Partial-Birth Abortion: Crime or Protected Right?

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INTRODUCTION

A woman's right to terminate her pregnancy and the ability of states to regulate this right, although established law, continues to be a rich source of political and judicial debate. This right was established by the landmark case Roe v. Wade in 1973 and although keeping the central holding in tact, subsequent Supreme Court cases have reviewed and refined this right. In Carhart v. Stenberg, after 8 years of silence on the subject, the Supreme Court has revisited the abortion issue within the context of a controversial procedure commonly referred to as partial-birth abortion. The Court struck down a ban on partial-birth abortions because it posed an undue burden on the mother's right to obtain an abortion and because it did not contain an exception for situations where the procedure would be necessary to preserve the health of the mother.

* Class of 2002, St. John's University School of Law.
1 410 U.S. 113 (1973).
3 120 S. Ct. 2597 (2000).
4 See id. at 2617; see also Akhil Reed Amar, The Supreme Court, 1999 Term Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26, 109-10 (2000) (stating reasons why Court struck down statute); Nation in Brief, ATLANTA J. AND CONST., Nov. 8, 2000, at 7A (stating U.S. Supreme Court struck down Nebraska ban because it placed
The purpose of this note is two-fold. First, this note will show that the history of abortion jurisprudence should not govern partial-birth abortions. *Roe* established a woman's right to terminate her pregnancy and as such this right no longer exists when all but the head of a fetus is delivered, thus the woman is no longer in the pregnancy stage. Second, even if the abortion jurisprudence does govern this issue, bans on partial-birth abortions do survive the applicable standard of review the court has articulated in *Planned Parenthood v. Casey,* commonly called the "undue burden" test, because the woman has many alternative procedures available to her. Furthermore, including an exception for the health of the mother would prove fatal to the intended purpose of the ban because historically the Supreme Court has interpreted health very broadly. Basically, a mother and her physician could advance any emotional, physical, or mental health concern as a basis for seeking this type of procedure. Part II of this note discusses the basis of a woman's right to privacy and the history of the abortion jurisprudence beginning with the seminal case of *Roe* through *Planned Parenthood v. Casey* and ending with the recent decision in *Stenberg v. Carhart.* Part III goes on to describe the procedure undue burden on woman's right to terminate pregnancy; Nichole Aksamit, *Carhart Makes 'Most Intriguing' List*, OMAHA WORLD HERALD, Jan. 3, 2001, at 15 (stating U.S. Supreme Court deemed Nebraska statute banning partial birth abortion unconstitutional).

5 See *Roe*, 410 U.S. at 163 (holding woman has right to terminate pregnancy); see also Richard Willing, *Abortion-ban Case Extends Division Issue Returns to High Court for 1st Time in 8 Years*, USA TODAY, Apr. 26, 2000, at 3A (stating *Roe* found abortion to be protected by Constitution); *Constitutional Analysis of Legislation Banning Abortion Procedures*, NARAL RES., at http://www.naral.org/mediasources/fact/constitutional.html (hereinafter *Constitutional Analysis of Legislation*) (stating U.S. Supreme Court recognized woman's constitutional right to choose to have abortion in *Roe*); *Privacy Law and the U.S. Supreme Court before and after Roe v. Wade*, CRLP PUBLNS, at http://www.crlp.org/timeline.html (hereinafter *Privacy Law and the U.S. Supreme Court*) (reiterating *Roe* holding).


7 See id. at 881; see also Allison D. Gough, *Banning Partial-Birth Abortion: Drafting a Constitutionally Acceptable Statute*, 24 DAYTON L. REV. 187, 193 (Fall 1998) (discussing emergence of undue burden standard in *Casey*); *Privacy Law and the U.S. Supreme Court*, supra note 5 (discussing strict scrutiny standard in *Roe* being replaced by undue burden test); *Supreme Court Decisions Concerning Reproductive Rights, A Chronology: 1965-1999*, NARAL RES., at http://www.naral.org/mediasources/fact/decisions.html (hereinafter *Supreme Court Decisions*) (stating strict scrutiny standard was replaced with undue burden standard in *Casey*).

8 410 U.S. 113 (1973).


10 120 S. Ct. 2597 (2000).
termed "partial-birth" abortion. It discusses alternative methods available as well as views advanced by the medical profession regarding this subject. Further, legislative efforts at the state and federal level to ban this procedure will be presented and discussed. Part IV contains an analysis of the Nebraska statute beginning with why it should have survived the undue burden test. In addition, this section discusses the fatality of the ban under the current definition of health as interpreted by the Supreme Court. Part V briefly discusses the future of the abortion debate, more particularly the issue of partial-birth abortion in light of the recent presidential election. The election of George W. Bush as the new president may result in a dramatic shift in the decisions of the Supreme Court relating to abortion.

I. ESTABLISHMENT OF THE RIGHT

A. Right to Privacy

The right to privacy, although not specifically enumerated within the Constitution of the United States, is held to be a fundamental right within the "zones of privacy created by several fundamental constitutional guarantees." The right to privacy has found its roots in various amendments to the Constitution including the Fourth, Fifth, and Fourteenth. In Griswold v. Connecticut, the Supreme Court, by a 7-2 vote, invalidated a state statute prohibiting the use of contraceptives between


12 See Stanley v. Georgia, 394 U.S. 557 (1969) (finding right to privacy existed under First Amendment); Griswold, 383 U.S. 479 (1965) (finding right to privacy existed in Fourth and Fifth Amendments, in penumbras of Bill or Rights and in Ninth Amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (finding right to privacy existed in liberty interest guaranteed by Fourteenth Amendment); see also 16B AM. JUR. 2D § 604, supra note 11 (discussing right to privacy exists in many constitutional provisions).

13 383 U.S. 479 (1965). The Court, in a well-known opinion authored by Justice Douglas, saw this statute as invading a zone of privacy created by several constitutional guarantees. See id. at 485-486. It appears that Justice Douglas relied predominantly on the penumbra created by the Fourth Amendment. He stated: "Would we allow the police to search the sacred precincts of marital bedrooms for the telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship." Id.
married people, holding that the law violated the constitutional right to marital privacy. This constitutional right to privacy was extended to reproductive decisions of unmarried persons in *Eisenstadt v. Baird*. Ultimately, in *Roe v. Wade* the Court, finding the right to privacy to exist within the fourteenth amendment's "concept of ordered liberty," expanded this right to encompass a woman's decision to terminate her pregnancy. Although the right to privacy is recognized as fundamental, both state and federal courts have held that this right is not absolute and may be regulated by governmental regulation where appropriate.

**B. Roe and its Progeny**

In *Roe*, a Texas statute prohibiting abortions not necessary to save the woman's life was invalidated. While the Court acknowledged a woman's right to terminate her pregnancy it also noted that this right was not absolute nor "unqualified and must be considered against important state interests in regulation."
The state interest in the protection of life, the safeguarding of health and preservation of medical standards become compelling and it is at this point that regulations will be upheld if they are "narrowly tailored" to these governmental interests.\(^{21}\) As the period of the pregnancy lengthens, the state may place increasing restrictions on a woman's right to an abortion. For example, prior to the end of the first trimester, the choice is left solely to the woman and her physician. After the end of the first trimester, the state's interest in maternal health becomes compelling. After viability, the state, in promoting its interest in the protection of human life, may regulate or even prohibit abortion except where it is necessary for the protection of the mother's health or life.\(^{22}\)

Following *Roe*, the Court reviewed the constitutionality of various state statutes seeking to regulate abortion.\(^{23}\) While the Court upheld the constitutionality of many of these statutes regulating abortion, at no point did it overrule the essential holding in *Roe*. In 1992, the Court heard *Planned Parenthood v. Casey*\(^{24}\) and reviewed the constitutionality of five provisions contained in the Pennsylvania Abortion Control Act of 1992,


\(^{22}\) See *Roe*, 410 U.S. at 164; see also Janet Benshoof, *The Truth about Women's Rights*, 6 WM. & MARY J. OF WOMEN & L. 423, 444 (Winter 2000) (noting instances set forth in *Roe* when state can regulate abortion); Gough, *supra* note 7, at 192 (discussing interests of state during various point of viability); Pacer, *supra* note 20, at 297 (discussing at what point certain state interests become compelling).

\(^{23}\) See *Webster v. Reprod. Health Servs.*, 494 U.S. 490 (1989) (upholding Missouri statute which prohibited use of public facilities or public personnel to perform abortions and required physicians to perform certain tests when there was reasonable belief that mother was 20 weeks or more pregnant); see also *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (rejecting Pennsylvania statute containing requirements such as informed consent and reporting requirements that were intended to discourage women from seeking abortion); Akron v. Akron Ctr. Reprod. Health, Inc., 462 U.S. 416 (1983) (striking down abortion regulations enacted by city including: requiring physicians to provide patients with anti-abortion information prior to procedure, providing for 24-hour waiting period after receipt of information, mandating all abortions to be performed in hospital, requiring parental consent for minors without availability of judicial waiver, and requiring physicians to dispose of fetal remains in sanitary manner); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut statute prohibiting use of public funds for abortions that were nontherapeutic and medically unnecessary).

which sought to limit a woman's right to obtain an abortion. 25

Ultimately, the Court held that all of the provisions were valid except for one requiring spousal notification. 26 In effect, the Court specifically overruled the portions of Akron and Thornburgh, where the Court had struck down two states' informed consent statutes. 27 The following three-part holding in Roe was reaffirmed: (1) the right of the woman to choose to have an abortion before viability without undue interference from the state, (2) the power of the State to restrict abortion after viability provided there are adequate exceptions for the health and life of the mother, and (3) the legitimate state interests in protecting the life of the fetus and the health of the mother exist at the beginning of the pregnancy and continue throughout the duration of the pregnancy. 28 The plurality rejected the trimester

25 See id. The provisions are: § 3205 which requires a woman to be provided with information 24 hours prior to the procedure and she must give her informed consent; §3206 which requires parental consent for minors but also contains a judicial bypass; §3209 which requires a woman to sign a statement indicating she has provided notification to her husband; §3203 which defines medical emergency that will excuse compliance with these provisions; and several other sections imposing reporting requirements on facilities that provide abortions. Currently, 31 states enforce parental consent or notification for minors seeking and abortion: AL, AR, DE, GA, IA, ID, IN, KS, KY, LA, MA, MD, MI, MN, NO, MS, NC, MD, NE, OH, PA, RI, SC, SD, TN, TX, UT, VA, WI, WV, and WY., Facts in Brief on Induced Abortion, ALAN GUTTMACHER INSTITUTE (Feb. 2000), at http://www.agi-usa.org/pubs/fb_induced_abortion.html. See generally, Ruth Coker, Abortion and Violence, 1 WM. & MARY J. WOMEN & L., 93, 115 (1994) (discussing abortion statutes with medical emergency exceptions); Adam M. Silverman, Constitutional Law- Pennsylvania's Wrongful Birth Statute's Impact on Abortion Rights: State Action and Undue Burden, 66 TEMPLE L. REV. 1087 (1993) (discussing Pennsylvania's abortion laws); Anderson, supra note 18, at 318 (discussing provisions under attack in Pennsylvania statute).

26 Casey, 505 U.S. at 837. The opinion of the Court was a joint plurality and was written by Justice O'Connor, Justice Kennedy and Justice Souter who delivered the opinion with respect to Parts I, II, and III, concluding that the rule of stare decisis requires the 3-part holding of Roe to be upheld; with respect to Part IV, which concluded that the trimester approach be rejected and the undue burden standard adopted; with respect to Part V-A, V-B, V-C, and V-D, which concluded respectively that the medical emergency definition was valid, the spousal notification was invalid, informed consent was valid, and one-parent consent with judicial by-pass was valid; with respect to Part V-E the above Justices joined Justice Stevens concluded the reporting requirements, with exception to ones of spousal notification were valid. Id. See generally, C. Elaine Howard, The Road to Confusion: Planned Parenthood v. Casey, 30 HOUS. L. REV. 1401 (1993) (discussing Court's decision in Casey); Schneider, supra note 21, at 1003 (discussing the Court's decision in Casey); John Christopher Ford, Note, The Casey Standard for Evaluating Facial Attacks on Abortion Statutes, 95 MICH. L. REV. 1443 (1997) (discussing Casey).

27 See Thornburgh, 476 U.S. at 747 (invalidating informed consent provision of Pennsylvania statute); Akron, 462 U.S. at 416 (holding statute requiring informed consent unconstitutional); see also Supreme Court Decisions, supra note 7 (stating holding in Casey overruled Akron and Thornburg). See generally Gough, supra note 7, at 192 (stating Court struck down informed consent requirement in Akron and Thornburgh).

28 See Casey, 505 U.S. at 844. See generally Albert P. Blaustein, et al., Amici for the
framework in *Roe* and adopted the "undue burden standard as the appropriate means of reconciling the state's interest with the woman's constitutionally protected liberty." The "undue burden" standard is a more flexible approach than the *Roe* trimester framework and gave states more leeway to impose regulations on abortion. Under the new standard, an undue burden exists when the "purpose or effect [of a statute] is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

Since the 1973 decision in *Roe*, the total number of abortions performed in the United States has been 38,010,378. The number in 1973 was 744,600 and progressively increased to an estimated 1,365,730 in 1998. Forty-nine percent of pregnancies

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29 See *Casey*, 505 U.S. at 873. The Court indicates that the trimester approach suffers flaws: "in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." *Id*; see also Gough, supra note 7, at 187 (describing how *Casey* Court rejected trimester framework while reaffirming *Roe*). See generally Alan I. Bigel, *Planned Parenthood of Southern Pennsylvania v. Casey: Constitutional Principles and Political Turbulence*, 18 DAYTON L. REV. 733 (1993) (discussing *Casey*’s impact on *Roe* and society).

30 See *Casey*, 505 U.S. at 876. ("[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose of effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). See generally Julie Schrager, *The Impact of Casey*, 1992 WISC. L. REV. 1331 (1992) (discussing undue burden test); Anderson, supra note 18, at 317 (discussing impact of undue burden on state abortion legislation); Pacer, supra note 20, at 295 (discussing functionality of undue burden test).

31 See Gough, supra note 7, at 193 (discussing adoption of undue burden analysis); Kohm, supra note 14, at 399 (discussing implication of *Casey* in rejecting trimester framework); see also Gillian E. Metzger, Note, Unburdening the Undue Burden Standard: Orienting *Casey* in Constitutional Jurisprudence, 94 COLUM. L. REV. 2025 (1994) (indicating impact of *Casey* on judicial scrutiny of abortion laws). But see Woltz, supra note 21, at 1787 (stating that *Casey* decision makes it harder for abortion laws to withstand judicial scrutiny).

32 See *Casey*, 505 U.S. at 877.

33 See *Abortion in the United States*, at http://www.nrlc.org/abortions/aboramt.html; see also *Abortion Overrides All Other Issues*, Editorial, IND. STAR, Nov. 5, 2000, at D04 (indicating since 1973, 40 million have been killed; more than 3000 abortions per day for 25 years); Mimi Hall, *Abortion Access Declining*, GANNET NEWS SERVICE, Apr. 30, 1991 (discussing decline in abortions); Mimi Hall, *Abortion Crackdown: Women Are Feeling the Changes*, GANNET NEWS SERVICE, June 2, 1991 (providing statistics relating to number of abortions); Mark Sauer, * Abortions Are Down But Reasons Vary*, SAN DIEGO UNION-TRIB., Jan. 12, 1995, at E-3 (indicating decline in abortions).

