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Failed Lessons of History: The Predictable Shortcomings of the Partial-Birth Abortion Ban Act

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FAILED LESSONS OF HISTORY: THE PREDICTABLE SHORTCOMINGS OF THE PARTIAL-BIRTH ABORTION BAN ACT

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I. INTRODUCTION

President George W. Bush signed the Partial-Birth Abortion Ban Act (PBABA)[1] into law on November 5, 2005,[2] the culmination of an eight-year battle led by the National Right to Life Committee (NRLC), the nation's major right-to-life organization, and congressional pro-life leaders.[3] The fight for this legislation took place at a time when similar battles were waged at the state level, with many laws being pushed through legislatures only to be struck down as unconstitutional in the courts. This article argues that Congress passed a Partial-Birth Abortion Ban Act that is fatally flawed and destined to be found unconstitutional because the drafters of the federal law did not study the judicial treatment of many similar state laws in drafting their national legislation to avoid the fate of many state partial-birth abortion statutes.

This article first provides a brief overview of the history of the regulation of abortion since *Roe v. Wade*,[4] in order to establish a context for the subsequent discussion of the Partial-Birth Abortion Ban Act. Further context is set forth in Part III, which provides a history of state partial-birth abortion statutes. Part IV describes the history of the federal Partial-Birth Abortion Ban Act, followed by an analysis, relying primarily on the courts' treatment of state partial-birth statutes, of why this statute will ultimately be found unconstitutional. The article concludes with some suggestions as to how those who favor a ban on partial-birth abortions might consider proceeding in the future.

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1. 18 U.S.C.A. § 1531 (2004).

2. 39 WEEKLY COMP. PRES. DOC. 154 (Nov. 5, 2003).

3. The PBABA was debated by the 104th, 105th, 106th, 107th, and 108th Congresses. *See infra* Part IV for a detailed discussion of the passage of this legislation.

4. 410 U.S. 113 (1973).

The issue of the legality of the PBABA is significant as the U.S. Supreme Court is now slated to hear a challenge to the PBABA[5] on appeal from the Eighth Circuit,[6] with two new Supreme Court justices who have not yet had the opportunity to rule on an abortion case. The outcome of this case could reshape the status of abortion rights in the United States.

II. A BRIEF HISTORY OF ABORTION REGULATION IN THE TWENTIETH CENTURY

The natural starting point for this history of abortion regulation is the landmark 1973 case of *Roe v. Wade*.[7] The ruling issued by the Court in this case has framed all subsequent legislation related to the topic. In *Roe*, the Court, specifically responding to a Texas statute barring abortions not regarded as necessary to save the life of the mother, ruled that no state may pass laws proscribing all abortions by declaring their performance a crime.[8]

The constitutional basis for this ruling was derived from the Fourteenth Amendment and the right to privacy recognized in *Griswold v. Connecticut*.[9] The decision in *Roe* recognized that the right to personal privacy encompasses "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and therefore bears "some extension to activities related to marriage, procreation, contraception, family relationships, and child rearing and education," a realm of concepts that was deemed to include a prospective mother's right to choose whether to carry a pregnancy to term.[10]

While the Court recognized the validity of a state's interest in protecting the health of prospective mothers and a potential life and

5. *See* Supreme Court of the United States Granted & Noted List—Cases to be Argued October Term 2006 (list of cases slated for argument for the next Supreme Court term), *available at* http://www.supremecourtus.gov/orders/06grantednotedlist.html (last visited Apr. 18, 2006).

6. Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (U.S. Feb. 21, 2006) (No. 05-380).

7. 410 U.S. 113 (1973).

8. *Id.* at 163-64.

9. 381 U.S. 479 (1965). The Court reasoned that several of the Bill of Rights guarantees, including those found in the First, Third, Fourth, Fifth, and Ninth Amendments, create a "penumbra" of privacy for married couples that is "protected from governmental intrusion." *Id.* at 483-85.

10. 410 U.S. 113, 152-53 (1973).

acknowledged a connection between these interests and abortion legislation, the opinion stated that, because personal privacy is a "fundamental right," a state could restrict that right of a prospective mother only when there was a "compelling State interest."[11]

In terms of states' concerns for maternal health, the Court's judgment, based on the medical knowledge of the time, was that abortions in the first trimester of pregnancy were no more dangerous to a woman's health than the act of childbirth itself. Thus, it was determined that a concern for maternal health justified state intervention only when the procedure in question was to take place after this "compelling" point.[12] On the issue of potential life, the Court elaborated on the constitutional definition of "person." It concluded that the Constitution, while never defining the term outright, contains no definite evidence that the term can be applied prenatally.[13] Therefore, the Court decided that constitutional guarantees, such as those provided by the Fourteenth Amendment, did not extend to the unborn.[14]

Furthermore, the Court did not decide when life genuinely begins. Instead, the Court acknowledged the role of diverging value systems and epistemological and metaphysical paradigms in framing definitions of "life" and "personhood."[15] Accordingly, the Court deferred to the legal concept of viability—the point at which the fetus is practically capable of survival outside the womb—as the point at which states are justified in regulating and even proscribing abortions, except in cases of medical necessity.[16] The lack of a decisive answer to this question of when life begins and manifold others related to this issue has served as the impetus for an inundation of legal controversy

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11. *Id.* at 148-56.

12. *Id.* at 164.

13. *Id.* at 157-58.

14. *Id.*

15. Conservative Christians and other pro-life oriented individuals almost always define life as beginning at fertilization; once a sperm has entered an egg, a new person or "soul" has been created, and therefore, any termination of this entity is viewed as murder. *See* Mary Meehan, *Saving Lives through the Churches*, HUMAN LIFE REV. 5-32 (2005) (describing the Biblical basis on which Christians see life beginning at fertilization and therefore consider abortions against the will of God). However, legal authorities tend to view life as beginning at later points in the course of pregnancy. *See American Bar Association Goes Pro-Choice*, Reproductive Freedom News 14 (1992). The ABA echoed the Court's implied definition of life beginning at viability, but later rescinded this resolution due to the loss of membership it caused. *See* Daniel Oliver, *Public Policy II – Deciding Abortion – The Key Questions*, Nat'l Rev., May 9, 2005. Science, while able to declare fetuses alive and dictate the point of fetal viability, cannot make a determination of when a fetus becomes a "person." *Id.*

16. *Roe*, 410 U.S. at 160-65.

henceforth, as discussed below.

In the parallel case of *Doe v. Bolton*,[17] the Court issued a closely related opinion. The decision held that state legislation making it unreasonably burdensome to have an abortion may not be enacted, because for all practical purposes, such measures would violate the fundamental right to an abortion established in *Roe*.[18] The Court thus declared null and void state regulations such as mandated pre-approval for an abortion by a hospital committee, required agreement of two physicians regarding the decision to abort, and the provision of legal recourse against locations other than licensed hospitals offering these procedures.[19]

Subsequently, there have been a number of cases brought before courts of various levels exploring the extent to which abortions can be regulated. Notably, *Webster v. Reproductive Health Services*[20] signified a relaxation of federal judicial review of state regulations, allowing significant freedom for state legislatures to pass measures restricting abortion practices, assuming such measures were predicted to withstand an examination of constitutionality.[21] The critical significance of this decision was its implications for future rulings such as the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[22]

In *Casey*, while upholding the constitutional right to an abortion provided in *Roe*, a sharply divided Court, by a vote of 5-4, allowed state legislatures even greater discretion in their regulation of the procedure.[23] Specifically, in place of the *Roe*-era requirement of a "compelling" state interest to justify regulation of abortion, this decision allowed for the enactment of any law not placing an "undue burden" on prospective abortion recipients. The term "undue burden" was defined as a "substantial obstacle in the path of a woman seeking

17. 410 U.S. 179 (1973).

18. *Id.*

19. *Id.* at 196-99.

20. 492 U.S. 490 (1989).

21. Specifically, the Court refused to invalidate the statute's prohibition against the use of public funds, employees, and facilities to provide abortions because the prohibition placed no governmental obstacle in the path of a woman who chose to have an abortion. She was no worse off than if the state had chosen to provide no public health care, which they are not bound to provide. The Court found that the statute's prohibition against publicly funded counseling in favor of abortions was moot because appellees contended that they were not adversely affected by this provision. *Id.*

22. 505 U.S. 833 (1992). *See* Library of Congress, Congressional Research Service Issue Brief IB9505, *Abortion: Legislative Response* 3-4 (2004).

23. *Casey*, 505 U.S. 833.

an abortion of a nonviable fetus."[24]

Additionally, important in *Casey* was the shift in the Court's stance toward the authenticity of states' interests in the protection of potential life.[25] The Court decided that these interests logically applied to the entire course of pregnancy, and that state legislation was appropriate from inception, a ruling going so far as to allow even for regulations designed to favor carrying the fetus to term.[26]

III. A HISTORY OF STATE PARTIAL-BIRTH ABORTION STATUTES

Since 1995, thirty-one states have passed laws attempting to ban partial-birth abortions.[27] Eighteen of these statutes have been

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24. *Id.* at 837. The Court reiterated that it was upholding the essential tenets of *Roe*, which it saw as having three specific principles:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

Id. at 846.

25. *Id.* at 878.

