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### Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law; B.A., Tufts University, 2003. I would like to thank my parents for their unending support; my sisters for keeping me laughing; Aaron for his patience and limitless encouragement; and Professor Robin A. Lenhardt for her helpful feedback and guidance.

# CHOOSING BALANCE: CONGRESSIONAL POWERS AND THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003

*Alissa Schechter\**

“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”<sup>1</sup>

## INTRODUCTION

Eight months into the pregnancy, tragedy hit. Vicki had picked a name for her baby and completed decorating his new room when she heard the tragic news; the baby boy she carried had at least nine major abnormalities, including a fluid-filled cranium with no brain tissue, compacted, flattened vertebrae, congenital hip dysplasia, skeletal dysplasia, and hypertelorlic eyes.<sup>2</sup> Vicki’s doctor told her that the baby would never survive outside the womb, advising her to terminate the pregnancy if she wanted to live and if she ever wanted to have another child.<sup>3</sup> After a sleepless night despairing over this decision, Vicki and her husband decided to terminate the pregnancy with a partial-birth abortion.<sup>4</sup> Vicki and her husband felt they had no choice; the doctor told them she had no other options. Since that time, Vicki has become pregnant again and delivered a healthy son.<sup>5</sup> Vicki is a woman who wanted to be a mother, yet confronted a tragic medical emergency.<sup>6</sup>

Were Vicki to face the same dilemma today, she would lack the freedom to abort the fetus to save her own life and preserve her ability to have another baby.<sup>7</sup> President George W. Bush signed the

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

2. 149 Cong. Rec. S12927-02,12929 (daily ed. Oct. 21, 2003) (statement of Sen. Durbin). Vicki described the pregnancy as “disgustingly normal.” *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Partial-Birth Abortion Ban Act ("PBABA") into law on November 5, 2003.<sup>8</sup> The PBABA restricts a woman's right to choose to have certain types of abortions, including the procedure chosen by Vicki.<sup>9</sup> This statute conflicts with the precedent set in *Stenberg v. Carhart*, which struck down a state statute criminalizing partial-birth abortions due to its vagueness and lack of an exception for the health of the pregnant woman.<sup>10</sup> Under *Stenberg*, Vicki possessed the option of a partial-birth abortion since her life and health were in jeopardy. Nevertheless, through the PBABA, Congress seeks to override the U.S. Supreme Court and restrict this right. As a result, three district courts responded by declaring the PBABA unconstitutional, citing due process violations, declaring the law unconstitutionally vague, and finding an undue burden on pregnant women seeking abortions.<sup>11</sup> With the newly elected Republican-controlled Congress after the 2004 election, the political climate of the United States is moving towards a more conservative, anti-abortion stance.<sup>12</sup> This is especially important given that by the time the Supreme Court considers the constitutionality of the PBABA, there may be different Justices on the bench.<sup>13</sup>

While many scholars contend the PBABA is unconstitutional on due process grounds,<sup>14</sup> this Note focuses on the root of the issue—generally, congressional authority, and specifically, whether Congress possesses the power to enact the PBABA. This Note argues that the PBABA is unconstitutional, advocating for congressional restraint when enacting legislation dealing with partial-birth abortion. Partial-birth abortion lies within the states' domain; Congress may not

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8. Pub. L. No. 108-105, § 3, 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531).

9. 149 Cong. Rec. S12927-02, S12929 (daily ed. Oct. 21, 2003) (statement of Sen. Durbin).

10. *Stenberg v. Carhart*, 530 U.S. 914 (2000); *infra* notes 77-84 and accompanying text.

11. See *infra* notes 172-89 and accompanying text.

12. See Carl Hulse, *Abortion Remark by G.O.P. Senator Puts Heat on Peers*, N.Y. Times, Nov. 6, 2004, at A1 (noting that "the expanded Republican Senate majority is strongly anti-abortion"); Robin Toner, *Changing Senate Looks Much Better to Abortion Foes*, N.Y. Times, Dec. 2, 2004, at A34 (claiming that "[a]s a result of November's election, the next Senate will have a bigger, more conservative Republican majority and several new opponents of abortion—including some of the most intense abortion foes in politics" and that Bush's conservative supporters expect his Supreme Court nominees to be opponents of *Roe v. Wade*).

13. See Hulse, *supra* note 12, at A12 (explaining that "Democrats say they fear that the Bush administration intends to use its second term to nominate judges interested in striking down abortion laws").

14. See, e.g., Alex Gordon, *The Partial-Birth Abortion Ban Act of 2003*, 41 Harv. J. on Legis. 501 (2004); Tamara F. Kushnir, Comment, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, 35 Loy. U. Chi. L.J. 1117, 1162-88 (2004). But see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1000 (2003) (arguing that the Supreme Court "has rarely in its history been so cavalier, so confident, so cocky, and so prolific in striking down legislative acts").

employ the Commerce Clause<sup>15</sup> or Section Five of the Fourteenth Amendment<sup>16</sup> to enact a federal ban on partial-birth abortions. Partial-birth abortion procedures are not economic in nature and do not substantially affect interstate commerce. Moreover, the PBABA restricts a woman's fundamental right to choose, and the Commerce Clause and Section Five of the Fourteenth Amendment do not afford Congress the power to enact legislation such as the PBABA.<sup>17</sup> By attempting to override the Supreme Court, Congress is overstepping its boundaries, blurring the line separating judicial and legislative powers. When dealing with such a nationally divisive issue, such as abortion, Congress should respect the balance of powers, and not impose its will on the nation, undermining important federalism precedent.

Part I of this Note outlines the history of the debate over the right to abortion and the different abortion procedures relevant to the partial-birth abortion discussion. It also analyzes Congress's powers under the Commerce Clause and Section Five of the Fourteenth Amendment. Part II discusses the controversy over Congress's power to enact certain legislation, specifically the PBABA. Part III argues that partial-birth abortion is primarily a state issue rather than a federal issue. It points to the Commerce Clause and Section Five, demonstrating that Congress lacks the power to legislate over partial-birth abortions, thereby rendering the PBABA unconstitutional.

#### I. THE ESTABLISHMENT OF THE RIGHT TO AN ABORTION AND THE DEVELOPMENT OF CONGRESSIONAL POWERS UNDER THE COMMERCE CLAUSE AND SECTION FIVE OF THE FOURTEENTH AMENDMENT

By enacting the PBABA, Congress asserted its purported right to pass legislation restricting a woman's right to have an abortion. It relied on the Commerce Clause and Section Five of the Fourteenth Amendment, undermining previous Supreme Court decisions prohibiting such legislation by the states. Building on precedent, the Supreme Court recognizes that the fundamental right to privacy extends to a woman's right to choose to have an abortion. Nonetheless, with the PBABA, Congress seeks to restrict that right using its power to govern interstate commerce and its authority to enforce provisions of the Fourteenth Amendment.

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15. U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

16. U.S. Const. amend. XIV, § 5 (stating that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

17. See *infra* Part III.

### A. *The Fundamental Right to an Abortion*

The recognition of the right to privacy laid the groundwork for giving women the right to obtain an abortion.<sup>18</sup> In *Griswold v. Connecticut*,<sup>19</sup> Justice Douglas, writing for the majority, noted that while neither the First,<sup>20</sup> Third,<sup>21</sup> Fourth,<sup>22</sup> Fifth,<sup>23</sup> nor Ninth<sup>24</sup> Amendments explicitly mentions a right to privacy, the amendments create penumbras that protect privacy from governmental intrusion.<sup>25</sup>

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18. Justice Harlan's dissent in *Poe v. Ullman* was the first judicial argument for the modern right to privacy. 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting). He states that "the concept of 'privacy' embodied in the Fourth Amendment is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment." *Id.* at 549 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949)). Justice Harlan cited *Olmstead v. United States*:

"[The makers of our Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." . . . [T]he Constitution protects the privacy of the home against all unreasonable intrusion of whatever character.

*Id.* at 550 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Justice Harlan also noted that these principles pertain to all government invasions into the privacies of a person's home and life. *Id.* (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

19. 381 U.S. 479 (1965).

20. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); see *Griswold*, 381 U.S. at 482-83 (explaining that certain forms of speech and association are not expressly included in the First Amendment, but are crucial to give full meaning to the rights).

21. U.S. Const. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); see *Griswold*, 381 U.S. at 484 (noting that the Third Amendment is one component of the right to privacy).

22. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ."); see *Griswold*, 381 U.S. at 485 (recognizing that the Fourth Amendment creates a right to privacy).

23. U.S. Const. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . ."); see *Griswold*, 381 U.S. at 484 (discussing that the right to be free from self-incrimination allows a citizen to create a zone of privacy which he is under no obligation to surrender).

24. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Justice Goldberg's concurrence in *Griswold* focused on the Ninth Amendment, pointing to James Madison's original purpose for including the Amendment in the Bill of Rights: to ease the fears of those who worried that rights not enumerated would be insecure. *Griswold*, 381 U.S. at 489-90 (Goldberg, J., concurring) (citing I Annals of Congress 439 (Gales & Seaton eds., 1834)). Looking to the framers of the Constitution, Goldberg asserted that the first eight amendments are not the only basic and fundamental rights granted by the Constitution. *Id.* at 490 (Goldberg, J., concurring).

25. *Griswold*, 381 U.S. at 484. The Court found the Connecticut statutes (prohibiting the distribution of information or advice on contraception to married

Using the reasoning from *Griswold*, the Court in *Eisenstadt v. Baird*<sup>26</sup> extended the right of privacy to unmarried people.<sup>27</sup> *Eisenstadt* laid the groundwork for *Roe v. Wade*,<sup>28</sup> holding that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>29</sup>

Then, in *Roe*, the Court recognized that the fundamental right of privacy included a woman’s right to have an abortion<sup>30</sup> by affirming the unconstitutionality of a state abortion law.<sup>31</sup> Justice Blackmun’s opinion for the Court asserted that the state only has an interest in potential life when viability occurs—in the third trimester.<sup>32</sup> Viability occurs when the fetus becomes capable of independent life outside the womb.<sup>33</sup>

Justice Blackmun established the trimester test to determine the fetus’s point of viability, and thus the emergence of a sufficiently

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people) overly broad, invading areas of protected freedoms. *Id.* at 485. The Court insisted that it was not using *Lochner v. New York*, 198 U.S. 45 (1905), as a guide. *Griswold*, 381 U.S. at 482. The Court did not want to appear to be sitting as a “super-legislature,” determining “the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” *Id.* It insisted that the law in question “operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.” *Id.* In his concurrence, Justice Harlan used the Fourteenth Amendment to find a right to privacy. *Id.* at 499-502 (Harlan, J., concurring). He emphasized that the Connecticut statutes under review violated “basic values ‘implicit in the concept of ordered liberty.’” *Id.* at 500 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Harlan, J., concurring)). He stressed that judicial restraint in interpreting the Due Process Clause could be achieved only with respect for history, recognition of our society’s basic values, and an appreciation of the separation of powers. *Id.* at 501. Justice White’s concurrence noted the significance of the right invaded by the challenged statute, necessitating strict scrutiny review. *Id.* at 503-05 (rejecting the statutes because of a failure to notice how the state’s ban on married couples’ use of contraceptives advanced the state’s interest in banning illicit sexual relationships). When laws infringe on constitutionally protected personal rights, the laws are subject to strict scrutiny review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Courts will uphold the laws only if they are “suitably tailored to serve a compelling state interest.” *Id.* (citing *Graham v. Richardson*, 403 U.S. 365 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). For a further discussion of the scrutiny standards, see K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 *New Eng. L. Rev.* 397 (1997). Justice Black and Justice Stewart dissented in *Griswold*. 381 U.S. at 507-31 (strictly construing the Constitution and thus finding no right to privacy).

26. 405 U.S. 438 (1972).

27. *Id.* at 452-53 (broadening the right to privacy to include the right of unmarried couples to obtain contraception).

28. 410 U.S. 113 (1973).

29. *Eisenstadt*, 405 U.S. at 453.

30. *Roe*, 410 U.S. at 153 (stating that the right of privacy, whether found in the Fourteenth Amendment or the Ninth Amendment “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

31. *Id.* at 166.

32. *Id.* at 160.

33. *Id.*

compelling state interest.<sup>34</sup> Under *Roe*, in the first trimester of pregnancy, the state lacks a compelling interest, placing the decision to have an abortion between a woman and her doctor.<sup>35</sup> In the second trimester, the state develops a compelling interest in the pregnant woman's health.<sup>36</sup> Therefore, the state may impose rules and regulations that affect the health of pregnant women.<sup>37</sup> A fetus's viability occurs in the third trimester, because the fetus can survive independently outside the womb, leading to a state's compelling interest in the potential life.<sup>38</sup> At this point, a woman's right to an abortion becomes limited to situations where her life or health (mental or physical health or imminent psychological harm) is in jeopardy.<sup>39</sup>

The decision in *Roe* recognizes that a pregnant woman possesses a "specific constitutional right to privacy in matters of procreation," including the right to an abortion.<sup>40</sup> Additionally, the finding that a fetus is not a "person" gives states the freedom to restrict abortion; if a fetus were a person entitled to constitutional protection, the Constitution would require states to have a compelling reason for *not* outlawing abortion.<sup>41</sup>

Scholars and legislators cite *Roe* as the case establishing the right to abortion, and since that landmark decision, abortion opponents have fought to reverse the decision; indeed, many thought the Supreme Court would overturn *Roe*.<sup>42</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>43</sup> the Supreme Court upheld *Roe*, but altered

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34. *Id.* at 163.