34 See *Abortion in the United States*, supra note 33 (stating possibility of 3% underreporting rate factored into total); see also Cheryl Wetzstein, *Number of Abortions Down Again, But Rate Holds Steady*, WASH. TIMES, Jan. 7, 2000, at A9 (reporting there
are unintended and one-half of these end in abortion. A study conducted by the Alan Guttmacher Institute indicated that 2 out of 100 women aged 15-44 have an abortion and an estimated 43% of all women have an abortion before reaching the age of 45. The reasons women obtain abortions vary, three-quarters indicate that having a baby would interfere with school or work; two-thirds claim financial inability to support a child; and one-half do not want to be a single parent.

II. PARTIAL-BIRTH ABORTION

The debate over the issue of partial-birth abortion began in 1993 when the National Right to Life Committee obtained a copy of a paper, presented by Dr. Martin Haskell at a National Abortion Federation meeting in 1992, in which the procedure was...
described in detail.\textsuperscript{38} The paper was entitled “Dilation and Extraction for Late Second Trimester Abortion” and while no specific data was presented, he described a procedure he used in second trimester abortion, which is typically 22-26 weeks.\textsuperscript{39} Partial-birth abortion has been heavily debated since then and contains many moral, ethical, medical and legal issues.\textsuperscript{40}

\textbf{A. Procedure}

Partial-birth abortion is a legal term for what is medically referred to as intact dilation and extraction or “intact D&X” and it involves the destruction of the fetus during the birth process.\textsuperscript{41} According to the American College of Obstetricians and Gynecologists, the procedure contains four elements: (1) over the course of several days the cervix is deliberately dilated; (2) with

\textsuperscript{38} See James Bopp, Jr., M.D. & Curtis R. Cook, M.D., \textit{Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence}, 14 \textit{Issues L. & Med.} 3, 7 (Summer 1998) (stating that Dr. Haskell is a family practitioner who operates three abortion clinics and that as of 1998 he had performed over 1,000 partial-birth abortions routinely on women 20 to 24 weeks pregnant; it should be noted that this paper excluded women that were twenty pounds overweight, had twins, or had certain other complicating factors); \textit{see also} Women’s Med. Prof’l Corp. v. Voinovich, 911 F. Supp. 1051, 1065 (1995) (testifying on behalf of a woman who came to him for partial birth abortion which resulted in enjoining enforcement of House Bill 125 based on constitutionality). \textit{But see} Nancy G. Romer, M.D., \textit{The Medical Facts of Partial Birth Abortion}, 3 \textit{Nexus J. Op.} 57, 59 (Fall 1998) (crediting Dr. James McMahon who wrote a paper and presented it at NAF conference in April 1996, describing similar procedure; these two doctors have submitted sole scientific paper written on this subject).

\textsuperscript{39} \textit{See} Romer, \textit{ supra} note 38, at 59 (stating Dr. Martin Haskell has performed this procedure on over 500 patients with low rate of complications); \textit{see also} Barbara Vobejda & David Brown, \textit{Harsh Details Shift Tenor of Abortion Fight; Both Sides Bond Facts on Late-Term Procedure}, WASH. POST, Sept. 17, 1996, at A01 (discussing Dr. Haskell’s paper); National Right to Life Committee on the Partial-Birth Abortion Ban Act [H.R. 929, S.4] at a Joint Hearing before the U.S. Senate Judiciary Committee and the Constitution Subcommittee of the U.S. House Judiciary Committee (Mar. 11, 1997) (Testimony of Douglas Johnson, Legislative Director) (Dr. Martin Haskell Starts Debate), at http://www.nrlc.org/abortion/pba/test.html [hereinafter Testimony of Johnson] (reading transcripts of interviews that Dr. Haskell gave to two medical publications when explaining the key part of this abortion).


\textsuperscript{41} \textit{See} Abortion Overrides All Other Issues, \textit{ supra} note 33, at D04 (describing procedure where child is killed during birth); \textit{see also} Bopp & Cook, \textit{ supra} note 38, at 4 (stating procedure involves killing child during birth); Jill R. Radloff, \textit{Partial-Birth Infanticide: An Alternative Legal and Medical Route to Banning Partial-Birth Procedures}, 83 MINN. L. REV. 1555, 1558 (May 1999) (stating term developed in conjunction with legislative efforts to ban this type of abortion); Taylor, \textit{ supra} note 11 (describing partial birth abortion as killing fetus on verge of birth).
instruments, the fetus is converted to breech position; (3) in breech position the fetus is, except for the head, extracted from the uterus and into the birth canal; and (4) the intracranial contents of the fetus are partially extracted and which point has the affect of vaginally delivering an intact but dead fetus.\textsuperscript{42} In essence the opening to the woman's womb, who is in her fifth or sixth month of pregnancy, is dilated over two to three days by forcing twenty-five dilators into the cervix at one time and she is then sent home overnight until the cervix dilates.\textsuperscript{43} Once the cervix is dilated, the woman returns to the clinic and her water bag is broken; instruments are subsequently inserted into the uterus to turn the fetus "feet first" and the fetus is pulled by the feet into the vagina up until the head is the only remaining appendage inside the womb.\textsuperscript{44} At this point, the person performing the procedure locates the base of the skull by following the spine; scissors are used to make an opening; a suction tube is inserted and the brain is removed.\textsuperscript{45} As a result, the skull collapses, killing the fetus and allowing for the delivery of the fetus in one piece.\textsuperscript{46}

\textsuperscript{42} See Romer, supra note 38, at 58 (outlining four elements to procedure); see also Bopp & Cook, supra note 38, at 8 (testifying precise details of critical part of procedure); Bill to Ban Partial-Birth Abortion Draws Tease Senate Debate, MED. IND. TODAY, Oct. 22, 1999 (describing briefly procedure) (hereinafter \textit{Bill Draws Debate}). See, e.g., Voinovich, 911 F. Supp. 1051 at 1065-66 (explaining and showing videotape that details this procedure).

\textsuperscript{43} See Verbatim: Testimony of Dr. Curtis R. Cook, 14 ISSUES L. \\& MED. 65, 67 (Summer 1998) (hereinafter \textit{Testimony of Dr. Cook}) (noting that Dr. Cook is board certified Obstetrician/Gynecologist and sub-specialist in Maternal-Fetal Medicine); see also Romer, supra note 38, at 58 (stating that this procedure is commonly used after first trimester). See generally Testimony of Johnson, supra note 39 (expressing that one benefit of this procedure is that it is quick, surgical outpatient method that can be performed on scheduled basis under local anestheisa).

\textsuperscript{44} See Testimony of Dr. Cook, supra note 43 (describing this portion of partial birth abortion based on technique of Dr. Haskell of Ohio who identified it as accurate); see also Bopp & Cook, supra note 38, at 4 (indicating fetus is pulled out by feet until only head remains in uterus); Radloff, supra note 41, at 1560 (indicating lower extremities and torso of fetus are pulled into vagina); U.S. Supreme Court: Roe v. Wade = Partial-Birth Abortions, at http://www.nrlc.org/press_releases_news/Release062800.html (hereinafter \textit{U.S. Supreme Court}) (reiterating Justice Thomas' dissenting opinion in Stenberg where he describes procedure).

\textsuperscript{45} See Bill Draws Debate, supra note 42 (describing this portion of procedure); see also Romer, supra note 38, at 38 (describing procedure); Willing, supra note 5, at 3A (describing portion of procedure in relation to Nebraska ban).

\textsuperscript{46} See Romer, supra note 38, at 58; see also Bopp & Cook, supra note 38, at 8; Radloff, supra note 41, at 1560 (describing steps taken to perform this type of procedure). See generally Carolyn Bower, J.D., Annotation, Validity, Construction, and Application of Statutory Restrictions on Partial Birth Abortions, 76 A.L.R. 5TH 637 (2000) (setting forth elements articulated by American College of Obstetricians and Gynecologists).
Partial-birth abortions have received widespread medical attention both as to the procedure itself and the use of the terminology.47 Opponents of the bans on partial-birth abortion refer to it as intact dilation and evacuation,48 dilation and extraction,49 or intact dilation and evacuation; however none of these terms appear in any medical dictionary.50 The American Medical Association, hereinafter (“AMA”) adopted a policy statement noting that the term “partial-birth abortion” is not a medical one51 and as such it would not use it, instead choosing to


48 See Bopp & Cook, supra note 38, at 21 (stating term Dilation and Evacuation (D&E) was created by Dr. James McMahon and considered correct medical term by National Abortion Federation); see also Romer, supra note 38, at 59 (discussing usage of D&E term); Susan Dudley, PhD, Fact Sheet Series, What is Surgical Abortion?, NATL ABORTION FEDERATION at http://www.prochoice.org/Issues/P52.htm (last visited Nov. 16, 2000) (describing techniques for later abortions as D&E procedures); Surgical Abortion — Questions and Answers, P L A N N E D PARENTHOOD, at http://www.plannedparenthood.org/abortion/surgabort3.html (last visited Nov. 16, 2000) (describing how D&E method is performed and making no reference to D&X).

49 See Bopp & Cook, supra note 38, at 21 (noting term Dilation and Extraction (D&X) was first used by Dr. Martin Haskell in his 1992 paper describing procedure and indicating that Planned Parenthood chooses to use this term in its literature); see also Romer, supra note 38, at 59 (claiming Planned Parenthood uses this term in its literature); AGI-Issues in Brief, supra note 47 (last visited Nov. 16, 2000) (calling late term abortion method D&X and noting that opponents of D&X call it partial birth abortion); Epner, supra note 47 (last visited Nov. 16, 2000) (stating how AMA adopted definition of D&X used by ACOG in order to clarify medical procedure).

50 See Bopp & Cook, supra note 38, at 21 (stating that terms “intact D&E”, “D&X”, and “intact D&X” never appeared in any medical dictionary in 1994). But see Carhart v. Stenberg, 192 F.3d. 1142 (8th Cir. 1999) (noting term “partial-birth abortion” has no fixed medical or legal content); 143 CONG. REC. S4517-01, (1997) (statement of Senator Feinstein) (noting how term partial birth abortion is non-existent in medical science); Rigel C. Oliveri, Crossing the Line: The Political and Moral Battle Over Late-Term Abortion, 10 YALE J.L. & FEMINISM 397, 403 (1998) (citing D&X as more accepted medical term and partial-birth abortion as neither medically nor legally accepted).

use the term “Intact D&X.”52 Nonetheless, the AMA recommended that this procedure should not be used “unless alternative procedures pose a greater risk to the woman” and “that third trimester abortions be performed only in cases of serious fetal anomalies incompatible with life.”53 A group of 600 physicians who make up The Physicians’ Ad Hoc Coalition for Truth (“PHACT”) have accepted the term and “defended it as accurate.”54 The bans imposed by both state and federal legislatures contain the term within the title.55 It has been advocated that this term is legally accurate and neither misleading nor inaccurate.56 In every state, as a matter of law, a

52 See Romer, supra note 38, at 58 (stating that AMA chose “intact D&X” as term to describe Partial-Birth Abortion); STATE HEALTH MONITOR, supra note 51, at 1 (adopting term “D&X to describe partial-birth abortion); AMA POLICY FINDER, supra note 51; Epner, supra note 47 (last visited Nov. 16, 2000) (stating how AMA adopted definition of D&X used by ACOG in order to clarify medical procedure). See generally AM. MED. ASS’N, available at http://www.ama-assn.org (last visited Nov. 16, 2000) (presenting wide discussion of abortion issues by medical doctors and referring to partial-birth abortion as “intact D&X” in many instances).


56 See Testimony of Johnson, supra note 39 (advocating that term is legally accurate because “full-term” and “birth” are entirely different things and baby expelled from womb, whether intentional or not is born), see also Bopp & Cook, supra note 38, at 7 (stating that federal model of partial-birth abortion is “accurately and unambiguously defined” as opposed to terms “D&E,” “intact D&E,” “D&X,” and “intact D&X”); Karen Krantzberg,
legal birth has occurred if a baby completely emerges from the uterus and shows "even the briefest signs of life." When the fetus is delivered entirely into the birth canal, it is a full birth, regardless of whether the baby is viable. It logically follows that if all but the head of the fetus is delivered it can be considered "partly-born." Continuing with this line of reasoning, when an abortion procedure requiring deliverance of most of the fetus, that procedure may aptly be termed "partial-birth" abortion. For purposes of this note, the term partial-birth abortion will be used.

B. Alternative Methods

In addition to the procedure described above, there are five medically identifiable methods of terminating a pregnancy:

Letters, TAMPA TRIB., July 9, 2000, at 3 (opining the term partial birth abortion accurately depicts procedure). But see Kevin Murphy, Abortion Supporters Lose Ruling Judge Denies Request to Block Ban on Partial-Birth Procedure, MILWAUKEE J. SENTINEL, May 14, 1998, at 3 (indicating medical community does not accept this term).


58 See Bopp & Cook, supra note 38, at 23 (indicating if head of fetus emerges legal live birth has occurred regardless of viability). See generally Steven Grasz, If Standing Bear Could Talk... Why There Is No Constitutional Right to Kill a Partially Born Human Being, 32 CREIGHTON L. REV. 23, 33-37 (1999) (discussing difference between birth and viability in context of partial birth abortion); Lenow, supra note 57, at 10-15 (indicating physicians are less likely to perform second trimester abortions due to viability issues).

59 See Bopp & Cook, supra note 38, at 23 (stating it is not inaccurate to say fetus delivered into birth canal except for head is partly born). See generally Kathleen A. Cassidy Goodman, The Mutation of Choice, 28 ST. MARY'S L. J. 635, 647 (1997) (linking term partial birth abortion to abortion performed on nineteen week old fetus); Oliveri, supra note 50, at 407 (stating in partial birth abortion difference between life and death is centimeters).

Dilation and Curettage (D&C), Dilation and Evacuation (D&E), Instillation and Induction, Hysterectomy, and Hysterotomy. The D&C method removes from the uterus anything remaining from conception. The uterine wall is "scraped" by suction and the woman is placed under local or general anesthesia. Typically, this procedure is most often utilized when a woman miscarries during the first trimester. More recently, this method has been used in the second trimester up to eighteen to twenty weeks.

The Dilation and Evacuation method consists of dilating the cervix, rupturing the membranes; and using forceps, curets, and suction dismembering the fetus within the womb prior to evacuation. This procedure is most often used during the


62 See Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794, 796-797 (8th Cir. 1999) (describing D&C as method of abortion where suction is used to remove fetus from uterus); Andrews, supra note 61, at 527 (describing D&C method of terminating pregnancy); Walther, supra note 61, at 697-698 (describing how D&C method of abortion removes from uterus "products of conception" by suction); AM. MED. ASS'N. ON-LINE MED. GLOSSARY, available at, http://www.ama-assn.org/insight/gen_bth/glossary/glos_d.htm (defining D&C as "a procedure in which the vagina and cervix are widened and the lining of the uterus is scraped away to diagnose and treat disorders of the uterus").

63 See Andrews, supra note 61, at 527 (stating that during D&C, woman is placed under local or general anesthesia); Walther, supra note 61, at 697 (stating that physician performing D&C "may choose either general or local anesthesia"). See generally Claudia Pap Mangel, Legal Abortion: The Impending Obsolescence of the Trimester Framework, 14 AM. J. L. AND MED. 69, 79 (1988) (describing use of local anesthesia in first trimester abortion procedures including D&C); Thomas W. Strahan, Negligent Physical or Emotional Injury Related to Induced Abortion, 9 REGENT U. L. REV. 149, 202 (1997) (describing D&C abortion procedure where patient was under general anesthesia).

64 See Little Rock, 192 F.3d at 796 (supporting statement that D&C is most commonly performed abortion procedure of first trimester); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 198 (6th Cir. 1997) (stating that most common method of abortion during first trimester is suction curettage); Andrews, supra note 61, at 526-527 (describing D&C procedure as safe abortion method typically performed in first trimester); Gerling, supra at note 60, at 280 (referring to suction curettage as "the most common abortion procedure of the first trimester of pregnancy").

