

EASING ABORTION’S PAIN: CAN FETAL PAIN
LEGISLATION SURVIVE THE NEW JUDICIAL SCRUTINY
OF LEGISLATIVE FACT-FINDING?

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I. INTRODUCTION

A registered nurse watching the late-term abortion of a twenty-six and one-half week-old fetus looked in horror at the procedure occurring before her eyes. With great emotion, she later described to Congress the child's reaction as the doctor ended the fetus's life:

The baby's little fingers were clasping and unclasping, and his feet were kicking. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when you throw him up in the air and he thinks he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.¹

Was this unborn child² experiencing pain or was the nurse merely observing a non-painful automatic reflex? Medical experts have testified on both sides of this question. Some have called it a "philosophical question" that turns on whether or not the unborn child has achieved "consciousness." Whatever the answer, this question helped ignite the political will of Congress and over thirty state legislatures to ban the late-term procedure known colloquially as "partial-birth abortion."³

Now, as courts continue to strike down these partial-birth abortion bans, a second wave of legislation has reached the state and federal levels: fetal pain statutes. These informed consent-type statutes would require abortion physicians to provide a pregnant woman seeking a late-term abortion with information explaining the existence of fetal pain and allowing the woman to obtain direct anesthesia for her unborn child. Various states

1. *Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 311 (1996) [hereinafter *1996 House Hearing*] (statement of Brenda P. Shafer, R.N.).

2. This article will use both the terms "fetus" and "unborn child," since it is evaluating a proposed, but not enacted, federal bill that defines an "unborn child" as "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb." Unborn Child Pain Awareness Act, H.R. 356, 109th Cong. (2005); S. 51, 109th Cong. (2005). The House and Senate versions of the bills are virtually identical. This article will quote primarily from the Senate version.

3. This article will frequently use the term "partial-birth abortion" to describe the late-term abortion procedure that many in the medical field refer to as dilation and extraction (D & X) or intact dilation and evacuation (D & E). The key to this procedure is to partially deliver the unborn child from its mother's womb, puncture the fetus's skull, suck out its brains, and complete the vaginal delivery.

have previously introduced fetal pain bills.⁴ Congress also entered the foray in 2004 and again in January 2005 by proposing national fetal pain legislation.⁵ But can this legislation survive the heightened judicial scrutiny that has recently been applied to legislative fact-finding?

Part II of this article will discuss fetal pain legislation, particularly the federal Unborn Child Pain Awareness Act of 2005, which is similar to most state legislation. Part III will describe the “new” judicial scrutiny of legislative fact-finding and will isolate four “deference factors” that courts often use when evaluating these “facts.” Part IV will examine the medical evidence regarding fetal pain. Finally, part V will apply the four “deference factors” and assess whether proposed legislative conclusions about fetal pain can survive this heightened judicial scrutiny.

II. FETAL PAIN LEGISLATION ON THE HORIZON

A. *What Would Fetal Pain Legislation Do?*

The idea for fetal pain legislation is not new⁶ and did not originate in Congress. At least since 1998 state legislatures have considered this type of abortion regulation—most notably California in 1998,⁷ New York⁸ and Texas⁹ in 2001, and Virginia,

4. Teresa S. Collett, *Fetal Pain Legislation: Is It Viable?*, 30 PEPP. L. REV. 161, 176–77 (2003).

5. See Unborn Child Pain Awareness Act, H.R. 4420, 108th Cong. (2004); S. 2466, 108th Cong. (2004). The Act never made it out of committee during the 108th Congress. See also Unborn Child Pain Awareness Act, H.R. 356, 109th Cong. (2005); S. 51, 109th Cong. (2005) (introduced on January 24, 2005 in the Senate and January 25, 2005 in the House).

6. See President Ronald Reagan, Remarks at the National Religious Broadcasters Convention (Jan. 30, 1984) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1984/13084b.htm>) (“[W]hen the lives of the unborn are snuffed out, they often feel pain, pain that is long and agonizing.”).

7. See A.B. 1758, 1997–1998 Reg. Sess. (Cal. 1998) (California fetal pain bill that would have required abortion providers to give women seeking abortions “information and counseling on fetal pain”). See also Note, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2010, 2023 (2002) (discussing the details of the California bill).

8. See A.B. 7940, 2001–2002 Reg. Sess. (N.Y. 2001) and S.B. 3385, 2001–2002 Reg. Sess. (N.Y. 2001) (proposed versions of the Fetal Pain Prevention Act, which would have required abortion providers to provide women with information about fetal pain, ask for their consent to provide anesthesia to the fetus, and arrange for anesthesia to be administered). See also Note, *supra* note 7, at 2023 (discussing the details of the New York and Texas bills).

Arkansas, and Nebraska in 2005.¹⁰ “Pro-life” groups have advocated these bills, hoping to educate the public about the human status of the unborn child while avoiding the perception that “painless” abortion is an acceptable compromise.¹¹ “Pro-choice” groups have vigorously opposed the bills, fearing that they could lead to other unrelated restrictions on abortion.¹²

Despite this opposition, conservative members of the 109th Congress have introduced the Unborn Child Pain Awareness Act of 2005 (the Act), which is similar to the various state bills that have been proposed.¹³ In general, the Act requires that an “abortion provider performing any abortion of a pain-capable unborn child”¹⁴ provide the pregnant woman with both oral and written information regarding the pain her fetus may feel during the abortion.¹⁵ The provider will present this information prior to the beginning of “any part of an abortion”¹⁶ except in

9. See H.B. 1244, 77th Reg. Sess. (Tex. 2001) (similarly proposed fetal pain legislation).

10. See H.B. 1524, 2004–2005 Reg. Sess. (Va. 2005); S.B. 74, 2004–2005 Reg. Sess. (Ark. 2005); L.B. 752, 2004–2005 Reg. Sess. (Neb. 2005).

11. See Note, *supra* note 7, at 2031.

12. See Brian D. Wassom, *The Exception that Swallowed the Rule?: Women's Medical Professional Corporation v. Voinovich and the Mental Health Exception to Post Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 860 (1999) (noting the fear of “pro-choice” groups that giving credence to fetal pain “could lead to the prohibition of all abortions”).

13. See Unborn Child Pain Awareness Act, H.R. 356, 109th Cong. § 3 (2005); S. 51, 109th Cong. § 3 (2005) (seeking to amend the Public Health Service Act (42 U.S.C. § 201 *et seq.* (2000)) by adding sections 2901–06). The bill's primary sponsors are Congressman Christopher H. Smith (R-NJ) and Senator Sam Brownback (R-KS). Section 3 of the Act consists of six sections: (1) section 2901 provides basic definitions; (2) section 2902 explains the requirement for oral and written informed consent, as well as the requirement entitling a woman to choose anesthesia for her fetus; (3) section 2903 lays out an exception to the requirement of informed consent for medical emergencies; (4) section 2904 sets out civil penalties that could be imposed on non-complying abortion providers; (5) section 2905 mandates the loss of Title XIX Social Security Act funding to a state unless that state promulgated regulations and procedures to revoke or suspend the licenses of non-complying abortion providers; and (6) section 2906 provides that the Act will not preempt state legislation that provides greater protection from pain for fetuses. See S. 51 § 3 (portion seeking to amend §§ 2901–06).

14. See *supra* note 2 and accompanying text (defining “unborn child”). The Act defines a “pain-capable unborn child” as an unborn child “who has reached a probable stage of development of 20 weeks after fertilization.” S. 51 § 3 (portion seeking to amend § 2901(3)(A)). The bill specifically notes that this determination of twenty weeks is not a finding “that pain may not in fact be experienced by an unborn child” at earlier stages. *Id.* (portion seeking to amend § 2901(3)(B)). By not specifically requiring a determination of fetal viability, the Act would require informed consent in some abortions of pre-viable unborn children.

15. *Id.* (portion seeking to amend § 2902(a)–(b)).

16. *Id.* (portion seeking to amend § 2902(b)(1)). The Act broadly defines the term “abortion.” See *id.* (portion seeking to amend § 2901(1)).

the event of a “medical emergency” that would cause severe damage to the woman’s physical health.¹⁷

The provider will tell the woman orally that Congress has determined that an unborn child over twenty weeks’ gestational age may experience pain and that the woman can choose to have anesthesia administered to her fetus.¹⁸ The Act allows the provider to give “his best medical judgment” on any risks and costs associated with anesthesia.¹⁹ He can also express his opinion about whether an unborn child is capable of experiencing pain or on any other matter.²⁰ Additionally, the Act instructs the abortion provider to give the woman a fetal pain awareness brochure and decision form, which will require the woman to either request or refuse anesthesia for her fetus.²¹

17. The bill describes the circumstances that comprise a “medical emergency”:

[T]he term “medical emergency” means a condition which, in the reasonable medical judgment of the abortion provider, so complicates the medical condition of the pregnant woman that a delay in commencing an abortion procedure would impose a serious risk of causing grave and irreversible physical health damage entailing substantial impairment of a major bodily function.

Id. (portion seeking to amend § 2903(b)(1)).

18. The bill sets out the exact oral statement that would be required to be made to the woman:

You are considering having an abortion of an unborn child who will have developed, at the time of the abortion, approximately XX weeks after fertilization. The Congress of the United States has determined that at this stage of development, an unborn child has the physical structures necessary to experience pain. There is substantial evidence that by this point, unborn children draw away from surgical instruments in a manner which in an infant or an adult would be interpreted as a response to pain. Congress finds that there is substantial evidence that the process of being killed in an abortion will cause the unborn child pain, even though you receive a pain-reducing drug or drugs. Under the Federal Unborn Child Pain Awareness Act of 2005, you have the option of choosing to have anesthesia or other pain-reducing drug or drugs administered directly to the pain-capable unborn child if you so desire. The purpose of administering such drug or drugs would be to reduce or eliminate the capacity of the unborn child to experience pain during the abortion procedure. In some cases, there may be some additional risk to you associated with administering such a drug.

Id. (portion seeking to amend § 2902(b)(2)(A)(i)).

19. *Id.* (portion seeking to amend § 2902(b)(2)(A)(ii)).

20. *Id.* (portion seeking to amend § 2902(b)(2)(A)(iv)).

21. The brochure and form will be developed by the Department of Health and Human Services. The woman will receive the brochure in person, via e-mail, or by certified mail prior to the beginning of any part of the abortion. The form will be signed by both the woman and abortion provider prior to the abortion procedure and will affirm that the woman has received all information. It will require her to explicitly “request or refuse the administration of pain-reducing drugs to the unborn child” and will provide a means for the woman to waive receipt of the brochure. *Id.* (portion seeking to amend § 2902(b)(2)(B), (c)).

If the woman requests anesthesia for her fetus, the Act requires the provider to either administer the anesthesia, arrange for another qualified specialist to do so, provide information on how anesthesia can be arranged, or explain that he will be unable to perform the abortion.²² To ensure compliance, the Act provides civil penalties for providers who fail to follow its provisions.²³ Additionally, the Act authorizes a private civil right of action for knowing or reckless violations by providers.²⁴ To ensure that states will suspend or revoke the licenses of offending providers, the Act threatens the loss of certain federal funding if a state fails to promulgate applicable procedures.²⁵

B. *Assessing the Constitutionality of the Act*

This article primarily focuses on the judicial scrutiny of legislative factual findings about fetal pain; yet it is also prudent to briefly explore the constitutionality of the Act. Assuming for the moment that a fetus can experience pain during an abortion, the need for some form of legislation becomes apparent even to those who oppose abortion regulation.²⁶ The

22. *Id.* (portion seeking to amend § 2902(b)(2)(A)(iii)).

23. For a knowing first offense, the bill authorizes the assessment of a civil penalty up to \$100,000 and notification to the abortion provider's state licensing agency in order to effect a license *suspension*. *Id.* (portion seeking to amend § 2904(d)). For a knowing subsequent offense, it authorizes the assessment of a civil penalty of up to \$250,000 and the notification of the provider's state licensing agency in order to effect a license *revocation*. *Id.* (portion seeking to amend § 2904(e)). The state licensing board will be given notice and an opportunity to be heard regarding the penalty to be assessed against the provider. *Id.* (portion seeking to amend § 2904(f)). These penalties will be enforceable by the U.S. Attorney General or his designate, who can commence an action in federal court. *Id.* (portion seeking to amend § 2904(a)-(b)).

24. *Id.* (portion seeking to amend § 2904(g)). Either the woman or her parents—if she is an emancipated minor—can commence that civil action for actual and punitive damages. *See id.*

25. *Id.* (portion seeking to amend § 2905) (threatening the states with a loss of funding under Title XIX of the Social Security Act). The Act explicitly does *not* preempt state law that provides fetuses greater protections from pain. *Id.* (portion seeking to amend § 2906).

26. Even some who opposed the ban on partial-birth abortion have acknowledged that the “nagging concern of fetal pain” might require a legal solution that would “necessarily have to apply to all abortion procedures that might cause fetal pain.” Ann M. Massie, *So-Called “Partial-Birth Abortion” Bans: Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301, 367 (1998). *See also* *Reintroduced Fetal Pain Bill Garners Unlikely Supporter*, NewsMax.com, Feb. 2, 2005, <http://www.newsmax.com/archives/articles/2005/2/1/214144.shtml> (noting that Frances Kissling of Catholics for a Free Choice offered conditional support for the Act in light of a “commitment to treating fetuses with respect”). Others believe it is possible for Congress to legislate a broader mandate to

reality is that during most late-term abortions the unborn child is not provided with anesthesia²⁷ and the mother is not informed that her fetus may experience extreme pain that can be eliminated by using anesthesia.²⁸ These facts provide a legitimate governmental interest to legislate in this area.

Congress and states can justify fetal pain legislation under the government's "profound interest in potential human life" within the mother's womb. The Supreme Court emphasized this interest in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁹ where it upheld a state's informed consent abortion regulation. Here, this type of legislation's primary interest in "potential life" is to minimize the amount of fetal suffering³⁰—an interest that courts have recognized.³¹ The primary purpose of fetal pain legislation, however, is not to save the life of the unborn child.³² Still, the desire to protect "potential life" from

require anesthesia for fetuses prior to an abortion, assuming a suitable health exception is included. See, e.g., Note, *supra* note 7, at 2020–21.

27. *Id.* at 2017–18 (noting from various sources that current medical practice is *not* to provide pain medication to fetuses during an abortion). In England, a survey of late-term abortions confirmed that anesthesia was not normally used on fetuses in that country either. *Id.*

28. In one challenge to the federal ban on partial-birth abortion, the court found that abortion providers testifying before the court did not speak with their patients about the possibility that their fetuses might feel pain during the abortion. See Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 466 (S.D.N.Y. 2004) (citing testimony by five different abortion providers). That same court found that some providers had "testified that fetal pain does not concern them, and that some do not convey to their patients that their fetuses may undergo severe pain during a [partial-birth abortion]. . . ." *Id.* at 479.

29. 505 U.S. 833 (1992). The legitimacy of the state's "profound interest in potential human life" was established in the landmark *Casey* decision that affirmed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), while also erecting the "undue burden" standard to evaluate abortion regulations (explaining that an undue burden is present when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). *Casey*, 505 U.S. at 877.

30. See *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1074 (S.D. Ohio 1995) (assuming that the state has an interest in mitigating the suffering caused by "brain suction abortion"), *aff'd*, 130 F.3d 187 (6th Cir. 1997). See also *Women's Med. Prof'l Corp. v. Taft*, 162 F. Supp. 2d 929, 936 n.7 (S.D. Ohio 2001) (assuming the validity of a state's interest in minimizing fetal pain), *rev'd on other grounds*, 353 F.3d 436 (6th Cir. 2003). See generally Wassom, *supra* note 12, at 802, 807 (discussing the uniqueness of Ohio's ban, since it was partly justified by the state's interest in preventing cruelty to the fetus).

31. Although courts have recognized that consideration for "potential life" is a valid interest, the Court in *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000), found that Nebraska's partial-birth abortion ban did not further this interest because it regulated only one method of abortion. Nebraska had asserted three other interests that the majority brushed aside: "the law 'shows concern for the life of the unborn,' 'prevents cruelty to partially born children,' and 'preserves the integrity of the medical profession.'" *Id.* at 930–31.

32. In contrast to the ban on partial-birth abortion, fetal pain legislation seeks to protect fetuses from the pain caused by *all* late-term abortion procedures. While survival

gratuitous pain³³ is a legitimate interest as long as the government does not create significant health risks to the mother or impose an “undue burden” on her right to procure an abortion.³⁴

Since the government has a legitimate interest in preventing fetal pain, the strongest constitutional argument against such legislation will likely focus on the lack of a broad “health exception,” as required by *Stenberg v. Carhart*.³⁵ That argument will contend that informed consent statutes cause significant mental health risks to pregnant women because they do not give the abortion provider an exception to ignore the requirements where fetal pain information could harm a woman’s emotional or psychological health.³⁶ Similarly, no health exception protects against non-life-threatening medical risks that might occur during the mandated delay prior to the abortion procedure.³⁷

of the fetus is not the primary goal of the legislation, it is likely that some women will change their minds about procuring an abortion when they discover that the living being growing inside of them is capable of experiencing pain.