35. *Id.* at 163-64.

36. *Id.*

37. *Id.* (giving examples of permissible state regulations: qualification requirements for the abortion provider, licensure of abortion provider, regulation of the facility, and licensing of the facility in which the abortion is to be performed (hospital, clinic, etc.)).

38. *Id.* at 163-65.

39. *Id.* at 153, 163-65.

40. Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 105 (1993).

41. *Id.* at 110.

42. See Janis L. McDonald, Book Review, 46 *Am. J. Legal Hist.* 104 (2004) (reviewing N.E.H. Hull & Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (2001)). Many people thought that when the Court revisited the landmark *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the judges would undermine *Roe*. Dworkin, *supra* note 40, at 152. The Justices, however, chose to use *Casey* to affirm and explain *Roe*, explaining the basic constitutional, social, political, economic, and legal foundations of the opinion. *Casey*, 505 U.S. at 864-79.

43. 505 U.S. 833 (1992). In between *Roe* and *Casey*, the Supreme Court heard other cases involving abortion. See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (declaring it permissible for a state to prohibit doctors in federally funded clinics from discussing abortion, even if a patient requests information and even if the physician thinks an abortion is necessary); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (finding unconstitutional a requirement that both parents be notified of minor's abortion decision, but deeming constitutional a statute's provision requiring two-parent

its holding by adding restrictions to when a woman could seek an abortion.<sup>44</sup> It also reviewed issues not resolved by *Roe*.<sup>45</sup> The Supreme Court moved away from the trimester system because medical studies undermined the trimester analysis utilized by Justice Blackmun in *Roe*.<sup>46</sup> Nonetheless, the Court upheld the fundamental right to abortion articulated in *Roe*, entrenching it in American society and jurisprudence.<sup>47</sup> *Casey* recognized the states' rights to pass laws curtailing the right to abortion up to the point where the law places an undue burden on the exercise of a woman's right to an abortion.<sup>48</sup> Under the new *Casey* test, a physician determines the point of a fetus's viability.<sup>49</sup> Consistent with *Roe*, after the fetus is capable of life outside the womb, a pregnant woman may secure an abortion only when her health or life is threatened.<sup>50</sup> While *Casey* added some restrictions on a woman's right to choose, by reaffirming *Roe*, it embedded in constitutional law the freedom of a woman to choose to have an abortion.<sup>51</sup>

With these cases, the Supreme Court instituted the right to privacy and the right of a woman to obtain an abortion. Once *Roe* and *Casey* established a woman's fundamental right to an abortion before the point of a fetus's viability, politicians and activists began fighting to ensure the ban on a different type of abortion commonly known as partial-birth abortion.<sup>52</sup>

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notification unless pregnant minor obtains judicial bypass); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (determining that a state may ban the use of public employees and facilities for performance or assistance of abortions); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (determining that the states may not intimidate women into continuing their pregnancies under the pretext of protecting potential life or maternal health); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983) (finding a requirement that abortions be performed in a hospital after twelve weeks of pregnancy unconstitutional, but finding constitutional requirements of a pathology report for each abortion performed, that a second physician be present during post-viability abortions, and that a minor secure parental consent or consent from a court for an abortion); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (noting that while a state may require a physician to give informed consent prior to performing an abortion, it may not insist upon a lengthy, inflexible list of warnings that create obstacles to the procedure).

44. See *infra* notes 46-50 and accompanying text.

45. Dworkin, *supra* note 40, at 153.

46. *Casey*, 505 U.S. at 873.

47. *Id.* at 864-65.

48. *Id.* at 877 (defining "undue burden" as something that amounts to a substantial obstacle).

49. *Id.* at 884.

50. *Id.* at 871 (using language similar to *Roe*).

51. Dworkin, *supra* note 40, at 171-76 (claiming that *Casey* not only endorsed *Roe*, but also demonstrated a change in the Court's appreciation for why *Roe* was correct).

52. See NARAL, "Partial-Birth Abortions": Anti-Choice Leaders Reveal True Intentions, *available* at <http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=5464> (last visited Jan. 25, 2005).

### B. *Partial-Birth Abortions and the Supreme Court*

In *Stenberg v. Carhart*,<sup>53</sup> the Supreme Court, in a five to four decision, struck down as unconstitutional a Nebraska statute<sup>54</sup> banning partial-birth abortions. Partial-birth abortion, a nonmedical term, refers to the procedure by which a physician partially delivers a fetus before aborting it.<sup>55</sup> The banned procedure accounts for approximately 2220 abortions per year, or 0.17% of all abortions.<sup>56</sup>

Approximately ninety percent of all abortions performed in the United States take place during the first trimester of pregnancy using vacuum aspiration.<sup>57</sup> The remaining ten percent of all abortions occur during the second trimester of pregnancy.<sup>58</sup> The most commonly used procedure during the second trimester is "dilation and evacuation" ("D&E"), which doctors perform between the thirteenth and fifteenth week of gestation.<sup>59</sup> The procedure resembles vacuum aspiration, except the cervix is more widely dilated so that physicians may remove larger pieces of tissue.<sup>60</sup> Physicians often use osmotic dilators, sometimes for as long as two days.<sup>61</sup> Physicians often do not remove the fetus intact, because the fetal tissue is "friable" and easily

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The partial-birth abortion strategy was designed to: a) emphasize the horror of partial-birth abortion to the general public by, b) introducing legislation to outlaw it, thus c) exposing pro-abortion legislators who would oppose the legislation for the brutes that they are, causing them to be unseated. This was a sure win (so we were told), and once partial-birth abortion was outlawed, then we could move on to outlawing other forms of abortion.

*Id.*

53. 530 U.S. 914 (2000).

54. Neb. Rev. Stat. Ann. § 28-328(1) (Michie Supp. 1999) ("No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."). The Nebraska statute defined "partial birth abortion" as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* § 28-326(9). The statute clarifies by defining the partial delivery as "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.*

55. See 18 U.S.C.A. § 1531 (West Supp. 2004); *Stenberg*, 530 U.S. at 922.

56. See Kushnir, *supra* note 14, at 1177 (citing Mary Ellen Schneider, *Bush Signs Partial-Birth Abortion Ban*, *Ob. Gyn. News*, Dec. 1, 2003, at 1).

57. *Stenberg*, 530 U.S. at 923 (citing Ctrs. for Disease Control and Prevention, *Abortion Surveillance—United States, 1996*, at 41 (July 30, 1999)). Vacuum aspiration involves "insertion of a vacuum tube (cannula) into the uterus to evacuate the contents." *Id.*

58. *Id.* at 924 (citing Ctrs. for Disease Control and Prevention, *Abortion Surveillance—United States, 1996*, at 41 (July 30, 1999)).

59. *Id.* at 924-25.

60. *Id.*

61. *Id.* Dilation for two days may cause fetal death. Kushnir, *supra* note 14, at 1140.

broken.<sup>62</sup> After removing the fetus, the physician scrapes the walls of the uterus to ensure that no tissue remains.<sup>63</sup>

After fifteen weeks, doctors employ a different procedure to abort the fetus. "Because the fetus is larger at this stage of gestation (particularly the head), and because bones are more rigid, dismemberment or other destructive procedures are more likely to be required than at earlier gestational ages to remove fetal and placental tissue."<sup>64</sup> After twenty weeks, "[s]ome physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D&E . . . to facilitate evacuation."<sup>65</sup>

The D&E abortion procedure entails certain risks.<sup>66</sup> Physicians use mechanisms within the uterus, creating a danger of puncturing and harm to nearby organs.<sup>67</sup> Fetal bone fragments may be sharp and cause similar damage.<sup>68</sup> Physicians may leave behind fetal tissue, which can cause infection and other damage.<sup>69</sup> Studies find, however, that the D&E method (performed between the twelfth and twentieth week of gestation) entails less risk of mortality and complication than labor-inducing procedures.<sup>70</sup>

When the fetal skull is too large to fit through the cervix, a physician will perform a dilation and extraction ("D&X") abortion, which is similar to the intact D&E procedure.<sup>71</sup> The physician will dilate the cervix and remove the fetus from the uterus through the cervix in one pass.<sup>72</sup> The physician "pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix."<sup>73</sup> According to some experts, D&X offers certain advantages over the D&E procedure.<sup>74</sup> However, other experts consider the D&X

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62. *Stenberg*, 530 U.S. at 924-25. If the fetus is removed intact, it is called an "intact D&E." Kushnir, *supra* note 14, at 1140.

63. *Stenberg*, 530 U.S. at 924-25.

64. *Id.* at 925 (internal citation and quotation omitted).

65. *Id.* (internal citation and quotation omitted).

66. *Id.* at 926.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 926-27 (citations omitted).

71. *Id.* at 927.

72. *Id.*

73. *Id.*

74. See *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 470-71 (2004) (explaining witnesses' expert testimony). Plaintiff's testimony demonstrated that as compared to D&E, D&X offers four safety advantages that decrease the risk of infection. *Id.* D&X is also safer for women with certain medical conditions and when the fetus contains certain abnormalities. *Id.* at 471. During a D&X procedure, a physician inserts forceps into the uterus fewer times than during a D&E procedure, which reduces the risk of uterine perforation. *Id.* (citation omitted).

procedure to be riskier, creating more health hazards for the pregnant woman.<sup>75</sup>

Many states enacted legislation banning these procedures, known as partial-birth abortions.<sup>76</sup> Because the Supreme Court initially failed to address the legitimacy of partial-birth abortion bans, states felt free to enact legislation in their own manner, protected by the political atmosphere at the time. However, when a physician challenged a Nebraska partial-birth abortion ban statute in *Stenberg*, the Supreme Court granted certiorari, establishing the rules by which states could control partial-birth abortions.

The Court in *Stenberg* reasoned that: (1) the D&X procedure has potential benefits over other abortion procedures in certain cases;<sup>77</sup> (2) the statute lacked an exception for the health of the pregnant woman as required by *Casey*;<sup>78</sup> and (3) as discussed in Justice O'Connor's concurrence, the statute imposed an undue burden on the woman seeking the abortion, because it applied to procedures on both pre- and post-viable fetuses.<sup>79</sup> States' interests in regulating abortions of pre-viable fetuses are "considerably weaker" than of post-viable fetuses.<sup>80</sup> The Court relied on *Roe* and *Casey*, which require that any post-viability abortion regulation must contain a health exception.<sup>81</sup> *Stenberg* retains the requirement that a pre-viability abortion regulation must, at a minimum, contain a health exception.<sup>82</sup> The Court found that the Nebraska statute did not further a state interest "in the potentiality of human life"; rather, it regulated particular abortion procedures instead of focusing on saving fetuses.<sup>83</sup> Without the health exception, the Nebraska statute violated the requirement that a state "may promote but not endanger a woman's health when it

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75. *Id.* (noting that the government's witnesses testified that D&X procedures are dangerous and risky for the pregnant woman). The experts testified that while D&E involves a higher frequency of instruments in the uterine, if performed correctly, there is no increased risk of perforation. *Id.* While D&X may entail less risk of cervical laceration, other aspects of the procedure ("such as the greater cervical dilation or the fact that the fetus's head is crushed in proximity to the cervix") may lead to a greater risk of uterine perforation. *Id.* (citation omitted).

76. See Karen E. Walther, Comment, *Partial-Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?*, 31 Loy. U. Chi. L.J. 693, 707 n.121 (2000) (listing thirty states that banned partial-birth abortion procedures as of 2000).

77. *Stenberg*, 530 U.S. at 931-46.

78. *Id.* at 930-46 (finding that although D&X is a rare procedure, it may be safer than the D&E procedure in some circumstances, and thus must be permitted if the pregnant woman's health is in danger).

79. *Id.* at 950-51 (O'Connor, J., concurring) (claiming that the statute did not distinguish between the D&E and D&X methods, and thus the vague language led to both procedures being banned).

80. *Id.* at 930 (citing *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 870 (1992)).

81. See *supra* notes 35-50 and accompanying text.

82. *Stenberg*, 530 U.S. at 930 (citing *Casey*, 505 U.S. at 880).

83. *Id.* (internal quotation omitted).

regulates the methods of abortion.”<sup>84</sup> Through its reasoning in *Stenberg*, the Court reaffirmed *Roe* and *Casey* with respect to partial-birth abortion bans.

