"Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey*. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."–Justice KENNEDY

"[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices.... Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure. The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women's place in the family and under the Constitution-ideas that have long since been discredited.... *Casey*."–Justice GINSBURG

GONZALES v. CARHART
___ U.S.___, 127 S.Ct. 1610, 167 L.Ed.2d 1 (2007).

KENNEDY, J., delivered the opinion of the Court, in which **ROBERTS**, C. J., and **SCALIA**, **THOMAS**, and **ALITO**, JJ., joined. **THOMAS**, J., filed a concurring opinion, in which **SCALIA**, J., joined. **GINSBURG**, J., filed a dissenting opinion, in which **STEVENS**, **SOUTER**, and **BREYER**, JJ., joined.

Justice KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), a federal statute regulating abortion procedures. In recitations preceding its operative provisions the Act refers to the Court's opinion in Stenberg v. Carhart (2000), which also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in *Stenberg,* the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it....

I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary...to discuss abortion procedures in some detail....

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU-486), to terminate the pregnancy. The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in this trimester. Although individual techniques for performing D & E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus....

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E. See M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992). For discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D & Es are performed in

this manner.

Intact D & E, like regular D & E, begins with dilation of the cervix....

In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart....

Rotating the fetus as it is being pulled decreases the odds of dismemberment....

Intact D & E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. Dilation and Extraction 110-111....

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation....

D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction...accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications.... These two procedures represent about .07% of second-trimester abortions.

B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on " 'partial birth abortion' " proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg,* Congress passed the Act at issue here. On November 5, 2003, President Bush signed the Act into law.

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* "was required to accept the very questionable findings issued by the district court judge," but that Congress was "not bound to accept the same factual findings." Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."

Second, and more relevant here, the Act's language [discussed below] differs from that of

the Nebraska statute struck down in *Stenberg*.

C

The District Court in *Carhart* concluded the Act was unconstitutional for two reasons. First, ...it lacked an exception allowing the procedure where necessary for the health of the mother. Second, ...it covered not merely intact D & E but also certain other D & Es.

The Court of Appeals for the Eighth Circuit...invalidated the Act.

D

The District Court in *Planned Parenthood* concluded the Act was unconstitutional "because it (1) pose[d] an undue burden on a woman's ability to choose a second trimester abortion; (2)[was] unconstitutionally vague; and (3) require[d] a health exception as set forth by ... *Stenberg*."

The Court of Appeals for the Ninth Circuit agreed....

II

The principles set forth in the joint opinion in Planned Parenthood of Southeastern Pa. v. Casey (1992), did not find support from all those who join the instant opinion. See *id.* (Scalia, J., joined by Thomas, J., *inter alios,* concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion – that the government has a legitimate and substantial interest in preserving and promoting fetal life – would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

Casey involved a challenge to Roe v. Wade (1973). The opinion contains this summary: "It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.".

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate

interest of the Government in protecting the life of the fetus that may become a child....

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." *Casey*. It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id. Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

III

We begin with a determination of the Act's operation and effect. A straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regulates and proscribes, with exceptions or qualifications to be discussed, performing the intact D & E procedure.

Respondents agree the Act encompasses intact D & E, but they contend its additional reach is both unclear and excessive. Respondents assert that, at the least, the Act is void for vagueness because its scope is indefinite. In the alternative, respondents argue the Act's text proscribes all D & Es. Because D & E is the most common second-trimester abortion method, respondents suggest the Act imposes an undue burden. In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D & E.

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." It defines the unlawful abortion in explicit terms.

First, the person performing the abortion must "vaginally delive[r] a living fetus."...The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb....

Second, the Act's definition of partial-birth abortion requires the fetus to be delivered "until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." The Attorney General concedes, and we agree, that if an abortion

procedure does not involve the delivery of a living fetus to one of these "anatomical 'landmarks,'"...the prohibitions of the Act do not apply.

Third, to fall within the Act, a doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered living fetus." [T]he overt act causing the fetus' death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark....

Fourth, the Act contains scienter requirements concerning all the actions involved in the prohibited abortion. To begin with, the physician must have "deliberately and intentionally" delivered the fetus to one of the Act's anatomical landmarks....In addition, the fetus must have been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]."...

B

Respondents contend the language described above is indeterminate, and they thus argue the Act is unconstitutionally vague on its face. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson (1983); Posters 'N' Things, Ltd. v. United States (1994). The Act satisfies both requirements.

The Act provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford (1972). Indeed, it sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure. *Posters 'N' Things*. Unlike the statutory language in *Stenberg* that prohibited the delivery of a " 'substantial portion' " of the fetus – where a doctor might question how much of the fetus is a substantial portion – the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. Doctors performing D & E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

This conclusion is buttressed by the intent that must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns. The Act requires the doctor deliberately to have delivered the fetus to an anatomical landmark. Because a doctor performing a D & E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as "a trap for those who act in good faith." *Colautti*....

C

We next determine whether the Act imposes an undue burden, as a facial matter, because

its restrictions on second-trimester abortions are too broad....