33. Late-term abortions will inflict “gratuitous pain” on unborn children if that pain “can be easily avoided with no significant increases in cost or health risk by the administration of targeted fetal relief.” Note, *supra* note 7, at 2010. It is reasonable to believe that most informed women facing a late-term abortion would choose to avoid this gratuitous pain for their unborn child. *See id.*

34. *See Casey*, 505 U.S. at 877. *See also* Karlin v. Foust, 188 F.3d 446, 471–73 (7th Cir. 1999) (concluding that it is constitutional to require doctors to “inform a woman seeking an abortion of information relating to the fetus, and the consequences of the abortion on the fetus, even when that information has no direct relation to the mother’s health”). *But see* Massie, *supra* note 26, at 355 (arguing that state interests must be somehow related to maternal health or informed choice by the woman, but also acknowledging that *Casey* can be read more broadly).

35. 530 U.S. 914 (2000) (striking down Nebraska’s partial-birth abortion statute). The broad health exception required by the Court allows a mother to procure an abortion during all three trimesters if her health is negatively impacted by the pregnancy. This concept of “health” has been interpreted very broadly, to include emotional and psychological health. *See Doe v. Bolton*, 410 U.S. 179 (1973) (defining health broadly). “Pro-life” advocates see this as evidence that a woman can obtain an abortion at any time as long as she is upset about being pregnant. *See also* Wassom, *supra* note 12, at 800 (explaining that some courts think that a health exception “must allow doctors almost limitless discretion to determine what ‘health’ means in any given context”). There is evidence, however, that abortion has a negative impact on a woman’s mental health. *See id.* at 850–56.

36. *But see* Collett, *supra* note 4, at 182 (arguing that concerns that a woman will be “devastated” by information about the fetus reflect “a false and outdated paternalism toward women seeking abortions” because “women often ask about the ability of the fetus to feel pain”) (citations omitted).

37. A similar issue was recently presented to the Supreme Court regarding a New Hampshire parental notification law with a mandatory forty-eight hour delay and no broad health exception. *See Ayotte v. Planned Parenthood of N. New England*, 390 F.3d 53 (1st Cir. 2004), *cert. granted*, 73 U.S.L.W. 3684 (U.S. May 23, 2005) (No. 04-1144). The Court is considering whether the statutory scheme preserves the health and life of the minor and whether a facial challenge against the law can succeed unless it shows that no

The *Stenberg* Court held that when a state regulates methods of abortion it “may promote but not endanger a woman’s health.”³⁸ Thus, the Constitution requires a health exception “where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”³⁹ State and federal proposed fetal pain legislation thus far has not contained a health exception, although the informed consent provisions are similar to those upheld in *Casey*.⁴⁰ The absence of this exception may prove troublesome, especially since the *Casey* Court found it “worth noting” that Pennsylvania’s medical emergency exception provided an additional exception: physicians had discretion *not* to provide the required information if they “reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.”⁴¹

But it is likely that this type of fetal pain legislation will still survive a constitutional challenge since a health exception is only required where “medically necessary.”⁴² Unlike in *Stenberg*, these bills do not create a significant health risk to women, as they are simply informed consent statutes that do not regulate a

set of circumstances exist where the law could be constitutionally applied. The Supreme Court’s decision in this case could essentially decide whether a broad health exception is necessary even in simple informed consent fetal pain statutes.

38. 530 U.S. at 931 (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768–69 (1986)).

39. *Stenberg*, 530 U.S. at 931 (quoting *Casey*, 505 U.S. at 879).

40. In *Casey*, Pennsylvania’s informed consent regimen set up a twenty-four hour waiting period before an abortion could be performed. The waiting period was not to be triggered until the mother was provided state-mandated oral and/or written information. *See Casey*, 505 U.S. at 902 (quoting the Pennsylvania statute in its appendix). Abortion providers were ordered to orally provide women with information about the abortion procedure, fetal development, and alternatives to abortion. Providers were instructed to give free written materials to any woman who requested them. Also, the pregnant woman was required to certify in writing prior to the abortion that she had been provided with the information. As with the Act, the Pennsylvania statute contained a medical exception for “serious risks” to the mother’s health. *See id.*

41. *Casey*, 505 U.S. at 883–84. The Act contains no additional exception; indeed, a physician faces serious licensing and civil penalty risks if he or she does not comply precisely with the Act’s provisions. *See S. 51*, 109th Cong. § 3 (2005) (portion seeking to amend § 2904 of the Public Health Service Act (42 U.S.C. § 201 *et seq.* (2000))).

42. *See Stenberg*, 530 U.S. at 931–32, 937–38 (noting Nebraska’s argument that that “the law does not require a health exception unless there is a need for such an exception,” but finding that this “factual question” was decided below and that Nebraska failed “to demonstrate that banning D&X without a health exception may not create significant health risks for women”). *See also Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1046 (D. Neb. 2004) (considering a challenge to the federal ban on partial-birth abortion and finding that a health exception may not be constitutionally required for “unnecessary” abortion procedures), *aff’d sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

method of abortion but merely require the provision of information.⁴³ Even critics of abortion regulation recognize the validity of this type of government interference.⁴⁴ The *Casey* Court explained it this way:

[M]ost women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.⁴⁵

Similarly, a woman who aborts her fetus only to later learn that her child unnecessarily suffered severe pain may also experience emotional trauma.⁴⁶ Therefore, fetal pain legislation should pass constitutional scrutiny with little modification⁴⁷ because it does not create a significant risk to a woman's health—mental or otherwise.⁴⁸ Instead, it helps a woman make

43. The Act instead is a regulation that addresses a medical aspect of abortion, with a much higher chance of passing constitutional muster. See *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 166–67 (4th Cir. 2000) (upholding other regulations on medical and safety aspects of abortion).

44. See *Massie*, *supra* note 26, at 304 (opposing abortion regulation but admitting it is permissible under the law to establish “the norms of informed consent that protect the patient from overreaching and help to ensure basic trust and mutuality in the physician/patient relationship itself”).

45. 505 U.S. at 882.

46. Even those women who testified before Congress against the partial-birth abortion ban acknowledged that the decision to get the procedure was difficult and that they cared deeply for their “babies.” See *1996 House Hearing*, *supra* note 1, at 320–26 (statement of Coreen Costello) and 326–31 (statement of Mary-Dorothy Line). Also, “it is estimated that 20% of women suffer from severe feelings of loss, grief, and regret [after an abortion]” which could be heightened if a woman later learns about fetal pain. Anna Glasier, *Counseling for Abortion*, in *MODERN METHODS OF INDUCING ABORTION* 112, 117 (David T. Baird et al. eds., 1995).

47. The one area where the Act may require some modification involves the coverage of the “medical emergency” exception. In *Casey*, the Court provided a limiting reading to Pennsylvania's medical emergency exception, interpreting that exception to include as “serious risks” to a mother's health three medical conditions: pre-eclampsia, inevitable abortion, and premature ruptured membrane. See 505 U.S. at 879–80. The Act's medical emergency exception would likely require a similar limiting reading.

48. See Note, *supra* note 7, at 2024–25. See also Collett, *supra* note 4, at 175–77 (arguing that informed consent statutes regarding fetal pain are constitutional after *Casey*).

an informed choice about how and whether to abort her unborn child.⁴⁹

Although one might raise further constitutional challenges to the proposed federal legislation based on federalism⁵⁰ and the First Amendment,⁵¹ these attacks also do not appear to seriously threaten the Act's validity. The next section of the article, however, will discuss an area that *may* pose a threat. Specifically, as the Supreme Court requires a greater quantity and quality of legislative fact-finding to support legislation, there is a real possibility that fetal pain legislation will encounter judicial resistance.

III. THE "NEW" JUDICIAL SCRUTINY OF LEGISLATIVE FACT-FINDING

In the early years of the nation's history, the Supreme Court was skeptical of a broad federal legislative power, and Congress exercised significant self-restraint. But after the Civil War—and especially after the industrial revolution—Congress began to

49. See Collett, *supra* note 4, at 182 (supporting this argument). This notion of information about fetal pain causing a mental health risk was addressed only one time prior to *Casey* using now-obsolete Supreme Court precedent. See *Charles v. Carey*, 627 F.2d 772, 784 (7th Cir. 1980) (finding that the requirement to inform a woman of fetal pain caused "cruel and harmful stress" to the woman).

50. One might argue that the Act raises concerns of federal overreaching by threatening states with the loss of federal funds unless they support the Act's provisions. See S. 51, 109th Cong. § 3 (2005) (portion seeking to amend § 2905 of the Public Health Service Act (42 U.S.C. § 201 *et seq.* (2000))). However, the Act is based on Congress's authority under the Commerce Clause, which is an enumerated federal power that provides a basis for federal regulation. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Regulating medical and health issues is in no way a new foray for the federal government. And while it is true that in the past decade the Supreme Court has twice struck down federal laws that exceeded Congress's commerce power, neither of those laws contained a "jurisdictional element" that required the regulated activity to be "in or affecting interstate commerce." See Antony B. Kolenc, *Commerce Clause Challenges After United States v. Lopez*, 50 FLA. L. REV. 867, 924–25 (1998) (explaining that when Congress—as an element of its legislation—requires that impact on interstate commerce be proven in each individual case, then this "jurisdictional element" will place legislation squarely within Congress's commerce power). The Unborn Child Awareness Act of 2005 contains this important "jurisdictional element." See S. 51 § 3 (portion seeking to amend § 2902(a)).

51. One might argue that the Act violates the First Amendment rights of abortion providers; however, the Court in *Casey* approved the government's power to force physicians to inform their patients of certain matters, calling this type of requirement "no different from a requirement that a doctor give certain specific information about any medical procedure." See 505 U.S. at 884. The Court compared it to a situation where a state requires a kidney transplant recipient to be informed of the risks to the kidney donor. *Id.* at 883. While this practice might somehow implicate an abortion provider's First Amendment free speech rights, it is merely "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 884 (citing *Whalen v. Roe*, 429 U.S. 589, 603 (1977)).

take a more active role when it passed legislation, bringing it into conflict with a conservative Supreme Court. At that time, the Court often conducted a rigorous review of the legislative record, especially after Congress began interpreting its commerce power expansively.⁵² In 1937, however, the well-known “switch in time that saved nine” resulted in a Supreme Court willing to tolerate greater expansions of federal power.⁵³ The Warren Court of the 1960s was even more complicit in allowing unprecedented federal civil legislation.⁵⁴ However, after sixty years of granting wide deference to Congress, the Supreme Court in the past decade has begun to reverse course and rein in federal power.⁵⁵ This retreat from deference is occurring on the two fronts where Congress has wielded the broadest and most expansive power: the Commerce Clause and Section Five of the Fourteenth Amendment.⁵⁶ As judicial deference dissipates, it becomes more difficult to predict with certainty whether legislation will survive this “new” heightened scrutiny. Similarly, state legislatures are not regarded as having greater fact-finding powers, leading to parallel issues when state lawmakers make factual conclusions.

52. See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 356–59 (2001) (demonstrating this rigorous judicial review of the record by citing *Hill v. Wallace*, 259 U.S. 44 (1922) (striking down the Grain Future Trading Act of 1921), *Bd. of Trade v. Olsen*, 262 U.S. 1 (1923) (upholding a new version of the Grain Future Trading Act after Congress made extensive findings), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). See also Kolenc, *supra* note 50, at 870–71 (discussing historical commerce cases).

53. The infamous “switch” has widely been perceived as a response to President Franklin D. Roosevelt’s threat to “stack the court” unless the Supreme Court ceased striking down key portions of New Deal legislation. See Bryant & Simeone, *supra* note 52, at 359–63 (discussing the shift in judicial scrutiny after the “switch” and concluding that “Congress was under no obligation to make factual findings or compile an evidentiary record in support of even highly attenuated assertions of its Commerce Clause power”).

54. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding public-accommodations provisions of the Civil Rights Act of 1964 under the Commerce Clause).

55. See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 87 (2001) (stating that “a new judicial activism has developed in which disrespecting Congress has become an important theme”).

56. See U.S. CONST. amend. XIV, § 5. An “enforcement clause” gives Congress extra authority to pass “appropriate legislation” in support of an amendment. All of the Reconstruction-era Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) contain enforcement clauses. This has been the basis for such controversial legislation as the Civil Rights Act of 1866, the Voting Rights Act of 1965, the Developmentally Disabled Assistance and Bill of Rights Act of 1975, and the “minority business enterprise” section of the Public Works Employment Act of 1977. See Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337 (1984).

This section of the article will identify and discuss the most common factors that courts have used—implicitly or explicitly—to determine the level of deference owed to legislative findings. The article will refer to these considerations as “deference factors.” The four deference factors are: (1) the constitutional delegation of fact-finding authority; (2) the comparative ability of legislatures and the courts to reliably find facts; (3) the thoroughness of the legislative record; and (4) the amount of division surrounding facts.

A. *Factor One: The Constitutional Delegation of Authority*

1. General Rule: Limited Factual Review of Legislative Findings

The first and most important factor that courts have traditionally used to determine the level of deference accorded to Congress is the Constitution’s own delegation of the fact-finding power. Traditionally, both liberals and conservatives have accepted the fact that, in a democracy, Congress—a co-equal branch of government—deserves deferential judicial review.⁵⁷ The primary role of Congress is to determine facts and make reasoned policy judgments in order to legislate.⁵⁸ On the other hand, *Marbury v. Madison* established that it is the “province and duty of the judicial department to say what the law is.”⁵⁹ Thus, for many, the question boils down to whether a “political majority” or the courts should have the last word in establishing policy.⁶⁰ State legislatures fulfill a parallel role within state systems, thus raising identical concerns.

As a general rule, if a legislature has made a factual determination, courts respect that determination and defer to it. Even the most conservative judges, however, believe the judiciary must conduct some review. While an appellate judge, Supreme

57. Colker & Brudney, *supra* note 55, at 87. Some of the more conservative members of the Court—namely Justices Scalia and Thomas—have a consistent disdain for legislative history in the context of statutory interpretation, due to the possibility of manipulation by its drafters. *See id.* at 137–38.

58. *See Note, Deference to Legislative Fact Determinations in First Amendment Cases After Turner Broadcasting*, 111 HARV. L. REV. 2312, 2315 (1998) (explaining that a “structural separation of powers” argument sees different delegations of fact-finding power to the judiciary and the legislative branches).

59. 5 U.S. 137 (1803).

60. *See* Pilchen, *supra* note 56, at 376. *But see* Colker & Brudney, *supra* note 55, at 120 (arguing that requiring Congress to build a record imposes “substantial opportunity costs on the legislative enterprise”).

Court Justice Clarence Thomas explained why complete judicial deference does not exist:

[W]e must review Congress's judgment deferentially, without reweighing the evidence *de novo*. . . . We know of no support—and our colleague cites none—for the proposition that if the constitutionality of a statute depends in part on the existence of certain facts, a court may not review a legislature's judgment that the facts exist. If a legislature could make a statute constitutional simply by “finding” that black is white or freedom, slavery, judicial review would be an elaborate farce.⁶¹

2. What Is a “Fact”?

Although there is general agreement on the legislative branches' constitutional role as fact-finder and legislator, this begs the question about what types of “facts” legislatures are entrusted to find. In answering this question, one must use proper labels. Identifying an issue as one of law or fact often determines the outcome of the case.⁶² For instance, in the abortion context some have suggested that Congress could overturn *Roe v. Wade* by “appropriate legislation” under the Fourteenth Amendment's Enforcement Clause simply by determining as a fact that human life begins at conception.⁶³ But not all facts are created equal—nor are each given the same standard of deference. Thus, in this area, it is important to classify a fact as adjudicative, legislative, or constitutional.

“Adjudicative facts are what juries decide: specific, historic, who-what-where-when-why-how facts, disputed by a small number of specific parties whose respective rights and duties turn on the outcome.”⁶⁴ Trial courts traditionally find these

61. *Lamprecht v. FCC*, 958 F.2d 382, 392 (D.C. Cir. 1992) (referring to Chief Judge Mikva as the dissenting colleague).

62. See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001) (noting that “Supreme Court decisionmaking treats the line separating law from fact as consequential, often outcome-determinative”).

63. See Pilchen, *supra* note 56, at 359–60 (citing Stephen H. Galebach, *A Human Life Statute*, HUM. LIFE REV., Winter 1981, at 5, 8 (arguing that Congress is the most appropriate branch of government to decide as a matter of fact that life begins at conception)).

64. See Pieter M. Schenkkan, *When and How Should Texas Court Review Agency Rules?*, 47 BAYLOR L. REV. 989, 1063 (1995) (citing Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942)). See also FED. R. EVID. 201 advisory committee's note (stating that “[a]djudicative facts are simply the facts of the particular case”).

types of facts and appellate courts generally evaluate them with a generous “clearly erroneous” standard of review. These are not, however, the kinds of facts usually discovered by legislatures. Legislative facts, on the other hand, are “those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.”⁶⁵ Discovering these broad facts is often within the realm of the legislative branches. For this reason, courts traditionally give substantial deference to legislative fact-finding, depending on the “certainty” of those facts.⁶⁶

When an adjudicative or legislative fact becomes decisive of a constitutional claim, judges may characterize it as a “constitutional fact.”⁶⁷ This label triggers a much-lowered deference to the finding and will usually result in an appellate court using a *de novo* standard or some other less generous scrutiny.⁶⁸ It makes sense, however, to apply stricter scrutiny

65. See FED. R. EVID. 201.3[1](a) advisory committee’s note. See also Schenckan, *supra* note 64, at 1063 (defining legislative facts as “what legislators and other policymakers struggle with: predictive, evaluative policy judgments relevant to making wise decisions for everyone, or at least for large numbers of people”). See also Carhart v. Gonzales, 413 F.3d 791, 799–801 (8th Cir. 2005) (discussing the difference between adjudicative and legislative facts in the context of partial-birth abortion).

