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Betsy West Suver
University of Dayton

THE OBSTACLES TO A CONSTITUTIONAL PARTIAL BIRTH ABORTION BAN: HOW STATE LEGISLATURES HAVE FAILED AND THE SHORTCOMINGS OF PRESIDENT GEORGE W. BUSH'S PARTIAL BIRTH ABORTION BAN ACT OF 2003.

Betsy West Suver*

I. INTRODUCTION

Since the decision in *Roe v. Wade*,[1] Congress and state legislatures have been attempting to restrict a woman's right to choose an abortion by creating exceptions to *Roe*.[2] In the first attempts, the Supreme Court held strong to the principle that the right to reproductive privacy is subject to the highest degree of constitutional protection – strict scrutiny.[3] This degree of scrutiny has changed, however, throughout the years. One of the major changes occurred in 1992 with the decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] which replaced the *Roe* standard of strict scrutiny with a less stringent "undue burden" test for analyzing the constitutionality of pre-viability restrictions on abortion.[5]

The latest pull in the tug-of-war concerning abortion is President George W. Bush's Partial Birth Abortion Ban Act of 2003, which essentially prohibits one of the most common abortion procedures available to women.[6] There are several problems regarding the constitutionality of Bush's Ban on partial birth abortions. The first problem is whether the required health exception provided in the statute is constitutionally adequate. Is it adequate when it forces women to choose riskier procedures? Is it an adequate health exception when it only allows for abortions when there are life threatening complications?

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* Staff Writer, 2003-2004, University of Dayton Law Review, Juris Doctorate Expected, May 2005, University of Dayton Law School; B.A. of Sociology, 2002, Ohio University.

[1] *Roe v. Wade*, 410 U.S. 113 (1973); *see infra* pt. II (A).

[2] *Infra* pt. II (A).

[3] "Strict Scrutiny is a test to determine the constitutional validity of a statute that creates a classification of persons, including classifications based on nationality or race. Under this test, if a classification scheme affects fundamental rights, it requires a showing that the classification is necessary to, and the least intrusive means of, achieving the compelling state interest. Such rights include . . . procreation." *Barron's Law Dictionary* 490 (Steven H. Gifis ed., 4th ed., Barron's 1996).

[4] *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

[5] *Id.* at 846.

[6] Pub. L. No. 108-105, § 3, 117 Stat. 1201 (2003) [hereinafter *Bush's Ban*]. George W. Bush is currently serving as the 43rd President of the United States of America. *See infra* pt. II (B) regarding partial birth abortion procedures.

The second problem is that the ban creates an undue burden on the woman's right to choose an abortion. An undue burden may be created when the language of a statute is so broad as to cover many conventional methods of abortion which has a chilling effect on a woman's ability to obtain constitutionally permissible methods of abortion. The third problem, which correlates with the first two, is that the statute is constitutionally vague. "A law is void for vagueness in violation of due process where persons of common intelligence must necessarily guess at the meaning and differ as to application."[7]

In order for a ban on an abortion procedure to be constitutionally valid, it should specifically define the procedure it is prohibiting. Moreover, it must not create an undue burden on a woman's right to choose, and it must contain an adequate health exception for the woman. Bush's Ban does not fulfill these requirements. If these elements were satisfied, it is possible there could be a constitutionally valid ban on certain abortion procedures.

This Comment argues that Bush's Ban should be found unconstitutional for lacking an adequate health exception, creating an undue burden on a woman's right to choose, and being unconstitutionally vague.[8] Section II includes: (1) summaries of five important cases upholding and then restricting women's abortion rights,[9] (2) explanations of the partial birth abortion procedures D&E and D&X at issue in state bans and Bush's Ban,[10] (3) and states the pertinent sections of the Partial Birth Abortion Ban Act of 2003.[11] Section III analyzes the adequacy of the health exception provided in the ban and the creation of an undue burden on a woman's right to choose by prohibiting a constitutionally valid procedure.[12] It also explains how a law will be found void for vagueness and how Bush's Ban is vague.[13] Section IV concludes by addressing whether a constitutionally valid prohibition could be created for a certain procedure.[14]

II. BACKGROUND

A basic understanding of the affirmation of abortion rights in *Roe v. Wade*,[15] and how they have been restricted over the years is

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[7] Allison D. Gough, Student Author, *Banning Partial Birth Abortion: Drafting a Constitutionally Acceptable Statute*, 24 Dayton L. Rev. 187, 202 (1998) (citing *Planned Parenthood v. Woods*, 982 F.Supp. 1369, 1378 (D. Ariz. 1997)).
[8] 117 Stat. 1201.
[9] *See infra* pt. II (A).
[10] *See infra* pt. II (B).
[11] *See infra* pt. II (C).
[12] *See infra* pt. III (A-B).
[13] *See infra* pt. III (C).
[14] *See infra* pt. IV.
[15] 410 U.S. at 113.

provided in this section. A general description of the abortion procedures prohibited in state and federal bans is also provided, in addition, to the important sections of Bush's Ban and some of its legislative history.

