The Partial-Birth Abortion Ban Acts of 1995, 1997, and 2003

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In the 2007 case *Gonzales v. Carhart*,[1] a 5-4 majority of the United States Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003. This marked the first time that the Court upheld an abortion ban that lacked an exception to protect a pregnant woman's health. In reaching its decision in *Gonzales*, the Court notably reversed the decisions of six lower federal courts. The Court also departed from the precedent it had established in the 1973 case *Roe v. Wade*.[2] In *Roe,* the Court held that abortion restrictions and prohibitions must include exceptions to protect a pregnant woman's life *and* health.[3] The Court had reaffirmed this tenet of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)*,*[4] *Stenberg v. Carhart* (2000),[5] and as recently as the 2006 case *Ayotte v. Planned Parenthood of Northern New England.*[6]

This paper will analyze the legislation that led to *Gonzales v. Carhart*, namely the Partial-Birth Abortion Ban Acts of 1995, 1997, and 2003. This paper will first summarize the relevant legal and legislative developments that occurred prior to these bans, beginning with the Supreme Court's landmark 1973 decision in *Roe v. Wade*. It will then investigate the political context of each ban, focusing on how forces exterior to Congress impacted each piece of legislation (e.g., assessing how legislators crafted the 2003 ban to respond to the *Stenberg* decision). This paper will also examine each ban's movement through Congress, highlighting the dominant issue frames that emerged during each ban's consideration and the significant amendments that were proposed to each ban. Additionally, this paper will analyze the political gains that anti-abortion

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[1] *Gonzales v. Carhart,* 550 U.S. 124 (2007).
[2] *Roe v. Wade*, 410 U.S. 113 (1973).
[3] *Id.* at 164-65.
[4] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
[5] *Stenberg v. Carhart,* 530 U.S. 914 (2000).
[6] *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

activists made during the "partial-birth abortion" debate. Finally, it will assess the factors that facilitated these gains.

Medical Background

The phrase "partial-birth abortion" is a political, non-medical term that usually[7] refers to a procedure called intact dilation and evacuation (intact D&E).[8] Although this term engenders images of viable, "full-term babies" who are "crushed" just as they are "emerging into the world" at "birth,"[9] the intact D&E procedure is usually performed in the latter stages of the second trimester on a nonviable[10] fetus.[11] Moreover, while the intact D&E procedure has received considerable media and political attention, it should be noted that it is rarely used; in its 2000 survey of all known abortion providers in the U.S., the Guttmacher Institute estimated that the intact D&E procedure was performed 2,200 times, accounting for only 0.17 percent of all the abortions performed that year.[12]

During a typical intact D&E procedure, a doctor dilates the pregnant woman's cervix and partially extracts the fetus, leaving the fetus's head inside the pregnant woman's cervix. The

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[7] Definitions of "partial-birth abortion" have sometimes been broad or vague enough to include the non-intact D&E procedure. For instance, in *Stenberg v. Carhart,* the Supreme Court ruled that a Nebraska law which banned "partial-birth abortion" also covered the non-intact D&E procedure. *Stenberg v. Carhart,* 530 U.S. 914 (2000) at 939. Nonetheless, the intact D&E procedure is "the procedure most commonly equated with partial-birth abortion." Jill R. Radloff. "Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures." 83 *Minnesota Law Review* (1999) at 1556. [hereinafter Radloff].

[8] The medical community has referred to this procedure by other names, including "dilation and extraction" (D&X). *Gonzales v. Carhart*, 550 U.S. 124 (2007) at 1621.

[9] William Saletan. *Bearing Right: How Conservatives Won the Abortion War.* Berkeley, CA: University of California Press (2004) at 233. [hereinafter Saletan].

[10] In *Roe v. Wade*, the Supreme Court defined fetal viability as "the interim point at which the fetus becomes . . . potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. 113 (1973) at 160. Although the point of fetal viable is different with every pregnancy, "fetal viability is thought to hover at about 24 weeks of pregnancy." Jessica Waters. Draft of "*Gonzales v. Carhart*: The Implications of the 'Partial Birth Abortion Ban' on Reproductive Rights and Women's Health," in Lois Duke Whitaker*, Women in Politics: Outsiders or Insiders?* (5th Edition). New York: Prentice Hall (2010) at footnote 21. [hereinafter Draft of Waters article].

[11] R. Alta Charo. "The Partial Death of Abortion Rights," 356 *New England Journal of Medicine* (2007) at 2125. [hereinafter Charo]; Tracy A. Weitz and Susan Yanow. "Implications of the Federal Abortion Ban for Women's Health in the United States." 16 *Reproductive Health Matters* (2008) at 101 [hereinafter Weitz & Yanow].

[12] Lawrence B. Finer and Stanley K. Henshaw. "Abortion Incidence and Services in the United States in 2000." 35 *Perspectives on Sexual and Reproductive Health (*2003) at 12.

doctor then uses an instrument such as medical scissors to puncture the base of the fetal skull, and s/he evacuates the fetus's intracranial contents using a suction tube. The doctor subsequently removes the otherwise intact fetus from the pregnant woman's birth canal.[13] This procedure is distinct from the more commonly used non-intact D&E procedure, during which the fetus is dismembered inside the uterus and removed in pieces.

As the Court stated in *Gonzales v. Carhart*, medical experts disagree on 1) whether the intact D&E procedure is the safest abortion method in some circumstances, and 2) on whether the procedure is ever necessary to preserve a woman's health.[14] In *Gonzales,* the Court noted that some medical experts testified during trial that the intact D&E procedure "decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments" than alternative procedures (e.g., non-intact D&E).[15] These experts also testified that the intact D&E procedure is safer than alternative procedures "because it reduces the risk that fetal parts will remain in the uterus,"[16] "a condition that can cause infection, hemorrhage, and infertility."[17]

In her dissenting opinion in *Gonzales*, Justice Ruth Bader Ginsburg stated that experts had testified at trial that the procedure was safer because it took less time to perform, thus potentially decreasing "bleeding, the risk of infection, and complications relating to anesthesia."[18] These experts also testified that intact D&E may be the safest abortion procedure for 1) women with certain medical conditions, such as "uterine scarring, bleeding disorders, heart disease, or compromised immune systems;" 2) women with certain pregnancy-related medical

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[13] Charo at 2126.
[14] *Gonzales v. Carhart*, 550 U.S. 124 (2007), at 1636.
[15] *Id.* at 1635.
[16] *Id.*
[17] *Id.* at 1645 (Ginsburg, J. dissenting).
[18] *Id*.

conditions, "such as placenta previa and accreta;" and 3) women "carrying fetus with certain abnormalities, such as severe hydrocephalus."[19]

Contrary to the claims of these medical experts, other experts testified before Congress and in the federal district courts that the non-intact D&E procedure was always a safe alternative to intact D&E. They further argued that the aforementioned touted health advantages of the intact D&E procedure were not supported by any scientific study and were merely based on "speculation."[20] Perhaps even more significantly, in a brief they submitted in *Stenberg v. Carhart*, the Association of American Physicians and Surgeons et al. argued that the intact D&E procedure actually created certain health risks, such as "cervical incompetence caused by [overdilation], injury caused by conversion of the fetal presentation, and dangers arising from the 'blind' use of instrumentation to pierce the fetal skull while lodged in the birth canal."[21]

LEGAL AND LEGISLATIVE BACKGROUND TO THE BANS

Since the Partial-Birth Abortion Ban Acts of 1995, 1997, and 2003 all sought to proscribe the intact D&E procedure without providing an exception to protect a pregnant woman's health, it is necessary to review the Supreme Court's jurisprudence on the health exception. In the landmark 1973 case *Roe v. Wade*, the Supreme Court considered a Texas law that prohibited all abortions except those necessary to save a pregnant woman's life. The Court struck down the Texas law, finding that the constitutional right to privacy—which it stated was grounded in the Fourteenth Amendment—protected a woman's decision to procure an abortion.[22] The Court

[19] *Id.*
[20] *Id.* at 1635.
[21] *Stenberg v. Carhart,* 530 U.S. 914 (2000) at 933.
[22] *Roe v. Wade*, 410 U.S. 113 (1973) at 153.

added, however, that the "privacy right involved" was not "absolute," and it stipulated distinctive legal requirements for sanctioning abortion based upon the trimester of a woman's pregnancy.[23]

The Court held that, during the first trimester of woman's pregnancy, the "abortion decision…must be left to the medical judgment of the pregnant woman's attending physician."[24] The Court held that, in the second trimester, the State had an interest in protecting the "health of the mother" and could therefore regulate abortion "in ways…reasonably related to maternal health."[25] In the third trimester, the State had an "interest in the potentiality of human life" and could thus regulate or prohibit abortion. However, the Court stated that such regulations or prohibitions must include exceptions to protect the pregnant woman's life *and* health. Specifically, the Court wrote that, in the third trimester, the State could "regulate" or "even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[26]

In *Doe v. Bolton*, the 1973 companion case to *Roe*, the Court considered a Georgia statute that outlawed abortions except in cases of serious and permanent fetal deformities, rape, when the pregnant woman's life is endangered, or when the pregnancy "would seriously and permanently injure" the woman.[27] The Georgia statute also stipulated that the woman seeking an abortion had to be a Georgia resident, that three physicians (including the abortion provider) must certify that the abortion was justified under the law, and that a hospital "abortion committee" must authorize the procedure.[28]

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[23] *Id.* at 154.
[24] *Id.* 164.
[25] *Id.*
[26] *Id.* at 164-65.
[27] *Doe v. Bolton,* 410 U.S. 179 (1973) at 183.
[28] *Id.* at 184.

In *Doe,* the Court held that the Georgia law violated the Fourteenth Amendment, and it specified the factors a doctor could consider when determining whether an abortion was necessary to protect a pregnant woman's health. The Court wrote, "…medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient."[29] The Court concluded that pregnant women seeking an abortion would benefit if their attending physicians had the wide discretion they needed to make their "best medical judgment."[30]

Congressional Responses to *Roe* and *Doe*

In the mid-1970s, many anti-abortion congressmen (especially House representatives) responded to the *Roe* and *Doe* decisions by introducing constitutional amendments that would directly or indirectly ban all abortions.[31] While anti-abortion legislators were aware that these amendments would not be enacted, they served as a vehicle through which legislators could symbolically display their staunch opposition to abortion.[32]

Then, in the early 1980s, Gallup public opinion polls showed that a growing portion of the public felt that "abortion should be legal only under certain circumstances" (from 52% in 1981 to 58% in 1983).[33] In their 2002 presentation, "Abortion Politics in the U.S. Congress," Scott Ainsworth and Thad Hall argue that, because these polls appeared to show that an increasing percentage of the public felt that abortion should not always be legal, anti-abortion legislators were encouraged to pursue legislation that restricted women's access to abortion in

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[29] *Id.* at 192.
[30] *Id*.
[31] Scott H. Ainsworth and Thad E. Hall. "Abortion Politics in the U.S. Congress: A View Across Committees and Over Time." Prepared for Delivery at the 2002 Annual Meeting of the Midwest Political Science Association (2002) at 5. [hereinafter Ainsworth & Hall].
[32] Burdett A. Loomis and Wendy J. Schiller. *The Contemporary Congress.* Belmont, CA: Wadsworth Publishing Company (2005) at 140.
[33] Gallup, Inc. *Abortion* (2010), available at http://www.gallup.com/poll/1576/abortion.aspx.

certain circumstances.[34] Gallup polls also showed that the percentage of the public that indicated that "abortion should illegal in all circumstances" decreased from 1981 to 1983 (from 21% to 16%).[35] Ainsworth and Hall argue that this demonstrated to legislators that it might be politically dangerous to pursue constitutional amendments to ban all abortions.[36]

Consequently, Ainsworth and Hall observe, legislators increasingly began to pursue incremental restrictions on women's access to abortion; one of these incremental policy changes, the authors explain, proved to be particularly effective: restrictions on the federal funding of abortions.[37] This legislative pursuit first rose to prominence in 1976, after Representative Henry Hyde (R-IL) successfully attached a "rider" to an appropriations bill that banned federal funding for abortions (e.g., Medicaid funds) except when the life of the pregnant woman was endangered by her pregnancy.[38]

In subsequent years, similar funding restrictions were attached as riders to other bills, including healthcare spending bills, international aid bills, and Department of Defense appropriations bills.[39] The language of these and other riders, which are usually referred to as "Hyde amendments," has changed in each congress; different Hyde amendments have granted exceptions to federal funding bans when: 1) the pregnant woman's life is endangered; 2) at least two physicians determine that a woman would suffer "severe and long-lasting damage" if she carried her pregnancy to term; and/or 3) a woman reported to the "proper authorities" that her pregnancy was the result of rape or incest.[40]

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[34] Ainsworth & Hall at 6.
[35] Gallup, Inc. *Abortion* (2010), available at http://www.gallup.com/poll/1576/abortion.aspx (2010).
[36] Ainsworth & Hall at 6-8.
[37] *Id.* at 7, 13.
[38] Karen O'Connor. *No Neutral Ground? Abortion Politics in an Age of Absolutes*. Boulder, CO: Westview (1996) at 69. [hereinafter O'Connor].
[39] Ainsworth & Hall at 7.
[40] O'Connor at 69.

