“Partial Birth Abortion”: Semantics, Legislation, and Court Cases

A Division III Exam in the Schools of Social Science and Natural Science

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Introduction: The Semantics of “Partial Birth Abortion” in the Abortion Debate

During the past forty years, the abortion debate in the United States has centered around legal, political, and ethical arguments. This debate became polarized with the landmark decision in Roe v. Wade, when the Supreme Court ruled that the constitutional right to privacy included a woman’s right to choose whether or not to continue a pregnancy. An essential aspect of this debate is to frame whichever side of the debate one falls on as good and the other side as evil. Pro-choice groups have continued to represent women seeking an abortion as victims of society and through choice they are able to gain agency. Those who support choice and abortion providers are portrayed as heroes and those who counter abortions as religious radicals who are the villains. However, pro-life groups reverse this dynamic; people that support abortion choices are seen as villains. Women who desire abortions are placed in a multitude of categories, from innocent victim if the woman was a virgin and raped, to a promiscuous woman who deserves to be pregnant, or self-seeking woman who is picking her life over another life. The women obtaining abortions are concerned only with their own interests and those who oppose abortions are viewed as heroes.

There has been a consistent effort since Roe v. Wade by the anti-choice group movement to restrict women’s and physicians’ choices regarding abortion, going beyond just attacking the women who seek abortions and the people who support a women’s choice by trying to grant personhood to the fetus. For example, in the mid-eighties the anti-choice movement released the Silent Scream, a video that depicted a medically, scientifically and legally inaccurate eleven week gestation abortion. This video shifted the focus of abortion from the woman’s health and to the fetus. Arguing for personhood
status for the fetus has been effective in creating legislation that affects a woman’s right to an abortion. Restricting abortion and placing one person, the woman, over another person, the fetus, has allowed legislators to pass legislation that labels abortion as taking a life. Such legislation includes the creation of fetal homicide statues that treat the killing of a fetus by a third party as a traditional homicide. This has emphasized the notion of a fetus as having separate personhood from the woman. Another tactic is criminalizing women for illegal drug usage while pregnant. Women who test positive for drug usage during their pregnancies often face charges of child endangerment, negligence, abuse and the distribution of an illegal substance to a minor, which occurs during the few seconds after birth when a woman is connected to her child via her umbilical cord.

Prosecutors have used statues that prohibit abuse or neglect of children to charge women for actions that potentially harm the fetus. By the mid-nineties, over two hundred pregnant women in thirty states had been arrested and criminally charged for their alleged drug use. These statutes are disproportionately affecting poor women and women of color, for most of the drug testing of pregnant women is happening in public hospitals. Public hospitals provide care for a higher rate of poor women and women of color than private hospitals. Regina McKnight a South Carolina woman became the first person to be convicted of killing her fetus by means of crack cocaine on May 16, 2001. Subsequently, this young, poor, black mother of three was sentenced to twelve years in prison. This decision and sentencing was upheld by the U.S. Supreme Court. The media portrayed Ms. McKnight as an evil woman deserving of her punishment.

The media had a field day with the Laci Peterson case. Laci Peterson a young, married, white woman went missing from her Modesto, California home while she was
seven and a half months pregnant on December 24th 2002. The emphasis on rescuing and then eventually finding her remains centered on not only bringing Laci home but also her “unborn son.” Her body as well as the remains of her fetus were found, which led to the prosecution and conviction of Scott Peterson, Laci’s husband. Scott was convicted of the first-degree murder of Laci as well as the second-degree murder of their “unborn son.” He was given the death penalty. The Laci Peterson case was pivotal in helping to pass the 2004 federal Unborn Victims of Violence Act in 2004. This was the first federal law to recognize a fertilized egg as a crime victim independent of the pregnant woman. The law finds any person who causes the death of a “child” while it is in utero guilty of a separate offense. This fetal homicide statute was written to create the notion of fetal personhood, which because of anti-choice and media efforts was publicly accepted and praised for protecting families.

The use of language has been a crucial aspect of the success of such statutes, which give fetuses personhood and attack abortion rights. Both pro-choice and anti-choice groups have carefully chosen specific word choices to express particular ideas, and direct messages in support of abortion rights or to counter abortion rights. Language is a key aspect in framing the political issues involved in abortion in the past, for the present, and future. Controversial subjects in the public sphere, such as abortion, are susceptible to political language with either open or hidden agendas. Political views on abortion are expressed easily through the terminologies which define each side, pro-choice, pro-life; anti-choice and pro-death. All of these terms have been used to express either an allegiance with or against abortion rights and to describe the counter opinion. These interpretations of language have dramatically challenged the views of the medical
community and its practices. Legal action has been taken both to secure rights to safe legal abortions and strip reproductive freedoms from women.

The specific phrases that have been used in laws and judicial decisions are often connected to particular political views on the abortion debate. Key political words and phrases in these legal statutes shape access, levels of care, types of procedures, cost, and restrictions in relation to abortions in this country. One particularly effective phrase in the recent abortion debate is the term “partial birth abortion.” This idiom is part of the anti-choice dialect within the United States. It is being used effectively to restrict a doctor’s choice of abortion procedures. The vagueness of what procedures are encompassed by the term “partial birth abortion” has affected abortion providers from making medically sound choices for their patients.

The specific word choice of “partial birth abortion,” correlates exactly with other anti-choice propaganda. In the media, the term “partial birth abortion” has been used to draw a close line between a fetus and a newborn. The words and word order coupled with false images of “partial birth abortions” displayed on anti-choice websites, conjure up horrific images for many people. John C. Willke, M.D. a former National Right to Life president writes about the importance of language in the anti-choice movement. In one such article, The Battleground of Semantics, Willke describes terms such as “abortion providers”, abortion clinics, the actual abortion procedures and the fetus. In regard to an “abortion provider,” Willke states adamantly than under no circumstance is an “abortion provider” to be referred to as a doctor or surgeon. Willke believes these terms grant the provider dignity and stature. Instead, Willke recommends that people within the anti-choice movement use the word “abortionist.” The term “abortionist” has a deep
connection to criminality and killing, which Willke believes the label deserves. “Abortionist” also creates the atmosphere of the time period when abortion was illegal in this country. An “abortionist” is also seen as money-hungry exploiter of selfish women. These women are only concerned with themselves and not their “unborn children” according to Willke.8

Similarly, the idea of an abortion clinic is appalling to Willke, because the term clinic has the connotation of a place that heals a person. Alternatively, Willke recommends the use of the formidable term abortion mill, and if one must be neutral on the subject to use the phrase abortion facility. An abortion provider uses a curette, which is the instrument employed to “gently scrape” the lining of the uterus to dislodge fetal tissue. Instead, Willke describes the process as “cutting and slicing” away at the uterine wall, to create a more graphic and disturbing notion.9 Willke continually presents the idea of being pro-life and he argues that any position which does not match the pro-life agenda is inhumane and pro-death. He makes it very clear that there is no middle ground in this debate.

Willke, like many of his contemporaries, insists on using the word murder in reference to an abortion; he believes in using the word murder because only a person can murder another person. This thought process emphasizes the anti-choice viewpoint that an embryo or fetus is a separate individual, and that an abortion is the killing of another separate entity. To exemplify the idea of the fetus having personhood, the anti-choice movement uses terms such as the “unborn child”, “prenatal life”, “children in womb”, “human life before birth” and the “viable unborn.”10
George Lakoff, an author who examines the thought process and semantics of conservatives and liberals in regards to politics, sees that the result of framing of the fetus by the anti-choice movement is to place the debate in a moral domain. Liberals, as Lakoff states, use medical terms to describe the different stages of pregnancy. The stages starting from cluster of cells, to embryo, to fetus are separate categories. In contrast, the Right uses the word baby to refer to all stages of pregnancy. The term baby gives the notion of an independent human being, not a group of cells or another medical term that will be subject to a medical procedure, an abortion. The idea of baby killing creates moral outrage and demands immediate action by anti-choice activists.\(^\text{11}\) Willke, as well as most of the public describing pregnant women, uses the word mother in place of pregnant women.\(^\text{12}\) The anti-choice language has been adopted by mainstream Americans, who fail to see the term “mother” as political language corrupted by the anti-choice movement.

The term “partial birth abortion” is defined more specifically as the killing of babies that are within seconds of their births.\(^\text{13}\) The anti-choice movement, in order to create the emphasis on the fetus has purposely covered up and discredited the voice of the woman. The abortion debate no longer centers on women’s voices and the horrors of illegal abortions, but rather on the voice for the fetus.\(^\text{14}\) John Willke emphasizes the value of every “successful semantic coup” for the anti-choice movement.\(^\text{15}\) The Battlegrounds of Semantics appeared in the book When Life and Choice Collide: Essays on Rhetoric and Abortion, which was published in 1994. This book demonstrates that the anti-choice movement has been well organized in its continual attack and manipulation of language.
The framing of abortion in anti-choice coalitions around the notion that abortion causes fetal death, has proven to be quite influential and instrumental in gaining large scale backing. Christian religious fundamentalism in the United States has gained massive support through grassroots organizing, focusing on family values with a strategic weight on anti-choice politics. Language such as “partial birth abortions” was accepted quickly by religious entities, as it combines the key religious issues of birth and family values. The term takes an abortion procedure and strips the medical language from it and instead replaces the abortion procedure with forbidding images.

Organizations such as the Moral Majority, Christian Coalition of America, and the Right to Life have created strong spheres of influence by appealing to the idea and language of “family values.” The Reverend Jerry Farwell an Evangelical Christian, who helped found the Moral Majority, stated prior to the decision of Roe v. Wade that “preachers should not become political figures or take political action. However, after Roe, he found himself calling for all-out involvement by the Christian community.”

Even greater political involvement on both state and local levels by Christian Organizations developed after the 1989 Supreme Court decision in Webster v. Reproductive. This decision allowed state restrictions on abortion services for the first time since 1973. These restrictions mobilized grassroots anti-choice organizations to focus on local and state legislation. Webster returned the spotlight of abortion policy making to the states; abortion became a state’s rights issue again. Anti-choice groups have effectively targeted states to pass legislation that restricts abortion providers, services and procedures. The support of anti-choice groups fueled by the religious right was demonstrated by the sixty-seven “self-identified religious groups that submitted
amicus briefs in Webster.”¹⁹ The hope among anti-choice groups was that by making “partial birth abortion” legislation easy to pass and because of the public perceptions of these abortions as being gruesome, that other restrictions on abortion would take effect. In the end their goal is an all out ban on abortion.²⁰

As critics have pointed out, in states where anti-choice policies dominate, there is a mixed message of support for “life.” Anti-choice states value only some fetuses under certain circumstances, as demonstrated by the fact that there are many more state statutes that prosecute women for taking illegal drugs while pregnant than statutes that prosecute pregnant women’s partners who abuse them while pregnant. Domestic abuse is more likely to cause harm to the fetus and affects more pregnancies than drug usage. Following this same trend, anti-choice states spend less on children in regards to prenatal care, postnatal care, adoption, foster care, welfare and education.²¹ “Conservatives who are ‘pro-life’ want to prevent the death of the fetus of women who don’t want them (abortion) but don’t want to save the lives of fetuses that women do want, by providing prenatal care.”²² Conversely, states with liberal abortion policies have more social programs in place to help with babies, children, families and women.²³ This philosophy is also linked to the “partial birth abortion,” bans, which value the fetal life on a greater level than the woman’s decision regarding her own life and the decisions of medical professionals.