26. *Id.*

27. ALA. CODE § 26-23-1 to 6 (Supp. 1998) (repealed 1999); ALASKA STAT. § 18.16.050 (1997) (repealed 2001); ARIZ. REV. STAT. ANN. § 13-3603.01 (1997) (repealed 1997); ARK. CODE ANN. § 5-61-202 (1997) (repealed 1999); FLA. STAT. ANN. § 390.011 (1998) (repealed 1998); GA. CODE ANN. § 16-12-144 (1997); IDAHO CODE ANN. § 18-613 (1998); 720 ILL. COMP. STAT. 513/10 (1998) (repealed 1998); IND. CODE § 16-34-2-1 (1997); IOWA CODE ANN. § 707.8A (1997) (repealed 1999); KAN. STAT. ANN. § 65-6721 (1998); KY. REV. STAT. ANN. § 311.720 (1998) (repealed 2000); LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999); MICH. COMP. LAWS § 333.17016 (1997); MISS. CODE ANN. § 41-41-73 (1997); MO. REV. STAT. § 565.300 (1999) (repealed 2002); MONT. CODE ANN. § 50-20-401 (1997); NEB. REV. STAT. § 28-328 (1997) (repealed 2000); N.J. STAT. ANN. § 2A:65A-6 (1997) (repealed 2000); N.M. STAT. ANN. § 30-5A-3 (2000); N.D. CENT. CODE § 14-02.6-02 (1999); OHIO REV. CODE ANN. § 2919.15 (1995) (repealed 1997), *amended by* OHIO REV. CODE ANN. § 2919.15.1 (2000) (upheld by the Sixth Circuit in *Women's Med. Prof'l Corp. v. Taft*, 2003 U.S. App. LEXIS 25413); OKLA. STAT. tit. 21, § 684 (1998); R.I. GEN. LAWS § 23-4.12-2 (1997) (repealed 2001); S.C. CODE ANN. § 44-41-85 (1997); S.D. CODIFIED LAWS § 34-23A-27 (1997); TENN. CODE ANN. § 39-15-209 (1997); UTAH CODE ANN. § 76-7-310.5 (1996); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003); W.VA. CODE § 33-42-8 (1998) (repealed 2000); WIS. STAT. ANN. § 895.038 (1998) (repealed 1999).

challenged in court,[28] and seventeen have been overturned.[29] A careful examination of the overturned statutes lays the groundwork for the argument that the PBABA is highly likely to be struck down as unconstitutional.

Part III.A reviews the four general categories of reasons why the state statutes were overturned to determine what courts found problematic or flawed in statutes attempting to ban partial-birth abortions. Part III.B will examine the one state partial-birth abortion statute that was challenged and upheld,[30] and then examine the thirteen state statutes that have not been challenged.[31] Finally, Part III.B will compare Ohio's[32] and Virginia's[33] revised statutes, which were rewritten with different degrees of success after being found unconstitutional.[34]

A. State Statutes that Failed to Withstand Constitutional Scrutiny

There appear to be four general categories of reasons why state statutes attempting to ban partial-birth abortions were overturned. The

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28. Summit Med. Assocs. v. Pryor, 180 F.3d 1326 (11th Cir. 1999); Alaska v. Planned Parenthood, 35 P.3d 30 (Alaska 2001); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360 (N.D. Ga. 1998); Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); Planned Parenthood v. Miller, 195 F.3d 386 (8th Cir. 1999); Eubanks v. Stengel, 224 F.3d 576 (7th Cir. 2000); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999); Missouri v. Planned Parenthood, 97 S.W.3d 54 (Mo. Ct. App. 2002); Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997); Rhode Island Med. Soc'y v. Whitehouse, 239 F.3d 104 (1st Cir. 2001); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999); Daniel v. Underwood, 102 F. Supp. 2d 680 (S.D. W.Va. 2000); Planned Parenthood v. Doyle, 44 F. Supp. 2d 975 (W.D. Wis. 1999).

29. Georgia's partial-birth abortion statute, GA. CODE ANN. § 16-12-144 (1997), was the only state statute to be challenged and found to be constitutional. In addition, Ohio's statute, which was overturned, was subsequently rewritten, challenged, and upheld. Virginia's statute was challenged, overturned, and rewritten, but it has not yet been challenged again. *See infra* at Part III.B for a discussion of these three statutes and an examination of how these statutes compare to those that were overturned.

30. GA. CODE ANN. § 16-12-144 (1997).

31. IDAHO CODE ANN. § 18-613 (1998); IND. CODE § 16-34-2-1 (1997); KAN. STAT. ANN. § 65-6721 (1998); MICH. COMP. LAWS § 333.17016 (1997); MISS. CODE ANN. § 41-41-73 (1997); MONT. CODE ANN. § 50-20-401 (1997); N.M. STAT. ANN. § 30-5A-3 (2000); N.D. CENT. CODE § 14-02.6-02 (1999); OKLA. STAT. tit. 21, § 684 (1998); S.C. CODE ANN. § 44-41-85 (1997); S.D. CODIFIED LAWS § 34-23A-27 (1997); TENN. CODE ANN. § 39-15-209 (1997); UTAH CODE ANN. § 76-7-310.5 (1996).

32. OHIO REV. CODE ANN. § 2919.15.1 (2000).

33. VA. CODE ANN. § 18.2-71.1 (2003).

34. Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999).

cases falling into these four categories are not all identical, but the similarities are significant enough to allow grouping. The four general categories of reasons for overturning the statutes are: (1) vagueness in the language of the statute; (2) a specific reference to a violation of a woman's right to privacy due to a consent provision; (3) a more general violation of a woman's right to privacy by placing an undue burden on the woman by making it more difficult to obtain safe abortions; and (4) failing to include an exception to protect the mother's health or her life. While there are four general categories, most of the cases cited give several reasons for the unconstitutional nature of the statutes, and as such, most of these cases fall into multiple categories.

1. Void for Vagueness

In the first category are state statutes overturned due to the vagueness of language used in the statute. States whose statutes fall into the vagueness category are: Alabama, Arizona, Arkansas, Florida, Illinois, Iowa, Kentucky, Louisiana, New Jersey, Rhode Island, and Virginia.[35] By and large, the state statutes falling into this category have exactly the same or substantially similar wording. The most common phraseology is: "'Partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[36] Ten of the eleven states in the vagueness category share substantially similar wording in their statutes as the wording quoted above.[37]

The state that does not generally conform to the previously quoted statute is Louisiana, and even its statute possesses the same basic elements as the other states. Louisiana's statute states:

> Partial-birth abortion is the performance of a procedure on a female by a licensed physician or any other person whereby a living fetus or infant is partially delivered or removed from the female's uterus by vaginal means or

35. ALA. CODE § 26-23-1 to 6 (Supp. 1998) (repealed 1999); ARIZ. REV. STAT. ANN. § 13-3603.01 (1997) (repealed 1997); ARK. CODE ANN. § 5-61-202 (1997) (repealed 1999); FLA. STAT. ANN. § 390.011 (1998) (repealed 1998); 720 ILL. COMP. STAT. 513/10 (1998) (repealed 1998); IOWA CODE ANN. § 707.8A (1997) (repealed 1999); KY. REV. STAT. ANN. § 311.720 (1998) (repealed 2000); LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999); N.J. STAT. ANN. § 2A:65A-6 (1997) (repealed 2000); R.I. GEN. LAWS § 23-4.12 (1997) (repealed 2001); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003).

36. ARIZ. REV. STAT. ANN. § 13-3603.01 (1997) (repealed 1997).

37. These ten states are: Alabama, Arizona, Arkansas, Florida, Illinois, Iowa, Kentucky, New Jersey, Rhode Island, and Virginia. *See supra* note 35.

> with specific intent to kill or do great bodily harm and is then killed prior to complete delivery or removal.[38]

Despite its effort to avoid vagueness through different wording, Louisiana's statute is not clearer than the other ten, which share wording and were all overturned.

A further examination of the statutes overturned for vagueness exposes the ambiguity in the legislation, and thus why they were found to be unconstitutional.[39] Many of the terms in the common form of the statute have multiple meanings, and legislatures have made no effort to rectify the ambiguity in most situations. For example, none of the statutes make any attempt to clarify which "procedures" are prohibited and which are acceptable.[40] Most of the cases addressing the constitutionality of a vague statute turn on the lack of clarity as to which abortion procedures are prohibited.

Another common ambiguity is caused by the failure of state legislatures to define "living fetus" in their statutes. The problematic nature of this ambiguity is demonstrated in *Planned Parenthood v. Woods*,[41] which challenged the Arizona partial-birth abortion statute.[42] Judge Bilby explained:

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38. LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999).

39. Although numerous different phrases contributed to state partial-birth abortion statutes being overturned, it should be noted that the term "partial-birth abortion" is also ambiguous. The term "partial-birth abortion" has no accepted medical meaning, although it typically refers to the intact dilation and extraction method of abortion, also known as D&X. Regardless, "partial-birth abortion" is not a medical term used in obstetrics, gynecology, or in any other medical field, but rather is a term coined by legislators, the media, and anti-abortion activists. *See* Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); Eubanks v. Stengel, 224 F.3d 576 (7th Cir. 2000); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999); Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000). *See also* A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); Rhode Island Med. Soc'y v. Whitehouse, 239 F.3d 104 (1st Cir. 2001).

40. Much of the debate over ambiguities in state partial-birth abortion statutes revolves around the fact that the definitions of "partial-birth abortion" make it unclear, even to trained medical professionals, exactly which methods of abortions would be banned under the statute and which would still be acceptable methods to use. This problem is exacerbated by the fact that, as stated before, "partial-birth abortion" is not a medical term, *see supra* note 39, and thus, use of the term is not sufficient to define any given procedure. Furthermore, the inclusion of a specific list of which methods are acceptable under the statute was one of the keys to Ohio's revised partial-birth abortion statute being upheld in court. *See* OHIO REV. CODE ANN. § 2919.15.1 (2000); Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436 (6th Cir. 2003).

41. 982 F. Supp. 1369 (D. Ariz. 1997).

42. ARIZ. REV. STAT. ANN. § 13-3603.01 (1997) (repealed 1997).

> Considering other terms utilized in the Act, the Court notes that the Act does not define "living fetus." Does "living fetus" under the Act refer to the presence of a fetal heartbeat? Alternatively, does "living fetus" refer to living cells? As demonstrated by the testimony in the case, reasonable physicians differ as to the meaning of what is "living."[43]

As the example from *Woods* demonstrates, ambiguity in a statute confuses even experienced physicians. The Court decided that if physicians cannot tell what is constitutionally protected and excluded, then the statute must be too vague as written. This example is only one of many of the state statutes facing this same problem.[44]

A third common ambiguity causing the courts to hold statutes unconstitutional is the phrase "partially vaginally deliver." The ambiguous phrase "partially vaginally deliver," more than any other phrase in partial-birth abortion statutes, calls into question what exactly is being banned. Numerous cases discuss how the ambiguous phraseology could be used to ban safe and constitutionally protected abortion methods.[45] Although examples abound, one specific example should clearly demonstrate the unconstitutionally vague nature of the phrase "partially vaginally deliver." Judge Graham stated:

> The phrase "partially vaginally delivers" is subject to more than one interpretation. The term "delivery" is given a very broad meaning in obstetrics. Anything that is removed from the uterus, whether it is a fetus, a fetal part, or a baby, is considered to be "delivered." Physicians define the term "living" as having a heartbeat. Given the broad definition of the term

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43. Planned Parenthood v. Woods, 982 F. Supp. 1369, 1379 (D. Ariz. 1997).