In addition to passing funding restrictions, anti-abortion congressmen limited women's access to abortion through "Church amendments" (named for Senator Frank Church, Democrat-Idaho, who introduced the first of these amendments in 1973). Church amendments allowed physicians and hospitals to refuse to perform abortions for moral or religious reasons, even if the hospital was federally funded and was the only public health institution in the area (thus limiting the number of available abortion providers).[41] Since the Hyde and Church amendments enjoyed considerable public support and were often able to pass both houses of Congress, they soon replaced constitutional amendments to ban all abortions as the dominant political strategies of anti-abortion legislators.[42]

The Impact of Technological Developments on Public Opinion

In his 1986 article, "How Technology is Reframing the Abortion Debate," Daniel Callahan posits that technological advances were one of the major factors that led to the public's growing support for restrictions on legal abortions.[43] Callahan argues that, in the face of several technological developments in the late 1970s and early 1980s, some individuals began to consider the fetus as a person "whose interests could override those of the [pregnant] woman."[44] Callahan specifically points to medical advances such as a lowered age of fetal viability (from 28 weeks in 1973 to 23-24 weeks by the mid-1980s), increasing knowledge of fetal development (including brain development), new fetal therapies, and the increasing utilization of ultrasound imaging.[45]

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[41] Eva R. Rubin. *Abortion, Politics and the Courts*. Westport, CT: Greenwood Press (1987) at 163. [hereinafter Rubin].
[42] Ainsworth & Hall at 6-7, 13.
[43] Daniel Callahan. "How Technology is Reframing the Abortion Debate." 16 *The Hastings Center Report* (1986) at 39. [hereinafter Callahan].
[44] *Id.* at 38.
[45] *Id.* at 34-38.

Ultrasound imaging, Callahan asserts, had a particularly strong effect on public abortion opinion because it was employed in "The Silent Scream," a 1984 anti-abortion film that was broadcast on national television. The film, which was later criticized for inaccuracies and for misleading viewers,[46] claimed to depict the real-time ultrasound image of a twelve-week-old fetus being aborted.[47] The film's narrator, former abortion provider turned anti-abortion activist Dr. Bernard Nathanson, uses the ultrasound images to purport that, during the abortion, the fetus "sense[s] aggression in its sanctuary," attempts to "escape" the suction cannula "moving violently toward it," and "rears back its head" in "a silent scream" before it is dismembered.[48,49]

State Legislative Responses to *Roe* and *Doe*

Like the federal government, many state governments began to restrict public funding of abortions in the early 1980s. In fact, by 1984, over two-thirds of the state governments had prohibited or severely restricted the use of state funds for abortions.[50] Additionally, in the two-year period that followed the 1973 *Roe* and *Doe* decisions, 32 states passed 62 laws that restricted women's access to abortion.[51] These laws included regulations that governed where abortions could be performed (e.g., only in hospitals), parental consent requirements for minors, spousal consent requirements for married women, "informed consent" requirements, conscience

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[46] For instance, the film was criticized in *New York Times* editorials, a Planned Parenthood film, and by medical experts because—contrary to the depiction of the film—fetal movements at twelve-weeks are "reflexive and without purpose." Additionally, the producers of "The Silent Scream" misled viewers by speeding up the film so that the fetus appeared to be moving rapidly (in real time, the fetus was moving much slower). Furthermore, the size of the fetus that is shown in the film is twice the size of a normal twelve-week fetus. Finally, medical experts stated that it was impossible for a fetus to scream inside the uterus. Rosalind P. Petchesky. "The Power of Visual Culture in the Politics of Reproduction." 13 *Feminist Studies* (1987) at 267. [hereinafter Petchesky].
[47] *Id.* at 266-67.
[48] *Id.*
[49] In "The Silent Scream," Dr. Bernard Nathanson also highlights another medical issue that has influenced the public's position on abortion: the concept of fetal pain. For a medical review of scholarship on fetal pain, see Susan J. Lee et al. "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence." 8 *The Journal of the American Medical Association* (2005). For a review of the scientific and political debate over the issue of fetal pain, see Teresa S. Collett. "Fetal Pain Legislation: Is it Viable?" 30 *Pepperdine Law Review* (2003).
[50] Saletan at 12.
[51] Rubin at 127; Draft of Waters article at 4.

clauses that allowed individual physicians and institutions (sometimes even public hospitals) to refuse to perform abortions for moral reasons, and laws that declared the fetus to be a person upon its conception.[52] During the 1970s, 1980s, and early 1990s, many of these state restrictions on abortion were challenged in the courts.[53] These challenges set the stage for the 1992 U.S. Supreme Court case, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (known as *Planned Parenthood v. Casey*).

Planned Parenthood v. Casey

In *Planned Parenthood v. Casey*, the Court ruled on a challenge against the Pennsylvania Abortion Control Act of 1982. Among other stipulations, this Pennsylvania law required a 24-hour waiting period for all women seeking abortions, women to give written "informed consent prior to the abortion procedure," minors to obtain "informed" parental consent for the abortion procedure,[54] and married women to notify their husbands if they were seeking an abortion.[55] In *Casey,* a plurality of the Court affirmed *Roe's* holding that a woman's decision to procure an abortion was protected by the Fourteenth Amendment, but it rejected *Roe's* trimester framework and replaced it with a framework based on fetal viability.

More specifically, the Court held that the State could regulate abortions prior to fetal viability as long as these regulations did not pose an "undue burden" on the woman seeking an abortion.[56] The Court stated that a regulation would pose an "undue burden" if it "place[d] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[57] Using the "undue burden" standard, the Court sanctioned all of the Pennsylvania law's requirements with

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[52] Rubin at 127-30.
[53] Draft of Waters article at 6.
[54] This law provided for a "judicial bypass option if the minor does not wish to or cannot obtain a parent's consent." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) at 844.
[55] *Id.*
[56] *Id.* at 874-77.
[57] *Id.* at 877.

the exception of the spousal notification mandate. Significantly, the Court also explicitly reaffirmed *Roe's* holding that, after fetal viability, the State could restrict and altogether ban abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[58]

The Aftermath of *Casey*

Following the *Casey* decision, Congress and state legislatures continued to enact restrictions on abortion. Among these federal and state restrictions were laws that prohibited specific methods of abortion, especially those that were "used after the first trimester of pregnancy."[59] In 1992, public awareness of the intact D&E procedure increased when Dr. Martin Haskell—an abortion provider—gave a presentation describing the operation.[60] Following Dr. Haskell's presentation, anti-abortion activists produced several cartoon-like depictions of the procedure, which they used in 1993 to generate opposition to the Freedom of Choice Act (which "[codified] the principles of *Roe*" *v. Wade*).[61]

In 1995 and 1997, Congress unsuccessfully attempted to ban "partial-birth abortions" (these bans are discussed in the subsequent sections). Anti-abortion legislators claimed that these bans targeted only the intact D&E procedure, but the Supreme Court's ruling in the 2000 case *Stenberg v. Carhart* seemingly refuted this claim.[62] Moreover, from 1996 to 2000, 30 states enacted "partial-birth abortion" bans.[63] One such state was Nebraska. In *Stenberg*, the Court invalidated the Nebraska statute on two grounds: 1) the language of the Nebraska statute was

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[58] *Id.* at 879 (citing Roe v. Wade, 410 U.S. 113 (1973) at 164-65).
[59] Draft of Waters article at 6.
[60] *Gonzales v. Carhart,* 550 U.S. 124 (2007) at 1622.
[61] Weitz & Yanow at 100-01.
[62] It appears that these bans, like the Nebraska ban that was invalidated in *Stenberg*, could be interpreted to include the non-intact D&E procedure. As legal scholar Melissa C. Holsinger notes, all three of these bans use almost identical definitions of "partial-birth abortion." Melissa C. Holsinger. "The Partial-Birth Abortion Ban Act of 2003: The Congressional Reaction to *Stenberg v. Carhart*." 6 *New York University Journal of Legislation and Public Policy* (2002) at 607-08. [hereinafter Holsinger].
[63] Draft of Waters article at 7; Radloff at 89.

unconstitutionally vague and could potentially ban the non-intact D&E procedure (thus violating *Casey* by posing an "undue burden" on a woman's decision to abort a nonviable fetus)[64]; 2) the ban did not include the health exception required by *Casey*.[65,66] This case is discussed in detail later in this paper (see *infra* 31-34).

THE PARTIAL-BIRTH ABORTION BAN ACT OF 1995

In January 1995, the Republican Party seized control over both the House and the Senate for the first time since 1955. That year, anti-abortion Republican congressmen spearheaded an effective, incremental attack on abortion. For instance, Congress passed a law that prohibited federal employees' health insurance plans from covering abortions. It also passed a law that prohibited federal funds from being used to provide abortions for federal prisoners. That same year, Congress passed another law which stipulated that American military hospitals could not perform abortions on U.S. servicewomen or female dependents of servicemen stationed overseas.[67]

Thus, when Representative Charles Canady (R-FL) introduced the Partial-Birth Abortion Ban Act (PBABA) of 1995 (H.R. 1833) on June 14, 1995, it fit into the larger pattern of Republican efforts to restrict access to abortions. Representative Canady learned of the intact D&E procedure after anti-abortion activists brought him a copy of Dr. Haskell's paper on the operation. According to his chief counsel at the time, Kathryn Lehman, Canady and his aides felt that the procedure "was just something most reasonable people, regardless of their position on abortion, would believe should not happen."[68] Canady, congressional lawyer Keri Folmar, and National Right to Life Committee lobbyist Douglas Johnson created the term "partial-birth

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[64] *Stenberg v. Carhart,* 530 U.S. 914 (2000) at 945-46.
[65] *Id.* at 938.
[66] See Draft of Waters article at 7-9.
[67] Saletan at 229.
[68] Chris Black. "The Partial-Birth Fraud." 12 *The American Prospect* (2001) at 3. [hereinafter Black].

abortion" when they met to discuss a potential ban of the procedure in early 1995. According to Keri Folmar, who wrote the PBABA of 1995, the group tried several terms but felt that "partial-birth abortion" was a name that "rang true" without being inflammatory.[69]

While the PBABA of 1995 was consistent with Republican efforts to restrict access to abortions, it was unique in that it attempted to ban a specific surgical procedure; Congress had historically granted deference to medical practitioners and abstained from exercising control over the delivery of medical services.[70] H.R. 1833 prohibited physicians from performing "partial-birth abortion," which it defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."[71]

It subjected physicians who performed this procedure to a fine and/or imprisonment not to exceed two years, but it stipulated that a woman who consented to the procedure could not be prosecuted under the law. H.R. 1833 also established "an affirmative defense" for a physician who performed the procedure when he or she "reasonably believed" that 1) the procedure was "necessary to save the life of the mother" and 2) that "no other procedure would suffice for that purpose."[72] The bill notably did not establish an affirmative defense for a physician who performed the procedure to protect the mother's health.

The House Judiciary Committee Report's Response to *Roe* and *Casey*

Capitalizing on his position as chairman of the House Judiciary Committee's Subcommittee on the Constitution, Canady held a subcommittee hearing on the bill the day after he introduced it— an extraordinarily quick action for congressional legislation.[73] The full

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[69] Cynthia Gorney. "Gambling with Abortion: Why Both Sides Think They Have Everything to Lose." *Harper's Magazine* (November 2004) at 37.
[70] Paul D. Blumenthal and Beverly Winikoff. "The Supreme Court and the Partial-Birth Abortion Ban Act of 2003: A Political Procedure Replaces Woman-Centered Care." 9 *Medicare General Medicine* (2007) at 52.
[71] H.R. 1833 at Sec. 1531 (b).
[72] *Id.* at Sec. 1531 (e).
[73] Black at 3.