The abortion debate is being fought on two levels; the legal and political fronts. The legal battle by the pro-choice side is based on scientific facts regarding a woman’s body and abortion procedures. However, once the issue leaves the court room and is taken on by the media, it appears as though the anti-choice groups have complete
dominance. I think that the key reason that the control of the political battle rests in the anti-choice group’s hands is related directly to the strategic language the anti-choice front has been orchestrating. For example, “partial birth abortion” is a medically inaccurate term that has infiltrated the media, legislation, popular culture and even scholarly articles. This term falls within the broad category of the usage of semantics as a strategic political tool in influencing both popular opinion as well as legislation. In this thesis I will trace the origins, usage and implementation of both the terminology of “partial birth abortion” and the bans in order to examine the influence of the phrase in obstructing both women and physician’s choices in the United States over the last fifteen years. By focusing on the use and manipulation of language in the “partial birth abortion” issue, I will illustrate broader issues about language.
1 Roe v. Wade. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed 2d 147 (1973)
3 Schroedel, 63-63.
9 Willke M.D., 327.
22 George Lakoff, don’t think of an elephant (VT:Chelsea Green Publishing Company, 2004 ) 47.
Chapter One: The Origins of “Partial Birth Abortion”

“Partial birth abortion” is part of a broad category of semantics used by anti-choice groups to limit reproductive rights. The specific term is a strategic political tool in influencing both popular opinion as well as legislation. The use of this term has been effective in passing bans to restrict medically necessary abortion procedures; however the term itself has no medical validity. The influence of anti-choice groups at manipulating language is clearly demonstrated with the term “partial birth abortion.”

The phrase “partial birth abortion” has only recently become part of popular discourse. “Partial birth abortion” is defined in the American Heritage Dictionary of the English Language as “a late term abortion, especially one in which a viable fetus is partially delivered through the cervix before extracted. Not in technical use.” The America Heritage Dictionary makes a point to state that this definition is not sound scientifically, which implies that the term has no medical validity and is used politically. The American College of Obstetrics and Gynecology states clearly that “partial birth abortion” is a non-medical term. There is no known medical procedure identified as a “partial birth abortion.”¹ In fact, there is a deliberate distortion between the term “partial birth abortion” and actual abortion procedures. According to the Center for Disease Control ninety-nine percent of all abortions have either a living embryo or fetus enter the birth canal during the procedure. Thus, if one uses the language of “partial birth abortion,” ninety-nine percent of all abortions would be placed in this category.²

The origin of the term “partial birth abortion” was a non-medical source, former Republican State Representative Charles Canady of Florida. Representative Canady was informed of the abortion procedure dilation and extraction by the organization National
Right to Life (NRLC). This organization obtained a copy of a paper describing the intact
dilation and evacuation dilation (ID&E)/extraction (D&X) procedure in 1992. Dr. Martin Haskell presented his paper entitled “Dilation and Extraction for Late Second
Trimester Abortion” at the National Abortion Federation convention during a Risk
Management Seminar on September 13th, 1992. The paper detailed all aspects of the
ID&E/D&X procedure. Dr. Haskell explained that at the time he wrote the paper he had
performed approximately seven hundred ID&E/D&Xs with very few complications. Dr.
Haskell announced that this abortion technique could be performed successfully on
patients at twenty to twenty-six weeks gestation. In his paper, however, Dr. Haskell
described that an alternative method of dilation and evacuation (D&E) would be difficult,
because of the toughness of fetal tissues and so the disarticulation would be challenging.
The information from Dr. Haskell’s paper motivated Representative Canady to create
another name for the procedure, one with political and emotional pull. Canady worked in
conjunction with Douglas Johnson the legislative director for the National Right to Life
to create the term “partial birth abortion.” The National Right to Life states that the term
“partial birth abortion” is perfectly accurate. This organization’s argument does not
reflect the medical accuracy of the phrase but rather how perfect the phrase is for political
propaganda, which would be used to gain support for legislation banning “partial birth
abortions.”

Prior to his appointment to the Florida Second District Court of Appeals by
Governor Jeb Bush in 1999, Canady promoted a general conservative and restrictive
agenda through his voting power while he was a Florida state representative. Canady
did not limit his agenda to bringing the term partial birth abortion into popular culture
and establishing the partial birth abortion ban act. Canady also voted yes to banning gay adoptions, limiting the use of tax deductions to reinforce traditional families, ending preferential treatment by race in college admissions, increasing prosecution and sentencing of juvenile crime, making federal death penalty appeals more difficult, decreasing the waiting period for guns from three days to one day, limiting welfare entitlements to two years, cutting welfare spending, and giving federal aid only to schools allowing voluntary prayer. Canady vetoed bills, which supported funding for alternative sentencing practices in lieu of more prisons and replacing the death penalty with life imprisonment. Canady’s politics encompassed a broad conservative, right wing agenda, which would later become useful when appealing to fellow legislators to support “partial birth abortion” legislation.

The phrase, “partial birth abortion,” appealed to people’s morality by claiming to protect those almost but not yet born, which fulfilled “family values.” Pro-choice factions viewed this bill as an immediate threat. The restrictions set forth in the bill would dramatically alter the relationship between women and their providers, while mistakenly appearing to the public and Congressional people as only affecting one specific type of abortion procedure. Randell Terry a militant anti-choice supporter, who founded Operation Rescue, an active anti-choice group, made the statement that “the partial-birth abortion ban is a political scam but a public relations gold mine.” The power of the language encapsulated in the term “partial birth abortion” went far beyond the legislative floor. The National Right to Life purposely created the term “partial birth abortion” because it would be the “perfect media catchphrase.” The media was quick to latch on to this anti-choice lexicon and apply the term as if it were non-biased and
deceptive. The pro-choice movement was unable to counter anti-choice groups with medically accurate information. Medically accurate information did not have the same media catchphrase as “partial birth abortion.” The adoption of the term “partial birth abortion” as a medical term continues to fuel the anti-choice movement, and promotes opposition to reproductive rights. The American public hears and sees this term on a continual basis, which places the focus on the fetus and not the woman.

The phrase “partial birth abortion” is a distorted term compared to the medical term dilation and extraction; however it is the non-medical phrase that the American culture assimilated into its lexicon. Ten percent of abortion articles written in 2003, with federal “partial birth abortion” legislation pending, mentioned, “partial birth abortion.” However only ten percent of those articles, one percent, used the terminology “so called partial birth abortion.” The remaining ninety percent of the articles presented “partial birth abortion” as a substantiated term. It is not simply conservative papers that use “partial birth abortion” as a legitimate phrase in articles, but it is employed also by the four largest national newspapers. The New York Times, The Washington Post, The L.A. Times and The Chicago Tribune were less likely to use correct language in their articles compared to smaller publications. These four papers used “so called partial birth abortion” only three point six times out of every one hundred articles written about abortion banning legislation. Ellen Goodman, a Boston Globe columnist, writes extensively about reproductive rights. She states that the Right Wing was able to manipulate the language by picking a specific word and word order. Thus, one imagines shear imagery when one hears the term “partial birth abortion,” rather than the concepts of medical procedure with the term dilation and extraction. This framing of the
procedure along with talking about the pregnant woman as a mother also allows people to become more emotionally invested with the fetus than the health of the woman.\textsuperscript{11}

The success of the anti-choice proponents push for Partial-Birth Abortion Ban Acts can be seen through the implementation of such bans in thirty-one states between the years of 1992-1999.\textsuperscript{12} These individual state bans credit their initial success to lobbying by national and local anti-choice groups. Such activists have stated that these bans are an important part of their piece-by-piece pressure tactics to keep abortion providers from offering abortion services. These bans also helped establish precedents that protect the fetus as a human life, for most of these bans refer to “partial birth abortions” as infanticide.\textsuperscript{13} While proponents of these bans state that they are only trying to target late-term abortions “in which the fetus is partially extracted from the uterus and then killed while still in the birth canal,” this does not ring true. Less than a hundredth of one percent of abortions are performed in the third trimester so these bans would affect only a minute fraction of abortions. However, the anti-choice movement sees these bans having a far greater affect than a mere percentage of abortions.\textsuperscript{14} George Lakoff the author of \textit{don’t think of an elephant} and \textit{Moral Politics: How Liberals and Conservatives Think}, argues that “partial birth abortions” places the most graphically disturbing type of abortion at the center of all abortion debates even though almost all abortion procedures are radically different from a late term abortion. He states, that this is the first step in ending all types of abortions; focusing on “partial birth abortions,” those which are most morally objectionable. According to Lakoff, the Right is centered on a strict father family model which grounds its morals.\textsuperscript{15} In that framework there are only two situations in which a woman would seek an abortion. The first reason is that she is an
unmarried teenaged girl who engaged in sex, which directly goes against a Strict Father model. This young woman should not be having sex and she should learn from her mistakes and by having an abortion she gets to avoid the consequences for her mistake. The second situation is if a woman was motivated to place her career above motherhood and have an abortion. A woman’s place in the Strict Father’s framework is to take care of her family and raise her children, which are paramount to her own career. Abortion is seen as immoral for it violates “the moral order and challenge[s] the entire Strict Father model.” The Right states that as moral people they have no choice but to object to the procedure. This notion of “family values” helps to explain why the Right takes such an adamant stance against abortion and specifically “partial birth abortion,” for it directly competes with the dynamics of a Strict Father model of family.

The language and terms of the abortion debate are being fabricated and defined by the anti-choice movement. These distortions are then subsequently adopted in the language used by lobbyists, politicians, legislation and the media. The success of the language used by the anti-choice movement in infiltrating governmental and societal groups is connected to the words and word order the anti-choice groups have used. The debates about “partial birth abortion” focus on the procedures and ban acts instead of the actual issues that contribute to later-term abortions. Poverty, the lack of health care, ignorance, youth and fear are the primary reasons for women and girls to have late-term abortions; however these problems are cast aside as irrelevant to the debate by the anti-choice movement the controlling side. The anti-choice movement’s strategic planning of the introduction and implementation of the term “partial birth abortion” dramatically influenced the Right’s attack on reproductive rights and health. The ability of anti-choice
advocates to gain the American public’s support through the key issue of “family values”
established a substantial political base to influence state and Federal legislation regarding
“partial birth abortion,” as well as other legislation that would negatively affect
reproductive rights.
9 Feldt, 12.
10 Feldt, 174
17 Lakoff, 268.
Chapter Two: Legal Restrictions and Abortion Procedures

The use of vague language by anti-choice groups, as in the term “partial birth abortion,” is a key tactic for passing legislation. However, once the constitutionality of “partial birth abortion” bans are questioned and brought before judicial review, this once instrumental language becomes problematic for pushing the anti-choice movement’s agenda. In the case of abortion issues the Courts rely on the medical community for the defining medical procedures and accurate language. Although, the Right has been triumphant in gaining support on the grassroots level, State and Federal government, the Courts have continually evaded this inclusion on the issue of “partial birth abortion.” The judicial standards of review for abortion decisions and the medically accurate language of abortion procedures have prevented the acceptance “partial birth abortion” ban acts as constitutional.

Legislation restricting abortion at both State and Federal levels must follow the pre-existing guidelines established by the federal court cases of Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey. These cases stand as the precedents for abortion decisions. However, it is possible for the Supreme Court to overturn these precedents if a case comes before the Supreme Court, which is found constitutional and is in contention with Roe or Casey. The reason “partial birth abortion” ban acts have been so visible in the media is not simply because of the language of the term, but also the controversial nature of the ban. The Courts have found that these bans do not fit into the framework for abortion restrictions established by both Roe and Casey. The reasoning by which both of these Supreme Court case were decided is important for understanding to the application in future abortion bans.
Legal Cases:
*Roe v. Wade*

The case was brought before the Supreme Court on behalf of a Texas woman who had become pregnant and desired an abortion and was denied the procedure. At issue in *Roe*, was the constitutionality of the Nineteenth Century Texas statute that prohibited all abortions except for the specific purpose of saving a woman’s life. A three judge federal district court declared that the Texas abortion statute was unconstitutional, because it was vague, overbroad and infringed on a woman’s rights guaranteed by the Ninth Amendment.