A. *Five Key Privacy Cases Decided by the Supreme Court Concerning Women's Reproductive Privacy Rights*

In *Roe v. Wade*, the United States Supreme Court recognized that a woman's right to decide whether to continue her pregnancy was protected under the constitutional provisions of individual autonomy and privacy.[16] For the first time, the Court conferred the highest degree of constitutional protection, strict scrutiny, to the right to choose an abortion.[17] It recognized that states have two legitimate interests, preserving and protecting the health of the mother and protecting the potentiality of human life.[18] These two interests are separate and distinct, but grow in importance through the pregnancy. Finding a need to balance a woman's right to privacy with the state's interest in protecting potential life, the Supreme Court established a trimester framework for evaluating restrictions on abortions.[19] During the first trimester, the state's interest in preserving the woman's health is not compelling enough to restrict her right to choose an abortion.[20] After the first trimester, the state's interest becomes compelling and it may regulate abortions to the extent that they are reasonably related to preserving the health of the mother.[21] After the point of viability,[22] the state was free to ban abortion or take other steps to promote its interest in protecting fetal life. A state may even go as far as prohibiting abortion during that period, "except when it is necessary to preserve the life or health of the mother."[23]

Although *Roe* gave women the right to choose,[24] the case of *Harris v. McRae* found that states do not have to provide public funding for medically necessary abortions.[25] The *Harris* Court found that States who participate in the Medicaid program are not required "under Title

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[16] *Id.* at 153.
[17] *Id.* at 155. Because fundamental rights are at issue, a regulation limiting these rights can only be justified by a compelling interest, and the regulation must be narrowly tailored to further that compelling interest.
[18] *Id.* at 156.
[19] *Id.* at 163.
[20] The *Roe* court found that medical facts showed that until the end of the first trimester, the mortality rate was lower than that of normal childbirth. *Id.*
[21] Examples of reasonable regulations after the first trimester would be requirements concerning the qualifications of the physician, and in what locations abortions may take place, such as a clinic or hospital. *Id.*
[22] *See infra* pt. III (B) (discussing viability).
[23] *Roe*, 410 U.S. at 164.
[24] *Id.* at 154.
[25] *Harris v. McRae*, 448 U.S. 297, 310 (1980).

XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment."[26] Since 1993, the Hyde Amendment has permitted funding in cases of rape and incest, but not to preserve the health of the woman.[27] The *Harris* Court found that the Hyde restrictions do not interfere with a woman's freedom to choose an abortion for health reasons, stating that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[28] The government may not place an obstacle in a woman's path to choose an abortion, but it is not obligated to remove those obstacles that it did not create, such as indigence.[29]

Once again, a women's ability to obtain an abortion was limited in the case of *Webster v. Reproductive Health Services*.[30] The *Webster* Court upheld a Missouri ban on the use of public employees and facilities for performing abortions, except where necessary to save a woman's life.[31] It found that the restriction was valid under *McRae* and preceding cases holding that the "state need not commit any resources to facilitating abortions."[32] This restriction stands even where such aid may be necessary "to secure life, liberty or property interests,"[33] that the government may not deprive a person. The reasoning behind this is that a woman is left with the same choice as if the government had decided not to run a public hospital at all. She can still obtain an abortion at private hospitals and clinics. Although this restriction does not limit a woman's right to obtain an abortion, it certainly takes away options for

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[26] *Id.* at 311. In 1965, Title XIX of the Social Security Act established the Medicaid program to provide federal financial assistance to States that chose to reimburse certain costs of medical treatment for needy persons. *Id.* at 301. Financial assistance was to be given to the categorically needy in "five general areas of medical treatment: 1) inpatient hospital services, 2) outpatient hospital services, 3) other laboratory and x-ray services, 4) skilled nursing facilities services, periodic screening and diagnosis of children and family planning services, and 5) services of physicians." *Id.* at 301-02. The categorically needy include families with dependent children who are eligible for public assistance. *Id*. The state is also permitted to give Medicaid benefits to people termed "medically needy." *Id.* at 302. In 1976-77, Congress amended the annual appropriations bill for the Department of Health, Education and Welfare, prohibiting the use of federal funds to reimburse the cost of abortions under the Medicaid program. *Id.* This amendment was known as the Hyde Amendment. The Hyde Amendment did allow for the reimbursement of childbirth costs. *Id.*

[27] Center for Reproductive Rights, *Roe v. Wade*, *Then and Now*, http://www.crlp.org (accessed Jan.16, 2004).

[28] *Harris*, 448 U.S. at 316.

[29] *Id.*

[30] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

[31] In addition to prohibiting the use of public employees and facilities to perform or assist abortions not necessary to save the life of the mother, it also prohibits the "use of public funds, employees or facilities for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life." *Id.* at 501 (citing Mo. Rev. Stat. §188.210 (1986)).

[32] *Webster*, 492 U.S. at 511.

[33] *Id.* at 507 (quoting *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989)).

obtaining one because a private clinic may not be as close as a public hospital.[34]

The test for the constitutionality of a prohibition on abortions was altered in the case of *Casey*.[35] The Court replaced the strict scrutiny standard established in *Roe* with the less stringent "undue burden"[36] test for analysis of pre-viability[37] restrictions on abortion. Before viability, there cannot be a prohibition on abortions or a substantial obstacle affecting a woman's right to choose.[38] After fetal viability, states have the power to restrict abortions as long as there is an exception when it is medically necessary to preserve the health or life of the mother.[39] The trimester framework was eliminated, extending the state's interest in protecting potential life and maternal health to apply throughout pregnancy.[40] Regulations that further these state interests, such as measures which ensure that the woman makes an informed choice or that she is persuaded to choose childbirth, will be considered valid.[41] Regulations that have the purpose or effect of imposing a substantial obstacle in the woman's path will be considered invalid.[42] In applying this new standard to the Pennsylvania statute, the *Casey* Court upheld the requirement that a physician must provide a woman with state scripted information 24 hours in advance of a non-emergency abortion.[43] In other words, it found that States have the power to restrict abortions after fetal viability, as long as there is an exception when it is medically necessary to preserve the health or life of the mother.