65 See Andrews, supra note 61, at 521 (1999) (stating D&C is now used in second trimester); see also Ragsdale v. Turncock, 734 F. Supp. 1457, 1465 (1990) (labeling D&C method as early second trimester procedure); Strahan, supra note 63, at 197 (discussing case where Dr. used D&C method in second trimester).

66 See Stenberg v. Carhart, 120 S. Ct. 2597, 2607 (2000) (describing dismemberment of fetus before "delivery" as feature which distinguishes D&E method of abortion from D&X method); Little Rock, 192 F.3d at 796-797 (stating that D&E procedure requires physician to dismember fetus with forceps in order to remove it from uterus); Voinovich, 130 F.3d at 198 (describing D&E abortion procedure which involves dilation of cervix, dismembering of fetus with curette and forceps, and removal of fetus from uterus with
second trimester of pregnancy, usually thirteen to sixteen weeks and accounts for approximately eighty-five percent of all second trimester abortions. A majority of D&E procedures are performed while the woman is under a local anesthetic and has a mortality rate of 4.9 per 100,000 abortions.

Partial-birth abortion or "intact D&X" is a variation of the D&E method, however, one must be sure to keep the two separate and distinct because the procedures are significantly different. Although the D&E procedure also requires the dilation of the cervix, it does not require pulling most of the fetus into the birth canal nor does it entail "delivering" the intact fetus. The AMA has even officially recognized the distinction between the two procedures. Since the intact D&X procedure is

suction); see also Romer, supra note 38, at 59 (contrasting D&E and D&X procedures).

67 See Andrews, supra note 61, at 527 (indicating percentage of abortions that are D&E's); see also Taylor, supra note 11, at 2885 (indicating D&E procedure is most common method used in second trimester abortions); AMA POLICY FINDER, supra note 51 (indicating D&E is most commonly used after first trimester); M. LeRoy Sprang, M.D. & Mark G. Neerhof, DO, Rational for Banning Abortions Late in Pregnancy, 280 JAMA 744-747 (Aug. 26, 1998), available at http://www.ama-assn.org (discussing D&E as method of terminating late term pregnancy and maternal and fetal considerations involved).

68 See Andrews, supra note 61, at 526 (stating that mortality rate for D&E abortion is 4.9 per 100,000); David Brown, Type of Abortion Outlawed by Vetoed Bill Is Relatively Uncommon, WASH. POST, Apr. 12, 1996, at A06 (stating mortality rate for D&E procedures is 4.9 per 100,000 abortions); see also Martha Christine Foley, Note, Hospitalization Requirements for Second Trimester Abortions: For the Purpose of Health or Hindrance?, 71 GEO. L.J. 991, 1017 (1983) (discussing mortality rate involved with D&E procedure). See generally Richmond Med. Ctr. For Women v. Gilmore, 11 F. Supp. 2d 795, 804 (E.D. Va. 1996) (stating generally that mortality rate for women having D&E abortions is lower than that of women who carry pregnancies to term).


70 See Voinovich, 130 F.3d at 199 (noting that main distinction between two procedures is that D&E results in dismembered fetus and D&X in an intact fetus). The D&E procedure involves dismemberment of the fetus within the uterus before the skull is compressed by suction whereas the D&E procedure involves removing the all of the fetus from the uterus intact, with the exception of the head, and then compressing the skull. Id.; see also Andrews, supra note 61, at 526 (describing D&X abortion procedure as variation of D&E procedure); Gough, supra note 7, at 193-199 (discussing Michigan statute which intended to proscribe D&X procedure, but was declared unconstitutionally vague because it could be interpreted to criminalize commonly used D&E procedure also).

71 See AMA POLICY FINDER, supra note 51 (stating D&X procedure is distinct from D&E procedures more commonly used to induce abortions after first trimester).
most commonly used between twenty and twenty-four weeks, questions arise as to the potential viability of the fetus. A study on 142 infants born between twenty-two and twenty-five weeks gestation was conducted and revealed a 15% viability rate at twenty-three weeks, a 56% viability rate at twenty-four weeks, and a 79% viability rate at twenty-five weeks. More recent data reveals an 83% survival rate at twenty-four weeks and an 89% survival rate at twenty-five weeks.

Commonly used at mid-trimester, instillation and induction methods are performed in a hospital and have a mortality rate of 9.6 deaths per 100,000 procedures. This termination procedure involves removing the amniotic fluid from the uterus and generally.

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See Stanley K. Henshaw, *Abortion Incidence and Service in the United States, 1995-1996*, 30 FAM. PLANNING PERSPECTIVES 263 (1998) available at, http://www.agi-usa.org/pubs/journal.htm. Results from Alan Guttmacher Institute survey of nine respondents asked to indicate the minimum and maximum gestation at which D&X procedures were performed indicated that the most common minimum gestation was twenty weeks and the most common maximum was twenty-four weeks. See *id*. Two of the nine reported maximum gestation period was more than twenty-four weeks; one reported twenty-six weeks; and one thirty-three weeks. In conclusion, AGI also indicated that the D&X procedure is most common between twenty to twenty-four weeks. *Id.*; see also Romer, *supra* note 38, at 50 (stating Dr. Martin Haskell presented paper where he indicated D&X procedure is used between 22 and 26 weeks gestation). *But see* Oliveri, *supra* note 50, at 403 (stating D&X procedure is used from 18 to 32 weeks of gestation).

See Marilee C. Allen et al., *The Limit of Viability: Neonatal Outcome of Infants Born at 22 to 25 Weeks Gestation*, NEW ENG. J. MED. 1597-1601 (1993) (discussing study conducted on infants in single hospital between May 1988 and September 1991); see also Romer, *supra* note 38, at 60 (stating same). *See generally* Oliveri, *supra* note 50, at 404 (stating in previous decades 28 weeks was considered threshold of viability).

See Sprang & Neerhof, *supra* note 67; *see also* Sheila Gunn, *Montefiore Denies Campaigning to Tighten up the Abortion Legislation*, TIMES (LONDON), Apr. 29, 1987 (stating babies born between 25 and 28 weeks had 59% survival rate); Judy Mann, *Abortion; National Right to Life Ad Fosters Misunderstanding of Abortion*, WASH. POST, Jan. 27, 1982, at C1 (stating medical advances make it possible for fetus delivered in 28th week has 90% survival rate). *See generally* Oliveri, *supra* note 50, at 404 (stating that current medical technology places viability at 23 to 24 weeks of gestation).

See Andrews, *supra* note 61, at 528 (stating procedure is used in mid trimester); *see also* Planned Parenthood of Wis. v. Doyle, 44 F. Supp. 2d 975, 980 (W.D. Wis. 1999) (stating induction abortions are performed at 17-20 weeks); Evans v. Kelley, 977 F. Supp. 1283, 1294 (E.D. Mich. 1997) (stating in Michigan and nationwide induction abortions account for most post first trimester abortions that are not D&E's).

See Andrews, *supra* note 61, at 528 (indicating hospitalization typically required); *see also* Evans, 977 F. Supp. at 1294-1295 (stating mother is hospitalized for procedure and inductions and D&E's have comparable safety rates from 16 to 18 weeks gestation); *Abortion after the First Trimester*, FACT SHEET OF PLANNED PARENTHOOD (New York, NY), May, 1997, at 3.
injecting saline or urea with the intention of aborting the fetus and stimulating labor. The possible risks associated with this method include diarrhea, fear, abdominal pain, and discomfort. Furthermore, because inductions do not require the use of any instruments within the woman's body, there is a decreased risk of uterine perforation. However, typically because no instruments are used, doctors performing this procedure tend to have less skill, so that inductions do have higher rates of infection and bleeding.

Accounting for "less than one percent of post-first-trimester abortions throughout the country," hysterotomy and hysterectomy are the most rarely used procedures. Both hysterectomy and hysterotomy are major surgical procedures; the former consists of removing the entire uterus and the latter is the "transabdominal, surgical removal of the fetus prior to term."

77 See Andrews, supra note 61, at 528; see also Evans, 977 F. Supp. at 1295-96 (indicating induction can be performed by introducing labor inducing agent either using intramuscular injection or intravaginal suppository); Walther, supra note 61, at 700 (stating that in most common induction procedures physician injects uterus with substance that kills fetus and induces labor while in less common induction procedures substance only induces labor).

78 See Andrews, supra note 61, at 528 (discussing risks); see also Doyle, 44 F. Supp. 2d at 981 (discussing situation where patient declined induction procedure for fear of labor pains); cf. Evans, 977 F. Supp. at 1295 (stating there is agreement that inductions are inadvisable for patients who have had caesarean sections or have renal or cardiovascular disease).

79 See Andrews, supra note 61, at 529 (indicating instruments are not used within body); see also Doyle, 44 F. Supp. 2d at 981 (discussing fact that one physician considered induction safest late term abortion procedure because it does not require use of instruments in uterus); Evans, 977 F. Supp. at 1294 (stating there is less risk of perforation since no instruments are used).

80 See Andrews, supra note 61, at 529; see also Evans, 977 F. Supp. at 1294 (stating same). But see Doyle, 44 F. Supp. 2d at 981 (indicating that another cause of excessive bleeding results from physicians waiting too long for fetal skull that is too large to pass through cervix instead of manually crushing it to facilitate delivery).

81 See Andrews, supra note 61, at 530; see also Nadine Strossen & Caitlin Borgmann, The Carefully Orchestrated Campaign, 3 NEXUS J. OP. 3, 7 (1998) (concluding since hysterectomies and hysterotomies pose high risks to women's health and fertility, they are used only in extremely rare circumstances); Walther, supra note 61, at 701 (stating hysterectomy and hysterectomy procedures are rarely used).

82 See Andrews, supra note 61, at 530; see also Evans, 977 F. Supp. at 1294 (stating same); Walther, supra note 61, at 701 (stating same); Judy Peres, Wisconsin Doctors Quit All Abortions; Ambiguity in New Ban on Late-Term Procedure Prompts Fear of Jail, CHI. TRIB., May 15, 1998, at 1 (stating hysterecomy is removal of uterus and hysterotomy is caeserian section).
C. Partial-Birth Abortion Bans: State and Federal Government Response to the Issue

In response to the hotly debated issue of partial-birth abortion that ensued after 1992 both Congress and state legislatures took action by proposing bans on the procedure. These bans have again sparked the debate because many view the bans as unconstitutional. The sole goal of the legislatures is to ban the D&X procedure, leaving D&E the most common method of second trimester abortion available. This section will first look at the Congressional Proposals followed by review of State statutes seeking to ban partial-birth abortion. Two abortion cases will be examined in depth, a 1995 Ohio case Women's Medical Professional Corp. v. Voinovich, and Stenberg v. Carhart, which was decided by the United States Supreme Court in June 2000.

1. Congressional Enactments

The controversy over partial-birth abortion compelled Congress to react. The Republican Congressman from Florida, Charles

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83 See Radloff supra note 41, at 1555 (stating Congress and many states have proposed and often passed partial-birth abortion bans); see also Bopp & Cook, supra note 38, at 4 (stating Congress and many state legislatures have passed bills barring this procedure); Gough, supra note 7, at 188-189 (recognizing both federal and state attempts to ban partial-birth abortions).

84 See Radloff supra note 41, at 1555 (stating partial birth abortion bans have been challenged in Court to determine whether they can be upheld under Supreme Courts abortion jurisprudence); see also Bopp & Cook, supra note 38, at 5 (describing how many state bills were challenged as unconstitutional); Gough, supra note 7, at 188 (discussing whether woman has constitutional right to partial birth abortion).

85 See Radloff supra note 41, at 1582 (recognizing ban on partial birth abortions would not infringe on woman's right to have abortion); see also Bopp & Cook, supra note 38, at 8 (stating ban on partial-birth abortions does not reach commonly used methods of abortion); Gough, supra note 7, at 188 (noting that ban on partial-birth abortion does not act as obstacle to woman's right to have abortion).


87 120 S. Ct. 1597 (2000).

88 See Lee Leonard, Late-Abortion Ban on Hold, COLUMBUS DISPATCH, Sept. 23, 2000, at A1 (comparing Ohio statute to Nebraska one struck down by U.S. Supreme Court in June); Abortion Law Ruled Unconstitutional, WASH. POST, Aug. 11, 2000, at B03 (indicating U.S. Supreme Court's 5-4 decision holding ban unconstitutional); Saving the Right to Associate, DETROIT NEWS, June 23, 2000, at A6 (indicating Court struck down Nebraska statute earlier in week).

89 See Grasz, supra note 58, at 24 (discussing Congress passing legislation to ban partial-birth abortion in mid and late 1990's); see also Maryclare Flynn, Editorial, As You Were Saying...It's Time to Stop the Horror of Partial-Birth Abortions, BOSTON HERALD, May 16, 1999, at 024 (stating Congress' campaign to end partial-birth abortions began in 1995); Peter Simon, Abortion Issue as Volatile as Ever in Wake of Ruling, June 29, 2000,
Canaday, originally introduced the bill banning partial birth abortions in 1995.90 Consequently, in 1996 Congress passed the first nationwide ban on abortion entitled “The Partial-Birth Abortion Act of 1995.”91 Former President Clinton vetoed the act92 and although the veto was successfully overridden in the House of Representatives it failed to acquire the necessary votes in the Senate.93 In 1997 a second, slightly amended version of

at 8A (stating Congress has passed legislation to ban partial-birth abortion, subsequently vetoed by Clinton).


92 See H. 10642, 104th Cong. (1996) (votes 285-137); S. 11337-61, 104th Cong. (1996) (votes: 57-41). President Clinton vetoed the Act on April 10, 1996 because it lacked an exception for women who faced serious health consequences. Id. Although the House overrode President Clinton's veto, the Senate lacked nine votes of the two-thirds majority required to override the veto. Id.; see also Ann MacLean Massie, So-Called “Partial-Birth Abortion” Bans: Bad Medicine? Maybe. Bad Law? Definitely!, 59 U. PITT. L. REV. 301, 321 (Winter 1998) (stating that President Clinton vetoed bill because it concerned “potentially life-saving, certainly health-saving” procedure for “a small but extremely vulnerable group of women and families in this country, just a few hundred a year”); Taylor, supra note 11 (indicating President Clinton twice vetoed partial birth abortion laws); Laurie Goodstein, Catholic Cardinals Vow to Lobby Congress to Overturn Clinton's Abortion Veto, WASH. POST, Apr. 17, 1996, at A14 (noting that in rejecting ban, Clinton said “that this particular procedure was used very rarely and usually only when the fetus was suffering severe birth defects, or when the health of the mother was at risk”).

93 See Massie, supra note 92, at 323. The House passed the bill by a veto-proof margin of 286-129 but the Senate, with a 54-44 vote, failed to meet the requisite two-thirds majority to successfully override the veto. Id; see also Bob Dart, Roe v. Wade: 25 Years Later; Steadfast Right, Eroding Access; The Supreme Court Repeatedly Refuses to Overturn Roe, But Activists Have Made Abortion Harder to Obtain All Across America, ATLANTA J. AND CONST., Jan. 18, 1998, at 02E (indicating Senate sustained Clinton's veto of 1995 Ban); Lawrence J. Goodrich, On Capitol Hill, Abortion Battle Intensifies on Many Fronts, CHRISTIAN SCIENCE MONITOR, Sept. 9, 1998, at 4 (indicating Senate was three votes short of 2/3 majority needed to overcome veto); Roe v. Wade, COLUMBUS DISPATCH, Jan. 18, 1998, at 4C (indicating Senate vote fell three votes short of veto-proof margin);
the Act was introduced into the House, which passed by a veto-proof margin of 295-136. Subsequently, Former President Clinton vetoed the amended version. The bill did not receive the requisite votes in the Senate and thus in 1998 it failed to become a law.