### C. Federal Partial-Birth Abortion Bans

Even though the Supreme Court deemed a statute banning partial-birth abortions unconstitutional due to its vagueness and lack of a health exception for the pregnant woman, Congress still has sought to implement similar legislation. Between 1995 and 2003, Congress attempted to pass a partial-birth abortion ban five times.<sup>85</sup> The House of Representatives voted to pass the Partial-Birth Abortion Act of 1995 with a vote of 288-139.<sup>86</sup> The Senate, voting fifty-four to forty-four, missed the two-thirds requirement to overturn a presidential veto.<sup>87</sup> President Clinton vetoed the bill because it did not contain an exception for the pregnant woman’s life.<sup>88</sup> In 1997, Congress made another attempt to pass the legislation, yet the Senate failed to provide the necessary two-thirds vote, and President Clinton again vetoed the bill for lack of a health exception,<sup>89</sup> due to the precedent set by *Casey*.

In 2002, Congress once again deliberated over the bill.<sup>90</sup> The 108th Congress passed the PBABA and President Bush signed the bill into law on November 5, 2003.<sup>91</sup> The PBABA of 2003 states that:

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84. *Id.* at 931 (citing *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 76-79 (1976); *Doe v. Bolton*, 410 U.S. 179, 197 (1973)).

85. Kushnir, *supra* note 14, at 1148-52.

86. See Off. of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 756, available at <http://clerk.house.gov/evs/1995/roll756.xml> (last visited Jan. 26, 2005).

87. See Senate Bill Clerk, U.S. Senate Roll Call Votes 104th Congress, 1st Session, at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=104&session=1&vote=00596](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=1&vote=00596) (last visited Jan. 26, 2005); see also U.S. Const. art. I, § 7, cl. 2 (giving Congress the power to override a presidential veto by a two-thirds vote of members of both the House and the Senate).

88. Kushnir, *supra* note 14, at 1149 (citing Carol Jouzaitis, *Clinton Vetoes Late-term Abortion Curb*, Chi. Trib., Apr. 11, 1996, at 3 (noting President Clinton’s position against the bill because of its lack of a health exception), available at 1996 WL 2660913).

89. *Id.* at 1150 (citation omitted). Both houses of the 106th Congress passed a partial-birth abortion ban in different versions in 1999, which President Clinton again vetoed. See An Act To Amend Title 18, United States Code, To Ban Partial-Birth Abortions, H.R. 3660, 106th Cong. (2000), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_bills&docid=f:h3660eh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h3660eh.txt.pdf); An Act To Amend Title 18, United States Code, To Ban Partial-Birth Abortions, S. 1692, 106th Cong. (1999), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_bills&docid=f:s1692es.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s1692es.txt.pdf).

90. Kushnir, *supra* note 14, at 1151.

91. *Id.* at 1118, 1152.

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 subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.<sup>92</sup>

The PBABA makes no exception for injuries that are less than life-threatening.<sup>93</sup> The statute also includes a "Findings" section, where Congress declares partial-birth abortion "a gruesome and inhumane procedure that is never medically necessary and should be prohibited."<sup>94</sup> Rejecting *Stenberg*, the Findings state that partial-birth abortions create a risk to the pregnant woman, lack approval in the medical community, and are never necessary to preserve the pregnant woman's health.<sup>95</sup> They further proclaim that Congress need not

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92. 18 U.S.C.A. § 1531(a) (West Supp. 2004). The statute defines "partial-birth abortion" as a procedure in which a physician

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

*Id.* § 1531(b)(1)(A)-(B). This definition uses nearly the same language as the Nebraska statute struck down in *Stenberg*. See *supra* note 54 and accompanying text.

93. See 18 U.S.C.A. § 1531.

94. See The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(1), 117 Stat. 1201 (2003) (to be codified at 18 U.S.C. § 1531); 149 Cong. Rec. S3456-02,3458 (daily ed. Mar. 11, 2003) (statement of Sen. Frist) (describing the partial-birth abortion procedure as "repulsive" and stating, as a physician, that "[n]ever has partial-birth abortion . . . been the only procedure or the best procedure available in the case of a medical emergency"). Senator Frist argues that the only "advantage" of a partial-birth abortion is the "guarantee . . . of a dead infant." *Id.* at S3458.

95. See § 2(1)-(2), 117 Stat. at 1201. *But see* 149 Cong. Rec. H9135-05,44 (daily ed. Oct. 2, 2003) (statement of Rep. Nadler) (stating that "Congress is not a doctor, and certainly Congress is not the doctor in a particular procedure performed on a particular woman. Only her doctor, who knows her medical condition, can decide what is medically necessary"); 149 Cong. Rec. S11454-01,11456 (daily ed. Sept. 15, 2003) (Letter from Am. Pub. Health Ass'n, to the House of Representatives (Mar. 31, 2003) (referring to partial-birth abortions as "medically accepted" procedures)); see also *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 449-51 (S.D.N.Y. 2004) (listing those organizations opposing the PBABA: American College Of Obstetricians and Gynecologists ("ACOG," a professional organization of board certified obstetricians and gynecologists); American Medical Women's Association ("AMWA," a group of female physicians, residents, and medical students); the American Public Health Association ("APHA"); Physicians for Reproductive Choice and Health ("PRCH," a professional organization of practicing obstetricians and gynecologists and academics); American Nurses Association ("ANA," a professional organization representing registered nurses); Nursing's Agenda for the Future ("NAF"); the California Medical Association ("CMA"); the Maine Medical Association ("MMA"); and the Association of Reproductive Health Professionals

accept the Supreme Court's findings with respect to the health exception requirement because the congressional findings determine that a health exception is not necessary in this situation, yet the Supreme Court must afford great deference to Congress's findings.<sup>96</sup> Immediately following the enactment of the PBABA, physicians and activists challenged this opposition to *Stenberg*.<sup>97</sup> Nonetheless, PBABA supporters insisted that Congress possessed the power to enact the PBABA under the Commerce Clause and Section Five of the Fourteenth Amendment.<sup>98</sup>

#### D. Congress's Powers of Enactment

Historically, the Supreme Court recognized Congress's broad powers to legislate under the Commerce Clause and Section Five of the Fourteenth Amendment.<sup>99</sup> Congress purported to rely on these two measures when enacting the PBABA.<sup>100</sup>

##### 1. Congressional Powers Under the Commerce Clause

In *United States v. Lopez*, the Supreme Court clarified Congress's powers under the Commerce Clause.<sup>101</sup> Before *Lopez*, many commentators viewed the Commerce Clause as giving overly sweeping regulatory power to Congress.<sup>102</sup> In the fifty years prior to *Lopez*, the Supreme Court did not strike down any legislation on

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("ARHP"). *But see also id.* at 452 (noting associations that supported the PBABA: PHACT (an organization of physicians, mostly obstetricians and gynecologists, which specifically addresses the partial-birth abortion debate) and the Association of American Physicians & Surgeons ("AAPS")).

96. *See* § 2(3)-(13), 117 Stat. at 1201; Gordon, *supra* note 14, at 508 (quoting Rep. James Sensenbrenner (R-Wis.) as conceding that the Supreme Court was not required to accept congressional findings, but hoping that the Court would "give the same type of deference that it has done in the past civil rights and employment cases" (quotations and citation omitted)).

97. *See* Jeff Kunerth, *Bush Signs Abortion Bill; The Ban on a Type of Late-Term Abortion Procedure Brought Immediate Legal Challenges*, Orlando Sentinel Trib., Nov. 6, 2003, at A1; Renuka Rayasam, *Abortion Law Sparks Suits Before Ink Dries*, The Atlanta J.-Const., Nov. 6, 2003, at A1; Maura Reynolds, *Bush Signs Bill to Ban a Type of Abortion; Challenges are Filed, and a Federal Judge in Nebraska Quickly Issues a Temporary Restraining Order*, L.A. Times, Nov. 6, 2003, at A1.

98. *See generally infra* notes 207-10, 221-26, 232-38, 253-58, 271 and accompanying text (discussing congressional powers pursuant to the Commerce Clause and Section Five of the Fourteenth Amendment and the PBABA).

99. *See infra* notes 101-66 and accompanying text.

100. *See* 18 U.S.C.A. § 1531 (West Supp. 2004); § 2, 117 Stat. at 1201.

101. *United States v. Lopez*, 514 U.S. 549 (1995).

102. Diane McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 Cal. L. Rev. 1675, 1678 (2002) (citing Judge Alex Kozinski, *Introduction to Volume Nineteen*, 19 Harv. J.L. & Pub. Pol'y 1, 5 (1995) (noting that before *Lopez*, many viewed the Commerce Clause as the "Hey, you-can-do-whatever-you-feel-like Clause"))).

grounds that Congress surpassed its Commerce Clause powers.<sup>103</sup> Through *Lopez*, the Supreme Court set boundaries for Commerce Clause legislation.<sup>104</sup>

In *Lopez*, police arrested the defendant for possessing a firearm in violation of the Gun-Free School Zones Act ("GFSZA").<sup>105</sup> The Supreme Court found that the GFSZA exceeded Congress's authority under the Commerce Clause, reasoning that possession of a gun in a school zone was not an economic activity substantially affecting interstate commerce.<sup>106</sup> The Court held that Congress may regulate three categories of activity under its Commerce Clause power: (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce, including persons or things in interstate commerce; and (3) activities substantially affecting interstate commerce.<sup>107</sup> The activity must be commercial in nature.<sup>108</sup>

The Court also noted the importance of realizing limitations on federal powers, especially in areas traditionally under state control.<sup>109</sup> The Court continued: "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."<sup>110</sup>

The government in *Lopez* argued that the "costs of crime" and the effect on "national productivity" affected interstate commerce, giving Congress the power to enact the legislation.<sup>111</sup> The Court rejected those arguments, fearing that they would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate

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103. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 83-84 (1999); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485, 511-12 (2002); Paul Tzur, Comment, *I Know Economic Activity When I See Economic Activity: An Operational Overhaul of the Measure By Which Federal Criminal Conduct Is Deemed "Economic,"* 94 J. Crim. L. & Criminology 1105, 1105 (2004).

104. Andrew St. Laurent, Note, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 Colum. J.L. & Soc. Probs. 61, 61 (1997) (noting that with *Lopez*, the Supreme Court established that "the powers of the Commerce Clause may not be extended indefinitely and has reasserted its role as the final arbiter of the limits of the Commerce Clause").

105. *Lopez*, 514 U.S. at 551.

106. *Id.* at 567.

107. *Id.* at 558-59. "The required level of 'substantial affect' is hardly self-evident." Richard W. Murphy, *The Constitution As Political Structure*, 13 Const. Comment. 330, 334 (1997) (book review); see Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 Colum. L. Rev. 1876, 1917 (1996) (suggesting that the Court looked for a "direct tie to commercial activity").

108. See *Lopez*, 514 U.S. at 561.

109. See *id.* at 564.

110. *Id.*

111. *Id.*

commerce.”<sup>112</sup> The Court went on to describe that under that reasoning,

Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law . . . for example. Under the[se] theories . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.<sup>113</sup>

In rejecting the government’s evidence and striking down the GFSZA, the Supreme Court made clear that there must be a “distinction between what is truly national and what is truly local.”<sup>114</sup>

In *United States v. Morrison*,<sup>115</sup> the Supreme Court expanded *Lopez*, further limiting Congress’s powers under the Commerce Clause. The Court determined that Congress violated its Commerce Clause powers and Section Five of the Fourteenth Amendment by enacting the Violence Against Women Act<sup>116</sup> (“VAWA”).<sup>117</sup> In *Morrison*, the petitioner was a student at Virginia Polytechnic Institute who reported being assaulted, raped, and sexually harassed by the respondents.<sup>118</sup> After the university’s judicial committee failed to punish either respondent, petitioner withdrew from the university and filed suit.<sup>119</sup> Her complaint alleged, among other things, that the attack violated VAWA.<sup>120</sup> Respondents moved to dismiss the complaint, claiming that VAWA’s civil remedy was unconstitutional.<sup>121</sup>

Addressing the constitutionality of VAWA, the Supreme Court noted that “even under our modern, expansive interpretation of the Commerce Clause, Congress’s regulatory authority is not without effective bounds.”<sup>122</sup> The Court looked to its reasoning in *Lopez*, noting that the *Lopez* decision “rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.”<sup>123</sup> The Court conceded that VAWA was supported by numerous findings on the significant impact that gender-

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112. *Id.*

113. *Id.*

114. *Id.* at 567-68 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

115. 529 U.S. 598 (2000).

116. 42 U.S.C. § 13981 (2000) (providing that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender” and offering a federal civil remedy for victims of gender-motivated crimes).

117. *Morrison*, 529 U.S. at 619, 626-27.

118. *Id.* at 602.

119. *Id.* at 603-04.

120. *Id.* at 604.

121. *Id.*

122. *Id.* at 608 (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995)).