The test set forth in *Casey* continues to be upheld.[44] In *Stenberg v. Carhart*,[45] a 5-4 decision, the Court struck down a Nebraska ban on so called "partial birth abortions."[46] It found the ban to be an unconstitutional violation of *Roe* by failing to include an exception to preserve the health of the woman, and by imposing an undue burden on a woman's ability to choose an abortion.[47] Furthermore, the *Stenberg* Court found the ban to be so broad and vague that constitutionally protected abortion procedures performed before viability could be

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[34] *Webster*, 492 U.S. at 509.
[35] 505 U.S. at 833.
[36] *See infra* pt. III(B).
[37] *Id.*
[38] *Casey*, 505 U.S. at 846.
[39] *Id.*
[40] *Id.* at 873.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 887.
[44] 505 U.S. 833.
[45] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[46] *Id.* at 951.
[47] *Id.* at 938-39.

prohibited.[48] This case is important because nearly 30 states have passed anti-partial birth abortion statutes containing similar vague language and lacking an adequate health exception.[49] This decision made most or all of the remaining laws null and void.

B. *"Partial Birth" Abortion Procedures*

Dilation and Evacuation ("D&E") is the most commonly used *pre-viability* abortion procedure.[50] It is used in 95% of second trimester (12-24 weeks into the pregnancy) abortions.[51] D&E relies upon dismemberment to remove the fetus from the uterus of the mother. The procedure begins by dilating the cervix (opening to the uterus) and then puncturing and draining the fetal sac.[52] During this process, the fetus's head is crushed.[53] The body of the fetus is then dismembered inside the uterus with instruments and removed.[54]

As the fetus grows and reaches the stage of viability, the fetal skull grows larger, making it harder to pass through the cervix. The fetal tissue also becomes tougher, making it harder to dismember inside the uterus.[55] In these circumstances, the Dilation and Extraction ("D&X") procedure will probably be utilized. For this procedure, the woman is substantially dilated.[56] Then, the doctor will use forceps to pull the fetus's lower extremities through the cervix and into the vagina.[57] The fetus is pulled into the vagina up to its shoulders.[58] At this point, the fetal skull lodges into the internal portion of the cervix because there is not enough dilation to allow it to pass through.[59] The doctor then uses an instrument to puncture the skull of the fetus, and the contents are suctioned out in order to collapse the skull and allow it to pass through the cervix and into the vagina.[60]

Some doctors prefer this method over D&E between 16 and 20 weeks of pregnancy because it reduces the danger of sharp bone fragments passing through the cervix. This procedure lessens the

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[48] *Id.* at 939.
[49] Carolyn Bower, *Validity, Construction, and Application of Statutory Restrictions on Partial Birth Abortions*, 76 A.L.R. 5th 637, *2a (2004).
[50] Charles Rice, The Observer Online, *Banning Partial Birth Abortions*, www.ndsmcobserver.com/news/2003/12/03/viewpoint/banning.partial.birth.abortions-570607.shtml (December, 12, 2003).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Stenberg*, 530 U.S. at 927.
[56] Rice, *supra* n. 50 (December 12, 2003).
[57] *Stenberg*, 530 U.S. at 927.
[58] Rice, *supra* n. 50 (December 12, 2003).
[59] Rice, *supra* n. 50 (December 12, 2003).
[60] *Id.*

likelihood that the uterus will be punctured by the instruments used and reduces the risk of infection that could be caused by fetal and placental tissue inadvertently left in the uterus.[61]

Both procedures involve a substantial portion of a living fetus passing through the cervix into the vagina, characterizing both as "partial birth abortions."[62] The language in most statutes attempting to ban partial birth abortions include both the D&E and the D&X procedures, while those sponsoring the bans claim to ban only the D&X procedure.

C. *George W. Bush's Partial Birth Abortion Ban Act of 2003*

Approximately 30 states have passed laws prohibiting "partial birth abortions."[63] With the exception of Ohio, Louisiana, and Utah, the statutes passed were found unconstitutional.[64] The failing statutes were largely based on the unsuccessful federal bill of 1996.[65] There were several reasons why many of these statutes failed to pass constitutional muster, including: the lack of an exception to use the D&X procedure for preventing serious health problems to the mother (versus just to save the life of the mother), vague language, and the creation of an undue burden on a woman's right to choose.

Bush's Ban contains the same problems as the failed state statutes.[66] Pertinent portions of the statute relevant to this comment are:

> The following section is the prohibition of partial birth abortions, with an exception, and the punishment for performing such a procedure.
>
> 3(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.[67]

The next section defines partial birth abortion, which covers both the

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[61] *Stenberg*, 530 U.S. at 928.
[62] *Id.* at 939.
[63] 117 Stat. at 1201.
[64] The American College of Obstetricians and Gynecologists, http://www.acog.org/from_home/publications/press_releases/ (accessed Jan. 29, 2004).
[65] 117 Stat. at 1201.
[66] *Id.*
[67] *Id.* at 1206.