66. See Kenneth C. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932 (1980) (formulating six different scales that courts use to measure the certainty of a legislative “fact”—to include whether the facts are controversial, mixed with judgment or policy considerations, or “provable”). See also Pilchen, *supra* note 56, at 340–41 (noting that Congress often uses legislative facts to support controversial exercises of federal power); Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 476–80 (1984) (discussing legislative facts).

67. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230–31 (1985) (citing Dickinson, Crowell v. Benson: *Judicial Review of Administrative Determinations of Questions of “Constitutional Fact,”* 80 U. PA. L. REV. 1055, 1067–72 (1932)).

68. See Carhart v. Gonzales, 413 F.3d 791, 800–01 (8th Cir. 2005) (finding that in the partial birth-abortion context the Supreme Court has established a constitutional *per se* rule based on legislative fact requiring a health exception in every instance of abortion regulation where it is medically necessary). See also Bryant & Simeone, *supra* note 52, at 367 (acknowledging that “considerations relevant to the proper treatment of the legislative record in cases requiring ‘strict’ judicial scrutiny are quite different from those in cases attendant on ‘rational basis’ review”); Note, *supra* note 58, at 2317 (arguing that “in most contexts” judicial deference to Congress is appropriate, but not in First Amendment cases or “other contexts triggering heightened scrutiny,” where the government must “prov[e] the constitutionality of” the statute). As an example, in *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, the Seventh Circuit noted that the *Stenberg* Court found Nebraska’s partial-birth abortion ban to be an “undue burden” despite the fact that a federal district court in Wisconsin had held a trial and found as a matter of adjudicative fact that the law would not pose a substantial obstacle in a woman’s path to an abortion. See 305 F.3d 684, 688 (7th Cir. 2002) (citing *Planned Parenthood of Wis. v. Doyle*, 44 F. Supp. 2d 975 (W.D. Wis. 1999), *aff’d sub nom.* Hope

because the traditional separation of powers argument for judicial deference falters where fundamental constitutional rights are at stake. The balance of power shifts where constitutions place a limit on legislative action.⁶⁹ But critics believe the Court has now crossed a constitutional line by substituting reliance on legislative fact-finding with an “adjudicatory fact” model based on [the Court’s] own institutional experiences.”⁷⁰

This criticism may have prompted Congress to defy the Court in *Stenberg v. Carhart*,⁷¹ which struck down Nebraska’s partial-birth abortion ban. In apparent protest to *Stenberg*, Congress passed a very similar ban on partial-birth abortion in 2003.⁷² Trying to avoid *Stenberg*, Congress interpreted that decision as one dictated by the Court’s deferential review of “adjudicative facts” found by the lower district court.⁷³ Cast in this light, Congress believed it had the authority to make its own independent factual findings.⁷⁴ Indeed, Congress cited various cases that demonstrated the great deference it felt the courts should use when reviewing its factual conclusions.⁷⁵ But this strategy has not worked. Three district courts and one circuit court of appeal have already struck down the federal ban on partial-birth abortion and discredited Congress’s

Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (en banc), *remanded*, 530 U.S. 1271 (2000), *decision on remand*, 249 F.3d 603 (7th Cir. 2001) (en banc)).

69. See Bose v. Consumers Union of United States, 466 U.S. 485 (1984) (discussing constitutional facts); Note, *supra* note 58, at 2314, 2320 (arguing in favor of the judiciary’s independent judgment as based in precedent); J.I.B., *Comment: Constitutional Substantial-Evidence Review? Lessons from the Supreme Court’s Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162, 1168–73 (1997) (discussing the Court’s apparent retreat in *Turner II*). See also *Turner Broad. Sys., Inc. v. Fed. Commc’n Comm’n (Turner I)*, 512 U.S. 622, 666 (1994) (plurality opinion) (using a “constitutional-fact” analysis to determine that a court should exercise “independent judgment of the facts bearing on” an issue involving a regulation of “First Amendment rights”). *But cf.* *Turner Broad. Sys., Inc. v. Fed. Commc’n Comm’n (Turner II)*, 520 U.S. 180 (1997) (plurality opinion) (appearing to back away from this requirement).

70. Colker & Brudney, *supra* note 55, at 122–23 (also arguing that the Court has taken questions of fact that are constitutionally delegated to Congress and transformed them into questions of law for the Court’s own determination).

71. See 530 U.S. 914, 930 (2000).

72. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2004).

73. See 18 U.S.C. § 1531 (note following) (congressional findings for Pub. L. No. 108-105, § 2(4)–(5), Nov. 5, 2003, 117 Stat. 1201).

74. See *id.* (note following) (congressional findings for Pub. L. No. 108-105, § 2(8), Nov. 5, 2003, 117 Stat. 1201).

75. See *id.* (note following) (congressional findings for Pub. L. No. 108-105, § 2(9)–(12), Nov. 5, 2003, 117 Stat. 1201) (citing numerous cases to uphold this interpretation).

characterization of *Stenberg* as merely a matter of adjudicative fact-finding review.⁷⁶

On the whole, courts following the first deference factor defer to the legislative branches' findings of facts as a matter of constitutional principle. These facts receive considerably less deference, however, when they are classified as "constitutional."

B. Factor Two: Comparative Ability of Legislatures and Courts to Find Facts

The second key deference factor that courts use to determine the level of deference is the ability of legislators to accurately and fairly assess facts. Courts have traditionally viewed the legislative branches as best-equipped to carry out a broad fact-finding mission. A close look at how Congress finds facts illustrates four key reasons why both federal and state legislatures have garnered a strong reputation in this area.

First, Congress is well-funded and broadly authorized under the Constitution⁷⁷ to carry out an intense fact-finding inquiry.⁷⁸ Second, Congress has accumulated expertise as it repeatedly

76. See *infra* notes 248–53 and accompanying text (discussing district courts' treatment of Congress's findings supporting the federal ban on partial-birth abortion).

77. Congress has broad authority to conduct investigations based on the Necessary and Proper Clause and Article I, Section 1's general grant of "legislative powers." See U.S. CONST. art. I, § 8, cl. 18 (empowering Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution [Congress's powers], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). See also Pilchen, *supra* note 56, at 363–64 (citing *McGrain v. Daugherty*, 273 U.S. 135, 160–61, 173–74 (1927)); *United States v. Morrison*, 529 U.S. 598, 683–85 (2000) (Souter, J., dissenting) (arguing that Congress's "institutional capacity for gathering evidence and taking testimony far exceeds" that of the Supreme Court). In modern times, this power to investigate has been carried out increasingly by committees and subcommittees. See Devins, *supra* note 62, at 1178–80 (noting that "committees operate both as legislative 'gatekeepers' and 'policy incubators'" and that "Congress, a truly representative body, is better positioned to find facts than the federal judiciary, whose judges and advocates are trained in a single discipline and, for the most part, are otherwise stratified by class, ambition, and the like").

78. Neal Devins makes a compelling argument in this area:

Legislatures, as compared to courts, "have substantial staff, funds, time and procedures to devote to effective information gathering and sorting." These assets are perhaps best employed in the committee system, which allows lawmaker experts to acquire extensive knowledge on questions of interest to them. Armed with the power to subpoena witnesses and otherwise do what is "necessary and proper" to allow Congress to effectively act on its legislative powers. . . .

Devins, *supra* note 62, at 1178–80.

investigates certain areas.⁷⁹ The Supreme Court itself has recognized this superior expertise when facing complex issues: “[W]e do well to pay careful attention to how the other branches of Government have addressed the same problem.”⁸⁰ The Supreme Court of the past decade has still acknowledged this reality.⁸¹ Third, unlike a court, Congress can take as much time as necessary to ensure it gets the facts correct—even if it “changes its mind” about an issue.⁸² Fourth, Congress has the ability to gather information from behind-the-scenes sources through proper *ex parte* discussions with constituents and interest groups.⁸³ Since legislating is a political process, this political aspect of building a legislative record is a plus that

79. *But see* Pilchen, *supra* note 56, at 363–67 (criticizing some of Congress’s investigatory hearings as being ineffective and not conducive to “in-depth probing”).

80. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 103 (1973) (assessing constitutionality of a wireless regulation and rejecting the argument that people have a First Amendment right to be heard over the broadcast spectrum). *See also* Wassom, *supra* note 12, at 834–36 (applying the language in *Columbia Broadcasting* to argue that the Judiciary should defer to Congress on findings regarding post-viability abortion); Devins, *supra* note 62, at 1205–06 (discussing *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *rev’d*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

81. A plurality of the *Turner I* Court stated that “courts must accord substantial deference to the predictive judgments of Congress” because “Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic” as the one presented in that case. *Turner I*, 512 U.S. 622, 665 (1994) (plurality opinion). This theme continued in *Turner II*, where the Court stated that there is “special significance” in cases where there are “regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change.” *Turner II*, 520 U.S. 180, 196 (1997) (plurality opinion). *See also* J.I.B., *supra* note 69, at 1180 (noting that *Turner II*’s apparently strong deference to Congress may be a result of the Court’s own discomfort with the highly complex area of telecommunications law—an area that the Court has admitted is confusing).

82. *See* Devins, *supra* note 62, at 1178–80 (“Unconstrained by the need to decide a particular case at a particular moment in time, moreover, legislative committees may conduct hearings over a number of months, even years, before acting.”). Devins also argues that Congress is superior because it “need not decide a case once and forever by issuing a decision that constrains it in subsequent decisionmaking . . . [and] is not constrained by *stare decisis*. It can correct its mistakes in ways that the Court cannot.” *Id.* As another illustration, in Justice Kennedy’s *Stenberg* dissent he argued, “Courts are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard.” 530 U.S. at 968 (Kennedy, J., dissenting).

83. *See* Bryant & Simeone, *supra* note 52, at 385–86 (noting that these types of informal discussions “are not only legally permissible, but constitutionally protected” under the Speech and Petition Clauses of the First Amendment). *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 292 (2d ed. 1995). *But see* Note, *supra* note 58, at 2322 (criticizing this potential influence of “lobbyists” as making a record “unreliable” and inaccurate).

highlights the fact that legislation is a democracy-based function—unlike judicial review.⁸⁴

Although both federal and state legislatures enjoy many advantages when finding facts, the judiciary also possesses significant fact-finding tools such as cross-examination and amicus briefs.⁸⁵ But the most compelling argument made in favor of judicial fact-finding criticizes the influence of politics that may taint legislative factual findings. The perception persists that courts are sheltered from the storms of the political process, giving them a greater incentive to draw unbiased conclusions.⁸⁶ Thus, critics argue that the political process sometimes has a different aim than that of relentlessly searching out the truth.⁸⁷

In sum, under the second deference factor courts are more likely to defer in complex factual areas where a legislature has benefited from its superior fact-finding ability. But courts are less likely to defer where a legislature has acted from political motives—ignoring reliable facts or “stacking” a committee hearing due to political bias.

C. Factor Three: Thoroughness of the Legislative Record

Courts use the third key deference factor to examine the thoroughness of the record that supports legislative findings of fact. The Constitution does not obligate legislatures to conduct formal fact-finding before they can legislate;⁸⁸ however, as a practical matter modern judicial scrutiny requires a record

84. See Colker & Brudney, *supra* note 55, at 119 (viewing heightened judicial scrutiny as a weakness).

85. See Pilchen, *supra* note 56, at 369–77 (describing some of the tools available to courts, to include discovery, cross-examination, and “Brandeis briefs”—blending excessive facts with legal research).

86. See *id.* at 369–70. See also Devins, *supra* note 62, at 1182–85 (explaining theories that demonstrate why courts have superior fact-finding ability, especially where legislators put self-interest above public interest).

87. See Pilchen, *supra* note 56, at 367–69 (noting that committee chairmen have various tactics to “inhibit the construction of a full record” by “packing” a subcommittee or limiting the scope of investigation). See also Devins, *supra* note 62, at 1177 (warning against the Court adopting fact-dependent standards of review for fear of giving Congress the “upper hand” and “severely limit[ing] its ability to check Congress”); Note, *supra* note 58, at 2321 (suggesting that politics might hinder Congress’s ability to objectively find facts).

88. See Pilchen, *supra* note 56, at 341 n.17. See also *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (noting that legislative bodies do not need to articulate their reasons for enacting a statute).

whenever Congress attempts to regulate in new or novel ways.⁸⁹ Although this reality may offend the principle of separation of powers,⁹⁰ some now believe that “[t]he Court is in effect directing Congress to hold focused hearings and to gather comprehensive evidence that will provide ample support for the existence of a national problem. . . .”⁹¹

This new preference for a thorough legislative record was most notably seen in modern federal jurisprudence in the 1990s. In the Commerce Clause arena, *United States v. Lopez*⁹² marked the first time the Court had struck down a commerce-based statute since the 1930s. Congress failed to produce a sufficient record to explain how its regulation was related to commerce.⁹³ The Court noted that such findings weren’t necessary but that they would help enable the Court to find a nexus to interstate commerce when that link is not “visible to the naked eye.”⁹⁴

89. See Colker & Brudney, *supra* note 55, at 83 (arguing that the Supreme Court is “using its authority to diminish the proper role of Congress” and “has undermined Congress’s ability to decide for itself how and whether to create a record in support of pending legislation”). The Court sometimes demands a thorough record even when Congress could not have realized such a record would be required. See *id.* at 85–86.

90. See Bryant & Simeone, *supra* note 52, at 376–77 (criticizing a judicial requirement for a Congressional Record because Article I, Section 5, Clause 2 and 3 simply requires a journal be kept by Congress with the “Yeas and Nays” recorded—even allowing for secret records, if Congress desires). See also *Sable Commc’ns v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) (“Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.”). By requiring a record, some argue that the Court has transformed Congress from a co-equal branch to “an entity charged with extensive fact-finding responsibilities.” Colker & Brudney, *supra* note 55, at 115–16. Some of the more conservative members of the Court—namely Justices Scalia and Thomas—have shown consistent disdain for legislative history due to the possibility of manipulation by the legislation’s drafters. See *id.* at 137–38.

91. Colker & Brudney, *supra* note 55, at 115–16.

92. 514 U.S. 549 (1995) (finding that Congress exceeded its power under the Commerce Clause).

93. See *id.* at 556–58. But see Colker & Brudney, *supra* note 55, at 98–99 (noting Congress had little reason to question its authority when passing the Gun-Free School Zones Act because the record could support the conclusion that gun-related violence affects interstate commerce).

94. *Lopez*, 514 U.S. at 563. Five years after *Lopez*, the Court confirmed a “new” approach to analyzing commerce legislation when it struck down the civil prong of the Violence Against Women Act. See *United States v. Morrison*, 529 U.S. 598, 602 (2000). Even with voluminous findings, the Court did not think Congress could justify this regulation of a non-economic activity. See Bryant & Simeone, *supra* note 52, at 343–44 (noting that Congress’s findings in *Morrison* were “legally irrelevant” because the Court found it was attempting to regulate a non-economic activity). See also Colker & Brudney, *supra* note 55, at 129; Kolenc, *supra* note 50, at 931 (concluding that to truly effect a change in commerce jurisprudence the Court “must make it perfectly clear that application of the *Wickard* aggregate effects test . . . is limited solely to commercial activities”).

Similarly, a series of key decisions in Section Five cases⁹⁵ have led some scholars to speculate that the Court will require Congress to make a formal record whenever Congress acts at “the margins of its constitutional authority.”⁹⁶ In Section Five cases, this occurs when Congress passes remedial legislation.⁹⁷

But *Turner I* and *II*⁹⁸ represent the most significant recent cases regarding the necessity for a legislative record. In *Turner I*, the Court determined that Congress needed to demonstrate the “harms” it was trying to prevent when it placed “must carry” provisions⁹⁹ in key cable television regulation.¹⁰⁰ A plurality of the Court claimed it was not “requiring” Congress to make a record “of the type that an administrative agency or court” does—although some record was necessary.¹⁰¹ Yet in apparent conflict with this claim, the Court then applied a new administrative-law type test that assessed whether Congress had

95. See *supra* note 56 and accompanying text.

96. Bryant & Simeone, *supra* note 52, at 352 (also noting that the Court’s recent decisions “assiduously preserve . . . ambiguity as to the ultimate significance or necessity of legislative findings of fact”). See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down a portion of the Religious Freedom Restoration Act because an insufficient record lacked “modern” instances of generally applicable laws passed by states based on “religious bigotry”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating Congress’s attempts to abrogate state sovereign immunity under the Eleventh Amendment due to inadequate record evidence).

97. See Colker & Brudney, *supra* note 55, at 104–05 (explaining that the Court seemed to find legislative history “helpful” when considering Section 5 cases).

98. *Turner Broad. Sys., Inc. v. Fed. Commc’n Comm’n (Turner I)*, 512 U.S. 622 (1994); *Turner Broad. Sys., Inc. v. Fed. Commc’n Comm’n (Turner II)*, 520 U.S. 180 (1997).