Judiciary Committee subsequently released a report, which included dissenting views, on September 27, 1995. This report highlighted how both anti-abortion activists and abortion rights proponents planned to incorporate the Supreme Court's *Roe* and *Casey* decisions into the "partial-birth abortion" debate.

In the report, the Judiciary Committee repeatedly likened the banned procedure to a natural "birth," focusing on the fetus's partial delivery. The report stated that the procedure terminates a "child" who "is in the process of being born,"[74] and it asserted that the procedure "takes…life…as the baby emerges from the mother's womb."[75] The report also found that the procedure "perverted" a medical practice that was normally used to "bring a healthy child into the world" to produce "a dead child."[76]

The report's language and focus on the partial delivery required by the procedure served a dual function: to humanize the fetuses terminated by intact D&E and to respond to *Roe v. Wade*. In a footnote in *Roe*, the Court held that it did not address Article 1195 of the Texas law it invalidated.[77] Article 1195 criminalized procedures that destroyed "a child in a state of being born and before actual birth, which child would have otherwise been born alive."[78] Inspired by the Court's failure to consider this article in its analysis, anti-abortion legal scholars informed like-minded legislators that "partial-birth abortion" bans might be able to withstand judicial scrutiny[79]—an argument that was overtly integrated into the Judiciary Committee's report.[80]

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[74] Report from the Committee on the Judiciary to the 104th Congress, House Report 104-267 (September 27, 1995) at 9. [hereinafter 1995 Judiciary Report].
[75] *Id.* at 3.
[76] *Id.*
[77] *Roe v. Wade*, 410 U.S. 113 (1973) at footnote 1.
[78] *Id.*
[79] Saletan at 233.
[80] See 1995 Judiciary Report at 9.

The report also responded to the Court's holding in *Roe* that the word "person," as it was used in the Fourteenth Amendment, did "not include the unborn."[81] The report asserted that the "baby involved" in the intact D&E procedure was "not 'unborn' " since it was terminated "during a breach delivery."[82] Ignoring issues of fetal development during the second trimester (when the procedure is usually performed), the report argued that a partially-birthed fetus "was just as much a person" as a newborn infant.[83] In writing the report, anti-abortion legislators were apparently attempting to provide the Court with a means of upholding the legislation without renouncing their interpretation of constitutional personhood in *Roe*.[84] After all, if the Court agreed that the "not unborn" fetus was akin to a newborn "person," then the intact D&E procedure would be tantamount to infanticide.

The report also included a statement of "dissenting views" that was signed by 14 of the Judiciary Committee's 34 members. These members posited that the ban was unconstitutional because it lacked the health exception required by *Roe* and *Casey*.[85] The dissenters further argued that the ban was unconstitutional because, while it granted physicians an "affirmative defense" if they could prove that they used the procedure to preserve a woman's life, it still subjected these physicians to a criminal trial. In the dissenters' opinion, the fact that the bill subjected these physicians to potential criminal prosecution caused it to violate the mandates of *Roe* and *Casey*.[86]

Furthermore, the dissenters maintained that the act was unconstitutional due to its vague and non-medical language. To support their argument, the dissenters cited Dr. Courtland

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[81] *Roe v. Wade*, 410 U.S. 113 (1973) at 158.
[82] 1995 Judiciary Report at 3.
[83] *Id.* at 9.
[84] Carol Mason. *Killing for Life: The Apocalyptic Narrative of Pro-Life Politicians.* Ithaca, NY: Cornell University Press (2002) at 81 [hereinafter Mason].
[85] 1995 Judiciary Report at 23. See "The Supreme Court's Requirement of the Health Exception" section for more information about the required health and life exceptions.
[86] *Id.* at 23, 25.

Robinson, a professor of obstetrics at Johns Hopkins Medical School who had testified before the Subcommittee on the Constitution. During his testimony, Dr. Robinson criticized the legislation for criminalizing procedures in which the abortion provider "partially vaginally delivers" the fetus. He called this language "vague" and stated that, during *any* second trimester abortion procedure, there could be a point at which some part of the fetus passed out of the birth canal prior to its termination.[87] Dr. Robinson's testimony contradicted the Judiciary report, which included a claim that the ban did not prohibit "more frequently used late-term abortion techniques."[88]

In spite of the objections of the dissenters, H.R. 1833 easily passed the House of Representatives on November 1, 1995, receiving 288 Yeas and 129 Nays.

The Dole and Boxer Amendments to H.R. 1833

From December 5-7, 1995, H.R. 1833 was considered in the Senate (an identical bill had been introduced in the Senate in June, but this bill was never considered by the full Senate). During that time, Senator Bob Dole (R-KS) proposed an amendment that provided a qualified life exception to the ban. This exception was distinctive from the House's life exception because it omitted the "affirmative defense" clause and shielded from prosecution physicians who performed the banned procedure when it was "necessary to save the life of a mother . . . endangered by a physical disorder, illness, or injury, provided that no other medical procedure would suffice for that purpose."[89] On December 7, Senator Dole's amendment was agreed to without objection, passing 98-0. This amendment provided a response to the "Dissenting Views" section of the Judiciary Report, which—as previously mentioned—criticized H.R. 1833's "affirmative defense" clause. By ameliorating one of the opposition's concerns, the Dole

[87] *Id.* at 23.
[88] *Id.* at 10.
[89] Senator Robert Dole. Amendment No. 3081 to H.R. 1833 (December 5, 1995).

amendment likely helped to strengthen the legislation—an important action given that Republicans (generally much more supportive of abortion restrictions than Democrats) held only a 52-48 advantage over Democrats in the Senate.

On the same day that Senator Dole proposed his amendment, Senator Barbara Boxer (D-CA)—an abortion rights supporter—proposed an amendment that would add a health exception to the bill. The amendment stated that the ban would not apply to an abortion that, "in the medical judgment of . . . [a] physician," was "necessary to preserve the life of the woman or avert serious adverse health consequences to the woman."[90] The Senate's vote on the Boxer amendment promised to have important implications for the legislation; then-President Bill Clinton had vowed to sign the bill if it included a health exception, and he had pledged to veto the bill if it lacked a health exception.[91]

In defending her amendment on the Senate floor, Senator Boxer employed an oft-used strategy of abortion rights supporters: she shifted the debate from the abortion procedure itself to a particular woman who had been forced to use it. Senator Boxer read the statement of Viki Wilson, a nurse who had an intact D&E abortion after an ultrasound revealed that her fetus's brain was growing outside its skull. Wilson's physician informed her that, if she continued with her pregnancy, her uterus would likely rupture, rendering her sterile. Wilson also stated that the intact D&E procedure was the safest abortion method for her (she did not specify why this was the case). Senator Boxer said that Wilson's story underscored the necessity of the health exception, since Wilson's ability to reproduce—but not her life—would have been jeopardized without the intact D&E procedure.[92]

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[90] Senator Barbara Boxer. Amendment No. 3083 to H.R. 1833 (December 5, 1995).
[91] Black at 6.
[92] Statement of Senator Barbara Boxer, 1995 Senate Record at 18084.

Anti-abortion legislators responded to the Boxer Amendment by employing their own oft-used strategy: characterizing abortions as mere matters of convenience. Senator Bob Smith (R-NH), who introduced the bill in the Senate, said that the health exception created a gaping loophole because *Doe v. Bolton* allowed "medical judgment" regarding health to be "exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age."[93] Senator Smith concluded that the Boxer Amendment would therefore allow a woman to use the intact D&E procedure late in her pregnancy simply because her fetus was "a little girl" or had "blue eyes," thus trivializing the decision to abort.[94] Senator Jesse Helms (R-NC) protested that the Boxer amendment's inclusion of the health exception was a "semantic…smokescreen to demand abortion at any time, for any reason." He said that the Boxer Amendment should have been called the "the partial-birth abortion on demand amendment."[95]

On December 7, 1995, after two days of consideration, the Boxer amendment narrowly failed to pass the Senate with a vote of 47 Yeas and 51 Nays. That same day, H.R. 1833 (as amended) passed the Senate 54-44. On March 27, 1996, the House voted 286-129 to pass the PBABA of 1995, which now included a life exception but still lacked a health exception.

President Clinton's Veto

On April 10, 1996, President Clinton fulfilled his promise to veto the PBABA of 1995. Like Senator Boxer, President Clinton sought to move the debate from the fetus to the pregnant woman.[96] When he announced his veto, he was surrounded by five women who were forced to have late-term abortions for medical reasons. All of these women wanted to carry their pregnancies to term, but each woman was thwarted by the knowledge that that her baby would

[93] *Doe v. Bolton*, 410 U.S. 179 (1973) at 192.
[94]Statement of Senator Bob Smith, 1995 Senate Record at 18074.
[95] Statement of Senator Jesse Helms, 1995 Senate Record at 18074.
[96] Black at 6.

be dead at birth and that fetal delivery would threaten her health (e.g., render her unable to reproduce). In his official statement, President Clinton said that, by failing "to protect women in such dire circumstances . . . the bill poses a danger of serious harm to women."[97]

President Clinton's focus on the health exception was the product of months of debate inside the White House and among abortion rights supporters. Some abortion rights advocates, including a number of lawyers in the Justice Department, argued that President Clinton should justify his opposition to the ban on constitutional grounds. They argued that the ban violated *Planned Parenthood v. Casey* since it limited the abortion provider's discretion, thereby posing an "undue burden" [98]on a woman's decision to procure an abortion before fetal viability.[99] Other abortion rights proponents contended that Clinton should frame the procedure as necessary to protect a woman's health and ability to reproduce. In the end, Clinton and his staff chose the latter strategy because, in the words of an anonymous White House aide, "We wanted to focus on the issue that was most powerful and would resonate with people most deeply."[100] Moreover, Clinton was confident that he would never have to fulfill his promise to sign a ban that included a health exception, since many anti-abortion zealots in Congress would never vote for such a qualified ban.[101]

"A Good Fight to Have" for Anti-Abortion Congressmen

In September 1996, the House voted to override President Clinton's veto, but the Senate fell nine votes short of the two-thirds majority required for an override. Despite the Senate's failure to override the presidential veto, anti-abortion activists still made political gains by

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[97] Bill Clinton. "Partial-Birth Abortion Ban Act—Veto Message from the President of the United States, House Document Number 104-198." Washington, DC: U.S. Government Printing Office (April 15, 1996).

[98] See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) at 844.
[99] Black at 6.
[100] *Id.*
[101] *Id.*

pursuing the ban. First, the ban forced pro-choice congressmen into a very difficult vote. Indeed, many abortion rights supporters did not want to set the precedent of banning an abortion procedure, especially since the ban lacked a health exception. At the same time, however, the primarily Democratic pro-choice politicians who voted against the ban were acting contrary to the will of a majority of Americans, including many members of their own party. Polls taken during the legislation's consideration consistently revealed that a majority of Americans favored a prohibition of "partial-birth abortions."[102] One poll even showed that 65 percent of self-identified pro-choice voters opposed the "partial-birth abortion" procedure.[103] William Saletan argues that many voters favored the ban because they "bought" the anti-abortion activists' framing of the procedure as one which blurred "the line between abortion and infanticide."[104]

Additionally, the ban helped anti-abortion activists to characterize the aborted fetus as an infant that was separate from the woman's body.[105] In framing the procedure in this manner, anti-abortion activists were able to shift the focus from a woman's autonomy to the aborted fetus, potentially altering how the public conceived of abortion in general. Pro-choice politicians who supported the ban contributed to this characterization by emphasizing the procedure's "partial delivery." For instance, in May 1996, pro-choice Senator Pat Moynihan (D-NY) suggested, "This is just too close to infanticide. A child has been born, and it has exited the uterus, and what on earth is this procedure?"[106]

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[102] Saletan at 234.
[103] *Id.* at 233.
[104] *Id.* at 234.
[105] Black at 7-8, citing Ann Lewis, White House Director of Communications under President Bill Clinton.
[106] Saletan at 234.