D&E and D&X procedures:

> 3(b)(1) The term partial birth abortion means an abortion in which the person performing the abortion—
> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.[68]

This section of Bush's Ban explains that whether an abortion was necessary to save the life of the mother will be determined by the state's medical board, and emphasizes that an abortion is only necessary when the life of the mother is endangered:

> 3(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.[69]

The 108th Congress found that a partial birth abortion procedure is neither an embraced procedure by the medical community, nor is it necessary to preserve the health of the mother.[70] Congress found the procedure to actually pose serious risks to the long term health or life of the mother.[71] In writing this ban, Congress noted that the Supreme Court in *Stenberg*[72] deferred to the federal district court's factual findings by adhering to the clearly erroneous standard of review.[73] The district court held that partial birth abortion procedures are medically and statistically safe and sometimes even safer than alternative procedures.[74] On the other hand, Congress found ample evidence presented at the *Stenberg* trial, as well as from extensive congressional hearings, demonstrating

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[68] *Id.* at 1207.
[69] *Id.*
[70] *Id.* at 1201.
[71] *Id.*
[72] *See supra* pt. II (A).
[73] The clearly erroneous standard for a finding of fact is "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 117 Stat. at 1202.
[74] *Id.*

that a partial birth abortion is "never necessary to preserve the health of the woman, poses significant health risks to the woman upon whom the procedure is performed and is outside the standard of medical care."[75] Much of this evidence was compiled after the *Stenberg* hearing and was not included in the trial record.[76]

Congress argues that the *Stenberg* findings were not set aside because under the clearly erroneous standard of review, they were not found to be clearly erroneous.[77] According to Congress, under well-settled Supreme Court jurisprudence, Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the clearly erroneous standard.[78] Rather, Congress is entitled to reach its own factual findings, which the Supreme Court is supposed to "accord great deference."[79] In addition, Congress may enact legislation based upon these findings "so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence."[80]

III. ANALYSIS

This section discusses three ways in which state partial birth abortion bans and Bush's Ban are unconstitutional.[81] The first problem with many prohibitions is the lack of an adequate health exception. The second problem is that they pose an undue burden on a woman's right to choose an abortion. The third problem is vagueness in the statutes. If any of these problems are present in a statute, it will be found unconstitutional.

A. *There Must Be An Adequate Health Exception to Pass Constitutional Muster*

In order for a prohibition on abortion procedures to be constitutional, it must contain an adequate health exception for when the procedure can be utilized.[82] The question becomes "what makes a health exception adequate?" Will it need to be "a medical condition of a pregnant woman

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[75] *Id.*
[76] *Id.*
[77] Clearly erroneous means that the reviewing court must accept the findings of the district court unless it is blatantly obvious they are incorrect. *U.S. v. Hill*, 195 F.3d 258, 265 (6th Cir. 1999).
[78] 117 Stat. at 1202.
[79] In the Act's findings, Congress refers to *Katzenbach v. Morgan*, 384 U.S. 641 (1966), to support its arguments of deference from the Supreme Court. It cites *Katzenbach* stating "it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did." 117 Stat. at 1202 (citing *Katzenbach*, 384 U.S. at 653).
[80] 117 Stat. at 1202.
[81] *Id.* at 1201.
[82] *Roe*, 410 U.S. at 164-65. This was also reaffirmed in *Casey*, 505 U.S. at 878.

as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function,"[83] or just to "prevent a significant health risk?"[84] The standard set forth in *Roe* generally said that "a state's interest in the potential life of the fetus became compelling at the point of viability, and justified even a total proscription of abortion, except in cases where the *life* or *health* of the mother was in danger."[85] Therefore, an adequate health exception must contain more than just an exception for the life of the mother. This life or health exception standard was later upheld in *Casey*.[86]

In the precedent case of *Stenberg*, the Supreme Court found the Nebraska statute prohibiting partial birth abortions unconstitutional according to *Casey* and *Roe* because it lacked an adequate health exception for the preservation of the *health* of the woman.[87] The statute only provided for partial birth abortions when necessary to save the *life* of the mother.[88] Nebraska argued that a D&X is never necessary to preserve the *health* of the woman.[89] The *Stenberg* Court found that while the D&X procedure is a rarely used procedure, it may be significantly safer in certain circumstances than alternative procedures, such as the D&E.[90] Casey determined that "necessary" meant what was considered "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[91] The *Stenberg* court noted that there is a division in opinion among medical experts determining whether D&X is safer, and there are no controlled medical studies to verify either position.[92] This division and lack of verification indicates there is a likelihood that the belief that D&X is safer could turn out to be correct and thus, the absence of the exception would place women at an

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[83] *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 445 (6th Cir. 2003); *Casey*, 505 U.S. at 881; Ohio Rev. Code Ann. § 2919.15.1 (B),(C) (2003).
[84] *Women's Med. Prof'l.Corp*, 353 F.3d at 450.
[85] Gough, *supra* n. 7, at 190-91 (emphasis added).
[86] 505 U.S. at 836.
[87] *Stenberg*, 530 U.S. 914. *See Daniel v. Underwood*, 102 F. Supp. 2d 680 (S.D.W. Va. 2000) (West Virginia attempted to ban partial birth abortions but failed to include an exception to preserve the health of the mother); *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997) (finding Arizona's prohibition of partial birth abortions unconstitutional because it lacked an exception where the procedure was in the best interest of the woman's health, not just her life); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998) (finding a Florida partial birth abortion prohibition statute unconstitutional because it only provided a health exception for the life of the mother, and failed to provide an exception for the health of the mother); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998) (holding that Iowa statute prohibiting partial birth abortions violated women's privacy rights because it did not contain an exception for the mother's health; only her life).
[88] *Stenberg*, 530 U.S. at 921.
[89] *Id.* at 938-39.
[90] Bower, *supra* n.49, at *4b (citing *Stenberg*, 530 U.S. 914).
[91] 505 U.S. at 879.
[92] *Stenberg*, 530 U.S. at 935.

unnecessary risk of major health consequences.[93] On the other hand, the Court reasoned that if this position turns out to be wrong, then the exception will simply have been unnecessary.[94] Therefore, there must be an exception when necessary to preserve woman's health and safety.