This decision was appealed to the Supreme Court. The case *Roe v. Wade* ultimately resulted in the legalization of abortion in the United States in 1973. The Supreme Court ruled that the constitutional right to privacy encompasses a woman’s right to choose whether or not to continue a pregnancy. Supreme Court Justice Blackmun wrote the majority opinion for *Roe*. Justice Blackmun acknowledged both the woman’s right to privacy and the state’s interest in promoting maternal health and safeguarding potential life. The Supreme Court decision in *Roe* found the Texas statute to be unconstitutional because it violated the Fourteenth Amendment’s right to privacy under personal liberty and substantive due process. Personal liberty as Justice Blackmun wrote “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. Justice Blackmun found that a state’s interest may override a woman’s fundamental right only when the state can justify the regulation “by a compelling state interest, and that the legislative enactments must be narrowly drawn to express only the legitimate state interest at stake.”

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*^*The District Court found the statute unconstitutional because the Ninth Amendment’s reservation of the rights of the people could include a woman’s decision whether or not to terminate her pregnancy.*
demonstrate an undeniable interest in a policy as justification, and without this compelling interest the policy is invalid. This is the use of strict scrutiny the most stringent judicial standard of review.

The creation of the trimester framework emerged in Blackmun’s decision. In *Roe* pregnancy is divided into three trimesters. During the first trimester consisting of the first 12 weeks of fetal gestation, there is no state interest and so no abortion restrictions would be constitutional. The abortion decision is left up to the woman and her physician. Once the end of the first trimester is reached, however a state interest arises and so abortion may be regulated, but only to protect and promote the woman’s health. Such regulations could include restrictions on the type of facility where an abortion may be provided and who may provide those services.  

The Texas statute defined life beginning at conception and hence the compelling state interest begins at this point. Blackmun disagreed with this reasoning. He declared that the unborn have never been seen under the eye of the law as full individuals. The state has a “compelling interest” once the fetus reaches viability, and it is capable of having a meaningful life outside the woman’s body. At the time *Roe* was decided the point of viability was defined at twenty-eight weeks gestation. The *Roe* decision states “if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”

The precedent case cited in *Roe* was *Griswold v. Connecticut*,  which held that a privacy right could be found under the Fourteenth Amendment’s due process clause. *Griswold* found that privacy gave married couples the right to decide how they would
plan their families; thus giving married couples the right to access contraceptives.\textsuperscript{11}

Abortion under \textit{Roe v. Wade} was protected under this fundamental right to privacy, which is the highest level of constitutional protection. However, when the trimester framework established in \textit{Roe} changed in 1992 with \textit{Casey} so did the level of protection. In \textit{Roe} a state regulation on a woman’s fundamental right to privacy could only be justified if it was a compelling state interest. \textit{Casey}, lowered the level of protection by requiring only an “undue burden” test to a regulation, which no longer had to serve a compelling state interest. The lower level of review allowed for a multitude of other restrictions through state statutes and cases.\textsuperscript{12}

\textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}

During the period between 1973 and 1992, the right to have an abortion under the \textit{Roe} framework was chipped away slowly, with legislation such as the Hyde Amendment. This Amendment, named after Congressman Henry Hyde (Ill-R) was attached annually to the Labor-HEW appropriations bill. It stipulates that no federal funding can promote, encourage and or pay for abortions.\textsuperscript{13} In 1992, the destruction of the original \textit{Roe} framework came about in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}.\textsuperscript{14} A Pennsylvania statute imposed many restrictions on abortion. It required a physician to inform the woman about fetal development, a twenty-four hour waiting period between consultation and the actual procedure, spousal notification of married women, parental consent of a minor who desires an abortion and required providers to maintain detailed reports of every abortion.\textsuperscript{15} The US District Court of the Eastern District of Pennsylvanian found all the provisions under the statute unconstitutional and placed a
permanent injunction against the state’s ability to enforce these provisions. Once the case went to the US Court of Appeals for the Third Circuit, this decision was reversed except for spousal notification, which was still found unconstitutional.¹⁶

The Supreme Court’s majority opinion on *Casey* is a joint opinion of Justice O’Connor, Justice Kennedy and Justice Souter in which they upheld the Third Circuit’s decision. The *Casey* majority states that the holdings of *Roe* are to be maintained based upon *Roe*’s constitutional analysis. *Casey* however, abandoned the trimester framework established by *Roe* and instead draws the line at viability, “so that before that time the woman has a right to choose to terminate her pregnancy.”¹⁷ Once viability, considered currently at twenty-four weeks gestation, is reached the state interest overrides the decision of the woman, unless her health and or life are at risk. The majority stated that they were upholding the essential claim of *Roe* that a woman had the right to terminate her pregnancy prior to viability and not within the trimester framework. The trimester framework in the majority’s opinion “undervalues the State’s interest in potential life.”¹⁸

In *Casey*, the Court also altered the standard for State interest from a “compelling interest” to an “undue burden.”¹⁹ An “undue burden” is a law whose purpose or effect places a substantial obstacle in the path of a woman to obtain an abortion prior to fetal viability. Laws that promote maternal health, childbirth over abortion require waiting periods and other measures can be covered under a State’s interest as long as they do not produce an “undue burden.” The District Court had found that waiting periods would increase the cost and delay the abortion procedure, but were merely burdensome and not an “undue burden.”²⁰ Additionally, the majority opinion changed the point of viability viewed under the law, from twenty-eight weeks under *Roe*
to twenty-four weeks. The Court claimed the advancements in neonatal health since 1973 allow for viability to come earlier in fetal gestation.\textsuperscript{21}

*Casey* considerably rewrote the *Roe* opinion. The “undue burden” test allows many more abortion regulations creating larger obstacles for a woman than the original “compelling state interest.” The “undue burden” standard of review is a lower level of review than strict scrutiny as in a “compelling state interest.” Thus, a government no longer has to demonstrate that an abortion restriction is serving a compelling state interest but rather that it does not place an undue burden upon a woman seeking an abortion. Each pre-viability abortion restriction is looked at on a case by case basis, which allows for more individual restrictions being passed and enforced.\textsuperscript{22} Rainey states that the Supreme Court

\begin{quote}
…has abandoned strict judicial review of abortion regulations and hence the notion of the act of abortion as a fundamental constitutional right and has replaced the *Roe* trimester framework of analysis with one dependent upon the viability of the fetus.\textsuperscript{23}
\end{quote}

The “undue burden” test requires quantitative measurements to prove if a policy is an undue burden upon a woman, which is hard to obtain and show until after implementation of the restriction. This is shown by legislation that provides for a twenty-four hour mandatory waiting period between a consultation for an abortion and the abortion procedure. Once the legislation is put in place it much easier to account for women who are burdened by the wait period, however prior to the mandatory wait period it is hard for these women to argue that it is an “undue burden.”\textsuperscript{24} Currently, *Casey* allows for the idea that if a woman has not acted to terminate her pregnancy she is consenting to the intervention of the State “on the
behavior of the developing child.” This perspective exists, because Casey claims that if a restriction is an “undue burden” it is not constitutional. When a restriction is not an “undue burden,” but rather constitutional, the state deems that a woman can obtain an abortion if she desires. However, this simply does not account for a woman’s ability to access an abortion. In the United States, since Casey, states have enacted many restrictive laws including: twenty states require counseling services for women and impose twenty-four hour waiting periods, thirty-two states prohibit Medicaid from paying for abortions, except if the woman’s life is at stake or in the cases of incest or rape, nineteen states require parental consent, fourteen states require parental notification and sixteen states prohibit coverage of abortions under state employee insurance none of these have been found to be “undue burdens” upon women seeking abortions.

The shift in abortion framework from Roe to Casey allowed for “partial birth abortion” ban acts to be seen as promoting a state interest, and not creating an “undue burden.” With this change in standards, the flexibility of a state’s interest has gone beyond supporting viable fetuses, and now extends to non-viable life, with legislation that includes “partial birth abortion” bans.

The political climate which allowed so many restrictions on abortions to be put in place eroded many aspects of a woman’s right to choose whether or not to terminate her pregnancy. The change in standard of review from Roe to Casey is part of the Right’s agenda to create easier avenues for reproductively restrictive language to be found constitutional. The terminology of “partial birth abortion,” is
part of an anti-choice agenda of separating medical accuracy from politically viable terms.

The term “partial birth abortion” itself has been instrumental in gaining support for legislation that bans many types of surgical abortion procedures. “Partial birth abortion” is not a medically accurate term, however it is used so frequently by anti-choice supporters, politicians and the media that the public has come to accept this term as a medical procedure. To comprehend the true power of language regarding abortion it is important to specifically understand how the types of abortion procedures differ medically in the United States. It is with this knowledge that the deceptive nature of the term “partial birth abortion” will become clear.

**Abortion Procedures:**

In the United States in 2002, 1.29 million legal abortions were provided to women, which was a drop from 1996 in which an estimated 1.36 million legal abortions took place. Unintended pregnancies account for 49 percent of pregnancies in American, and twenty-four percent of pregnancies are terminated through an abortion. Among women under the age of twenty-five, fifty-two percent have an abortion. Disproportionately, women of color are more likely to have an abortion than white women. Black women are three times and Latino women are two and a half times more likely to have an abortion than white women. The number of providers and the facilities that offer abortion services are declining each year. Between 1996 and 2000, the number of providers shrunk from 2,042 to 1,819, a reduction of eleven percent. As of 2000, eighty-seven percent of all counties in the United States lacked an abortion provider.
An abortion empties the uterus of its contents including the endometrius, clotted blood and mucus, and the embryo or fetus and the protective sac.\textsuperscript{28} There are five primary abortion procedures performed in the United States, vacuum aspiration, medical abortion, sharp curettage, dilation and evacuation and dilation and extraction. The abortion options a woman has are subject to the progression of her pregnancy, state and federal laws, and her access to a provider. Certain procedures are performed during the first trimester and other procedures are performed after the beginning of the second trimester and after eighteen weeks these abortions are considered later term abortions. There are also procedures that can be performed during either the first trimester and after the first trimester. Nearly ninety percent of all legal abortions performed in the United States happen during the first trimester. In 2001, the actual statistic was eight-eight percent. The first trimester is defined as prior to twelve weeks of fetal gestation. Fifty-six percent of these abortions occur during the first eight weeks. About ten percent of abortions are between twelve and twenty-four weeks.\textsuperscript{29} Abortion providing facilities include clinics, hospitals and private physicians’ offices. Within these facilities, ninety-seven percent provide abortions at eight weeks, eighty-six percent provide abortions at twelve weeks and only thirteen percent offer services at twenty-four weeks.\textsuperscript{30}

The most common and recommended abortion procedure in the United States is vacuum aspiration. Vacuum aspiration is also known as suction curettage. In 2000, ninety-seven percent of legal first term abortions performed in the U.S. were done with vacuum aspiration procedure. This procedure uses either a manual syringe, allowing the procedure to be done in remote areas without electricity, or with an electric pump.\textsuperscript{31}
The provider cleans and swabs the vagina and cervix with an antiseptic solution and cleans the genital area, after a pelvic exam is completed, which assesses the size and position of the uterus. The clinician inserts a speculum in to the vagina of the patient, in order to create a continual view of the cervix during the procedure. The practitioner then places a tenaculum (a slender long-handled instrument) on the cervix, which keeps the cervix in the proper position to perform the abortion. A local anesthetic solution is injected into the cervix, such as lidocaine, which numbs the pain created from the probing and opening of the cervix. After the anesthetic takes effect the provider will begin to stretch the cervix with dilators, which graduate in size. Dilating typically takes less than two minutes and the greater the progression of the pregnancy the more dilation necessary.