44. *E.g.*, A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); Eubanks v. Stengel, 224 F.3d 576 (7th Cir. 2000); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999); Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999).

45. Planned Parenthood v. Woods, 982 F. Supp. 1369, 1379 (D. Ariz. 1997); Little Rock Family Planning Servs. v. Jegley, 192 F.3d 794 (8th Cir. 1999); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999); Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000); Rhode Island Med. Soc'y v. Whitehouse, 239 F.3d 104 (1st Cir. 2001); Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999).

> "delivery," a physician would consider any procedure a "partial-birth abortion" if during the course of the procedure a fetal part is delivered while the remaining part continues to have a heartbeat.[46]

What is demonstrated in the excerpt from *A Choice for Women v. Butterworth* is that, given the vagueness of the phrase "partially vaginally deliver," the Florida partial-birth abortion statute is unclear as to what exactly is being banned. Also, as expressed by Judge Graham, the vagueness in the language of the statute creates a situation where the statute becomes overbroad by including safe, legal abortion procedures in the category of banned procedures.[47]

2. Violation of the Right to Privacy Due to Consent Provisions

The second category of cases overturning state statutes are those that explicitly hold that statutorily mandated consent provisions violate a woman's right to privacy. Four of the seventeen cases that overturned statutes specifically mention a woman's right to privacy as a reason for the decision.[48] Although the four cases cited consent provisions as one of the reasons why the legislation was unconstitutional, the consent provisions in each statute were fairly dissimilar.[49] Because the federal partial-birth abortion statute does not

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46. A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148, 1157-58 (S.D. Fla. 1998).

47. This point will be explored further in Part III.A.3. *See infra* Part III.A.3 and accompanying notes.

48. State of Alaska v. Planned Parenthood, 35 P.3d 30 (Alaska 2001); Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999).

49. Alaska, Arizona, Illinois, and Louisiana all included consent provisions in their respective partial-birth abortion statutes. Alaska's consent provision required minors seeking partial-birth abortions to obtain parental consent. In *State of Alaska v. Planned Parenthood*, 35 P.3d 30, 33 (Alaska 2001), Judge Bryner stated, "privacy is a fundamental individual right, . . . this right encompasses a pregnant woman's reproductive choices, and . . . it applies to minors and adults co-extensively, regardless of age." Arizona's partial-birth abortion statute goes a step further than Alaska's by requiring consent from the parents of a child under eighteen, as well as from the spouse of a woman who is over eighteen. *See* Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997). Similar to Alaska, Illinois's partial-birth abortion statute, 720 ILL. COMP. STAT. 513/10 (1998) (repealed 1998), requires parental consent in all cases where a minor seeks a partial-birth abortion. Louisiana's partial-birth abortion statute, LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999), goes the farthest with the consent provision. Under the Louisiana statute, a physician must obtain parental consent for minors and spousal consent for women over eighteen. Additionally, the Louisiana statute subjects the physician to litigation from the putative father and a maternal "grandparent," unless the pregnancy was criminally caused.

have a consent provision, this article will not discuss this particular defect.

3. Violation of the Right to Privacy by Placing an Undue Burden on the Exercise of the Right

The third category of cases overturning state partial-birth abortion statutes decided that the statutes violated a woman's right to privacy by placing an undue burden on her exercise of that right. However, unlike statutes with consent provisions, the violation of privacy here is more general and refers to statutes that impinge the right by making it more difficult for women to obtain safe abortions prior to or post-viability, thus placing an undue burden on them. The "undue burden" category is the largest grouping of cases, containing cases from sixteen different states.[50]

The rulings in this category hold that the statute, as a whole, is ambiguous to such a degree that it appears to prevent women from seeking constitutionally protected forms of abortions.[51] Furthermore, these statutes also tend to be unreasonably constrictive because their

50. ALA. CODE § 26-23-1 to 6 (Supp. 1998) (repealed 1999); ARIZ. REV. STAT. ANN. § 13-3603.01 (1997) (repealed 1997); ARK. CODE ANN. § 5-61-202 (1997) (repealed 1999); FLA. STAT. ANN. § 390.011 (1998) (repealed 1998); 720 ILL. COMP. STAT. 513/10 (1998) (repealed 1998); IOWA CODE ANN. § 707.8A (1997) (repealed 1999); KY. REV. STAT. ANN. § 311.720 (1998) (repealed 2000); LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999); MICH. COMP. LAWS § 333.17016 (1997); NEB. REV. STAT. § 28-328 (1997) (repealed 2000); N.J. STAT. ANN. § 2A:65A-6 (1997) (repealed 2000); OHIO REV. CODE ANN. § 2919.15 (1995) (repealed 1997), *amended by* OHIO REV. CODE ANN. § 2919.15.1 (2000) (upheld by the Sixth Circuit in *Women's Medical Prof'l Corp. v. Taft*, 2003 U.S. App. LEXIS 25413); R.I. GEN. LAWS § 23-4.12 (1997) (repealed 2001); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003); W.VA. CODE § 33-42-8 (1998) (repealed 2000); WIS. STAT. ANN. § 895.038 (1998) (repealed 1999).

51. *See* Planned Parenthood v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998); Midtown Hosp. v. Miller 36 F. Supp. 2d 1360 (N.D. Ga. 1998); Hope Clinic v. Ryan, 249 F.3d 603 (7th Cir. 2001); Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood v. Farmer, 220 F.3d 127 (3d Cir. 2000). There are seven commonly used methods of partial-birth abortion: suction curettage, suction aspiration, dilation and evacuation (D&E), dilation and extraction (D&X), labor induction, hysterotomy, and hysterectomy. The cited cases go into detail as to the specifics of each procedure. The partial-birth abortion statutes that were overturned due to an undue burden were overturned because the statute precluded the use of the D&X procedure as well as the protected D&E procedure, and in some cases, the suction curettage procedure. The word "protected" is used to distinguish the D&E from the D&X procedure. The D&X procedure is the one typically thought to be at issue in "partial-birth abortions," although most pieces of legislation do not clearly identify the D&X procedure as being the one banned. The D&E procedure is used in early abortions, as well as some later ones, and is not considered a partial-birth abortion as the fetus is not removed whole (as with the D&X procedure). Therefore, the word "protected" refers to the fact that the D&E procedure has been found to be constitutional under past cases, but due to ambiguous wording was lumped into procedures that would be banned by the various state statutes that had been overturned.

wording appears to prevent women from obtaining what would be the safest form of abortion, while still allowing other procedures, which involve greater health or safety risks. The undue burden is the limiting of the procedures women can actively seek, especially when the procedure is constitutionally protected, or when the procedure is the safest a woman could receive in a given situation.

For example, in *Planned Parenthood v. Farmer*,[52] the Third Circuit addressed the issue of over-inclusiveness in New Jersey's partial-birth abortion statute as it pertains to prohibiting safe and constitutionally protected abortion procedures. In *Farmer*, Judge Barry stated, "The Act erects a substantial obstacle because . . . it is so vague as to be easily construed to ban even the safest, most common and readily available conventional pre- and post-viability abortion procedures."[53] The court overturned the state statute because it included constitutionally protected methods of abortion, as well as those methods that are the safest to perform. Another, more illustrative example of the same basic point is given in *Hope Clinic v. Ryan*,[54] where Judge Kocoras elucidated:

> For two reasons, the court finds that [the statute] imposes an undue burden on a woman's constitutional right to choose to terminate her pregnancy before viability. First, the statute, as written, has the potential effect of banning the most common and safest abortion procedures. It does so without regard for the viability of the fetus. Second, the statute does not permit a physician to use the prohibited procedure when it is necessary to protect the woman's health, whether mental or physical, or when an alternative abortion procedure would compromise the woman's health. As such, [the statute] is clearly unconstitutional.[55]

Similar to *Farmer*, the Illinois partial-birth abortion statute was overturned because it, too, included safe and constitutional procedures within the scope of the ban enacted by the statute. Furthermore, the statute also prevented the use of the prohibited method when it would be the safest possible method to use, effectively leaving out a health

52. 220 F.3d 127 (3d Cir. 2000).
53. *Id.* at 144.
54. 995 F. Supp. 847 (N.D. Ill. 1998), *aff'd*, 249 F.3d 603 (7th Cir. 2001).
55. *Id.* at 857.

exception, which is the fourth category of reasons why state statutes were overturned.

4. Failure to Include an Exception to Protect the Life or Health of the Mother

The final category of overturned state partial-birth abortion statutes is statutes with no exception to protect the mother's health and or life. This category also includes cases where the health or life exception, although present in the statute, was found inadequate. Twelve state statutes were overturned, in part, because of the lack of a health exception,[56] while four additional state statutes were overturned because the life exception was deemed inadequate.[57]

The reasons underlying the repeal of the twelve state statutes that failed to include a health exception for the mother are fairly straightforward. Simply put, the statutes were overturned because there is no exception for when the partial-birth abortion is necessary to protect the mother's health, but not necessarily her life. In fact, this rationale, although not the only one, was a major factor behind the Court's intervention in the case of *Stenberg v. Carhart*.[58]

In the majority opinion in *Stenberg*, Justice Breyer explained that the requirement for the health exception was established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[59] which reiterated points made in *Roe v. Wade*.[60] Justice Breyer wrote:

> The *Casey* plurality opinion reiterated what the Court held in *Roe*; that subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate*

56. ARIZ. REV. STAT. ANN. § 13-3603.01 (1997) (repealed 1997); FLA. STAT. ANN. § 390.011 (1998) (repealed 1998); LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999); MO. REV. STAT. § 565.300 (1999) (repealed 2002); NEB. REV. STAT. § 28-328 (1997) (repealed 2000); N.J. STAT. ANN. § 2A:65A-6 (1997) (repealed 2000); OHIO REV. CODE ANN. § 2919.15 (1995) (repealed 1997), *amended by* OHIO REV. CODE ANN. § 2919.15.1 (2000) (upheld by the Sixth Circuit in *Women's Medical Prof'l Corp. v. Taft*, 2003 U.S. App. LEXIS 25413); R.I. GEN. LAWS § 23-4.12 (1997) (repealed 2001); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003); W.VA. CODE ANN. § 33-42-8 (1998) (repealed 2000); WIS. STAT. ANN. § 895.038 (1998) (repealed 1999).

