Dismantling *Roe* Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003

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Introduction

Carrie was happily married for nine years when she became pregnant.¹ During her second trimester, she received test results confirming her baby had Cat Eye Syndrome in every cell of her body and that her kidneys were starting to malfunction.² Carrie and her husband made the best decision they could with the information they had.³ Carrie explains, “We wanted her. But we didn’t want to condemn her to [a] life of agony.”⁴

Women typically seek second trimester abortions for three reasons.⁵ First, medical tests for certain grave conditions and disorders cannot be administered until well into the second trimester.⁶ Upon

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² Id. “Cat Eye syndrome typically results in the grotesque malformation of a fetus’s skull and facial features. Additional conditions associated with the chromosomal disorder include malformations of the heart, kidneys, and intestinal and anal systems.” Id. at 7.
³ Id. at 10.
⁴ Id.
⁵ Id. at 2, 11, 13. See generally Centers for Disease Control and Prevention, Abortion Surveillance - United States (2003), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5511a1.htm. “The gestational age at which an abortion is obtained can be influenced by multiple factors including level of education, availability and accessibility of abortion services, timing of confirmation of pregnancy, timing of personal decision-making, timing of prenatal diagnosis, fear of discovery of pregnancy, and denial of pregnancy.” Id.
hearing that their child is unlikely to survive labor or will be condemned to a life of pain, some women, like Carrie, choose to terminate the pregnancy.\(^7\)

Second, women may choose a second trimester abortion if the pregnancy imperils their health.\(^8\) For these women, the abortion will likely preserve their ability to have healthy children in the future.\(^9\) For example, during Sara's pregnancy she had early onset preeclampsia, a "condition where a woman's blood pressure becomes seriously elevated," which caused a great risk of stroke or seizure.\(^10\) She also had a condition where the placenta blocked the birth canal, and the placenta was so "abnormally massive" that if the pregnancy spontaneously naturally ended, there was a great chance she would suffer massive hemorrhaging.\(^11\) Sara said, "My child was dying and I was really sick."\(^12\) Her doctor recommended a dilation and extraction ("D&E") abortion which she had on the same afternoon.\(^13\)

Third, women face second trimester abortions when they have been unable to access medical care because of financial, geographical, or other obstacles.\(^14\) In some cases, some women do not realize for several months that they are pregnant.\(^15\) One woman explained that she was unemployed and had no health insurance.\(^16\) She was struggling to support herself and to take care of her immediate needs; her health was secondary.\(^17\) Additionally, it was normal for her to go for extended periods of time without menstruating.\(^18\) As a result, she did

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1610 (2007) (No. 05-1382). "Amniocentesis is the most common and accurate prenatal test used to diagnose serious birth defects. It is generally not available before the fifteenth week of pregnancy." Id. at 6–7 n.11.

7. Id. at 10.
8. Id. at 13.
9. Id. at 16.
10. Id. at 14–15.
11. See id. at 15.
12. Id.
13. Id. D&E is the "usual" abortion method used in the second trimester. Gonzales v. Carhart, 127 S. Ct. 1610, 1620 (2007). During a D&E procedure, "[a] doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus." Id. Next, "[a]fter sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the women's cervix . . . to grab the fetus." Id. The doctor may make "10 to 15 passes with the forceps" until the fetus is entirely removed. Id.
15. Id. at 20–21.
16. Id. at 20.
17. Id.
18. Id. at 20–21.
not find out she was pregnant until her second trimester.\textsuperscript{19} Because of these and other reasons, she obtained an intact dilation and extraction ("D&X") abortion.\textsuperscript{20} Today, the Federal Partial-Birth Abortion Ban Act of 2003 (the "federal ban" or "ban") prohibits this procedure.\textsuperscript{21}

One cannot overstate the problem of limited access to abortion providers. Eighty-six percent of all counties in the United States have no abortion provider.\textsuperscript{22} By 2000, the declining number of providers meant that one-third of American women between the ages of fifteen and forty-four lived in counties without abortion services.\textsuperscript{23} Therefore, many women must travel long distances to find a physician; for example, in 2000, one in four women traveled more than fifty miles to obtain an abortion.\textsuperscript{24} State-mandated waiting periods impose an additional obstacle and add to the delay.\textsuperscript{25} Between health complications and barriers to accessing abortion services, women often face the decision to abort during the second trimester for reasons out of their control.

On April 18, 2007, the Supreme Court dramatically changed its course on abortion jurisprudence by upholding the federal ban in \textit{Gonzales v. Carhart}.\textsuperscript{26} The ban outlaws at least one safe method of second-trimester abortions and introduces Congress's (and any state legislature's) new authority to define a woman's right to reproductive health.\textsuperscript{27}

In 2000, the Court affirmed the constitutional requirement that laws restricting abortion contain a health exception.\textsuperscript{28} Seven years

\textsuperscript{19. \textit{Id.}}
\textsuperscript{20. \textit{Id.} at 21 n.7. The D&X procedure involves removing the fetus in an intact condition rather than dismembering it in the uterus. The D&E and D&X methods are both used to terminate pregnancies beginning at about twelve weeks, after the fetus has grown too big to be removed by the suction method commonly used in the first trimester, when eighty-five percent to ninety percent of all abortions take place. Linda Greenhouse, \textit{In Reversal of Course, Justices, 5--4, Back Ban on Abortion Method}, N.Y. TIMES, Apr. 19, 2007, at A1.}
\textsuperscript{21. 18 U.S.C. § 1531 (Supp. IV 2006).}
\textsuperscript{22. Lawrence B. Finer & Stanley K. Henshaw, \textsc{Guttmacher Institute, After Three Decades of Legal Abortion, New Research Documents Declines in Rates, Numbers and Access to Abortion Services}, at 6 (Jan./Feb. 2003).}
\textsuperscript{23. \textit{Id.} at 11.}
\textsuperscript{24. \textit{Id.}}
\textsuperscript{26. 127 S. Ct. 1610 (2007).}
\textsuperscript{27. \textit{See 18 U.S.C. § 1531 (Supp. IV 2006); Carhart, 127 S. Ct. at 1637.}}
\textsuperscript{28. Stenberg v. Carhart, 530, U.S. 914 (2000).}
later, with blatant disregard for the previous decision, a new Court reversed direction, approving Congress's conclusion that a health exception is not necessary for the federal ban.29 The ban imposes criminal sanctions on doctors who perform the prohibited procedures regardless of the doctor's professional medical judgment about what is best for the health of his or her patient.30 Prior to the Court's decision, lower court rulings blocked the ban from taking effect.31

Under the current Supreme Court precedent governing abortion restrictions, the "undue burden test," a state regulation with the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus violates the Constitution.32 Most legal challenges to restrictions on abortions have exclusively sought to demonstrate that the challenged restriction has an improper effect on women's access to abortion.33 Experience has shown that demonstrating improper effect is an arduous burden because it is a highly fact-sensitive inquiry.34 However, relying on the purpose prong of the undue burden test is a relatively clear-cut method to prove the unconstitutional character of a law.35

Evidence of improper purpose is likely available pre-implementation of a law, whereas proof of improper effect might not be.36 Judicial reliance on the purpose prong would deter legislative overreaching by invalidating laws clearly outside constitutional limits.37 Analysis of purpose reveals the big picture and shows what Congress truly meant to accomplish with the law. In the abortion context, it enables judges to avoid the difficult task of sifting through complex medical data and answering unanswerable questions, such as when life begins. Reliance on the purpose prong is particularly important because behind Congress's medical findings lies a calculated and uncon-

29. Carhart, 127 S. Ct. at 1637.
34. See id. at 377.
35. See id.
36. Id.
stitutional intent to pass the federal ban as a stepping stone to overturn *Roe v. Wade*.\textsuperscript{38}

This Note focuses on the purpose prong of the undue burden test and argues that the federal ban is unconstitutional because its only purpose is to impose an undue burden on a woman’s right to seek an abortion.\textsuperscript{39} The federal ban’s purpose is to dismantle the analytical framework for evaluating abortion regulations that the Supreme Court established in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.\textsuperscript{40} Yet, in *Gonzales v. Carhart*, the majority turned its head and ignored the ban’s glaring illegal purpose.\textsuperscript{41} The ban’s legislative history, the plain language of the statute, and the insincerity of the government’s alleged interests all clearly illustrate this illegal purpose. Opposite upholding the ban, the Court should have struck it down entirely because its purpose is to lay the foundation for overturning *Roe*.