Moreover, the ban helped to bring the intact D&E procedure to the attention of state legislators. As previously mentioned, from 1996-2000, 30 states outlawed the procedure,[107] with many of these states using the proposed federal ban's seemingly vague definition of a "partial-birth abortion."[108] Thus, as the Republican congressional aide Kathryn Lehman remarked, even though anti-abortion congressmen could not secure the ban's passage federally, "it was still a good fight to have."[109]

Reigniting the Issue: Ron Fitzsimmons's Lie

In February and March 1997, Ron Fitzsimmons—executive director of the National Coalition of Abortion Providers—helped to reignite the "partial-birth abortion" debate. Two years earlier, Fitzsimmons had appeared on *Nightline* to argue against the PBABA of 1995. During that interview, Fitzsimmons made *unaired* claims that the intact D&E procedure was used rarely and only to preserve a woman's life or physical health.[110] Then, in a March 3, 1997, interview with the *American Medical News* (AMN), Fitzsimmons said that he had "lied through his teeth" during the *Nightline* interview; he knew that the procedure was typically used to terminate a healthy woman's healthy fetus, and he knew that the procedure was performed much more frequently than 500 times a year, the estimate that several abortion rights groups provided in a letter to Congress.[111] In another interview in March, Fitzsimmons estimated that, in reality, U.S. physicians performed between 3,000 and 5,000 intact D&E abortions each year.[112]

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[107] Draft of Waters article at 7; Anne W. Esacove. "Dialogic Framing: The Framing/Counterframing of 'Partial-Birth' Abortion." 74 *Sociological Inquiry* (February 2004) at 89. [hereinafter Esacove].
[108]These bans have been invalidated for their vague language in a majority of the states in which they have been challenged. Several courts have found that these bans' definitions of "partial-birth abortion are overbroad and inclusive of the non-intact D&E procedure." See Radloff. at 1564.
[109] Black at 8.
[110] David Stout. "An Abortion Rights Advocate Says He Lied About Procedure." *The New York Times* (February 26, 1997) at A8. [hereinafter Stout]. Franklin Foer. "Abortion Apostate: The Media Get Suckered by Ron Fitzsimmons—Again." *Slate* (March 9, 1997) at 21. [hereinafter Foer].
[111]Foer at 22; Black at 5.
[112] Esacove at 85.

Fitzsimmons's comments garnered significant attention from the media and the public, which was somewhat surprising for two reasons. First, Fitzsimmons's lie never aired on *Nightline*, so it obviously had not impacted the public discourse on the PBABA of 1995. Second, the *Bergen Record,* the *Washington Post,* and PBS had already revealed that leading abortion rights groups had underestimated the number of intact D&E procedures performed annually. These same news outlets also disclosed that some abortion rights groups greatly overestimated the percentage of intact D&E procedures that were performed to preserve the woman's life or health.[113]

Nonetheless, Fitzsimmons's comments had a substantial impact on the "partial-birth abortion debate." His statements helped to reshape the narrative of abortion rights opponents, who now increasingly discussed the frequency of the intact D&E procedure and characterized abortion rights groups as "brazenly deceptive."[114] Fitzsimmons's comments also put many abortion rights groups in a defensive position, since they now appeared to be either deliberately deceptive or statistically incompetent.

THE PARTIAL-BIRTH ABORTION BAN ACT OF 1997

The day after the AMN published its interview with Fitzsimmons, H.R. 929—the first version of the PBABA of 1997—was introduced in the House. This ban was almost identical to the PBABA of 1995, and it also lacked a health exception. On March 11, 1997, the Senate Committee on the Judiciary and the House Subcommittee on the Constitution held a joint hearing on this legislation. The heads of the most prominent abortion rights groups in the nation testified at this hearing, including Kate Michelman of the National Abortion and Reproductive Rights Action League (NARAL), Gloria A. Feldt of the Planned Parenthood Federation of America

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[113] Stout at A8; Esacove at 85.

[114] Esacove citing Douglas Johnson, *"News Conference on Re-introduction of the Partial-Birth Abortion Ban Act (H.R. 929) in the US House*." Washington, DC: U.S. Government Printing Office (1997) at 85.

(Planned Parenthood), Vicki Saporta of the National Abortion Federation (NAF), and Renee Chelian of the National Coalition of Abortion Providers (NCAP).

From the onset of the hearing, it was evident that Fitzsimmons's remarks would shape the proceedings. During his introductory statement, Senator Orin Hatch (R-UT) said that Ron Fitzsimmons's comments revealed "that a great deal of misinformation [had] been disseminated about partial-birth abortions."[115] Senator Hatch also said that Fitzsimmons's statements contributed to the "voluminous evidence" that there were "thousands of elective partial-birth abortions" performed annually.[116]

During their testimonies, each abortion rights group leader responded to the issue of the frequency of the intact D&E procedure. Vicki Saporta stated that the NAF's original estimate (she did not cite that initial estimate) of the number of intact D&E procedures performed each year was merely a "good faith effort." She contended that it was impossible for the NAF to obtain an accurate estimate, since there were no national statistics on the procedure, physicians were unsure what qualified as an intact D&E procedure, and the NAF could not identify every physician that performed the procedure.[117]

Gloria Feldt stated that Planned Parenthood's low estimate was based exclusively on late-third trimester intact D&E abortions (which are very rare). She said that Planned Parenthood reported these numbers because the "framers of the debate . . . talked almost exclusively about late third-trimester abortions."[118] Kate Michelman asserted that, regardless of the exact number of intact D&E abortions performed each year, it was important to remember that the procedure

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[115] "Partial-Birth Abortion: The Truth." *Joint Hearing of the Senate Judiciary Committee and the House Judiciary Subcommittee on the Constitution*. Senate Hearing 105-90. (March 11, 1997) at 1. Washington, DC: U.S. Government Printing Office.[hereinafter 1997 Senate Hearing].
[116] *Id.*
[117] *Id.* at 32.
[118] *Id.* at 24.

was quite rare, constituting only a "subset" of the one percent of abortions performed after the twentieth week of pregnancy.[119] Renne Chelian, the president of the organization for which Ron Fitzsimmons worked (NCAP), said she realized that the abortion rights groups' initial estimates were too low, but she said she felt "completely out of control to clarify that [information]."[120]

The fact that each of these leaders had to respond to this issue meant that they were, at least momentarily, diverted from the frames they typically emphasized (e.g., the necessity of the procedure to preserve a woman's health). This gave abortion rights opponents an obvious advantage, as they had gained control over the subject matter of the debate. Abortion rights groups countered that anti-abortion activists were fixating on the frequency of the procedure in order to ignore the most critical issues at hand.[121] The American Civil Liberties Union, for instance, called the hearing "a 'witch hunt' against pro-choice groups" that allowed anti-abortion activists to "avoid discussing the health and safety consequences of criminalizing an abortion procedure."[122]

Abortion Rights Leaders Focus' on the Excluded Health Exception and Doctors' Autonomy

When they were not discussing the number of intact D&E procedures performed annually, the abortion rights leaders provided two principal explanations for their opposition to the ban. First, these leaders honed in on the ban's exclusion of a health exception, once again focusing on women who were forced to use the procedure. Kate Michelman asked congressmen to consider, "Does this legislation protect the lives and the health of those women whose wanted

[119] *Id.* at 19.
[120] *Id.* at 75.
[121] Esavoce at 88.

[122] *Id.*, citing ACLU. "ACLU Decries Anti-Abortion 'Witch Hunt' by Congress to Divert Attention from Women's Health and Safety." New York: ACLU Reproductive Freedom Project (1997).

pregnancies have become medical nightmares?"[123] Similarly, Renee Chelian stated, "[D]octors must be able to use this method because of a serious health threat posed to the patient or because of a severe fetal anomaly."[124] In focusing on health issues, it appeared that—like President Clinton and his advisers—the abortion rights leaders had decided that this was the issue that would "resonate with people most deeply."[125]

Of course, as Fitzsimmons's comments elucidated, many intact D&E procedures were performed on women who pursued abortions for non-medical reasons (e.g., they did not have enough money to fund an abortion earlier in their pregnancy).[126] These types of abortions were extremely difficult for abortion rights leaders to defend, especially because many voters did not feel that a woman should be able to independently decide to have an abortion.[127]Accordingly, each leader emphasized the importance of doctors' autonomy during their testimony, criticizing the legislation as an inappropriate governmental intrusion on physicians' discretion. For instance, Vicki Saporta declared, "Only doctors are qualified to make judgments that some of you have taken upon yourselves by supporting this legislation."[128] Kate Michelman asked congressmen if they were "ready" to "dictate a medical decision…even when a doctor" felt that the intact D&E procedure was the most "medically appropriate" method of abortion.[129]

As William Saletan notes, the abortion rights leaders' focus on a doctor's discretion was astute, at least in the short term. Polls showed that many of the voters who did not "entrust abortion decisions to women" also believed that doctors could be entrusted with the abortion

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[123]1997 Senate Hearing at 20.
[124] *Id.* at 32.
[125] Black at 6.
[126] Saletan at 235.
[127] *Id.*
[128] 1997 Senate Hearing at 33.
[129] *Id.* at 20.

decision.[130] The opinions of these voters echoed the Court's decision in *Roe*. In that case, the Court held that, in the first trimester, the "abortion decision…must be left to the medical judgment of the pregnant woman's attending physician."[131]

By emphasizing doctors' autonomy, abortion rights leaders were also able to indirectly defend the use of the intact D&E procedure for so-called "elective" abortions (abortions pursued for non-medical reasons), since they could present the procedure as one option for doctors to choose from when performing such abortions. However, this strategy was seriously challenged when the American Medical Association (AMA) supported the ban, an issue that will be discussed later in this paper (see *infra* 27-30).

H.R. 1122 in the House: The Frank Amendment

On March 19, 1997, a week after the H.R. 929 hearing, a slightly altered version of the PBABA of 1997 was introduced in the House (H.R. 1122). The revised bill was an exact replica of the PBABA of 1995. House leaders said that, in light of new discoveries about the frequency of the intact D&E procedure, they wanted to give President Clinton another chance to sign the legislation he had previously vetoed.[132] On March 20, 1997, the House voted 295-136 to pass H.R. 1122.

Prior to the House's passage of H.R. 1122, Rep. Barney Frank (D-MA) had offered an amendment to the legislation. The Frank amendment would have permitted the use of the intact D&E procedure to prevent "serious adverse long-term physical health consequences."[133] Frank said that the amendment would satisfy President Clinton, who had again stated he would only

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[130] Saletan at 235.
[131] *Roe v. Wade*, 410 U.S. 113 (1973) at 164.
[132] The Alan Guttmacher Institute. *Politics of 'Partial-Birth' Abortion Clarify as Bill Heads Toward Senate*. New York: AGI (April 21, 1997). [hereinafter 1997 AGI].
[133] Statement of Representative Barney Frank. "The Partial-Birth Abortion Ban Act of 1997, Congressional Record: House." Washington, DC: U.S. Government Printing Office (March 20, 1997) at H1229.

support a ban that included a health exception. Frank also asserted that his amendment addressed anti-abortion activists' concerns that a health exception was too broad.[134] When his amendment failed 149-282, Frank said, "It is very clear that we have people who would prefer an issue to a bill that could become law."[135] Anti-abortion activists countered that the procedure was never medically necessary, and they asserted that Frank's amendment served to perpetuate the lie that it was.[136] The dispute over the medical necessity of the intact D&E procedure became an increasingly important and divisive issue after the AMA endorsed the PBABA of 1997.

The AMA's Endorsement of the PBABA of 1997

On May 19, 1997, while the Senate was considering H.R. 1122 (no similar legislation had been introduced in the Senate), the AMA endorsed the PBABA of 1997. The AMA, which is the largest physicians' association in the nation, declared that they could not identify a "situation in which [intact D&E] was the only appropriate procedure to induce abortion." The organization also stated that the procedure had "no history in peer reviewed medical literature or in accepted medical practice development."[137]

The AMA's endorsement quickly became the focal point of anti-abortion legislators' arguments against the ban.[138] These congressmen now rebuked the pro-choice argument that the ban posed a threat to women's health. Referring to this pro-choice argument the day after the endorsement, Senator Rick Santorum (R-PA) chided, "The charade is over."[139] Pro-choice legislators were crushed since they had long emphasized the authority of medical

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[134] *Id.*
[135] 1997 AGI.
[136] *Id.*
[137] Norra Macready. "American Medical Association Backs Amended Abortion Bill." 314 *British Medical Journal* at 1572.
[138] Saletan at 236.
[139] "The Partial-Birth Abortion Ban Act of 1997, Congressional Record: Senate." Washington, DC: U.S. Government Printing Office (May 20, 1997) at S4694.

professionals.[140] The leaders of the prominent abortion rights groups were especially hurt by the endorsement because they had stressed the importance of doctors' autonomy during the joint hearing.