99. The twin *Turner* cases developed out of a First Amendment challenge to the “must carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, which forced cable companies to carry the signals of broadcast stations even at the cost of dropping cable channels that the cable operators desired. See 47 U.S.C. § 534(a). See also J.I.B., *supra* note 69, at 1163–64 (explaining the *Turner* decisions). Congress found that the cable industry had become “vertically integrated,” which could result in local broadcast stations being unable to compete. There was a “substantial government interest” in the continuation of “the local origination of programming.” 47 U.S.C. § 521 (note following) (congressional findings and Policy for Pub. L. 102–385, 2(a)(5), Oct. 5, 1992, 106 Stat. 1460, 1463).

100. See *Turner I*, 512 U.S. 622, 664 (1994) (plurality opinion). See also *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 483–87 (S.D.N.Y. 2004) (discussing standards for fact-finding in the *Turner* cases); Note, *supra* note 58 (discussing *Turner I*). The Court had previously applied this requirement to “demonstrate harm” only to the actions of administrative agencies such as the F.C.C.—not to Congress directly. See J.I.B., *supra* note 69, at 1166–67.

101. See *Turner I*, 512 U.S. at 665. See also Bryant & Simeone, *supra* note 52, at 370–73 (criticizing treating Congress like an agency because the scrutiny of administrative agencies is a product of “the uncomfortable constitutional status of the administrative state”); Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987).

“drawn reasonable inferences based on substantial evidence” from the record.¹⁰² Further rejecting the principle of deference, the Court remanded the case for judicial fact-finding.¹⁰³

Upholding the law on remand, the judges of the lower court could not agree why evidence outside the Congressional Record would be relevant to the court’s consideration of the issue.¹⁰⁴ Thus, in *Turner II*, the Supreme Court attempted to revise the apparently conflicting standards announced in *Turner I*. The Court abandoned the notion that Congress was “required” to make a record due to Congress’s special constitutional role.¹⁰⁵ Still, it upheld Congress’s predictive judgments only “in light of the [judicially] augmented factual record.”¹⁰⁶ In the end, the Court left in disarray the level of “substantial deference” required and the circumstances under which this standard applied.¹⁰⁷

While much of the above discussion applies specifically to Congress, under the third deference factor, courts will similarly defer to state legislative findings where a legislature has formally compiled a thorough record and can demonstrate that its findings reasonably flow from evidence in that record.

D. Factor Four: The Amount of Division Surrounding the Facts

As a fourth deference factor, courts may consider the amount of division that surrounds the relevant facts. Often, experts provide conflicting opinions on the same issue. Is a legislature paralyzed from legislating in the face of this division? That may

102. See *Turner I*, 512 U.S. at 666. See also J.I.B., *supra* note 69, at 1169 (viewing this as an explicit reference to administrative law because it used “terms of art” that have a well-settled meaning).

103. See Note, *supra* note 58, at 2328.

104. See Bryant & Simeone, *supra* note 52, at 337. Compare this with the Fifth Circuit’s determination in *Lopez* that a remand based on an inadequate record is unnecessary where the court would need to “guess at what Congress’s determination would have been had it considered the same evidence.” See *id.* at 340 (citing *United States v. Lopez*, 2 F.3d 1342, 1367–68 (5th Cir. 1993), *aff’d*, 514 U.S. 549 (1995)).

105. See J.I.B., *supra* note 69, at 1172–74 (explaining the differences between *Turner I* and *II*).

106. See Note, *supra* note 58, at 2328 (quoting the majority as stating that “Congress’ conclusion was borne out by the evidence on remand”).

107. See Bryant & Simeone, *supra* note 52, at 337 (arguing that the ambiguity of the twin *Turner* decisions represented “the slipping of the camel’s nose into Congress’s tent”). See also Note, *supra* note 58, at 2314–15 (noting that lower courts have adopted “hybrid articulations” of the *Turner* standard, with some emphasizing deference and others relying on “independent judgment”).

be the case—at least in the context of abortion—as seen in *Stenberg* and the federal partial-birth abortion cases.¹⁰⁸

Looking at state legislative fact-finding, the Court in *Stenberg* struggled with divided medical opinion on the safety and necessity of the partial-birth abortion procedure.¹⁰⁹ The Court relied on the district court's finding that partial-birth abortion "significantly obviates health risks."¹¹⁰ Although this finding was made while evaluating state law, it is notable that it directly contradicted findings of Congress on the matter.¹¹¹ When determining that Nebraska fatally erred by not including a health exception in its ban, the *Stenberg* majority cited to the "division of opinion among some medical experts" and the "absence of controlled medical studies" regarding the matter.¹¹² This divided medical opinion resulted in the majority's conclusions that a health exception was necessary and that Nebraska could not simply rely on one side of the medical opinion when legislating.¹¹³

In a dissenting opinion, Justice Anthony Kennedy argued that prior cases had established the right of "the State to take sides in a medical debate, even when fundamental liberty interests are at stake and even when leading members of the profession disagree with the conclusions drawn by the legislature."¹¹⁴ Justice

108. While congressional fact-finding raises issues of separation of powers, fact-finding by state legislatures can still raise issues of federalism—a federal court should defer to reasonable judgments made by state legislatures in the same way it defers to congressional judgments.

109. See *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

110. *Id.*

111. See 18 U.S.C. § 1531 (note following) (congressional findings for Pub. L. No. 108–105, § 2(14)(A)–(B), Nov. 5, 2003, 117 Stat. 1201).

112. 530 U.S. at 936.

113. *Id.* at 938. The Court recognized that by prohibiting the state to act in the face of divided opinion, it might handcuff state action in a variety of areas. The Court dealt with this potential problem by noting that individual physicians could not accomplish this—it would require "substantial medical authority" to support a particular proposition before affecting the state's ability to legislate. *Id.*

114. *Stenberg*, 530 U.S. at 970 (Kennedy, J., dissenting). In his *Stenberg* dissent, Justice Kennedy cited to language in a decision penned by Justice Holmes, where the Court stated that a state has the right "to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute." *Collins v. Tex.*, 223 U.S. 288, 297–98 (1912). Justice Kennedy also discussed *Jacobson v. Mass.*, 197 U.S. 11, 26–30 (1905) (upholding mandatory smallpox vaccination despite medical evidence that the vaccination could actually harm those to whom it was given). He argued that the *Jacobson* Court established "beyond doubt the right of the legislature to resolve matters upon which physicians disagreed." *Id.* at 30. The *Jacobson* Court had expressed a need to defer to the legislators on such issues: "It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection

Kennedy partly relied on *Kansas v. Hendricks*¹¹⁵ to support this position. In *Hendricks*, the Supreme Court had examined Kansas's civil-commitment statute, requiring that a person have "a mental abnormality" such as pedophilia prior to being committed.¹¹⁶ The petitioner, a pedophile, challenged his civil commitment, arguing that the mental health community was divided on whether "pedophilia" was truly a mental illness. Recognizing the different medical opinions in this area, the Court stated:

[Such division does] not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation."¹¹⁷

All told, courts applying the fourth deference factor are less likely to defer to controversial findings where significant medical authority supports an opposite view.¹¹⁸ Yet the extent of deference is unclear after *Stenberg* and remains a future issue.

IV. MEDICAL AND SCIENTIFIC EVIDENCE REGARDING FETAL PAIN

A. Introduction

Can a fetus feel pain? If so, at what gestational age does this capability develop? Congress and the states wrestled with these questions from 1995 through 2003 while they considered a ban

of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain." *Id.*

115. 521 U.S. 346 (1997).

116. Under the statute, a person could be involuntarily committed if three conditions were met: (1) the person is "dangerous"; (2) the person has been convicted of or charged with a sexually violent offense; and (3) the person "suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." 521 U.S. at 357 (citing Kan. Stat. Ann. § 59-29a2(a) (1994)).

117. *Hendricks*, 521 U.S. at 360 n.3 (citing *Jones v. United States*, 463 U.S. 354 (1983)).

118. See *Carhart v. Gonzales*, 413 F.3d 791, 801-04 (8th Cir. 2005) (finding that no medical consensus currently exists regarding the medical necessity of partial-birth abortion and thus finding the federal ban unconstitutional in light of *Stenberg v. Carhart*).

on partial-birth abortion.¹¹⁹ Three federal district courts and one circuit court of appeal have now struck down the federal ban, providing important clues about the viability of the informed consent requirements contained in the Unborn Child Pain Awareness Act of 2005 (the Act). The Act, and similar state bills, may face judicial resistance because its sponsors developed their proposed findings partly in reliance on the congressional investigation into the partial-birth abortion procedure.

Part II of this article summarized the Act and briefly assessed its constitutionality. Part III identified four deference factors courts use to determine how much deference to give to legislative findings. Part IV will now individually examine each of the Act's six factual findings regarding fetal pain, considering the medical evidence that was presented both before Congress and also that was discovered during subsequent litigation. This discussion will also be highly relevant in evaluating state findings on these same issues.

B. *Analyzing the Six Factual Findings Regarding Fetal Pain*

Sponsors of the Unborn Child Pain Awareness Act of 2005 believe fetal pain legislation is properly based on the "valid Federal Government interest in reducing the number of events in which great pain is inflicted on sentient creatures."¹²⁰ As examples of this interest, the Act references statutes legislating the humane slaughter of animals,¹²¹ the humane treatment of animals,¹²² and the humane research use of animals.¹²³ A specific finding Congress made when passing its ban on partial-birth

119. After two vetoes of the ban during the 1990s, President George W. Bush signed the ban in November 2003. It is currently codified at 18 U.S.C. § 1531 (2003).

120. See Unborn Child Pain Awareness Act, S. 51, 109th Cong. § 2(7) (2005). Professor Sunstein has argued that "animals have long had a wide range of rights against cruelty and mistreatment under state law, rights that have recently been grown in both state and national legislatures. The capacity to suffer is, in this sense, a sufficient basis for legal rights for animals." Cass Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1364 (2000). See also James Bopp, Jr. & Curtis R. Cook, M.D., *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 33-34 (1998) (arguing that the state has a legitimate interest in "preventing cruelty to human beings who are nearly born" and nearly clothed in personhood).

121. See Humane Slaughter Act, 7 U.S.C. § 1902 (2005) (regulating the amount of pain inflicted on animals being slaughtered).

122. See Animal Welfare Act, 7 U.S.C. § 2143(a)(3) (2005) (minimizing pain to animals during handling, care, treatment, and transportation).

123. See Public Health Service Act, 42 U.S.C. § 289(d) (2005) (ensuring the proper care and treatment of animals used in research, to include guidance on the use of tranquilizers and analgesics that minimize pain).

abortion also supports the Act: Congress concluded it is “medical fact” that “unborn infants” can feel pain “and that their perception of this pain is even more intense than that of newborn infants. . . .”¹²⁴ This led sponsors of the Act to develop six proposed findings of fact.¹²⁵ This section will analyze each of the six factual findings.

1. Does an “Unborn Child” Have “the Physical Structures Necessary to Experience Pain” at Least Twenty Weeks After Fertilization?

One proposed finding concludes that by twenty weeks’ gestation an unborn child has sufficient physiological development to experience pain.¹²⁶ To understand this finding it is necessary to understand the physiological systems involved in pain sensation:

In addition to the brain and spinal cord, the human nervous system involves an intricate network of peripheral receptors and transmitters. The receptors specifically involved in discerning pain are called nociceptors. . . . The network of nociceptors and fibres develop in the period from seven to twenty weeks gestation, beginning with the skin of the face, continuing to the soles of the hands and feet, and ultimately covering the entire body. The fibres are connected to the central nervous system via a network of synapse-like

124. Congress specifically found:

The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

18 U.S.C. § 1531 (note following) (congressional findings for Pub. L. No. 108-105, § 2(14)(M), Nov. 5, 2003, 117 Stat. 1201).

125. The proposed factual findings are that (1) “an unborn child has the physical structures necessary to experience pain” by twenty weeks’ gestation; (2) there is “substantial evidence” that unborn children respond to pain by drawing away from certain stimuli by twenty weeks’ gestation; (3) there is “substantial evidence that the abortion methods most commonly used” after twenty weeks’ gestation “cause substantial pain to an unborn child, whether by dismemberment, poisoning, penetrating or crushing the skull, or other methods”; (4) anesthesia is “routinely used” during prenatal surgery on unborn children who have developed to twenty weeks’ gestation; (5) “by 20 weeks after fertilization an unborn child may experience substantial pain even if” the child’s mother has received anesthesia; and (6) “anesthesia or other pain-reducing drugs” are capable of reducing this pain. S. 51 § 2(1)–(6).

126. *Id.* § 2(1).

connections to the cells of the fetal dorsal horn in the spinal cord. Impulses received by the dorsal horn are transmitted to the various parts of the brain via neural and chemical connections. When received by the brain, the impulses enter the thalamus. The thalamus registers the impulse and, if the impulse is identified as one of organic pain, physiologically signals the motor nerves to initiate the body's complex reflexive response to pain.¹²⁷

Witnesses on both sides of the issue have testified that at some point during development a fetus will acquire the capability to feel pain—it is simply a matter of “when.”¹²⁸

a. *Theory of Pain Development by Twenty Weeks' Gestation*

Although some experts believe an unborn child can experience pain as early as five and one-half weeks' gestation,¹²⁹ there is more support for the position that sufficient fetal neurological development to experience pain exists at twelve to thirteen weeks' gestation.¹³⁰ This position is consistent with the video entitled “Silent Scream”¹³¹ that some pro-life groups have used as evidence that a twelve-week-old fetus can experience pain. Testifying before the 1996 House Hearing, Dr. Jean

127. Collett, *supra* note 4, at 166–67 (also explaining that medical opinion divides over whether pain perception is controlled by the brain cortex—developed by six weeks' gestation—or whether it requires the thalamus and lower brain stem—developed by twenty to twenty-four weeks' gestation).

128. To some, the matter of “when” is impossible to determine. For example, in *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1030 (D. Neb. 2004), *aff'd sub nom.* *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), Judge Kopf found that the evidence established “to a virtual certainty that human fetuses lack the anatomy and physiology to perceive pain prior to 20 weeks.” Due to disagreement in the medical community, he also concluded that it was “not possible to pinpoint when a fetus develops sufficiently” to perceive pain. *Id.* Ultimately, he did not make a final determination regarding fetal pain because he deemed the issue “irrelevant” to the constitutionality of the partial-birth abortion ban. *Id.*

129. See Commission of Inquiry into Fetal Sentience, *Human Sentience Before Birth*, available at <http://64.233.187.104/search?q=cache:YlvsLbf8neAJ:www.care.org.uk/resource/pub/fs/fs02.htm+%22human+sentience+before+birth+2%22&hl=en> (last visited Nov. 25, 2005).

130. See Note, *supra* note 7, at 2013. See also Collett, *supra* note 4, at 167–68.

131. SilentScream.org, Silent Scream Video, <http://www.silentscream.org/video1.htm> (last visited Nov. 18, 2005). The video shows ultrasound footage of a suction abortion, with the fetus's mouth opening as if it is screaming when the suction instrument makes contact with it. Critics argue, however, that the child's mouth movement would be better interpreted as a reflex reaction and not a pain reaction given the “present state of knowledge about fetal development. . . .” See also Note, *supra* note 7, at 2015.

Wright¹³² specifically agreed that the “Silent Scream” video may portray a fetus in pain despite the child’s early gestational age.¹³³ She noted various studies that indicate a fetus may experience pain as early as seven weeks’ gestation.¹³⁴

Despite these opinions, the majority of evidence before Congress established that fetuses have sufficient physiological development to experience pain by twenty weeks’ gestation. Over a period of eight years, Congress considered various medical journal articles on this issue.¹³⁵ For instance, an article on neonatal pain management considered by Congress in 1995 concluded that by twenty weeks’ gestation all “cutaneous and mucous surfaces” of the fetus have sensory pain perception.¹³⁶ Moreover, Dr. Robert J. White¹³⁷ testified before the 1995 House Hearing that by twenty weeks’ gestation a fetus has sufficient neurostructural development to feel pain.¹³⁸ Dr. White also testified that a fetus may be more sensitive to painful stimuli than it will be after birth.¹³⁹ Dr. Jean Wright¹⁴⁰ seconded this testimony during the 1996 House Hearing when she testified that fetuses at later stages (twenty-four to twenty-eight weeks) “feel pain . . . more than a term neonate does.”¹⁴¹ More recently,

132. Dr. Wright was an Associate Professor of Pediatrics and Anesthesia at the Emory School of Medicine. She was not an abortion provider but was board-certified in pediatrics, anesthesia, and critical care medicine. *Verbatim: Effects of Anesthesia During a Partial-Birth Abortion*, 14 ISSUES L. & MED. 71, 83 (1998).

133. *Id.* at 89 (presenting verbatim testimony from the 1996 House Hearing); *1996 House Hearing*, *supra* note 1, at 89 (testimony of Dr. Jean Wright).

134. *1996 House Hearing*, *supra* note 1, at 89.

135. *See id.* at 151–282; *Partial-Birth Abortion: The Truth: Joint Hearing on S. 6 and H.R. 929 Before the S. Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 157–70 (1997) [hereinafter *1997 Joint Hearing*]; *Partial-Birth Abortion Ban Act of 2002: Hearing before the Subcomm. on the Constitution of the House Comm. of the Judiciary*, 107th Cong. 47–280 (2002) [hereinafter *2002 Hearing*].

136. *See Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 81 (1995) [hereinafter *1995 House Hearing*] (citing Constance M. Houck, M.D.).