While the Court recognizes that the state has a legitimate interest from the outset of pregnancy in protecting the health and life of the woman and the potentiality of life,\textsuperscript{42} banning certain methods of abortion does not advance these interests. The ban prohibits women from receiving particular types of abortion procedures, forcing doctors to use riskier procedures to avoid criminal liability only to obtain the same outcome.\textsuperscript{43}

Because the result is unchanged—the fetus is aborted with or without the ban—the state’s alleged interest in the life of the fetus is illusory. Yet the effect of the ban is worse because the health of the woman is compromised, thereby failing to advance the interest in wo-

\begin{itemize}
\item \textsuperscript{40} 505 U.S. 833.
\item \textsuperscript{41} See Gonzales v. Carhart, 127 S. Ct. 1610, 1627 (2007). The majority took the federal ban at face value, refusing to look beyond the text of the law. "A straightforward reading of the [federal ban’s] text demonstrates its purpose and the scope of its provisions: It regulates and proscribes . . . performing the intact D&E procedure." Id.
\item \textsuperscript{42} Casey, 505 U.S. at 834.
\item \textsuperscript{43} "Substantial record evidence shows the intact D&E procedure that the Act forbids is essential if women and their doctors are to have access to the safest means of terminating a pregnancy after the first trimester." Brief of the National Women’s Law Center et al. as Amici Curiae Supporting Respondents at 7, Gonzales v. Planned Parenthood Fed’n of Am., 127 S. Ct. 1610 (2007) (No. 05-1382) [hereinafter Brief of the National Women’s Law Center].
\end{itemize}
men's health.\textsuperscript{44} By legislating under the guise of legitimate state interests, Congress uses preservation of women's health and the potentiality of life as pretext to accomplish indirectly what the Supreme Court in \textit{Roe} and \textit{Casey} would not allow it to accomplish directly.\textsuperscript{45} In \textit{Gonzales v. Carhart}, the Supreme Court should have struck down the federal ban as unconstitutional because it promotes an illegal purpose—Congress's sole purpose in passing the law was the demise of women's reproductive freedom.

Part I of this Note describes the federal ban and includes a brief discussion of Congress's medical findings. Part II describes the landmark cases in abortion jurisprudence and the development of the undue burden test, focusing on the Court's treatment of the purpose prong. Part III presents \textit{Gonzales v. Carhart} and the procedural history of the two cases heard before the Supreme Court. Part IV applies the purpose prong of the undue burden test to the federal ban. It analyzes the law's legislative history and plain language, and it examines the truth behind the government's alleged interests in passing the ban. This analysis leads to the conclusion that the Court should have invalidated the federal ban because it has an unconstitutional purpose.


Since 1995, anti-choice groups have waged a political campaign to eliminate the right to particular abortion procedures as part of their movement to overturn \textit{Roe}.\textsuperscript{46} The National Right to Life Com-

\textsuperscript{44} Precluding women from obtaining intact D&Es endangers their health and intrudes on their most personal family decisions, with life-long adverse consequences. For example, a woman who suffers from hemorrhage or infection from a perforated uterus or lacerated cervix—because the intact procedure most likely to avoid those complications was outlawed—could face hospitalization and surgery, including a possible hysterectomy. \textit{Id.} at 13.


"Intelligent scrutiny reveals that most of this legislative activity has been little more than an attempt to use doctrinal loopholes of \textit{Roe} and \textit{Casey} to accomplish indirectly what \textit{Roe} and \textit{Casey} purportedly prevent the states from accomplishing directly—severely limiting, even prohibiting, a woman's exercise of a right of choice within the framework of a broader right of reproductive autonomy." \textit{Id.} at 212.

mittee coined the term "partial-birth" abortion as an inflammatory way to refer to the procedure medically known as intact dilation and extraction.47 "Partial-birth" is not a medical term and cannot be found in any medical textbook.48 The title of the federal statute thus uses political terms created to aid anti-abortion advocates in their crusade against Roe.49

The federal ban is the first ever federal law criminalizing an abortion procedure, and it was the subject of the litigation in Gonzales v. Carhart.50 The federal ban prohibits any physician from "knowingly perform[ing] a partial-birth abortion and thereby kill[ing] a human fetus."51

The drafters of the ban intentionally excluded a health exception,52 even though the Supreme Court expressly required a health exception in Stenberg v. Carhart.53 There is a critical difference between a life exception and a health exception; both are required by the Supreme Court when the government regulates abortion.54 Casey held that subsequent to viability, the state may regulate or even prescribe abortion, except "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."55

The federal ban contains a life exception: "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical ill-

49. "‘Partial-birth abortion’ is a fabricated term that anti-choice activists concocted in an attempt to make almost all abortions illegal.” CENTER FOR REPRODUCTIVE RIGHTS, supra note 46, at 10.
50. Brief of the National Women’s Law Center, supra note 43, at 4 n.2.
52. See id.
53. Stenberg, 530 U.S. at 914.
55. Id.
ness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.\textsuperscript{56}

However, the ban does not include a health exception.\textsuperscript{57} In Doe v. Bolton,\textsuperscript{58} Roe's companion case, the Court clarified that "health" must be defined broadly to include both physical and mental well-being.\textsuperscript{59} The Court said that "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health."\textsuperscript{60} Such concern for women's health is absent from the federal ban.

Congress concluded that "partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives."\textsuperscript{61} In direct contradiction to Congress's opinion, the American College of Obstetricians and Gynecologists (representing approximately ninety percent of all board-certified obstetricians and gynecologists) stated that the abortion procedures targeted by the ban are necessary alternatives for physicians to use in certain circumstances to prevent serious harm to women.\textsuperscript{62}

As defined by Congress, "partial-birth abortion" is when a physician "deliberately and intentionally vaginally delivers a living fetus, until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of the breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus . . . ."\textsuperscript{63} Attorney

\begin{enumerate}
\item 18 U.S.C. § 1531(a).
\item See 18 U.S.C. § 1531.
\item 410 U.S. 179 (1973).
\item Id. at 192.
\item Id.
\item Brief of the American College of Obstetricians and Gynecologists as Amici Curiae Supporting Respondents at 1, 10–17, Gonzales v. Planned Parenthood Fed'n of Am., 127 S. Ct. 1610 (2007) (No. 05-1382) [hereinafter Brief of the American College of Obstetricians and Gynecologists]. "Among D&E procedures, those in which the fetus is delivered intact, or relatively intact, offer potentially significant health advantages . . . . The intact approach reduces the risk of the most severe complications of D&Es involving dismemberment by minimizing instrumentation and reducing the chances of retained fetal tissue." Id. at 10–11. The brief also states that intact D&E is the safest procedure available for women with certain medical conditions. Id. at 13.
\end{enumerate}
General Alberto R. Gonzales stated that the ban prohibits a "late-term abortion procedure known interchangeably as dilation and extraction (D&X) or intact dilation and evacuation (intact D&E), in which a physician partially delivers the fetus intact (i.e., without first dismembering it) and then kills the fetus, typically by puncturing its skull and vacuuming out its brain." Any physician who violates the law will be fined and imprisoned for up to two years.

The congressional findings section of the statute begins by stating that: "A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." The findings section does not elaborate further on the alleged moral and ethical consensus, though, notably, the Supreme Court relied heavily on morality in its decision to uphold the ban. The Court held that the ban is a legitimate exercise of the government's interest in promoting fetal life because, “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.” The ban protects the mental and moral health of women because, the majority claims, "some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow."

The findings section includes several paragraphs discussing the legislative hearings that led Congress to conclude that intact D&E is never medically necessary. It states: "substantial evidence . . . demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care." The congressional findings supporting the federal ban

64. Petition for a Writ of Certiorari at 2, Gonzales v. Planned Parenthood Fed’n of Am., 127 S. Ct. 1610 (No. 05-1382).
66. § 2(1), 117 Stat. at 1201 (codified at 18 U.S.C. § 1531 note 1). Moral opposition to a medical procedure is not (or, at least, was not) a permissible ground for upholding legislation. In Lawrence v. Texas, 539 U.S. 558 (2003), Justice Kennedy said, “‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” Id. at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)). In Casey, the Court explained that whether or not a State views a practice as “immoral” is “not a sufficient reason for upholding a law prohibiting the practice.” Casey, 505 U.S. at 850.
68. Id. at 1634.
69. Id. The Court conceded that it actually had “no reliable data to measure [this] phenomenon. . . .” Id.
did not withstand inspection by the lower courts; however, the Supreme Court accepted them.  

The drafters anticipated the struggle over the appropriate deference the Court should give to Congress's factual findings, as the findings section boldly declares that Congress's findings of fact supersede those of the judiciary. This argument is contrary to the recent Supreme Court decision in United States v. Morrison. However, judicial deference to congressional fact-finding is beyond the scope of this Note.

II. Landmark Cases in Abortion Jurisprudence and the Development of the Undue Burden Test

Since Roe in 1973, Congress and the Supreme Court have struggled to define a woman's right to abortion. Roe represents the high-water mark for protection of abortion rights. Casey altered key aspects of Roe when the Court announced a new test to replace Roe's strict scrutiny test. The Casey test is by its plain terms a disjunctive test that entails review of either the law's effect or its purpose.