After establishing that a ban on abortions must contain an exception for the life and health of the mother, one must consider what the term "necessary" means. The Court in *Stenberg* cautioned that although "the term 'necessary' does not refer to an absolute necessity or to absolute proof, the word cannot be emptied entirely of its distinctive meaning by being equated with 'desirable.'"[95] *Casey* has established that "necessary" is to be determined through appropriate medical judgment.[96] The term "necessary" cannot require "unanimity of medical opinion."[97] Courts must recognize the responsible difference among medical judgments/opinions. This difference does not mean that physicians are given "unfettered discretion in their selection of abortion methods."[98] Under Bush's Ban, whether an abortion is considered necessary (to save the life of the mother) will be determined in a hearing before the State Medical Board.[99]

The Sixth Circuit Court of Appeals found an Ohio statute from 2002 to be constitutional.[100] The health exception was valid because it permitted the partial birth abortion procedure when *necessary* to prevent *a significant health risk*.[101] The Sixth Circuit further explained that the Fourteenth amendment,[102] as applied in *Casey* and *Stenberg*, requires nothing more.[103] More specifically, the Ohio statute provides that a:

> health exception that permits the partial birth [abortion] procedure, both before and after viability 'when necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.[104]

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[93] *Id.* at 937.
[94] *Id.*
[95] *Women's Med. Prof'l Corp.*, 353 F.3d at 447.
[96] 505 U.S. at 879.
[97] *Stenberg*, 530 U.S. at 937.
[98] *Id.* at 938.
[99] 117 Stat. at 1207.
[100] *Women's Med. Prof'l Corp.*, 353 F.3d at 453; Ohio Rev. Code Ann. § 2919.15.1 (2002).
[101] *Women's Med. Prof'l Corp.*, 353 F.3d at 444.
[102] U.S. Const. amend. XIV.
[103] *Women's Med. Prof'l Corp.*, 353 F.3d at 445.
[104] *Id.* at 441(citing Ohio Rev. Code Ann. §2919.15.1(B), (C)).

Further, the Ohio Act defines:

> serious risk of substantial and irreversible impairment of a major bodily function mean[ing] any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function.[105]

Some of the possible risks include preeclampsia, inevitable abortion, and premature ruptured membrane.[106] The plaintiffs urged the Sixth Circuit to find that an adequate health exception must make the abortion procedure available "whenever any physician deems it simply safer than using alternative methods."[107] The Sixth Circuit disagreed and found that the exception was only needed for "significant, as opposed to negligible, health risks."[108]

Bush's Ban on partial birth abortions contains a health exception which states that a partial birth abortion is permitted if "necessary to save the life of a mother whose life [is] endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[109] At first glance, the ban's exception might seem to include the health of the mother because of the terms "physical illness" and "physical injury." However, it really states that there can only be a partial birth abortion if these physical illnesses and injuries endanger the woman's life. Under *Roe's* standard of exceptions for the health and life of the mother, Bush's Ban's health exception should not be found constitutionally adequate since it only refers to conditions that would be life endangering. The language of Bush's Ban does not refer to exceptions for other serious health risks that may or may not ultimately end in death, but are dangerous nonetheless. For example, an "abortion may be medically necessary where the patient has genital cancers, proliferative retinopathy (retina disease), or nephropathy (kidney disease),"[110] but in any of these cases the abortion may only be necessary to preserve the health of the mother.[111] Only in rare cases "could a physician accurately state that the life of a pregnant patient would be endangered if the pregnancy were to continue to term."[112] Under Bush's Ban, whether an abortion is considered necessary to save the life of the mother will be determined in

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[105] Ohio Rev. Code Ann. at § 2919.15.1(A)(5).
[106] *Women's Med. Prof'l Corp.*, 353 F.3d at 445.
[107] *Id.*
[108] *Id.*
[109] 117 Stat. 1201.
[110] *Reprod. Health Services v. Freeman*, 614 F.2d 585, 589 (8th Cir. 1980).
[111] *Id.*
[112] *Id.*

a hearing before the State Medical Board.[113] Thus, doctors and patients will be uncertain as to the possibility of punishment if brought in front of a medical board. This uncertainty brings up the issue of vagueness by failing to put patients and doctors on notice of what is and is not prohibited.[114]

Congress argues that the partial birth abortion procedure D&X is never necessary to preserve the *health* of the mother, therefore, no exception is needed.[115] Congress believes the Supreme Court in *Stenberg* deferred to the district court's factual findings that the partial birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.[116] As mentioned previously, Congress found substantial evidence from the *Stenberg* trial and its own congressional hearings indicating a partial birth abortion is never necessary to preserve the health of the woman.[117] In addition, Congress found that a partial birth abortion poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care.[118]

The problem with Congress's argument is that "Congress can't just ignore a legal ruling it dislikes by adopting conflicting legislative 'findings'."[119] It is a court's duty to state the law, "and to make independent judgments on the facts underlying an issue of constitutional law."[120] Further, "just as Congress couldn't overturn *Brown v. Board of Education*[121] by *finding* that segregated schools are good for children, it can't overturn *Carhart* and *Roe v. Wade* by deciding that some medical procedures aren't necessary."[122] The Supreme Court states that there must be exceptions for maternal health:

> Even construing defendant's argument in the most favorable light and assuming that congressional findings need only be 'reasonable and supported by substantial evidence,'[123] the court finds a strong likelihood of

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[113] 117 Stat. at 1207.
[114] *See infra* pt. III (C).
[115] *See supra* pt. II (C).
[116] *Id.*
[117] *Id.*
[118] *See supra* pt. II (C) for a discussion of the *Stenberg* case.
[119] Center for Reproductive Rights, *Reproductive Freedom News*, http://www.crlp.org/rfn_03_04_1.html (accessed Sept. 15, 2004).
[120] *Id.*
[121] *Id.*
[122] *Id.* (emphasis added).
[123] *Turner Broadcasting v. FCC*, 520 U.S. 180, 211 (1998).

> success on plaintiff's argument that the legislative conclusions do not meet even that lenient standard.[124]

In comparison, the *Stenberg* court did not adopt the argument of Nebraska that the D & X procedure was never medically necessary and therefore no exception was needed. The Court noted that:

> where a significant body of medical opinion believes a procedure to may bring with it greater safety for some patients and explains the medical reasons supporting that view, [it cannot be said] that the presence of a different view by itself proves the contrary.[125]

The fact that these contrary opinions exist means that the absence of a health exception will place an unnecessary risk of serious health problems on the woman.[126] A state cannot endanger a woman's health, the state can only promote a women's health when regulating abortion procedures.[127]

B. *The Ban Cannot Pose an Undue Burden on a Woman's Right to Choose an Abortion in Order to Pass Constitutional Muster*

An undue burden is a regulation which has the purpose and "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[128] Although the Supreme Court has recognized that women have the right to choose whether to terminate or to continue their pregnancies, this right is not absolute or unqualified.[129] A woman's right to decide whether or not to carry her pregnancy to term is now balanced by the state's interest in protecting both her health and the potential life of the fetus.[130] The trimester approach established in *Roe* was abandoned in the case of *Casey.*[131] After *Casey*, a state can "regulate an abortion *before* viability as long as it does not impose an 'undue burden' on a woman's right to terminate her pregnancy."[132] This standard gives states more power to regulate abortions compared to the standard set forth in *Roe*, which essentially stated that during the first

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[124] *Planned Parenthood of Am. v. Ashcroft*, 2003 U.S. Dist. LEXIS 20105 at *4 n.2 (N.D. Cal. Nov. 7, 2003).
[125] *Stenberg*, 530 U.S. at 937.
[126] *Id.*
[127] *Id.* at 931.
[128] *Stenberg*, 530 U.S. at 938 (citing *Planned Parenthood*, 505 U.S. at 877).
[129] *Casey*, 505 U.S. at 869.
[130] *Id.* at 846. The state interests include preventing the unnecessary deaths of fetuses when they are substantially outside the mother's body; maintaining a strong public policy against infanticide; preventing unnecessary cruelty; and "preserving the integrity of the medical profession." *Women's Med. Prof'l. Corp*., 353 F.3d at 443.
[131] 505 U.S. at 833.
[132] *Women's Med. Prof'l. Corp*., 353 F.3d at 443 (emphasis added).

trimester the state lacks any valid interest in prohibiting abortions.[133] Basically, after the fetus becomes viable (able to survive outside of the womb) the state's interest in protecting potential life becomes compelling enough in some circumstances to outweigh the woman's right to an abortion.[134] Before viability, however, "the state's interests are not strong enough to support a prohibition of abortion, or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[135] However, a state may impose regulations designed to ensure that a woman makes a thoughtful and informed choice, but only if such regulations do not unduly burden her right to choose whether to abort.[136]

Under *Casey*, "an undue burden exists, and therefore a provision of law is invalid, if its *purpose* or *effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains *viability*."[137] Legislative purpose to achieve a constitutionally prohibited result may be found when that purpose was the motivating factor for the legislature's decision.[138] A prohibited purpose may be gathered from both "the structure of the legislation and from examination of the process that led to its enactment."[139]

A statute will also be held as creating an undue burden on women choosing to have an abortion if its effect was to ban some of the most conventional abortion procedures without regard to *viability* of the fetus.[140] The government cannot create an undue burden by placing a substantial obstacle in a woman's way of obtaining an abortion before fetal viability.[141] By forbidding common procedures, a woman is forced to choose other procedures that may not be as safe or preferred, thereby placing an obstacle to choosing an abortion.

Viability is a matter of medical judgment because "[v]iability is reached when in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus's sustained survival outside the womb, with or without artificial support."[142] Viability may be different with each pregnancy; therefore,

> neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of

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[133] *Casey*, 505 U.S. at 846.
[134] *Id.*; *see Planned Parenthood Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995).
[135] *Casey*, 505 U.S. at 846.
[136] *Id.*
[137] *Id.* at 878 (emphasis added).
[138] *Utah's Women's Clinic v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996).
[139] *Id.*
[140] *Planned Parenthood of C. N.J. v. Verniero*, 41 F. Supp. 2d 478 (D.N.J. 1998).
[141] *Casey*, 505 U.S. at 877.
[142] *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

> viability – be it weeks of gestation or fetal weight or any other single factor - as the determinant of when the State has a compelling interest in the life or health of the fetus.[143]