137. Dr. White, who was not an abortion provider, was a Professor of Surgery at Case Western Reserve University, with experience as a brain surgeon and neuroscientist. *1995 House Hearing*, *supra* note 136, at 69.

138. *Id.* at 69 (testimony of Dr. White).

139. *Id.*

140. *See supra* note 132 and accompanying text.

141. *See 1996 House Hearing*, *supra* note 1, at 89 (testimony of Dr. Wright). *See also* Bopp & Cook, *supra* note 120, at 37 (explaining that preterm infants subject to late-term abortions experience more pain because they have an abundance of neurotransmitters for pain but a lack of transmitters that “moderate or diminish the experience of pain . . . (5-HT, norepinephrine, dopamine)”).

during the 2003 House Hearing, Dr. Mark Neerhof¹⁴² also confirmed that a fetus does in fact feel pain.¹⁴³

These expert opinions have been echoed in subsequent litigation over the federal partial-birth abortion ban, which three district courts permanently enjoined in 2004 and the Eighth Circuit enjoined in 2005.¹⁴⁴ Testifying before the court in *Carhart v. Ashcroft*, Dr. Kanwaljeet Anand¹⁴⁵ surmised an eighty percent probability that fetuses are sensitive to pain from about twenty weeks' gestation onward.¹⁴⁶ He explained how fetuses develop physiologically and testified that "there exists a greater sensitivity to pain earlier in development" because of a lack of "inhibitory fibers" that would normally block painful stimuli.¹⁴⁷ The court in *National Abortion Federation v. Ashcroft* credited Dr. Anand's testimony when it stated:

Because the density of receptors is greater in the fetal skin at about twenty weeks of gestation, and because the mechanisms that inhibit and modulate the perception of pain do not develop until after thirty-two to thirty-four weeks' gestation,

142. Dr. Neerhof, D.O., who also was not an abortion provider, had been an osteopathic physician for over fourteen years. He was also an Associate Professor of Obstetrics and Gynecology at Northwestern University Medical School and an attending physician in the Department of Obstetrics and Gynecology at Evanston Northwestern Health Care. See *Partial-Birth Abortion Ban Act of 2003: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 5 (2003) [hereinafter *2003 House Hearing*].

143. *Id.* at 6–10.

144. The three district courts considered a wide array of challenges to the federal ban—allegations that the ban (1) lacks a necessary health exception; (2) imposes an undue burden on the right of a woman to procure an abortion; (3) fails to serve any legitimate interest; (4) violates the Equal Protection Clause; (5) violates a "woman's due process right to bodily integrity"; (6) contains an insufficient emergency exception for a mother's life; and (7) is unconstitutionally vague. These courts all heard extensive testimony from numerous expert witnesses to determine the safety and necessity of the partial-birth abortion procedure. See *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 967 (N.D. Cal. 2004) (finding ban unconstitutional on three grounds: undue burden, vagueness, and lack of a health exception); *National Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 482–83 (S.D.N.Y. 2004) (finding ban unconstitutional on the limited consideration that it lacked a constitutionally necessary health exception); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1003 (D. Neb. 2004) (involving same district judge and plaintiff as in *Stenberg v. Carhart*, and finding ban unconstitutional on three grounds: lack of a health exception, undue burden, and vagueness, but limiting the court's ruling to apply only to pre-viable partial-birth abortions and those where viability is in doubt), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

145. Dr. Anand, who had never performed an abortion, was a Professor of Pediatrics, Anesthesiology, Pharmacology, and Neurobiology at the University of Arkansas for Medical Sciences. He had written extensively about fetal development and the relationship to fetal pain. See *Carhart*, 331 F. Supp. 2d at 912–13.

146. *Id.* at 913.

147. *Id.*

there was testimony that a fetus likely feels severe pain while the [partial-birth abortion] procedure is being performed.¹⁴⁸

Additionally, in *Planned Parenthood Federation of America v. Ashcroft*, various doctors similarly testified that fetuses develop pain “early.”¹⁴⁹

b. *Theory of Pain Development After Twenty Weeks' Gestation*

Nevertheless, not everyone agrees with Congress's determination that an unborn child will experience pain by twenty weeks' gestation.¹⁵⁰ One theory that discounts fetal pain suggests that fetuses have an insufficient “myelination”¹⁵¹ of nerves to transmit pain.¹⁵² Yet fetuses do develop a sufficient level of myelin by twenty weeks, and even non-myelinated adult nerves conduct pain quite well.¹⁵³ Moreover, during the 1995 Senate Hearing, Dr. Warren Hern¹⁵⁴ testified that biologists did not believe fetuses could experience pain until at least thirty weeks after gestation.¹⁵⁵ And in the 1995 House Hearing, Dr.

148. 330 F. Supp. 2d at 466–67 (noting that Dr. Anand testified that “the fetus will experience severe pain when its skull is punctured or crushed”).

149. In *Planned Parenthood Federation of America v. Ashcroft*, the court heard testimony that fetuses would “feel intense pain, even more so than infants or adults” because they lack the development of “inhibitory mechanisms.” 320 F. Supp. 2d at 967, 997–98 (recounting testimony from Dr. Anand, as well as Dr. Leroy Sprang and Dr. Stephen Chasen).

150. Dr. Anand, a supporter of the ban on partial-birth abortion, acknowledged during his testimony in *Carhart v. Ashcroft* that there is some disagreement in the medical community regarding the ability of the fetus to feel pain, especially with regard to when a fetus experiences some level of consciousness. *Carhart*, 331 F. Supp. 2d at 913–14.

151. “‘Myelination’ is the process of [developing fetal] myelin, a white, fatty substance that acts as ‘a thick medullary sheath’ around the nerve fibers. This sheath plays an important role in transmitting impulses.” Wassom, *supra* note 12, at 858 n.474 (citations omitted).

152. Brief of Amici Curiae of the Am. Ass'n of Pro Life Obstetricians & Gynecologists, et al., at 9, *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997) [hereinafter *AAPLOG Brief*].

153. *See id.* *See also* Bopp & Cook, *supra* note 120, at 36 (explaining that these nerves are the “principal conducting systems for pain”); K.J.S. Anand & P.R. Hickey, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 1321, 1322 (1987) (“Incomplete myelination merely implies a slower conduction velocity in the nerves or central nerve tracts of neonates, which is offset completely by the shorter interneuron and neuromuscular distances traveled by the impulse.”).

154. Dr. Warren M. Hern, an abortion provider, was an Assistant Clinical Professor at the Department of Obstetrics and Gynecology at the University of Colorado Health Sciences Center. He was also the author of a leading abortion textbook. *See* Biography of Dr. Warren Hern, <http://www.drhern.com/biography.htm> (last visited Nov. 25, 2005).

155. *Partial-Birth Abortion: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 153 (1995) [hereinafter *1995 Senate Hearing*].

Mitchell Creinin and Dr. J. Courtland Robinson¹⁵⁶ flat-out denied the possibility of fetal pain.¹⁵⁷

Most experts who argue for a later date or suggest the date is unknowable rely on the theory that the experience of pain requires “consciousness.” This makes the issue of fetal pain more of a philosophical—rather than a physiological—question.¹⁵⁸ It is difficult to determine how any other sentient being feels pain internally because “each individual only has direct access to his or her own sensory experiences.”¹⁵⁹ Thus, some physicians believe that “feeling pain” requires “self-awareness” and a “conscious appreciation” of the pain.¹⁶⁰ For instance, Dr. Creinin told the court in *Carhart v. Ashcroft* that since fetuses do not have “conscious brains” until twenty-six weeks of gestation, they are not aware of their pain or “automatic reflexive acts.”¹⁶¹ Others wonder whether it is wise to compare fetuses with adults because

156. Dr. Creinin, who opposed the ban on partial-birth abortion, was an Assistant Professor and Director of Family Planning Research at the Magee-Women’s Hospital at the University Health Center of Pittsburgh. See KaiserNetwork.org, Daily Women’s Health Policy (June 26, 2003), http://www.kaisernet.org/daily_reports/rep_index.cfm?DRID=18490. Dr. Robinson, an abortion provider for over forty years, was a faculty member at the Department of Gynecology and Obstetrics at Johns Hopkins University School of Medicine and at the Johns Hopkins School of Hygiene and Public Health; *1995 House Hearing*, *supra* note 136, at 63.

157. Dr. Creinin wrote a letter to Congress in which he stated, “As a physician, I can assure you that there is no such thing as pain to a fetus; plain and simple, pain does not exist to a fetus. Any doctor who states otherwise is flat out lying and twisting medical data.” *1995 House Hearing*, *supra* note 136, at 289–90 (H.R. Rep. No. 104–267). Similarly, Dr. Robinson testified that “in no case is pain induced to the fetus” during a late-term abortion. *Id.* at 66. However, Dr. Robinson ultimately admitted that he did not know whether or not a fetus could feel pain. See *1995 Senate Hearing*, *supra* note 155, at 94 (testimony of Dr. Robinson).

158. Philosophers debate whether any person can verify that another being has consciousness. It is unknown “whether one can know whether anybody else has a mind and, by extension, whether they have thoughts, perceptual experiences, and pains.” See David Benatar & Michael Benatar, *A Pain in the Fetus: Toward Ending Confusion About Fetal Pain*, 15 *BIOETHICS* 57, 61 (2001). See also *Roe v. Wade*, 410 U.S. 113, 159–62 (1973) (discussing impossibility of knowing which philosophical theory of life is correct).

159. See Note, *supra* note 7, at 2010–11. But see Richard A. Posner, *Animal Rights*, 110 *YALE L.J.* 527, 539 (2000) (“We should be able to agree without help from philosophers and constitutional theorists that gratuitous cruelty is bad.”).

160. See Collett, *supra* note 4, at 163–64 (citing this as a minority view); Zbigniew Szawarski, *Commentary: Probably No Pain in the Absence of ‘Self,’* 313 *BRIT. MED. J.* 796 (1996). This minority view was adopted by an Ohio district court. See *Women’s Med. Prof’l Corp. v. Voinovich*, 911 F. Supp. 1051, 1074 (S.D. Ohio 1995) (noting that the partial-birth abortion ban could not be justified based on cruelty to the fetus because there was no medical evidence that a fetus “experiences a conscious awareness of pain”).

161. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 914 (D. Neb. 2004), *aff’d sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005). Dr. Creinin also told Congress in a letter that a fetus could not feel pain because it “has no level of consciousness.” *1995 House Hearing*, *supra* note 136, at 289 (testimony of Mitchell Creinin, M.D.).

“it is possible that the fetal brain interprets these [pain] markers differently than it would if the fetus was entirely delivered.”¹⁶²

Where the requirement for consciousness is accepted, the predicted date that a fetus experiences pain will be set later or not at all. For instance, in *Planned Parenthood Federation of America v. Ashcroft*, the court acknowledged testimony that fetuses have “developed the basic elements and connections of a nervous system” and respond to stimuli by twenty weeks after conception; however, the court stressed that this “does not necessarily mean that it feels pain.”¹⁶³ Relying on testimony that fetuses do not develop “full consciousness” until at least twenty-six weeks after conception, the court concluded that “the fetus must have developed some form of consciousness in order to ‘feel pain.’”¹⁶⁴

The court in *Women's Medical Professional Corporation v. Voinovich* demonstrated an even more ethereal view during the federal challenge to Ohio's partial-birth abortion ban. The district court judge ruled that the evidence regarding fetal pain was contradictory and insufficient to justify banning partial-birth abortion based on that ground.¹⁶⁵ The court ultimately resolved the issue by considering it simply a matter of “conscience” as to whether a fetus feels pain.¹⁶⁶

In sum, the proposed finding that a fetus can feel pain by twenty weeks' gestation strikes a middle ground supported by most of the physiological data. Some may argue for an earlier or later date, but most agree a fetus has enough physiological development to respond to uncomfortable stimuli by twenty weeks. For those who require consciousness in the fetus—a philosophical concept that is entirely not measurable—the twenty week mark is at least six weeks too early. Yet, even most of those advocates would agree that at some point the fetus develops this consciousness and will be able to experience pain.

162. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 998 (N.D. Cal. 2004).

163. *Id.* at 997.

164. *Id.* at 997–98.

165. *See Voinovich*, 911 F. Supp. at 1074–75. *See also* Massie, *supra* note 26, at 355 (arguing the district court was correct in this conclusion).

166. *See Voinovich*, 911 F. Supp. at 1073. *See also* Wassom, *supra* note 12, at 857 (characterizing this as an “intellectual retreat” that ignores the difference between whether a fetus has a soul and whether it has the ability to experience pain). But the desire to avoid the issue is not unique: the Supreme Court dodged the issue of fetal pain decades ago. *See City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443 n.34 (1983) (noting that the district court had found it impossible to determine whether or not a fetus felt pain).

2. Is There “Substantial Evidence” that Unborn Children Respond to Pain by Drawing Away From Certain Stimuli by Twenty Weeks After Fertilization?

A second proposed finding interprets a fetus’s “drawing away from certain stimuli” to be a response to pain.¹⁶⁷ Scientifically, this finding consists of two parts. First, science must establish that an unborn child at twenty weeks’ gestation will “draw away” from “certain stimuli.” Second, the data must be interpreted to determine why the child has drawn away—either from pain or autonomic reflex. Since a fetus cannot verbally report the feeling of pain,¹⁶⁸ science must interpret observations of fetal movement in response to stimuli and hypothesize whether the response is an experience of pain.

Regarding the first part of this finding, Congress received evidence to establish that unborn children do draw away from stimuli by twenty weeks’ gestation. During the 1995 House Hearing, Mary Ellen Morton, R.N.—a neonatal specialist—testified from her experiences with premature babies that young babies (twenty-three to twenty-four weeks’ gestation) responded to puncture and injection stimuli with “changing facial expressions” and “differing vocalizations.”¹⁶⁹ Similarly, Brenda Pratt Shafer, R.N., testified about fetal responses to stimuli that she observed during a partial-birth abortion that indicated more than simple reflex.¹⁷⁰ In short, Nurse Shafer described the child “clasp[ing],” “kick[ing],” and making a “startle” reaction.¹⁷¹ Further, during the 1997 Joint Hearing, Dr. Curtis Cook¹⁷² testified that

167. Unborn Child Pain Awareness Act, S. 51, 109th Cong. § 2(2) (2005).

168. Even though some argue it is unknowable if a fetus feels pain, others argue that “most people are sure that dogs experience pain” even though they cannot speak. Note, *supra* note 7, at 2012 (“[W]e come to believe not only that the dog that is kicked feels pain, but also that the dog knows the difference between being stumbled over and being kicked.” *Id.* (citing Oliver Wendell Holmes, Jr., *THE COMMON LAW* 3 (1881))).

169. See *1995 House Hearing*, *supra* note 136, at 76 (statement of Mary Ellen Morton, R.N.). See also Massie, *supra* note 26, at 348 (discussing witnesses before the House hearing).

170. See *1996 House Hearing*, *supra* note 1, at 310–15 (statement of Brenda Pratt Shafer, R.N.).

171. *Id.* at 310–12. Her description was also used in the House Report to demonstrate the severe pain experienced by an unborn child during a partial-birth abortion. H.R. Rep. No. 104–267 (1995). Some would agree that at the stage of development described by Nurse Shafer a fetus would indeed feel pain. See Note, *supra* note 7, at 2015 (stating that it would be “reasonable to conclude that the fetus felt pain” due to the gestational age of the fetus).

172. Dr. Cook was an assistant professor at the Michigan State University College of Human Medicine, a board-certified obstetrician and gynecologist, a specialist in

he had personally witnessed fetuses at approximately five or six months' gestation who would withdraw from needles during medical procedures, indicating that they experience pain.¹⁷³ This finding was consistent with other evidence Dr. Cook had seen showing changes in a fetus's hormonal levels and heart rate, among other things, when subjected to certain stimuli—changes consistent with pain responses in adults.¹⁷⁴

Despite this evidence, some experts interpret these reactions as reflexes rather than the experience of pain. During the 1995 Senate Hearing, Dr. Hern submitted a paper to the Senate in which he acknowledged that fetuses have the level of neurological development necessary to allow a “reflex” to certain stimuli.¹⁷⁵ He believed, however, that the “interpretation of these reflexes as ‘pain’ is highly misleading.”¹⁷⁶ Similarly, during testimony in the challenge to Ohio's partial-birth abortion ban, Dr. Joseph Conomy testified that while “many of the neural pathways which transmit pain” are developed by twenty to twenty-four weeks, in his opinion it would be “speculative” to get inside the mind of the fetus, despite fetal responses to the “unpleasurable stimulus” of a late-term abortion.¹⁷⁷ Similarly, the district court in *Planned Parenthood Federation of America v. Ashcroft* found evidence of “stress responses” to stimuli in a fetus; however, the court ultimately concluded that “it is impossible to determine conclusively if the stress responses seen in fetuses in fact translate into an actual pain response.”¹⁷⁸

So experts on both sides of the issue have recognized that unborn children of twenty weeks' gestation do respond to certain stimuli. Experts on opposing sides of the issue, however, have not agreed on whether this is a pain response or simple

maternal-fetal medicine, and a founding member of a physician's group opposed to partial-birth abortion. He believes “unborn members of the human family [are] entitled to full legal protection as *persons*.” Bopp & Cook, *supra* note 120, at 51 n.193.