72. See Carhart, 127 S. Ct. at 1643 (Ginsburg, J., dissenting); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 482 (S.D.N.Y. 2004) ("Congress did not . . . carefully consider the evidence before arriving at its findings."); Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d. Cir. 2006); see also Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004) ("[N]one of the six physicians who testified before Congress had ever performed an intact D&E. Several did not provide abortion services at all, and one was not even an obgyn . . . . [T]he oral testimony before Congress was not only unbalanced, but intentionally polemic."); Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1011 (D. Neb. 2004) ("Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experiences with surgical abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures."); aff'd, 413 F.3d 791 (8th Cir. 2005).

73. § 2(8), 117 Stat. at 1202 (codified at 18 U.S.C. § 1531 note 8).
74. 529 U.S. 598 (2000). In United States v. Morrison, the Supreme Court emphasized that the powers of the legislature are limited. See id. at 608. The Court explicitly indicated that the judiciary does not have to defer to congressional findings. See id. at 614.
76. See id.
78. Harvard Law Review Ass'n, supra note 37, at 2566.
79. Casey, 505 U.S. at 877.
A. The Supreme Court’s Framework for a Woman’s Right to Choose an Abortion: From Strict Scrutiny to the Undue Burden Test

Roe first recognized that a woman’s right to choose an abortion is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.80 The Court established that abortion restrictions were subject to the highly protective strict scrutiny standard.81 Under the strict scrutiny standard of constitutional review, regulations limiting fundamental rights, like the right to abortion, can only be justified by a “compelling state interest,”82 and legislative enactments must be “narrowly drawn to express only legitimate interests at stake.”83

The Roe Court noted that the state has an important interest both in preserving and protecting the health of the woman and in the potentiality of life.84 The Court evaluated these interests according to a trimester framework, finding that each interest is separate and distinct and grows as the woman approaches term.85

During the first trimester of the pregnancy, the Court prohibited the state from interfering with a woman’s right to seek an abortion.86 The state’s interest in the health of the mother only became compelling during the second trimester, when it could regulate “to the extent that the regulation reasonably relate[d] to the preservation and protection of maternal health.”87 The state’s interest in potential life did not become compelling until the third trimester, upon viability.88 At this stage, the state could go as far as proscribing abortion altogether to advance its interest in protecting fetal life, except when abortion was necessary to preserve the life or health of the mother.89

Roe established the first standard for Supreme Court review of statutory restrictions on a woman’s right to seek an abortion. Al-

81. Id. at 155, 163.
82. Id. at 155.
83. Id.
84. Id. at 162.
85. Id. at 162–63.
86. Id. at 163.
87. Id. For example, during the second trimester, the state may regulate by imposing requirements as to the qualifications of the person who is to perform the abortion. Id.
88. Id. Viability is when the fetus is “potentially able to live outside the mother’s womb, albeit with artificial aid.” Id. at 160. This usually occurs at “about seven months (twenty-eight weeks) but may occur earlier, even at twenty-four weeks.” Id.
89. Id. at 163–64. The Court’s decision to uphold the federal ban marks the first time since Roe that the Court “blesses a prohibition with no exception safeguarding a woman’s health.” Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting).
though many perceive *Roe* as the landmark case outlining a woman’s right to choose, *Casey* most accurately describes current law. In *Casey*, five abortion clinics and a physician brought facial challenges to several provisions of Pennsylvania’s Abortion Control Act of 1982.90

Writing for the *Casey* plurality, Justice O’Connor protected the core of *Roe* by reaffirming what she deemed as its three central tenets.91 The Court upheld the right of a woman to choose to have an abortion prior to viability and to obtain it without undue interference from the state.92 It confirmed the state’s power to restrict abortion after fetal viability93 if the law contains exceptions for pregnancies that endanger the woman’s life or health.94 The Court reaffirmed that the state has legitimate interests from the outset of the pregnancy in protecting the life and health of the woman and the potentiality of life.95

Departing from *Roe*, the *Casey* Court rejected the rigid trimester framework.96 It replaced the dividing line for determining when the state’s interest in potential life outweighs a woman’s interest in seeking an abortion at the point of fetal viability.97 The plurality indicated that the state’s interest in potential life exists throughout pregnancy, and it adopted the undue burden standard to evaluate abortion restrictions prior to viability.98 Thus, the Court moved away from the strict scrutiny approach in *Roe*, allowing greater state interference dur-

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90. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992). The first provision required informed consent and a twenty-four hour waiting period; the Court held this was not an undue burden. *Id.* at 887. The second provision mandated informed parental consent of a minor prior to abortion, but did provide a judicial by-pass procedure; the Court deemed this constitutional. *Id.* at 899. The third provision required spousal notification, unless certain exceptions applied; the Court struck this down as an undue burden. *Id.* at 893–94. The Court upheld the last provisions and imposed certain reporting requirements on facilities providing abortion services. *Id.* at 901.
91. *Id.* at 846; Wharton et al., supra note 33, at 329.
93. *Roe* defined the point of fetal viability “at about seven months (twenty-eight weeks) but [it] may occur earlier, even at twenty-four weeks.” *Roe*, 410 U.S. at 160. Using fetal viability as a distinction to determine when the state can and cannot regulate abortion becomes increasingly problematic as advances in medicine and technology allow fetal viability to occur earlier and earlier in the pregnancy.
94. *Casey*, 505 U.S. at 846.
95. *Id.*
96. *Id.* at 870.
97. *Id.*
98. *Id.* at 876. Some believe that *Casey* offers less protection than *Roe* because the majority replaced the strict scrutiny trimester test with the undue burden test. Wharton et al., supra note 33, at 330 n.67. *Roe* fully protected the first trimester, and the right was absolute. See *id.* at 330. Under *Casey*, the state has certain legitimate interests justifying interference during the first trimester, so long as the regulation passes the undue burden test. See *id.* Scholars, like Laurence Tribe, have argued that, in fact, *Casey* intended to pro-
ing the once fully protected first trimester. The Court, however, did carefully reiterate that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce." The Court, however, did carefully reiterate that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce."

Today, any state action restricting access to abortion must meet the undue burden test. An undue burden is found when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The Court explained that statutes with this purpose are invalid because "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."

The Court instructed that the burden should be analyzed by looking at the group of women affected by the restriction, "not the group for whom the law is irrelevant." It firmly repudiated the rights-by-numbers approach, stating that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." Though the federal ban does not affect a large number of women, the proper question is whether the legislation has the purpose or effect of placing a substantial obstacle in the path of these women seeking an abortion.

vid greater protection of the right, evidenced by the plurality's emphasis on equality and liberty. Id. at 830 n.67.

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life . . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.

Casey, 505 U.S. at 851–52.


100. Casey, 505 U.S. at 871.
101. Id. at 877.
102. Id.
103. Id. at 894.
104. Id.
B. The Supreme Court’s Treatment of the Purpose Prong Since Casey

Abortion jurisprudence has largely neglected the purpose prong of Casey’s undue burden test.\(^{106}\) Casey announced the test but provided scant details for applying it.\(^{107}\) Although the best one can say of the Court’s reading of the purpose prong in Mazurek v. Armstrong,\(^{108}\) Stenberg v. Carhart, and Ayotte v. Planned Parenthood of Northern New England\(^{109}\) is that it is inconclusive, the need to “reestablish” this part of Casey’s test is paramount.\(^{110}\) The legal strategy of the anti-abortion movement focuses “on taking full advantage of any room for state regulation allowed by the Court”\(^{111}\) by pushing legislation beyond the bounds of the Constitution. Renewed reliance on the purpose prong will require legislators to respect constitutional precedents because statutes clearly drafted with the purpose of circumventing constitutional standards will result in facial invalidation.\(^{112}\)

1. Mazurek v. Armstrong

Mazurek v. Armstrong is the Court’s most thorough examination of the purpose prong of the undue burden test since Casey.\(^{113}\) A group of physicians and a physician assistant challenged the constitutionality of a Montana statute that restricted the performance of abortions to licensed physicians.\(^{114}\) Because the “physician only” provision solely affected physician assistant Susan Cahill, the district court held that there was insufficient evidence in the record to show that the law imposed an undue burden.\(^{115}\) The lower court also rejected plaintiff’s claim that the law had an improper purpose.\(^{116}\) It used an impossibly high threshold, holding that the plaintiff had not made a claim for improper purpose because she had not shown that “none of the individual legislators approving the passage of [the law] was motivated by a desire to foster the health of a woman seeking an abortion.”\(^{117}\)

106. See Harvard Law Review Ass’n, supra note 37, at 2567.
107. See id. at 2566.
110. Harvard Law Review Ass’n, supra note 37, at 2569.
111. Id. at 2564.
112. See id.
113. Wharton et al., supra note 33, at 343.
116. Id.
117. Id.
The Court of Appeals for the Ninth Circuit reversed and relied on the purpose prong of *Casey* to conclude that Montana's physician only requirement was "arguably invalid because its *purpose* . . . may have been to create a substantial obstacle to women seeking abortions." It remanded the case, finding that plaintiffs met the burden of demonstrating "a fair chance of success" on the purpose-prong claim. The appellate court noted that the Supreme Court has not provided instructions for finding legislative purpose under *Casey*, although it has in other contexts outside of abortion. For example, in an Equal Protection challenge to redistricting legislation, the Court stated that "[l]egislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.'" Courts may find purpose in both the "structure of the legislation" and the law's legislative history. The appellate court did not examine the legislative purpose behind the law, but remanded to the district court to make such determinations.