A vacuum aspiration procedure, when performed between six to eight weeks of gestation requires no anesthetic or dilation. A cannula, which resembles straw like tube, is inserted into the cervix. The cannula is flexible and its diameter ranges from a small drinking straw to half an inch. The cannula is connected to either a handheld or an electric vacuum device and then the provider begins a sweeping motion with the cannula within the uterine cavity.\(^{32}\)

The process of emptying the uterine cavity takes about five minutes, and the patient will feel cramping as the uterus contracts around the cannula. After the contents from the uterus has been removed the practitioner takes out the cannula inspects for any excess bleeding, removes the speculum and cleans the vulva. The woman then stays in the providing facility until she and the staff feel that she is ready to leave. Vacuum aspiration has an effective rate of ninety-eight to ninety-nine percent, and is least effective in the first six weeks after conception.\(^{33}\) Vacuum Aspiration is most often used
as an abortion method through twelve weeks gestation and even some providers will offer
this method until the fifteenth week of gestation.

Medical abortion is an alternative to surgical abortion in the first trimester. It involves using two drugs mifepristone and misoprostal. Mifepristone was approved by the Food and Drug Administration in September, 2000 under the U.S. trade name Mifeprex. Misoprostal’s trade name is Cytotex. Mifepristone is an antiprogestin that prevents the transmission of the hormone progesterone, which is necessary to nurture the implanted pre-embryo and embryo. Misoprostal is a synthetic prostaglandin that causes strong contractions, and this drug is also approved for the treatment of gastric and duodenal ulcers in more than seventy countries. Mifepristone is administered orally or vaginally in three, two hundred milligram dosages at the physician’s office, after the gestation is determined. Then, at home between one and three days later misoprostal is taken either orally or vaginally. Approximately two thirds of women pass the product of conception within four hours of administering misoprostal and three fourths will pass within twenty-four hours. Severe lower abdominal cramping will be felt as the conception tissue passes through the cervix. Blood clots will be passed and so will the gestational sac. The farther along the gestation the larger the embryo, however, it is less than half an inch long until seven weeks. After a few days, the bleeding slows to a light flow and then eventually just spotting for a few more days to a week.  

One week later there is a mandatory follow up visit for the patient. An ultrasound is performed to determine whether the pregnancy was terminated and all tissue expelled. About five percent of women will not fully expel all of the uterine contents and less than one percent of women will need to either have vacuum aspiration or curettage to
stop heavy or prolonged bleeding. Used until seven weeks gestation, this two-drug regimen is at least ninety-five percent effective, and between eighty and ninety-five percent effective when used from seven to nine weeks gestation.35

Three hundred and fifty thousand women have used the two drug combination mifepristone/misoprostal between the fall of 2000 and the fall of 2004 in the United States.36 Medical abortion with the regimen of mifepristone and misoprostal has increased the number of women having earlier abortions in the United States. This type of abortion is provided in a number of settings. A trained abortion provider does not need to administer the drug, but rather simply needs to be on call for emergencies.37

Sharp Curettage, which in the past was referred to as dilation and curettage, has been replaced with vacuum aspiration. Vacuum aspiration is a more recent technological advancement in the abortion field, which allows for increased comfort and safety compared to sharp curettage. The complications from vacuum aspiration during this period are half of those from sharp curettage. Sharp curettage is used for a multitude of reasons beside abortion. As in vacuum aspiration, the technique is “used to obtain diagnostic material for uterine biopsies, to treat excessive bleeding, and to clean out the uterus following a miscarriage.”38

The procedure of sharp curettage is ideal for abortions occurring between twelve and sixteen weeks, after vacuum aspiration is no longer as effective. Sharp curettage uses a ridged metal curette instead of the flexible plastic cannula, which is used during vacuum aspiration; this causes sharp curettage to be both more painful and dangerous for the woman. The metal curette is placed through the cervix and moved about so that it scrapes against the uterine walls loosening and removing the tissue within the uterus.
This procedure takes longer and causes more bleeding than vacuum aspiration. Typically, general anesthesia is used while performing this type of abortion, which greatly increases the cost of the procedure and requires more staff members.\textsuperscript{39}

Dilation and evacuation (D&E) is the most frequently used procedure during the second trimester. D&E abortions account for ninety-five percent of all abortions occurring between twelve and twenty weeks gestation.\textsuperscript{40} This procedure is comprised of a combination method of evacuating the uterus through the means of vacuum aspiration, sharp curettage, and usage of forceps to extract the fetus and placenta with a small possibility of injecting sodium chloride into the fetal sac prior to removal. A D&E is often started a day ahead of the actual procedure to allow for enough dilation of the cervix, since the fetus will be larger as the gestational period increases. The practitioner places osmotic dilators, such as laminaria, into the cervix. These dilators start as the size of match sticks and expand over time with the absorption of fluid and may cause some cramping.\textsuperscript{41}

Prior to the surgical abortion paracervical blockers or stronger sedation is given and the osmotic dilators are removed. Further dilation may be needed depending on how far along the fetal gestation is and how well the osmotic dilators worked.\textsuperscript{42} Next, “the aspirator is then introduced into the uterus to loosen the tissue and remove what it can, followed by scraping with a curette, perhaps more aspiration, and then use of forceps to remove any remaining parts of the fetus or placenta.”\textsuperscript{43}

This procedure takes between twenty to thirty minutes and heavy bleeding is generated. A drug may be given to slow the blood loss by contracting the uterus. Sixteen weeks is considered mid time to have a D&E and at this point the fetus is 120mm (five
inches) long and 110 grams (four ounces), the fetus is unaware of pain, because the neocortex is not developed enough to transmit signals.\textsuperscript{44} Anti-choice groups dispute this information and instead state that the fetus does feel pain during an abortion. Dilation and evacuation is quite similar to vacuum aspiration, apart from the fact that the cervix is required to be dilated further because the surgical instruments remove large pieces of fetal tissue. D&E is associated with specific risks due to the nature of the procedure. Perforation of the uterus and damage to other internal organs are possible because of the surgical instruments used in the procedure and the sharp fetal bones being removed from the uterus. There is also the possibility of infection from fetal tissue being accidentally left within the uterus. However, the risks are substantially lower with a D&E procedure between twelve and twenty weeks of gestation compared with induced labor procedures, which is the next safest procedure during this gestation.\textsuperscript{45}

Intact dilation and evacuation (ID&E)/dilation and extraction (D&X) is an abortion procedure rarely implemented in the United States. In 2001, less than 1.4 percent of abortions performed after twenty weeks were ID&E/D&X procedures. The procedure of an ID&E/D&X is quite similar to a D&E procedure. There are two substantial differences. First the cervix will require more dilation because the nature of the procedure requires the fetus to be removed intact instead of in pieces. The second difference is that there is no disarticulating the fetus by means of forceps. Instead, forceps are used to grasp the intact fetus to pull the entire fetal trunk through the cervix and the fetal head is lodged in the cervix.\textsuperscript{46} The head “is too big to pass through the dilated cervix, remains in the internal cervical opening. At this point, the physician takes a pair of blunt curved scissors and forces the scissors into the base of the skull.”\textsuperscript{47} Then
the abortion provider suctions the contents of the fetal skull, and is then able to remove the fetal skull through the cervix. An ID&E/D&X procedure is sometimes preferable to a D&E procedure. The forceps that grasp the fetus during an ID&E/D&X are not used to disarticulate the fetus, which may require several insertions, as during a D&E. The repetitive motion can result in trauma to the uterine wall. With a more advanced fetus, the length of the procedure may increase from two days to three days, which is typical of a gestation between twenty and twenty-four weeks. The first two days are used to dilate the uterus and on the third day, the fetus is removed. Intact dilation and evacuation/dilation and extraction is the abortion procedure that causes the most controversy and is at the same time the procedure least performed in the United States.

After reading the in depth descriptions of the abortion procedures offered in the United States the discrepancy between the explanation of a “partial birth abortion” and any type of surgical abortion becomes apparent. The language used to depict a “partial birth abortion” fails to specifically depict any type of medically recognized surgical abortion. The rationale for the usage of the term becomes clear. It is a politically advantageous term that lacks medical truth. Similarly, the pro-choice advocates often use intact dilation and evacuation (ID&E) instead of the term dilation and extraction (D&X), because of the political advantage of the term ID&E. The term D&X has been vilified by the media and anti-choice advocates, and so pro-choice advocates in an effort to recapture the language have switched to the use of ID&E.

The Courts in combination with medically accurate language have been the devices, which have loosened the tight grip of the Right over abortion restrictions. Once the term “partial birth abortion” is compared to the actual surgical abortions performed in
this country, the large medical discrepancies in the term become apparent. The lack of a
health exception in “partial birth abortion” ban acts has proven to be a fatal flaw of the
anti-choice group’s efforts once such legislation reached the Courts.
1 Roe v. Wade. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed 2d 147 (1973)
3 Ball, 96.
10 Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct., 1678, 14 L.Ed.2d 510 (1965)
17 Sullivan, 578.


44 Muller-Dixon, 103.


Chapter Three: The 1995 “Partial Birth Abortion” Ban Act and Aftermath

The United States Congress provides the platform to create legislation, which governs every state. Activists in the anti-choice movement realize it is harder to have an impact on national level government than at the state level. However, they have been consistently lobbying their Congressional delegates to push their anti-abortion agenda on a national level. Attacking access to abortion procedures quickly became a tactic that anti-choice groups used to counter the right to have an abortion guaranteed by the decision *Roe v. Wade*. Total prohibition of abortion is the ultimate goal of anti-choice groups. The road to this goal is achieved incrementally. For example, anti-choice adherents viewed the passage of the Hyde Amendment, which blocks any federal funding of abortions through Medicaid or the U.S. Department of Human Health Services except if the life of the mother is at risk, as a successful step in their goal. Other examples of legislative successes included TRAP (targeted regulations of abortion providers) laws, which specifically target abortion clinics and providers with requirements that no other health clinics or providers must meet. TRAP laws are passed with the intention of restricting abortion access one such law requires providers to have privileges at local hospitals.\(^1\) This may be difficult for the provider to obtain for their general practice may be out of state or the hospital may have a religious affiliation. Mandatory twenty-four hour waiting periods require women to have a preliminary visit prior to having an abortion. These restrictions not only make obtaining an abortion more challenging, but also prevent many women from having abortions. For many women, the location of clinics coupled with the resources required to make multiple trips eliminate abortion as a viable option.
Flush with the success of curtailing access to abortion procedures anti-choice advocates set forth to achieve the next target toward the fundamental goal. Anti-choice groups and legislators sought prohibitions targeting a specific type of abortion. The “Partial Birth Abortion” Ban Act of 1995 was a significant part of the anti-choice strategy. It was the very first time in history that Congress passed legislation, which prohibited a medical procedure and criminalized physicians for performing such procedures. Legislators were deciding on the legitimacy and necessity of medical procedures for which they had no personal expertise. A physician’s ability to make medically necessary decisions was being seen as something that concerned not only the physician and patient, but also the United States Congress. Passage of this bill proved to the pro-choice movement that the anti-choice groups had no plans to end their relentless attacks on the right to an abortion. The clout of the anti-choice movement crystallized in its ability to bypass the medical community and convince Congress to pass a bill without any health exclusion. Further, the 1995 “Partial Birth Abortion” Ban Act was just the beginning of the onslaught of legislative bans that would come before state and federal legislators.