173. See *1997 Joint Hearing*, *supra* note 135, at 124 (statement of Curtis Cook, M.D.).

174. See also Bopp & Cook, *supra* note 120, at 37–38 (explaining that “preterm infants show much greater responses to invasive procedures and surgical operations compared to adults” to include changes in pituitary, adrenal, and pancreatic hormones and increases in blood pressure, heart rate, and dysrhythmias. . .”).

175. *1995 Senate Hearing*, *supra* note 155, at 242–55 (letter of Warren Hern, M.D.).

176. *Id.*

177. *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1072–73 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997).

178. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 997 (N.D. Cal. 2004).

reflex that the child's body does not translate into the feeling of pain. Ultimately, this finding turns on the expert's position regarding fetal consciousness.¹⁷⁹

3. Is There "Substantial Evidence" That Abortion Methods Commonly Used After Twenty Weeks' Gestation Cause "Substantial Pain" to Unborn Children?

A third proposed finding—that late-term abortion methods cause "substantial pain" to unborn children¹⁸⁰—is intricately embedded in the same testimony that was previously discussed regarding the existence of fetal pain.¹⁸¹ Other evidence considered by Congress¹⁸² and discovered during the three legal challenges to the federal ban on partial-birth abortion also supports this third finding.

Testifying before the district court in *Carhart v. Ashcroft*, Dr. Anand¹⁸³ explained that between twenty and thirty weeks' gestation, a late-term abortion will cause "severe and excruciating pain" to an unborn child.¹⁸⁴ This resembled the findings of Judge Casey in *National Abortion Federation*, who concluded that the late-term partial-birth abortion procedure "may subject fetuses" to "prolonged and excruciating pain."¹⁸⁵ In the court's findings of fact, Judge Casey noted that there was "credible evidence" that partial-birth abortions "subject fetuses to severe pain."¹⁸⁶

Of course, the potential for fetal pain is not limited to the partial-birth abortion procedure. In *Carhart*, Dr. M. Leroy Sprang¹⁸⁷ testified that a fetus would definitely experience

179. See *supra* part IV(B)(1)(b).

180. Unborn Child Pain Awareness Act, S. 51, 109th Cong. § 2(4) (2005).

181. See *supra* part IV(B)(1)–(2).

182. Congress also considered expert opinions in the form of documentary evidence. For instance, Dr. Watson A. Bowes, Jr., a professor at the University of North Carolina at Chapel Hill, submitted a letter to Representative Charles T. Canady in which he stated his belief that a fetus will feel pain during the partial-birth abortion procedure. See *1995 House Hearing, supra* note 136, at 104–07.

183. See *supra* note 150 and accompanying text.

184. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 913 (D. Neb. 2004), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

185. *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 466 (S.D.N.Y. 2004) (citing testimony of Drs. Anand, Lockwood, and Sprang).

186. *Id.* at 479.

187. Dr. Sprang, an abortion provider, worked at the Northwestern University Medical School in Chicago, where he served as Assistant Professor in Clinical Obstetrics and Gynecology. See *Carhart*, 331 F. Supp. 2d at 914.

“excruciating” pain during a late-term abortion.¹⁸⁸ Similarly, Dr. Charles Lockwood¹⁸⁹ explained that trauma to a fetus aged between twenty and twenty-four weeks’ gestation should be avoided.¹⁹⁰ Moreover, in *Planned Parenthood Federation of America v. Ashcroft*, the court found it “undisputed” that “if a fetus feels pain” during a partial-birth abortion, “the amount is no less and in fact might be greater in” other legal methods of abortion.¹⁹¹ Likewise, the court in *Carhart* also assumed that unborn children will experience pain during any type of abortion or miscarriage, thus suffering “‘pain’ in every event”—making it unreasonable for Congress to speculate about which procedure causes more or less pain.¹⁹²

Perhaps the most telling evidence of the reality of fetal pain, however, is the behavior of some abortion providers who testified against the ban on partial-birth abortion. Testifying in *Carhart*, Dr. Marilyn Frederiksen¹⁹³ implicitly acknowledged her concern with fetal pain during late-term abortion procedures. She testified that one way in her own practice that she attempts to reduce the possibility of fetal pain in about seventy percent of her cases is by cutting the umbilical cord, supposedly leading to the child’s death prior to the painful procedure.¹⁹⁴ Similarly, Dr. Leroy Carhart—the plaintiff in both *Stenberg v. Carhart* and *Carhart v. Ashcroft*—testified that he anesthetizes “nonviable fetus[es] when he believes it safe for the woman to cause fetal death by injection.”¹⁹⁵ If these abortion providers did not believe fetal pain to be likely, there would be little reason for them to take such preventive measures.

188. *Id.*

189. Dr. Lockwood specialized in maternal-fetal medicine and was Chairman of the Department of Obstetrics, Gynecology and Reproductive Services at the Yale University School of Medicine. *Id.*

190. *Id.*

191. *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1002 (N.D. Cal. 2004).

192. *Carhart*, 331 F. Supp. 2d at 1029.

193. Dr. Frederiksen, a board-certified specialist in obstetrics and gynecology, maternal-fetal medicine, and clinical pharmacology, privately practiced medicine with Northwestern Perinatal Associates in Chicago. *See Carhart*, 331 F. Supp. 2d at 914.

194. *Id.* This procedure of cutting the umbilical cord assumes a sufficient period of time to pass for the fetus to die (more time than is normally allotted during a late-term abortion). *See Bopp & Cook, supra* note 120, at 34–35. Moreover, medical experience in other contexts where an umbilical cord must be cut demonstrate that even after cutting the cord, “a healthy liveborn child” can result. *Id. See also Carhart*, 331 F. Supp. 2d at 910–11 (confirming this during the testimony of Dr. Chasen).

195. *Carhart*, 331 F. Supp. 2d at 1029 n.155.

All in all, there is significant evidence that a fetus will experience pain during a late-term abortion. The key disagreement involves whether the fetus has a consciousness that would allow him or her to appreciate painful stimuli.¹⁹⁶

4. Is Anesthesia “Routinely Used” During Prenatal Surgery on Unborn Children Who Have Developed Twenty Weeks Past Fertilization?

A fourth proposed finding concludes that anesthesia is routinely used during prenatal surgery on unborn children over twenty weeks’ gestation.¹⁹⁷ This non-controversial finding is drawn primarily from the many articles presented to Congress on the issue of anesthesia and fetal pain. Nor has anyone challenged this concept during the three federal challenges to the ban on partial-birth abortion. Medical textbooks on anesthesiology have long acknowledged the practice of direct fetal anesthesia during fetal surgery.¹⁹⁸ In fact, relatively speaking, anesthesiologists administer greater doses of painkillers to fetuses during surgery than to adults.¹⁹⁹

In short, this proposed finding remains undisputed.

5. By Twenty Weeks After Fertilization, Will an Unborn Child “Experience Substantial Pain” Even if the Child’s Mother Has Received Anesthesia?

A fifth proposed finding concludes that anesthesia administered directly to a woman will not lessen the pain felt by her fetus.²⁰⁰ The premise of this finding—that unborn children experience “substantial pain”—is supported by the evidence previously discussed.²⁰¹ However, the issue regarding anesthesia was separately explored by Congress—one of the most extensive questions it investigated.²⁰²

196. See *supra* part IV(B)(1)(b).

197. Unborn Child Pain Awareness Act, S. 51, 109th Cong. § 2(3) (2005).

198. See John W. Seeds & Barry C. Corke, *Anesthesia for Fetal Intervention*, PRINCIPLES AND PRACTICE OF OBSTETRIC ANALGESIA AND ANESTHESIA 1241, 1247 (John J. Bonica & John S. McDonald eds., 1995) (“[T]he anesthesiologist could develop a tailor-made anesthetic regimen for the fetus complete and separate from that of the mother.”).

199. See *AAPLOG Brief*, *supra* note 152.

200. S. 51 § 2(5).

201. See *supra* part IV(B)(1)–(3).

202. This issue first came up during the 1995 House Hearing. Later that year, the 1995 Senate Hearing focused primarily on the effects experienced by a fetus from anesthesia given to the child’s mother. Finally, the 1996 House Hearing focused almost

According to Representative Charles T. Canady—the House subcommittee chairman—this issue was explored in-depth to “set the record straight” and “examine one of the myths created by abortion advocates” that “anesthesia given to the mother at the beginning of a partial-birth abortion kills the unborn child.”²⁰³ This controversy emerged from opinions such as that given by Dr. Mary Campbell, the Medical Director of Planned Parenthood of Metropolitan Washington, in an undated letter inserted into the Congressional Record.²⁰⁴ In this letter, Dr. Campbell took the position that analgesic drugs given to a pregnant woman will cross the “placental circulation” to the fetus, leading to death or prevention of pain perception.²⁰⁵ During her testimony before the 1995 House Hearing, however, Dr. Campbell admitted that a fetus will not die “of an overdose of anesthesia given to the mother intravenously” during a partial-birth abortion.²⁰⁶ It appears that she modified her earlier position.²⁰⁷

Also during the 1995 House Hearing, Dr. Norig Ellison, the President of the American Society of Anesthesiologists, testified about the effects of anesthesia on a fetus during an abortion.²⁰⁸ He explained that—unlike the claims of some doctors opposing the ban on partial-birth abortion—a fetus would *not* die or receive an adverse effect from anesthesia given to the mother.²⁰⁹ He also testified that anesthesia given to a woman during an abortion would not eliminate pain to the child.²¹⁰ During the 1996 House Hearing, four anesthesiologists—Dr. Ellison, Dr.

exclusively on the effects of a mother’s anesthesia on her fetus. *See 1996 House Hearing, supra* note 1, at 138–50. *See also Verbatim, supra* note 132, at 71 (presenting verbatim testimony from that hearing).

203. *Id.*

204. *See 1996 House Hearing, supra* note 1, at 17.

205. *Id.*

206. *See 1995 House Hearing, supra* note 136, at 153 (statement of Mary Campbell, M.D.).

207. *See id.* Dr. Campbell testified before the House and Senate, in addition to the undated letter that was later inserted into the record. Although it appears that she had changed her position since the time of the letter, the record was unclear whether the letter represented her original position prior to her testimony or whether this was yet another modified position that Dr. Campbell took after giving her testimony.

208. *Id.* at 107–08.

209. *Id.* at 108.

210. *See id.* *But see id.* at 106 (recording a letter to Chairman Canady by Dr. Watson A. Bowes, Jr., a Professor at the University of North Carolina at Chapel Hill, explaining that it is difficult to document whether an analgesic given to the mother will provide pain relief for the fetus).

David Birnbach,²¹¹ Dr. David Chestnut,²¹² and Dr. Jean Wright²¹³—testified regarding the anesthesia issue. Sharply opposing the “myth” about anesthesia, each of the witnesses testified in essence that the administration of anesthesia to a pregnant woman would not cause fetal demise or greatly alleviate the pain a fetus experiences during a partial-birth abortion.²¹⁴ The witnesses were certain in their positions, although they also acknowledged that some small amount of pain relief might pass to the unborn child.²¹⁵

This testimony was later echoed before the *Carhart v. Ashcroft* court. During that trial, Dr. Anand testified that it would require “toxic amounts” of anesthesia given to a mother to anesthetize a fetus to pain, indicating a need to provide anesthesia to a fetus directly.²¹⁶ On the other hand, Dr. Caroline Westhoff,²¹⁷ an opponent of the ban on partial-birth abortion, admitted that she did not know if a second-trimester fetus could experience pain; however, she testified that in her experience with late-term abortions the fetus was “limp” and non-responsive, causing her to believe that anesthesia to the mother might affect the child.²¹⁸ Dr. Cassing Hammond²¹⁹—another abortion provider opposing

211. Dr. Birnbach directed the Department of Obstetric Anesthesiology at St. Luke’s-Roosevelt Hospital Center in New York City. See *1996 House Hearing*, *supra* note 1, at 140.

212. Dr. Chestnut chaired the Department of Anesthesiology at the University of Alabama at Birmingham. See *1996 House Hearing*, *supra* note 1, at 143.

213. See *supra* note 132 and accompanying text.

214. See *1995 House Hearing*, *supra* note 136, at 140–43 (statement of Dr. Birnbach); *id.* at 143–46 (statement of Dr. Chestnut); *id.* at 146–50 (statement of Dr. Wright).

215. Dr. Ellison called the claims about anesthesia made by abortion advocates “entirely inaccurate”; however, both he and Dr. Birnbach did acknowledge that some analgesic or anesthetic medicine given to a pregnant woman will reach her fetus and perhaps provide a small amount of pain relief. *Verbatim*, *supra* note 132, at 78–80. Dr. Chestnut emphasized that the degree of fetal pain relief from this type of crossover effect was unknown and that “local anesthetics rarely have any effect at all on the fetus. The mother’s liver would clear these drugs . . . and the concentration that reaches these babies does not achieve a therapeutic response.” *Id.* at 82, 84. See also Bopp & Cook, *supra* note 120, at 39 (noting that over 500,000 women a year receive anesthesia during pregnancy with no effect on the fetus and that local anesthetics “do not have an effect on the fetus”).

216. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 913 (D. Neb. 2004) (noting that this opinion was based on “inference and extrapolation”).

217. Dr. Westhoff, a board-certified specialist in obstetrics and gynecology, worked as a Professor of Obstetrics and Gynecology at Columbia University College of Medicine. She also taught as a Professor of Epidemiology and of Population and Family Health for the Columbia University School of Public Health. See *Carhart*, 331 F. Supp. 2d at 914.

218. *Id.*

219. Dr. Hammond, a board-certified specialist in obstetrics and gynecology, was an assistant professor in Northwestern University’s Department of Obstetrics and Gynecology. See *id.*

the ban—testified to his belief that a fetus may get some pain relief from anesthesia given to a mother placed under deep sedation.²²⁰

Thus, despite credible testimony before Congress that anesthesia given to a pregnant mother will not significantly affect her unborn child, some question still exists over how much pain relief, if any, a fetus will receive from this “crossover.”

6. Are “Anesthesia or Other Pain-Reducing Drugs” Capable of Reducing Pain to the Unborn Child?

A sixth proposed finding concludes—without any real dispute—that administering anesthesia directly to an unborn child will reduce the child’s pain during an abortion.²²¹ Congress received almost no direct testimony on this point, although it was implicit in the testimony of the anesthesiologists who were witnesses. Perhaps the most telling evidence to demonstrate the non-controversial nature of this finding, however, is that many abortion providers actually use drugs such as lidocaine directly on an unborn child “in an attempt to anesthetize the nonviable fetus when” they believe it is “safe for the woman” for the physician “to cause fetal death by injection.”²²² It follows that if anesthesia were ineffective on a fetus, then doctors would not use it.

All told, the proposed factual finding about the effect of direct anesthesia on a fetus is not controversial.

V. HOW MUCH DEFERENCE SHOULD COURTS GIVE TO FINDINGS ABOUT FETAL PAIN?

In parts II and IV, this article presented the substance of proposed fetal pain legislation and examined the medical and scientific evidence supporting proposed findings behind the Unborn Child Pain Awareness Act of 2005. Part III set forth a framework for analyzing how much deference, if any, courts give to modern legislative findings. That part identified four key deference factors that courts use to assess how much deference legislative findings deserve: (1) the constitutional delegation of fact-finding authority; (2) the comparative ability of legislatures

220. *Id.*

221. Unborn Child Pain Awareness Act, S. 51, 109th Cong. § 2(6) (2005).

222. *Carhart*, 331 F. Supp. 2d at 1029 n.155.

and the courts to reliably find facts; (3) the thoroughness of the legislative record; and (4) the amount of division surrounding the facts. This final part will analyze the Act using each one of these four deference factors, in light of the medical evidence discussed in part IV. This analysis will partly be accomplished by comparing proposed fetal pain legislation with the ban on partial-birth abortion, which has received harsh treatment from the courts.

A. Factor One: The Constitutional Delegation of Fact-Finding Authority

In this section, the article will discuss whether it is appropriate to apply the general rule of “limited factual review” to proposed findings regarding fetal pain.²²³ As a primary consideration, it is necessary to classify these factual findings regarding fetal pain as adjudicative, legislative, or constitutional facts.

When passing the federal ban on partial-birth abortion, Congress claimed that judicial pronouncements on the topic were not binding on Congress because the courts had been handcuffed by the rules for interpreting *adjudicative* facts.²²⁴ Three district courts and one circuit court, however, have enjoined enforcement of the federal ban and rejected Congress’s claim. For instance, in *National Abortion Federation v. Ashcroft*, the court squarely addressed this issue and flatly disagreed with Congress’s characterization of *Stenberg* as a decision based on adjudicated facts.²²⁵ Instead, the court classified the issue as one of *legislative* fact-finding that would not change from case to case.²²⁶ Moreover, the Supreme Court in *Stenberg* had already made a finding of “legislative” fact about the necessity of the partial-birth abortion procedure; that finding directly conflicted with Congress’s findings on the issue.²²⁷ The court in *National Abortion Federation* considered this to be an important factor when evaluating Congress’s conclusions.²²⁸

223. See *supra* notes 57–76 and accompanying text.

224. See 18 U.S.C. § 1531 (note following) (congressional findings for Pub. L. No. 108-105, § 2(4)–(5), Nov. 5, 2003, 117 Stat. 1201). See also *supra* notes 71–76 and accompanying text.