Before the district court could reconsider the issue, the Supreme Court accepted certiorari and reversed the decision of the appellate court. It concluded that respondents had not shown a fair chance of success on their claim that the law would have an unconstitutional effect. The Court declined to address whether the court of appeals identified an appropriate method for discerning improper legislative purpose, focusing instead on the absence of evidence of adverse impact on a woman's access to abortion. In Justice Stevens's dissent, he highlighted the fact that Montana's law targeted one particular person, Susan Cahill, the only licensed physician assistant (a nonphysician under the statute) performing abortions in the state. The legislative hearings preceding the enactment of the statute that referenced Cahill by name revealed the unconstitutional purpose of the law. Also, the proponents of the legislation were the same anti-abortion groups who had "repeatedly targeted" her practice. According to

118. Armstrong v. Mazurek, 94 F.3d at 567.
119. Id. at 568.
120. Id. at 567.
121. Id. (citing Miller v. Johnson, 515 U.S. 900, 916 (1995)).
122. Id.
123. Id. at 568.
125. Id. at 974 n.2.
126. Id. at 977 (Stevens, J., dissenting).
127. Id. at 978 (Stevens, J., dissenting).
128. Id. at 979 (Stevens, J., dissenting).
the dissent, the Montana law served no legitimate purpose because the legislature's predominant motive was to make access to abortion services more difficult by prohibiting physician assistants from performing abortions.\textsuperscript{129}

The Mazurek majority did not clarify how litigants prove improper legislative purpose, nor did it comment on the appropriateness of the method advocated by the court of appeals.\textsuperscript{130} Without further guidance from the Supreme Court as to the preferred method for evaluating improper legislative purpose, the analysis employed by the court of appeals serves as a useful guideline. Under this analysis, a court may determine whether an improper purpose was a predominant factor motivating the federal ban by looking to the statute's structure and legislative history.\textsuperscript{131}

\section*{2. Stenberg v. Carhart}

The Supreme Court previously considered whether a criminal ban on certain abortion procedures violates the undue burden test from \textit{Casey}. In \textit{Stenberg v. Carhart}, the Supreme Court struck down a Nebraska law that criminalized doctors' use of certain second trimester surgical procedures, referred to as "partial-birth abortions."\textsuperscript{132} The majority focused exclusively on the effects prong of the \textit{Casey} test to invalidate the law, but Justice Ginsburg wrote a separate concurrence to emphasize that Nebraska's statute was unconstitutional because of its improper purpose.\textsuperscript{133}

The majority found the statute unconstitutional for two independent reasons.\textsuperscript{134} First, it failed to distinguish between two abortion procedures that entail partial delivery, the rarely used D&X and the most commonly used second trimester procedure, D&E.\textsuperscript{135} The majority upheld the lower court's conclusion that the ban effectively applied to both procedures, thereby unduly burdening a woman's right

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.} at 979–80 (Stevens, J., dissenting).
  \item \textsuperscript{130} \textit{See id.} at 974 (majority).
  \item \textsuperscript{131} Outside the context of abortion jurisprudence, when conducting statutory analysis, courts often look to the text of the statute and the legislative history documenting its enactment to determine the statute's meaning. \textit{Russello v. United States}, 464 U.S. 16, 20-22 (1983).
  \item \textsuperscript{132} \textit{Stenberg v. Carhart}, 530 U.S. 914, 930 (2000).
  \item \textsuperscript{133} \textit{Id.} at 951–52 (Ginsburg, J., concurring).
  \item \textsuperscript{134} \textit{Id.} at 930 (majority).
  \item \textsuperscript{135} \textit{Id.} at 938–39. Intact D&E (also called D&X) is the procedure prohibited by the federal ban. 18 U.S.C. § 1531 (Supp. IV 2006).
\end{itemize}
to terminate her pregnancy prior to viability.\textsuperscript{136} Second, Nebraska's statute excluded the constitutionally-required exception to allow doctors to use the procedure if necessary for the health of the woman.\textsuperscript{137} The Court held that "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, \textit{Casey} requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’"\textsuperscript{138}

Understanding the Court’s health exception requirement is critical to analyzing the current federal ban. The \textit{Stenberg} Court explained that the word “necessary” from \textit{Casey}'s phrase “necessary, in appropriate medical judgment, for the preservation of the life or health of the mother”\textsuperscript{139} does not refer to an absolute necessity or to absolute proof.\textsuperscript{140} Because medical treatments and procedures are considered appropriate (or inappropriate) in light of estimated comparative health risks (and benefits) in particular cases depending on the individual, the Court reasonably concluded that “[d]octors often differ in their estimation of comparative health risks and appropriate treatment.”\textsuperscript{141} Judicial tolerance of differences in medical opinion allows doctors to make decisions in the best interests of their patients without being 100% certain that a given procedure is necessary for a woman’s health. Medical professionals testified before Congress that such deference is crucial in the case of D&X because, in practice, a physician cannot always determine before the procedure begins whether a D&X or D&E procedure is most appropriate for the individual.\textsuperscript{142}

\textit{Stenberg} facially invalidated Nebraska’s statute banning intact D&E instead of offering a partial remedy and describing how the statute should be rewritten to comport with the Constitution.\textsuperscript{143} The Nebraska State Attorney General urged the Court to interpret the statute in a way that would distinguish between D&X and D&E.\textsuperscript{144} The Court

\begin{footnotes}
\footnotetext[136]{Id. at 939 ("Even if the statute’s basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures. The language does not track the medical differences between D&E and D&X . . . .")}.
\footnotetext[137]{Id. at 937.}
\footnotetext[138]{Id. at 938 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)).}
\footnotetext[139]{Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).}
\footnotetext[140]{\textit{Stenberg}, 530 U.S. at 937.}
\footnotetext[141]{\textit{Id.}}
\footnotetext[142]{Brief of the National Women’s Law Center, \textit{supra} note 43, at 6 n.5.}
\footnotetext[143]{\textit{Stenberg}, 530 U.S. at 944–45.}
\footnotetext[144]{Id. at 943.}
\end{footnotes}
declined because it was "without power to adopt a narrowing construc-
tion of a state statute unless such a construction is reasonable and
readily apparent." 145

Although the Court did not have to reach the question of
whether the Nebraska ban violated the purpose prong of the Casey
test, Justice Ginsburg's concurrence stressed that "if a statute burdens
constitutional rights and all that can be said on its behalf is that it is
the vehicle that legislators have chosen for expressing their hostility to
those rights, the burden is undue." 146 She warned legislators that they
could not pass restrictive laws simply as a means to protest the funda-
mental right to abortion, and she emphasized that a finding of im-
proper purpose is a sufficient reason to invalidate abortion
regulations. 147 The purpose prong prevents legislators from crafting
laws for the political purpose of chipping away at the private right
protected by Roe and Casey. 148 Yet the federal ban was drafted for the
same strategic purpose as the Nebraska statute—not to advance the
state's interest in the potentiality of life or to preserve women's health,
but to weaken protection for the fundamental right to abortion.

3. Ayotte v. Planned Parenthood of Northern New England

The Stenberg Court "did not agonize over the question of remedy,
striking down the statute in its entirety in the context of a facial chal-
lenge." 149 It viewed the lack of a health exception as per se unconstitu-
tional. 150 Six years later, in Ayotte v. Planned Parenthood of Northern New
England, the Court struggled with the question of remedy in a facial
challenge to a New Hampshire parental notification statute. 151 The
statute prohibited doctors from providing abortion services to preg-
nant minors until forty-eight hours after written notice of the pending
abortion was delivered to the patient's parent or guardian. 152 For the
first time, a unanimous Court acknowledged that Casey was the con-
trolling standard, and it concluded that, as written, the statute was
unconstitutional. 153

145. Id. at 944.
146. Id. at 952 (Ginsburg, J., concurring).
147. See id. at 951–52.
148. See id.
149. Wharton et al., supra note 33, at 349.
150. See Stenberg, 530 U.S. at 945–46.
152. Id. at 964.
153. Id.; Wharton et al., supra note 33, at 350.
Addressing the question of remedy, the Court stated, "the touchstone for any decision about remedy is legislative intent. . . . After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" Claiming that legislative intent remained an open question, the Court ducked the issue of remedy, remanding to the lower court to settle the issue. By avoiding the question of legislative intent, the Court simultaneously evaded analysis of the law’s purpose.