Once again finding themselves in a defensive position, pro-choice groups insisted that the AMA's endorsement did not represent a medical consensus. They pointed out that organizations such as the American College of Obstetricians and Gynecologists and the American Public Health Association continued to oppose the ban and argue for the necessity of the intact D&E procedure. This was a tough argument to sell, however, since the AMA was widely regarded as the nation's preeminent medical association.[141]

Pro-choice groups and legislators also responded by attacking the AMA's motives. NARAL said that the AMA endorsed the ban to move their "political agenda through an anti-choice Republican Congress."[142] Senator John Chafee (R-RI) complained, "It looks like the doctors took care of themselves and not the women."[143]

These reactions were supported by an internal AMA report that was released in December 1998. This report found that the organization was "determined to cut a deal with congressmen."[144] Indeed, on the same day that they endorsed the ban, the AMA sent Speaker of the House Newt Gingrich (R-GA) a list of the policy changes they wanted Republicans to pursue. Most of these changes were integrated into legislation that Republicans introduced two

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[140] Saletan at 236.
[141] Esacove at 87.

[142] National Abortion and Reproductive Rights Action League. *Statement of Kate Michelman: NARAL Calls American Medical Association Support of Late-Term Abortion Ban "Extraordinary, Contradictory and Political."* Washington, DC: NARAL (1997) at 5.
[143] Saletan at 236.
[144] *Id.*

weeks later, including protections for doctors' fees, limits on malpractice liability, and the authorization for doctors "to refer patients to companies from which they profited."[145]

In finalizing the conditions of their endorsement, the AMA insisted that Republicans "tighten up" the language they used to define the term "partial-birth abortion."[146] The AMA also required Republicans to allow doctors accused of violating the ban to request a hearing in front of their peers.[147] Senator Santorum addressed both of these concerns in an amendment he proposed on May 20, 1997. The Santorum amendment clarified that when the ban criminalized abortions in which a physician "vaginally delivers a living fetus," it referred to procedure in which the physician "deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus."[148] The Santorum amendment also entitled doctors who were accused of violating the ban to a hearing before their State's medical board. The State Medical Board would determine whether the doctor had performed the "partial-birth abortion" procedure to preserve a woman's life, and the Board's determination would be admissible evidence during the accused doctor's criminal trial.[149]

On May 20, 1997, the day after the AMA endorsed the ban, the Senate voted 64-36 to pass H.R. 1122 as amended by Senator Santorum. On October 8, 1997, the House agreed to the amended act with 296 Yeas and 132 Nays. Two days later, the legislation was vetoed by President Clinton, who said that he did not sign the bill because it lacked a health exception. In

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[145] *Id.*
[146] "The Partial-Birth Abortion Ban Act, Congressional Record: Senate." Washington, DC: U.S. Government Printing Office (May 20, 1997) at S4694.
[147] Saletan at 236.
[148] Senator Rick Santorum. Amendment No. 290 to H.R. 1122 (May 20, 1997).
[149] *Id*.

July 1998, the House overrode the veto 296-132, but the Senate once again failed to override the veto, falling only three votes short of the 67 required for an override.

Implications of the PBABA of 1997

In the aftermath of Ron Fitzsimmons's highly publicized comments and the AMA's endorsement of the PBABA of 1997, abortion rights advocates were forced into a reactive position. Conversely, anti-abortion activists appeared to benefit greatly from the prolonged public attention that the proposed ban received. Indeed, the proposed ban helped anti-abortion activists to motivate their conservative base.[150] It also allowed anti-abortion activists to launch another attack on the very popular President Clinton; abortion rights opponents claimed that Clinton's second veto proved that he was completely beholden to groups that supported abortions at any time, for any reason.[151] Moreover, in the opinion of the National Right to Life Committee, the now lengthy debate over the procedure exposed the public to the gruesome nature of abortion, which helped to decrease public support for abortion in general.[152]

Furthermore, like the PBABA of 1995, the PBABA of 1997 was consequential because it served as a model for the state legislatures that outlawed partial-birth abortion. In fact, many of these states adopted the section of the Santorum amendment that defined a vaginal delivery as one in which a physician "intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus." New Jersey and Kentucky integrated this language into their respective bans, and in both states the bans were judicially challenged.[153] In both cases, federal courts

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[150] Black at 7.
[151] Esacove at 88.
[152] National Right to Life Committee. 25 *National Right to Life News*. Washington, DC: NRLC (1998). Cited in Esacove at 88.
[153] Radloff at 1566.

enjoined the enforcement of the bans, finding that the term "substantial portion" was unconstitutionally vague.[154]

Other state-level bans met similar fates in the late 1990s; in fact, by the end of 1998, 19 of the 20 state-level bans that had been judicially challenged were enjoined or substantially restricted.[155] The courts cited three major problems with these bans: 1) they posed an undue burden on a woman seeking a pre-viability abortion; 2) they lacked a health exception; and 3) they were unconstitutionally vague.[156] The cases in which these bans were invalidated served as precursors for the 2000 Supreme Court case, *Stenberg v. Carhart.*[157]

Stenberg v. Carhart

In *Stenberg v. Carhart*, the Supreme Court considered a Nebraska statute that banned "partial-birth abortions" unless they were "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[158] The statute's definition of "partial-birth abortion" was extremely similar to the definitions used in the PBABAs of 1995 and 1997. The statute defined "partial-birth abortion" as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery."[159] In language almost identical to that used in Senator Rick Santorum's amendment to the PBABA of 1997, the statute further defined "partially delivers vaginally a living unborn child before killing the child" to

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[154] See *Planned Parenthood of Central New Jersey v. Verniero*, 41 F. Supp. 2d 478 (D.C.D.N.J. 1998) at 14; *Eubanks v. Stengel*, 28F. Supp. 2d (D.C.W.D. Ken. 1998) at 1129-32. Cited in Radloff at 1566.

[155] Center for Reproductive Law and Policy. *Changing Tides—Victories Against "Partial-Birth Abortion" Bans*. New York: Center for Reproductive Law and Policy (1998).

[156] National Abortion and Reproductive Rights Action League. *Bans on Abortion Procedures and the Law*. Washington, DC: NARAL (1998). Cited in Esacove at 90.

[157] *Stenberg v. Carhart,* 530 U.S. 914 (2000).

[158] *Id*. at 921-22.

[159] *Id.* at 922.

mean "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child."[160]

In *Stenberg*, the Court invalidated the Nebraska statute on two grounds: 1) the language of the Nebraska statute was unconstitutionally vague and could potentially ban the non-intact D&E procedure (thus violating *Casey* by posing an "undue burden" on a woman's decision to abort a nonviable fetus)[161]; 2) the ban did not include the health exception required by *Casey*.[162,163]

Regarding the Nebraska statute's vague language, the Court held that the ban failed to include "the medical differences between" intact D&E and non-intact D&E.[164] More specifically, the Court asserted that the statute failed to stipulate that the ban applied only to a procedure in which "a portion of the fetus' body is drawn into the vagina as part of a process to extract an intact fetus after collapsing the head [(intact D&E)] as opposed to a process that would dismember the fetus [(non-intact D&E)]."[165] This was problematic, the Court held, because evidence given before the District Court had elucidated that, like the intact D&E procedure, the non-intact D&E procedure often involved "a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus."[166] The court concluded that, since the statute potentially applied to the non-intact D&E procedure—"the most

[160] *Stenberg v. Carhart,* 530 U.S. 914 (2000) at 922.
[161] *Id.* at 945-46.
[162] *Id.* at 938.
[163] See Draft of Waters article at 7-9.
[164] *Stenberg v. Carhart,* 530 U.S. 914 (2000) at 939.
[165] *Id.*
[166] *Id.* at 939.

commonly used procedure for previablility second trimester abortions"—it violated *Casey* by posing an "undue burden" on a woman's decision to abort a nonviable fetus.[167]

Concerning the health exception, Nebraska and its supporting *amici* argued that no medical study identified a situation in which the intact D&E procedure would be the only appropriate method of abortion.[168] Nebraska further argued that "a ban on partial-birth abortion/[intact D&E] would create no risk to the health of women,"[169]since the non-intact D&E procedure and labor induction were always safe alternatives.[170] The Court held that Nebraska failed to show that their statute's exclusion of a health exception would not endanger women, "because the record shows that significant medical authority supports the proposition that in some circumstances, [intact D&E] would be the safest procedure."[171]

The Court acknowledged that some medical experts believed that there were no circumstances in which the intact D&E procedure would be the safest method of abortion.[172] However, the Court held that *Casey* did not require "absolute proof" of medical necessity or "unanimity of medical opinion" to trigger the health exception requirement.[173] The Court stated that *Casey's* health exception requirement must "tolerate responsible differences of medical opinion."[174] It further held that scientific uncertainty over the medical necessity of the procedure meant that there was a "significant likelihood that those who believe that [intact D&E] is a safer abortion method in certain circumstances may turn out to be right."[175] If these individuals were correct, the Court stated, "then the absence of a health exception [would] place women at an

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[167] *Id.* at 945-46.
[168] *Id.* at 934.
[169] *Id.* at 931
[170] *Id.* at 933.
[171] *Id*. at 932.
[172] *Id*. at 937.
[173] *Id.*
[174] *Id.*
[175] *Id*.

unnecessary risk of tragic health consequences."[176] If these individuals were incorrect, then the exception would "simply turn out to have been unnecessary."[177] The *Stenberg* Court thus concluded that, even in the midst of scientific debate, the health exception was necessary because a "substantial medical authority" felt that the absence of such an exception would endanger women's health.[178]

As legal scholar Melissa Holsinger argues, the *Stenberg* decision would have presumably invalidated the PBABAs of 1995 and 1997 if they had been signed into law (if the Court had not already invalidated these laws). Like the Nebraska statute, these bills did not include language that restricted the ban's application to the intact D&E procedure. These bills also did not include health exceptions despite the existence of a "substantial medical authority" that felt the absence of such an exception would endanger women's health.[179]

President Bush's Support for "Partial-Birth Abortion" Bans

In the aftermath of the *Stenberg* decision, anti-abortion congressmen vowed to enact a ban that could withstand judicial challenges.[180] In pursuing such a ban, anti-abortion congressmen knew that they had the support of then-President George W. Bush. President Bush had long voiced his opposition to partial-birth abortions, and—during the 2000 presidential election—he had stated that he was disappointed with the *Stenberg* decision. It also seemed safe to assume that President Bush would support a ban that lacked a health exception, since he had stated prior to his election that he would support a constitutional amendment to ban all abortions,

[176] *Id.*
[177] *Id.*
[178] *Id.* at 938-39.
[179] Holsinger at 607-608.
[180] *Id.* at 608.

even if that amendment did not include a health exception (but included a life exception and exceptions for women whose pregnancies were the product of rape or incest).[181]

Further illustrating his support of a congressional ban on "partial-birth abortions," President Bush proclaimed in his 2003 State of the Union address, "We must not overlook the weakest among us. I ask you to protect infants at the very hour of their birth and end the practice of partial-birth abortion."[182] In this statement, President Bush helped to advance the anti-abortion activists' characterization of the intact D&E procedure as one which killed viable, full-term babies that were in the process of being born.[183] Of course, this is a very inaccurate, albeit politically effective and emotionally evocative, characterization of a procedure that is typically performed on a nonviable fetus in the latter stages of the second trimester.

THE PARTIAL-BIRTH ABROTION BAN ACT OF 2003

In June 2002, Representative Steve Chabot (R-OH) introduced the PBABA of 2002. His aim was to pass a ban that could withstand post-*Stenberg* judicial challenges.[184] The bill passed the House in July, but—largely because it was received near the end of the 107th Congress—it was never voted on in the Senate.[185]

On February 13, 2003, Representative Chabot reintroduced this legislation as H.R. 760. The next day, Senator Rick Santorum (R-PA) introduced an identical ban in the Senate (S. 3). These bills subjected any doctor who knowingly performed a "partial-birth abortion" procedure to a fine and/or imprisonment not to exceed two years.[186] Like the invalidated Nebraska statute,

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[181] Sandra Sobieraj. Gore, Bush at Odds on Abortion Decision. *Milwaukee Journal Sentinel* (June 29, 2000).
[182] CBS News. *Statement of President George W. Bush. State of the Union Adresss Text* (January 28, 2003), available at http://www.cbsnews.com/stories/2003/01/28/politics/main538336.shtml.
[183] Saletan at 233.
[184] Holsinger at 608.