After both the United States House and Senate passed the “Partial Birth Abortion” Ban Act, President Clinton vetoed the bill and the Senate failed to override the veto by the necessary two-thirds majority. The Act H.R. 1833 passed by the House and Senate defined “partial birth abortion” as “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.” The bill specified that a person who performs a “partial birth abortion” is knowingly killing a fetus and will be fined and or imprisoned for such actions for no
more that two years. Financial relief was granted to the father or the maternal grandparents of the fetus unless the pregnancy resulted from criminal conduct of the woman. A woman could not be prosecuted for conspiracy if a “partial birth abortion” was performed upon her. The only exception in the writing of the bill was if a “partial birth abortion” was necessary to save the woman’s life and no other procedure would suffice.5

The U.S. House of Representatives

When the bill first reached the House on Thursday June 15 1995, Chairman Canady’s opening remarks set the tone for how the legislation would be presented to the House of Representatives. He stated that all abortion took a human life, but “partial birth abortion” was a truly heinous act for the procedure takes “life as the baby emerges from the mother’s womb while the baby is in the birth canal. The difference between partial-birth abortion procedure and homicide is a mere 3 inches.”6 Canady used the language to create a vivid image of a baby at birth. The combination of linguistic and pictorial images to create support for the restrictive legislation reappeared clearly in the testimony of Mary Ellen Norton a R.N. Neonatal Specialist. Nurse Norton presented a slide show of babies prematurely born between 23-28 weeks. While flipping from slide to slide she told the story of each baby featured and keyed in on the aspects that each and every baby has a distinct cry, unique facial expressions and can feel pain. The goal of this testimony was to give personhood to each fetus that would be affected if the “partial birth abortion” ban act was not passed, for the images of babies at very premature stages gives the false sense that “partial birth abortions” ultimately destroy “innocent life”.7 Nurse Norton’s
testimony described that these babies had been saved, but she failed to explain the immense costs of “saving” neonatal life of most fetuses if born at 23 weeks. Norton did not acknowledge that often they suffer an agonizing death.

Representative Henry Hyde, famous for the Hyde Amendment, spoke in the subcommittee hearing and generated dramatic imagery of “unborn life” with his choice of words. While addressing Dr. Robinson, a physician testifying against the “partial birth abortion ban act,” Senator Hyde continually criticized abortion providers. Senator Hyde stated, “of course health is irrelevant for the fetus that has been exterminated. It just seems ironic that this surgery does not speak its name.” Senator Hyde used extremist language to focus his agenda on the fetus and not the woman; the woman’s health is irrelevant as presented by Senator Hyde.

Expressing her deep concern of where to draw the line of Congressional interference in medical decisions, Representative Patricia Schroeder, stated she opposed the “partial birth abortion” ban act. Representative Schroeder expressed her concern that Congress would be restricting a medically necessary procedure. Like the anti-choice side, pro-choice advocates use specific language, such as “medically necessary.” This term represents a life or death situation dependant upon whether a patient receives the “medically necessary” procedure. Representative Schroeder also claimed that the bill would affect what would be taught in Medical schools. This micro-managing of the medical community by Congressional leaders in her opinion would only harm women’s health. Representative Schroeder acknowledged a key aspect of this legislation that the ban would not just affect current patient care, but would also allow anti-choice ideas to affect what medical students would be taught. The ability to affect the curriculum of
Medical schools would be crucial in changing the type of abortions providers could perform.

**The Debate in the U.S. Senate**

The Senate Judiciary Committee Hearing consisted of arguments in support of the legislation centering on the “unborn life,” the need to protect this “life” from an inhumane death and the constitutionality of the legislation. Arguments against the “partial birth abortion” ban act cited that it restricted necessary health care, criminalized providers, contained deceptive language, reflected a fanatical agenda and was unconstitutional. Statements came from committee members, witnesses, legislators, questions and answers from physicians and legal scholars, and submissions for the record. The committee members, who made statements included Chairman Orrin Hatch, Edward Kennedy, Arlen Specter, Dianne Feinstein, Russell Feingold, Hank Brown and Strom Thurmond.

Senator Orrin Hatch opened the hearing and focused his statements on support for the “unborn life” granting an excerption to the ban act only if the life of the mother is in jeopardy. He also made the claim that this bill was not a general ban on abortion, but pertained to a specific medical procedure. Senator Hatch referred to an interview by American Medical News with Dr. Martin Haskell, considered an expert on “partial birth abortion.” Dr. Haskell authored and presented a paper entitled *Dilation and Extraction for Late Second Trimester Abortion*. In the American Medical News interview, Dr. Haskell stated that eighty percent of all abortions performed between twenty and twenty-four weeks of gestation are elective and that in one-third of these abortions the fetus is
already dead before the procedure begins. Senator Hatch extrapolated from that report that two thirds of these fetuses must be alive during the entire procedure. This fact helped to support his pro-life agenda, because by stating that these fetuses were alive during the procedure Senator Hatch could further describe these procedures as barbarically killing “innocent fetuses.”

Speaking for the minority, Senator Edward Kennedy condemned the passage of the “Partial Birth Abortion” Ban Act. Senator Kennedy’s argument concentrated on the idea that the bill restricted a woman’s right to obtain reproductive healthcare. The bill was just one step on the road to eradicating a woman’s right to an abortion in Senator Kennedy’s opinion. He also stated that it is part of an extremist agenda to nullify the Supreme Court decision in Roe v. Wade. Senator Kennedy stated the cases targeted by the proposed legislation are extremely rare and that the decision to perform such a procedure should be left to the judgment of a physician. Citing the Guttenmacher statistics, Senator Kennedy argued that 1.5 million abortions occurred annually. However, the bill would affect less than one-tenth of one percent, or approximately 600 abortions a year. In his statement, Senator Simon echoed Senator Kennedy’s argument against outlawing a rare but necessary medical procedure and creating legislation that would criminalize physicians for their practice. Senator Simon entered into the record a letter he received from The University of Chicago Department of Obstetrics and Gynecology responded to questions posed by Senator Simon. Dr. Arthur L. Herbst wrote that the “Partial Birth Abortion” Ban Act should not be passed because it would outlaw rare but necessary medical procedures.
Senator DeWine questioned the medical necessity of these procedures, in response to the pro-choice Senator’s claims. He questioned if “partial birth abortions” were medically necessary because Dr. Haskell claimed that eighty percent of abortions between twenty and twenty-four weeks were elective. Dr. Campbell responded to Senator DeWine’s statement by testifying that during this time frame the pregnancy is seen under the law as pre-viable. Therefore, the question of whether the abortion is elective or not is irrelevant because the woman has the right to make her own decision to terminate her pregnancy.12

Senator Kennedy emphasized that the decision to perform such a procedure should be left to the judgment of a physician. Senator Kennedy focused on the American tradition of delineating between public and private spheres, which places patient physician relations in the private sphere. By passing this bill, Congress would for the first time outlaw a type of medical procedure, as well as threaten doctors with prison for practicing their profession. Senator Kennedy declared that the American College of Obstetrics and Gynecology (ACOG) expressed grave concerns about the ban act. The ACOG stated that this procedure “partial birth abortion” does not appear in any textbook. The ACOG had reservations about how physicians could conform their practices to a law that criminalizes a medical procedure that is not defined in these terms in the medical world.13 In Senator Simon’s submission from Dr. Herbst, he stated clearly his opposition to the Federal Government deciding the acceptability of specific medical practices and procedures. Dr. Herbst claimed that “these decisions should be based on medical information and not by a legislative process.”14 He further emphasized his views about the idea of governmental roles in medicine by writing that “it appears ironic to me that
the current emphasis in Washington is to reduce Federal Government’s involvement in our lives. The proposed legislation goes alarming in the opposite direction.”

Dr. J. Courtland Robinson, an associate professor at John Hopkins University School of Medicine and OB/GYN for over forty years expressed his opposition to the proposed legislation. Dr. Robinson testified that Congress is not a qualified entity to determine how he as a physician should treat patients while in the operating room and so he opposed the legislation. The Supreme Court instead has given women the right to decide whether to terminate a pregnancy and their doctors must be guaranteed the ability to make the best decisions in their professional ability to treat patients. He concluded that only someone who wanted to place restrictions on abortion would they characterize the procedures as a “partial birth abortion”. Dr. Robinson also directed the attention of the committee to the drawings of such procedures that had been passed around, which he stated were inaccurate. He testified that these pictures were not drawn to scale and were used solely to upset lay people. He further stated that the sketches “do not advance medical practice. And the other words of the legislation are equally inflammatory.”

The criminalizing of both providers who perform “partial birth abortions” and those who counsel a pregnant woman before or after the “partial birth abortion” was the focus of Senator Patrick Leahy presentation. Those who counsel the pregnant woman could be sentenced to up to three years in prison, which is a year longer than those who perform the abortion. Dr. Herbst also declared that he opposed the idea of introducing criminal penalties into the practice of medicine in the United States. Senator Leahy stated that the inability of a woman to fully disclose information regarding a current or past pregnancy is a violation of privacy rights. The denial of privacy rights placed the
bans in opposition to fundamental rights. The bill created a large problem for legislators who supported the legislation, because legislators usually pass laws that protect fundamental rights.

Senator Kennedy also drew the attention of the hearing to the fact that the much talked about Dr. Haskell was absent. Senator Kennedy read a letter from Dr. Haskell’s attorney, which stated the reason why her client was unable to testify at the hearing. The facts included that Dr. Haskell had been physically threatened and his clinic had been firebombed. Thus, Dr Haskell had decided to make fewer media appearances to insure his own safety as well as that of his clients. Attorney Kathryn Kolbert stated that Dr. Haskell opposes such legislation. In closing, Senator Kennedy claimed that the Federal Government should not be intruding and imposing laws on such deeply personal medical decisions.\(^2\) The reading of Kathryn Kolbert’s letter demonstrated that this legislation is supported by extremism, for Dr. Haskell was being threatened with assault because he is a provider.

Both Senator Arlen Specter and Senator Russell Feingold addressed the lack of a health exception. Senator Specter referenced the American College of Obstetrics and Gynecology, an institutional expert on female reproductive health. In its letter to the committee, the ACOG faulted the bill for the failure to include a health exception. Senator Specter stated the “Supreme Court had applied the Constitution to permit abortion to protect the life of the mother or health of the mother at any time during pregnancy.”\(^2\) Senator Feingold explained why the bill failed to meet the constitutional requirements of \textit{Roe v. Wade}, which ensure a right to terminate a pregnancy pre-viability and a health and life exception post viability. Senator Feingold finished his statement

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with a focus on being pro-family. He described the ban as being anti-family, because these procedures are often necessary to protect a woman’s ability to bear children in the future. The statement by Senator Feingold showed that although he favored a health exception, he valued life just as much as those in support of the legislation, because he supported the life of a woman and her family.