Because the *Ayotte* Court avoided the remedial question, the Court’s inaction is the most significant aspect of the decision. It did not limit *Casey* nor "retreat from *Casey’s* and *Stenberg’s* emphasis on the paramount mandate to protect women’s health." Legal commentators have read *Ayotte* as establishing a holding pattern in the area of abortion restrictions, heading off any major decision until a new Court arrived at the bench.

III. The Judicial Response to the Federal Ban and the Supreme Court’s Erosion of *Roe* and *Casey* in *Gonzales v. Carhart*

The federal ban was challenged immediately after President George W. Bush signed it into law. Three different United States district courts, the Northern District of California in *Planned Parenthood Federation of America v. Ashcroft*, the Southern District of New York in *National Abortion Federation v. Ashcroft*, and the District of Nebraska in *Carhart v. Ashcroft*, declared the ban unconstitutional.

United States Attorney General Alberto Gonzales appealed the ruling by the United States Court of Appeals for the Eighth Circuit,

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155. See id. at 969.
156. See id. at 967–69.
157. See Wharton et al., supra note 33, at 351 ("Ayotte is most notable for what it did not do: adopt *Salerno*, retrench *Casey*, or retreat from *Casey’s* and *Stenberg’s* emphasis on the paramount mandate to protect women’s health.").
158. Id.
159. Id.
which affirmed the decision in *Carhart v. Gonzales*.\textsuperscript{163} He also appealed the Ninth Circuit’s decision to uphold *Planned Parenthood Federation of America v. Ashcroft*.\textsuperscript{164} Despite the lack of a circuit split and recent precedent directly on point in *Stenberg*, the Court granted review.\textsuperscript{165}

A. The Ninth Circuit Concludes the Federal Ban is Unconstitutional: *Planned Parenthood Federation of America v. Gonzales*

Directly after President Bush signed the federal ban into law, Planned Parenthood Federation of America, Inc. filed suit claiming that the statute violated its Fifth Amendment due process rights.\textsuperscript{166} The City and County of San Francisco intervened as plaintiff because enforcing the ban would “cause irreparable harm to the health and safety of pregnant women in the City and County of San Francisco.”\textsuperscript{167} The district court held that the ban did indeed violate the Constitution, and it entered a permanent injunction against its enforcement.\textsuperscript{168}

In *Planned Parenthood Federation of America v. Gonzales*,\textsuperscript{169} the United States Court of Appeals for the Ninth Circuit affirmed that the federal ban was unconstitutional for three reasons, “each of which [was] sufficient to justify the district court’s [permanent injunction].”\textsuperscript{170} First, the law lacked the constitutionally-required health exception.\textsuperscript{171} The court adhered to the holding in *Stenberg* that, without

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\textsuperscript{163}. Petition for a Writ of Certiorari, Gonzales v. Carhart, 127 S. Ct. 1610 (No. 05-1380).

\textsuperscript{164}. Petition for a Writ of Certiorari, Gonzales v. Planned Parenthood Fed’n of Am., 127 S. Ct. 1610 (No. 05-1382).

\textsuperscript{165}. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).


\textsuperscript{167}. City and County of San Francisco’s Complaint in Intervention at 3, Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 967 (N.D. Cal. 2004) (No. 03-4872).

\textsuperscript{168}. Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d at 1035.

\textsuperscript{169}. 435 F.3d 1163 (9th Cir. 2006).

\textsuperscript{170}. *Id.* at 1171. “We do not conclude that it is unconstitutional solely due to its lack of a health exception.” *Id.* at 1185.

\textsuperscript{171}. *Id.* at 1171; see also Nat’l Abortion Fed’n v. Gonzales, 437 F.3d 278 (2d Cir. 2006). In *National Abortion Federation*, the Second Circuit limited its decision to the question of the law’s failure to include a health exception. *Id.* at 281. A group of physicians sued the United States claiming the statute violated their due process rights under the Fifth Amendment. *Id.* The District Court for the Southern District of New York declared the statute unconstitutional for its lack of a maternal health exception and enjoined its enforcement. *Id.* The appellate court explained its decision by saying, “The Supreme Court has held that a health exception is constitutionally required for any statute prohibiting a method of
a health exception, the ban "is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health."\textsuperscript{172} Without a medical consensus, it is impossible for the legislature to determine that no circumstances exist in which the procedure is necessary to preserve a woman's health.\textsuperscript{173} The Ninth Circuit looked at the relevant congressional findings and found that even the "most cursory review" of the congressional record reveals that no such medical consensus exists.\textsuperscript{174} Because the lack of consensus is "replete" throughout the record, the failure to include a health exception renders the law unconstitutional.\textsuperscript{175}

The court struck down the federal ban for a second independent reason: it imposes an undue burden on women's ability to obtain previability abortions.\textsuperscript{176} Like the Nebraska statute struck down in \textit{Stenberg},\textsuperscript{177} the federal ban fails to distinguish between previability second trimester abortion procedures.\textsuperscript{178} Therefore, it imposes an undue burden on a woman's right to choose an abortion.\textsuperscript{179} It does not differentiate between D&X and D&E procedures, thereby allowing federal prosecutors to pursue physicians who use non-intact D&E procedures, the most commonly-used method for performing second trimester abortions.\textsuperscript{180}

Third, the court deemed the ban unconstitutionally vague because it deprives "physicians of fair notice of what it prohibits and [encourages] arbitrary enforcement."\textsuperscript{181} This would lead doctors to "fear prosecution, conviction, and imprisonment" and have a chilling effect on their willingness to perform second-trimester abortions,

\begin{flushright}
\textsuperscript{172} Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163, 1172 (9th Cir. 2006).
\textsuperscript{173} \textit{Id.} at 1172–73.
\textsuperscript{174} \textit{Id.} at 1175.
\textsuperscript{175} \textit{Id.} at 1174, 1176.
\textsuperscript{176} \textit{Id.} at 1171.
\textsuperscript{177} Stenberg v. Carhart, 530 U.S. 914, 939 (2000).
\textsuperscript{179} \textit{See} 18 U.S.C. § 1531(a); \textit{Neb. Rev. Stat.} §§ 28-326(9)–28-328(1); \textit{Stenberg}, 530 U.S. at 939.
\textsuperscript{180} Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d at 1177.
\textsuperscript{181} \textit{Id.} at 1171–72.
\end{flushright}
thereby imposing an undue burden on women's constitutional rights.182

The Ninth Circuit concluded that, in light of Ayotte, the only appropriate remedy was to enjoin enforcement of the Act, therefore affirming the district court's decision to grant a permanent injunction.183

B. The Eighth Circuit Concludes the Federal Ban is Unconstitutional: Carhart v. Gonzales

The day President Bush signed the federal ban into law, four physicians filed suit in the United States District Court for the District of Nebraska challenging the constitutionality of the statute.184 The plaintiffs claimed that the law is unconstitutional for four reasons: (1) it lacks a health exception; (2) it is overly broad and bans other types of abortion procedures; (3) the law is vague; and (4) the life exception included in the ban is too narrow.185

The district court found the ban unconstitutional on two grounds.186 First, the court concluded that Congress's findings of a medical consensus were unreasonable and therefore the ban was unconstitutional because it lacked a health exception.187 Second, the ban imposed an undue burden because it effectively covered the most common late-term abortion procedure.188 Because the district court concluded that the law had an improper effect, it declined to consider the law's purpose.189

The Eighth Circuit recognized that the case before it and the record in Stenberg were "similar in all significant aspects."190 It agreed

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182. Id. at 1179.
183. Id. at 1184-85. The court reached its conclusion by applying the effects prong of the undue burden test established in Casey. Id. at 1171. Under this analysis, "[t]he fact that the statute is susceptible to some constitutional application will not save it from facial attack." Id. The court declined the invitation to rewrite the statute to make it comport with Stenberg's health exception requirement. Id. at 1187. In light of the ban's legislative history, the court explained it would be improper for it to issue an injunction that essentially adds a health exception to the statute. Id. Because "Congress purposefully excluded [a health exception] . . . [writing one in] would be inconsistent with our proper judicial role." Id.
186. Carhart v. Gonzales, 413 F.3d at 793.
187. Id.
188. Id.
190. Carhart v. Gonzales, 413 F.3d at 803. As a preliminary matter, the circuit court addressed the question of what standard to use in determining the constitutionality of the statute. Id. at 794. It specifically declined to use the traditional and generally-used Salerno
with the Fourth Circuit (and other district courts) that Stenberg established a per se constitutional rule that the requirement of a health exception applies to all abortion statutes.191 Because the Supreme Court already determined that substantial medical authority supports the need for a health exception for D&X abortions, the Eighth Circuit found the federal ban facially unconstitutional.192

C. Undoing Constitutional Protection for the Right to Choose an Abortion: Gonzales v. Carhart

On April 18, 2007, the anti-abortion movement celebrated one of its biggest legal victories.193 In a five-to-four decision, the Supreme Court upheld the federal ban, rejecting the conclusions of the Eighth and Ninth Circuits by finding that the law is not void for vagueness, does not impose an undue burden due to any overbreadth, and is not invalid for its failure to include a health exception.194 The decision limits a woman’s choice to three options: (1) compromise her health and undergo a riskier but legal procedure; (2) violate the law in order to obtain the safest procedure (if her physician will risk criminal liability); or (3) refrain altogether from exercising her right to choose a safe abortion.