1

The Act prohibits a doctor from intentionally performing an intact D & E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure. First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt-act requirement because it kills the fetus and is distinct from delivery....

The Act excludes most D & Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D & E procedure can often "tak[e] about 10-15 'passes' through the uterus to remove the entire fetus." Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery.

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in *Stenberg* prohibited " 'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.' " The Court concluded that this statute encompassed D & E because "D & E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus."...

Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," instead of "'delivering ... a living unborn child, or a substantial portion thereof.'"...

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*....

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth abortion and the distinct overt act that kills the fetus.... This distinction matters because, unlike intact D & E, standard D & E does not involve a delivery followed by a fatal act.

The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to

whether the Act covers the prototypical D & E procedure. " '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council (1988). It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic "'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.'" *Stenberg* (Kennedy, J., dissenting). *Casey* put this novel statutory approach to rest.. *Stenberg* need not be interpreted to have revived it....

2

Contrary arguments by the respondents are unavailing. Respondents look to situations that might arise during D & E, situations not examined in *Stenberg*. They contend-relying on the testimony of numerous abortion doctors-that D & E may result in the delivery of a living fetus beyond the Act's anatomical landmarks in a significant fraction of cases. This is so, respondents say, because doctors cannot predict the amount the cervix will dilate before the abortion procedure. It might dilate to a degree that the fetus will be removed largely intact. To complete the abortion, doctors will commit an overt act that kills the partially delivered fetus. Respondents thus posit that any D & E has the potential to violate the Act, and that a physician will not know beforehand whether the abortion will proceed in a prohibited manner.

This reasoning, however, does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D & E. If a doctor's intent at the outset is to perform a D & E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited scienter is not present. When a doctor in that situation completes an abortion by performing an intact D & E, the doctor does not violate the Act....

The evidence also supports a legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance....

Many doctors who testified on behalf of respondents, and who objected to the Act, do not perform an intact D & E by accident. On the contrary, they begin every D & E abortion with the objective of removing the fetus as intact as possible. This does not prove, as respondents suggest, that every D & E might violate the Act and that the Act therefore imposes an undue burden. It demonstrates only that those doctors who intend to perform a D & E that would involve delivery of a living fetus to one of the Act's anatomical landmarks must adjust their conduct to the law by not attempting to deliver the fetus to either of those points....

IV

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of

a woman seeking an abortion before the fetus attains viability." *Casey* (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

A

The Act's purposes are set forth in recitals preceding its operative provisions.... The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." Congressional Findings. The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain: "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." Congressional Findings.

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." Washington v. Glucksberg (1997)...

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." This was not an idle assertion. The three premises of *Casey* must coexist. The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D & E is a procedure itself laden

with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," Congressional Findings, and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." Congressional Findings. The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey*. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey* ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little.... [But] [i]t was reasonable for Congress

to think that partial-birth abortion, more than standard D & E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings....

B

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where " 'necessary, in appropriate medical judgment, for [the] preservation of the ... health of the mother.' " *Ayotte* (quoting *Casey*). The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." *Ayotte*. In *Ayotte* the parties agreed a health exception to the challenged parental-involvement statute was necessary "to avert serious and often irreversible damage to [a pregnant minor's] health." Here, by contrast, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D & E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*. Abortion doctors testified, for example, that intact D & E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp....Respondents, in addition, proffered evidence that intact D & E was safer for women with certain medical conditions or women with fetuses that had certain anomalies.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D & E always to be a safe alternative.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question....

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

This traditional rule is consistent with *Casey,* which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not

give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community....

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D & E.... In addition the Act's prohibition only applies to the delivery of "a living fetus." If the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

The instant cases, then, are different from Planned Parenthood of Central Mo. v. Danforth (1976), in which the Court invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method. The Court found the ban in *Danforth* to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See Crowell v. Benson (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. Whether or not accurate at the time, some of the important findings have been superseded. Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. The testimony in the District Courts, however, demonstrated intact D & E is taught at medical schools. Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. The evidence presented in the District Courts contradicts that conclusion. Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, relying on the Court's opinion in *Stenberg,* respondents contend that

an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'" As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty.

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

V...

The Act is open to a proper as-applied challenge in a discrete case....

* * *

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

Justice **THOMAS**, with whom Justice **SCALIA** joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including *Casey*. I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe*, has no basis in the Constitution. I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.

Justice **GINSBURG**, with whom Justice **STEVENS**, Justice **SOUTER**, and Justice **BREYER** join, dissenting.

In *Casey,* the Court declared that "[l]iberty finds no refuge in a jurisprudence of doubt."...

Taking care to speak plainly, the *Casey* Court restated and reaffirmed *Roe's* essential holding. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." Second, the Court acknowledged "the State's power to restrict abortions *after fetal viability,* if the law contains exceptions for pregnancies which endanger the woman's life *or health*." (emphasis added). Third, the Court confirmed that "the State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and the life of the fetus that may become a child." (emphasis added).

In reaffirming *Roe,* the *Casey* Court described the centrality of "the decision whether to bear ... a child," Eisenstadt v. Baird (1972), to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of ... her place in society." Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman."