225. See *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 485 n.30 (S.D.N.Y. 2004).

226. See *id.*

227. 530 U.S. 914, 931–32, 937–38 (2000); see *supra* note 42 and accompanying text.

228. See 330 F. Supp. 2d at 485.

Similarly, the proposed findings about the existence of fetal pain are *not* adjudicative in nature. Since these conclusions apply to all human beings and pregnancies, it is more appropriate to classify them as legislative facts, which will normally garner substantial deference by the courts. As discussed below under the third deference factor, the courts have not necessarily disagreed with legislative conclusions about fetal pain, unlike the courts' reception of Congress's conclusions about the necessity and safety of the partial-birth abortion procedure.²²⁹

Still, even though the fetal pain findings are legislative facts, that determination does not necessarily resolve the issue in favor of fetal pain legislation. If a court were to conclude that the fetal pain findings are also decisive in limiting a woman's constitutional right to an abortion, that court might label the proposed findings as "constitutional" facts and apply a more probing scrutiny.²³⁰

This scenario was clearly seen in how the courts characterized Congress's findings on partial-birth abortion. For instance, the court in *Planned Parenthood Federation of America v. Ashcroft* considered three potential levels of deference to give to congressional fact-finding under the federal ban on partial-birth abortion.²³¹ Ultimately, the court found that a "hard look" standard would be most appropriate because Congress's finding that the partial-birth abortion procedure was "never" necessary to protect a woman's health was a "constitutional" fact.²³² The court believed that Congress's failure to include a health

229. *See infra* part V(C).

230. *See infra* part V(C) (it is unlikely that a court would find these facts to be decisive on the issue of procuring an abortion).

231. 320 F. Supp. 2d 957, 1010–12 (N.D. Cal. 2004). Plaintiffs argued that Congress had not engaged in "fact-finding" but in an attempt to evade constitutional standards—thus warranting no deference and a *de novo* review. *See id.* at 1010 (citing *Dickerson v. United States*, 530 U.S. 428 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997)). On the other hand, the Government counter-argued that Congress was not evading judicial fact-finding but was merely making an "independent assessment of the medical evidence" apart from the specific district court case that was appealed to the Supreme Court—thus warranting the *Turner* substantial deference standard. *See id.* at 1010–11. Finally, law professors submitting an amicus curiae suggested that conclusions about the necessity of a health exception were both legislative and constitutional facts—not amenable to alteration by the fact-finding of individual legislatures and requiring a "hard look standard." *Id.* at 1011–12. *See also* *A Woman's Choice v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (discussing legislative and adjudicative facts).

232. *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1013.

exception to the ban would substantially impact the exercise of a fundamental right.²³³

When considering the facts about fetal pain, however, the courts should reach a different conclusion. Under the ban on partial-birth abortion, Congress's finding about the necessity of a health exception was directly and substantially aimed at the exercise of the right to abortion. Indeed, the finding led Congress to prohibit a method of abortion that some experts testified was "necessary" to preserve the health of some women seeking abortion.²³⁴ The fact itself was the equivalent of a legal conclusion that had great constitutional significance. In contrast, findings about when unborn children can experience pain are not decisive of any constitutional claim. The existence of these facts does not impact a constitutional right—not the equivalent, for instance, of a finding that fetuses are human "persons" from the moment of conception, leading to the inescapable conclusion that their right to life is protected by the Fifth and Fourteenth Amendments. The proposed findings about fetal pain are broad facts about physiology based on scientific observation—facts that can be used to craft various types of legislation. Here, both federal and state sponsors of fetal pain legislation have used these legislative facts to write laws that may *enhance* a fundamental right by providing women with more information so that they can better exercise their constitutional choice.²³⁵

For these reasons, the proposed findings about fetal pain are best characterized as legislative facts of a non-constitutional nature that policymakers may use to craft appropriate legislation. Thus, courts should apply the traditional standards of reviewing these types of determinations made by a co-equal branch of government entrusted in the Constitution with certain delegations of fact-finding authority.²³⁶ Under the first deference factor, courts applying a "limited factual review" should grant legislatures a substantial amount of deference in this area.

233. *See id.*

234. *See id.*

235. *See supra* notes 48–49 and accompanying text.

236. *See supra* notes 57–61 and accompanying text.

B. Factor Two: Comparative Ability of Legislatures and the Courts to Reliably Find Facts About Fetal Pain

In this section, the article will discuss whether the facts about fetal pain would be better discovered through legislative fact-finding processes or through the courts.²³⁷ It will then examine whether the proposed findings are tainted by politics and whether this calls for the application of a court-based fact-finding model.

1. The Superior Fact-Finding Ability of Legislatures

Ultimately, the proposed findings regarding fetal pain are medical and scientific facts. Although they are universal in nature, they are also subject to modification as science advances. While one theory or “fact” may seem clear today, it may suffer scientific discredit tomorrow. These types of facts require extensive research, testing, and ongoing evaluation. For all of these reasons, it would appear that legislatures—not the courts—are better equipped to make these types of factual findings.

To demonstrate this, consider a few examples where expert opinions in this area have been modified during the eight years that Congress spent evaluating the partial-birth abortion issue. First, opinion has shifted regarding the effects of a mother’s anesthesia on her unborn child. Originally, a few experts claimed that such anesthesia would either kill the fetus or provide significant pain relief in the womb prior to the abortion procedure.²³⁸ Congress further explored this question, however, and uncovered vast amounts of evidence that this was simply a “myth.”²³⁹ This was not an area of deep controversy during subsequent litigation. Yet even after years of investigation, some still believe that the “myth” has some truth to it, although it is unclear how much pain relief a mother’s anesthesia actually provides to her unborn child.²⁴⁰

As a second example, consider the debate as to when fetuses physiologically develop enough systems to experience pain. Some disparity in medical opinion exists on this front even after

237. *See supra* notes 77–87 and accompanying text.

238. *See supra* notes 203–05 and accompanying text.

239. *See supra* notes 208–15 and accompanying text.

240. *See supra* notes 216–18 and accompanying text.

years of intense exploration, with some experts claiming pain as early as six weeks and others stretching this time to the thirty-sixth week after fertilization.²⁴¹ This is an area where, in particular, further scientific research into how pain is felt could lead to further modification of this data. The district court's opinion in *Planned Parenthood Federation of America v. Ashcroft* is illustrative, reading like a "he said-she said" article that cites one set of experts on the plaintiff's side and the opposing view of experts on the Government's side.²⁴² Clearly, there is room for a shift in medical opinion as more time passes.

Thus, the facts regarding fetal pain play to legislative fact-finding strengths. Legislatures are well-manned and funded to continue investigating this issue as medical science develops and changes.²⁴³ For instance, Congress has already accumulated some institutional expertise in this area and will continue to do so. Further, it is fair to characterize this as a complex area that may be beyond judicial expertise, as recognized in the twin *Turner* cases.²⁴⁴ Since there may be modifications to this data over time, legislators are better-situated to "change their mind" since they are not bound by *stare decisis* like the courts.²⁴⁵ Finally, legislatures are in the best position to evaluate democracy-based considerations about the public will to protect unborn children from unnecessary pain and suffering.²⁴⁶

2. The Political Stumbling Block

Despite the many reasons that give legislatures the superior fact-finding position in this situation, the Achilles heel of this position is the highly political environment that surrounds abortion. This issue threatens both the image of legislatures and the courts.²⁴⁷ The abortion issue, above all others, is the most

241. See *supra* notes 128–66 and accompanying text.

242. See *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 982–97 (N.D. Cal. 2004).

243. See *supra* notes 77–79 and accompanying text.

244. See *supra* notes 80–81 and accompanying text.

245. See *supra* note 82 and accompanying text.

246. See *supra* notes 83–84 and accompanying text.

247. Although the public traditionally views the courts as "above politics," the abortion issue has thrown this perception into jeopardy. See *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) (noting that *Roe v. Wade* "inflamed our national politics" and "obscured with its smoke the selection of" Supreme Court Justices and warning that the Court may be consumed in the "contention and controversy" of the issue).

divisive—lending itself to political manipulation by legislators (and also by the courts).²⁴⁸ Indeed, each of the three decisions examining the federal ban on partial-birth abortion lambasted many of Congress's factual findings due to political taint and questioned the amount of deference Congress's findings deserved.

There were many perceived problems with how Congress arrived at its findings about partial-birth abortion. First, some of the facts were viewed as nothing more than “inaccurate” or “mischaracterized” legal conclusions “disguised as factual findings.”²⁴⁹ Second, the courts felt that the Congressional Record was purposely incomplete—with the *Planned Parenthood Federation of America v. Ashcroft* court finding that the record was “heavily weighted in favor of” the ban and that “the oral testimony before Congress was not only unbalanced, but intentionally polemic.”²⁵⁰ In *National Abortion Federation*, Judge Casey openly questioned the sufficiency of Congress's hearings:

The Court also finds that Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings. Congress only held two hearings after the Supreme Court issued its opinion in *Stenberg*. . . . This Court heard more evidence during its trial than Congress heard over the span of eight years.²⁵¹

248. For instance, in *Planned Parenthood Federation of America v. Ashcroft*, Judge Hamilton severely questioned the credibility of “biased” or “unqualified” Government witnesses, even refusing to qualify any of the Government experts regarding partial-birth abortion because of their objections to the procedure and the fact that none of them had experience in performing the controversial procedure themselves. 320 F. Supp. 2d 957, 982, 998 (N.D. Cal. 2004). Similarly, Judge Kopf in *Carhart v. Ashcroft* devalued the testimony of the Government witnesses who had not performed late-term abortions themselves, saying that the “views of such inexperienced doctors have little value when compared to the opinions of surgeons who are experienced abortionists.” 331 F. Supp. 2d 805, 1011–12 (D. Neb. 2004) (finding Congress's findings “unreasonable”), *aff'd sub nom.* *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005). Judge Kopf went so far as to discredit the Government's two most important witnesses, Dr. Sprang and Dr. Cook, by saying that they “were too rigid in their beliefs to be entirely credible.” *Id.* at 1024. He found that Congress was “plainly unreasonable” for choosing the opinions of less experienced doctors than the opinions of abortion doctors with vast experience performing the procedure. *Id.* at 1025.

249. *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1003. The court explained how Congress had misinterpreted *Stenberg* and the undue burden standard, as well as how it “grossly mischaracterized” the trial evidence in *Stenberg* and made “factually erroneous” findings. *See id.* at 1003–06.

250. *Id.* at 1018–20. Judge Hamilton also concluded that Congress “chose to disregard the statements by . . . medical organizations in opposition to the Act, and then exclusively utilized statements derived directly from” a 1997 fact sheet. *Id.* at 1021.

251. *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 482 (S.D.N.Y. 2004).

Third, the courts viewed many of Congress's findings regarding partial-birth abortion as willfully false.²⁵² Finally, many of the Government's own witnesses who testified at trial disagreed with Congress's findings.²⁵³ When three "neutral and objective" federal district court judges unanimously agree that Congress has been politically insincere, factually manipulative, and patently false, it spells trouble for congressional findings and greatly decreases the chance of judicial deference. However, this does not necessarily mean that the proposed fetal pain findings are doomed simply due to their proximity to the controversial partial-birth abortion findings.

Proposed findings regarding fetal pain are not tainted by the same political maneuvering that surrounded findings about partial-birth abortion. In fact, the district courts considered Congress's findings about fetal pain with much more respect. Indeed, in *National Abortion Federation*, Judge Casey agreed with Congress's findings regarding fetal pain.²⁵⁴ While the other two district courts did not consider the issue of fetal pain settled, neither did they note any evidence of political taint.²⁵⁵

In sum, applying the second deference factor benefits the case for judicial deference. The facts regarding fetal pain are best discovered using the processes normally seen as legislative strengths—long investigations, evolving medical evidence, and a building of institutional expertise in a complex area. Moreover,

252. In *Planned Parenthood v. Ashcroft*, the court found that Congress's claim that it had "new" evidence was false. "Congress did not have before it any *new* medical evidence or studies not available to both the district court and Supreme Court in *Stenberg*, at the time that the courts issued their decisions." 320 F. Supp. 2d at 1023. Similarly, in *National Abortion Federation*, Judge Casey received testimony from witnesses who criticized many of the congressional findings as "patently false" or as questionable because they "were reached despite a division of medical opinion on the matter." 330 F. Supp. 2d at 475. In *Carhart*, Judge Kopf found that—contrary to Congress's findings—the Congressional Record showed that there was a "'consensus' in favor of the banned procedure." 331 F. Supp. 2d at 1008–09. The *Carhart* court also found that the primary findings by Congress about the partial-birth abortion procedure were "unreasonable and not supported by substantial evidence in the Congressional Record." *Id.* at 1010. Finally, the court found that Congress "grievously erred" when it made the finding that partial-birth abortions are "dangerous to the health of women." *Id.* at 1018.

253. *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1024. In *National Abortion Federation*, Judge Casey noted, "[e]ven the Government's own experts disagreed with almost all of Congress's factual findings." 330 F. Supp. 2d at 482. Finally, in *Carhart*, Judge Kopf—using some of the government's own witnesses against it—noted that the trial testimony "flatly contradict[ed]" Congress's finding that the partial-birth abortion procedure was "never medically necessary." 331 F. Supp. 2d at 1012, 1024–27.

254. See 330 F. Supp. 2d 436. See also notes 183–84 and accompanying text.

255. See 320 F. Supp. 2d at 1002; 331 F. Supp. 2d at 1029. See also *supra* notes 190–92 and accompanying text.

unlike the findings regarding partial-birth abortion, the proposed fetal pain conclusions are not plagued by the type of political manipulation that would cause courts to substitute their own fact-finding in place of “unreliable” facts articulated by legislators.

C. Factor Three: Thoroughness of the Legislative Record

In this section, the article examines whether fetal pain legislation is an area where the courts will require legislatures to make a formal record. It will then assess the thoroughness of the Congressional Record (as supplemented by subsequent litigation) and determine whether the six proposed findings reasonably flow from the evidence.

1. Will Courts Require a Record to Support Fetal Pain Legislation?

As a general rule, legislatures are not required to make findings of fact or to establish a thorough formal record in order to legislate.²⁵⁶ Yet modern jurisprudence virtually imposes such a requirement, especially where a legislature passes “new” or “novel” laws.²⁵⁷ When it comes to informed consent statutes, however, it can hardly be said even in the federal arena that Congress is legislating in a “new” way.²⁵⁸ Thus, at first blush an informed consent statute regarding fetal pain does not appear to be an area where the courts should require legislatures to make any kind of formal record. However, that ignores the political reality of abortion jurisprudence.

Clearly, the *Stenberg* Court and lower federal courts believed it was necessary for legislatures to make accurate findings about partial-birth abortion before outlawing the procedure. All three district courts evaluating the federal partial-birth abortion ban agreed that Congress’s findings should not receive the “substantial deference” discussed in *Turner II*.²⁵⁹ The *Planned Parenthood Federation of America v. Ashcroft* court believed that a

256. *See supra* note 88 and accompanying text.

257. *See supra* notes 89–91 and accompanying text.

258. *See* 42 U.S.C. § 289g-1(b)(1) (2005) (requiring informed consent from a fetus’s mother prior to donation of any fetal tissue for research); 20 U.S.C. § 1414(a)(1)(D) (2005) (requiring informed parental consent before the evaluation of a disabled child for special education); 50 U.S.C. § 1520a(c) (2005) (requiring the Secretary of Defense to receive informed consent prior to any testing on human subjects).

259. *See supra* notes 98–107 and accompanying text.

“hard look” standard would be most appropriate.²⁶⁰ Similarly, the *National Abortion Federation* court believed that Congress’s findings deserved a heightened standard of review because *Turner* would not apply where Congress “substantially burdens a fundamental right” such as abortion.²⁶¹

Finally, the *Carhart* court did not think that *Turner II* “substantial deference” was necessary because there was no “predictive judgment” used by Congress in the case.²⁶² The *Carhart* court did find, however, that it should give Congress *some* deference in its partial-birth abortion findings due to the Supreme Court’s statement in *Stenberg* that physicians do not have “unfettered discretion” when performing abortions.²⁶³ This indicated to the court that under some circumstances it should give “binding deference” to Congress’s factual judgments, even though they deal with the issue of abortion.²⁶⁴ The *Carhart* court ultimately concluded that it should “closely examine” the Congressional Record to answer the following question: “Is there substantial evidence in the relevant record from which a reasonable person could conclude that the banned procedure is *never necessary, in appropriate medical judgment, for the preservation of the health of the woman?*”²⁶⁵

Even though all three district courts believed a more heightened scrutiny of the partial-birth abortion findings was appropriate, each court in essence chose to analyze the findings using the more generous *Turner II* standard of “substantial

260. 320 F. Supp. 2d at 1013.

261. 330 F. Supp. 2d 436, 484 (S.D.N.Y. 2004) (citing *Landmark Commc’n, Inc. v. Va.*, 435 U.S. 829, 843 (1978)). While discussing the *Turner II* “substantial deference” standard, Judge Casey found that *Stenberg* and *Turner II* were “fundamentally at odds” because *Stenberg* “rejected deference to the institutional competency of legislatures, at least when abortion regulations are concerned.” 330 F. Supp. 2d at 486.