On April 5, 2000 the House approved the “Partial-Birth Abortion Act of 2000.” Essentially, the bill, which defines partial-birth abortion as “an abortion in which a living baby is partly delivered outside the mother’s body before being killed” would ban the procedure unless it was necessary to save a mother’s life. The bill places criminal penalties of up to two

See generally Hearing before the Senate Comm. on the Judiciary, 104th Cong. 248 (1995) [hereinafter Senate Hearing] (statement of Sen. Feingold) (“I am concerned as well that, although the focus of this legislation is, in fact, one particular type of abortion used in late-term abortions, I fear that this is really an assault upon the basic right to have an abortion”).

See H.R.1122, 105th Cong. § 234 (1997); see also Matt Kelley, Abortion Bill Again Passes in the House with a Veto Certain, the Ban on 'Partial-Birth' Procedures Is an Election-Year Move, Its Opponents Say Abortion Votes, OMAHA WORLD HERALD, Apr. 6, 2000, at 1 (indicating House passed ban on March 20, 1997 by 295-136 vote). See generally Senate Hearing, supra note 93, at 61 (statement of Sen. Feinstein) (“This bill is a calculated effort to undermine Roe v. Wade and to undercut subsequent Supreme Court decisions that have affirmed a woman’s constitutional right to choose to have an abortion”).

See S. 10551-64, 105th Cong. (1998) (stating that Senate only fell three votes short of overriding President Clinton’s veto (votes: 64-36)); see also Taylor, supra note 11 (stating proposed bans twice passed by Congress failed to become law due to presidential veto); Ann Devroy, Late-Term Abortion Ban Vetoes; “Small But Vulnerable” Group of Women Needs Procedure, Clinton Says, WASH. POST, Apr. 11, 1996, at A1 (noting that “Clinton had said he could allow ban only if it contained an exception for women who faced serious health consequences”).

See H.R. 3660, 106th Cong. § 1531(2000). The pertinent portions of the Act read as follows:

Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury. This paragraph shall become effective 1 day after the enactment.

(b)(1) As used in this section, the term 'partial-birth abortion' means an abortion in which the person performing the abortion deliberately and intentionally – (A) vaginally delivers some portion of an intact living fetus until the fetus is partially outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the fetus while the fetus is partially outside the body of the mother; and (B) performs the overt act that kills the fetus while the intact living fetus is partially outside the body of the mother.

H.R. 3660, 106th Cong. § 1531.; see also For the Record, WASH. POST, Apr. 13, 2000, at V07 (indicating House passed bill banning partial-birth abortion); How Texans Voted, HOUSTON CHRON., Apr. 9, 2000, at 29 (indicating H.R. 3660 passed by 287-141 vote).

See H.R. 3660, 106th Cong. §1531; see also, Andrews, supra note 61, at 531 (stating that majority of states banning partial birth abortion define procedure as “partially vaginally delivering a living fetus and completing the delivery”). See generally Bower, supra note 46 (collecting cases considering validity, construction, and application of state
years' imprisonment; fines on anyone performing an illegal partial-birth abortion; and it authorizes for private lawsuits against those performing the procedure.\(^98\) While being reviewed in the House, opponents were allowed to offer one amendment known as the "Frank Amendment" because Representative Barney Frank, a Massachusetts Democrat, put it together.\(^99\) The Amendment, which failed by a vote of 140 to 289,\(^100\) sought to add an exception allowing partial-birth abortions in order to avoid any serious physical health consequences to the mother.\(^101\) Ultimately, the bill was passed in the Senate by a vote of 63 to 34\(^102\) and in the House by a vote of 287 to 141; all the members of statutes banning partial birth abortions); *Who Decides: A State-by-State Review of Abortion and Reproductive Rights*, NAT'L ABORTION AND REPROD. RIGHTS ACTION LEAGUE (2000) (summarizing study, chronicling laws on abortion and reproductive rights in all 50 states and District of Columbia), available at http://www.nara.org/mediaresources/publications/2000/executive.html.

\(^98\) See H.R. 3660 106th Cong. § 1531(a) (providing penalty of fines and/or prison sentence of up to two years for physicians who perform procedure); H.R. 3660 106th Cong. § 1531(c)(1)-(2) (providing civil cause of action for husband or parents of mother whose fetus was aborted, allowing money damages for psychological and physical injuries, and statutory damages equal to three times cost of partial-birth abortion); *House Again Okays Ban*, supra note 90 (noting that bill penalizes violators, and makes private lawsuit available).


\(^100\) See *House Again Okays Ban*, supra note 90 (noting final vote on Frank Amendment was 140-289); see also H.R. Roll No. 103, 106th Cong. (2000) (providing breakdown of votes by state: 123 Democrats and seventeen Republicans voted for passage of Amendment as opposed to eighty-seven Democrats, 200 Republicans, and two Independents who voted against it); 143 Cong. Rec. S4614 (daily ed. May 15, 1997) (showing similar amendment was proposed in 1997 by Senator Feinstein, which would have prohibited abortions of viable fetuses unless abortion was necessary to save life of, or prevent "serious adverse health consequences to the woman."); http://clerkweb.house.gov/evs/2000/ROLL_100.asp (providing breakdown of votes by states).

\(^101\) See *House Again Okays Ban*, supra note 90 (discussing proposed exception); see also James W. Standard, *Abortion: Prohibit Partial-Birth Abortions; Define Partial-Birth Abortion; Provide for Criminal Sanctions Against One Performing Such Procedure; Provide for Exception to Criminal Sanctions When Such Procedure Is Necessary to Save Life of Mother; Provide for Civil Remedy for Father and Maternal Grandparents, Subject to Certain Exceptions; Provide That Mother Is Not Subject to Criminal Sanctions for Violation of This Code Section*, 14 GA. ST. U.L. REV. 250, 251 (1997) (recognizing that President vetoed similar partial-birth abortion ban in 1998 for lack of such exception). See generally Erika Fox, Editorial, *House Bill Could Virtually Outlaw All Abortions*, KAN. CITY STAR, Mar. 24, 1999, at B6 (noting Missouri House of Representatives' refusal to accept similar amendment to state ban on partial-birth abortion).

\(^102\) See H.R. Roll No. 104, 106th Cong. (2000) (Of the 287 yeas, 209 were Republicans, seventy-seven were Democrats, and one was Independent. Of the 141 nays 132 were Democrats, eight were Republicans, and one was Independent; S. 1692, 106th Cong. CR# 340 (2000). Of the 63 yeas 48 were Republicans, 14 were Democrats, and 1 was an Independent; of the 34 nays 31 were Democrats and 3 were Republicans. The pro-ban states included: Ala, Alaska, Ariz., Ark., Colo., Del., Idaho, Ind., Kan., Ky., La., Miss., Mo., N.H.; N.D., Ohio, Okla., Pa., S.C., S.D., Tenn., Tex., Utah, and Wy. The states
the House who voted for the ban in 1998 did so again. Public opinion on the ban varies: of 1000 citizens polled nationwide, 68% found in favor of the ban and 20% opposed it.

2. State Legislative Action

The Supreme Court's recent decision in *Carhart*, rendering a Nebraska ban on partial-birth abortions unconstitutional, will likely result in other states' statutes being struck down because opposing the ban included: Cal., Conn., Fla., Haw., Me., Md., Mass., N.J., R.I., and Wis. The split states included: Ga., Ill., Iowa, Mich., Minn., Mont., Neb., Nev., N.M., N.Y., N.C., Or., Va., Wash., and W. Va.; see also S. 1692, 145th Cong. Rec. S12949-07 (1999) (quoting senator: "I guess perhaps the biggest insult and the biggest injury that was done yesterday on this floor was when the Senator from Pennsylvania dismissed heartfelt stories of women and their families who have struggled through the biggest tragedy, almost, that anyone can imagine-of having to terminate a pregnancy at the final stages because something has gone horribly wrong and the baby, if born, would suffer and the mother would suffer adverse health consequences, irreversible; he called those stories anecdotes. Don't be blinded, he says, by the anecdotes of women. I want to say to my colleague from Pennsylvania, with no hate in my heart whatsoever, you call these stories anecdotes. I say these stories are these families' lives... I think it is shameful to dismiss them in that fashion"); *Abortion: Sen. Passes 'Partial-Birth' Ban But Affirms Roe*, AM. HEALTH LINE, Oct. 22, 1999 (indicating Senate vote of 63-34 to ban partial-birth abortion).

103 See H.R. Roll No. 104, 106th Cong. (2000). (The Act passed by vote of 287 to 141 with seven not voting. Of the 287 Yeas, 209 were Republicans; seventy-seven Democrats, and one Independent. Of the 141 Nays, eight were Republicans, 132 Democrats, and one Independent. Of the seven not voting, five were Republican and two Democrat. Ala.: 6 of 7 reps voted yea; Alaska: 1 of 1 rep voted yea; Ariz.: 4 of 6 reps voted yea; Ark.: 3 of 4 reps voted yea; Cal.: 24 of 52 reps voted yea and 1 did not vote; Colo.: 4 of 6 reps voted yea; Conn.: 2 of 6 reps voted yea; Del.: 1 of 1 rep voted yea; Fla.: 17 of 23 reps voted yea; Ga.: 9 of 11 reps voted yea; Haw.: 0 of 2 voted yea; Idaho: 2 of 2 voted yea; Ill.: 12 of 20 voted yea and 1 did not vote; Ind.: 9 of 10 voted yea; Iowa: 5 of 5 voted yea; Kan.: 3 of 4 voted yea; Ky.: 6 of 6 voted yea; La.: 7 of 7 voted yea; Me.: 0 of 2 voted yea; Md.: 3 of 8 voted yea; Mass.: 2 of 10 voted yea; Mich.: 11 of 16 voted yea; Minn.: 5 of 8 voted yea and 1 did not vote; Miss.: 4 of 5 voted yea; Mo.: 7 of 9 voted yea; Mont.: 1 of 1 vote yea; Neb.: 3 of 3 voted yea; Nev.: 1 of 2 voted yea; N.H.: 2 of 2 voted yea; N.J.: 7 of 13 voted yea; N.M.: 2 of 3 voted yea; N.Y.: 14 of 31 voted yea and 1 did not vote; N.C.: 9 of 12 voted yea; N.D.: 1 of 1 voted yea; Ohio: 15 of 19 voted yea and 1 did not vote; Okla.: 6 of 6 voted yea; Or.: 1 of 5 voted yea; Pa.: 16 of 21 voted yea; R.I.: 2 of 2 voted yea; S.C.: 5 of 6 voted yea; S.D.: 1 of 1 voted yea; Tenn.: 9 of 9 voted yea; Tex.: 20 of 30 voted yea and 1 did not vote; Utah: 2 of 3 voted yea and 1 did not vote; Vt.: 0 of 1 voted yea; V.I.: 8 of 11 voted yea; Wash.: 4 of 9 voted yea; W.Va.: 2 of 3 voted yea; Wis.: 8 of 9 voted yea; Wyo.: 1 of 1 voted yea.); see also H.R. Roll No. 104; H.R. 3660, 146th Cong. Rec. H3829-01 (2000) (Rep. Jackson-Lee of Texas states that "By banning partial birth abortions not only are we taking the right of women to have autonomy over their bodies and the right of families to determine their future, but we are also taking the right of women to live their lives as healthy American citizens and treating them like prisoners in their own country"); Final Vote Results for Roll Call 104, available at <http://clerkweb.house.gov/evs/2000/ROLL_104.asp> (linking to chart of voters broken down by yeas and nays).

104 See House Again Okays Ban, supra note 90 (referring to MarketFacts poll results); see also Marissa J. Ventura, *Where Nurses Stand on Abortion*, 62 RN No. 3, at 44 (Mar. 1, 1999) (revealing that 2/3 of nurses surveyed agree that partial-birth abortions should be prohibited by law); Mark Harrington, Editorial, *The Myths about Partial-Birth Abortion*, PLAIN DEALER, May 1, 2000, at 8B (according to most definitive surveys, 70% of Americans oppose procedure); CNN Today: Gallup Poll: Democratic Platform in American Mainstream (CNN television broadcast, Aug. 16, 2000) (Transcript # 00081602V13) (referring to consistent showing of 65% approval of ban among Americans).
such statutes contain similar language.\textsuperscript{105} As a background and general understanding of the issue, however, this section will examine the treatment of "partial-birth abortions" at the state level and will discuss in detail the \textit{Carhart} decision.

Thus far, thirty states have attempted to regulate abortion in the form of a partial-birth abortion ban, except when the procedure is necessary to save the mother's life.\textsuperscript{106} However, in a majority of the states, courts have enjoined enforcement of the bans finding the language to be vague and too broad so as to capture both the D&X and D&E procedures, leaving no alternatives available.\textsuperscript{107} The first state that attempted to ban the D&X procedure was Ohio where Dr. Haskell, the doctor who coined the term, maintains abortion clinics.\textsuperscript{108} The ban, which


\textsuperscript{106} See Who Decides? A State-by-State Review of Abortion and Reproductive Rights, NARAL RES., at http://www.naral.org/mediaresources/publications/2000whod.html (2000) (chronicling laws on abortion and reproduction rights in all 50 states and D.C. for year 2000); see also William Claiborne, 3 Laws Banning Type of Late Term Abortion Rejected, WASH. POST, Sept. 25, 1999, at A01 (stating thirty states have passed these bans and in eighteen federal courts have blocked them); Matt Kelley & Jake Thompson, \textit{Abortion Grilling Is 2-Sided 'Partial Birth' Puts Issue Back before High Court}, ÔMAHA WORLD HERALD, Apr. 25, 2000, at 1 (indicating Nebraska is among thirty states to pass such legislation); Bans on "Partial-Birth Abortion" and other Abortion Methods, CRLP PUB'NS, available at http://www.crlp.org (May 1, 2000) (describing status of "partial-birth abortion" bans among states).


\textsuperscript{108} See Massie, \textit{supra} note 92, at 327 (stating that Ohio, where Dr. Haskell maintains two abortion clinics, was first state to enact partial-birth abortion ban); see also Bopp & Cook, \textit{supra} note 38, at 57 (discussing Ohio ban and Dr. Haskell); Radloff,
specifically criminalized the D&X procedure, passed Ohio's General Assembly on August 16, 1995 and was scheduled to take effect on November 14, 1995. However, before taking effect, the ban was challenged on its face as being unconstitutional in *Women's Medical Professional Corp. v. Voinovich*. In *Voinovich*, the Court of Appeals affirmed the District Court's holding that three major portions of the Act were unconstitutional: (1) the ban on the D&X procedure; (2) the ban on post-viability abortions; and (3) the viability testing requirement. The suit was brought by Women's Medical Professional Corporation (WMPC) on behalf of its patients and itself alleging that the act placed an "undue burden on the rights of pregnant women to choose an abortion." The Court of


110 130 F.3d 187 (6th Cir. 1997).

111 *See id.* at 193. (stating that while District Courts had opportunity to address such issue, this was first United States Court of Appeals to consider this issue); *see also* Kurt D. Ebersbach, *Recent Development: Women's Medical Professional Corp. v. Voinovich: Applying Overbreadth Analysis to Post Viability Abortion Regulation*, 30 GA. L. REV. 1151, 1152 (1996) (discussing basis for striking down Ohio ban); Massie, *supra* note 92, at 327 (stating that United States Court of Appeals for Sixth Circuit was first to hear this issue).


113 *See Voinovich*, 130 F.3d at 190. That portion of the ban provided that "No person shall purposely perform or induce or attempt to perform or induce an abortion upon a pregnant woman if the unborn human is viable..." *Id.; see also* Barrow, *supra* note 112, at 313 (discussing provisions of statute). *See generally,* Janet E. Gans Epner, PhD, et al., *Late-term Abortion, 280 JAMA 724-729 (Aug. 26, 1998), available at httpL1/www.ama-assn.org/special (discussing definitions of trimesters and viability).