123. *Id.* at 612 (citing *Lopez*, 514 U.S. at 563-67).

motivated violence has on its victims and their families.<sup>124</sup> It reaffirmed that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”<sup>125</sup> The Court noted that the congressional findings relied on an “unworkable” method of reasoning, defying the Constitution’s enumeration of powers.<sup>126</sup> Were the Court to accept the petitioners’ reasoning, Congress would have the power to regulate any crime so long as its nationwide, collective impact had a substantial effect on employment, production, transit, or consumption.<sup>127</sup> The Court feared that petitioners’ reasoning would expand Congress’s power to regulate family law and other areas traditionally left to state regulation.<sup>128</sup> It notes that while marriage, divorce, and childrearing have a significant effect on the national economy, these are areas traditionally under state control and outside the boundaries of Congress’s powers.<sup>129</sup> While Congress explicitly precluded VAWA from being used in the family law context, the Supreme Court refused to accept it as constitutional.<sup>130</sup> It declared that “[u]nder our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace.”<sup>131</sup>

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124. *Id.* at 614 (citing legislative findings). Congress found that violent, gender-motivated crimes constitute bias crimes, violating victims’ rights to be free from gender discrimination. State and federal criminal laws do not adequately protect against the bias element of gender-motivated crimes. See H.R. Rep. No. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1803, 1853. Violent, gender-motivated crimes “have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce.” *Id.* These crimes “have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.” *Id.* The report found that a federal civil remedy is necessary to ensure equal protection and to reduce the effects on interstate commerce caused by gender-motivated violent crimes. *Id.* The Senate found that there is a need for a strong federal response to gender-motivated crime, especially rape, noting that rape is a “repugnant crime” in which victims are often further victimized by an insensitive criminal justice system and the media. *Id.* at 386. The Senate described the need for rape victims to feel protected so that they may come forward and bring the perpetrator to justice. *Id.*

125. *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2).

126. *Id.* at 615. The Court mentioned that these findings validate their concerns in *Lopez* that Congress would use the Commerce Clause to eliminate the distinction between federal and local power. *Id.*

127. *Id.* (worrying that if Congress had the power to regulate gender-motivated violence, there would be a slippery slope leading to the power to regulate murder or any other type of violence).

128. *Id.*

129. *Id.* at 615-16.

130. *Id.*

131. *Id.* at 616.

## 2. Powers Afforded to Congress by Section Five of the Fourteenth Amendment

Beyond the Commerce Clause, Section Five of the Fourteenth Amendment gives Congress the power to legislate. Section Five states that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>132</sup> The original draft of the Fourteenth Amendment gave Congress the “power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.”<sup>133</sup> Before enactment, the framers worried that the proposed amendment granted Congress the power to encroach in areas traditionally governed by the states.<sup>134</sup> They feared that the amendment expanded Congress’s power in a way that would destabilize laws every time a party shift occurred in Congress.<sup>135</sup> The “Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit.”<sup>136</sup>

Immediately following the adoption of the Fourteenth Amendment, two Supreme Court cases clarified its provisions. In *United States v. Harris*,<sup>137</sup> the Court considered a challenge to section two of the Civil Rights Act of 1871, which punished “private persons” for “conspiring to deprive any one of the equal protection of the laws enacted by the State.”<sup>138</sup> The Court struck down the statute, finding that the law exceeded Congress’s Section Five power.<sup>139</sup> It reasoned that the law was “directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers.”<sup>140</sup> The Court reaffirmed that the Fourteenth Amendment provisions “have reference to state action exclusively, and not to any action of private individuals.”<sup>141</sup> Unless a state is guilty

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132. U.S. Const. amend. XIV, § 5.

133. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (citing Cong. Globe, 39th Cong., 1st Sess. 1034 (1866)).

134. *Id.* at 521 (noting that the fear existed among both Democrats and conservative Republicans).

135. *Id.* at 520-21 (citing Cong. Globe, 39th Cong., 1st Sess. 1034 (1866)). See generally Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section Five of the Fourteenth Amendment*, 21 Cardozo L. Rev. 469 (1999); K.G. Jan Pillai, *Incongruent Disproportionality*, 29 Hastings Const. L.Q. 645 (2002).

136. *City of Boerne*, 521 U.S. at 527 (citing *Oregon v. Mitchell*, 400 U.S. 112, 154 (1970) (opinion of Harlan, J.)).

137. 106 U.S. 629 (1882).

138. *Id.* at 639.

139. See *id.* at 637-40.

140. *Id.* at 640.

141. *Id.* at 639 (quoting *Virginia v. Rives*, 100 U.S. 313, 318 (1879)).

of violating a Fourteenth Amendment provision, “the amendment imposes no duty and confers no power upon Congress.”<sup>142</sup>

The *Civil Rights Cases* further interpreted Congress’s powers under the Fourteenth Amendment.<sup>143</sup> The Supreme Court declared that “[i]ndividual invasion of individual rights is not the subject-matter of the amendment.”<sup>144</sup> Clarifying the Section Five provision, the Court stated that Congress may enforce “the prohibition,” meaning it may legislate to correct the effects of such prohibited state actions, rendering them null and void.<sup>145</sup> Section Five does not give Congress the authority to legislate on issues within the realm of state powers nor does it permit Congress to create laws regulating privacy rights.<sup>146</sup> It “provide[s a mode] of redress against the operation of State laws . . . when these are subversive of the fundamental rights specified in the amendment.”<sup>147</sup> Congress can only legislate in reaction to state action; state laws or proceedings must precede any congressional legislation.<sup>148</sup>

*City of Boerne v. Flores*<sup>149</sup> is the most recent extensive Supreme Court clarification of Congress’s enforcement power under Section Five of the Fourteenth Amendment. Before *City of Boerne*, the Court considered the power to be “remedial,”<sup>150</sup> entitling Congress to enforce constitutional rights, but not change them.<sup>151</sup> As stated by the Court: “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”<sup>152</sup> History and precedent support this

142. *Id.*

143. The *Civil Rights Cases*, 109 U.S. 3 (1883).

144. *Id.* at 11 (noting that the Amendment has a “deeper and broader scope”). The Court reaffirms that the Amendment nullifies and voids state legislation that violates privileges and immunities, due process, or equal protection. *Id.*

145. *Id.* (stating that “[t]his is the legislative power conferred upon Congress, and this is the whole of it”).

146. *Id.*

147. *Id.*

148. *Id.*

149. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

150. *Id.* at 519 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

151. *Id.*

152. *Id.* at 520. The Supreme Court has adhered to the congruence and proportionality test; since *City of Boerne*, very little congressional enforcement legislation has survived the test. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Americans with Disabilities Act (ADA)); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999) (Patent and Plant Variety Protection Remedy Clarification Act); *see also Pillai, supra* note 135, at 646 n.5. *But see Tenn. v. Lane*, 124 S. Ct. 1978 (2004) (upholding Title II of the ADA as a valid exercise of Congress’s enforcement power under the Fourteenth Amendment); *Nev. Dept. of*

distinction.<sup>153</sup> In *City of Boerne*, the Court found that the Religious Freedom Restoration Act (“RFRA”) of 1993 exceeded Congress’s Section Five powers.<sup>154</sup> It reasoned that the statute was overbroad, and restricted, rather than enforced, a Fourteenth Amendment provision.<sup>155</sup> The Court used extremely strong language in rejecting the RFRA as unconstitutional, reasoning that the RFRA was “so out of proportion to a supposed remedial or preventive object” that it could not be deemed responsive to, or preventative of, unconstitutional behavior.<sup>156</sup> The statute had “sweeping coverage,” ensuring infringement at “every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”<sup>157</sup> Its reach and scope were overbroad.<sup>158</sup> *City of Boerne* mentions that the RFRA legislation has no termination date, geographic restriction, or predicates.<sup>159</sup> The Court noted that while these criteria are not mandatory, those sorts of limitations tend to ensure that Congress’s means are proportionate to ends legitimate under Section Five.<sup>160</sup>

The Court noted that the “RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.”<sup>161</sup> Thus, Congress overstepped its boundaries when enacting the legislation:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.<sup>162</sup>

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Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (concluding that the Family Medical Leave Act is “congruent and proportional to its remedial object, and can ‘be understood as responsive to, or designed to prevent, unconstitutional behavior’”) (quoting *City of Boerne*, 521 U.S. at 532)).

153. *City of Boerne*, 521 U.S. at 520. *But see* Louis D. Bilonis, *The New Scrutiny*, 51 Emory L.J. 481, 526 (2002) (arguing that the Court has never uttered the phrase “principles of proportion and congruence” before and it is “plucked seemingly from thin air”). Bilonis argues that one might agree with the relevance of history and precedent, without agreeing that judicial demands for proportionality and congruence are necessary. *Id.*

154. *City of Boerne*, 521 U.S. at 511.

155. *See id.* at 532.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 532-33.

160. *Id.* at 533.

161. *Id.* at 534-35.

162. *Id.* at 536 (discussing that the RFRA was enacted to control cases and controversies, but since it is beyond congressional authority, the Court’s precedent must control).

Courts rely on *City of Boerne* to clarify the confines of congressional powers under Section Five of the Fourteenth Amendment. One example is *Board of Trustees of University of Alabama v. Garrett*.<sup>163</sup> There, the Court concluded that a federal statute is not a valid exercise of Congress's Section Five powers when the historical record and the statute's broad sweep suggest that the statute's true aim is not enforcement, but an attempt to "rewrite" the Court's Fourteenth Amendment jurisprudence.<sup>164</sup> The Court cited to *City of Boerne*, confirming "the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."<sup>165</sup> Accordingly, Section Five legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>166</sup>

While Congress determined that it was within its power to enact the PBABA in 2003, "[s]imply because Congress may conclude that a particular activity substantially effects interstate commerce does not necessarily make it so."<sup>167</sup> The limitations of the Commerce Clause, along with Congress's power to enforce provisions of the Fourteenth Amendment, raise serious doubts about whether Congress used its powers appropriately when enacting the PBABA.

## II. DO THE COMMERCE CLAUSE AND SECTION FIVE OF THE FOURTEENTH AMENDMENT AFFORD CONGRESS POWER TO ENACT THE PBABA?

Many physicians, politicians, and lobbyists have challenged the PBABA since its enactment in 2003. Even while the bill was in Congress, there was much debate over the constitutionality of its enactment.<sup>168</sup>

PBABA opponents argued that the PBABA was essentially the same as the Nebraska statute that the Supreme Court struck down in *Stenberg*.<sup>169</sup> Besides noting that no abortion ban without a health

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163. 531 U.S. 356 (2001).

164. *See id.* at 372-74.

165. *Id.* at 365 (citing *City of Boerne*, 521 U.S. at 519-24).

166. *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

167. *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981)).

168. *See* 149 Cong. Rec. S13046-01,13046 (daily ed. Oct. 22, 2003) (statement of Sen. Snowe) (stating that while she originally supported the PBABA, she withdrew her support due to the lack of an exception for the life of the pregnant woman); 149 Cong. Rec. S12914-02,12917 (daily ed. Oct. 21, 2003) (statement of Sen. Boxer) (worrying that the passage of the PBABA will send a message that women's health does not matter). *But see* 149 Cong. Rec. S12914-02,12916 (daily ed. Oct. 21, 2003) (statement of Sen. Santorum) (claiming that the PBABA is necessary to show the world America's values and to protect children from brutality).

169. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *Law & Contemp. Probs.* 105, 135 (2004).

exception had ever been upheld, the challengers argued that the congressional findings would not be enough to uphold the PBABA as constitutional.<sup>170</sup> Nonetheless, both houses of Congress passed the PBABA and President Bush signed the bill into law.<sup>171</sup> Shortly thereafter, litigation ensued.

District courts have consistently invalidated the PBABA. Thus far, three district courts have struck down the PBABA as unconstitutional. In *Planned Parenthood Federation of America v. Ashcroft*,<sup>172</sup> the U.S. District Court for the Northern District of California found the PBABA unconstitutional based on three factors: (1) the PBABA did not take into account the health of the pregnant woman;<sup>173</sup> (2) the PBABA was unconstitutionally vague because it did not clearly define the banned procedures, depriving physicians of fair notice, and leading to arbitrary enforcement;<sup>174</sup> and (3) the PBABA placed an undue burden on a woman seeking an abortion of a nonviable fetus.<sup>175</sup> The plaintiffs also argued that the PBABA is “impermissibly vague” as to what conduct is “in or affecting interstate or foreign commerce,” leading to the arbitrary and discriminatory prosecution of physicians.<sup>176</sup> Once the court concluded that the PBABA is unconstitutionally vague with regard to the abortion procedures, it declined to address this argument.<sup>177</sup>

A Nebraska district court found the PBABA unconstitutional in *Carhart v. Ashcroft*<sup>178</sup> based on four factors: (1) the PBABA did not take into account the health of the pregnant woman;<sup>179</sup> (2) since the PBABA’s language reached both D&X and D&E procedures, it

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170. Gordon, *supra* note 14, at 508-09. Representative Jerrold Nadler (D-N.Y.) found the idea that congressional findings in the PBABA would remove the need for a health exception “laughable.” *Id.* at 508. Representative John Conyers, Jr. (D-Mich.) said that the authors of the PBABA believed that somehow “this bill is now going to be okay because we have congressional findings.” *Id.* at 508-09. Representative Conyers noted that “Congress cannot simply refute findings of fact made by the District Court by presenting its own ‘findings’ that are contrary to the evidence the Court depended upon to make its ruling.” *Id.* at 509.

171. Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 530, available at <http://clerk.house.gov/evs/2003/roll530.xml> (last visited Jan. 22, 2005); Senate Bill Clerk, U.S. Senate Roll Call Votes 104th Congress, 1st Session, available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=108&session=1&vote=00402](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00402) (last visited Jan. 25, 2005).

172. 320 F. Supp. 2d 957 (N.D. Cal. 2004).

173. *Id.* at 978-1034 (discussing the PBABA’s lack of a health exception).

174. *Id.* at 975-78.

175. *Id.* at 968-74. Some politicians denounced the ruling, supporting the PBABA as constitutional. See 150 Cong. Rec. S6443-02,6444 (daily ed. June 3, 2004) (statement of Sen. Brownback) (stating that the California decision “is wrong on the medical facts, and it is wrong in its blatant disregard of Congressional findings”).

176. *Planned Parenthood Fed’n*, 320 F. Supp. 2d at 975 n.15.

177. *Id.*

178. 331 F. Supp. 2d 805 (D. Neb. 2004).

179. *Id.* at 1004.

constituted an undue burden on the woman seeking an abortion;<sup>180</sup> (3) the PBABA was vague;<sup>181</sup> and (4) the PBABA applied to both pre- and post-viable fetuses.<sup>182</sup> The plaintiffs alleged that certain terms, such as “in or affecting interstate commerce,” are unconstitutionally vague.<sup>183</sup> Nonetheless, since the plaintiffs did not cite any binding cases holding that such terms are constitutionally vague, the court failed to address the issue in depth.<sup>184</sup> Moreover, the court adopts a “specific intent” approach to narrow the statute, obviating vagueness concerns.<sup>185</sup>

The U.S. District Court for the Southern District of New York in *National Abortion Federation v. Ashcroft* declared the PBABA unconstitutional, citing the same reasons as the Nebraska court and the California court.<sup>186</sup> The court also noted that too much deference was given to congressional findings.<sup>187</sup> At trial, the district court heard more evidence than Congress had heard on the subject in eight years.<sup>188</sup> Even the government experts disagreed with most of Congress’s factual findings.<sup>189</sup> The decision cites *Turner Broadcasting System, Inc. v. FCC*<sup>190</sup> (“*Turner II*”).<sup>191</sup> In *Turner II*, the Supreme Court reviewed the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Television Act”),<sup>192</sup> which required “cable television systems to dedicate some of their channels to local broadcast television stations.”<sup>193</sup> In *Turner Broadcasting System, Inc. v. FCC* (“*Turner I*”), the Court held that these “must-carry” provisions were content-

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180. *Id.* at 1030.

181. *Id.* at 1037.

182. *Id.* at 1042.

183. *Id.* at 1040.

184. *See id.* at 1040-41.

185. *Id.*

186. *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

187. *Id.* at 484 (noting that “such substantial deference to Congress’s factfindings would not comport with the Supreme Court’s treatment of statutes burdening fundamental rights, whether the constitutional test is ‘the most exacting scrutiny’ . . . or undue burden” (internal citations omitted)).

188. *Id.* at 482 (finding that Congress “did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings”). Congress held two hearings after the *Stenberg* decision, lasting three hours. *Id.* Three physicians testified, and one of them had already testified before Congress regarding the PBABA. *Id.* Only seven physicians testified about the safety of the D&X procedure, and their testimony lasted fewer hours than that which the U.S. District Court for the Southern District of New York heard. *Id.*

189. *Id.*

190. 520 U.S. 180 (1997).

191. *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 483 (discussing *Turner I* and *Turner II* and the level of deference owed to congressional findings).

192. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended in scattered sections of 47 § U.S.C.).

193. *Turner II*, 520 U.S. at 185.

neutral, incidental restrictions on speech, requiring intermediate scrutiny.<sup>194</sup>

The court in *National Abortion Federation* noted that the standard for deferring to Congress should be more lax in dealing with the PBABA because the court is dealing with a fundamental right, rather than only a mid-level review situation.<sup>195</sup> The court did not address whether Congress had the power to enact the PBABA, because the plaintiffs did not allege that Congress exceeded its authority under the Commerce Clause and Section Five of the Fourteenth Amendment when it passed the PBABA.<sup>196</sup> PBABA advocates deplored these decisions, declaring them a demonstration of judicial activism.<sup>197</sup>

While these courts cite the *Stenberg* decision, noting the similarities in language between the Nebraska statute and the PBABA, there is another issue that deserves attention. A question still remains as to whether Congress possesses the power to enact such legislation, which the courts did not address.<sup>198</sup> Congress derives many of its powers from the Commerce Clause and Section Five of the Fourteenth Amendment.<sup>199</sup> While Congress attempted to structure the PBABA to ensure that the Supreme Court would afford great deference to the legislative findings, the Supreme Court may not need to defer so

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194. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

195. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 484; see also Richard A. Brisbin, Jr. & Edward V. Heck, *The Battle Over Strict Scrutiny: Coalitional Conflict in the Rehnquist Court*, 32 Santa Clara L. Rev. 1049, 1099 (1992) (noting that in *Hodgson v. Minnesota*, 497 U.S. 417, 463 (1990), the Rehnquist Court in 1990 abortion cases "explicitly reiterated the position that *Roe v. Wade* was still controlling and that laws limiting the fundamental right to choose abortion should be subjected to the 'most exacting scrutiny' of the compelling interest standard"). Finding *Turner II* at odds with *Stenberg*, the district court ignored the *Turner II* standard when giving deference to congressional findings. See *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 484-86 (noting that even when strict scrutiny did not apply, the Court was not "so deferential to congressional factfinding in other cases" determining the constitutionality of congressional statutes (citing *United States v. Morrison*, 529 U.S. 598 (2000))).

196. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 439 n.1. It is unclear why the plaintiffs focused on due process issues rather than congressional powers when challenging the PBABA. It could be that the arguments against the PBABA based on due process are stronger. Another possibility could be that normally these liberal groups encourage federal legislation and might not want to restrict these federal powers (they might not want to curtail federal funding possibilities for abortion procedures).

197. See, e.g., 150 Cong. Rec. S6443-02,6444 (daily ed. June 3, 2004) (statement of Sen. Brownback) (claiming that the California district court decision striking down the PBABA is "judicial bias and judicial activism at its extreme"); 150 Cong. Rec. H2239-15 (daily ed. Apr. 21, 2004) (statement of Rep. King) (claiming that no congressional legislation would meet the sort of standard that would "allow a single judge to substitute his judgment for the wisdom of the people of America. . . . If we allow judicial activism to run its course, there is no point in this body existing. They will have taken away all of the legislative power of this Congress").

198. See *supra* notes 176-77, 183-85, 196 and accompanying text (discussing the lack of attention the district courts gave to issues of congressional powers when striking down the PBABA).

199. See *supra* Parts I.D.1-I.D.2.

strongly to the congressional findings. Moreover, while Section Five of the Fourteenth Amendment gives Congress the power to enforce provisions of the Fourteenth Amendment, it does not grant Congress the authority to restrict constitutional rights.

#### A. *The Commerce Clause and the PBABA*

While the PBABA claims to regulate partial-birth abortions “in or affecting interstate commerce,” its extensive “Findings” section does not mention interstate commerce.<sup>200</sup> Only the accompanying House Report attempts to invoke the Commerce Clause by mentioning that most abortion providers likely advertise and purchase medical supplies across state lines, and many women seek abortions out of state; thus the procedures affect interstate commerce.<sup>201</sup> Under *Lopez*, however, it is the Supreme Court, not Congress, who must determine whether partial-birth abortions substantially affect interstate commerce.<sup>202</sup>

In *Lopez*, the Supreme Court outlined the boundaries of Congress’s Commerce Clause powers. Congress may regulate three categories of commercial activity pursuant to its commerce power: (1) the use of channels of interstate commerce; (2) instrumentalities of interstate commerce, including persons or things in interstate commerce; and (3) activities substantially affecting interstate commerce.<sup>203</sup> “[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”<sup>204</sup>

The Court applied this analysis in *Morrison*,<sup>205</sup> striking down VAWA.<sup>206</sup> There are many parallels between VAWA and the PBABA. Both domestic violence and abortion procedures involve physical interaction between people. The PBABA focuses on partial-birth abortion procedures as “gruesome and inhumane” acts of violence; it does not punish the doctor for the service he provides, but for the violent act of killing a fetus, a noneconomic activity.<sup>207</sup>

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200. The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2, 117 Stat. 1201 (2003) (to be codified at 18 U.S.C. § 1531).

201. The Partial-Birth Abortion Ban Act of 2003, H.R. Rep. No. 108-58, at 24-25 (2003).

202. See *infra* note 204 and accompanying text.

203. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

204. *Id.* at 557 n.2 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

205. *United States v. Morrison*, 529 U.S. 598 (2000).

206. 42 U.S.C. § 13981(b)-(c) (2000) (providing that “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender” and offering a federal civil remedy for victims of gender-motivated crimes).

207. See The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(1), 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531); Allan Ides, *The Partial-Birth*

Some commentators argue that since abortion clinics charge a fee for services and doctors perform abortion services for payment, abortions are commercial in nature.<sup>208</sup> Moreover, sometimes abortion clinics buy supplies from out-of-state and deal with out-of-state insurance companies.<sup>209</sup> Patients may travel interstate seeking a partial-birth abortion.<sup>210</sup> Thus, these commentators argue that abortions could be construed to substantially affect interstate commerce.<sup>211</sup>

Opponents of the PBABA argue that while abortion clinics might be commercial enterprises, a physician's choice to perform a specific type of abortion is not related to commerce,<sup>212</sup> as implicitly stated in the PBABA's findings.<sup>213</sup> While the PBABA begins by stating that "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion"<sup>214</sup> it is practically impossible to perform an abortion "in or affecting interstate or foreign commerce."<sup>215</sup> Additionally, since *Lopez* supports limiting federal powers in areas where states historically have exerted authority,<sup>216</sup> and crime, family law, and medical regulation are all issues traditionally under state control, the PBABA should not survive Commerce Clause review.<sup>217</sup>

### B. District Courts' Deference to Congressional Findings

Congress specifically shaped the PBABA to endorse the deference standard it hoped the district courts would employ when analyzing the

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*Abortion Ban Act of 2003 and the Commerce Clause*, 20 Const. Comment. 441, 447 (2003-2004).

208. See David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 Conn. L. Rev. 59, 104-05 (1997) (explaining how a court could uphold a partial-birth abortion ban).

209. See *id.*

210. See *id.*

211. See *id.*

212. *Id.* at 105 (describing what a decision striking a federal partial-birth abortion might mention).

213. See The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(1)-(14), 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531).

214. 18 U.S.C.A. § 1531(a) (West Supp. 2004).

215. See Kopel & Reynolds, *supra* note 208, at 111 (stating that the only possible way a physician could perform an abortion "in or affecting interstate or foreign commerce" is by "operating a mobile abortion clinic on the Metroliner"); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. Cin. L. Rev. 367, 410-11 (2002) (deeming it "difficult to imagine how a federal criminal prohibition on particular methods of abortion" complies with *Lopez*); see also *supra* note 204 and accompanying text (noting that just because Congress claims that an activity affects interstate commerce does not necessarily make it so).

216. See *supra* notes 109-10 and accompanying text.

217. See Ides, *supra* note 207, at 454 (citing *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (noting that "the field of health care [is] a subject of traditional state regulation"); Kopel & Reynolds, *supra* note 208, at 71 n.56, 105.

legislation. Congress cited four cases in the PBABA's "Findings" section to substantiate the standard it wanted used in reviewing its legislation:<sup>218</sup> *Anderson v. Bessemer City*,<sup>219</sup> *Katzenbach v. Morgan*,<sup>220</sup> *Turner I*, and *Turner II*. However, these cases do not necessarily support Congress's hopes for substantial deference to its findings.