57. ARK. CODE ANN. § 5-61-202 (1997) (repealed 1999); LA. REV. STAT. ANN. § 14:32.9 (1997) (repealed 1999); R.I. GEN. LAWS § 23-4.12 (1997) (repealed 2001); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003).

58. 530 U.S. 914 (2000).

59. 505 U.S. 833 (1992).

60. 410 U.S. 113 (1973).

> *medical judgment, for the preservation of the life or health of the mother.*[61]

Breyer pointed out that two previous Supreme Court rulings mandated a health exception for statutes attempting to limit abortions.[62] In *Stenberg*, Nebraska argued that the health exception established in *Roe*[63] and *Casey*[64] was not necessary because other safe methods of abortions existed besides the post-mortality dilation and extraction (D&X) procedure, which the state equated with the term "partial-birth abortion." In addressing Nebraska's argument, Justice Breyer stated:

> Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.[65]

In the end, the Court held that the controversy over whether the D&X procedure is in fact the safest method is beyond the scope of the Court's review, as long as doctors have determined that in some circumstances it is the safest procedure.[66] The Court held that it is unlawful to prevent what could be the safest abortion method under certain circumstances because subjecting women to other procedures in these instances might jeopardize their health and thereby violate the protections set forth in *Roe*[67] and *Casey*.[68] The *Stenberg* opinion

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61. 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164-65)) (emphasis added by J. Breyer) (quotations omitted).
62. *See id.*
63. 410 U.S. 113 (1973).
64. 505 U.S. 833 (1992).
65. Stenberg v. Carhart, 530 U.S. 914, 937 (2000).
66. *Id.*
67. 410 U.S. 113 (1973).
68. 505 U.S. 833 (1992).

provided the basis for overturning many of the other eleven statutes in this category.

In some statutes, although a life exception is present, the Court has deemed it inadequate. Similar to the health exception cases, this rationale is fairly straightforward. An adequate life exception is necessary to allow a woman to obtain an abortion if the pregnancy threatens her life, or if the abortion procedure itself is dangerous and a different method is needed to protect the mother's life. A clear example of this logic is seen in *Causeway Medical Suite v. Foster*,[69] a Louisiana case challenging the state partial-birth abortion statute. Similar to the cases discussed *supra* involving a failure to include a health exception, the Louisiana statute lacked a health exception and also contained an inadequate life exception. In discussing the life exception, Judge Porteous explained:

> Additionally, while the Act does provide an exception for the life of the mother, this exception is wholly inadequate. The life exception only permits the use of life saving banned abortion procedures when they "[are] necessary to save the life of a mother [whose] life is endangered by a physical disorder, physical illness or physical injury; and [*furthermore only if*] *no other medical procedure would suffice for that purpose.*" In effect, this provision may force a woman to choose higher risk procedures in her attempt to preserve her own life. . . . For example, if a hysterotomy or hysterectomy would suffice to save a woman's life, the physician must resort to these procedures even though they present far greater risks to the woman's health and may leave her infertile.[70]

Judge Porteous provided a clear example of what it means to have an inadequate life exception, thus falling short of actually protecting the mother's life. The three other statutes that fall into this category[71] were overturned for similar reasons as those cited in *Causeway*.

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69. 43 F. Supp. 2d 604 (E.D. La. 1999).

70. *Id.* at 614 (quoting LA. REV. STAT. ANN. § 14:32.9 (B) (emphasis added by the court)).

71. ARK. CODE ANN. § 5-61-202 (1997) (repealed 1999); R.I. GEN. LAWS § 23-4.12 (1997) (repealed 2001); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003).

B. State Statutes that Have Withstood Constitutional Scrutiny, Have Not Been Challenged, or Have Been Challenged and Revised

While most challenged state statutes have failed to withstand constitutional scrutiny, only one statute was found to be valid.[72] Meanwhile, other statutes have not been challenged at all.[73] Finally, there are two state statutes that have been challenged, overturned, and subsequently revised.[74] Part III.B focuses on those statutes and evaluates the changes these two states made in order to pass constitutional muster.

Georgia was the only state to have its original partial-birth abortion statute challenged and upheld as constitutional.[75] The statute was found to be valid because of specifics unique to the Georgia case, *Midtown Hospital v. Miller*.[76] To understand *Midtown Hospital*, one must understand a previous challenge[77] raised by the plaintiffs in 1997 seeking a temporary restraining order to prevent the enforcement of the Georgia partial-birth abortion statute. In the 1997 *Midtown Hospital* case, the plaintiffs sought a restraining order to prevent the enforcement of the statute while the other cases (i.e., those that actually challenged the statute) were still pending. The court held that the plaintiffs provided no evidence of a "threat of immediate irreparable injury and . . . it is unlikely that the Plaintiffs will prevail on the merits."[78] Notably, while the court denied the plaintiffs' request for a restraining order and stated that the plaintiffs were unlikely to succeed on the merits of the case, this case did not directly uphold the statute.

Midtown Hospital[79] is unique because the court took certain liberties that none of the other courts have taken. Although the court upheld the law, it defined the statute in a way that is comparable to the

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72. GA. CODE ANN. § 16-12-144 (1997).

73. *See supra* note 31.

74. OHIO REV. CODE ANN. § 2919.15 (1995) (repealed 1997), *amended by* OHIO REV. CODE ANN. § 2919.15.1 (2000) (upheld by the Sixth Circuit in *Women's Medical Prof'l Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003)); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* VA. CODE ANN. § 18.2-71.1 (2003) (Virginia's statute was rewritten, but the revised statute has not yet been challenged).

75. As noted above, Ohio's statute was initially challenged and struck down, but it was then revised and the revision upheld. *See infra* notes 106-123 and accompanying text for a thorough discussion of the Ohio statute.

76. Reported at 36 F. Supp. 2d 1360, 1367 (N.D. Ga. 1998).

77. Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360 (N.D. Ga. 1997).

78. *Id.* at 1367.

79. *Id.*

findings of the courts that overturned the statutes. This point becomes clearer when examining the specifics from *Midtown Hospital*.[80]

Plaintiffs first argued that the statute was void for vagueness.[81] The plaintiffs claimed that "partial-birth abortion" had no fixed medical meaning, so it was unclear which procedures were being prohibited. Furthermore, the plaintiffs claimed that the term "living fetus" was ambiguous and could potentially include constitutionally protected forms of abortion. Instead of agreeing with the plaintiffs, which is what most of the other courts did when presented with similar arguments, the Georgia court instead took it upon itself to clear up the ambiguity in the law, thus allowing the statute to stand.

One example of the court's clarification comes with respect to the term "living." Judge Forrester stated:

> The Georgia General Assembly chose to define partial-birth abortions in terms of a "living" fetus. In the context of the jurisprudence in this area, such a phrase can only mean "viable." As a result, the court cannot find a lack of notice as to whether the statute applies to post-viability abortions. . . . Moreover, the statute is not void for lack of further definition about when a fetus becomes living or viable. That point in the development of a fetus was thought to be of sufficient precision by the Supreme Court in *Planned Parenthood v. Casey*.[82]

Judge Forrester defined "living" to mean "viable," thus limiting the scope of the statute to post-viability abortions. While many of the other courts found the other state statutes to be unconstitutionally vague, the Georgia court clarified the law, but did not overturn it. Accordingly, the official actions of the Georgia court differ from those taken by other courts that heard similar challenges to partial-birth abortion statutes. Yet the final implications of the court's actions were similar in so far as ambiguities were explicated.

The plaintiffs also challenged the statute on the grounds that it violated the substantive due process rights of women.[83] In addressing the substantive due process claim, the court first identified seven

80. *Id.*
81. *Id.* at 1363.
82. *Id.*
83. 36 F. Supp. 2d at 1361.

abortion procedures that were currently available: hysterotomy, hysterectomy, induction methods, post-mortality dilation and evacuation (D&E), post-mortality dilation and extraction (D&X), and D&E and D&X performed without first terminating the fetus's life.[84] The court found that the statute prevented only two of these seven procedures. Judge Forrester explained that "physicians can continue to employ D&E and D&X techniques in appropriate cases after they first cause the demise of the fetus."[85] Consequently, the court found that only two of the seven available procedures were barred from use by the state statute. Furthermore, of the five procedures still allowed, two of them were variations of the two that were prohibited. Unlike the two invalid procedures, the two permissible procedures required fetal demise before using the D&E or D&X technique. The court found that because these five other techniques were not restricted, including the two variations of the two that were restricted, there was no violation of due process, ergo the plaintiffs were not likely to succeed on the merits.

One final point should be made about the Georgia statute. Unlike some of the statutes examined earlier, the Georgia statute contained both a health and a life exception, allowing for abortions post-viability to protect the health or life of the mother.[86] By having these two exceptions, it appears that the Georgia statute avoided the pitfalls that the previously discussed state statutes fell into.

In the subsequent 1998 *Midtown Medical Hospital* case,[87] the court approved stipulations that were agreed upon by the plaintiffs and the defendants. The stipulations included the definition of "living fetus" as "viable," the prohibition of the D&E and D&X procedures where the fetus is not first terminated before the procedure, and the reiteration of the health and life exceptions.[88] Consequently, the 1998 case served to formalize the clarifications made by the court in the 1997 case. As such, the Georgia partial-birth abortion statute was not overturned, but rather interpreted in such a way as to make the end results similar to those reached in the cases that did overturn state statutes. Essentially, there is little or no difference between the Georgia statute and the seventeen statutes that were overturned.

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84. *Id.* at 1362.
85. *Id.* at 1363.
86. *Id.* at 1365.
87. Midtown Hosp. v. Miller, 36 F. Supp. 2d 1360 (N.D. Ga. 1998).
88. *Id.* at 1368.