114 *See Voinovich*, 130 F.3d at 190. That portion of the ban required that "[N]o abortion shall be performed after the beginning of a pregnant woman's twenty-second week of pregnancy." *Id.; see also* Roe v. Wade, 410 U.S. 113, 152-66 (1973) (laying foundation for constitutional right of pregnant woman, under Due Process Clause of 14th Amendment, to terminate her pregnancy before viability). *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 872-76 (1992) (reaffirming central holding in *Roe*, which prohibits States from placing undue burden on woman's choice to terminate her pregnancy before viability of fetus).

115 *Voinovich*, 130 F.3d at 190-191(indicating that Dr. Haskell, whose report on D&X sparked debate on issue, is affiliated with Women's Medical Professional Corp). *See generally* Jane L. v. Bangerter, 102 F.3d 1112, 1115-18 (10th Cir. 1996) (holding legislation that bans an abortion after twenty weeks of gestation is undue burden on
Appeals concluded that the Act's definition of the method included both the D&E and D&X procedures, thereby constituting an "undue burden" on a woman's right to an abortion by banning the most common procedure used in the second trimester.\textsuperscript{116} In addition, the court found that the ban's application to post-viability cannot be severed from the pre-viability portion and thus the entire Act is unconstitutional.\textsuperscript{117}

On June 28, 2000, the Supreme Court decided \textit{Stenberg v. Carhart},\textsuperscript{118} the first "partial-birth" abortion case the Court has accepted for review.\textsuperscript{119} The Court, in a 5-4 majority,\textsuperscript{120} affirmed

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117 \textit{See Voinovich, 130 F.3d at 202. The court, in its analysis, acknowledges that a state can proscribe abortions post-viability when not required for the life or health of the mother and assumes therefore that the State can also restrict abortions post-viability as long as abortions were still available for the life and health of the mother. Id. See generally Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 57-58 (1976) (involving constitutionality of ban on specific abortion procedures); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997) (discussing substantial obstacle placed in path of woman seeking pre-viability abortion by banning specific abortion method).}

118 120 S. Ct. 2597 (2000); \textit{see also} David G. Savage, \textit{Bitter Decisions: Justices End Term Angrily in Abortion Rulings on Procedure, Protests}, 86 A.B.A. J. 34 (Aug. 2000). A trial judge conducted a hearing in 1997 and concluded that the ban forced doctor's to use riskier methods; the 8th Circuit of the U.S. Court of Appeals in \textit{Carhart v. Stenberg, 152 F.3d 1142 (8th Cir.1999)} affirmed and Don Stenberg, the Attorney General, appealed to the Supreme Court. Id.; Gough, supra note 7, at 200. The statute was originally challenged on vagueness grounds but the Court did not have to reach a decision on that because it determined it was unconstitutional as an undue burden. Savage, supra note 118; Gough, supra note 7, at 200.

119 \textit{See Willing, supra note 5 (stating Justices agreed to hear case on partial-birth abortion not right to abortion in January 2000). See generally Abortion: Supreme Court Accepts Nebraska Case, AM. HEALTH LINE, Jan. 18, 2000 (stating U.S. Supreme Court agreed to hear case on partial-birth abortion); Maggie Mulvihill, \textit{Campaign 2000: Opportunity to Reshape High Court Concerns Voters}, BOSTON HERALD, Nov. 7, 2000, at 007 (stating Court in June ruled ban unconstitutional); \textit{Nation in Brief, supra note 4} (indicating U.S. Supreme Court struck down ban); \textit{The Associated Press Top 10 Stories of 2000, OMAHA WORLD HERALD, Jan. 1, 2001, at 2 (listing \textit{Stenberg} ruling as one of top ten stories in 2000).}

120 \textit{See Stenberg, 120 S. Ct. at 2597. In J. O'Connor's concurring opinion she stated that a ban "that only proscribed the D&X method of the abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view." Id.; Savage, supra note 118. Eight Justices (Scalia, Requinston, Breyer, Stevens, O'Connor, Ginsburg, Kennedy, and Thomas), except for Souter, who joined the majority, wrote opinions. J. O'Connor cast the deciding vote asserting that the health of the mother...}
the Eighth Circuit's decision holding that the Nebraska Statute, making the performance of a "partial-birth abortion" a felony, violated the United States Constitution. The statute was held unconstitutional on two grounds: (1) because it lacked an exception for the health of the woman; and (2) because it imposed an undue burden on a woman's right to choose the D&E method thereby burdening the right to choose abortion itself.

Dr. Leroy Carhart, a Nebraska physician, the only physician in the state who performs abortions after the sixteenth week, brought the suit testifying the reasons why he used the procedure included: (1) it reduced dangers of sharp bones from passing through the cervix; (2) it reduced the likelihood of uterine perforations because fewer instruments are used; (3) it reduced likelihood of infection due to residual fetal tissue remaining in the uterus; and (4) it could help to prevent fatal absorption of fetal tissue into the mother's circulation.

must be provided for. See 120 S. Ct. at 2597.; U.S. Supreme Court, supra note 44 (discussing 5-4 decision in Stenberg).

121 See NEB. REV. STAT. ANN. §28-328(1) (Supp. 1999). In pertinent part, the statute provided that "[n]o partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused or arising from the pregnancy itself." Id. The statute defined "partial-birth abortion" as "an abortion procedure in which the performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery ... Id. "Partially delivers vaginally" meant "to deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child" Id.; see also Savage, supra note 118 (indicating statute was drafted by National Right to Life Committee and passed in legislature by 99-1 vote). See generally Jennifer Doran, Recent Developments in Health Law: Select Recent Health Court Decisions, 25 AM. J.L. & MED. 569, 570 (1999) (discussing cases holding state regulation of partial birth abortion unconstitutional).


123 See Stenberg, 120 S. Ct. at 2609; see also Nat'l L. Ctr. For Medically Dependent & Disabled, Inc., Verbatim: Oral Arguments Before the United States Supreme Court in Stenberg v. Carhart, 16 ISSUES L. & MED. 69 (Summer 2000) (discussing oral argument made to Supreme Court in Stenberg v. Carhart)[hereinafter Nat'l L. Ctr.]. See generally Elliott, supra note 69, at 1103–08 (discussing constitutionality of partial birth abortions).

124 See Stenberg, 120 S. Ct. at 2608; see also Nat'l L. Ctr., supra note 119, at 69 (discussing arguments made by Dr. Leroy Carhart). See generally Elliott, supra note 69, at 1089-90 (discussing D&X procedure).
differentiate between the D&E and D&X procedures by the use of the words "substantial portion," which mean "the child up to the head."125 The Court refused to accept this argument on the grounds that it was a narrowing interpretation of the statute. The dissenters in the opinion called the decision an "outrage and predicted the American public would turn against the Court because of it."126

IV. ANALYSIS

A. Survival of the Partial-Birth Abortion Ban Under Casey's Undue Burden Analysis

In order to examine the decision it is necessary to re-articulate the well-established guidelines set forth by the Supreme Court in abortion jurisprudence. A state may regulate abortion throughout the pregnancy and pre-viability as long as the regulation does not impose an undue burden on a woman's right to terminate her pregnancy.127 After fetal viability, the states may regulate, and even proscribe abortion unless it is necessary to save the life or preserve the health of the mother.128 To properly conduct an analysis of the constitutionality of a partial-

125 See Stenberg, 120 S. Ct. at 2614; see also Brief for Petitioners 20, Stenberg. See generally Elliott, supra note 69, at 1089 (commenting on D&X procedure).

126 See Savage, supra note 118. (stating that although Kennedy upheld the right to an abortion in 1992, he dissented here and called the procedure "abhorrent...and [it] should be outlawed." Scalia called the procedure "so horrible that the most clinical description, evokes a shudder of revulsion."). See generally Stenberg, 120 S. Ct. at 2603 (finding that dissenters included Justices Renquist, Scalia, Kennedy, and Thomas); John & Aggie Dowd, Editorial, Partial Birth Abortion Is Plain and Simple Infanticide, UNION LEADER, Mar. 3, 2000 (listing groups who would like to see procedure banned); James Bopp Jr., Abortion Rights Is Not Issue, USA TODAY, Apr. 25, 2000, at 18A (indicating 64% of public support ban); House Again Okays Ban, supra note 90 (indicating public opinion favoring ban).

127 See Stenberg, 120 S. Ct. at 2604 (stating that undue burden has purpose or effect of placing substantial obstacle in path of women seeking abortion of nonviable fetus); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 876 (stating statute that creates substantial obstacle to women seeking abortions are undue burdens); see also Ohio v. Akron Ctr. For Reprod. Health, 497 U.S. 502, 519 (1990) (stating that undue burden is unconstitutional); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 192 (6th Cir. 1997) (describing undue burden standard).

128 See Roe v. Wade, 410 U.S. 113, 164 (1973); see also Casey, 505 U.S. at 876 (reiterating holding in Roe that subsequent to viability state may limit abortion); Stenberg, 120 S. Ct. at 2604 (setting forth established principles of Roe). See generally Constitutional Analysis of Legislation, supra note 5 (discussing holdings in Roe and Casey related to this).
birth abortion ban, it is necessary to balance the states’ interests in proscribing these bans against the implication of the abortion right.129 An undue burden exists when a statute has the effect of placing a substantial obstacle in the path of a woman to obtain an abortion.130 Partial-Birth abortion bans, similar to the proposed federal act131 and the Nebraska act,132 do not prohibit all methods of abortion.133 The abortion procedure targeted for prohibition involves partially delivering the fetus into the birth canal before it is killed.134 As previously set forth in this note, safer alternative procedures exist which do not involve the fetus being partially delivered.135 Requiring a woman to choose an alternative procedure does not place a substantial obstacle in obtaining an abortion.136 The woman can also avoid this

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129 See Barrow, supra note 112, at 318 (discussing balancing of state interests in Casey); see also L.G. Almeda, Michigan’s Ban on Partial-Birth Abortions: Balancing Competing Interests, 74 U. DET. MERCY L. REV. 685, 720 (discussing constitutionality of Michigan’s ban as it adequately balances states interests); Paul W. Bridenhausen, Abortion: From Roe to Akron, Changing Standards of Analysis, 33 CATH. U. L. REV. 393, 397-398 (discussing balancing interests of state against woman's right to privacy).


132 See Neb. Stat. Ann. §28-328(1) (June 10, 1997); see also Libby Copeland, For One Doctor, There Was No other Choice; Despite Threats, Abortionist Won't Back Down, Wash. Post, Oct. 28, 2000, at C01 (discussing Nebraska’s ban on partial-birth abortion); Eric Lorn, Flood of Ideas Fills This Stream of Consciousness, Chi. Trib., July 6, 2000, at 1 (discussing Nebraska’s ban).


134 See Bill Draws Senate Debate, supra note 42 (stating fetus is partially extracted before being killed); see also Donna Halvorsen, House Approves Ban on Late-Term Abortions, Star Trib., Mar. 11, 1998, at 3B (stating ban passed by House defined partial birth abortion as "partially delivering" a fetus rather than killing it); Judy Mann, Doctor Takes on the Antiabortion Lobby, Wash. Post, Apr. 21, 2000, at C09 (quoting language of Nebraska ban defining partial birth abortion as "partially delivering" fetus before it is killed).

135 See Brief for Petitioners at 35, Stenberg (No. 99-830) (stating that under Nebraska's statute safe alternatives to partial-birth abortion remain available). See generally An Abortion Ban Allowed to Stand, Chi. Trib., Oct. 28, 1999, at 24 (indicating procedure is less safe than alternatives). But see Stenberg, 505 S. Ct. at 2610 (stating that D&X procedure may be safer than alternatives); Planned Parenthood v. Doyle, 162 F.3d 463, 471 (7th Cir. 1998) (commenting that D&X procedure may be the safest procedure); Women's Med. Prof'l Corp. v. Taft, 114 F. Supp. 2d 664, 675 (S.D. Ohio 2000) (reiterating D&E procedure in some instances is safest method).

136 See e.g., Gough, supra note 7, at 208 (stating that because D&X procedure is
procedure by ensuring that the fetus is fully dismembered within the uterus.\textsuperscript{137} One particular procedure available to the woman has been documented as being a much safer alternative.\textsuperscript{138} The procedure is somewhat similar to D\&X in the sense that the cervix is dilated but with the use of only one to three dilators as opposed to the twenty-five used in D\&X.\textsuperscript{139} The procedure differs from the D\&X method in that the physician injects the fetus with a drug called digoxin to soften the tissue and bring about the death of the fetus within the uterus with the effect of delivering a dead but intact fetus on the third day.\textsuperscript{140} Not only is the procedure significantly different, but also the risks associated with D\&X are not present.

1. Availability of Safer Alternatives and the State’s Interests in Banning Partial Birth Abortion

The number of partial-birth abortions performed per year is astounding and probably underreported.\textsuperscript{141} The Alan scarcely employed as method of terminating second trimester pregnancies woman is essentially left with same range of choices as if D\&X procedure would never have been invented). See generally An Abortion Ban Allowed to Stand, supra note 135 (indicating undue burden does not exist). But see Stenberg, 120 S. Ct. at 2613 (stating that ban does create undue burden); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337, 339 (4th Cir. 2000) (following Supreme Court’s Rationale in Stenberg); Planned Parenthood of Centr. N.J. v. Farmer, 220 F.3d 127, 145 (3d Cir. 2000) (following Supreme Court’s rationale in Stenberg).

\textsuperscript{137} See Kopp, supra note 52 (indicating partial birth abortion evolved from D&E procedure, which involves dismembering fetus inside uterus); see also Brief of Stenberg, supra note 125 (indicating object of D&E procedure is to dismember fetus); David G. Savage, Midterm Abortions Argued in High Court, L.A. TIMES, Apr. 26, 2000 (indicating fetus is dismembered before removing it in D&E procedure).

\textsuperscript{138} See Romer, supra note 38, at 62 (noting that Dr. Warren Hern’s technique of softening fetal tissue prior to standard D&E); Massie, supra note 92, at 364 (indicating Dr. Haskell’s paper included alternatives to partial-birth abortion including Dr. Hern’s softening technique).

\textsuperscript{139} See Romer, supra note 38, at 62 (indicating only three dilators are used).

\textsuperscript{140} See Romer, supra note 38, at 62 (noting that this procedure is written about and described by Dr. Warren Hern who has written extensively on abortion practice); see also, Louise Kiernan & Barbara Brotman, Late-Term Abortion: Inside One Clinic; Women Have Many Reasons for Deciding on Abortion in the Second Trimester, CHI. TRIB., Mar. 23, 1997, at 1 (discussing D&E procedure and use of digoxin); Judith Nygren and Patrick Strawbridge, Abortion Appeal Is Promised, OMAHA WORLD-HERALD, Sept. 25, 1999 (describing role of digoxin in D&E abortion procedure).

\textsuperscript{141} See Sprang & Neerhof, supra note 67, at 744, available at \texttt{http://www.ama-assn.org} (discussing interviews of physicians who use this technique reveal they performed thousands per year and one facility reported using Intact D\&X on half of 3000 abortions performed each year on fetuses between 20 and 24 weeks' gestation); see also Testimony of Dr. Cook, supra note 43, at 66-67 (discussing that in his testimony at Joint Hearing Before U.S. Senate, Dr. Cook indicated that partial-birth abortions occur thousands of times per year); Nation in Brief, supra note 4 (indicating of 1200 abortions
Guttmacher Institute conducted a study in which eight respondents revealed that they performed 363 D&X procedures in 1996 and 201 during the first half of 1997. However the mere popularity of the D&X procedure does not mean that its prohibition will create an undue burden on a woman's right to terminate her pregnancy since alternative abortion procedures exist and medical studies do not suggest that the D&X procedure is any safer than the alternatives. The D&X method is not a medically recognized procedure nor is it taught in medical schools or in obstetrics and gynecology residencies. Actually, a medical consensus has emerged indicating that D&X is not necessary nor is it the safest method for late-term abortion and there are safer alternatives available to the woman. Although some proponents of D&X argue that there are advantages to using this procedure, there is scant medical support or evidence backing the argument. The D&E method, a safer alternative,

performed per year by Dr. Carhart, 20 are "partial-birth" abortions).