The Supreme Court in *Anderson* found that a court must accept a lower court's findings of fact unless it has a "firm conviction" that they are "clearly erroneous."<sup>221</sup> Congress sought to show that while the Supreme Court was bound to accept the trial court's factual findings, Congress may reach its own factual findings.<sup>222</sup>

To ensure that courts provided deference to its findings under the PBABA, Congress cited *Katzenbach*.<sup>223</sup> The Supreme Court in *Katzenbach* allowed congressional findings that sought to expand the fundamental right to vote to more citizens.<sup>224</sup> *Katzenbach* gave great deference to Congress's findings, reasoning that "[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations . . . . It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."<sup>225</sup> Relying on this language, Congress reached its own factual findings, and thereafter enacted the PBABA based on these findings.<sup>226</sup> As long as the legislation pursues a legitimate constitutional interest, and "draws reasonable inferences based upon substantial evidence," Congress has the power to enact legislation based on findings to be given great deference by the Supreme Court.<sup>227</sup>

While Congress relied on *Katzenbach* to establish its findings, the statute at issue in *Katzenbach* sharply differs from the PBABA. *Katzenbach* sought to expand a fundamental right, yet the PBABA seeks to limit a fundamental right.<sup>228</sup> Moreover, "when a law *denies* (rather than expands) a fundamental right, that law is subject to the strictest scrutiny."<sup>229</sup> Thus, since the right to an abortion constitutes a

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218. See § 2, 117 Stat. at 1201.

219. 470 U.S. 564 (1985).

220. 384 U.S. 641 (1966).

221. *Anderson*, 470 U.S. at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

222. § 2(8), 117 Stat. at 1201.

223. 384 U.S. at 641.

224. *Id.* at 646-47.

225. *Id.* at 653.

226. See § 2(8), 117 Stat. at 1201.

227. *Id.*

228. See Melissa C. Holsinger, *The Partial-Birth Abortion Ban Act of 2003: The Congressional Reaction to Stenberg v. Carhart*, 6 N.Y.U. J. Legis. & Pub. Pol'y 603, 611 (2003) (stating that the statute in question in *Katzenbach* was an attempt by Congress to enforce a constitutional right whereas the PBABA is a congressional effort to limit a constitutional right expressed by the Supreme Court).

229. Kushnir, *supra* note 14, at 1179 (citing *Katzenbach*, 384 U.S. at 657).

fundamental right, the Court need not defer to Congress in quite the same way when analyzing the PBABA.<sup>230</sup> When the Court legitimately classifies an activity, “the regulation of which ought to trigger suspicions, those suspicions should apply to fact-finding as well.”<sup>231</sup> Then, the Court need not be very deferential to Congress when legislating in a context meriting heightened scrutiny.<sup>232</sup>

Congress also relied on the *Turner* cases to ensure the application of a highly deferential standard to their findings. In the *Turner* cases, the Court applied a highly deferential standard to the findings of Congress regarding the continuity of local broadcast television.<sup>233</sup> *Turner II* lays out a roadmap by which the courts may defer to Congress’s findings.<sup>234</sup> First, the court reviews the harm or risk that induced Congress’s action: “[C]ourts must accord substantial deference to the predictive judgments of Congress” when reviewing a statute’s constitutionality.<sup>235</sup> Then, the courts’ only obligation is to guarantee that “in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.”<sup>236</sup> Courts measure substantiality by “a standard more deferential than . . . accord[ed] to judgments of an administrative agency.”<sup>237</sup> The Supreme Court reasoned that Congress “is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon” legislative issues.<sup>238</sup> By drawing on inferences that partial-birth abortion procedures are “gruesome,” Congress used its findings to

230. See Holsinger, *supra* note 228, at 611-12. An argument exists that the Supreme Court should give more deference to Congress and that the Court is too lenient in extending “heightened scrutiny” to areas like Section Five of the Fourteenth Amendment. Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 *Fordham Urb. L.J.* 657, 660 n.17 (2004) (noting that from 1995-2000, Congress struck down twenty-four congressional enactments compared with the relatively low number from the earlier days of the century).

231. Amar, *supra* note 230, at 660.

232. *Id.*; see *supra* note 25.

233. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-67 (1994).

234. See *Turner*, 520 U.S. at 195-96.

235. *Id.* at 195 (quoting *Turner*, 512 U.S. at 665).

236. *Id.* (quoting *Turner*, 512 U.S. at 666).

237. *Id.* (citing *Turner*, 512 U.S. at 666-67); see, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (deferring to agency’s interpretation of vague statutes if the agency’s interpretation is reasonable); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (expressing a highly deferential standard for reviewing agency rulemaking); *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982) (noting that the courts’ inquiries into administrative agencies and Congress are similar when preempting state law).

238. *Turner*, 520 U.S. at 195 (citing *Turner*, 512 U.S. at 665-66 (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985))); see *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (finding that courts must perform an “appropriately deferential examination of Congress’ evaluation of [the] evidence”).

enact the PBABA, expecting that the Supreme Court will afford its findings great deference under the *Turner* cases.<sup>239</sup>

A court could distinguish the PBABA from the *Turner* statutes.<sup>240</sup> In *Turner II*, the Court used a mid-level standard of review.<sup>241</sup> The PBABA involves the right to abort a pre-viable fetus, which is a fundamental right, subject to heightened scrutiny.<sup>242</sup> Moreover, Congress enacted the PBABA in response to the *Stenberg* decision, while Congress did not implement the Cable Television Act in response to a Supreme Court decision.<sup>243</sup> The factual findings in the Cable Television Act relate to “predictive judgments,” involving “complex regulatory schemes and the interaction of industries undergoing significant economic and technological changes.”<sup>244</sup> This is in contrast to the PBABA, which neither relates to a complex regulatory scheme nor to an industry enduring significant change.<sup>245</sup> Therefore, under this reasoning, the level of deference given to Congress when evaluating the PBABA need not be so substantial.

Congress used the PBABA to express disagreement with how the Supreme Court exercised its power in *Stenberg*.<sup>246</sup> While *Turner* advises courts on giving deference to congressional findings, *Turner* and *Stenberg* are distinguishable. In *Stenberg*, the Supreme Court “implicitly rejected deference to the institutional competency of legislatures, at least when abortion regulations are concerned.”<sup>247</sup> The Supreme Court set a standard by which the government cannot “legislate in the face of medical uncertainty.”<sup>248</sup> Therefore, the Court should remain consistent and refrain from offering the deference it rejected in *Stenberg* when evaluating whether Congress’s findings were correct to determine that the PBABA satisfied the *Stenberg* standard.<sup>249</sup>

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239. See The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(11)-(14), 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531) (concluding that since Congress found no evidence that a partial-birth abortion is medically necessary, it need not include a health exception). After laying out the *Turner* deference standards, Congress goes through its findings that partial-birth abortion is never medically necessary and “blurs the line between abortion and infanticide.” *Id.* § 2(14)(O).

240. See Nat’l Abortion Fed’n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) (striking down the PBABA using a different deference standard than *Turner*).

241. *Turner*, 520 U.S. at 189.

242. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 933 (1992) (Blackmun, J., concurring); *Roe v. Wade*, 410 U.S. 113, 153-54 (1973); *supra* note 25.

243. Holsinger, *supra* note 228, at 612.

244. *Id.*

245. *Id.*

246. Nat’l Abortion Fed’n v. Ashcroft, 330 F. Supp. 2d 436, 486 (S.D.N.Y. 2004).

247. *Id.*

248. *Id.* (citing *Stenberg v. Carhart*, 530 U.S. 914, 937-38 (2000)).

249. *Id.*

C. *Section Five of the Fourteenth Amendment and the PBABA*

Section Five grants Congress the authority to “enforce” the provisions of the Fourteenth Amendment.<sup>250</sup> Congress may not legislate against private individuals; it may only enact legislation in response to state laws.<sup>251</sup> Under *City of Boerne*, Section Five does not empower Congress to restrict constitutional rights; Section Five is strictly limited to the enforcement of the Fourteenth Amendment. Congress’s power to enforce the Fourteenth Amendment is “remedial,” not “substantive.”<sup>252</sup> Congress cannot enforce a constitutional interpretation that differs from “the interpretation that the Court itself would adopt.”<sup>253</sup> Some scholars argue that courts should give Congress leeway, and that the Supreme Court should not supervise Congress’s actions under Section Five.<sup>254</sup> Because Congressmen are elected by a democratic process, there is a certain legitimacy to their actions that does not exist in the court system.<sup>255</sup> Moreover, proponents of giving Congress flexibility rely on Justice Brennan’s opinion in *Katzenbach*,<sup>256</sup> which indicated that “Congress might find a violation of the Equal Protection Clause even where the Court has not.”<sup>257</sup> Congress may be better equipped than the courts in finding constitutional violations because of its resources and confidence.<sup>258</sup> It might enact “complex and preventive remedies” more elaborate than an action a court would take.<sup>259</sup>

The Court gave Congress the power to act prophylactically: Congress may ban permissible state conduct to prevent or remedy constitutional violations.<sup>260</sup> Nonetheless, the Court must “distinguish between prophylactic legislation and legislation that seeks to change the substantive meaning of the Constitution.”<sup>261</sup> Thus, if Congress

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250. U.S. Const. amend. XIV, § 5.

251. *See supra* notes 145-48 and accompanying text.

252. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

253. Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 Tex. L. Rev. 1551, 1570 (2003) (reviewing John T. Noonan, Jr., *Narrowing the Nation’s Power: The Supreme Court Sides with the States* (2002)).

254. *See id.* at 1572 (describing Judge Noonan’s argument that Congress should have interpretive freedom so that when people differ about the meaning of the Constitution, Congress can act on its own meaning).

255. *See* Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 Tex. L. Rev. 1, 68 (2004).

256. *Katzenbach v. Morgan*, 384 U.S. 641, 648-58 (1966).

257. Young, *supra* note 253, at 1573 (noting that the “substantive power” interpretation of *Katzenbach* is controversial).

258. *Id.* (citing Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 106-08 (1966)).

259. *Id.* at 1575.

260. *Id.* at 1577.

261. *Id.*

acts prophylactically, the legislation must have “‘congruence and proportionality’ to the constitutional violation at issue.”<sup>262</sup>

In *Morrison*, once the Court determined that the Commerce Clause did not afford Congress the power to enact VAWA, it analyzed Congress’s power under Section Five of the Fourteenth Amendment.<sup>263</sup> Distinguishing VAWA from other federal statutes challenged under Section Five,<sup>264</sup> the Court found that VAWA was not a “remedy . . . directed to the culpable state official.”<sup>265</sup> While VAWA applied uniformly throughout the United States, Congress’s findings indicated that the discrimination problem associated with gender-motivated crimes did not exist in most states.<sup>266</sup> Therefore, the Supreme Court found that under Section Five of the Fourteenth Amendment, Congress did not have the authority to enact VAWA.<sup>267</sup>

The *Morrison* analysis can apply to the PBABA. Like VAWA, the PBABA is not directed to a culpable state official. It applies uniformly throughout the country, yet the partial-birth abortion “problem” does not exist in every state; to the contrary, many states already have partial-birth abortion bans in place.<sup>268</sup>

Some scholars, such as Judge Noonan, criticize the *Morrison* decision, arguing that “Congress should be able to provide remedies against private defendants as a remedy for unconstitutional state action.”<sup>269</sup> This view finds the states’ failure to prosecute gender-motivated crimes as unconstitutional, not the crime itself.<sup>270</sup> Such criticism could apply to the PBABA as well, since some states do not prosecute physicians for performing partial-birth abortions. However, the Supreme Court in *Morrison* found this argument contrary to precedent.<sup>271</sup>

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262. *Id.* at 1570 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

263. *United States v. Morrison*, 529 U.S. 598, 619 (2000) (noting that Congress explicitly included the Fourteenth Amendment as a source of authority to enact VAWA).

264. *See id.* at 624-27 (citing *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *Ex parte Virginia*, 100 U.S. 339 (1880); *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

265. *Id.* at 626.

266. *Id.* at 626-27. The Court noted that in *Katzenbach*, Congress directed the remedy only to the State where Congress found wrongdoing and in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), Congress targeted the remedy only to the states in which Congress determined the existence of discrimination. *Morrison*, 529 U.S. at 626-27.

267. *Morrison*, 529 U.S. at 627.

268. Congress was not responding to any unconstitutional state laws by enacting the PBABA; to the contrary many states have enacted their own partial-birth abortion bans. *See, e.g.*, Ga. Code Ann. § 16-12-144 (1997); La. Rev. Stat. Ann. § 14:32.9 (West 1997); Mich. Comp. Laws Ann. § 333.17016 (West 2001); Tenn. Code Ann. § 39-15-209 (1997).

269. Young, *supra* note 253, at 1581-82.

270. *Id.* at 1582.

271. *See id.* (discussing the *Civil Rights Cases*, in which the Court struck down a provision which sanctioned conduct). Because states had equality laws that were

PBABA supporters assert that Section Five allows Congress to protect potential life.<sup>272</sup> Considering a legislative ban on partial-birth abortions constitutional, Attorney General John Ashcroft stated that “allowing this life-taking procedure to continue would be inconsistent with our obligation under section 5 of the 14th Amendment to protect life.”<sup>273</sup> The Fourteenth Amendment, however, refers to “persons,” which does not include the unborn.<sup>274</sup> While some argue that the government has the right to protect creatures besides persons, the government does not have the power to do this “in ways that make the exercise of a fundamental constitutional right impossible.”<sup>275</sup>

While Congress purports that the Commerce Clause and Section Five of the Fourteenth Amendment afford it the power to enact the PBABA, previous case law does not grant Congress such authority. In analyzing the constitutionality of the PBABA, the Supreme Court has the opportunity to clarify the boundaries of congressional powers with regard to partial-birth abortions.