In *Stenberg*, the Nebraska statute prohibiting "partial birth abortion" was considered to have created an undue burden on the constitutional right to obtain an abortion.[144] The language of the statute was so broad as to cover many conventional methods of abortion thereby having a chilling effect on a woman's ability to obtain conventional and constitutionally permissible methods of abortion.[145] This might lead to greater health risks for women seeking abortions.[146] The plain language of the statute covers the permitted D&E procedure because it involves pulling a "substantial portion" of the fetus into the vagina before the fetus is killed.[147]

Bush's Ban should be found unconstitutional because it poses an undue burden on women's right to choose an abortion. Bush's Ban creates this burden in two ways. First, the ban prohibits both D&X and the constitutionally permitted procedure D&E. Unlike the Nebraska statute in *Stenberg*, Bush's Ban does not use the language "substantial portion." Nonetheless, it contains vague language which could effectively encompass D&E,[148] stating "any part of the baby's trunk past the navel. . ." This could be the case in certain circumstances with the D&E procedure if both legs of the fetus come out without being dismembered.[149]

Second, even if Bush's Ban could be construed to apply only to D&X, it would still be unconstitutional because it creates an undue burden on the right to choose such a procedure on a *nonviable* fetus.[150] Bush's Ban does not specify at what stage the regulation would apply, it only refers to the procedure killing a "living fetus."[151] As discussed

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[143] *Id.* at 389.
[144] *Stenberg*, 530 U.S. at 938.
[145] The statute expressly prohibits "deliberately and intentionally delivering into the vagina a living unborn child or a substantial portion thereof, for the purpose of performing a procedure that . . . will kill the unborn child." *Id. See also Daniel*, 102 F. Supp. 2d at 680 (finding West Virginia's statute banning partial birth abortions unconstitutional because it placed an undue burden on a woman's right to the common previable abortion procedure D&E); *A Choice for Woman*, 54 F. Supp. 2d at 1148 (finding a partial birth abortion statute unconstitutional because it placed an undue burden on the woman's right to choose an abortion by the language including both D&E and D&X); *Planned Parenthood of Greater Iowa, Inc.*, 195 F.3d at 386 (finding a partial birth abortion statute unconstitutional because it prohibited the D&E procedure through its vague language).
[146] *Planned Parenthood of C. N.J. v. Farmer*, 220 F.3d 127 (3rd Cir. 2000).
[147] *Stenberg*, 530 U.S. at 942 (citing Neb. Rev. Stat. Ann. §28-326(9) (1999)).
[148] 117 Stat. 1201.
[149] *Id.*
[150] Bower, supra n.49, at *4b (citing *A Choice for Women*, 54 F. Supp. 2d at 1148).
[151] 117 Stat. at 1207.

supra, the term "living fetus" could refer to the point of conception or to a fetus that could survive outside the womb with or without life support.[152] Therefore, its vagueness essentially prohibits certain procedures before fetus viability, such as D&E, one of the most commonly used methods of abortion in the second trimester. Thus, Bush's Ban is creating an undue burden on a woman's right to choose an abortion.[153] The fact that the statute creates an undue burden alone renders it unconstitutional.

It is easy for a legislature to avoid the undue burden simply by "narrowly tailoring the definition of partial birth abortion to only prohibit the dilation and extraction, D&X procedure."[154] This definition could be accomplished by expressly allowing an exception for the D&E procedure or by specifically describing the D&X procedure. Instead, state legislatures continue to use "broad and amorphous language,"[155] which seems calculated to include the D&E procedure.

C. *The Ban Cannot be Vague in Order to Pass Constitutional Muster*

The aversion and prohibition against vagueness stems from the fact that a vague statute essentially violates the Due Process Clause.[156] A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[157] Procedural Due Process requires that people are given fair notice of what conduct is permitted and/or prohibited.[158] When there is a lack of notice there is a "chilling" effect,[159] meaning that people might be afraid to do some of the constitutionally permitted activities because they are not certain

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[152] *See infra* pt. II (C).

[153] The D&E procedure has been determined by the Supreme Court as a common procedure, and to forbid this procedure places an undue burden on a woman's right to choose an abortion. Bower, *supra* n.49, at *4a.

[154] *Id.* at *4b (citing *A Choice for Women*, 54 F. Supp. 2d at 1148).

[155] *A Choice for Women*, 54 F.Supp.2d at 1155.

[156] The Fifth Amendment states that the federal government cannot deprive any person of life, liberty or property without due process of the law. The Fourteenth Amendment prohibits states from depriving any person of life, liberty or property without due process of the law. Procedural due process requires that a person shall receive adequate notice and opportunity to be heard before his or her life, liberty, or property can be taken. When something is vague there is no adequate notice to those affected by the law. U.S. Const. amend.V, XIV.

[157] *Connally v. Gen.l Constr. Co*., 269 U.S. 385, 392 (1926).

[158] Procedural due process protection is the guarantee of procedural fairness. This requires that notice and the right to a fair hearing be accorded prior to a deprivation. *Barron's Law Dictionary* at 158-159.

[159] "Chilling effect" is defined as "the relinquishment of legitimate First Amendment rights by individuals fearful of the possible or threatened application of laws or sanctions and subsequent prosecutions, whether or not successful, indirectly resulting from the exercise of those legitimate rights." *Id.* at 75. In other words, someone may not partake in constitutionally permitted activities because there is a law that seems to apply to that activity. Therefore, the person does not do it to avoid the possible consequences, thus, constitutional activity is "chilled."

whether or not the law prohibits them.