142 See Henshaw, supra note 61. However, respondents indicated that they could not estimate accurately the number of procedures that met all the components of the definition and AGI indicated that many did not respond to the survey. Id.; see also Judy Thomas, Bill Seeks to Halt Type of Abortion; House Panel Backs Measure to Outlaw Late-Term Procedure, KANSAS CITY STAR, July 20, 1995, at A1 (stating 450 D&X procedures are performed yearly). But see Public Pulse, OMAHA WORLD HERALD, June 14, 1996, at 24 (discussing 4000 abortion performed daily using D&X procedure).

143 Brief of Stenberg supra note 125, at 39, Stenberg (No. 99-830). To support this contention, petitioner referred to testimony of Dr. Frank Boehm, an expert in abortion field, who stated that safety of D&X procedure has never been medically proven and as far as he knows there are are no ongoing studies. Id.; see also Testimony of Dr. Cook, supra note 39, at 67 (indicating that there is no evidence to support assertion that D&X is safer or even preferred procedure).

144 See Sprang & Neerhof, supra note 67, at 745 (indicating this procedure is not taught in medical schools); see also, Jim Stirling, Cruel and Unusual or Lifesaver?, MILWAUKEE J-.SENTINEL, May 28, 1995 (“Assistant Attorney General Susan Ullman elicited testimony that ‘partial-birth’ abortion and its risks have never been subject of peer review in any medical journal and method is not taught in medical schools.”). See generally Jim Nichols, Cain Calls Anonymous Flier on Abortion False, Misleading, PLAIN DEALER, Mar. 29, 1995, at 4B (quoting chairman of Case Western Reserve Medical School saying he never heard of procedure).

145 See Sprang & Neerhof, supra note 67, at 745 (stating D&X is not safest method); see also Bopp & Cook, supra note 38, at 53 (“The partial-birth abortion entails more risk than other abortion procedures because it requires internal podalic version, a technique that essentially has been abandoned by modern obstetrics”). But see Massie, supra note 92, at 316 (stating advantages to using D&X over available alternative methods common to second trimester include: less potential blood loss, less likelihood of woman's membranes tearing, less time, and no hospitalization).

146 See Massie, supra note 92, at 370 (stating advantages of D&E over D&X include: less risk of tearing in uterus; less risk of affecting future ability to carry to term; eliminating risk of tissue being absorbed into woman's bloodstream); see also, Wes Hills, Doctor Says Abortion Procedure Is Safer, DAYTON DAILY NEWS, Sept. 7, 2000, (Reporting that D&X method may have several advantages over the D&E method: "[I]njecting a fetus
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has some basic advantages including no hospitalization time; a low rate of complications; no experience of labor pains; and predictability as to procedure time. The AMA recommends that the D&X procedure not be used “unless alternative procedures pose materially greater risk to the woman,” and the American College of Obstetricians and Gynecologists “could find no situation where the [D&X] procedure would be the only procedure necessary to save the life or preserve the health of the woman.”

2. States Interests in Banning Partial-Birth Abortion
Outweigh Abortion Right

One of the states many interests is protecting the health of the mother. Many doctors have testified that the partial-birth abortion procedure is “a threat to the health and safety of the mother.” These potentially immediate and long-term risks can

with a drug to kill it before performing an abortion would take the fetus several hours...to die and subject the mother to needless pain and potential complications by having dead tissue in her uterus.” In addition, the D&E procedure would keep themother “under anesthesia for a long period of time with no benefit to her.” The procedure of dismembering the fetus would also subject the mother to risk by requiring the physician to “repeatedly and blindly [probe] the uterus for fetal parts”;

Michael Miller, Judge Expected to Rule Today on Abortion Law, CAPITAL TIMES (Madison, WI), May 28, 1999.

See Andrews, supra note 61, at 527-28 (discussing advantages of D&E method); see also, Massie, supra note 92, at 370-71 (listing advantages of D&E over D&X: less risking of tearing in uterus; less risk of affecting future ability to carry to term; eliminating risk of tissue being absorbed into woman's bloodstream); Fred Barbash, Supreme Court Reaffirms 1973 Abortion Decision, WASH. POST, June 11, 1983, at A1 (indicating D&E is safer procedure reducing risk).

See AMA POLICY FINDER, supra note 51; see also Romer, supra note 38, at 58 (stating view of American Medical Association that intact D&X not be used unless alternative procedures posed greater risk). See generally Planned Parenthood of Wis. v. Doyle, 162 F.3d 463, 470 (7th Cir. 1998) (discussing application of Wisconsin statute concerning partial-birth abortions).

Romer, supra note 38, at 60; see also Almeda, supra note 129, at 692 (discussing other viable techniques for late-term abortions); Padraig P. Flanagan, Banning Partial-Birth Abortions: A Few Inches Away from Testing Post-Viability Jurisprudence, 23 SETON HALL LEGIS. J. 141, 156 (1998) (discussing doctor's opinion that performing D&X procedure is never necessary).


be detrimental to the woman's physical and emotional health. The forced dilation of the cervix over a period of two or three days can cause cramping, nausea, infection, and excessive bleeding. The use of forceps to turn the child to a breech position inside the uterus, medically referred to as internal podalic version, can cause the uterus to be ruptured or punctured, causing hemorrhaging from the displaced placenta, and resulting in the need for a hysterectomy. Long-term risks associated with this procedure include future fertility problems, difficulties in conceiving due to scarring of the uterine wall, and an inability to carry a fetus to full-term. Actually, this procedure is not new, but merely the reemergence of an older, almost identical method that was used in the earlier part of the Twentieth century to deliver a dead fetus, and was abandoned by the medical community because it posed serious risks to the mother, including infections and injury to the cervix.

152 See Banning Partial Birth Abortion, supra note 147 (stating some physical health risks associated with partial-birth abortion include amniotic fluid embolism, cervical incompetence, and ruptured uterus). Research conducted by the American Journal of Drug and Alcohol Abuse found that women who have abortions are five times more likely to subsequently engage in substance abuse as compared to women who carry a child to term. Id.; see also Bopp & Cook, supra note 38, at 1570 (stating that there are mental and physical health risks with partial-birth abortions); Partial-Birth Abortion Borders on Medical Malpractice, KAN. CITY STAR, at B4 (Sept. 13, 1999) (stating that there are many possible risks associated with partial-birth abortions).

153 See Testimony of Dr. Cook, supra note 43, at 66; see also Almeda supra note 129, at 694-95 (discussing general abortion complications); Bopp & Cook, supra note 38, at 9 (explaining that while cervix is dilating membrane can rupture and cause infection).

154 See Partial Birth Abortion Ban Act of 1995: Hearing before the Subcomm. on the Constitution Comm. on the Judiciary (June 15, 1995) (testimony of Dr. Pamela Smith) (describing internal podalic version as procedure "utilized by many obstetricians with the intent of delivering a live infant in the management of twin pregnancies, or single infant pregnancies complicated by abnormal positions of the pre-born infant"); see also Almeda, supra note 129, at 690-91 (describing version of fetus during D & X procedure); Romer, supra note 38, at 61 (describing turning of fetus as internal podalci version).

155 See Romer, supra note 38, at 61 (stating that there is risk of maternal hemorrhaging); see also Standard, supra note 101, at n.51 (stating that D & X procedure can cause uterus to tear and make hysterectomy necessary). See generally Partial-Birth Abortion Borders on Medical Malpractice, supra note 152 (discussing possible risks associated with partial birth abortion).

156 See Testimony of Cook, supra note 43, at 69 (discussing future fertility problems may occur for women due to partial-birth abortions); see also Romer, supra note 38, at 61 (stating that future complications can include cervical incompetence); Partial-Birth Abortion Borders on Medical Malpractice, supra note 152 (stating risks involved with partial-birth abortion). But see Massie, supra note 92, at 316 (1998) (stating proponent of procedure claim D&X process is less likely to tear woman's membrane).

157 See Bopp & Cook, supra note 38, at 52-53 (discussing use of procedure in early part of century); see also Julia Epstein, The Pregnant Imagination, Fetal Rights, and Women's Bodies: A Historical Inquiry, 7 YALE J. L. & HUMAN. 139, 150 (1995) (discussing
As articulated in *Roe*, a woman's right to terminate her pregnancy is not "absolute" and it must be balanced against compelling states' interests.\footnote{158} States also have an interest in protecting the potential life of the fetus;\footnote{159} drawing a distinct line between abortion and infanticide;\footnote{160} and protecting the fetus from undue cruelty.\footnote{161} States' interests in protecting the potential life of the fetus and protecting the fetus from undue cruelty will be looked at together. It is an erroneous belief that anesthesia, administered to the woman as part of the D&X procedure, kills the baby or has the effect of making the fetus immune from feeling pain.\footnote{162} Dr. Mary Campbell, the medical

Eighteenth Century practice of craniotomy and its discontinuation); *Testimony of Dr. Cook*, supra note 43, at 67 (indicating form of internal rotation used in partial-birth abortion procedures to put fetus in feet first position has been largely abandoned due to "unacceptable" risks associated with it).

\footnote{158} See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (indicating right is not absolute); see also *Beal v. Doe*, 432 U.S. 438, 446 (1997) (stating that woman's right to terminate pregnancy is qualified and must be balanced against important states' interests); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983) (stating right to terminate pregnancy is not absolute); *Birth Control Ctrs. v. Reizen*, 743 F.2d 352, 360 (6th Cir. 1984) (reaffirming woman's right to terminate pregnancy is not absolute).


\footnote{160} See *Willing*, supra note 5, at 3A (stating Nebraska has interest in drawing line between infanticide and abortion); *Bill Draws Debate, supra note 42* (quoting Santorum that this procedure is not like abortion but infanticide); Robin Toner, *The 2000 Campaign: A Closer Look at the Planks*, N.Y. TIMES, July 30, 2000, at 24 (indicating AMA has termed partial-birth abortion 4/5 infanticide).

\footnote{161} See *Women's Med. Prof'l Corp., Inc. v. Voinovich*, 130 F.3d 187, 198 n.6 (6th Cir. 1997) (citing H. 135, §3, 121st Gen. Ass. (Ohio 1995)). In instituting a ban on partial-birth abortion, the Ohio General Assembly declared that its interest was to prevent "unnecessary cruelty to the human fetus." *Id.* See also *Women's Med. Prof'l Corp. v. Haskell*, 911 F. Supp. 1051, 1071 (S.D. Ohio 1995). Before reaching the appellate division, the District Court found protecting fetus from undue cruelty legitimate interest. *Id.* Ohio's stated purpose for the statute was derived from the Ohio General Assembly. *Id.*; *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1028 (W.D. Ky. 1998). The states also have an interest in protecting potential life and in preventing unnecessary cruelty to a partially unborn child. *Id.*; *Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 810 (E.D. Va. 1998). One interest of a state is to prevent cruelty to living beings. *Id.*

\footnote{162} See *Partial-Birth Abortion: The Truth: Hearing on H.R. 1122 before the Senate Judiciary Comm. and House Judiciary Comm. Subcomm. on the Const.*, 105th Cong. (Mar. 11, 1997) [hereinafter *The Truth*] (prepared statement by Orrin Hatch). The statement by Mr. Hatch includes testimony by Norig Ellison, M.D., the president of the American Society of Anesthesiologists, stating that there is no scientific evidence to support the claim that an overdose of anesthesia kills the fetus before it is extracted from the uterus. *Id.* See generally Robert Schwarzwalder, *Courts Should Use Common Sense; No Excuse for Cruel Abortions*, CINCINNATI ENQUIRER, Apr. 30, 2000, at E02 (stating pain felt by fetus if abortion performed before brain has capacity to block pain); Robert, F.
director of Planned Parenthood, stated that fetal demise occurs in the mother’s womb, before the procedure begins, from an overdose of anesthesia given to the mother intravenously and the anesthesia causes the fetus to become brain dead in minutes.\textsuperscript{163} This statement was unaccompanied by scientific support or evidence and the American Society of Anesthesiologists denounced this claim, ensuring the record be set straight in order to prevent any misinformation. In reality, a local anesthetic, which only numbs the nerves and the tissue, has no effect on the fetus because only a small amount enters the mother’s circulatory system and an even smaller amount actually reaches the fetus.\textsuperscript{164} General anesthesia, administered intravenously, has a minimal effect on the fetus because the woman’s liver clears most of it, and it is transferred from the mother’s bloodstream to the placenta before reaching the fetus.\textsuperscript{165}

Pre-term fetus’ can experience pain because early in the second trimester the centers for pain perception are developed.\textsuperscript{166} Although fetal pain cannot be measured, there is proof from ultrasound that a fetus responds to needle punctures in the

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White, M.D., \textit{Fetuses Do Feel Pain, Despite Earlier Beliefs}, \textit{Knoxville News-Sentinel}, Aug. 13, 2000 at H5. The current methods for providing maternal anesthesia during partial-birth abortions are unlikely to prevent the experience of pain and stress in human fetuses before their death occurs. \textit{Id.}
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\textsuperscript{163} \textit{The Truth, supra note 162. See generally Effects of Anesthesia During Partial Birth Abortion, 14 \textit{Issues L. & Med.} 71, 73 [hereinafter Effects of Anesthesia] (noting that fetus is not killed by anesthesia). \textit{But see Andrew Conte, Baby Girl Lives Three Hours after Late Abortion; Hospital Staff Traumatized; Activists Riled, Chattanooga Times, Apr. 21, 1999 at A11 (noting that twenty-two week old fetus was born alive after partial-birth abortion and lingered for three hours).}


\textsuperscript{165} \textit{See Bopp & Cook, supra note 38, at 38. See generally White, supra note 162 (noting that current methods for providing maternal anesthesia during partial-birth abortions are unlikely to prevent experience of pain and stress in human fetus before death).}

\textsuperscript{166} \textit{See Sprang & Neerhof, supra note 67; see also Bopp & Cook, supra note 38, at 35 (noting that pre-term fetuses can experience pain because “they have both the neurologic anatomy and the physiologic and chemical processes in the brain that enable humans to feel pain and other noxious stimuli...even through the 20-week to 30-week category”); Wes Hills, Doctor Defends Late-Term Abortion Procedures, \textit{Dayton Daily News}, Sept. 6, 2000 at 1B (noting that it has been opined that fetus’ can feel pain during D&X procedure); White, supra note 162 (stating that pre-term neonates have neuroanatomic substrate and functional physiologic and chemical processes in brain responsible for mediating pain).}
In his testimony to the Senate Committee, Dr. Cook, indicated that he himself has observed fetus' of five to six months gestation withdraw from needles and instruments, indicating that the fetus exhibits some type of pain response. In the intact D&X procedure, the fetus is literally within inches of being fully delivered when the cranium is pierced with scissors, without administering anything to the fetus for pain management. Therefore, it would be difficult to refute that the fetus does in fact experience pain, and as such, that this method is extremely cruel to the fetus.

In his brief to the Court, Attorney General Stenberg, argued that this procedure borders on infanticide. Imagine what the consequences would be if a physician, while performing this procedure, encounters a loose cervix on the mother, resulting in the head slipping out while pulling the fetus; thereby transforming the status of the fetus into a living human being and affording it the full legal rights of personhood under the Constitution. Because of the possibility that the fetus may

167 See Bopp & Cook, supra note 38, at 36; see also Sprang & Neerhof, supra note 67 (indicating that as early as 23 weeks gestation it is possible to measure fetal hormonal stress response to “needling to the intra-abdominal portion of the umbilical vein.”). See generally White, supra note 162 (noting magnitude of endocrine-metabolic and other stress responses of neonates to being surgically cut or needled).