As stated previously, thirteen state partial-birth abortion statutes[89] have not been challenged. The statutes may not have been challenged because they have something the other statutes lacked or because they fall victim to the same weaknesses, but simply have not been challenged in court yet. Instead of examining each individual statute in-depth, the following focuses on the definitions in the statutes and whether the statutes include health and life exceptions.

The first group of statutes that have not been challenged are those with substantially similar wording to the majority of statutes that have been overturned. State statutes falling into this category of laws that probably would be overturned if challenged, due to vague wording, are: Idaho, Indiana, Michigan, Mississippi, Oklahoma, South Carolina, South Dakota, and Tennessee.[90] The implication of these definitions and the previously examined cases is that, if these eight state statutes were to be challenged, they more than likely would be overturned for the previously examined reasons of vagueness and imposing an undue burden on a woman's right to an abortion.

For example, the definition used in the Idaho partial-birth abortion statute is similar to the other seven in this category and is also similar to the definition presented in the section of state statutes that were determined to be void for vagueness. The Idaho statute states: "'Partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[91] Again, the ambiguous phraseology, "partially vaginally delivers," appears. Based on the prior discussions of this phraseology,[92] the Idaho statute and the other seven that have not been challenged but are practically carbon copies of this definition, would all be found unconstitutional. Because the statutes would be overturned, it appears that they have not been contested, not because of an inherent quality they share, but rather for some other reason, perhaps simply because no one has challenged these laws yet.

The second group of statutes consists of those whose definitions have attempted to clear up the ambiguity that has caused other statutes to be overturned for vagueness. The states that used

89. *See supra* note 31.

90. IDAHO CODE ANN. § 18-613 (1998); IND. CODE § 16-34-2-1 (1997); MICH. COMP. LAWS § 333.17016 (1997); MISS. CODE ANN. § 41-41-73 (1997); OKLA. STAT. tit. 21, § 684 (1998); S.C. CODE ANN. § 44-41-85 (1997); S.D. CODIFIED LAWS § 34-23A-27 (1997); TENN. CODE ANN. § 39-15-209 (1997).

91. IDAHO CODE ANN. § 18-613 (1998).

92. *See supra* Part III.A.1.

more specific wording are: Kansas, Montana, New Mexico, North Dakota, and Utah.[93] While the specific wording of these five state statutes varies, they share common concepts. All five state statutes attempt to limit the scope of the statute to the intact dilation and extraction (D&X) procedure.[94] These states accomplish this limiting process by specifically listing the steps of the procedure that are considered a partial-birth abortion, so that there is no ambiguity over which procedure is being restricted.[95] However, Utah's statute is the only one to specifically include the phrase "dilation and extraction."[96]

Moreover, Kansas, North Dakota, and Utah[97] go as far as to list protected forms of abortions that are excluded from the partial-birth abortion ban. While these three states do not list the same procedures, all three make an effort to clear up which abortion procedures are protected from prosecution. The inclusion of protected methods attempts to clarify the problem examined previously in which state statutes were determined to be over-inclusive and effectively barred protected forms of abortion procedures. For example, the Utah statute states:

> "Partial-birth abortion" or "dilation and extraction procedure" means the termination of pregnancy by partially vaginally delivering a living intact fetus, purposefully inserting an instrument into the skull of the intact fetus, and utilizing a suction device to remove the skull contents. This definition does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction aspiration procedure for abortion.[98]

Clearly the effort to be more specific has helped Utah avoid the significant ambiguities contained in the more generic definition that is commonly used. Given the precedents set by the various courts

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93. KAN. STAT. ANN. § 65-6721 (1998); MONT. CODE ANN. § 50-20-401 (1997); N.M. STAT. ANN. § 30-5A-3 (2000); N.D. CENT. CODE § 14-02.6-02 (1999); UTAH CODE ANN. § 76-7-310.5 (1996).

94. *See, e.g., id.*

95. *See, e.g., id.*

96. UTAH CODE ANN. § 76-7-310.5 (1996).

97. KAN. STAT. ANN. § 65-6721 (1998); N.D. CENT. CODE § 14-02.6-02 (1999); UTAH CODE ANN. § 76-7-310.5 (1996).

98. UTAH CODE ANN. § 76-7-310.5 (1996).

hearing challenges to partial-birth abortion statutes, the Kansas, Montana, New Mexico, North Dakota, and Utah statutes, which clarify significant ambiguities, would probably be upheld in court. Therefore, the apparent constitutionality could explain why these statutes have not been challenged.

The third group of cases switches focuses, and instead examines the presence of life and health exceptions for the mother. This third group includes those state statutes that have a life exception for the mother, but are lacking the requisite health exception. Unchallenged state statutes that do not have a health exception include: Idaho, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, and Tennessee.[99] While these eight states have life exceptions, the statutes do not include an exception to protect the mother's health. As was presented in *Roe*,[100] *Casey*,[101] and again in *Stenberg*,[102] a health exception is necessary for a statute to be constitutional. Therefore, the eight statutes in this category would be found unconstitutional if challenged because they fail to provide for the protection of the mother's health.

In sum, although these thirteen state statutes have not been challenged, nine[103] of them would be overturned based on the four criteria examined in Part III.A.[104] The four statutes that would be upheld based upon the precedents examined are the statutes from Kansas, Montana, New Mexico, and Utah.[105]

Finally, the two statutes that were challenged, overturned, and revised, are the statutes from Ohio and Virginia.[106] The revised Ohio

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99. IDAHO CODE ANN. § 18-613 (1998); MICH. COMP. LAWS § 333.17016 (1997); MISS. CODE ANN. § 41-41-73 (1997); N.D. CENT. CODE § 14-02.6-02 (1999); OKLA. STAT. tit. 21, § 684 (1998); S.C. CODE ANN. § 44-41-85 (1997); S.D. CODIFIED LAWS § 34-23A-27 (1997); TENN. CODE ANN. § 39-15-209 (1997).

100. 410 U.S. 113 (1973).

101. 505 U.S. 833 (1992).

102. 530 U.S. 914 (2000).

103. IDAHO CODE ANN. § 18-613 (1998); IND. CODE § 16-34-2-1 (1997); MICH. COMP. LAWS § 333.17016 (1997); MISS. CODE ANN. § 41-41-73 (1997); N.D. CENT. CODE § 14-02.6-02 (1999); OKLA. STAT. tit. 21, § 684 (1998); S.C. CODE ANN. § 44-41-85 (1997); S.D. CODIFIED LAWS § 34-23A-27 (1997); TENN. CODE ANN. § 39-15-209 (1997).

104. The four criteria identified earlier are: (1) vagueness in the language of the statute, (2) a specific reference to a violation of a woman's right to privacy due to a consent provision, (3) a more general violation of a woman's right to privacy by placing an undue burden on the woman by making it more difficult to obtain safe abortions prior to or post-viability, and (4) failing to include an exception to protect the mother's health or her life.

105. KAN. STAT. ANN. § 65-6721 (1998); MONT. CODE ANN. § 50-20-401 (1997); N.M. STAT. ANN. § 30-5A-3 (2000); UTAH CODE ANN. § 76-7-310.5 (1996).

106. OHIO REV. CODE ANN. § 2919.15 (1995) (repealed 1997), *amended by* OHIO REV. CODE ANN. § 2919.15.1 (2000) (upheld by the Sixth Circuit in *Women's Medical Prof'l Corp.*

statute has two sections, one accounting for pre-viability,[107] and the other accounting for post-viability, both of which use essentially the same language.[108] The Ohio statute criminalizing partial-birth abortions states:

> When the fetus that is the subject of the procedure is viable, no person shall knowingly perform a partial-birth procedure on a pregnant woman when the procedure is not 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.[109]

The Ohio statute also defines partial-birth abortion as:

> "Partial-birth procedure" means the medical procedure that includes all of the following elements in sequence: (a) Intentional dilation of the cervix of a pregnant woman, usually over a sequence of days; (b) In a breech presentation, intentional extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus from the body of the mother, or in a cephalic presentation, intentional extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother; (c) Intentional partial evacuation of the intracranial contents of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, intentional compression of the head of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, or performance of another intentional act that the person performing the procedure knows will cause the death of the fetus; (d) Completion of the vaginal delivery of the fetus.[110]

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v. Taft, 2003 U.S. App. LEXIS 25413); VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003) (Virginia's statute was rewritten, but the revised statute has not yet been challenged).

107. OHIO REV. CODE ANN. § 2919.151(B) (2000).

108. OHIO REV. CODE ANN. § 2919.151(C) (2000).

109. OHIO REV. CODE ANN. § 2919.151(B), (C) (2000).

110. OHIO REV. CODE ANN. § 2919.151(A)(3) (a)-(d) (2000).

It is immediately obvious that both the criminalizing statute and the definition of partial-birth abortion differ significantly from those in statutes that were overturned due to vagueness. Also, it should be noted that the statute clearly has health and life exceptions protecting the mother.

In *Women's Medical Professional Corp. v. Voinovich*,[111] which overturned the original Ohio partial-birth abortion statute, the court found two main flaws in the Ohio partial-birth abortion statute. By examining the two flaws, we can compare what is different now that the statute has been revised, and see why the statute is constitutional in its revised form.

The first reason the initial Ohio statute was overturned was because it lacked a health exception. The court ruled that the statute was unconstitutional because it did not allow a post-viability abortion "where necessary to prevent a serious non-temporary threat to a pregnant woman's mental health."[112] As explained earlier, both *Casey*[113] and *Stenberg*[114] ruled that a health exception is necessary for a statute limiting abortions to be constitutional. Ohio's revised statute, however, has corrected its original version, and it now contains a health exception. Regardless, the plaintiffs in *Women's Medical Professional Corp. v. Taft*[115] challenged the revised statute, in part, on the grounds that its health exception was inadequate.