### III. KEEPING THE FEDERAL GOVERNMENT AWAY FROM ABORTION LEGISLATION SUCH AS THE PBABA

In complying with the historic checks and balances system, the Supreme Court should review the PBABA to determine if Congress overstepped its boundaries by enacting the statute. The Court must neutrally use the preexisting law to examine the constitutionality of the PBABA, without allowing personal prejudices to influence the decision.<sup>276</sup> Ultimately it will be up to the Court to either strike down

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unenforced by the state governments, Congress wished to give an alternate remedy under federal law, yet it was prohibited from doing so under Section Five of the Fourteenth Amendment. *See id.*

272. *See Law, supra* note 215, at 411.

273. *Id.* at 411 n.271 (citing 114 Cong. Rec. S10,491 (daily ed. Sept. 17, 1998)).

274. *See id.* at 412 n.277. “[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” *Id.* (citing *Roe v. Wade*, 410 U.S. 156, 158 (1973)). Moreover, “an abortion is not ‘the termination of life entitled to Fourteenth Amendment protection.’” *Id.* (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 913 (1992)). *But see* *Unborn Victims of Violence Act*, 18 U.S.C.A. § 1841 (West Supp. 2004) (providing that “[w]hoever engages in conduct that . . . causes the death of, or bodily injury . . . to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense”). The *Unborn Victims of Violence Act*, however, explicitly notes that the statute is not applicable to “any conduct relating to an abortion”. *Id.* § 1841(c)(1); *see also* *26 GOP Members of Congress Ask Federal Appeals Court to Overturn Ruling Striking Down Federal Abortion Ban*, Daily Reprod. Health Rep. (The Henry J. Kaiser Family Found., Menlo Park, Ca.), Dec. 10, 2004, available at [http://www.kaisernetwork.org/daily\\_reports/rep\\_index.cfm?hint=2&DR\\_ID=27177](http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=27177).

275. Dworkin, *supra* note 40, at 114 (citing the arguments of Professor John Hart Ely of Stanford Law School and Professor Laurence Tribe of Harvard Law School).

276. *See* Roger Clegg, *Is a Ban on Partial-Birth Abortions Within Congress's Enumerated Powers?*, Fall Nexus, 1998, at 25 (acknowledging that “[f]or a conservative, it does not follow that, just because something is wrong, Congress has authority to prohibit it . . . even if something is very wrong”); Ronald J. Krotoszynski,

or uphold the PBABA, setting the future for the expansion or tightening of Congress's powers.

Congress did not have the requisite power to enact the PBABA; thus, it is unconstitutional. Upholding the PBABA would not only undermine *Roe* and *Casey*, it would undermine the Commerce Clause and Section Five jurisprudence. The Commerce Clause would retreat back to the pre-*Lopez* standard, with few limitations on Congress.<sup>277</sup> Congress's power to "enforce" under Section Five would stretch to include congressional actions already deemed unconstitutional by the Supreme Court; Congress would no longer need to show congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.<sup>278</sup> Moreover, when striking down the PBABA, besides focusing on the precedent set by *Stenberg*, the statute's lack of a health exception for the pregnant woman, its vagueness, and the undue burden it places on the pregnant woman, the Court should make explicitly clear that Congress does not have the authority to enact such legislation over partial-birth abortions. Partial-birth abortion regulation should remain solely within the states' domain.

Part III.A argues that Congress did not possess power under the Commerce Clause to enact the PBABA. Part III.B proposes that the Court need not afford substantial deference to Congress's findings that the PBABA is a valid expression of congressional powers. Part III.C argues that Section Five of the Fourteenth Amendment did not afford Congress the requisite authority to enact the PBABA. Part III.D illustrates the implications of a decision upholding the constitutionality of the PBABA.

#### A. *The PBABA's Unconstitutionality Under the Commerce Clause*

The PBABA can be struck down as a violation of congressional powers under the Commerce Clause. First, both crime and health care are traditionally areas of state control.<sup>279</sup> Even before *Lopez*, the Court accentuated criminal law as a state concern.<sup>280</sup> Moreover,

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Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 Ind. L. Rev. 11, 24 (1998) (worrying that the Supreme Court would not apply "neutral federalism principles" when reviewing a federal law prohibiting or severely discouraging specific abortion procedures because personal views on abortion would get in the way).

277. See *supra* note 102 and accompanying text.

278. See *supra* notes 154-67, 265-68 and accompanying text (discussing the standard set by the Supreme Court in *City of Boerne* for reviewing statutes under Section Five and cases that applied the congruence and proportionality analysis).

279. See *Ides, supra* note 207, at 454 (citing *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (noting that "the field of health care [is] a subject of traditional state regulation")); *Kopel & Reynolds, supra* note 208, at 71 n.56.

280. *Kopel & Reynolds, supra* note 208, at 71 n.56 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *United States v. Emmons*, 410 U.S. 396, 411-12 (1973));

medical regulation and family law are both traditionally matters left to the states.<sup>281</sup> Thus, the PBABA limits a “truly local” activity, which is unconstitutional under *Lopez*.<sup>282</sup> The PBABA is the first federal law outlawing a form of abortion since *Roe*.<sup>283</sup> It is also the first legislation criminalizing a medical procedure.<sup>284</sup> To uphold the PBABA would be to expand federal powers to other aspects of medical procedures and family law, which is precisely what *Lopez* sought to avoid.<sup>285</sup> When Congress enacted VAWA, it added a clause stating that the statute would not encroach in the state-controlled area of family law.<sup>286</sup> Nonetheless, the Court still struck down the statute, finding that the statute infringed on an area of law traditionally left up to the states.<sup>287</sup> While Congress might feel that the PBABA fails to invade the state-controlled realm of family law, the Court will conduct its own analysis as to whether the statute primarily deals with a federal issue. Because the PBABA deals with abortion, a family law matter, the Court should not be sympathetic to an argument that Congress did not mean to invade traditional state-controlled areas of law. There is no need for Congress to impose itself in this manner as states are competent to regulate partial-birth abortions.<sup>288</sup>

Second, the Court must determine whether the restricted partial-birth abortion procedures are economic in nature.<sup>289</sup> In *Lopez*, the Supreme Court struck down the GFSZA because the regulated activity (gun possession) was not economic in nature.<sup>290</sup> Like gun possession, partial-birth abortions can occur in a noncommercial setting.<sup>291</sup> Although most doctors will only perform abortions for a

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*Screws v. United States*, 325 U.S. 91 (1945) (reaffirming criminal law as an issue for the states rather than the federal government)).

281. Kopel & Reynolds, *supra* note 208, at 105.

282. See *supra* note 114 and accompanying text; see also Law, *supra* note 215, at 412 (noting that a law criminalizing abortion “falls under the domain of the ‘truly local’ because it involves both criminal and family law”).

283. 150 Cong. Rec. S4371-01 (daily ed. Apr. 26, 2004) (statement of Sen. Feinstein).

284. *Id.*

285. See Kopel & Reynolds, *supra* note 208, at 105; see also *supra* notes 110-14 and accompanying text.

286. See *supra* notes 129-30 and accompanying text.

287. See *supra* notes 127-31 and accompanying text.

288. See Kopel & Reynolds, *supra* note 208, at 110 (citing *Roe v. Wade*, 410 U.S. 113, 163-64 (1973)).

289. See *supra* notes 105-14 and accompanying text (discussing the *Lopez* standard for the Commerce Clause).

290. *United States v. Lopez*, 514 U.S. 549, 567 (1995); see also Ides, *supra* note 207, at 446 (noting that while the defendant in *Lopez* wished to sell his gun, the Court deemed his conduct noneconomic since the application of the GFSZA did not require any such showing); *supra* notes 101-14 and accompanying text (discussing the significance of the *Lopez* decision).

291. Ides, *supra* note 207, at 446 (noting that “[i]f simple gun possession is noneconomic, then the performance of an abortion, unadorned by a commercial element, must be similarly characterized”).

fee, the PBABA does not require that the woman obtain an abortion in a commercial transaction.<sup>292</sup>

Third, the Court must analyze whether the restricted partial-birth abortion procedures substantially affect interstate commerce.<sup>293</sup> The arguments that partial-birth abortions substantially affect interstate commerce because abortion clinics charge a fee for services, doctors perform abortion services for payment, and abortion clinics buy supplies from out-of-state and deal with out-of-state insurance companies, are incompatible with the *Lopez* decision and other case law. The effects of partial-birth abortions on interstate commerce are tenuous, at most.<sup>294</sup>

Fourth, while the PBABA begins by stating that “[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion”<sup>295</sup> it is practically impossible to perform an abortion “in or affecting interstate or foreign commerce.”<sup>296</sup> Also, this phrase contradicts *Lopez* and *Morrison*, which distinguish between “the nature of the regulated activity and its potential effect on interstate commerce.”<sup>297</sup> To consider any activity which affects interstate commerce economic would be to obliterate the distinction between an economic and a noneconomic activity.<sup>298</sup> The PBABA does not limit the ban to abortions performed for payment, including noncommercial and commercial abortions. Therefore, the overbroad quality of the PBABA bans a noneconomic procedure that does not substantially affect interstate commerce. Accordingly, the PBABA violates the Commerce Clause as clarified by *Lopez*.

While the PBABA’s accompanying House Report declares that the partial-birth abortion procedures affect interstate commerce,<sup>299</sup> the

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292. See 18 U.S.C.A. § 1531 (West Supp. 2004); *Ides*, *supra* note 207, at 446 (claiming partial-birth abortion procedures are not part of a commercial transaction, much like acts of domestic violence punished by VAWA). While the PBABA uses the words “in or affecting interstate or foreign commerce,” that is not enough. *Id.* at 449 (noting that the PBABA does not contain language limiting the scope of the “affecting interstate commerce” and thus embraces commercial and noncommercial activities that affect interstate commerce).

293. See *supra* notes 105-14 and accompanying text (discussing the *Lopez* standard for the Commerce Clause).

294. See *supra* notes 201-04, 212-17 and accompanying text.

295. 18 U.S.C.A. § 1531.

296. *Kopel & Reynolds*, *supra* note 208, at 111 (stating that the only possible way a physician could perform an abortion “in or affecting interstate or foreign commerce” is by “operating a mobile abortion clinic on the Metroliner”); see also *supra* note 204 and accompanying text (noting that just because Congress claims that an activity affects interstate commerce does not necessarily make it so).

297. See *Ides*, *supra* note 207, at 449.

298. See *id.* at 450 (noting that the “in or affecting interstate commerce” language does not limit the PBABA’s scope to abortions-for-hire).

299. The Partial-Birth Abortion Ban Act of 2003, H.R. Rep. No. 108-58, at 24-25 (2003).

PBABA's banned procedure accounts for only 0.17 percent of all abortions, often when the fetus could not sustain life outside the womb.<sup>300</sup> This does not constitute a substantial effect on interstate commerce.<sup>301</sup> Congress could not rationally conclude that women who travel interstate to obtain a partial-birth abortion have a significant impact on interstate commerce.<sup>302</sup>

B. *Why the Court Need Not Give Substantial Deference to Congress's Findings Under the PBABA*

The Court made it clear in *Lopez* that just because Congress concludes that an activity substantially affects interstate commerce does not make it true.<sup>303</sup> As the Court stated, “[t]his case deals with factual findings rather than legal interpretation; however, it would also infringe upon the constitutional role of the judiciary if Congress could simply tell the federal courts that their findings are wrong and receive substantial deference in order to prove it.”<sup>304</sup> The Court also noted that “[u]nlike the statute in *Turner*, in which Congress exercised original, predictive judgment about the marketplace, but similarly to the RFRA, the Act here is an expression of Congress’s disagreement with how the judiciary has exercised its authority.”<sup>305</sup> While *Turner* advises courts on giving deference to congressional findings, *Turner* and *Stenberg* are distinguishable. In *Stenberg*, the Supreme Court “implicitly rejected deference to the institutional competency of legislatures, at least when abortion regulations are concerned.”<sup>306</sup> The Supreme Court set a standard by which the government cannot “legislate in the face of medical uncertainty.”<sup>307</sup> In the *Stenberg* dissent, Justices Thomas and Kennedy acknowledged that “barring legislative action when there is no consensus on an abortion procedure disregards the Court’s traditional respect for legislatures’ superior resources and factfinding capabilities.”<sup>308</sup> The Supreme

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300. Kushnir, *supra* note 14, at 1177.

301. The Court will uphold “regulations of activities that arise out of or are connected with a *commercial* transaction, which viewed in the aggregate, substantially affects interstate commerce.” Maloney, *supra* note 107, at 1917 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)); *see supra* note 107 and accompanying text.