Senator Dianne Feinstein, the only female committee member, argued that the language of the ban act is too vague and fails to specify prohibited procedures. Rather, the ban act described a fetus being delivered in a live state. The ban act is not written in a medical framework, but instead in layman’s terms. She questioned the interest of the government in intruding on decisions between a woman and her physician. Louis Michael Seidman, a law professor at Georgetown University Law Center, argued that the statute in fact was unconstitutional as it contained no health exception. If the legislation passed, the Government would prevent women from making the ultimate decision pre-viability, both rights guaranteed under Casey. Seidman stated that the legislation was not protecting any potential life, but would rather force women to undergo riskier abortion procedures, placing a woman’s life in jeopardy. While being questioned by Senators, Seidman responded that in many states infanticide is punishable by life imprisonment, but the punishment under this statute for performing a “partial birth abortion” would result in a maximum two years imprisonment. He questioned the validity of describing these procedures as killing an infant moments from being born if the punishment did not match any other infanticide statutes. In closing remarks, Seidman stated that the statute was crafted in a bizarre fashion. A Douglas W. Kmiec, a law professor at Notre Dame,

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A Seidman’s cited the example that the bill gives the right of action to maternal grandparents but not paternal grandparents of the fetus if the woman was under eighteen years of age. Claiming
supported the legislation as he felt that it met all of the *Casey* standards and that there was no issue of vagueness within the statute, because it clearly warns doctors of the conduct that would be prohibited.\textsuperscript{25}

The testimony of witnesses was a key strategic plan for both the supporters and opponents of the legislation. Brenda Pratt Shafer appeared as the first witness, a supporter of the fetal life argument. She had worked as an assistant nurse in the Women’s Medical Center in Dayton Ohio, run by Dr. Haskell. Her narrative depicted that she was pro-choice when she started work at the clinic. This opinion changed after working in the clinic for a mere three days. Shafer described that, over the course of her three days of employment, she witnessed second trimester dilation and evacuations (D&E) and Dilation and Extractions. She recounted specific details of an intact dilation and evacuation/dilation and extraction of a fetus at twenty-six weeks gestation, which she claimed she had witnessed. Shafer described explicitly how the fetus, which she referred to as a baby, had movement while in the birth canal and went limp once the brain matter was removed from the fetus. At this point, Shafer stated that she felt in complete shock and could not comprehend what she had seen.\textsuperscript{26} The language that Shafer used in her testimony framed the discussion around the fetus and purposely cast aside the importance of a woman’s health. Anti-choice legislators presented her as an expert based upon her experience, however it was her sensational testimony the anti-choice legislators found crucial. Her testimony consisted of an account that described abortions being performed on viable fetuses and her own personal transition to an anti-choice position, which appealed to the anti-choice movement.

\begin{flushleft}
that one side of grandparents would have a more vested interest in a potential grandchild seemed gender discrimination another reason to call the statute unconstitutional.
\end{flushleft}
Senators Kennedy, Feinstein, Specter and Leahy extensively questioned the validity of Shafer’s testimony. Arguments against Shafer centered on the inaccuracy of her account, contradictions between Shafer and Head Nurse Gallivan and her connections to the National Right to Life. Referring to the inaccuracy of Shafer’s account of the procedures performed in front of her, Senator Kennedy submitted a letter from Christine Gallivan, Dr. Haskell’s head nurse, who trained Shafer. The letter stated that Shafer had given the name of Brenda Pratt, when she worked for the clinic. Gallivan wrote that Dr. Haskell has a self-imposed limit of twenty-four week for abortion procedures, and that Shafer was inaccurate when describing the ID&E/D&X she claimed was at twenty-six weeks gestation. Gallivan also made the point that during a D&E there is no fetal response or awareness to pain stimuli. A temporary nurse, such as Shafer, would not have been present during an ID&E/D&X procedure, because of the technical aspects of the procedure. Kennedy asked Shafer to respond to the letter written by Gallivan. Shafer testified that she had witnessed an ID&E/D&X and that the fetus was at twenty-six weeks gestation. This was a clear contradiction between the testimony of Shafer and Head Nurse Gallivan.

In response to this paradox, Senator Feinstein drew attention to the fact that the committee hearings were relying on an employee who participated in these types of procedures for a mere three days. Senator Feinstein asserted that there was no conclusive way to prove that the Shafer was telling the truth, as her employer, Dr. Haskell, was unable to attend the hearing.27 Expressing his discontent, Senator Specter discussed the fact that the four physicians that have performed this procedure in this country were either unable or unwilling to testify, and so the expert testimony would not be heard.28
Senator Specter implied that in no way could Ms. Shafer be considered an expert in this field. Kennedy then asked Shafer about the American Nurses Association’s claim that Shafer is an employee of the National Right to Life. Shafer stated that the National Right to Life did not employ her but rather she had joined them.  

The first physician to testify in support of the ban was Dr. Pamela Smith, the director of medical education in the department of Obstetrics and Gynecology at Mount Sinai Hospital and the president-elect for the American Association of Pro-Life Obstetricians and Gynecologists, she emphasized the importance of the legislation in protecting fetal life. She adamantly stated that the term “partial birth abortion” was a correct expression for the type of procedure that takes place during an ID&E/D&X and that she supported the legislation. She disagreed with the notion that these types of abortions in any way protect a woman’s fertility. Few physicians who perform abortions have continued contact with their patients. Thus, there is no way to determine the rate of fertility post abortion asserted Dr. Smith. The committee received a copy of Chapter twenty-five of *Williams Obstetrics 19th Edition*, entitled Techniques for Breech Delivery for the purpose of comparing it to Dr Haskell’s techniques in an ID&E/D&X procedure.  

Dr. Smith equated the techniques of Dr. Haskell’s ID&E/D&X with fetal breech extraction, in which the intent is to deliver the fetus in the cases of twins and in complications of abnormal fetal positions at time of birth.  

Dr. Nancy Romer also claimed that she saw no reason for ID&E/D&X procedures and supported the legislation before Congress. As a practicing OB/GYN, in the same community as Dr. Haskell she stated that she had never performed an ID&E/D&X. Rather, she has found alternative methods, which she viewed, as effective and safe. Dr. Romer failed to elaborate on what
these techniques were, but instead stated that Dr. Haskell’s practice is not affecting rare or tragic pregnancies but normal healthy pregnancies. In closing, Dr Romer stated that in her “medical judgment, legislation to prohibit the ID&E/D&X procedure or partial-birth abortion does not present a substantial barrier to women seeking late-term abortion.”

Dr. Campbell the medical director of Planned Parenthood of Metropolitan Washington as well as a board certified OB/GYN, testified in opposition to the reasoning of Dr. Smith and argued against the legislation. She stated that she was in favor of ID&E/D&X procedures because they are the safest abortion technique in the second trimester. Dr. Campbell established her credentials by testifying that she had apprenticed at the Dr. James McMahon Clinic, with Dr. McMahon, the leading practitioner of D&E procedure practices. She explained the procedures of abortion in first, second and third trimester and the risks involved with each method. Dr. Campbell used long-term studies conducted by the Center for Disease Control (CDC), which found that the ID&E/D&X procedure is the safest abortion technique during second trimester to buttress her argument.

Dr. Campbell sought to disprove the dangers involved in D&X procedures, claimed by Dr. Smith. Dr. Campbell stated that a Caesarian delivery and hysterectomy is fourteen times more likely to cause the death of a pregnant woman than an ID&E/D&X abortion during third trimester gestation. Dr. Campbell indicated that it was inaccurate to testify as to the use of Drusshen’s incisions of the cervix, which “Dr. Pamela Smith refers to are not used in this country because of the danger of maternal hemorrhage. They were referred to in out-of-date textbook.” Dr. Campbell ended her testimony with three definitive medical reasons why she opposed such a “Partial Birth Abortion”
Ban Act. She testified first, that the language of the act was vague, secondly, the effect the ban would have on access to abortion services, and last because it would outlaw the safest procedure performed during the third trimester.\textsuperscript{35}

Senator Kennedy drew the committee’s attention to the fact that there was no consensus on “partial birth abortion” within the medical community and that four different medical procedures could be included in the term.\textsuperscript{36} The assertions that the procedures that Dr. Haskell performed were mostly elective, failed to look at the rights asserted by women who have pregnancies that were pre-viable to make their own decisions on terminating their pregnancies.

\textbf{The Voices of Women}

The testimony of women who had actually chosen or faced the decision of a late trimester abortion placed a voice on the Congressional floor of women affected by the proposed legislation. The first two women, Coreen Costello and Viki Wilson, both spoke about the necessary aspects of such “partial birth abortion” procedures and how the proposed legislation would harm families. Both Costello and Wilson directed the focus of their testimony on the ability of families to make arduous decisions with the support of their physicians.\textsuperscript{37} These two women’s testimony infused an aspect of humanity into the hearing. Listening to their accounts and how their families benefited from procedures that would be eliminated by the “partial birth abortion” ban act placed the debate into a practical context. The two women expressed that they had never wanted to have an abortion. Costello also testified that she was extremely religious and conservative. Neither woman had any choice due to gross abnormalities of their fetuses, discovered
very late in their pregnancies and posing threats to their own health and possibly life. Costello further testified that she felt that the abortion procedure was safe. Her evidence was the fact that she was pregnant at the time she testified. Wilson stated that she and her family felt that her fetus died with dignity, instead of being born and only surviving an excruciating few days of life. To counter the proposed ban act these two women used the language of family and dignity, which is typically used by the Right to support “partial birth abortion” ban acts.

The third woman to testify, Jeannie French proclaimed that she supported the proposed legislation. She painted a very different story than Costello and Wilson. During her pregnancy with twins she was notified that one of the twins was not going to survive due to occipital encephalocoele, which causes the brain to develop outside of the skull. Instead of aborting this fetus, French gave birth to both twins. The ill twin died within a few hours. The organs of this twin were donated to neo-natal centers around the country. French stated that the legislation would prevent women from aborting fetuses that may be disabled.38

Senator Hatch asserted that both Costello and Wilson would be protected under the ban act as their lives were clearly in danger.39 In response to Senator Hatch’s comment, Wilson stated that physicians “would not be willing to provide any late-term pregnancy abortions knowing that perhaps they would be in an overzealous antiabortion district.”40 This might happen even though a woman would fall into the category of a life exception because she might not be able to locate a physician who would provide the safest procedure she desperately needed, due to the climate of fear caused by the proposed legislation.
The Political Response

President Clinton stated in his veto of the “Partial Birth Abortion” Ban Act in early 1996, that he could not sign “H.R. 1833 as passed because it fails to protect women in such dire circumstances, because by treating doctors who perform the procedure in these tragic cases as criminals, the bill poses a danger of serious harm to women.”

There was an immediate backlash by the anti-choice movement to President Clinton’s veto. Politicians, specifically Republicans, took this opportunity to differentiate themselves from Clinton’s decision. At that time, the 1996 Presidential Election campaign was moving forward. Bob Dole, who became the Republican nominee for the Republican Party in the Presidential election made comments in favor of “partial birth abortion” ban acts. In the spring of 1996 Dole condemned President Clinton’s veto saying, “A partial birth abortion blurs the line between abortion and infanticide and crosses an ethical and legal line we must never cross.”

Politicians in the pro-choice circle were not emphasizing the importance of the physician having autonomy to make decisions with a patient, without the intrusion of the government. Instead, they were stressing the woman’s right to choose which voters were not willing to support in this case. Pro-choice groups had won reproductive rights in the past on the platform of a woman’s choice and not strictly physician’s autonomy. However, the public was not being receptive to the woman’s choice argument anymore. The anti-choice propaganda had influenced the public to create separate rights for fetuses in opposition to pregnant women.

Voters were seeing abortion and “partial birth abortion” as two separate issues. Republican Senator Rick Santorum from Pennsylvania was emphasizing and exploiting
this notion by stating that “there may be a medical need to terminate a pregnancy, but there is never a need to kill the baby.” Voters made it quite clear how they felt. Those people, who defined themselves as pro-choice were being influenced to support “partial birth abortion” ban acts. In 1996, voters who identified themselves as pro-choice never fell below fifty-two percent. However, in that same period those in favor of the ban acts never fell below fifty-four percent, and skyrocketed as high as seventy-one percent. The massive amount of media coverage on the “partial birth abortion” ban act had penetrated many American homes. During the debate the details of the ban act and the vagueness of the term had been excluded. People were given little substantial information regarding “partial birth abortion,” but the phrase itself created a negative connotation in the public’s mind. The fact that the Democratic Party strictly aligned itself in favor of “partial birth abortion” negatively affected the Democratic Party in the 1996 House and Senate races, as there was a loss of Democratic seats. Polls during this election reported that many voters that favored pro-choice legislation typically were also favoring “partial birth abortion” ban acts.