168 See Testimony of Dr. Cook, supra note 43, at 68; see also Harriet Chiang, Roe vs. Wade - 25 Years Later: Legal, Political Battles Intertwine over Abortion, SAN. FRAN. CHRON., Jan. 22, 1998, at A10 (discussing fetal pain and anesthesia to avoid this pain); Science of Fetal Pain, N.Y. TIMES, Nov. 4, 1997, at 26 (discussing how abortion advocates avoid question of fetal pain).

169 See Sprang & Neerhof, supra note 67; see also Stenberg v. Carhart, 120 U.S. 2597, 2624 (2000) (stating that appropriate instrument to be used during procedure is pair of scissors); Planned Parenthood v. Farmer, 220 F.3d 127, 140 (3d Cir. 2000) (describing procedure as performed by delivering fetus almost completely, where head still remains in womb, and then using scissors to puncture skull of fetus); Planned Parenthood v. Miller, 30 F. Supp. 2d 1157, 1164 n. 5, (S.D. Iowa 1998) (describing procedure where physician uses scissors to perform partial birth abortion).

170 See Almeda, supra note 129, at 706 (giving testimony of Dr. White that partial birth abortion is extremely painful experience for fetus); see also Bopp & Cook, supra note 38, at 34 (discussing misconception that fetus does not experience pain during partial birth abortion); Walther, supra note 61, at 723 (indicating some legislatures, when attempting to pass partial birth abortion laws, consider preventing unnecessary cruelty to fetus as part of state’s interest in protecting fetus’ life).

171 See Brief for Petitioners supra note 125, at 49; see also Bill Draws Debate, supra note 42 (quoting Santorum advocating procedure is like infanticide); Willing, supra note 5, at 3A (showing Stenberg’s argument that this procedure is infanticide).

172 See generally, Tracy Ballard, The Norplant Condition: One Step Forward or Two Steps Back?, 16 HARV. WOMEN’S L.J. 139, 156 (1993) (discussing viability as point when fetus is granted personhood status); Bopp & Cook, supra note 38, at 3 (referring to fetus subject to partial-birth abortion as “a human being three-fourths immersed in the free air of personhood”). But see Susan Goldberg, Of Gametes and Guardians: The Impropriety of
accidentally be delivered, many otherwise pro-choice advocates cannot justify the continued use of this procedure as it is too close to infanticide. In a Senate debate Barbara Boxer, chief opponent of the bill, refused to answer questions when asked to draw distinct lines regarding this issue by posing questions to her involving what would happen if the baby is delivered except for the foot or except for the toe. Judie Brown, the president of the American Life League, argued that there is no such thing as partial birth abortion because a fully alive child is proceeding down the birth canal and being killed, which is infanticide.

B. Post-Viability and the Health Exception

The Court in Casey made it clear that post-viability, a state may limit and even proscribe abortion as long as it provides for

Appointing Guardians Ad Litem for Fetuses and Embryos, 66 Wash. L. Rev. 503, 516-17 (1991) (discussing right of fetus at common law and recognizing fetuses have not enjoyed status of personhood); Steven Graines & Justin Wyatt, The Abortion Right, Originalism, and the Fourteenth Amendment, 47 Clev. St. L. Rev. 161, 167-68 (1999) (indicating fetus is not entitled to Fourteenth Amendment protection because it is not a person).

173 See Bopp, supra note 126, at 18B (stating what is at stake is extending abortion right outside mother's womb to protect killing of healthy, partially born child from healthy mother); see also John & Aggie Dowd, Editorial, Partial Birth Abortion is Plain and Simple Infanticide, Union Leader, Mar. 3, 2000 (stating that partial birth abortion procedure is infanticide not abortion); Letters, Tampa Trib., Nov. 3, 2000, at 13 (stating thousands of doctors, both pro-choice and pro-life, oppose partial birth abortions); Mark M. Quinn, Abortion Decisions, Chi. Trib., July 2, 2000, at C14 (citing opinion polls that show that "substantial portion" of pro-choicers oppose partial-birth abortion). See generally Bob Mahlburg, Granger to Back FDA on 'Abortion Pill' Issue; Lawmaker Opposes More Regulations, Fort Worth Star-Telegram, Oct. 5, 2000, at 1 (stating that Texas Congresswoman Granger, is pro-choice, but opposes partial birth abortions).


175 See Interviews: Activists Discuss Semantics (Am. Pol. Network, Dec. 18, 1996) (Insider Commentary). See generally Lewis R. Sheckler, Editorial, Elect Politicians Who Will End Legalized Infanticide; A Bush Court Would Reject Partial-Birth Abortion, Roanoke Times & World News, Oct. 26, 2000, at A19 (stating that health exceptions to partial birth abortion bans "permit killing babies even after all of each baby is born except the top of his or her head"); Uwe Siemon-Netto, Bishops Call Late Abortion Virtual Infanticide, United Press Intl., Nov. 15, 2000 (stating that right to choose is "now being used to justify killing outside the womb"); George F. Will, A Question for Gore Next Week, Newsweek, Oct. 2, 2000, at 82 (viewing partial birth abortion as "killing an almost entirely delivered baby"). See, e.g., Senate Hearing, supra note 93, at 116 (statement of Helen M. Alvare, Esq.) ("No reasonable person can disagree, once he or she has read a description or seen an accurate drawing of the partial-birth abortion method: it is one-fifth abortion and four-fifths infanticide. It kills a child when 80 percent of his or her body is already outside the womb").
an exception to protect the life or health of the mother.\textsuperscript{176} It is argued in this section that, unless specifically provided, if an exception for the mother's health were included it would in essence negate the intended effect of the ban.\textsuperscript{177} For the past twenty-seven years, when faced with the question of how to define "health" the Court provided an extremely broad definition, essentially including all types of health conditions including physical, mental, and emotional ones.\textsuperscript{178} \textit{Doe v. Bolton}\textsuperscript{179} a companion case to \textit{Roe} involved a Georgia statute criminalizing abortion except in situations of rape, severe fetal defect or when the pregnancy would endanger the life or permanently injure the health of the mother.\textsuperscript{180} There the Court indicated that in making the best medical judgment, a physician may consider many factors all relating to health including: "physical, emotional, psychological, familial, and a woman's age."\textsuperscript{181}

\begin{itemize}
  \item \textsuperscript{176} See Planned Parenthood of Centr. N.J. v. Farmer, 220 F.3d 127, 135 (3d Cir. 2000) (citing \textit{Casey} at 878-879); see also Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337, 339 (4th Cir. 2000) (stating law requires health exception in order to validate post viability abortion regulation); Planned Parenthood v. Doyle, 162 F.3d 463, 479 (1998) (stating that state may proscribe abortion post viability, except when necessary to preserve health or life of mother).
  \item \textsuperscript{177} See Carhart v. Stenberg, 120 S. Ct. 2597, 2631 (2000). Justice Kennedy opined, in his dissenting opinion in \textit{Carhart}, that including an exception for the health of the mother would make the ban meaningless because Dr. Carhart exercises "appropriate medical judgment" when using the D&X procedure for "every patient in every procedure." \textit{Id.} He continues and says that "[t]his, of course, is the vice of a health exception resting in the physician's discretion." \textit{Id.; see also,} Scheckler, supra note 175, at A19 (stating that health exceptions to partial birth abortion bans "permit killing babies even after all of each baby is born except the top of his or her head");
  \item \textsuperscript{178} See United States v. Vuitch, 402 U.S. 62, 71-72 (1971) (construing D.C. statute, making abortion criminal unless necessary for preservation of health or life of the mother, to implicate both psychological as well as physical well-being, and thus holding that term "health" was not vague); see also Doe v. Bolton, 410 U.S. 179, 192 (1973) (stating that "medical judgment [with regard to performing abortions] may be exercised in the light of all factors - - physical, emotional, psychological. . ."); Women's Med. Prof'l Corp. v. Taft, 114 F. Supp 2d 664, 695 (S.D. Ohio 2000) (holding that state "cannot prohibit a woman from aborting a viable fetus to preserve her own psychological or emotional health. . ."); \textit{But see} Voinovich v. Women's Med. Prof'l Corp., 523 U.S. 1036, 1039 (1998) (stating, although holding that statute in \textit{Bolton} was not vague, because it included emotional and psychological considerations, it is not required under federal constitutional law that "mental health" exception be included in post viability abortion regulatory statutes).
  \item \textsuperscript{179} 410 U.S. 179 (1973).
  \item \textsuperscript{180} See id. at 202; see also Brian D. Wassom, \textit{The Exception that Swallowed the Rule? Women's Medical Professional Corporation v. Voinovich and the Mental Health Exception to PostViability Abortion Bans}, 49 CASE W. RES. L. REV. 799, 814 (1999) (discussing basis of the case); \textit{Privacy Law and the U.S. Supreme Court}, supra note 5 (discussing \textit{Doe}).
  \item \textsuperscript{181} See \textit{Doe}, 410 U.S. at 192 (articulating that this would free physician from "artificial constraints" on his medical judgment); see also Andrews, supra note 61, at 525 (noting holding of Court and relevant factors when determining health); Wassom, supra
Historically, some of the health reasons advanced to justify performing the D&X procedure include cleft lip, two vessel cord, not enough or too much fluid, and exposure to teratogen. In effect, requiring such a health exception “means that a doctor can perform a partial-birth abortion on a healthy baby of a healthy mother who may find the late-term pregnancy just too emotionally stressful.” If a mother experiences medical complications during the second trimester of her pregnancy, “what is required to save her life and protect her health is not the death of her baby, but separation of the baby from the mother.” Therefore, it is advanced that bans on partial birth abortions do serve to protect the health of the mother.

Alternatively, it has been advocated that partial-birth abortions are never medically necessary to preserve the health of the mother. It has been noted by the AMA and determined by physicians that maternal health factors necessitating that the pregnancy be terminated could be accommodated without

\[182\] See Bopp & Cook, supra note 38, at 10-11 (citing examples of health reasons from writings by late Dr. McMahon, who performed thousands of these procedure); see also Katherine Dowling, What Constitutes A Quality of Life?: Neither Treatable Conditions Nor Permanent Handicaps Mean People Can’t Live Useful, Happy Lives, L.A. TIMES, Aug. 28, 1996, at B9 (indicating reasons for performing partial birth abortion, most of which were surgically correctable and posed no harm to mother).

\[183\] See Dorinda C. Bordlee, Partial Birth: What Next?, CHRISTIANITY TODAY (Aug. 7, 2000); see also Rose Mims, It's What the People Want, ARK. DEMOCRAT-GAZETTE (Apr. 22, 1997) (illustrating President's proposal allowing for “health” exception, leading to abortions performed due to not just serious physical health, but mental health as well); Roger Myers, Panel Ponders Bill to Ban Partial-Birth Abortions Divisive Issue, TOPEKA CAPITAL J. (Mar. 9, 2000) (stating anti-abortion forces consider mental health exception loophole in law and arguing that Doctor in Kansas was using it in order to justify later-term abortions at his clinic).

\[184\] See Romer, supra note 36, at 60 (indicating separation of baby from mother is proper remedy, not abortion). But see Coreen Costello, Giving up My Baby, N.Y. TIMES, Nov. 29, 1995, at A23 (recounting author's longstanding opposition to abortion but then changing her view of procedure once actually performed on her in her seventh month in surprisingly gentle and compassionate way).

\[185\] See e.g., Gerald R. McDermott, Editorial, Abortion Ruling May Itself Prove Unconstitutional; Roe vs. Wade Notes a Compelling State Interest When a Fetus Is Viable, ROANOKE TIMES & WORLD NEWS, at A15, (July 28, 1999) (quoting C. Everett Koop, former Surgeon General, along with 300 other physicians who work in obstetrics as saying that partial birth abortion is never medically necessary to protect mother's health); see also, Massie, supra note 92, at 367 (providing testimony offered to House Judiciary Subcommittee of Dr. Pamela Smith, Director of Medical Education at Mt. Sinai asserting that she never came across case where it was medically necessary to use this method to save life of mother and even if there was case where woman encountered an emergency in second trimester requiring baby to be removed, no doctor would employ this method as it takes three days – which could pose greater health risk. But see Costello, supra note 184 (illustrating example where partial-birth abortion was indeed medically necessary).
sacrificing the fetus or jeopardizing the health of the mother.\textsuperscript{186} Moreover, a majority of the patients obtaining this procedure do not have significant medical problems and there is evidence showing that partial-birth abortions are performed on healthy woman and healthy babies.\textsuperscript{187} Furthermore, Dr. Haskell, whose paper on this procedure sparked the debate, indicated that "an overwhelming number of his partial-birth abortions were elective."\textsuperscript{188} Among some of the "medical reasons" that were cited for performing this procedure was agoraphobia, fear of open places.\textsuperscript{189} The AMA argues that even when pregnancy is

\textsuperscript{186} See Romer, supra note 38, at 58 (discussing ways pregnancy could be terminate without sacrifice of fetus); Sprang & Neerhof, supra note 67, at 745 (argument advanced for ending pregnancy through delivery is substantiated by high likelihood of fetal survival beyond periviable period); see also W.M. Hern, Outpatient Abortion for Fetal Anamoly and Fetal Death from 15-34 Menstrual Weeks' Gestation: Techniques and Clinical Management, 81 OBSTETRICS AND GYNOCOLOGY 301-306 (Feb. 1993) (describing example of alternative procedure to D&X which causes death to fetus while still in uterus, thus resulting in the delivery of an intact fetus).

\textsuperscript{187} See Testimony of Dr. Cook, supra note 43, at 66 (noting that 10% of procedures performed by Dr. Mahon were for maternal indications, with ill-defined reasons such as depression, drug exposure of spouse and youth, while Dr. Haskell claimed that 80% were purely elective and not because of fetal abnormalities); The Partial Birth Abortion Ban Act of 1995: Hearing on H.R.1833 before the Senate Comm. on the Judiciary, 104th Cong. (1995) [hereinafter Hearing on H.R. 1833] (including testimony by Nancy G. Romer, M.D., who said three of her patients in good health with normal fetuses, who were well beyond fifth month, went to Dr. Haskell's clinic for abortions); see also Dianne M. Gianelli, Medicine Adds to Debate on Late-Term Abortion, AM. MED. NEWS, (Mar. 3, 1997) (noting Fitzsimmons explained there was no popular support for procedure). This article also explains that interviews with doctors published in the American Medical News, The Washington Post and The Record (Bergen County, N.J.) had all revealed that thousands of procedures were done each year, the majority on healthy fetuses and healthy women. In The Record one doctor explained: "Most are Medicaid patients . . . and most are for elective, not medical reasons: people who didn't realize, or didn't care, how far along they were." Id; Sprang & Neerhof, supra note 67, at 744. (including statement made by Ron Fitzsimmons, Executive Director of National Coalition of Abortion Providers, in 1995 that these procedures were only performed in extreme circumstances of life endangerment or fetal anomaly and he later retracted this statement admitting vast majority of these procedures were performed on healthy mothers and fetuses and not in response to any extreme medical condition).

\textsuperscript{188} Dr. Martin Haskell, Dilation and Extraction for Late Second Trimester Abortion, (presenting paper at National Abortion Federation Risk Management Seminar in Dallas, Tx.)(Sept. 13, 1992) reprinted at http://members.aol.com/MoCatholic/pbi/haskell.html; see also Bopp & Cook, supra note 38, at 9 (quoting doctor as saying that most of his abortions are elective in 20-24 week range, with 20% for genetic reasons and other 805 for purely elective reasons and that in 1995 lawsuit he testified that women came to him seeking abortions for many reasons, "some medical and some not so medical"); Laura Hirschfeld, Creating 'Aura of Re'gion around a Practice of Death', DETROIT NEWS, Apr. 17, 1996 (quoting Dr. Haskell as stating eighty percent of partial birth abortions he did were purely elective).