After the decision, it is unclear what the future holds for abortion rights. The majority boldly asserts that a “‘rational ground’ is enough to uphold the Act,” which is a substantial departure from the strict scrutiny standard applied in Roe.195 The decision marks the first time since Roe that the Court has considered fetal life more important than women’s health. Until Carhart, the state’s interest in potential life has always been insufficient to overcome the combined interest of the

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191. Carhart v. Gonzales, 413 F.3d at 800.
192. Id. at 803.
194. Gonzales v. Carhart, 127 S. Ct. 1610, 1615 (2007). “Although Congress’ findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings,” Id. at 1652–53 (Ginsburg, J., dissenting).
195. Id. at 1650 (Ginsburg, J., dissenting).
state and the woman in her health.\textsuperscript{196} Using outdated patriarchal reasoning, the majority insists the decision protects women because "[w]omen who have abortions come to regret their choice and consequently suffer from 'severe depression and loss of esteem.'\textsuperscript{197}

The majority failed to look meaningfully at the law's purpose, even though "[t]he Act's sponsors left no doubt that their intention was to nullify our ruling in Stenberg."\textsuperscript{198} Justice Ginsburg explained the illegal purpose of the law in her dissent: "In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at the right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."\textsuperscript{199}

\section*{IV. Applying \textit{Casey}—The Illegal Purpose Behind the Federal Ban}

Previous Supreme Court case law establishes Justice Ginsburg as the most prominent proponent of using the purpose prong to strike down abortion restrictions.\textsuperscript{200} She wrote a separate concurrence in \textit{Stenberg} to emphasize the unconstitutional purpose behind Nebraska's ban on D&X abortions.\textsuperscript{201} Like the federal ban, Nebraska's law failed to advance the state's interest in protecting the life of the fetus as it did not save any fetus from destruction. It targeted only a method of abortion and did not advance the lives and health of pregnant women.\textsuperscript{202} Justice Ginsburg concluded that the law's purpose was to chip away at the right of a woman to seek an abortion, a right protected by \textit{Roe} and \textit{Casey}.\textsuperscript{203} Under \textit{Casey}, a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" violates the Constitution.\textsuperscript{204} Because the only purpose of the Nebraska law was to chip away at a woman's right to abortion, it was unconstitutional.\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{196} See \textit{id.} at 1641 (Ginsburg, J., dissenting) ("[T]he Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health."); Brief of the American Medical Women's Ass'n, \textit{supra} note 48, at 29–30.
\item \textsuperscript{197} \textit{Carhart}, 127 S. Ct. at 1648 (Ginsburg, J., dissenting).
\item \textsuperscript{198} \textit{Id.} at 1643 n.4 (Ginsburg, J., dissenting).
\item \textsuperscript{199} \textit{Id.} at 1653 (Ginsburg, J., dissenting).
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 952.
\item \textsuperscript{204} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (emphasis added).
\item \textsuperscript{205} See \textit{Stenberg}, 530 U.S. at 952 (Ginsburg, J., concurring).
\end{itemize}
Likewise, because the only purpose of the federal ban is to express general anti-abortion hostility towards women’s reproductive freedom, the Court should have found it unconstitutional as well. Examining the legislative history of the law, looking at the plain language of the statute, and questioning the sincerity of the government’s asserted interests, all reveal the improper purpose behind the ban.

A. The Legislative History Behind the Ban

When President Bush signed the ban into law in 2003, it marked the end of an eight-year struggle by its anti-abortion proponents.\(^{206}\) It also signified a validation of the anti-abortion movement’s long-term strategy of incrementalism, restricting abortion step by step as part of the larger battle to turn public opinion against \textit{Roe}.\(^{207}\) Congress had previously passed the bill two times, but President Bill Clinton vetoed it twice.\(^{208}\) Clinton said, “I just cannot look at a woman . . . and tell her that I’m signing a law which will prevent her from ever having another child.”\(^{209}\) Clinton’s emotional statement illustrates the repercussions of Congress’s deliberate flaunting of the required health exception—that women face difficult and personal decisions when deciding whether to have an abortion in their second trimester. Although a victory for the anti-abortion movement, the ban constitutes a significant departure from the Court’s previous standards.

The principal goal of anti-abortion legislators is to continually provoke the Supreme Court to re-consider \textit{Roe}’s recognition of women’s right to reproductive freedom, therefore, pushing the Court to curtail the right, little by little, until it is completely abrogated, and \textit{Roe} is overturned.\(^{210}\) Ken Connor, the president of the conservative Family Research Council, spelled out the strategy behind the federal ban in an email reported by the \textit{Washington Post}: “With this bill . . . we are beginning to dismantle, brick by brick, the deadly edifice created by \textit{Roe v. Wade}.”\(^{211}\)

During the House debates, Representative Nadler commented that it was as if the authors “went out of their way to thumb their noses


\(^{207}\) \textit{Id}.


\(^{210}\) See Van Detta, \textit{Supra} note 45, at 243–44.

at the Supreme Court." The ban’s authors deliberately excluded a health exception, disregarding the Supreme Court’s unambiguous requirement. The bill’s chief Senate sponsor, Senator Santorum, explained that “health is an exception that swallows the rule.” Senator Santorum was correct. Women have the D&E procedure due to health complications; therefore, the ban is only effective at prohibiting the procedure if no exception is made for health. Inserting a health exception undermines the very reason proponents drafted the bill—as stated by President Bush, “[W]e need to ban partial-birth abortions . . . [and doing so] would be a positive step toward reducing the number of abortions in America.”

President Bush openly revealed the improper purpose behind the law. It is facially inaccurate to claim that the ban will reduce the number of abortions in this country. The ban only prohibits a particular method of abortion—the fetus is still aborted under the ban, except by a different procedure which may compromise the woman’s health. From this perspective, the ban will not reduce the number of abortions in America, as the President claims. However, anti-abortionists intended for the law to have a chilling effect, thereby decreasing the availability of physicians willing to provide abortion services. The drafters intentionally employed vague and imprecise terminology in the statute so that doctors will fear and avoid performing abortions as a precaution to avoid criminal prosecution.217 Casey explicitly held that to further the state’s interest in potential life, the state must “inform” the woman’s free choice, not hinder it.218 Banning a method of

214. Id.
215. Brief of the National Women’s Law Center supra note 43, at 8 (“For all women, the intact D&E procedure provides certain health and safety benefits. Among other advantages, it minimizes the risk of perforation of the uterus, laceration of the cervix, infection, and hemorrhage.”).
217. The federal ban also includes a civil liability provision allowing the father of the fetus (if the mother is married) or the maternal grandparents of the fetus (if the mother is a minor) to sue the physician for money damages for performing intact D&E. 18 U.S.C. § 1531(c) (Supp. IV 2006). The imposition of civil liability, in addition to criminal liability, increases the likelihood that some physicians will discontinue providing second trimester abortions altogether in order to avoid the risk of jail time and money damages. Additionally, by allowing the father or grandparents to sue on behalf of the fetus, this provision demonstrates that the law’s drafters valued the rights of the fetus more than the rights of the woman.
abortion does not inform the woman, but instead hinders her ability to exercise her constitutional right.

The congressional debates over the legislation reveal the political motivations behind the law. The majority of the Senate voted on an amendment to the statute to include an explicit commitment to uphold Roe. The resolution’s proposed language stated: “It is the sense of the Senate that—(1) the decision of the Supreme Court in Roe v. Wade was appropriate and secures an important constitutional right; and (2) such decision should not be overturned.”219 This amendment was introduced by Senators Tom Harkin and Barbara Boxer to affirm support for a woman’s constitutional right to abortion.220 Opponents of the amendment (an affirmation of current law) called it extreme.221 In about five minutes, the House of Representatives stripped the amendment from the bill, demonstrating its intent to unravel Roe’s protections rather than uphold them.222 This caused great consternation during the debates. Illustrating one of the many complaints, Representative Lautenberg exclaimed, “Stripping [the ban] of the Harkin Amendment reaffirming Roe v. Wade shows us what the President and his anti-choice allies are really after. They want to overturn Roe v. Wade, [the ban] puts them on that path.”223

The constitutionality of Roe was the centerpiece of congressional discussion. The statement of Representative Toomey illustrates its prominence in the debates. He explained:

This bill establishes what I see as at least a minimum level of respect for human life; but, frankly, we have got a long way to go. I would like to address the Roe v. Wade decision which has come up repeatedly. . . . The fact is it is a terrible decision that has resulted in the deaths of millions of unborn babies. But even if the immorality of the decision does not move someone, I would think the contempt for the Constitution that it demonstrates ought to. Because let us face it, you can read the Constitution. It is written in English, and it is very clear. The Constitution does not guarantee a right to have abortions.224

Although proponents claim the government’s interest in the federal ban is about protecting the sanctity of life, Representative Too-mey and the complete legislative history of the ban show that the government’s true interest lies in passing a stepping stone to overturn Roe.