[185] Cheryl Schonhardt-Bailey. "The Congressional Debate on Partial-Birth Abortion: Constitutional Gravitas and Moral Passion." 38 *British Journal of Political Science* (2008) at 388. [hereinafter Schonhardt-Bailey].
[186] H.R. 760 at § 1531(a); S.3 at § 1531(a).

these bills lacked health exceptions, but they included exceptions for cases in which the procedure was "necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[187]

In an apparent response to *Stenberg*'s holding that the language of the Nebraska statute was vague, these bills redefined the term "partial-birth abortion." They specifically defined a "partial-birth abortion" as one in which

> "the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and performs the overt act, other than completion of delivery, that kills the partially delivered living fetus."[188]

The bills also included a "findings" section that challenged the Court's decision in *Stenberg*. In the findings section, both houses declared that a "moral, medical, and ethical consensus exists that" partial-birth abortions are "gruesome and inhumane," "never medically necessary," and "should be prohibited."[189] Congress also found that "the great weight of evidence presented at the *Stenberg* trial," other trials, and during congressional hearings, demonstrated that the procedure was "never necessary to preserve the health of a woman," and actually posed "significant health risks"[190] to women.[191] Additionally, Congress proclaimed that

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[187] *Id.*
[188] H.R. 760 at § 1531 (b); S.3 at § 1531 (b).
[189] *Id.* at Sec. 2 (1).
[190] The House Judiciary Committee's report cited additional health risks such as 1) "an increase in a woman's risk of suffering from cervical incompetence" due to the prolonged cervical dilation required by the procedure;" 2) "an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position;" and 3) an increased "risk of iatrogenic lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal." Report from the Committee on the Judiciary to the 108th Congress, House Report 108-58 (April 3, 2003) at 18-19.
[191] H.R. 760 at Sec. 2 (5); S.3 at Sec. 2 (5).

there was "no credible medical evidence that partial-birth abortions" were "safe" or "safer than other abortion procedures."[192] These bills also stated that the Supreme Court had historically accorded "great deference" to congressional fact findings.[193].

Republican Leadership in the Senate: Bypassing the Judiciary Committee

In February 2003, the Republican leadership in the Senate bypassed committee consideration of S.3 by placing it on the legislative calendar immediately after it was introduced by Senator Santorum.[194] On March 12, 2003, Senator Barbara Boxer (D-CA) moved to commit the bill to the Senate Judiciary Committee. Senator Boxer argued that it was imperative for the Senate Judiciary Committee to consider S.3 because, as it was written, it was "legally identical" to the Nebraska statute invalidated in *Stenberg*.[195] In Senator Boxer's opinion, this meant that, if it became law, S.3 would be invalidated as soon as it was challenged in court.[196] Senator Patrick Leahy (D-VT), a member of the Judiciary Committee, supported Senator Boxer's motion and posited that "senators deserve the benefit of full consideration and vigorous debate before they are asked to cast a vote on such a significant and complicated issue."[197]

Contrary to Senator Boxer, Senator Santorum contended that committee consideration was unnecessary because S.3 corrected the "infirmities" of Nebraska's invalidated statute.[198] Santorum claimed that, unlike the Nebraska statute, S.3's ban applied only to the intact D&E procedure. Moreover, he argued, the Supreme Court should grant deference to Congress's

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[192] *Id.* at Sec. 2 (14B).
[193] *Id.* at Sec. 2 (8).
[194] Schonhardt-Bailey at 399.
[195] Statement of Senator Barbara Boxer. "The Partial-Birth Abortion Ban Act of 2003, Congressional Record: Senate." Washington, DC: U.S. Government Printing Office (March 12, 2003) at S3560. [hereinafter March 2003 Senate Record]
[196] *Id.*
[197] Statement of Senator Patrick Leahy. March 2003 Senate Record at S3570.
[198] Statement of Senator Rick Santorum (March 12, 2003). Cited in Schonhardt-Bailey at 399 (Schonhardt-Bailey compiled every senators on-record remarks during the Senate's consideration of S.3).

finding that the procedure was never medically necessary because Congress had performed a "more exhaustive study" of the issue than the Court had.[199]

On the same day that it was introduced (March 12, 2003), Senator Boxer's motion to commit the bill to the Senate Judiciary Committee failed 42-56. The vote was an important loss for pro-choice senators, who likely hoped that the influential pro-choice members of the Senate Judiciary Committee (e.g., Ted Kennedy (D-MA), Dick Durbin (D-IL), and Chuck Schumer (D-NY)) could revise the legislation to make it less restrictive or could at least delay the legislation's progress.[200]

The Murray Amendment to S.3

In her 2007 book, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, congressional scholar Barbara Sinclair argues that congressmen increasingly utilize unorthodox legislative strategies (when compared to the "textbook" era of the 1950s-1970s) because the growing partisanship of Congress has made the two dominant parties more distinct and less able to compromise with another.[201] As an example of one of the emerging unorthodox techniques, Sinclair cites legislators who propose amendments that are, at least in the eyes of a given bill's sponsor(s), primarily designed to weaken the bill or decrease the bill's likelihood of passage.[202] During the Senate's consideration of S.3, such amendments were proposed by Senators Patty Murray (D-WA) and Tom Harkin (D-IA).

On March 11, 2003, Senator Murray filed an amendment to S.3 that, among other aims, sought to increase the availability of contraceptives to women. The amendment required certain public group health plans to cover prescription contraceptive drugs. It also proposed the

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[199] *Id*.
[200] Schonhardt-Bailey at 388.
[201] Barbara Sinclair. *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*. Washington, DC: CQ Press (2007) at 8.
[202] *Id.* at 23.

appropriation of $10 million in annual funding from 2004-2008 to support a federal education campaign designed to promote the use of emergency contraception. Furthermore, the Murray amendment sought to strip federal funding from hospitals that refused to provide emergency contraceptive services to women who survived rape or incest.[203]

A point of order was raised to forbid consideration of the Murray amendment immediately after it was introduced. The point of order was raised against that the Murray amendment because it violated the Congressional Budget Act of 1974 by creating additional outlays after the annual budget had already been agreed to in both houses.[204] On the same day that the amendment was introduced, a vote was held to waive the application of the Budget Act to the Murray amendment. That motion narrowly failed in a 49-47 vote. Following this vote, Senator Murray's amendment was ruled out of order.

Had the Murray amendment passed, it would have almost certainly made it harder for Republican leaders to secure the ban's passage in the Senate. Indeed, the Murray amendment would have forced social conservatives into a very difficult vote in which they would simultaneously ban the "partial-birth abortion" procedure *and* support the allocation of federal funds for an emergency contraception promotion campaign. Such a vote would have been particularly difficult for Senator Santorum, who introduced the original bill (S.3) and who later argued that emergency contraceptives were "abortifacient[s]" (substances that induce an abortion) in some circumstances.[205]

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[203] March 2003 Senate Record at S3551-53.
[204] See U.S. Committee on the Budget. "Compilation of Laws and Rules Relating to the Congressional Budget Process. " Washington, DC: U.S. Government Printing Office (May 2000) at 27.
[205] Statement of Senator Rick Santorum. *Meet the Press: Transcript for Sept. 3* (2006), available at http://www.msnbc.msn.com/id/14568263/ns/meet_the_press/

The Harkin Amendment to S.3

On March 12, 2003, Senator Tom Harkin (D-IA) proposed an amendment that expressed the sense of the Senate that the Supreme Court's decision in *Roe v. Wade* "was appropriate and secures an important constitutional right."[206] The amendment also expressed the sense of the Senate that the *Roe* decision "should not be overturned."[207] The Harkin amendment was predictably opposed by Senator Santorum, who said that the *Roe* Court had erred in finding that the word "person," as it was used in the Fourteenth Amendment, did not include the "unborn."[208] Senator Santorum further criticized the *Roe* decision as one which improperly placed the constitutional right to liberty ahead of the constitutional right to life. He argued that the Court essentially held that "one's freedom to do what one wants trumps someone else's right to exist."[209]

In spite of Senator Santorum's ardent opposition to the Harkin amendment, it passed the Senate 52-46 on the same day that it was introduced. Notably, seven moderate Republicans voted to support the amendment.

The Harkin amendment was significant because, in a debate that often focused on the most disturbing facets of a particular abortion procedure, it endorsed the decision that established constitutional protections for a woman's decision to procure an abortion. This undermined the efforts of the many anti-abortion senators who had used the ban as a means to frame abortions in general as immoral. For instance, while he was discussing the ban, Senator Santorum likened the

[206] Senator Tom Harkin. Amendment SA 260 to S.3 (March 12, 2003).
[207] *Id.*
[208] See *Roe v. Wade*, 410 U.S. 113 (1973) at 158.
[209] Statement of Senator Rick Santorum. March 2003 Senate Record at S3591.

abortion issue to the slavery issue in the early 1800s. He posited that, in both cases, many Americans allowed individuals they "knew to be . . . human being[s]" to become "property."[210]

On March 13, 2003, the Senate voted 64-33 to pass S.3 as amended by Senator Harkin. On June 4, the House voted 282-139 to pass H.R. 760, which had not been amended. Then, in an extremely rare move, the House leadership proposed an amendment in the Senate that removed the Harkin amendment from S.3. Senators balked at the House's attempt to exert direct influence over the Senate, and Senator Boxer encouraged her fellow legislators to "disagree with what the House did when they callously stripped out the *Roe* language that Senator Harkin put in."[211] On September 17, the Senate voted 93-0 to reject the House amendment, sending a clear message that—regardless of their differing opinions on the abortion issue—senators would close ranks to oppose House interference with the Senate's operation.

On September 22, a joint House-Senate conference was appointed to resolve the discrepancy between S.3 and H.R. 760 (i.e., the Harkin amendment). From the Senate, Barbara Boxer (D-CA), Dianne Feinstein (D-CA), Orrin Hatch (R-UT), Mike DeWine (R-OH), and Rick Santorum (R-PA) were chosen. From the House, the conferees were Steve Chabot (R-OH) and Zoe Lofgren (D-CA). To the chagrin of pro-choice legislators, the conference report deleted the Harkin amendment from the ban. Senator Boxer later complained that it took the Republican conferees "about five minutes" to remove the amendment.[212]

The Republican conferees' successful removal of the Harkin amendment represented yet another legislative victory for anti-abortion activists. The ban no longer contained any semblance

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[210] *Id.*
[211] Statement of Senator Barbara Boxer. "The Partial-Birth Abortion Act of 2003, Congressional Record: Senate." Washington, DC: U.S. Government Printing (September 17, 2003) at S11620.
[212] Statement of Senator Barbara Boxer. "The Partial-Birth Abortion Ban Act of 2003, Congressional Record: Senate." Washington, DC: U.S. Government Printing Office (October 21, 2003) at S12918. [hereinafter October 2003 Senate Record].

of support for abortion, which helped anti-abortion legislators to continue to use the ban as a launching pad to criticize abortion in general. Indeed, just before the Senate voted on the post-conference ban, anti-abortion Senator Sam Brownback (R-KS) stated, "This will go down in history as a pivotal day, where we start to recognize that the child in the womb is a child . . . not a piece of property. The child is, indeed, a person with dignity and rights and is entitled to life."[213]

On October 2, the conference report was agreed to in the House 281-142. On October 21, it was agreed to in the Senate 64-34. The Partial-Birth Abortion Ban Act of 2003[214] was subsequently signed into law by President George W. Bush on November 5, 2003. After an eight-year legislative battle, anti-abortion activists had finally succeeded in outlawing so-called "partial-birth abortions."