When the revised Ohio statute[116] was challenged,[117] the court found the health exception to be adequate. In the opinion, Judge Ryan stated: "In our view, this [health] exception allows physicians to perform the partial-birth procedure whenever the procedure is necessary to protect the mother from significant health risks, including those which embody comparative safety concerns."[118] According to the court, the new health exception in the revised Ohio statute allows partial-birth abortions when necessary to protect the health of the mother and when the partial-birth abortion procedure is safer in a

111. 130 F.3d 187 (6th Cir. 1997).
112. *Id.* at 209.
113. 505 U.S. 833 (1992).
114. 530 U.S. 914 (2000).
115. 353 F.3d 436, 438 (6th Cir. 2003).
116. OHIO REV. CODE ANN. § 2919.151 (2000).
117. Women's Medical Prof'l Corp. v. Taft, 353 F.3d 436 (6th Cir. 2003).
118. *Id.* at 449.

given situation than a different abortion procedure.[119] However, Judge Ryan did put a caveat on the health exception when he stated:

> [T]he exception does not apply when the choice of methods is dictated purely by the preference of an individual physician. But when a woman's actual medical condition makes the partial-birth procedure necessary to prevent a significant health risk, the health exception applies. Likewise, the exception is triggered when other procedures, relative to the partial-birth procedure, would expose a woman to significant risks.[120]

Consequently, the health exception allows partial-birth abortions when they are the safest procedure in light of existing health concerns, but not when it is the mere preference of the practicing physician. Ultimately, the court found the health exception to be adequate and upheld the Ohio partial-birth abortion statute.

The second reason the original Ohio statute was overturned was because it placed an undue burden on a woman's right to obtain an abortion when the definition of partial-birth abortion in the statute included the most widely used D&E procedure.[121] Although the legislature tried to restrict the use of only the D&X procedure, the wording was vague and would have included the D&E procedure. However, the revised version of the statute takes two specific actions to avoid a repeat of this problem.

First, the revised statute specifically lists the steps involved in the banned procedure,[122] clearly defining the D&X procedure. The specific definition is similar to the one seen in the unchallenged statutes from Kansas, Montana, New Mexico, North Dakota, and Utah. By specifically listing the steps of the banned procedure, the Ohio legislature left no doubt as to which procedure was being banned. The second action taken by the Ohio legislature to avoid having the revised statute declared unconstitutional was to specifically list protected forms of abortions: suction curettage, suction aspiration, and the dilation and evacuation (D&E) procedures.[123] By doing so, the revised

119. *Id.*
120. *Id.*
121. OHIO REV. CODE ANN. § 2919.151(A)(3) (a)-(d) (2000).
122. *Id.*
123. OHIO REV. CODE ANN. § 2919.151(F) (2000).

statute did not create an undue burden because it specifically protected the D&E procedure and, thus, was not overbroad.

By specifically addressing the two areas that caused the original partial-birth abortion statute to be overturned, Ohio's legislature was able to revise the statute, making it constitutional. Given that the new statute was challenged and upheld, it offers some guidance as to what is required in a partial-birth abortion statute to avoid imposing an undue burden and to present an adequate health exception.

An example of a statute that was revised and then struck down a second time is Virginia's revised partial-birth abortion statute.[124] Virginia's original partial-birth abortion statute was overturned in 1999[125] and was then revised in 2003.[126] The revised statute was struck down in 2004.[127] The court held the statute facially invalid under the Fourteenth Amendment for a number of independent reasons, namely:

> (1) [I]t lacks an exception to protect a woman's health, (2) it places an undue burden on a woman's right to decide to have an abortion, (3) its life exception is inadequate, (4) it bans—in the absence of a compelling state interest—other safe gynecological procedures such as those used in certain miscarriage presentations, and (5) it is unconstitutionally vague.[128]

The Fourth Circuit affirmed the summary judgment on this basis, stating that the judgment of the district court must be upheld because of the Court's unequivocal holding in *Stenberg v. Carhart* that "any ban on partial-birth abortion must include an exception for the health of the mother in order to be constitutional."[129]

The original Virginia statute had been struck down on three grounds: it failed to provide an exception for the mother's health, it was unconstitutionally vague, and it placed an undue burden on the woman.[130] Because the legislature failed to pay close attention to

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124. VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003).
125. Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999).
126. VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999), *amended by* 18.2-71.1 (2003).
127. Richmond Med. Ctr. for Women v. Hicks, 301 F. Supp. 2d 499 (2004).
128. *Id.* at 513-17.
129. Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005) (quoting Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376, 377 (4th Cir. 2000)).
130. Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337 (4th Cir. 1999).

these three problems when it revised the statute, the revised statute likewise failed to meet constitutional muster, even though the revised version did appear to be an improvement over the original.

A key reason for overturning the original Virginia statute was the absence of an exception to protect the mother's health.[131] The relevant section of the revised statute states:

> This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother, so long as the physician takes every medically reasonable step, consistent with such procedure, to preserve the life and health of the infant. A procedure shall not be deemed necessary to prevent the death of the mother if completing the delivery of the living infant would prevent the death of the mother.[132]

While the revised statute obviously contains an exception for the mother's life, the statute appears to be lacking an exception to protect the mother's health. Nowhere is the word "health" used with respect to the mother, even though it references the health of the infant. The exclusion of a health exception is peculiar given that the original statute was overturned, in part, because the statute lacked a health exception. Given the mandates of *Casey*[133] and *Stenberg*,[134] one would have expected the legislature to have added an exception to protect the mother's health. Its failure to do so was indeed a fatal flaw in the revised statute.

Because the Fourth Circuit had declared the statute facially unconstitutional, the court did not analyze the rest of the statute.[135] However, one member of the court disagreed.[136] Part of his dissent highlights some of the things that the legislature did "right" in its revision and hence, may provide guidance for other legislators in the future. As noted in Judge Niemeyer's dissent, the legislature's effort to address these issues in the revision was successful. For example, the revised statute defining "partial-birth infanticide" states:

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131. Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005).
132. VA. CODE ANN. §18.2-71.1(E) (2003).
133. 505 U.S. 833 (1992).
134. 530 U.S. 914 (2000).
135. *See, e.g.*, Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005).
136. Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619 (4th Cir. 2005) (Niemeyer, J., dissenting).

> For the purposes of this section, "partial-birth infanticide" means any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed.
>
> The term "partial-birth infanticide" shall not under any circumstances be construed to include any of the following procedures: (i) the suction curettage abortion procedure, (ii) the suction aspiration abortion procedure, (iii) the dilation and evacuation abortion procedure involving dismemberment of the fetus prior to removal from the body of the mother, or (iv) completing delivery of a living human infant and severing the umbilical cord of any infant who has been completely delivered.[137]

Clearly the Virginia legislature attempted to make the definition more specific and to avoid the ambiguities present in their former definition.[138] Additionally, the statute defines "human infant who has been born alive,"[139] as well as "substantially expelled or extracted from its mother."[140] By clarifying these key terms, the Virginia legislature made a conscious effort to avoid the significant

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137. VA. CODE ANN. § 18.2-71.1(B) (2003).

138. VA. CODE ANN. § 18.2-74.2 (1997) (repealed 1999).

139. VA. CODE ANN. § 18.2-71.1(C) (2003).
> For the purposes of this section, 'human infant who has been born alive' means a product of human conception that has been completely or substantially expelled or extracted from its mother, regardless of the duration of pregnancy, which after such expulsion or extraction breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

Id.

140. VA. CODE ANN. §18.2-71.1(D) (2003).
> For purposes of this section, 'substantially expelled or extracted from its mother' means, in the case of a headfirst presentation, the infant's entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant's trunk past the navel is outside the body of the mother.

Id.

ambiguities present in the original version of the state partial-birth abortion statute.

The district court, however, had found terms such as "from its mother," "from the body of the mother," "outside the body of the mother," and "involving dismemberment of the fetus prior to removal from the body of the mother" unconstitutionally vague. But on appeal, the dissenting judge reiterated that a statute is unconstitutionally vague if it "fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits."[141] Applying that standard, the dissenting judge found it hard to imagine that any person of normal intelligence would not be able to understand what these words mean.[142] Thus, Virginia's revision at least appeared to clarify the statute to the point that it was no longer constitutionally ambiguous.

The legislature also attempted to address the claim that it presented an undue burden by including the D&E procedure in the ban. By including specific references to protected forms of abortion, including the D&E procedure, the revised Virginia statute arguably escapes the problem of creating an undue burden. Similar to what Judge Ryan found in *Women's Medical Professional Corp. v. Taft*,[143] the Virginia statute is not overbroad because it specifically excludes the D&E procedure from the statute, and the D&E procedure is the only one similar enough to the banned form of abortion to potentially create an undue burden. Unfortunately, the court never addressed this issue because of the significance of the lack of a health exception.

IV. THE FEDERAL PARTIAL-BIRTH ABORTION BAN

As the above legal battles were being waged in the nation's courts, a similar series of battles were taking place in the U.S. Congress, as pro-life forces struggled to pass a ban on partial-birth abortions. After President Clinton's vetoes of the partial-birth abortion bans passed by the 104th and 105th Congresses, each subsequent Congress has at least considered a similar bill.

In the 106th Congress, the Senate passed the Partial-Birth

141. Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 642 (4th Cir. 2005) (quoting Chicago v. Morales, 527 U.S. 41, 56 (1999)).

142. *Id.* The court further pointed out that even the plaintiff's own medical witness had no trouble answering questions about the application of the statute. Had it been ambiguous, the doctor would have asked for clarification rather than simply answering questions about the statute. *Id.*

143. 353 F.3d 436, 446 (6th Cir. 2003).

Abortion Ban Act of 1999, S. 1692, by a vote of 63-34.[144] A very similar piece of legislation, the Partial-Birth Abortion Ban Act of 2000, H.R. 3660, was approved by the House a short time later by a vote of 287-14.[145] When S. 1692 came under consideration by the House, it was passed without objection after its language had been modified to read identically to that of H.R. 3660.[146] However, after conferees had been appointed, formal action on the matter ceased, and the bill's course hit a dead end.[147] The issue arose again in the 107th Congress when the House passed the Partial-Birth Abortion Ban Act of 2002 by a vote of 274-151.[148] The bill was not, however, considered by the Senate, and suffered a fate similar to that of its direct predecessor.[149]

These two prospective measures were very similar in nature. Each used a definition of "partial-birth abortion" based on the concept of partially delivering a living fetus for the purpose of ending its life, then intentionally engaging in a course of action that leads to this result.[150] Also, both pieces of legislation outlined similar repercussions for violations of the ban: the levying of fines and the sentencing of prison terms of up to two years in duration.[151] Furthermore, both bills contained structural similarities that placed them into a category with those vetoed by President Clinton. For example, while providing an exception for cases where the mother's life was determined to be contingent upon the performance of a partial-birth abortion, each neglected to include an exception for cases where merely the protection of the mother's health was at stake.[152] Supporters of the measures claimed these omissions to be non-issues, based on the position, commonly espoused by opponents of partial-birth abortion, that such procedures are never necessary to protect maternal health and, in fact, pose serious risks.[153] However, the Court

144. *See* Congressional Research Service Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law* at 6, *available at http://www.law.umaryland.edu/marshall* /crsreports/crsdocuments/RL30415b.pdf.