While the state does have legitimate interests in regulating abortion (limited to preserving the life and health of the woman and the potentiality of life), the legislators were more interested in using the ban to chip away at reproductive rights. During the debate, Santorum explained why he authored the bill: "Roe v. Wade is, according to the Court, how they will decide abortion cases. I vehemently disagree with them and I will continue to fight on this floor [until the decision is overturned]." Given that the ban does not save any fetus from demise nor protect women’s health, the law significantly weakens Roe’s protections. Its only effect is to narrow women’s access to abortion by criminalizing one of their safest options. Furthermore, the law’s intentional vagueness will have a chilling effect on physicians, causing many to fear prosecution and avoid providing second-trimester abortions altogether.

Another component of the ban’s legislative history to consider is the political movement behind the bill. The federal ban is part of the overall strategy of the anti-abortion movement to overturn Roe. Commenting on the significance of Carhart, Roberta Combs, president of the Christian Coalition of America, said, “[I]t is just a matter of time before the infamous Roe v. Wade decision in 1973 will also be struck down by the [C]ourt.” For years, the anti-abortion movement has “focused on passing step-by-step abortion restrictions in state legislatures and the Congress,” working to gradually eviscerate women's reproductive freedom. The ban is just one limitation employed to limit women’s access to abortion and works in conjunction with numerous other calculated limitations, including mandatory waiting periods, state-scripted counseling provisions, licensing and regulatory schemes for abortion facilities, state-mandated counseling require-

226. 149 CONG. REC. S11,602 (daily ed. Sept. 17, 2003) (statement of Rep. Lautenberg) (“The underlying bill makes a pretense of protecting women but really, what we have here is a bill that takes away rights while doing nothing to help anyone.”).
227. Stout, supra note 193.
ments, public and private funding restrictions, and rules requiring par-
ental involvement.229

The federal ban in particular has helped the movement galvanize sup-
sport through its use of emotional and gruesome language to de-
scribe the medical procedure.230 Dr. Deirdre Gifford, a professor at
Brown University explains, "Focusing on the particulars of this one
procedure is missing the point. Any procedure you use [in the second
trimester] is pretty distasteful."231 Anti-abortion activists have capital-
ized on the unpleasant nature of the procedure to rally support for
the movement to overturn Roe. But when political public relations
campaigns use complex medical details to further their cause, im-
portant facts get lost in the emotional rhetoric. Gifford asks, "[W]hat is
the alternative [to the procedure]? Women whose lives and health are
wrecked, babies with severe disabilities that drain precious medical re-
sources, and children born to families who don't have the psychologi-
cal or financial means to take care of them."232 The strategic choice to
focus on "partial-birth" abortions was ingenious. As Gifford says, "You
can't win an argument [in which one side is] talking about punctur-
ing a hole in a baby's head."233 Gifford's frustration demonstrates why
the purpose prong is vital to analysis of the federal ban. Focusing on
the effects of the law restricts the debate to complex and emotional
medical issues. Analyzing the law's purpose reveals what is at stake
with the federal ban and why it is so dangerous to women's fundamen-
tal right to choose an abortion.

Anti-abortion forces calculated the timing of the federal ban so
that, by the time the legal challenges reached the Supreme Court,
there would be new Justices likely to limit the scope of Roe's pro-
tections.234 In spite of previous presidential vetoes and the Supreme
Court's disapproval, abortion opponents pushed the law through
Congress, "betting that the Supreme Court would soon be different:
more conservative, and more open to an array of new abortion restric-
tions."235 The legislative director for the National Right to Life Com-
mittee, Douglas Johnson, explained the tactic: "We hope that by the
time this ban reaches the Supreme Court, at least five Justices will be

229. See State Policies in Brief, supra note 25.
230. Toner & Liptak, supra note 228.
232. Id. at E8.
233. Id.
234. Id.
235. Id.
willing to reject such extremism” (referring to current abortion law).236

Over ten years prior to Carhart, in Jane L. v. Bangerter,237 the Tenth Circuit found improper purpose because the statute plainly disregarded Supreme Court precedent. “In our view, the State’s determination to define viability in a manner specifically and repeatedly condemned by the Court evinces an intent to prevent a woman from exercising her right to choose an abortion after twenty weeks in those instances in which the fetus is not viable.”238 During the beginning of oral arguments before the Supreme Court in Gonzales v. Carhart, Justice Breyer compared the congressional findings in the federal ban with the record from Stenberg. For all intents and purposes, it is the same record: “[I]n each case . . . there are some doctors who think this is safe and some doctors who think it isn’t safe.”239 Congress’s decision to pass a federal law clearly inconsistent with the Court’s abortion jurisprudence serves as evidence of improper intent to burden the constitutional right.

B. Language of the Ban

The text of the federal ban is remarkably similar to the Nebraska ban struck down by the Supreme Court in 2000.240 First, like the Nebraska law, the federal ban fails to limit the stage of pregnancy to which it applies, criminalizing abortions throughout pregnancy.241 This is contrary to what many of the ban’s sponsors claim: that the statute affects only late term or post-viability procedures.242 Yet during oral arguments in Gonzales v. Carhart, the Solicitor General, Paul D. Clement, admitted that the statute “applies to both sides of the viability line.”243 Compared to the Nebraska ban, Congress did add some descriptive words regarding the procedures targeted. When questioned about the difference between the statutes, Clement explained that the two are distinct because of the “addition of the anatomical

236. Toner & Liptak, supra note 228.
237. 102 F.3d 1112 (10th Cir. 1996).
238. Id. at 1117.
239. Transcript of Record at 7-8, Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (No. 05-380).
241. Id.
242. Id.
landmark language to the Federal statute." These changes are "merely cosmetic" and still fail to define at what point a doctor will be criminally liable for his or her actions. Although it is settled constitutional law that Congress cannot simply ignore a legal ruling it dislikes by adopting its own conflicting legislative findings, this is exactly what has happened. In a different context, Justice Clarence Thomas wrote, if Congress "could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce."

Second, like Nebraska's law, the ban fails to limit its prohibitions to abortion involving an "intact" fetus, fails to explicitly exclude the D&E technique or the suction curettage abortion method from its prohibitions, and fails to define key terms such as "living" or "completion of delivery" to provide doctors notice of the meaning of the law on the operating table. The same vagueness and overbreadth problems in Nebraska's law plague the federal ban. It effectively criminalizes numerous safe and otherwise legal procedures instead of just one procedure as the statute's sponsors allege.

The language of the ban is purposefully emotional; it intentionally dramatizes the ugliness of abortion to gain political support. The findings section of the statute states that the "gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life . . . ." As Judge Posner stated, the language of the ban is "[w]hipped up by activists who wanted to dramatize the ugliness of abortions and deter physicians from performing them . . . ." This conflicts with Casey, where the plurality warned that courts must not make decisions based on whether a judge (or in the case of the ban, a legislator) finds the procedure morally

244. Transcript of Record at 26, Gonzales v. Planned Parenthood Fed'n of Am., 127 S. Ct. 1610 (2007) (No. 05-1382).
247. Marcus, supra note 211.
249. See Justice Breyer's comment in Stenberg. "[T]he language of [these statutes] does not track the medical differences between D&E and D&X—though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures." Stenberg v. Carhart, 530 U.S. 914, 939 (2000).
Morals legislation is also prohibited by *Lawrence v. Texas*, where the Court ruled that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice...”

In *Okpalobi v. Foster*, a panel of the Fifth Circuit concluded that a Louisiana law creating tort liability for medical professionals providing abortion services was unconstitutional in part because of its improper purpose. The court found evidence of improper purpose in the language of the statute. While the State’s alleged purpose was to inform the woman’s choice and ensure that doctors shared information of the risk of abortion with their patients, the “plain language” and the structure of the statute “put the lie to” the State’s asserted interests. The court concluded that “it is undeniable that the provision is designed not to supplement the Woman’s Right to Know Act, but to ensure that a physician cannot insulate himself from liability by advising a woman of the risks... associated with abortion.” Likewise, Congress dedicated half of the federal ban’s findings section to argue that a court should uphold the law, rather than explaining why the law was “actually good legislative policy.”