Legal Challenges to the PBABA of 2003 in the Federal District and Circuit Courts

Shortly after the PBABA of 2003 became law, abortion rights supporters simultaneously challenged the ban in federal district courts in Nebraska, California, and New York.[215] In each of these cases, abortion rights lawyers argued that the PBABA of 2003 was unconstitutional because 1) its vague language could potentially proscribe procedures besides the intact D&E procedure (thus violating *Casey* by posing an "undue burden" on a woman's decision to abort a nonviable fetus) and 2) the ban did not include the health exception required by *Casey* even though the intact D&E procedure was the safest abortion method in certain circumstances.[216]

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[213] Statement of Senator Sam Brownback. October 2003 Senate Record at S12919.
[214] 18 U.S.C. § 1531.
[215] Draft of Waters article at 11.
[216] *Id.*

Each of the three federal district courts invalidated the PBABA of 2003, and each court cited the ban's exclusion of a health exception as one of the reasons for its decision.[217]

The federal government then appealed each of these decisions to their respective federal circuit courts. The Nebraska case was appealed to the Eighth Circuit Court of Appeals, the California case was appealed the Ninth Circuit Court of Appeals, and the New York case was appealed to the Second Circuit Court of Appeals. Like the federal district courts, the three federal circuit courts invalidated the ban in part because it lacked a health exception. The federal government subsequently appealed these decisions to the Supreme Court, which agreed to hear the case.[218]

Gonzales v. Carhart

In the 2007 case *Gonzales v. Carhart*,[219] a 5-4 majority of the U.S Supreme Court reversed the decisions of the six lower federal courts and upheld the Partial-Birth Abortion Ban Act of 2003. The Court rejected the respondents' claim that the language of the PBABA of 2003 was unconstitutionally vague. The Court found that "a straightforward reading of the Act's text demonstrates" that it "regulates and proscribes…performing the intact D&E procedure."[220] The Court further held that, because the act specified "anatomical landmarks" that described the intact D&E procedure (i.e., "either the fetal head or the fetal trunk" being delivered outside of the mother's body prior to its termination),[221] it provided doctors "with objective standards" that would allow them to accurately assess whether or not they were violating the law.[222] The Court stated that the act did not apply to the non-intact D&E procedure because—in performing that

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[217] *Id.*
[218] *Id.* at 11-12.
[219] *Gonzales v. Carhart,* 550 U.S. 124 (2007).
[220] *Id.* at 1627.
[221] *Id*.
[222] *Id*. at 1629.

procedure—a "doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery."[223]

Concerning the health exception, the Court explicitly rejected Congress's "finding" that there was a medical consensus that the intact D&E procedure was never medically necessary.[224] In fact, the Court noted, there was "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women."[225] The Court further acknowledged that, during congressional proceedings and in the trial courts, "both sides" of the debate demonstrated that they had "medical support for their position."[226]

Amidst this medical uncertainty, the Court held that the ban's lack of a health exception did not render it unconstitutional. The Court stated that it had historically "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[227] In the specific case of abortion, the Court held that "medical uncertainty does not foreclose the exercise of legislative power."[228] Indeed, the Court concluded, "The law need not give abortion doctors unfettered choice in the course of their medical practice,"[229] and "if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations."[230]

The Court asserted that its holding on the health exception was "supported" by the fact that there were "alternatives" to the intact D&E procedure, including the more commonly used non-intact D&E procedure.[231] Additionally, the Court conjectured that, if the intact D&E

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[223] *Id.*
[224] *Id*.
[225] *Id.* at 1636.
[226] *Id*. at 1635.
[227] *Id*. at 1636.
[228] *Id*. at 1637.
[229] *Id*. at 1636.
[230] *Id*. at 1638
[231] *Id.* at 1637.

procedure was ever "truly necessary" to preserve a woman's health, a physician could "likely" avert prosecution under the act by terminating the fetus through an injection before they performed the intact D&E procedure (the act applies specifically to the delivery of a "living fetus").[232]

While this paper does not thoroughly explore the implications of the *Gonzales* decision,[233] it is important to note that this decision directly contradicted the *Stenberg* decision. In *Stenberg*, the Court invalidated a "partial-birth abortion" ban that did contain a health exception despite scientific uncertainty about the medical necessity of the intact D&E procedure. Under the same circumstances, the *Gonzales* Court upheld the constitutionality of the PBABA of 2003.

The *Gonzales* decision also seemed to defy the Court's January 2006 ruling in *Ayotte v. Planned Parenthood of Northern New England*. In *Ayotte*, the Court considered a New Hampshire parental notification statute[234] that lacked a health exception. Quoting *Roe* and *Casey*, the *Ayotte* Court held that "a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.' "[235]

The apparent disconnect between the *Gonzales* decision and the *Stenberg* and *Ayotte* decisions is likely attributable to a change in the Court's membership.[236] Justice Sandra Day O'Connor, who co-authored the plurality opinion in *Casey* and wrote the majority opinion in

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[232] *Id*.
[233] For a discussion of the implications of *Gonzales*, see Graham Gee. "Regulating Abortion in the United States after *Gonzales v. Carhart*." 70 *The Modern Law Review* (2007); Jessica Waters. "*Gonzales v. Carhart*: The Implications of the 'Partial Birth Abortion Ban' on Reproductive Rights and Women's Health," in Lois Duke Whitaker*, Women in Politics: Outsiders or Insiders?*" (5th Edition). New York: Prentice Hall (2010).
[234] The New Hampshire law specifically required pregnant minors to notify their parent(s) or guardian(s) in writing that they were seeking an abortion at least 48 hours before they actually procured an abortion. *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320 (2006) at 323-24.
[235] *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320 (2006) at 327 (citing *Roe* at 164-65 and *Casey* at 879).
[236] See Weitz and Yanow at 102; Draft of Waters article at 17.

Ayotte, retired on January 31, 2006, just two weeks after the *Ayotte* decision. She was replaced by Justice Samuel Alito, who joined "the new majority—comprised of Justices [Antonin] Scalia, [Anthony] Kennedy, [Clarence] Thomas and Chief Justice John Roberts—to uphold the Ban."[237] As previously mentioned, this marked the first time that the Court upheld an abortion ban that lacked an exception to protect a pregnant woman's health.

Analysis: Anti-Abortion Activists' Political Gains

During the course of their eight-year effort to criminalize "partial-birth abortions," anti-abortion activists made significant political gains. First and foremost, the bans allowed them to continue their incremental attack on abortion. When the PBABA of 2003 became law, anti-abortion activists had established two significant precedents in their battle against abortion: 1) they had prohibited a specific abortion procedure at the federal level; and 2) they had enacted an abortion ban that did not contain a health exception.

Since the *Gonzales* Court upheld the PBABA of 2003, these precedents could lay the groundwork for future abortion restrictions. As Jessica Waters explains, the *Gonzales* decision suggests that a state legislature or Congress might be able to ban another abortion procedure without providing a health exception. Indeed, under *Gonzales*, a federal court might uphold a statute that proscribed another procedure of medically contested necessity. [238]

If this were to happen, it might spur a multitude of prohibitions against specific abortion procedures. This would further obstruct a woman's access to the full range of available medical care, and it would limit the discretion of abortion providers to provide the treatment they deem most appropriate. Such a chain of events could also discourage physicians from providing abortions under any circumstance, since the abortion practice would be increasingly associated

[237] Draft of Waters article at 17.
[238] *Id*. at 14.

with criminal prosecution. This would compound an already existent problem; from 1982 to 2000, the number of sites providing abortion in the U.S. decreased by 37 percent.[239] In 2005, 87 percent of U.S. counties did not have a single abortion provider, and 35 percent of women lived in those counties.[240]

Even if none of these hypothetical consequences occur, the bans have already given anti-abortion legislators a readily identifiable political advantage: during all three bans, anti-abortion legislators were able to force their pro-choice colleagues into a very difficult vote. Many pro-choice legislators did not want to allow anti-abortion legislators to establish the aforementioned precedents. However, these politicians also had to answer to a public that generally opposed "partial-birth abortions."[241] The issue was particularly challenging for Catholic Democrats who faced conflicting pressures from their pro-choice party leaders and the anti-abortion Catholic Church (which actively supported the bans).[242]

Furthermore, as Lydia Saad—a Senior Gallup Poll Editor—argues, the emergence of the "partial-birth abortion" debate may have altered the public's opinion on whether abortions should always be legal.[243] From May 1991 to September 1995, Gallup conducted ten polls on abortion in the U.S. These polls asked, "Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?"[244] During this period, an average of 33 percent of the respondents said that abortion should be legal under

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[239] Emily Bazelon. "The New Abortion Providers." *The New York Times* (July 14, 2010) at MM30 of the Sunday Magazine.
[240] The Alan Guttmacher Institute. *Facts on Induced Abortion in the United States* (May 2010), available at http://www.guttmacher.org/pubs/fb_induced_abortion.html#2. Citing RL Jones et al. "Abortion in the United States: Incidence and Access to Services, 2005. 40 *Perspective on Sexual and Reproductive Health* (2008) at 6-16.
[241] Saletan at 234.
[242] Black at 6.
[243] Lydia Saad. *Public Opinion about Abortion: An In-Depth Review* (January 22, 2002) at 4. Available at http://www.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx#4. [hereinafter Saad].
[244] Gallup, Inc. *Abortion* (2010), available at http://www.gallup.com/poll/1576/abortion.aspx (2010).

any circumstances, and an average of 50 percent of respondents said that abortion should be legal only under certain circumstances.

The next Gallup poll on abortion was released in July 1996, one year after the introduction of the PBABA of 1995. That poll found that only 25 percent of Americans said that abortion should be legal in all cases, and that 58 percent of Americans said that abortion should be legal only under certain circumstances. Over the next seven years, the average percentage of Americans favoring the legalization of abortion in all cases held steady at 25 percent, while the percentage of Americans favoring the legalization of abortion only under certain circumstances averaged at 55 percent.[245] These numbers have endured; in Gallup's latest poll (released May 2010), 24 percent of Americans said that they favored the legalization of abortion in all circumstances, while 54 percent said that abortion should only be legal under certain circumstances.[246]

The public's shift in opinion regarding abortion in 1996 is remarkable because it was a rapid and substantial change that has now been sustained for 14 years. Moreover, as Saad conjectures, the timing of the shift suggests that it may have been "cause[d]" by the "partial-birth abortion" debate. After the debate rose to national prominence, "partial-birth abortion" became an important factor for Americans to consider when crystallizing their own positions on abortion."[247] Due to the debate, many Americans began to think about women who were seeking "partial-birth abortions" when they thought about the circumstances in which they would oppose legal abortion.[248] In other, more partisan words, "Saying in the abstract that you're in favor of abortion in 'all circumstances' is one thing. Repeating that [opinion] after contemplating an

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[245] *Id.*
[246] Saad at 4.
[247] *Id*.
[248] *Id.*

abortionist jamming surgical scissors in the back of the head of a mature baby and sucking out her brains is quite another."[249]

If the "partial-birth abortion" debate has indeed played a significant role in the public's decreased support for the legalization of all abortions, it is a noteworthy victory for anti-abortion activists. As Scott Ainsworth and Thad Hall assert, when most of the public feels that abortion should be legal only under certain circumstances, anti-abortion legislators are afforded "wiggle room" to pursue restrictions on access to abortion.[250]

Even if the bans themselves played only a minimal role in the public's altered opinion, it seems safe to assume that—because of the debate the bans generated—more Americans began to think about "partial-birth abortion" when they considered abortions in general. This is important because polls have shown that a majority of Americans are opposed to second trimester abortions.[251] Thus, if Americans focus on the maligned "partial-birth abortion" procedure—which is usually performed in the second trimester—they may become more likely to form a negative opinion of abortion in general.

Factors Contributing to the Anti-Abortion Activists' Success

Although many factors helped anti-abortion activists to make political gains during the "partial-birth abortion" debate, a few factors merit special discussion because of their particular significance. These important factors include: 1) the anti-abortion activists' astute choice of the intact D&E procedure as the ostensible target of the three PBABAs; 2) anti-abortion legislators' use of language and issue framing throughout the debate, especially their creation of the term "partial-birth abortion;" 3) anti-abortion activists' utilization of Jenny Westberg's cartoon-like

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[249] Dave Andrusko. *Opposition to Abortion Is Strong and Growing* (January 2003), available at http://www.nrlc.org/news/2003/NRL01/oppo.html.
[250] Ainsworth & Hall at 6.
[251] Weitz & Yannow at 101.

drawings of the intact D&E procedure; and 4) the Republican leadership's masterful use of procedural tactics and deal-brokering during the debate over PBABAs of 1997 and 2003.