The notion of passing a federal ban did not falter, even as “Partial Birth Abortion” Ban Acts spread from state to state. During the hundred and fifth Congress, 1997, there was another ban act passed by both the House and Senate. To gain support for this bill, Republicans negotiated with the chair of the American Medical Association (AMA), Dr. Nancy Dickey. On May 19 1997, the AMA sent Republican Speaker of the House Newt Gingrich a wish list of Medicare reforms. The majority of these proposals were incorporated into the Republican legislation, which was passed two weeks later. On this same day, the AMA’s executive board publicly endorsed the “Partial Birth Abortion”
Ban Act of 1997. This endorsement triggered pro-life support within Congress. The day after the endorsement, the ban act picked up seven Senate votes of support, bringing the bill within three votes of the sixty-seven votes needed to override President Clinton’s 1997 veto of the “Partial Birth Abortion” Ban Act. After an internal investigation of the AMA, the decision to support the 1997 “Partial Birth Abortion” Ban Act was revealed to have been purely politically motivated and not medically researched. The links between Dr. Dickey and the AMA and Senator Gingrich were released to the public and the AMA declined to support any future “partial birth abortion” ban acts.

Many organizations took advantage of the volatile political atmosphere to push their agendas in local politics. One such group, The National Right to Life, had its committee send copies of the 1995 federal “partial birth abortion” ban act to state affiliates after the Presidential veto. The South Carolina affiliate to the National Right to Life brought the slightly amended federal bill before the state legislature. The “partial birth abortion” ban act passed in the South Carolina House one hundred and five to four. It passed in record time in the Senate. The only exception in the bill was a life exception for the woman; this bill still lacked a health exception. South Carolina Governor David Beasley signed the ban act into state law, which was not found unconstitutional until the Supreme Court ruling in 2000.

The jump from Federal legislation to State legislation did not simply take place in South Carolina. By early 2000 thirty-one states passed “partial birth abortion” ban acts. The anti-choice groups realized that if Federal legislation was not going to pass at that point time it was best to have multiple levels of attack on restricting abortion. They had prior success in grassroots organizing and this could easily be applied to state level
government. “Partial birth abortion” ban acts were often passed without much opposition in states and the pro-choice voice was suppressed by the ease with which this legislation was accepted by state representative and their constituents.

The “Partial Birth Abortion” Ban Act of 1995 and 1997 failed to be implemented into Federal law; however these ban acts still had national influence. The media attention given to the ban acts greatly shaped the American public’s view on the term “partial birth abortion.” Disturbing images of “partial birth abortion” procedures played over and over again in the heads of many Americans, because the media failed to cover the medically accurate information regarding surgical abortions in the country. Planting this seed in the public’s mind proved to be greatly influential once the “partial birth abortion” ban acts moved to the State level. The Right’s attack on reproductive rights and health simply moved venues.

**Congressional Votes on 1995 and 1997 “Partial Birth Abortion” Ban Acts**

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<tr>
<th>Congress</th>
<th>House</th>
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<th>Clinton</th>
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<tr>
<td>104th 1995-1996</td>
<td>Passed 288-139</td>
<td>Passed 54-44</td>
<td>Vetoed</td>
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<td>Overrode 285-137</td>
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<tr>
<td>105th 1997-1998</td>
<td>Passed 295-136</td>
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<td>2/3rds Challenge</td>
<td>Overrode 296-132</td>
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3 Herring, 169.
5 United States Congress, House of Representatives, 76-79.
7 United States Congress, House of Representatives, 76-79.
8 United States Congress, House of Representatives, 86.
9 United States Congress, House of Representatives, 97.
11 United States Congress, 64.
12 United States Congress, 121, 135-136, 141.
14 United States Congress, 64.
15 United States Congress, 64.
16 United States Congress, 105.
17 United States Congress, 103-104.
18 United States Congress, 104.
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21 United States Congress, 16.
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25 United States Congress, 169-171, 188-189, 200, 205
27 United States Congress, 58-64.
28 United States Congress, 17.
30 United States Congress, 84-98.
31 United States Congress, 75-79.
32 United States Congress, 110.
36 States Congress, 121, 135-136
37 United States Congress, 158-163
38 United States Congress, 163-168
39 United States Congress, 163-168
40 United States Congress, 167.
41 William Saletan, Bearing Right: How the Conservatives won the War on Abortion (CA: University of California Press, 2003) 234
42 Saletan, 234.
43 Saletan, 234.
44 Saletan, 234.
45 Saletan, 234-235.


Chapter Four: The Political Battle Over “Partial Birth Abortion”

At the State Level

As we have seen in chapter three, prior to 1995, anti-choice adherents concentrated their efforts to pass "partial birth abortion" ban legislation at the Federal level. However, President Clinton’s veto of the Federal “partial birth abortion” ban act triggered a surge by anti-choice movement to lobby state legislatures to enact “partial birth abortion” ban acts. Their efforts proved fruitful; over thirty states passed “partial birth abortion” ban acts between 1994 and 2000. These state bans did not refer solely to post viability fetuses, but rather affected pregnancies that were both pre and post viability. The use of intentionally vague and/or deceptive language in these bills and laws created the opportunity for a much broader prohibition on abortion. The majority of states within the country enacted laws to prevent abortions during post-viability after the case Roe v. Wade.¹ These statutes, that prohibit third term abortions, have been unchallenged in forty states and the District of Columbia. These same thirty-year-old statutes have exceptions, only when the health and life of the woman is at stake.² Thus no further legislation is required to rule out post viability abortion.

Critics argue that “partial birth abortion” ban acts target abortion procedures as early as thirteen weeks of gestation. Clearly, the effect of these bans is not limited to late term abortions, as their advocates claim. Only a mere three out of the thirty-one states that have passed “partial birth abortion” ban acts referred to a particular stage of pregnancy.³ According to the Center for Reproductive Rights “partial birth abortion” ban acts “represent an attempt to criminalize numerous abortion procedures including the safest and most commonly used pre-viability abortion methods even early in pregnancy.”⁴ Almost all of the “partial birth abortion” ban acts have no exceptions for
the health of the woman and have “only a dangerously inadequate exception to save a woman’s life.” The failure to include a health exception places many women’s health gravely at risk and only when a woman’s health risk becomes a life risk is her health considered valid. This lack of consideration in state legislatures for a woman’s health will become a pivotal point, upon which the constitutionality of these statutes will rest.

The nineteen states that never successfully passed “partial birth abortion” ban acts included typical blue, liberal, states. However, a few typically red states, which often pass anti-choice legislation, were also among the states, which abstained from passing “partial birth abortion” ban acts. Almost all the states not passing legislation are clustered along the eastern and western seabords. The Atlantic cluster includes Connecticut, Maine, Massachusetts, New Hampshire, Vermont, New York, Pennsylvania, Delaware, Maryland, and North Carolina. The west coast states that did not pass “partial birth abortion” ban acts are California, Oregon, Washington and Hawaii. Finally, in Middle America, Minnesota, Wyoming, Nevada, Colorado and Texas declined to enact “partial birth abortion” bans. The thirty-one states that passed “partial birth abortion” ban acts were concentrated in regions of the West, Midwest and the South, which are generally areas of social conservatism. There were a few surprising exceptions; New Jersey, Rhode Island and Wisconsin, which characteristically do not enact anti-choice legislation, succeeded in passing “partial birth abortion” ban acts.

Educating voters in the states of Colorado, Maine and Washington about the deceptive nature of “partial birth abortion” ban acts resulted in the defeat of ballot initiatives in all three states. The Center for Reproductive Rights conducted a poll of registered voters in these three states. Of those voters responding to the poll seventy-
seven percent were seriously concerned that the “partial birth abortion” bans were extreme because the ban allowed no health exception posing serious harm to women. Another sixty-nine percent of poll respondents felt deceived because the legislation banned the safest and most commonly used abortion procedure. The lack of education among voters in other states seems to be another aspect of the success of the “partial birth abortion” ban acts. Voters became alarmed once they learned the restrictive nature of the bans and took this distress to the ballot box.

In states that passed “partial birth abortion” ban acts, conservative anti-choice groups felt quite victorious. For example, the legislation, enacted by South Carolina in 1997 was seen by one anti-choice individual “as a first step in a long progression ‘to take Supreme Court decisions to their limits’ and push hard to decrease access, physician involvement and public support for abortion.”

Notably, these statements do not represent the framework or language, which was used to push the act through the State House or Senate. Instead, it was the language of “unborn child” and destroying viable fetal life that the public and legislatures heard. The difference in semantics was essential for the success of the ban acts as it focused on the notion of “unborn life” rather than using the more scientific term fetus. The “partial birth abortion” ban act in Missouri, passed in 1999, used specific language to distinguish between infanticide and legal abortion. Legislation, which outlawed infanticide described infanticide as the killing of “a partially born living infant or a living infant aborted alive.” However, in the language of the law there was no specific time in the gestation of the fetus or description of which type of abortion method could cause an abortion to be changed from a legal procedure to
infanticide. This was deeply problematic as the lack of specific gestation allowed for the statutes to be applied widely to numerous time frames and procedures.

Returning to the state of Florida where the term “partial birth abortion” was coined, the ban act within this state was entitled *Termination of Pregnancies*. Florida legislators refused to include a health exception. Instead they only included a life exception. The phrase “partial birth abortion” is defined in the Florida statute as “a termination of pregnancy in which the physician performing the termination of pregnancy partially vaginally delivers a living fetus before killing the fetus and completing the delivery.”9 The statute granted the right to perform a Partial birth abortion” only to save a woman’s life.\(^{A}\) In this case, a woman’s husband must be notified of the proposed termination, and if the woman is found to be incompetent at the time of the decision her legal guardian must grant permission for the procedure. There is no clear language connecting third trimester abortions to “partial birth abortions,” however the statute prohibits “partial birth abortion” procedures except “to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, provided that no other medical procedure would suffice for that purpose.”10 All aspects of the act are overlooked if termination of the pregnancy results in the birth of a live child instead of an abortion, which kills the fetus.11 This exception from the law shows the legislation’s focus is simply about fetal life and that the legislation failed to take into account the significance of the woman’s life.

Any woman who has a “partial birth abortion” is free from any criminal prosecution under the Florida state statute. Alternatively, the statute penalizes anyone

\(^{A}\) After defining the term, the statute elaborates on the fact that no third trimester abortions are to be performed unless two physicians agree in writing that the procedure is necessary to save the life of the woman
who willfully performed or participated in a “partial birth abortion.” If a person was
found guilty of violating the state statute, he or she faced a penalty of third degree felony.
The crime escalates to a second-degree felony if a person participated or performed a
“partial birth abortion” that subsequently led to the woman’s death. Compensation for a
woman’s death caused by a “partial birth abortion” will be granted to the husband of the
woman, or if the woman in under the age of eighteen will be granted to her parents. The
appropriations under civil action are defined as “monetary damages for all injuries,
psychological and physical, occasioned by the violation of this subsection [and] damages
equal to three times the cost of the partial-birth abortion.”

The language used in this statute is biased towards anti-choice efforts and fails to
protect women. Crafters of the state statute placed the fetus at the center of the
legislation and almost entirely disregarded the women who are to be affected by the
legislation. There is rationale given for why the fetus is of higher value in society than
the health of a woman. The section of the statute that grants compensation to the
husband of the woman who dies because of a “partial birth abortion” refers to the
husband as the father of the fetus. The woman’s parents are named as maternal
grandparents of the fetus. Using the terms of father and maternal grandparents gives
personhood to the fetus as if a baby. In the legislation there is an exception to civil
compensation if the woman’s criminal conduct resulted in pregnancy. The criminal
conduct is never explicitly described. Questions arise as to what constitutes criminal
conduct that would result in pregnancy and why pregnancy that results from criminal
activity would be valued less than any other a pregnancy. Such aspects of the legislation
have no relationship to protecting fetal life, which is the stated objective of legislators, who promote these statutes.