302. Kopel & Reynolds, *supra* note 208, at 105; *see Clegg, supra* note 276, at 31 (explaining that Congress is “not trying to ban partial-birth abortions as a means of regulating interstate commerce, after all. They are banning them because they believe persons are being murdered and they want it to stop”).

303. *See supra* notes 105-14 and accompanying text (discussing the Supreme Court’s Commerce Clause analysis in *Lopez*).

304. *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 486 (S.D.N.Y. 2004).

305. *Id.*

306. *Id.*

307. *Id.* (citing *Stenberg v. Carhart*, 530 U.S. 914, 937-38 (2000)).

308. *Id.* (citing *Stenberg*, 530 U.S. at 970 (Kennedy, J., dissenting); *id.* at 1017-18 (Thomas, J., dissenting)).

Court rejected this deference. Therefore, courts should not defer to Congress's findings regarding the PBABA.<sup>309</sup>

By establishing the *Turner* standard, the Supreme Court "explicitly holds that Congress could disregard evidence contrary to its findings provided that the position it accepted was reasonable and based on substantial evidence."<sup>310</sup> Moreover, while Congress cites *Katzenbach* as the source for its deference, *Katzenbach* is distinguishable from the PBABA; whereas *Katzenbach* sought to expand a fundamental right, the PBABA seeks to limit a fundamental right.<sup>311</sup> When a law denies, rather than expands, a fundamental right, courts must analyze it with the strictest scrutiny.<sup>312</sup> Therefore, courts reviewing the PBABA, which limits women's right to choose an abortion, need not give such rigid deference to Congress's findings.

### C. *The PBABA's Unconstitutionality Under Section Five of the Fourteenth Amendment*

Section Five of the Fourteenth Amendment also does not afford Congress the power to enact partial-birth abortion bans such as the PBABA. Unless a state violates a provision of the Fourteenth Amendment, Congress does not have the power to legislate under Section Five.<sup>313</sup> Congress did not enact the PBABA in response to any unconstitutional state laws, and thus it had no authority to pass the PBABA.<sup>314</sup> Moreover, Section Five does not allow Congress to design laws regulating privacy rights.<sup>315</sup> It restricts Congress to the rectification of state laws infringing on privacy rights.<sup>316</sup> Section Five does not give Congress the power to infringe on individual rights unless Congress is reacting to a preexisting state law; since there was no previous state action, Congress did not have the requisite authority to enact the PBABA.

Like the RFRA, which the Court struck down in *City of Boerne*, the PBABA is overbroad. The PBABA is not enforcing a constitutionally-protected issue, it is restricting it; under *City of Boerne*, Congress may not redefine the Constitution's fundamental

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309. *See id.*

310. *Id.* at 487 (citing *Turner*, 520 U.S. 180, 210-11 (1997) (stating that the "presence of contradictory evidence before Congress does not render its findings invalid").

311. *See* 18 U.S.C.A. § 1531 (West Supp. 2004); *supra* notes 228-30 and accompanying text.

312. Kushnir, *supra* note 14, at 1179 (citing *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)).

313. *See supra* notes 141-42 and accompanying text.

314. *See supra* note 268 and accompanying text.

315. *See supra* notes 144-48 and accompanying text.

316. *See supra* notes 146-48 and accompanying text.

guarantees.<sup>317</sup> Like the RFRA, the PBABA has no termination date, geographic restriction, or predicate.<sup>318</sup> The PBABA does not contain limitations showing that Congress's means are proportionate to ends legitimate under Section Five. The restrictions imposed by the PBABA are disproportionate to any unconstitutional conduct that might be targeted by the Act. Many states already ban partial-birth abortion procedures, and perhaps Congress could better enforce the Fourteenth Amendment by ensuring that these existing state laws are constitutional.<sup>319</sup> Thus, the PBABA violates the proportionality test given by *City of Boerne*, rendering it an unconstitutional manipulation of Congress's Section Five power.<sup>320</sup>

#### D. Implications of a Decision Upholding the Constitutionality of the PBABA

If the Supreme Court upheld the PBABA as constitutional, it would undo the *Stenberg* decision. By not requiring an exception for the health of the pregnant woman and by allowing the vague language to impose an undue burden on the pregnant woman seeking the abortion, it would challenge the past precedent given by *Roe* and *Casey*.<sup>321</sup> If the Court allows Congress to prohibit abortions in this manner, it would chip away at the rights previously afforded to women by *Roe* and *Casey*. The Supreme Court would be granting Congress the power to override the Court, undermining its authority. In *Stenberg*, the Supreme Court unmistakably reaffirmed that any

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317. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (stating that "Congress does not enforce a constitutional right by changing what the right is").

318. See *supra* notes 159-62 and accompanying text.

319. See Clegg, *supra* note 276, at 31 (asking, "[w]hy is a national ban needed when half the states have passed such bans? And for those states that have not passed bans and are not enforcing their murder laws against partial-birth abortionists, why isn't the better course to sue or otherwise act against the recalcitrant officials?"); *supra* note 314 and accompanying text.

320. See *supra* note 160 and accompanying text.

321. In her concurrence in *Stenberg*, Justice O'Connor specifically stated that she would not consider a partial-birth abortion ban constitutional unless it contained a health exception. *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring). Despite this, the PBABA's authors and supporters seemed willing to gamble that by the time the Supreme Court reviews the statute, the makeup of the Supreme Court will be different. Gordon, *supra* note 14, at 512-13. As President Bush has promised to put partial-birth abortion opponents on the Court, it seems likely that the ban could be ruled constitutional if a member of the *Stenberg* majority retires before the PBABA comes up for review. *Id.* Justice Blackmun's warning remains true: "All that remained between the promise of *Roe* and the darkness . . . was a single flickering flame . . . I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light." Letter from NARAL Legal Department, NARAL Pro-Choice America Foundation, to Interested Parties (Jan. 1, 2004) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 922-23 (1992) (Blackmun, J., concurring)), available at <http://www.naral.org/facts/loader.cfm?url=/commonsspot/security/getfile.cfm&PageID=7879>.

legislation restricting access to abortions must contain a health exception and cannot be vague.<sup>322</sup> Nonetheless, Congress enacted the PBABA, lacking a health exception and using vague language.<sup>323</sup> Congress does not have the power to “legislatively supersede” Supreme Court decisions that interpret and apply the Constitution.<sup>324</sup> Therefore, Congress must respect the Supreme Court’s judgment in *Stenberg*, and not attempt to overrule the decision by enacting legislation such as the PBABA.

Justice Ginsburg warned against passing legislation as a step towards eliminating the fundamental right to an abortion.<sup>325</sup> In their lobbying, Republicans separated the right to choose issue from the partial-birth abortion issue.<sup>326</sup> They referred to the procedure as infanticide, persuading pro-choice Democrats to support the ban.<sup>327</sup> Since the procedure seemed so depraved,<sup>328</sup> it was difficult for advocates to defend partial-birth abortions, leading them to focus on medical reasons rather than a woman’s right to choose.<sup>329</sup> Nonetheless, the unpleasant nature of the partial-birth abortion procedures should not divert the issue away from the inherent illegality of the PBABA.

The Supreme Court should not only strike down the PBABA as unconstitutional, it should use language indicating that this is not a topic under congressional control.<sup>330</sup> Only if the Supreme Court

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322. See *supra* notes 77-84 and accompanying text.

323. See *supra* notes 92-95 and accompanying text.

324. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (finding an inherent conflict between the *Miranda v. Arizona* ruling and a federal statute, therefore rendering the statute unconstitutional).

325. *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (quoting Judge Posner, who proposed that legislatures pass these laws to “chip away at the private choice shielded by *Roe v. Wade*”).

326. William Saletan, *Bearing Right: How Conservatives Won the Abortion War* 233 (2003).

327. *Id.* at 234 (quoting Senator Pat Moynihan (D-NY) as saying “[partial-birth abortion] is just too close to infanticide . . . I’m pro-choice, but this goes above and beyond what anybody would think of as an abortion”). Republican presidential nominee Bob Dole added that “[a] partial-birth abortion blurs the line between abortion and infanticide and crosses an ethical and legal line we must never cross . . . . Regardless of your views on abortion—pro-life or pro-choice—we’ve got to end this partial-birth abortion.” *Id.*

328. See Gordon, *supra* note 14, at 505 (noting that the proponents of the PBABA used the partial-birth abortion procedure’s “gory details” to advance their cause). Representative Forbes asked, “[i]s there no limit, is there no amount of pain, is there no procedure that is so extreme that we can apply to this unborn child or this fetus that we are willing as a country to say that just goes too far?” 149 Cong. Rec. H9146 (daily ed. Oct. 2, 2003) (statement of Rep. Forbes).

329. Saletan, *supra* note 326, at 235 (pointing to pro-choice activists who stressed that women did not choose to have partial-birth abortions, but rather underwent the procedure due to medical necessity). Activists proclaimed that the decision to have a partial-birth abortion must be left up to physicians. *Id.*

330. See U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

makes it clear that federal partial-birth abortion bans are automatically invalid by virtue of the Commerce Clause and Section Five of the Fourteenth Amendment will administrations cease from restricting freedoms in this way.

Congress exceeded its constitutional boundaries by enacting the PBABA. The Supreme Court should prohibit Congress from enacting future legislation in this arena. Instead of striking down the PBABA using a due process analysis, as the Supreme Court did in *Stenberg*, the Court should make it clear that the federal government has no right to regulate in this manner.

#### CONCLUSION

By the time the Supreme Court has the opportunity to review the PBABA, the makeup of the Supreme Court might very well be different. With Republican-controlled legislative and executive branches, the new Supreme Court might lean further to the right, especially on the issue of abortion.<sup>331</sup> This might sway the Court into upholding the PBABA.

Sustaining the PBABA, however, would unravel previous privacy and abortion rights<sup>332</sup> and confuse the lines between federal and state authority. If the Supreme Court finds that the PBABA constitutes a proper exercise of congressional powers under the Commerce Clause, then almost any activity could be deemed “interstate” for the purposes of pursuing federal legislation, effectively overturning the precedent set by *Lopez* and *Morrison*. If Congress obtains its powers from Section Five of the Fourteenth Amendment, then the Supreme Court will be handing Congress the freedom to legislate in any manner it deems appropriate, thus ending the important interpretation that *City of Boerne* gave in defining Congress’s power to “enforce.”

Nevertheless, the Court, when reviewing the PBABA, can avoid this potential confusion. In reviewing the PBABA, the Supreme

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respectively, or to the people.”). The Constitution includes other provisions by which Congress may legislate, yet none are relevant to this discussion. *See, e.g.*, U.S. Const. Art. I, § 8 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).

331. *See supra* note 12 and accompanying text.

332. *See* 150 Cong. Rec. S4371-01 (daily ed. Apr. 26, 2004) (statement of Sen. Feinstein) (worrying that “[w]e are on a slippery slope toward granting fetuses greater rights than the mothers who carry them. It may not be long before common forms of contraception, in-vitro fertilization and stem-cell research are banned in the name of the unborn”); *see also* Editorial, *Rolling Back Women’s Rights*, N.Y. Times, Nov. 23, 2004, at A24 (stating that “Americans, and American women in particular, are officially on notice that post-election, the Republican war on reproductive rights has entered an ominous new phase”).

Court has the unique opportunity to create a workable and consistent standard, articulating the bounds of federal powers, and thus promoting stability. With such a consistent standard, federalism can contribute to domestic tranquility by affording different resolutions to many controversial, divisive moral issues.<sup>333</sup> With “vigorous judicial enforcement of federalism,” the Court will promote stability over faction, avoiding the “destabilizing effects of imposing a single national answer to fractious questions.”<sup>334</sup>

Through the PBABA, Congress imposes a single national answer to the divisive conflict over abortion rights. However, the Supreme Court has expressly hindered Congress’s ability to override the Court’s decisions on constitutional issues such as the right to an abortion. The decisions of *Roe*, *Casey*, and *Stenberg* indicate that the Court expects legislatures to stay within certain boundaries when enacting abortion legislation. Laws restricting abortion are permissible, provided they do not create an undue burden on the woman seeking the abortion through either vagueness or the lack of a health exception. Congress must respect those boundaries. The constitutional separation of powers is essential to maintaining balance in the federal government. By choosing balance, the Court will ensure that the different branches of government respect one another’s sovereignty, leading to a more harmonious resolution of nationally divisive issues. Therefore, in striking down the PBABA as an unconstitutional exercise of Congress’s powers, the Supreme Court will offer a clear boundary between state and federal powers, and not undermine years of precedent defining these powers.

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333. See Kopel & Reynolds, *supra* note 208, at 111 (citing Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 Mich. L. Rev. 752, 768-69 (1995)).

In [the separation of power doctrine’s] major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. . . . Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

*Id.* at 76 n.75 (quoting *Plaut v. Spendthrift, Inc.*, 514 U.S. 211, 239-40 (1995)).

334. *Id.* at 111.