Choosing the Intact D&E Procedure

When anti-abortion activists first learned of the intact D&E procedure from Dr. Martin Haskell's 1992 presentation/paper, they knew they had found a procedure that the majority of Americans would oppose.[252] Unlike other abortion procedures, the intact D&E procedure is not obfuscated by medical jargon; it is a procedure that people can easily understand. Moreover, it is a procedure that inspires public discomfort, particularly because it involves the termination of an intact, partially-delivered fetus.[253]

Thus, when Republicans gained control of Congress in 1995, anti-abortion Representative Charles Canady sought to outlaw a procedure that "most reasonable people" would oppose.[254] In introducing the PBABA of 1995, Canady cleverly placed abortion rights supporters into a defensive position, as they struggled to defend a very unpopular abortion procedure. At the onset of the debate, abortion rights supporters knew they were in for an uphill battle; one Planned Parenthood representative even predicted that the PBABA of 1995 would be a "disaster" for abortion rights groups.[255]

The anti-abortion activists' decision to pursue a ban on intact D&E was astute for another reason. Since many Americans regarded the intact D&E procedure as extreme, anti-abortion activists could—and did—claim that legislators who opposed the ban must be supportive of *all* abortions.[256] Given that the public's support for the legalization of abortion in all circumstances was waning (perhaps because of the bans themselves), this was not a distinction that most pro-

[252] Black at 3.
[253] Gorney at 35.
[254] Black at 3.
[255] Gorney at 37.
[256] See Esacove at 88.

choice legislators welcomed.[257] Interestingly, in 2003, Senator Mike Enzi (R-WY) bluntly admitted that anti-abortion activists targeted the intact D&E procedure because it forced many moderate pro-choice politicians to defend the seemingly extreme intact D&E procedure. Senator Enzi said, "What we tried to do in framing this argument was to come up with the most definite situation when those who are in favor of abortion are separated from those opposed to abortion." He further noted that some pro-choice legislators would "try to bring it back a little more to the middle, but . . . if you cannot oppose partial-birth abortion, then you must be in favor of abortion [under any circumstance]."[258]

Use of Language and Issue Framing

The anti-abortion activists' creation of the term "partial-birth abortion" also contributed to their overall success during the "partial-birth abortion" debate. Prior to the term's origin in early 1995 (see *infra* 12-13), anti-abortion activists had often used the term "brain-suction abortion" to describe the intact D&E procedure. This sensational term floundered as it incited an almost humorous response from the public.[259]

In contrast, the term "partial-birth abortion" engenders very serious images of viable, full-term babies who are murdered as they are in the process of being born.[260] As Tracy Weitz and Sarah Yanow assert, this term (and the images it produces) "plays on public discomfort with later abortions."[261] The term was especially effective because abortion rights supporters seemed unable to eliminate it from even their own lexicon, in part because they argued that "partial-birth abortion," as it was defined in the three acts, encompassed abortion methods besides the intact D&E procedure (meaning that they could not refer to the bans as prohibitions of intact D&E).

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[257] Schonhardt-Bailey at 22.
[258] March 2003 Senate Record at S3564.
[259] Esacove at 75.
[260] Saletan at 233.
[261] Weitz & Yanow at 101.

Abortion rights supporters eventually started to refer to the laws as "so-called 'partial-birth abortion' " bans.[262] Anti-abortion activists countered that abortion rights supporters had to use the qualifier "so-called" because they feared that the term "partial-birth" too accurately described the morbid and immoral characteristics of the intact D&E procedure.[263]

The term "partial-birth abortion" also served as the foundation for the larger anti-abortion effort to liken the intact D&E procedure to infanticide. In the 1996 presidential campaign, Senator Bob Dole (R-KS) said, "A partial-birth abortion blurs the line between abortions and infanticide and crosses an ethical . . . line we must never cross."[264] That same year, Senator Santorum argued that the difference between an intact D&E and other abortion procedures was that, "There may be a medical need to terminate a pregnancy, but there is never a need to kill [a] baby."[265] Moreover, the Judiciary Report from the PBABA of 1995 stated that "the only difference between the partial-birth abortion procedure and homicide is a mere three inches."[266]

This kind of language was effective because it provided a public that had already been misled by the "partial-birth abortion" term with additional misinformation. Ultimately, as William Saletan notes, many voters "bought" into this mischaracterization of a procedure that is, in reality, usually performed in the second trimester on a nonviable fetus.[267]

Furthermore, anti-abortion activists used emotionally evocative language to turn the public's attention toward the fetus and away from the pregnant woman. For instance, over the course of the three bans, many anti-abortion legislators quoted the testimony of Brenda Shafer, a nurse who had briefly worked at the clinic that Dr. Haskell ran. Shafer said that she witnessed

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[262] Esacove at 90.
[263] For instance, see Jay Johansen. *So-called Partial-Birth Abortion* (July 2001), available at http://www.pregnantpause.org/abort/socalled.htm
[264] Raymond Tatalovich. *The Politics of Abortion in the United States and Canada: A Comparative Study*. Armonk, NY: M.E. Sharp (1997) at 99.
[265] Saletan at 234.
[266] 1995 Judiciary Report at 4.
[267] Saletan at 234.

Dr. Haskell perform an intact D&E procedure, and she described what she witnessed before Congress on March 21, 1996 (three weeks before President Clinton vetoed the PBABA of 1995). Shafer said,

> "[T]he doctor stuck the scissors through the back of [the baby's] head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp. . . He threw that baby in a pan, along with the placenta and the instruments he'd used. I saw the baby move in the pan. I asked another nurse and she said it was just 'reflexes.' "[268]

As part of their focus on the fetus rather than the woman, anti-abortion activists almost never discussed the dilation portion of the intact D&E procedure. This would have shifted the public's attention to the pregnant woman, who must have her cervix dilated by artificial means (e.g., the insertion of laminaria, or sticks of seaweed) for at least one day.[269] It also would have undermined the anti-abortion argument that women can procure frivolous abortions because the abortion procedure is virtually effortless even after the first trimester.[270]

Utilization of the Westberg Drawings

Almost immediately after they discovered Dr. Martin Haskell's paper on the intact D&E procedure, anti-abortion groups mailed the paper to some of their more active members. Jenny Westberg, an anti-abortion activist who lived in Oregon and who had some cartooning experience, was one such member. After reading Haskell's paper, she produced five cartoon-like drawings of the intact D&E procedure. Westberg's drawings were first published in early 1993 in the Portland-based magazine, *Life Advocate*. After seeing these drawings, the National Right

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[268] Testimony of Brenda Shafer. "Hearing on Partial-Birth Abortion." *Hearing of the House Judiciary Subcommittee on the Constitution*. (March 21, 1996), available at http://judiciary.house.gov/legacy/215.htm.

[269] *Gonzales v. Carhart*, 550 U.S 124 (2007) at 1620.

[270] Mason at 80.

to Life Committee (NRLC) modified them slightly and published them in a few newspaper advertisements.[271] The NRLC's slightly modified drawings are shown in Appendix 1.

Later in 1993, when Congress considered the Freedom of Choice Act (FOCA), the NRLC distributed these images in four million brochures and in additional newspaper advertisements.[272] The advertisements warned that passage of FOCA "would lead to an increase in the use of this grisly procedure."[273] The advertisements were extraordinarily effective; they disturbed many moderate voters and helped anti-abortion activists to defeat FOCA.[274]

Given their effectiveness during the FOCA debate, it is unsurprising that anti-abortion activists continued to distribute the Westberg drawings each time Congress attempted to outlaw "partial-birth abortions." Additionally, anti-abortion legislators frequently presented the Westberg drawings during congressional debates, and the drawings were even published in the *Congressional Record* during the PBABA of 1995.[275] Reflecting on the strategy of the anti-abortion legislators during the PBABA of 1995, Ron Fitzsimmons stated, "They did exactly what I would have done—they brought out those pictures. And I was just thinking: who's going to go out there and defend this?"[276]

The efficacy of the drawings can be attributed to a few factors. First, unlike the photos of just-aborted fetuses that anti-abortion activists had long distributed, the cartoon-like Westberg drawings were able to provoke strong, negative reactions (to the procedure) without causing people to avert their eyes. Moreover, whereas mainstream newspapers had refused to publish the unquestionably grotesque abortion photos, they agreed to publish the Westberg drawings.[277]

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[271] Gorney at 36-39.
[272] Esacove at 75.
[273] *Id*.
[274] *Id*.; Weitz & Yanow at 101.
[275] Gorney at 38.
[276] *Id*.
[277] *Id*. at 37.

Most importantly, the Westberg drawings depicted what many considered to be the most disturbing characteristic of the intact D&E procedure: the termination of an intact fetus that resembled a small infant. The third drawing in the series proved to be especially potent for anti-abortion activists.[278] This drawing showed a physician grasping the fetus in his/her hands as s/he delivered the fetus out of the birth canal (see Appendix 1). Keri Folmar, the congressional lawyer who authored the PBABA of 1995, later said of this drawing, "To think that a human being would actually hold a little baby in his or her hand, and then kill it—that's what got me."[279] The fourth and fifth drawings were also powerful, as they depicted the termination of a dangling, seemingly helpless fetus (see Appendix 1).

The Republican Leadership's Influence on the PBABAs of 1997 and 2003

The Republican leadership exercised substantial influence over the PBABAs of 1997 and 2003. In the case of the PBABA of 1997, the deal that Republican Speaker of the House Newt Gingrich brokered[280] with the AMA proved to be extremely significant. The AMA's negotiated endorsement of the ban immediately lent credibility to anti-abortion activists. The endorsement also subjected pro-choice politicians and groups, who were already vulnerable in the aftermath of Ron Fitzsimmons's comments, to a series of new attacks. For instance, the NRLC asked President Clinton (who had consistently emphasized the necessity of the health exception) whether he would "continue to defend [partial-birth abortions] on the basis of medical mythology, now that the nation's largest physicians' association has supported the ban."[281]

Furthermore, Republican leaders in the House and the Senate strategically delayed the vote to override Clinton's veto of the PBABA of 1997. Although Clinton vetoed the ban on

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[278] *Id*.
[279] *Id.* at 38.
[280] Saletan at 236.
[281] National Right to Life Committee. *NRLC Lauds AMA Decision to Endorse Partial-Birth Abortion Ban with Only Clarifying Changes.* Washington, DC: NRLC (1997). Cited in Esacove at 86.

October 10, 1997, Republican leaders in the House did not schedule an override vote until July 1998, and Republican leaders in the Senate did not schedule an override vote until September 1998. Both of these votes were placed near the 1998 midterm elections, which allowed Republicans to remind voters of the "partial-birth abortion" issue just before the election.

During the PBABA of 2003, the Senate Republican leaders bypassed the Senate Judiciary Committee by placing the ban on the legislative calendar as soon as it was introduced. This allowed the Republican leadership to shield S.3 from probable pro-choice efforts to modify or delay the bill. Furthermore, in selecting the members of the conference committee for the PBABA of 2003, the Republican leadership made sure that a 4-3 majority of the conferees were staunch anti-abortion activists (each receiving a rating of 0% from NARAL, indicating a consistent anti-abortion voting record).[282] This selection of conferees ensured that the conference report would delete the Harkin amendment, which expressed the Senate's support for *Roe v. Wade*. As previously discussed, the Harkin amendment would have seriously undercut anti-abortion activists' attempts to use the ban as means to criticize abortions in general.

Conclusion

It would be difficult to exaggerate the achievements that anti-abortion activists made during the "partial-birth abortion" debate. During Congress's consideration of each PBABA, anti-abortion activists skillfully focused the public's attention on a rare yet disturbing post-first trimester abortion procedure. They also maintained almost uninterrupted control over the debate, and they consistently forced abortion rights supporters into a defensive position. Furthermore, in passing the PBABA of 2003, anti-abortion legislators secured a new victory in their incremental attack on abortion: enacting legislation that criminalizes a specific abortion procedure without

[282] *Public Notes on NARAL.* (December 31, 2003), available at http://www.ontheissues.org/Notebook/Note_03n-NARAL.htm.

providing an exception for cases in which a pregnant woman's life is in danger. This victory has substantial implications for the future, and—in light of the *Gonzales* decision—it may serve as the foundation for a new set of restrictions on women's access to abortion.

Appendix 1