145. *See id.* at 7.

146. *See id.*

147. *See id.* at 6-7.

148. *See id.* at 7.

149. *See id.*

150. *See* Congressional Research Service Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law* at 7, *available at* http://www.law.umaryland.edu/marshall/ crsreports/crsdocuments/RL30415b.pdf.

151. *See id.*

152. *See id.*

153. There is dissent in the medical community about the advantages of D&X procedures. For example, *see* Jeffery Rosen, *TRB from Washington; Legal battle over partial-*

has held that such a provision must be included in any regulation of this practice, and opponents of the ban propose their own evidence that partial-birth abortions are medically advantageous in some situations.[154]

During the 108th Congress, a ban on partial-birth abortion was finally enacted into law.[155] The measure passed in the House by a vote of 281-142 and by 64-34 in the Senate,[156] and was signed into law by President George W. Bush on November 5, 2003.[157] The Partial-Birth Abortion Ban Act of 2003 was very similar to the two bills preceding it, using a coinciding definition of the procedure in question and providing for the same penalties to be inflicted upon violators of the legislation.[158] Moreover, this measure, like the two before it, provided an exception for cases where the life of the mother was at issue, but failed to do so for situations of endangered health.[159]

Paralleling the perspectives on the previous ban attempts, supporters of the measure claimed that a health exception was unnecessary because of the lack of necessity associated with partial-birth abortions and the potential risks they pose. Opposition groups, on the other hand, offered their own medical evidence as to the necessity of the procedure under certain circumstances. Based on this and other points of contention,[160] a firestorm of controversy

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birth abortions, New Rep., Nov. 29, 1999, at 6. Referring to the decision in *Casey*, Rosen outlines how one judge "deferred to a Wisconsin judge who concluded, based on the testimony of one Dr. Giles, that the D&X procedure is never medically necessary to preserve a woman's health." *Id.*

154. *See* Carol Cruzan Morton, *Doctors Wary of Partial-Birth Abortion Law*, Boston Globe, Oct. 28, 2003, at C3.

> The bill . . . describes the D&X procedure as risky and medically unjustified—claims most doctors dispute. A D&X, according to the American College of Obstetricians and Gynecologists, "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances, can make this decision."

Id. (citation omitted).

155. *See supra* note 144 at 7.

156. *Id.*

157. *Id.*

158. *See id.*

159. *See supra* note 144 at 7.

160. *See* Gloria Feldt, The War on Choice: The Right-Wing Attack on Women's Rights and How to Fight Back (Bantam Books 2004). Feldt argues that partial-birth abortion bans are just the first step down the road towards totally outlawing abortion. Further, she sees the war against abortion in all forms as a backlash against the steps made by American women toward equality and freedom, as the ability to separate sex and childbearing is an essential step in creating equality between the sexes. *See also* Steven Sawicki, *And Baby Makes...Too Many?* 9 E MAGAZINE: THE ENVIRONMENTAL MAGAZINE 28 (1998). Sawicki offers evidence of the

surrounding this Act exploded directly following its signing by President Bush. Within two days, its enforcement had been prevented by court decisions in California, New York, and Nebraska.[161] In the subsequent months, a number of lawsuits have been decided with the conclusion that the Partial-Birth Abortion Act of 2003 is, in fact, unconstitutional.[162] The Nebraska ruling was affirmed by the Eighth Circuit Court of Appeals in 2005,[163] and is now headed to the Supreme Court, with oral arguments likely to begin in 2006.[164] Part V will explain why the Court should finally put the nails in the coffin of this ill-conceived piece of federal legislation.

V. THE INHERENT FLAWS OF THE PARTIAL-BIRTH ABORTION STATUTE

As noted previously, Congress had every opportunity to draft a constitutional ban on certain types of partial-birth abortions. Had it carefully studied the Court's ruling in *Sternberg v. Carhart*,[165] where the Court struck down a virtually identical state partial-birth abortion law,[166] Congress could have avoided duplicating the mistakes made by the Nebraska state legislature. It appears that the drafters of the federal statute ignored the clear message from the Court, as well as other lower federal courts, that subsequent to viability, any prohibition on abortion must include an exception "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[167] Instead of respecting this long-standing mandate of the Court, Congress chose to hold hearings about the procedure and include congressional findings in the statute.[168] These findings were contrary to what numerous courts had found regarding the need for the partial-birth abortion procedure in some cases to protect the health of the mother. Specifically, the PBABA findings state that partial-birth

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impending population crisis and argues that regulations detrimental to family planning techniques, including limitations on the right to abortion, directly feed into this problem.

161. *See Abortion Ban Blocked Again*, WASH. POST, Nov. 7, 2003, at A2.

162. *See supra* note 144 at 8.

163. Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (U.S. Feb. 21, 2006) (No. 05-380).

164. Bob Egelko, *Justice Dept. Seeks to Have Abortion Ban Reinstated; Three Federal Judges have Already Ruled Prohibition Unconstitutional*, S.F. CHRON., Oct. 21, 2005, at A3.

165. 530 U.S. 914 (2000).

166. *See supra* notes 58-68 and accompanying text, for a more detailed discussion of this case.

167. 530 U.S. 914, 930 (quoting 505 U.S. at 879, which quotes Roe, 410 U.S. at 164-65).

168. *See* Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, § 2(1)-(2), 117 Stat. 1201 (2003).

abortion is "a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[169] They further state that Congress need not accept the Court's findings regarding the health exception because the congressional findings determine that the health exception is not necessary in this situation and the Court should give these congressional findings great deference.[170] Congress included these findings in the PBABA despite the testimony in their own record that these conclusions were contrary to the positions of the major medical organizations.[171]

In the first appellate ruling striking down the PBABA, *Carhart v. Gonzolas*,[172] the Eighth Circuit Court of Appeals dismissed the government's reliance on the congressional findings that a partial-birth abortion is almost never medically necessary. The court agreed with a recent Fourth Circuit case that "*Stenberg* established the health exception requirement as a *per se* constitutional rule."[173] The Eighth Circuit continued, "this rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a 'partial-birth statute' lacking a health exception."[174] This unanimous Eighth Circuit decision also stated that the appropriate question is whether "substantial medical authority" supports the medical necessity of the banned procedure, and that when there is no clear consensus in the medical community, "the Constitution requires legislatures to err on the side of protecting

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169. *Id.*

170. *Id.*

> However, under well-settled Supreme Court jurisprudence, the United States 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. Rather, the United States Congress is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to 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.

Id. at § 2(3)-(13).

171. *See, e.g.*, 149 Cong. Rec. S11454-01, 11456 (Daily ed. Sept. 15, 2003) (Letter from Am. Pub. Health Ass'n, to the House of Representatives (Mar. 31, 2003)) (referring to partial-birth abortions as "medically accepted" procedures).

172. 413 F.3d 791 (2005). This case was initially filed under the name *Carhart v. Ashcroft*.

173. *Id.* at 796 (citing Richmond Med. Ctr. v. Hicks, 409 F.3d 619, 625-26 (2005)). This Fourth Circuit decision struck down a Virginia statute that was very similar to the federal PBABA.

174. *Carhart*, 413 F.3d at 796.

women's health by including a health exception."[175] As the court noted, even one of the government's own witnesses testified that there was a "body of medical opinion," including positions taken by the American College of Obstetrics and Gynecologists, that the procedures prohibited by the PBABA may sometimes be medically necessary.[176] As the Eighth Circuit concluded, the Court has already clearly spoken on this matter. The PBABA must be struck down simply because it does not provide an exception for the mother's health.[177] Support for strength of this precedent and the necessity of striking down the law comes from the treatment of the absence of a medical exception in similar state laws. As noted above, courts have struck down twelve state laws for the lack of a health exception.[178] Further support comes from the district court holdings with respect to the PBABA itself.

In *Carhart v. Ashcroft*,[179] the district court case from which this Eighth Circuit Appeal was taken, one of the grounds on which the lower court found the PBABA unconstitutional was the lack of a health exception.[180] Likewise, the district court in *Planned Parenthood Federation of America v. Ashcroft*, found that *Stenberg* required a health exception.[181] Although the court noted that it did not need to address this issue in light of its previous findings, it decided to address the issue anyway in light of all the effort the parties put into arguing the case.[182] After an extensive review of the evidence presented by both parties, as well as the evidence on which Congress made its findings, the court ruled that, in applying *Stenberg*, it really had no option but to find that the lack of an exception for the mother's health rendered the statute unconstitutional.[183] As to the extent of deference that should be given to congressional findings, the court stated that, "Congress has not drawn reasonable inferences based on substantial evidence, and its findings are therefore not entitled to

175. *Id.*

176. *Id.* at 803 (citing Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1009 (2005)).

177. Of course, while it seems clear that if the make up of the Court were the same as it was when *Stenberg* was decided, the law would be upheld, the replacement of O'Connor does create some uncertainty. As both proponents and opponents of the law concede, the outcome of this case may hinge on the extent to which the newest justices feel compelled to follow precedent. *See* Robin Toner & Adam Liptak, *Court in Transition: Abortion; In New Court Roe May Stand, So Foes Look to Limit Its Scope*, N.Y. TIMES, July 10, 2005, at 1.

178. *See supra* Part III.A.4.

179. 331 F. Supp. 2d 805 (D. Neb. 2004).

180. *Id.*

181. 320 F. Supp. 2d 957 (D. Cal. 2004).