Seven years ago, in *Stenberg*, the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion."[1] With fidelity to the *Roe-Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health.

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey,* between previability and postviability abortions. And, for the first time since *Roe,* the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition.... [T]he Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny."... Women, it is now acknowledged, have the talent, capacity,

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[1]The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E).

and right "to participate equally in the economic and social life of the Nation." *Id.* Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." *Id.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, *e.g.,* Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L.Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L.Rev. 955, 1002-1028 (1984).

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health.

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. See *Danforth* (holding unconstitutional a ban on a method of abortion that "force[d] a woman ... to terminate her pregnancy by methods more dangerous to her health"). See also *Stenberg.* Indeed, we have applied the rule that abortion regulation must safeguard a woman's health to the particular procedure at issue here-intact dilation and evacuation (D & E).

Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy. Minors may be unaware they are pregnant until relatively late in pregnancy, while poor women's financial constraints are an obstacle to timely receipt of services. Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester.

In *Stenberg,* we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception. We noted that there existed a "division of medical opinion" about the relative safety of intact D & E, but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required....

Thus, we reasoned, division in medical opinion "at most means uncertainty, a factor that signals the presence of risk, not its absence." *Ibid.* "[A] statute that altogether forbids [intact D & E] .... consequently must contain a health exception." *Id.*

B

In 2003, a few years after our ruling in *Stenberg,* Congress passed the Partial-Birth

Abortion Ban Act-without an exception for women's health.[2] The congressional findings on which the Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede.

Many of the Act's recitations are incorrect. For example, Congress determined that no medical schools provide instruction on intact D & E. But in fact, numerous leading medical schools teach the procedure.

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. But the evidence "very clearly demonstrate[d] the opposite."

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D & E carries meaningful safety advantages over other methods. No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings."

C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence....

During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D & E is safer than alternative procedures and necessary to protect women's health....

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure."...

The Court acknowledges some of this evidence, but insists that, because some witnesses disagreed with the ACOG and other experts' assessment of risk, the Act can stand. [T]he Court brushes under the rug the District Courts' well-supported findings that the physicians who

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[2]The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*. See, *e.g.,* 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) ("Why are we here? We are here because the Supreme Court defended the indefensible .... We have responded to the Supreme Court.").

testified that intact D & E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D & E procedure, and many performed abortions only on rare occasions.

II

A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D & E *sans* any exception to safeguard a women's health. Today's ruling, the Court declares, advances "a premise central to [*Casey's*] conclusion"-*i.e.,* the Government's "legitimate and substantial interest in preserving and promoting fetal life." But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. And surely the statute was not designed to protect the lives or health of pregnant women.cf. *Casey* (recognizing along with the State's legitimate interest in the life of the fetus, its "legitimate interes[t] ... in protecting the *health of the woman* " (emphasis added))....

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. But why not, one might ask. Nonintact D & E could equally be characterized as "brutal," involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs. "[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg* (Stevens, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures-along with D & E by dismemberment-the Court says, saves the ban on intact D & E from a declaration of unconstitutionality. Never mind that the procedures deemed acceptable might put a woman's health at greater risk.

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, *e.g., Casey* ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); Lawrence v. Texas (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing *Casey*).

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem."[3] Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure.[4] The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Cf. *Casey* (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."). Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[5]

This way of thinking reflects ancient notions about women's place in the family and under the Constitution-ideas that have long since been discredited. Compare, *e.g.,* Bradwell v. State (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. ... The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with United States v. Virginia (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have ... impeded ... women's progress toward full citizenship stature throughout our Nation's history").

Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped ... on her own conception of her spiritual imperatives and her place in society." *Casey* (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.").

B

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[3]The Court is surely correct that, for most women, abortion is a painfully difficult decision. But "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have ... ." Cohen, Abortion and Mental Health: Myths and Realities, 9 Guttmacher Policy Rev. 8 (2006); see generally Bazelon, Is There a Post-Abortion Syndrome? N.Y. Times Magazine, Jan. 21, 2007, p. 40.

[4]Notwithstanding the "bond of love" women often have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity.

[5]Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies.

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. See *Casey* (plurality opinion). "[T]here is no line [more workable] than viability," the Court explained in *Casey*....

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because ... a fetus is a living organism while within the womb, whether or not it is viable outside the womb." Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed.

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby," second-trimester, previability abortions are referred to as "late-term," and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. And, most troubling, *Casey's* principles, confirming the continuing vitality of "the essential holding of *Roe,*" are merely "assume[d]" for the moment, rather than "retained" or "reaffirmed."...

IV

As the Court wrote in *Casey,* "overruling *Roe's* central holding would not only reach an unjustifiable result under principles of *stare decisis,* but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."

Though today's opinion does not go so far as to discard *Roe* or *Casey,* the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis*." Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health. Although Congress' findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings. A decision so at odds with our jurisprudence should not have staying power.

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court-and

with increasing comprehension of its centrality to women's lives. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." *Stenberg* Ginsburg, J., concurring) (quoting Hope Clinic v. Ryan (C.A.7 1999) (Posner, C. J., dissenting)).

* * *

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.