\textsuperscript{189} See Bopp & Cook, supra note 38, at 9; see also Bob Modic, Judge Vows Quick Decision on Abortion Law, DAYTON DAILY NEWS, Sept. 13, 2000, at 3B (reporting that Dr. Haskell testified that he had performed 2,000 procedures without complication). See generally Haskell, supra note 188 (describing procedure and when it is used).
terminated because of these abnormalities, it should be done in the most "humane" way, therefore D&X should not be the method used.190 A fetus that is handicapped or malformed poses neither a health risk to the mother nor a threat to her life or future reproduction.191 Therefore, with the broad "health" exception a woman may justify choosing a partial-birth abortion merely because the pregnancy presented an emotional health risk to her.192 The late Dr. McMahon, issued a report detailing more than 2000 partial-birth abortions of which 9% were performed for "maternal indications," such as depression, and 56% were done for "fetal indications," many of which were not fatal.193 In essence, a health exception would pave the road for women to freely abort their babies for any medical reason.194

190 See Sprang & Neerhof, supra note 67; see also Court Turned Back on Abortion Evidence, Editorial, COLUMBUS DISPATCH, July 22, 2000, at 13A (indicating AMA stated partial-birth abortion is "not good medicine"); The 43rd President; Upclose, N.Y. TIMES, Dec. 23, 2000, at A9 (indicating stance of AMA that partial birth abortions are never medically necessary).

191 See Romer, supra note 38, at 60 (discussing absence of health risk when fetus is malformed or handicapped). See generally David Stoller, Prenatal Genetic Screening: The Enigma of Selective Abortion, 12 J.L. & HEALTH 121, 136-137 (1997/1998) (discussing abortion statutes in relation to health of fetus and mother). But see Patricia Apodaca, The Politics of Heartbreak; Three Women - Concerned about Their Health and Fatal Birth Defects - Made the Painful Decision to End Late-Term Pregnancies. Now They Work to Keep That Option for other Women, L.A. TIMES, May 7, 1996, at E1 (indicating worsening condition of malformed fetuses' increased risk to mothers' health and future fertility); Marc Dall'era, Letters to the Editor, S.F. CHRONICLE, Aug. 23, 1996, at A28 (indicating carrying malformed fetus to term poses serious health risk to mother); Public Pulse, Editorial, OMAHA WORLD HERALD, May 1, 1996, at 26 (stating when fetus is malformed dangers such as health problems and preventing future pregnancies exist with respect to mother).

192 See Elliott, supra note 69, at 1102 (stating that Sixth Circuit in Voinovich decided that women should be allowed to have abortions for severe emotional harm); see also Goodman, supra note 59, at 641-42 (indicating Congress did not include "health" in proposed legislation because as interpreted it would negate intended effect of ban to protect lives of late-term babies); David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act, 30 CONN. L. REV. 59, 116 n.16 (forwarding statement of Rep. Canady that many late term abortions are for emotional reasons); LaShunda R. Lowe, An Inside Look at Partial Birth Abortion, 24 THUR. MAR. L. REV. 327, 338 (1999) (stating under Clinton's proposal to include "health" in ban woman could get abortion if "depressed").

193 See Romer, supra note 38, at 60; see also Paul LaChine, Editorial, Refuting the Lies about Partial Birth Abortion, INDIANAPOLIS STAR, June 4, 2000, at D03 (finding one-third of 2000 partial-birth abortions performed were for purely elective reasons). See generally Apodaca, supra note 191 (stating Dr. McMahon used this procedure in cases where fetal anomalies were not conducive to life).

194 See Goodman, supra note 59, at 641 (listing factors included in health). See generally Lowe, supra note 192, at 338 (stating health exception is interpreted broad enough to include almost anything); Wassom, supra note 180, at 309-10 (discussing health exception in Voinovich); Padraig P. Flanagan, Note, Banning Partial Birth Abortions: A Few Inches Away from Testing Post-Viability Jurisprudence, 23 SETON HALL LEGIS. J. 141, 175 (1998) (indicating that courts consider age and emotional well-being as factors).
V. THE FUTURE OF THE ABORTION DEBATE AFTER THE 5-4 DECISION IN STENBERG V. CARHART AND IN LIGHT OF THE PAST PRESIDENTIAL ELECTION

A. The Supreme Court Decision and the Likelihood of Change

As indicated above, the ban at issue in Stenberg was held unconstitutional by a narrow 5-4 vote. One of the most surprising opinions was the dissenting one issued by Justice Kennedy who has historically been a supporter of the abortion right. This narrow decision has put many abortion-rights advocates on guard because it demonstrates the frailty of the right to choose and it gives President Bush the opportunity to appoint two if not three new Justices, which could result in overturning Roe and Casey. According to NARAL’s legal department, the likelihood of that happening will depend on three factors: (1) Bush must be able to appoint at least two justices to overstep the current 6-3 split favoring Roe and Casey; (2) the appointees must replace existing pro-choice

195 See Mulvihill, supra note 119 (indicating June decision in Stenberg was narrow one); see also Cannon, supra note 122 (indicating win for abortion rights was narrow one); U.S. Supreme Court, supra note 44 (indicating decision was 5-4 vote). See generally Stenberg v. Carhart, 120 S. Ct. 2597, 2604 (2000) (giving statement of Court indicating recognition of well-established principles).

196 See Savage, supra note 118 (noting that Justice Kennedy who had voted for abortion in 1992 opposed ruling and wrote dissent pronouncing procedure “abhorrent”). See also Michael Kramer, Bush Win No Threat to Abortion, DAILY NEWS, Nov. 5, 2000, at 6 (stating Justice Kennedy is one who has refused to overturn Roe); Neil A. Lewis, Presidential Candidates Differ Sharply on Judges They Would Appoint to Top Courts, N.Y. TIMES, Oct. 8, 2000, at 28 (indicating Kennedy, liberal, sided with conservative minority in Carhart decision).

197 See Cannon, supra note 122; Mulvihill, supra note 119 (indicating belief of experts that closeness of vote is indicator that new appointees could swing future abortion decisions); see also Richard L. Berke, The 2000 Campaign: The Overview: Bush and Gore Stake Out Differences in First Debate, Oct. 4, 2000, 1A (reporting Vice President Al Gore warned that Governor George W. Bush would choose justices who would overturn Roe v. Wade); President Clinton, Remarks by President at People for the American Way Reception, (Oct. 24, 2000) (Federal Dept. and Agency Documents) (stating that next president would appoint two Supreme Court Justices and that Roe is just one or two votes away from being reversed). See generally Tony Mauro, Clinton: High Court at Stake, LEGAL TIMES, Oct. 30, 2000, at 10 (commenting that it was unusual for President to bring Supreme Court into prominence as election issue).

198 See MEMORANDUM FROM NARAL LEGAL DEPT TO INTERESTED PERSONS (Feb. 22, 2000), available at http://www.naral.org/mediaresources/fact/presidency.html. It is highly probable that the next president will get to elect at least two Justices because since 1869 when the number of Justices was fixed at nine seventy Justices were appointed to the Supreme Court by twenty-five Presidents, averaging 2.8 Justices per President. Id.; see also Jeffrey Rosen, The Next Court, N.Y. TIMES, Oct. 22, 2000, at 6 (labeling Stevens and O’Connor as pro-Roe justices); Privacy Law and the U.S. Supreme Court, supra note 5
Justices; he must appoint and the Senate must confirm appointment of Justices who would overturn Roe and Casey. Most likely, because President George W. Bush, a pro-lifer, has been elected these factors will occur. Currently, the Supreme Court consists of three blocks of Justices, categorized by each Justice's view on abortion. The anti-choice Justices who would most likely overturn Roe are Chief Justices Renquist, Scalia, and Thomas. The Justices who favor the Casey "undue burden" approach are Justices O'Connor, Kennedy, and Souter. The

(indicating Justices Kennedy, Souter, and O'Connor were responsible for replacing strict scrutiny standard with undue burden test).

See NARAL, supra note 198; see also Lewis, supra note 196 (discussing historical stances of justices); Kramer, supra note 196 (discussing justices who have refused to overturn Roe).

See NARAL, supra note 198 (noting there are 32 pro-choice Senators, some of which have announced they will not seek re-election); see also David G. Savage, Supreme Stumpers: The Next President could Reshape the Court and the Legal Arena, A.B.A. J., Oct. 2000, at 28 (indicating next president will face Republican-controlled Senate and Judiciary Committee chaired by Orrin Hatch; Bush would probably be free to appoint conservatives whereas Gore's choices might be limited). But see Scott Canon, Balance of High Court May Hinge on Election, KAN. CITY STAR, Oct. 30, 2000, at A1 (noting Gore will try to appoint liberal Justices modeled after Brennan and Marshall).

See Barbara Brotman, The Big "Ifs; If Bush Wins. . . If Gore Wins. . .; Activists on Both Sides Say the Next President Could Change the Course of the Supreme Court on Abortion Issues, CHI. TRIB., Sept. 20, 2000, at 1 (stating appointment of Supreme Court Justices by pro-life president could change balance of Court); see also Carl P. Leubsdorf, Jackson Leads Charge on Bush Attack Against GOP Serves to Ignite, Unite, DALLAS MORNING NEWS, Aug. 16, 2000, at 1A (opining if Bush has opportunity he will appoint Justices who will overturn Roe). See generally, Richard L. Hasen, Bush's Case Is a Real Test for Scalia's Philosophy, L.A. TIMES, Nov. 27, 2000, at 7B (stating Bush is likely to appoint Justices such as Scalia, a strict constructionist); Steven Walters, Gore Would Keep Abortion Legal, His Daughter Tells UW Students, MILWAUKEE J. SENT., Sept. 20, 2000, at 02B (indicating next president will appoint three or four new Justices). But see, Rosen, supra note 198 (refuting possibility President will have opportunity to appoint new justices).

See NARAL, supra note 198 (providing members of each block); see also Matt Kelley & Jake Thompson, Abortion Ban Struck Down Nebraska Officials Vow to Try Again Abortion: How the Supreme Court Ruled Some other Major Supreme Court Cases on Abortion, Nebraska Case on 'Partial-Birth' Abortion, OMAHA WORLD-HERALD, June 8, 2000, at 1 (indicating Justice and respective stance on abortion issue); Rosen, supra note 198 (stating there are currently three justices who believe Roe should be overruled). See generally, Bob Dart, Struggle Turns Calmer before Supreme Court Custom Will Calm the Electoral Circus, ATLANTA J. AND CONST., Nov. 30, 2000, at 16A (labeling each justice as liberal, moderate or strict).

See Rosen, supra note 198, at 74 (stating only three justices believe that Roe should be overruled); see also Lyle Denniston, Bush vs. Gore and Roe vs. Wade, BALT. SUN, Oct. 30, 2000, at 1A (discussing Scalia's and Thomas's opposition to Roe); John Whitesides, Nader Sees Big Parties 'Morphing', SUN-SENTINEL (Fl. Lauderdale), Oct 30, 2000, at 6A (noting Bush's appointments may swing court to overturn Roe).

See NARAL, supra note 198 (stating these three justices would not vote to overturn Roe and would continue to apply undue burden test announced in Casey). See generally Kramer, supra note 196 (stating justices Kennedy, O'Connor, and Souter who were appointed by Reagan and Bush have refused to overturn Roe); Lewis, supra note 196 (stating Kennedy usually sides with O'Connor and liberal bloc favoring abortion rights);
Pro-Roe Justices are Justices Stevens, Ginsberg, and Breyer.\textsuperscript{205} As of January 2001, the ages of the Justices are as follows: Stevens 80, Renquist 76, O'Connor 70, Ginsburg 67, Scalia 64, Kennedy 64, Breyer 62, Souter 61, and Thomas 52.\textsuperscript{206} If the three oldest Justices, who are either Roe or Casey supporters, retired, the President could appoint three anti-choice Justices who would join Scalia and Thomas.\textsuperscript{207}

In the 2000 presidential election, President, Republican George W. Bush and former Vice President, Democrat Al Gore, clashed over the judicial philosophy they would seek when appointing candidates to the Supreme Court, both assuring they would not use the abortion issue as a "litmus test."\textsuperscript{208} Bush, most likely to appoint strict constructionist, conservatives to the bench, stated the Justices he most admired were Justices Scalia and Thomas, both of whom are viewed as the most resolute conservatives and "reliable foes of court rulings extending abortion rights."\textsuperscript{209} Now
in office, likely picks for Bush include Judge J. Michael Luttig of the Fourth Circuit; Judge Emilio Garza of the Fifth Circuit; Judge Samuel A. Alito of the Third Circuit; and Chief Judge J. Harvie Wilkinson of the Fourth Circuit. When commenting on the Court’s decision in Carhart, Bush, who was disappointed by the decision, stated he would fight for and sign a ban on partial-birth abortion, which was twice vetoed by former President Clinton. With Bush as president, there could be significant changes in the development of abortion jurisprudence.

CONCLUSION

A woman’s right to terminate her pregnancy has been established and found to be part of her right to privacy. For the first time in 8 years, the Court had the opportunity to revisit the abortion issue in context of the Nebraska statute seeking to ban partial-birth abortions. This ban was ultimately held unconstitutional because it failed to contain an exception for the mother’s health and it posed an undue burden on a woman’s right to obtain an abortion. The intention of the Court was not to touch or effect the decision in Roe. The partial birth procedure, medically referred to as “intact D&X,” is an extremely inhumane procedure, which involves killing a partially delivered fetus that is minutes away from being fully born. First, this note has argued that banning such a procedure does not pose an undue burden on the mother to terminate her pregnancy because there are many safer alternatives still available to her. Banning this one procedure, which is both unsafe and unnecessary, will not implicate a woman’s right. No medical evidence exists showing that this is the safest method during late-term pregnancy nor is

*Sharply Divided over Issues in Abortion Debate, MILWAUKEE J. SENTINEL, Oct. 11, 2000, at 01A (indicating Bush’s pledge that his appointees will be strict constructionists).*

210 See Savage, supra note 200 (setting forth likely candidates for Bush); see also Rosen, supra note 198 (discussing visit with Luttig, one of Bush’s likely picks to appoint to U.S. Supreme Court). See generally Lars-Erik Nelson, *Vote Results Could Put U.S. to Test, DAILY NEWS, Nov. 5, 2000, at 4* (indicating probability of Bush appointing pro-life judges to Supreme Court); Skiba, supra note 209 (indicating Bush’s pledge that his appointees will be strict constructionists).

211 See David S. Broder, Op-Ed, *Gore Means Gridlock, WASH. POST, Oct. 22, 2000, at 807* (describing Bush did acknowledge that “[a]bortion is not going to be outlawed until a lot of minds are changed”); Michael Griffin, *Dramatic Differences, ORLANDO SENTINEL TRIB., Oct. 29, 2000, at G1* (saying Bush would have signed the bill Clinton vetoed because of his position on banning partial-birth abortions); Neal, supra note 208, at 41 (noting Bush’s pledge to sign ban vetoed by Clinton).
it ever medically necessary to save the mother’s life. Second, insisting on a health exception could prove fatal to the intended goal of the ban unless the ban provides for specific physical health conditions. Health has been interpreted to include many things and this could lead to a doctor justifying these procedures for anything, including depression. Third, in enacting such a ban, states have many legitimate interests, which could substantiate the ban. States have an interest in protecting the life of the mother; protecting the potential life of the fetus; protecting the fetus from undue cruelty; and ensuring a distinct line is drawn between abortions and infanticide.