262. 331 F. Supp. 2d 805, 1006 (D. Neb. 2004) (“When the answer to the relevant question can only be a guess because the answer will turn on accurately predicting future facts, Congress, being an elected body, is most often the place to make that guess. Here, in contrast, the answers to the relevant questions require no prophesy.”).

263. *Id.* at 1006–07.

264. *Id.* at 1007. In *Carhart*, Judge Kopf concluded that Congress should receive deference on its findings—and “binding deference” where its legislative conclusions are reasonable and supported by substantial evidence. *Id.* He later explained that “the absence of a health exception for ‘unnecessary’ procedures does not constitute a per se violation of the Constitution. It must also mean that Congress has the right to regulate specific abortion methods.” *Id.* at 1046.

265. *Id.* at 1008 (imposing *Turner II* standard over the *Stenberg* requirement for a broad health exception).

deference.”²⁶⁶ In a sense, each court “played it safe” by using this more generous standard because in the end, all of the courts found that even in light of “substantial deference” Congress had “not drawn reasonable inferences based on substantial evidence.”²⁶⁷ On appeal in *Carhart*, however, the Eighth Circuit found that the *Turner* standard was “irrelevant” because the court was bound by the standard that the Supreme Court had articulated in *Stenberg*.²⁶⁸

Applying these concepts in the fetal pain context, it is highly likely that courts will require a record when they evaluate the validity of the proposed findings—despite the traditional position that would not require a record under these circumstances. The next part will explore how the courts will likely view the proposed findings using either a “substantial deference” standard or some closer level of scrutiny.

2. Assessing the Six Proposed Findings Regarding Fetal Pain

In *Casey*, the Supreme Court evaluated an informed consent statute that had many similarities to proposed state and federal fetal pain legislation. The *Casey* Court stated, “In attempting to ensure that a woman apprehend the full consequences of her decision . . . , [i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.”²⁶⁹ Since it is likely that the courts will require legislatures to formally establish the basis for fetal pain legislation, it is also likely that the test will ask: “Is there ‘substantial evidence’ from which a reasonable person could conclude that legislative findings regarding fetal pain are ‘truthful and not misleading’?”²⁷⁰ This section will briefly apply this test to the six proposed findings of fact discussed in Part III and conclude that—assuming legislatures can act in the face of divided opinion (the fourth deference factor)²⁷¹—these findings

266. See *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1014 (N.D. Cal. 2004); *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 486–87; *Carhart*, 331 F. Supp. 2d at 1008–09.

267. *Planned Parenthood Fed’n of Am.*, 320 F. Supp. 2d at 1014; *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 486–87; *Carhart*, 331 F. Supp. 2d at 1008–09.

268. *Carhart v. Gonzales*, 413 F.3d. 791, 797–99 (8th Cir. 2005).

269. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

270. See 331 F. Supp. 2d at 1008. See also *supra* notes 264–65 and accompanying text.

271. See *supra* part III(D).

are reasonably supported by substantial evidence and are neither untruthful nor misleading.

First, one can reasonably conclude that by twenty weeks' gestation fetuses have sufficient physiological development to experience pain.²⁷² Numerous experts testified to such a belief and the *National Abortion Federation* court reached the same conclusion.²⁷³ Almost all of those experts who disagreed with this finding based their opinion on the question of when a fetus achieves "consciousness."²⁷⁴ Since that issue is akin to a philosophical consideration, it should not be sufficient to displace a legislative factual finding. This is unlike the question in *Roe* that arguably turned on when a fetus could be called a human being with a soul.²⁷⁵ It is perfectly reasonable for a legislature to limit its findings of fact to purely physiological considerations and to leave the more speculative philosophical questions to philosophers. After all, if Congress can determine that an animal is capable of experiencing pain,²⁷⁶ it is also reasonable for it to find that a fetus can do so—even though neither the animal nor the fetus can speak. It would be illogical to allow Congress to draw this conclusion to protect animals while at the same time preventing Congress from equally protecting an unborn human child.

Second, one can reasonably find that a fetus's "drawing away from certain stimuli" is a response to pain.²⁷⁷ Doctors and nurses who work with neonates and fetuses testified to their observations of unborn children who draw away from stimuli.²⁷⁸ Even those witnesses who doubted fetal pain acknowledged the empirical reality of this "drawing away." The only question is whether such a "drawing away" is a pain response or mere painless reflex. This again would require the legislature to "get inside the fetus's mind," which it cannot do. Since the child's other physiological signs—heart rate, blood pressure, and hormone levels—are consistent with the experience of adults in

272. See *supra* notes 126–27 and accompanying text.

273. See 330 F. Supp. 2d 436, 466–67 (S.D.N.Y. 2004) (noting that Dr. Anand testified that "the fetus will experience severe pain when its skull is punctured or crushed" and noting similar testimony of Drs. Anand, Lockwood, and Sprang). See also *supra* notes 148, 183–84 and accompanying text.

274. See *supra* notes 158–66 and accompanying text.

275. *Roe v. Wade*, 410 U.S. 113, 133–35, 165–66 (1973).

276. See *supra* notes 120–23 and accompanying text.

277. See *supra* notes 167–68 and accompanying text.

278. See *supra* notes 169–74 and accompanying text.

pain,²⁷⁹ it would be reasonable for a legislature to interpret these responses as indications of pain.

Third, one can reasonably conclude that late-term abortion methods cause “substantial pain” to unborn children.²⁸⁰ Assuming the validity of the first two findings, it is equally reasonable to believe that “substantial pain” can be caused to the fetus by other methods of abortion that tear the fetus apart limb from limb or puncture the child’s skull with scissors. Indeed, the *Stenberg* Court, as well as numerous lower courts, assumed that—*if* pain is experienced by a fetus—such pain will occur using any of the late-term abortion methods.²⁸¹ Congress and the courts heard testimony from various experts who held this exact opinion.²⁸² Some abortion providers even go out of their way to avoid fetal pain when possible.²⁸³

Fourth, it is reasonable to find that anesthesia is routinely used on fetuses over twenty weeks’ gestation during prenatal surgery, despite any increased risk to the mother. Not only is this finding based on substantial evidence, but it is also uncontroverted.²⁸⁴

Fifth, it is reasonable to determine that anesthesia administered to a pregnant woman will not significantly lessen the pain felt by the unborn child in her womb.²⁸⁵ Although at one time there was some disagreement on this issue, it now appears that the consensus of medical evidence is that anesthesia given to a mother will not remove or significantly lessen pain experienced by her fetus.²⁸⁶ One may quibble with the phrase “will not lessen”—finding that it may slightly lessen the pain—but ultimately, this judgment is both reasonable and based on substantial evidence, including the expert opinion of four anesthesiologists.

Sixth and finally, it is reasonable to conclude that pain to an unborn child during an abortion will be reduced by

279. *See supra* note 174 and accompanying text.

280. *See supra* notes 180–82 and accompanying text.

281. *See* Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1002 (N.D. Cal. 2004); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1029 (D. Neb. 2004). *See also supra* notes 191–92 and accompanying text.

282. *See supra* notes 183–86 and accompanying text.

283. *See supra* notes 193–95 and accompanying text.

284. *See supra* notes 197–99 and accompanying text.

285. *See supra* notes 200–01 and accompanying text.

286. *See supra* notes 203–15 and accompanying text.

administering anesthesia directly to the child. This is the most non-controversial of all the proposed findings and should pass judicial scrutiny.²⁸⁷

When assessing the thoroughness of the “required” legislative record regarding fetal pain, courts should find that the proposed findings reasonably flow from the available data—that they are based on “substantial evidence” and are neither untruthful nor misleading.

D. Factor Four: The Amount of Division Surrounding Facts About Fetal Pain

In this section, the article will assess the level of division within the medical community regarding fetal pain. It will then evaluate whether the division is such that the courts would find it inappropriate for legislatures to act in this area.²⁸⁸

The Supreme Court in *Stenberg* relied on the fact that a “significant body of medical opinion” existed regarding whether the partial-birth abortion procedure was safe and necessary.²⁸⁹ In the face of this division, it did not allow Nebraska to act. A similar result occurred in the more recent challenges to the federal partial-birth abortion ban. Yet other precedent stands for the proposition that where medical opinion is divided, government has greater latitude to legislate.²⁹⁰ One explanation for this apparent dichotomy could be that the *Stenberg* Court viewed Congress’s legislation as jeopardizing the safety of women seeking a late-term abortion.²⁹¹ In the face of this increased risk in exercising a fundamental right, the Court was not willing to give the state much latitude to legislate.

Unlike in *Stenberg*, fetal pain legislation does not raise the same concerns for either the safety of a pregnant woman or the exercise of a fundamental right. An informed consent statute does not limit a woman’s choices for abortion procedures nor does it prevent her from choosing the “safer” procedure.²⁹² Thus, courts should not be as hesitant in allowing legislatures to act in this area of somewhat divided opinion. Of course, the

287. See *supra* notes 221–22 and accompanying text.

288. See *supra* notes 108–18 and accompanying text.

289. 530 U.S. 914, 937 (2000).

290. See *supra* notes 117–18 and accompanying text.

291. See *supra* notes 35–39 and accompanying text.

292. See *supra* notes 131, 141, and accompanying text (discussing *Casey*).

more divided the opinion is, the more likely the courts will be to rein in the power to legislate in this area.²⁹³

Yet some of the findings regarding fetal pain are not particularly controversial. Of the six proposed factual findings²⁹⁴ supporting the Unborn Child Pain Awareness Act, the fourth²⁹⁵ and sixth²⁹⁶ findings regarding anesthesia are largely uncontroverted. The fifth finding²⁹⁷—also related to anesthesia—is also not seriously at issue. Very few experts argue that providing a mother anesthesia will remove or significantly lessen the fetus's pain.²⁹⁸ The first three factual findings,²⁹⁹ however, have faced more division.

The most division exists over the first proposed finding: that a twenty week-old fetus has the physiological development to experience pain.³⁰⁰ As discussed above, the main line of division regarding the first finding breaks between those who believe “consciousness” is required and those who rely on physiological development alone.³⁰¹ Despite this division, even those courts that struck down the federal partial-birth abortion ban were fairly deferential towards Congress's finding about fetal pain. Judge Casey in *National Abortion Federation* actually made a conclusion of fact that was consistent with Congress's finding.³⁰² Judge Hamilton in *Planned Parenthood Federation of America v. Ashcroft* noted the “debate within the medical community on this

293. *See supra* part III(D).

294. *See supra* note 125.

295. This finding provides that anesthesia is “routinely used” during prenatal surgery on unborn children who have developed to twenty weeks' gestation. Unborn Child Pain Awareness Act, S. 51, 109th Cong. § 2(3) (2005).

296. This finding concludes that “anesthesia or other pain-reducing drugs” are capable of reducing an unborn child's pain. *Id.* § 2(6).

297. This finding states that “by 20 weeks after fertilization an unborn child may experience substantial pain even if” the child's mother has received anesthesia. *Id.* § 2(5).

298. *See supra* notes 217–22 and accompanying text.

299. S. 51 § 2(1)–(2), (4). (The first three findings state (1) “an unborn child has the physical structures necessary to experience pain” by twenty weeks' gestation; (2) there is “substantial evidence” that unborn children respond to pain by drawing away from certain stimuli by twenty weeks' gestation; and (3) there is “substantial evidence that the abortion methods most commonly used” after twenty weeks' gestation “cause substantial pain to an unborn child, whether by dismemberment, poisoning, penetrating or crushing the skull, or other methods.”).

300. *Id.* § 2(1).

301. *See supra* notes 158–62 and accompanying text.

302. *See* 330 F. Supp. 2d 436, 466–67, 469 (S.D.N.Y. 2004). *See also supra* notes 148, 185–86, and accompanying text.

issue”³⁰³ but concluded that Congress had taken a position that was “neither incorrect nor entirely unsupported.”³⁰⁴ Judge Kopf in *Carhart* merely found the question “irrelevant” and unsettled.³⁰⁵

Significant division also exists over the third proposed finding: that there is “substantial evidence that the abortion methods most commonly used” after twenty weeks’ gestation “cause substantial pain to an unborn child, whether by dismemberment, poisoning, penetrating or crushing the skull, or other methods.”³⁰⁶ Division surrounds this finding for the same reasons there is division about the first proposed finding. All seem to agree that if an unborn child feels pain, any of the late-term procedures will cause that pain.³⁰⁷ Some abortion providers already take actions to avoid fetal pain—such as anesthetizing the fetus or killing the fetus in advance by cutting the umbilical cord or injecting a chemical into the fetus’s heart.³⁰⁸ This speaks volumes for the practical unity on both this issue and the more general issue of fetal pain—physicians who have no hesitation killing the fetus will undertake extra inconvenience, cost, and risk in order to avoid the possibility of inflicting great pain on an unborn child.

The final area of medical division involves the second proposed finding: that a fetus draws away from painful stimuli, indicating that it must be in pain.³⁰⁹ Once again, the premise of this finding is not in controversy. Most experts agree that fetuses draw away from painful stimuli.³¹⁰ The division exists as to *why* the fetus draws away—it is either in pain or simply exhibiting an autonomic reflex reaction. Here, since there is no absolute way to determine this answer, a certain amount of hypothesizing must come into play. Once again, the “philosophical” division over the first proposed finding is the key to the mild controversy surrounding this fact. The proposed finding seeks the more rational route in avoiding philosophical considerations and sticking with the most likely scientific conclusions.

303. 320 F. Supp. 2d 957, 1031 (N.D. Cal. 2004).

304. *Id.*

305. 331 F. Supp. 2d 805, 1030 (D. Neb. 2004)

306. S. 51 § 2(4).

307. *See supra* notes 187–92 and accompanying text.

308. *See supra* notes 193–95 and accompanying text.

309. *See* S. 51 § 2(2).

310. *See supra* notes 169–78 and accompanying text.

Unlike the partial-birth abortion cases, there is not a great deal of division on the issue of fetal pain, although the issue is not well-settled within the medical community. Since an informed consent statute serves to help a woman make a better decision—one that she can live with later—the courts should be willing to allow Congress to legislate in the face of this fairly low level of division.

E. Balancing the Four “Deference Factors”

Now that each factor has been individually analyzed, the larger picture emerges. The Unborn Child Pain Awareness Act of 2005—and similar acts by state legislatures—should be constitutional. Each of the four deference factors weighs in favor of legislative fact-finding. First, the proposed findings regarding fetal pain are entitled to the traditional constitutional deference of “limited factual review” by the courts.³¹¹ These would be “legislative facts” that apply to all fetuses and pregnancies.³¹² Moreover, the existence of these facts does not in any way impair the exercise of a fundamental right.³¹³

Second, the complex medical and scientific questions regarding fetal pain depend on continuing studies and data, making them more appropriate for investigation by legislative bodies—not the courts.³¹⁴ Moreover, the major concern about political taint is not present in the findings regarding fetal pain, as three district courts found with the findings on the safety and necessity of partial-birth abortion.³¹⁵

Third, Congress compiled a formal record when investigating partial-birth abortion that would also be useful in its findings regarding fetal pain. That record is abounding with evidence that reasonably supports each of the six proposed factual findings.³¹⁶ Although there is not complete agreement in the medical community on each of these findings, a reasonable person examining the data could conclude that each of the

311. *See supra* notes 223–36 and accompanying text.

312. *See supra* note 223 and accompanying text.

313. *See supra* notes 233–35 and accompanying text.

314. *See supra* notes 237–46 and accompanying text.

315. *See supra* notes 247–55 and accompanying text.

316. *See supra* part IV(B).

proposed findings is based on substantial evidence and is neither untruthful nor misleading.³¹⁷

Fourth, the level of division in medical opinion about fetal pain is comparatively low.³¹⁸ Indeed, the major area of disagreement involves the general philosophical question of “consciousness.”³¹⁹ Where, as here, the proposed legislative scheme neither inhibits access to abortion nor outlaws any abortion procedure, legislatures should have great leeway to choose sides in the face of this type of division. Here, sponsors of fetal pain legislation have chosen to stick with purely physiological evidence and avoid more speculative opinions based on philosophical considerations that cannot be measured. This is both practical and reasonable.

Ultimately, fetal pain legislation should survive judicial scrutiny.

VI. CONCLUSION

With the Unborn Child Pain Awareness Act and other similar state bills, legislatures are on the brink of entering the next stage of the abortion debate. In entering this foray, “pro-life” supporters are building on Congress’s latest failed attempt to pass a ban prohibiting partial-birth abortion. Yet fetal pain legislation may prove to be more viable. It garners a large amount of public support: an April 2004 Zogby Poll found that seventy-seven percent of Americans favored fetal pain informed consent laws for pregnancies of at least twenty weeks’ gestation.³²⁰ Moreover, the Act’s legislative aims are less ambitious and controversial than, for instance, banning a method of abortion.

If fetal pain legislation passes constitutional muster, the type of gruesome description portrayed by Nurse Shafer to Congress may become a rarity in abortion practice as more women choose to eliminate the pain of their fetuses—even as they take away the “potentiality” of their unborn children’s lives.

317. *See supra* notes 269–87 and accompanying text.

318. *See supra* part V(D).

319. *See supra* notes 158–66 and accompanying text.

320. Steven Ertelt, *New Poll: Majority of Americans, Blacks, Students Pro-Life on Abortion*, Zogby International, Apr. 26, 2004, available at <http://www.zogby.com/Soundbites/ReadClips.dbm?ID=8087>.