The operative language of the federal ban plainly conflicts with *Roe, Casey,* and *Stenberg* because of the lack of a health exception. In *Planned Parenthood Federation of America v. Gonzales*, the Ninth Circuit emphasized that Congress did not “inadvertently” omit a health exception. It was a “deliberate effort” to challenge the constitu-

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254. Id. at 577.
255. 981 F. Supp. 977 (E.D. La. 1998), aff’d, 190 F.3d 337 (5th Cir. 1999), rev’d on other grounds, 244 F.3d 405 (5th Cir. 2001) (en banc).
256. See *Okpalobi*, 190 F.3d at 356.
257. Id.
258. Id. at 357.
260. See Alex Gordon, *Recent Development: The Partial-Birth Abortion Ban Act of 2003*, 41 Harv. J. on LEGIS. 501, 511 (2004) (“Despite various claims to the contrary, the 2003 [federal ban] unmistakably suffers from one of the same defects the Supreme Court declared unconstitutional in *Carhart*, the lack of an exception to the ban to protect the health of a patient.”).
261. Planned Parenthood Fed’n of Am. v. Gonzales, 435 F.3d 1163, 1185 (9th Cir. 2006).
262. Id.
tional protection of a woman's health. Contravening over thirty years of Supreme Court jurisprudence requiring a health exception reveals Congress's intent to flout the law and push the issue until the establishment of a new Court more sympathetic to its cause. An agenda with such improper purpose is prohibited under *Casey* because when "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."263

*Casey's* purpose test is valuable because it deters legislative overreaching by invalidating abortion restrictions in their entirety when they are at odds with current law.264 It encourages legislators to "color within the lines" of permissible law-making, instead of pushing constitutional limits with every bill. Courts should rely on the purpose prong to protect the sanctity of *Roe*, because it disallows laws drafted with the intent to weaken constitutional protection for a woman's right to choose an abortion.

C. The Insincerity of the Government's Stated Interests: How Anti-Abortion Legislators Hid Their Unconstitutional Purpose

Justice O'Connor provided a loophole for the anti-abortion movement. In *Stenberg* she said that if the ban was rewritten to include a health exception and to resolve the vagueness problems, it would likely withstand constitutional scrutiny.265 Proponents of the ban declined this invitation; because, with a health exception, there is no reason to have the law at all.266 The unconstitutional purpose behind the ban demands facial invalidation, regardless of adherence to Justice O'Connor's suggestions. The alleged interests of the state are "nothing but a veiled attempt to undermine the Supreme Court's landmark ruling in *Roe* versus *Wade*."267

Congress asserted that the banned procedure is "not only unnecessary to preserve the health of the mother, but in fact poses serious

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265. *Stenberg*, 530 U.S. at 951.
risks to the long-term health of women and in some circumstances, their lives."\textsuperscript{268} In great contrast, the American College of Obstetricians and Gynecologists concluded that intact D&E procedures "may be the best or most appropriate . . . in a particular circumstance to save the life or preserve the health of a woman."\textsuperscript{269} Instead of protecting women's health, the ban prevents physicians from "providing the care that is most likely to avoid potentially catastrophic health outcomes."\textsuperscript{270} The ban will force physicians to use alternative abortion procedures, imposing a "risk of increased harms"\textsuperscript{271} in order to avoid criminal prosecution. During oral arguments in \textit{Gonzales v. Planned Parenthood Federation of America}, Justice Breyer relied on the medical testimony before the Court and explained:

[D]octor after doctor who takes the other position [that a health exception to the federal ban is medically necessary] . . . say: Look, all that we're doing here is trying to remove the fetus in a single pass. The fetus is going to die anyway. It's not viable. We're trying to remove it in a single pass, and the reason we're trying to do that is if we don't, there may be bone fragments left inside the womb. There may be fetal parts left inside the womb. Every time you make another pass, it turns out there's an added risk of scarring or hurting the inside of the womb. If you try to induce demise through a drug before, there is serious risk[ ] of introducing drugs into the system. If the woman has uterine cancer, it's a serious problem . . . \textsuperscript{272}

Justice Kennedy continued this line of discussion, highlighting the risks associated with causing fetal demise in order to avoid criminal liability, particularly in cases where women have certain health conditions. The government conceded these risks; after Kennedy listed the risks of performing fetal demise prior to the procedure, in particular when women have cancer, the Solicitor General stated, "[t]here is a risk . . . ."\textsuperscript{273} Thus, while doing nothing to preserve fetal life, the law "bars a woman from choosing intact D&E although her


\textsuperscript{269} Brief of the American College of Obstetricians and Gynecologists, \textit{supra} note 62, at 2.

\textsuperscript{270} \textit{Id.} at 3.

\textsuperscript{271} \textit{Id.} The averted harms include massive hemorrhaging, serious infection, and subsequent infertility. \textit{Id} at 2.

\textsuperscript{272} Transcript of Record at 4, \textit{Gonzales v. Planned Parenthood Fed'n of Am.}, 127 S. Ct. 1610 (2007) (No. 05-1382).

\textsuperscript{273} \textit{Id.} at 7.
doctor 'reasonably believes [the procedure] will best protect [her].'”274

While the ban fails to safeguard women's health, it also fails to advance the state interest in fetal life because the fetus will be aborted regardless of imposition of the ban. Proponents of the legislation do not accept this outcome and argued during the debates that the law would “save lives.”275 During oral arguments in Gonzales v. Carhart, Solicitor General Clement attempted to argue that the federal ban prevented “infanticide,” but Justice Ginsburg corrected him, saying, “General Clement, that's not what this case is about, because . . . we're not talking about whether any fetus will be preserved by this legislation . . . . So anything about infanticide, babies, all that, is just besides the point because what this bans is a method of abortion.”276

If the government's interest is not what it claims, meaning the law will not protect women's health or the potentiality of life, what is the purpose of the federal ban? The real purpose is to criminalize abortion methods that closely resemble other common procedures so that women's right to abortion is effectively chilled. The law's vague and non-medical terms intentionally fail to provide doctors with adequate notice of the procedures they may and may not perform. A scholar of abortion rights, David J. Garrow, explains that the real effect of the law is “the extent to which it intimidates doctors.”277

In response to challenges questioning the sincerity of the state's interests in the federal ban, the government is likely to claim its interest has more to do with protecting the sanctity of or respect for life than preventing fetal demise.278 Yet, as the legislative history and language of the ban make abundantly clear, this was not Congress's purpose in enacting this bill.

277. Toner & Liptak, supra note 228.
278. For example, during oral arguments, the Solicitor General conceded that the ban would not save any fetuses from destruction, but he claimed, "Congress has an interest in maintaining the spatial line between infanticide and abortion, even with respect to pre-viability fetuses . . . ." Transcript of Record at 17, Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (No. 05-380).
V. Conclusion

Casey unambiguously requires that to further the state's interest in potential life, the state must "inform the woman's free choice, not hinder it."279 Yet prohibiting abortion procedures does not "inform" the woman of her options; it limits them at the cost of her health and ability to have healthy children in the future. It does so in the name of an unconstitutional purpose—to narrow the right to abortion until it is essentially meaningless, and Roe is overturned.

Congress may encourage women to carry pregnancies to term, but is forbidden from interfering with women's right to choose an abortion.280 There are numerous legitimate ways the government could promote childbirth. If it was the sincere interest of the government to protect the health and life of the woman and the potentiality of life, the government could provide women with food and shelter, access to prenatal care and education, and universal health care. Or, at the very least, it could require health insurance to cover contraceptives.281 Legislative efforts could focus on drafting laws providing economic incentives to employers who offer paid leave and benefits for parents, or work to close the earnings gap between the sexes so women have a fair opportunity to make a living wage to support their children. Instead, the government's interest in the fetus ends at its birth and raising the child becomes "her problem."

There is evidence supporting this proposition and proving that the goals of protecting the fundamental right to abortion and decreasing the number of abortions can simultaneously be achieved. For example, Vermont has focused legislative efforts on providing options rather than imposing restrictions. It has not enacted any comprehensive abortion laws since Roe was decided.282 In 2000, 93.5% of all Vermont residents had health insurance; this has resulted in the lowest rate of teenage pregnancy in the nation because it has expanded opportunities for young women to "visit physicians, obtain counseling, receive sex education, and afford birth control pills and other contraceptives . . . ."283 Expanding health care for women can affect the

280. Id. at 878.
281. See Van Detta, supra note 45, at 276 ("[W]hile almost all traditional indemnity insurance plans provide coverage for some prescription drugs, only about half cover any of the five contraceptive methods available by prescription . . . . [M]any . . . cover the cost of Viagra for men (to the tune of ten dollars per pill), but do not cover the cost of contraceptive pills for women (which average one dollar per day.").
282. Id. at 275 n.232.
283. Id. at 275 n.233.
number of women facing the decision to terminate their pregnancies. Rather than squander judicial resources by pushing courts to review legislation clearly beyond the bounds of the law, political resources would be best spent revamping our social structure so that women are not in the difficult position of deciding whether or not to have an abortion in the first place.