182. *Id.*

183. *Id.*

substantial deference."[184]

Finally, while the third district court to consider the PBABA, *National Abortion Federation v. Ashcroft*,[185] has not yet made a definitive ruling on the constitutionality of the PBABA, it did issue a temporary restraining order prohibiting enforcement of the Act, finding that it was substantially likely that the plaintiffs would be able to succeed on the merits of the case. In that case, the plaintiffs had argued that, among other issues, the statute was unconstitutional because it did not contain an exception to protect the woman's health.[186]

Thus, a review of both the state court holdings regarding similar state statutes and the federal cases at the district and circuit court levels considering the constitutionality of the PBABA make it clear that the absence of an exception for the woman's health alone is sufficient to render this statute unconstitutional. But the statute is also vulnerable to challenge on other grounds.

Because the lack of the mother's health exception was sufficient to uphold the lower court's decision to strike down the PBABA, the Eighth Circuit did not address any other potential defects in the statute.[187] It is highly likely that the Court will likewise resolve the case simply by applying the precedent from *Stenberg* with respect to the lack of a health exception.[188] However, in the interests of providing a thorough evaluation of the statute, this article will also address another potential flaw in the PBABA: that it places an undue burden on women.

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184. *Id.* at 1014.

185. 330 F. Supp. 2d. 436 (S.D.N.Y. 2004).

186. But see *Nat'l. Abortion Federation v. Ashcroft*, a subsequent ruling in the case where the district court refused to grant the plaintiff's motion for summary judgment on the grounds that the failure to include an exception for the mother's health made the PBABA unconstitutional as a matter of law. Unlike other courts that had said the absence of the exception made the statute unconstitutional as a matter of law, this district court believed that the constitutionality of the Act had to be judged according to *Stenberg's* requirement that abortion regulations had to include a maternal health exception if a significant body of medical opinion believed a procedure brought with it greater safety advantages, and in light of the congressional findings that there was no evidence that the procedure never offered such safety advantages, a question of fact had been created. *Id.*

187. "Because the Act does not contain a health exception, it is unconstitutional. We therefore do not reach the district court's conclusion of the Act imposing an undue burden on a woman's right to have an abortion." *Carhart*, 413 F.3d at 803-04.

188. As one editorialist noted, the opinion was a model of clarity and restraint, with the author of the opinion sticking very close to the precedent of *Stenberg*. *See Real Judicial Restraint*, ST. LOUIS POST-DISPATCH, July 12, 2005, at B6. This approach should make it easy for the Court to affirm the appellate court's ruling on the grounds that it is simply following the well-established precedent.

The question of whether the PBABA places an undue burden on a woman's right to choose whether to terminate her pregnancy has been addressed by the district courts in both *Carhart v. Ashcroft* and *Planned Parenthood Federation of America v. Ashcroft.*[189] Likewise, as the cases discussed in Part III.A.3[190] reveal, the primary reason for striking down many state partial-birth abortion bans has been that they place an undue burden on the woman's right to decide whether to terminate her pregnancy.

As Part III.A.3 explains, courts have found that a number of these laws create an undue burden on a woman's Fourteenth Amendment rights in a variety of ways. Some laws have been found to be overly broad when they prohibit physicians from being able to perform otherwise safe and constitutional procedures. Others fail to distinguish between pre- and post-viability procedures, or are so ambiguously worded as to make a physician reluctant to use certain preferable procedures because of a fear that they will violate the statute.[191]

Most of the courts striking down these laws, as well as the three district courts that have enjoined the PBABA, have looked to the Court's decision in *Stenberg* for guidance in determining what constitutes an undue burden. In *Stenberg*, the Court said that a law creates an undue burden when it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[192] The Court found the statute at issue in that case placed an undue burden on a woman's right to choose because the statute required the delivery into the vagina of "a living unborn child, or substantial portion thereof,"[193] and the Court did not see how that language distinguished the prohibited intact D&E from the lawful D&E procedure.[194] Thus, it placed an undue burden on the woman's right to choose because the physician may believe that he cannot risk undertaking the procedure that would be best for the mother because it might be deemed to fall under the Act's prohibition.[195]

The government, however, believed that the more specific language in the PBABA saved it from the constitutional problem of

189. *See supra* notes 172-84 and accompanying text.
190. *See supra* notes 51-55 and accompanying text.
191. *Id.*
192. *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992)).
193. NEB. REV. STAT. § 28-326(9) (2004).
194. *See Stenberg*, 530 U.S. at 921.
195. *Id.*

the Nebraska statute.[196] In *Planned Parenthood Federation of America v. Ashcroft*, the government argued that the language distinguishes intact D&Es from other procedures because the specific act to kill the fetus must happen at a particular point and place in time. According to the government, "the fact that during the course of a D&E or induction, some 'overt act' is taken to kill a living fetus . . . does not render D&E or induction unlawful" because the overt act characteristic of each of the other procedures does not occur.[197]

The district court, however, did not agree with this argument. According to the testimony at the trial:

> In any D&E or induction, if the fetus has been brought to the point "where any part of the fetal trunk past the navel is outside the body of the mother" or "the entire fetal head is outside the body of the mother," a physician may then, in order to complete the abortion in the safest manner, need to perform an "overt act," short of completing delivery, that the physician knows the fetus cannot survive, if it is still living, and that "kills" the fetus.[198]

In light of the medical testimony presented to it, the court concluded that any abortion performed using the D&E or induction method could violate the Act when the physician was trying to perform it in the safest manner.[199] Thus, a physician would often have to worry that he might, to best serve his patient, violate the PBABA.[200] Also, the government claimed that the statute precluded only the intact D&E procedure, but the court was concerned that Congress did not simply state this in the statute.[201] In fact, arguably Congress purposefully ignored *Stenberg*, as there was evidence in the congressional record that some opponents had pointed out the over-breadth problem when

196. The government argued that the PBABA differed from the Nebraska statute in *Stenberg* in three respects: (1) the Act requires delivery of the fetus outside of the mother; (2) the Act specifies the required protruding fetal parts; and (3) the Act proscribes an overt act distinct from the completion of the delivery itself, and consequently, the law will not prohibit many of the lawful procedures prohibited by the Nebraska law, and therefore it does not pose an undue burden on a woman's right to choose. *Planned Parenthood*, 320 F. Supp. 2d 957, 970 (N.D. Cal. 2004).

197. *Id.* at 971.

198. *Id.* at 972-73 (citations omitted).

199. *See id.*

200. *Id.* at 974.

201. *Id.*

the law was being considered.[202] In light of these facts, the court found that the PBABA suffered from similar flaws as the statute in *Stenberg*, and imposed an undue burden on a woman's right to choose.[203]

In *Carhart v. Ashcroft*, the district court also found the PBABA to be unconstitutional because in limiting physicians' abilities to choose the safest and best procedures for their patients, the law placed an undue burden on the woman.[204] There was significant evidence in the record that in some cases, the best choice of medical procedures would be a method that was banned by the law. That method might be safer, more convenient, or less painful, and to prohibit the physician from exercising his best medical judgment in these situations placed an undue burden on the woman's right. While the appellate court did not need to address this second constitutional problem, if it had, it would have most likely found, consistent with the Court's holding in *Planned Parenthood*, that the law does indeed impose an undue burden on women. Such a holding is consistent with the undue burden cases involving state laws discussed above in Part III.A.3.

VI. CONCLUSION

Based on the foregoing, it is clear that the federal Partial-Birth Abortion Ban Act is unconstitutional. The district courts and the single circuit court of appeals that have examined the statute have done a very thorough and fair job of analyzing the evidence in this case, and have come to the only conclusion that can be justified under *Stenberg*: that the PBABA is unconstitutional because it fails to include an exception for the mother's health. It is also highly likely that the statute is unconstitutional because it places an undue burden

202. *Id.* at 975.

203. *Id.* The statute was also found to be unconstitutional because it failed to distinguish between pre-viability and post-viability in violation of *Roe*. *Id.* That same court also found the statute to be unconstitutionally vague. It noted that the term "partial-birth abortion" has no medical meaning, and several of the terms in the Act are ambiguous, making it unclear exactly which procedures would be banned under the Act. Therefore, the statute is unconstitutionally vague. *Id.* at 976-78. Illustrative of the vagueness of the Act cited by the Court is the term "living human fetus," which says nothing about viability, which is required by *Casey* and *Roe*. *Id.* at 977. Thus, the district court most clearly demonstrated the flawed construction of the PBABA.

204. Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1030 (D. Neb. 2004) (because the ban reaches the D&E abortion method used by physicians like Dr. Carhart, the law is an undue burden and unconstitutional.).

on the mother's right to choose.

Instead of attempting to use creative "findings" to pass legislation, if Congress wishes to ban a very specific type of post-viability abortion, it should examine the courts' rulings in challenges to both state and federal partial-birth abortion statutes and revise the law in accordance with these opinions. At a minimum, statutes need to add an exception for the mother's health. Secondly, statutes must include a medical definition of the procedure that the legislature wants to prohibit.[205] Such a definition will ensure that the law is not seen as unconstitutionally vague for not letting doctors know which procedures are banned and being subject to interpretation in such a way that it would ban lawful procedures.[206] The law also needs to specify that the ban applies to only post-viability procedures so as to once more prevent it from being viewed as overly broad and therefore placing an undue burden on women. By following this course of action, a constitutional, limited ban on certain types of partial-birth abortions may be possible.[207]

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205. All drafters would need to do is look to the Ohio Partial-birth Abortion Statute as a model, specifically, OHIO REV. CODE ANN. § 2919.151(A)(3) (2000).

206. OHIO REV. CODE ANN. § 2919.151(F) (2000) provides a model for how to avoid this problem: simply list the procedures that are not prohibited. If the drafters are indeed interested in banning a specific procedure, and are not trying to undermine the basic holding of *Roe*, then they would include such a provision.

207. The caution of this prediction is based on a potential problem that the Court has yet to address, i.e., whether Congress really has the authority to limit abortion procedures in the first place. As Professor Allan Ides pointed out in *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 Const. Com. 441 (2004), this statute is justified as an exercise of power under the Commerce Clause, but in light of the increasingly more stringent definition of "affecting interstate commerce" being used by the Court since *United States v. Lopez*, 514 U.S. 549 (1995), it is difficult to see how regulating types of abortions constitutes a regulation of interstate commerce. It appears, at least on the surface, to be a regulation of a non-economic matter that is not a part of a larger regulation of some economic matter, and therefore should not be subject to congressional regulation.