government is involved in medical decision-making in many ways" and that "when you talk about defending somebody against as heinous a crime as partial birth abortion," the government must become involved).


408. \textit{See YARNOLD}, \textit{supra} note 385, at 117 ("In the abortion cases examined overall, the federal courts were not 'friends' of pro-life litigants.").

409. \textit{See supra} Part IV.A.

410. \textit{See supra} Parts III.A, IV.C.
Court's previous abortion precedent such as *Casey*. An overly broad health exception requirement constitutes the primary obstacle to a legitimate balancing of the partial-birth abortion issue. Ultimately, providing constitutional protection to partial-birth abortions would reveal a deep inconsistency with *Roe's* definition of personhood, while also frustrating the overwhelming consensus of this nation to oppose the procedure. The PBABA does not violate the Constitution in any sense. Therefore, the Court should allow Americans the ability to prevent partial-birth abortion.

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411. See *supra* Part IV.B.
412. See *supra* Part III.A.2.
413. See *supra* Part IV.D.
414. See *supra* Part IV.A.