Regarding abortion statutes, the partial birth abortion procedure and its terms must be specifically defined in order to withstand constitutional attack. The definition must give a person fair notice of what abortion procedures are prohibited by the statute.[160] Due process calls for a higher standard of certainty with respect to statutes which potentially hinder the exercise of a constitutional right – such as abortion.[161]

There are several ambiguities in partial birth abortion statutes. These include the vague meaning of the terms "partial birth abortion" and "living fetus," and the failure to indicate when the prohibitions apply, specifically, post or pre-viability.

1. Vagueness Regarding the Phrase Partial Birth Abortion

The first common unclear phrase is "partial birth abortion." It has been regularly defined in statutes as "an abortion in which a person partially vaginally[162] delivers a living fetus before killing the fetus and completing the delivery."[163] D&X and D&E procedures are so similar in definition that a statute only attempting to limit D&X effectively prohibits the D&E procedure. Although Bush's Ban does provide a specific definition for the term "partial birth abortion,"[164] it is still unconstitutional because the definition encompasses the commonly used and constitutionally valid D&E procedure.

2. Vagueness Regarding the Phrase Living Fetus

The phrase "living fetus" is also consistently vague in partial birth abortion statutes, as well as in Bush's Ban. It has a "broader meaning in the medical community than in society at large."[165] Physicians differ on what "living fetus" means, varying from having living cells, to having a heartbeat, to being capable of surviving outside of the womb.[166] In the case of *Planned Parenthood of Greater Iowa v. Miller*, the district court stated that it was uncertain whether the term "living fetus" referred "only to an intact fetus with a heartbeat or some other form of 'life,' or to a disarticulated fetus with a heartbeat or some other sign of 'life.'"[167] Bush's Ban fails to define the term "living fetus" and therefore, fails to put physicians and women seeking abortions on

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[160] Gough, 24 Dayton L. Rev. at 202.
[161] *Id.*
[162] This is when part of the fetus has been pulled through the birth canal and out of the vagina.
[163] *See Planned Parenthood of Greater Iowa*, 30 F.Supp. 2d at 1162; *Planned Parenthood of S. Ariz. v. Woods*, 982 F.Supp. at 1369; *Stenberg*, 530 U.S. at 914.
[164] 117 Stat. at 1207.
[165] Bower, *supra* n.49, at *3b.
[166] *Woods*, 982 F.Supp. at 1375.
[167] Bower, supra n.49, at *3b (citing *Miller*, 30 F.Supp. 2d at 1157).

fair notice of what conduct is permitted and prohibited and what will expose them to criminal and/or civil liability.

3. Vagueness Regarding the Time Applications of the Statute

A partial birth abortion statute will also be considered vague if it fails to establish when the procedures are prohibited, that is, post or pre-viability. A state's interest in protecting fetal life during pre-viability is much less compelling; therefore, a pre-viability prohibition could be determined as an undue burden on a woman's right to choose an abortion. The phrase "living fetus" does not automatically refer to viability out of the womb because a fetus may have a heartbeat, meeting the definition of "living," but not be viable outside of the womb. Thus, the term "living" does not classify the abortion procedure as post or pre-viability. Bush's Ban does not state whether the partial birth abortion procedures are prohibited post or pre-viability; therefore, it is unconstitutionally vague. In order to prevent an undue burden on a women's right to choose, Bush's Ban would need to establish that it was prohibiting the procedures post-viability.

Reading Bush's Ban does not put a physician or a woman seeking an abortion on fair notice of what is forbidden. The Ban is vague because it fails to define specifically what is considered a "living fetus" and whether the procedure is prohibited post or pre-viability. Due Process requires fair notice to those who are affected by the statute. Bush's Ban's lack of fair notice "chills" physicians and women from obtaining certain abortion procedures that are protected, accordingly, affecting a woman's right to choose. Bush's Abortion Ban should be found unconstitutional for vagueness.

IV. CONCLUSION

It seems unlikely that the concept of "partial birth abortion" could be completely banned. However, it might be possible to have a ban on certain "partial birth abortion" procedures after the point of viability of the fetus. In order to have a constitutional ban on the D&X procedure, the statute must adhere to certain constitutional protections. First, it must contain an adequate exception for maternal health and life. Second, the statute cannot create an undue burden on a woman's right to choose. It must establish when the procedure will be regulated, for example, post-viability of the fetus. It must also specifically describe the abortion procedure it is prohibiting, rather than using broad terms that tend to cover permitted procedures. If the statute is vague concerning when the prohibition takes effect or what procedures it covers, the statute will be deemed to unduly burden pre-viability abortion procedures. One problem that legislatures will face is defining the terms "living" and "viability." Courts will be very skeptical of the use of set time periods

and weight of the fetus. Therefore, roadblocks still exist before a valid partial birth abortion statute will pass constitutional muster.[168]

[168] *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (2004), ruled that George W. Bush's Partial Birth Abortion Ban of 2003 was unconstitutional. Specifically the court found that the language of Bush's Ban prohibited other safe, pre-viability second trimester procedures. Furthermore, Bush's Ban did not distinguish between pre-viability and post-viability. Therefore, Bush's Ban posed an undue burden on a woman's right to choose an abortion. The court also held that Bush's Ban was impermissibly vague because it failed to expressly define the prohibited medical procedures. In addition, Bush's Ban needed to contain a health exception, and that only providing for a life endangering exception was inadequate. The court also stated that Congress's findings on the health exception were not entitled to deference. The court did not issue a nation wide injunction.