The Florida “Partial Birth Abortion” Ban Act, also known as the House Bill 1227, was scheduled to take effect on June 30th 1998. However, on June 24th 1998, *A Choice for Women, et al v. Robert A. Butterworth, et al* came before the United States District Court for the Southern District of Florida seeking to have the court place a temporary restraining order or a permanent injunction against the enforcement of the legislation. The case was argued in November 1998. The plaintiffs argued that the Act violates a woman’s right to privacy, bodily integrity, the Due Process Clause and the Equal Protection Clause all guaranteed under the Fourteenth Amendment. The plaintiffs stated that the restriction on a woman’s choice of abortion procedures violates a woman’s right to determine her own medical treatment. The suit claimed that the broad terms of the Ban Act also failed to give physicians clear notice of the medical procedures that are prohibited and so violate the Due Process Clause. The violation of the Equal Protection Clause is derived from the fact that the Act only prevents women for choosing medically appropriate and necessary health care treatments without a legitimate justification, and so it is discrimination based on sex. The state countered this argument by stating that the Act “is a reasonable regulation on a specific type of abortion procedure, the intact dilation and extraction.” The Defendants contend that the ban does not restrict most other abortion procedures and so it is not placing an undue burden on a woman’s right to choose to terminate her pregnancy.

The court led by Justice Donald L. Graham evaluated the case under the undue burden standard, life and health of the mother, vagueness, irreparable injury, threatened
injury outweighing harm to non-movant and public interest. In regard to the undue burden standard, the Court found the Act unconstitutional, because it places an undue burden on a woman who seeks dilation and evacuation, a labor induction procedure, or a dilation and extraction prior to viability. The Court overrode the State’s contention that the statute narrowly tailored the prohibition of intact dilation and evacuation/ dilation and extraction procedures. The Court stated that the statute was not narrowly tailored enough and the “partial birth abortion” ban applies to all stages of pregnancy which is an undue burden. The next aspect of the act that the Court found to be unconstitutional is the lack of a health exception and only a qualified life exception. The Court cited that both under Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey no state may prevent a specific abortion procedure even during post-viability if it is the most appropriate abortion procedure to save the life or health of the woman.

The Court found that House Bill 1227 was “void for vagueness,” as it does not define explicitly what medical procedures are prohibited with the required degree of certainty. The language used in the Ban Act intentionally creates confusion. The Ban Act does not clearly communicate to physicians what medical procedures are prohibited.¹⁷ “Moreover, the Ban Act must meet a higher standard of certainty because it directly affects a woman’s constitutional right to an abortion and imposes criminal penalties.”¹⁸ The Act does not meet the higher standard that is required. The Act threatens both women and physicians with irreparable injury. Women are endangered by the possibility that they may be denied appropriate medical care because physicians either will not provide health care or are forced to provide a more dangerous abortion method.
Physicians and health care clinics that provide abortions would be subject to felony prosecution, which the Court saw as an irreparable injury.

The Court determined the threatened injury outweighed harm to the defendants’ and public interest and that issuing a permanent injunction would not cause damage to the Defendants nor adversely affect the public interest. The harm to women through the denial of their right to choose an abortion procedure pre-viability vastly outweighed the nonexistent damage to the Defendants by issuing a permanent injunction. Issuing a permanent injunction was in the best interest of the public, for the public’s interest is served when the Court uses its power to protect the constitutional rights of the public. In this case, the protection was the right of women to have an abortion prior to viability and the health and life exception post viability. Thus, on December 2nd 1998, Justice Donald L. Graham granted a permanent injunction on the “Partial Birth Abortion” Ban Act HB 1227.

The process of “partial birth abortion” ban acts from creation to implementation and to eradication is seen clearly at the state level. The advertisement of procedural specific legislation has been instrumental in the anti-choice’s attack on reproductive freedom. Strategically anti-choice groups have spread their message state by state, while at the same time remaining visible on the Federal level. This two-tiered approach of state and Federal action has proven effective. Even when state and federal legislation is struck down, the issue “partial birth abortion” has remained in the public eye and mind.

The achievement of passing “partial birth abortion” ban acts on the state level was not a singular win for anti-choice advocates. Rather, this accomplishment is part of a broader sweeping success of the anti-choice movement. Restricting reproductive
freedoms including rights and health is a greater goal of the anti-choice movement, which culminates with the eradication of abortion access and provision in the United States. To accomplish these goals the Right has moved into the local communities and Churches of small town America. The Right’s message has influenced local politicians and religious leaders, who directly impact their constituents and followers. The anti-choice movement has created the image of a personal touch while appealing to the masses.


10 Florida House of Representatives, 4.

11 Florida House of Representatives, 6.

12 Florida House of Representatives, 6.


Chapter Five: *Stenberg v. Carhart*

*Carhart v. Stenberg* was the first case to draw national attention to the idea of abortion restriction in this country since *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992. On June 3, 1997 the state of Nebraska passed a “partial birth abortion” ban act, which was similar to both the failed federal legislation and other successful state legislation. Many states that passed legislation banning “partial birth abortion” faced opposition from within their own legislatures and from pro-choice activists. The protests of the activists and legislators did not result in reversing the state “partial birth abortion” ban acts. However, as we shall see, the Nebraska legislation gave activists the fodder to effectively challenge the ability of any other state to pass a ban.

The sole party affected by the state statute was Dr. LeRoy Carhart who was the only physician in the state who performed elective abortions after sixteen weeks of gestation. Dr. Carhart on behalf of himself and his patients obtaining abortions decided to challenge the legislation. The plaintiff and Don Stenberg, Attorney General of the state of Nebraska was the key defendant.\(^1\) The law was contested in the Federal District Court as well as in the Supreme Court of the United States. The decision in *Carhart v. Stenberg* once again upheld the findings made in both *Casey* and *Roe*. The Nebraska “partial birth abortion” ban act was found unconstitutional based on the lack of a health exception. In 2000, both the Federal legislative and judicial branches of government rejected the concept of partial birth abortion bans as proposed without any health exception.

The Nebraska statute for a “partial birth abortion” ban differed slightly from the failed federal “partial birth abortion” ban act of 1995. The Nebraska statute like the
Federal statute lacked a health exception and the language placed a focus on the physical problems of a woman, which would endanger her life. The statute proclaimed that a “partial birth abortion” could only be performed if the “procedure is 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.” The statute’s authors refused to acknowledge any mental distress, which might place the woman’s life at risk. The legislation criminalized physicians who performed such procedures, and would automatically suspend their licenses allowing them to practice medicine in the state of Nebraska. A physician found guilty of providing such services could receive a maximum of twenty years in prison. This is ten years longer than a physician convicted of performing illegal abortions before Roe v. Wade.

However, the greatest source of controversy concerning this bill was its definition of “partial birth abortion”:

the term partially delivers vaginally a living unborn child before killing the unborn child means 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.

The Nebraska state legislators chose the broad language of the bill over an earlier proposed bill that limited the law to only one narrowly defined procedure. This was an important aspect of the anti-choice strategy. They wanted to include as many procedures as possible and enacting legislation early. The legislation was passed as part of an emergency clause that became effective as soon as the governor signed the bill on June 9, 1997.
District Court for the District of Nebraska

The language of the “partial birth abortion” ban act allows the act to bar more than an ID&E/D&X procedure. It also includes D&E procedures. Thus the law affected pregnancies with gestational ages as early as thirteen weeks and restricted a multitude of women from having abortions. The inclusion of the prohibition on a physician’s ability to extract a “substantial portion” of the fetus with the intent to kill the fetus allows the D&E procedure to be incorporated within the ban. Dr. Carhart’s attorneys argued that this is an “undue burden” as it prevents Dr. Carhart from performing the most common and safest abortion between the weeks of sixteen and twenty week gestation. The defendants’ argued that the intention of the legislation was not to criminalize a D&E procedure. However, the statute’s language did criminalize the procedure, as a physician must place a limb of the fetus in the vaginal canal to perform disarticulation; this aspect of the procedure is criminalized under the statute.

In his decision, Justice Richard G. Kopf of the United District Court for the District of Nebraska made reference to a discussion that took place in the Nebraskan Senate the day prior to the passing of the bill. Senator Chambers asked Senator Maurstad what “substantial portion” was intended to mean, to which Senator Maurstad responded that he thought “substantial would indicate that more than a little bit has been delivered into the vagina.”8 Senator Chambers further inquired as to “how much is a little bit,” and Senator Maurstad stated that “enough that would allow for the procedure to end up with killing of the unborn child.”9 After this reference, Justice Kopf stated that the intentions of legislation could not be accurately determined because the language did not specify exactly what procedures the legislation restricted and would affect more than an
ID&E/D&X procedure. This was proven by the discrepancy between what the Senators definitions of the law.

Dr. Carhart rejected the legitimacy of the law and brought the state of Nebraska to court. He was represented by the Center for Reproductive Law & Policy. The suit made him one of most famous physicians in the legal battle against anti-choice legislation. On July 2, 1998 Justice Kopf stated that the “partial birth abortion” ban act of Nebraska was unconstitutional as applied to Dr. LeRoy Carhart and his patients. Justice Kopf permanently enjoined enforcement of the law against Dr. Carhart and his patients for three primary reasons. The first reason was that the law placed an “undue burden” on Dr. Carhart and his patients, as an ID&E/D&X procedure is the safest procedure in certain situations. Secondly, the language of the ban, specifically restricting a “substantial portion” of the fetus from being removed with the intention of killing the fetus, caused an undue burden as it would prohibit a D&E procedure. Legislators who had presented the bill had adamantly stated that the bill would not prohibit D&E procedures. Finally, Kopf stated that the legislation is void for vagueness, because it would force Dr. Carhart to guess as to what the meaning of the language of “substantial portion.”

However, Justice Kopf did not find the law as facially invalid, which meant that the state statute was not unconstitutional as written, but as applied. The application of the law specifically affected Dr. Carhart and his patients, for Dr. Carhart was the only late trimester provider in the state. The finding left a window open for future anti-choice efforts. If legislation was passed that applied to a greater number of providers the legislation would have a better chance of being found constitutional.

Justice Kopf declared that the Nebraska “partial birth abortion” ban act had the
effect of subjecting Dr. Carhart’s patients to an increased medical risk of injury or death, if Dr. Carhart was prohibited from performing the safest procedure. Under the framework set by Planned Parenthood v. Casey laws that either by purpose or effect place an “undue burden” in the path of a woman to obtain an abortion during pre-viability are seen as unconstitutional. The Nebraska statute in effect placed an “undue burden” on Dr. Carhart’s patients. In response to counter claims by the defendants; Justice Kopf gave five specific reasons. The “partial birth abortion” ban act would increase the operating time and create a greater risk of blood loss and infection. Dr. Carhart would have to perform more abortions in which there would be a larger risk of complications from bone fragments perforating the uterine wall as well as instruments inflicting injury to the uterus and cervix. In addition, the ban would also create more exposure to common reasons for maternal mortality, disseminated intravascular coagulopathy (DIC) and amniotic fluid embolus. Finally, the less effective procedures would increase the complications that come from fetal remains left behind in the uterus. Justice Kopf saw these as substantial obstacles for a woman to obtain an abortion pre-viability.11

In his conclusion, Justice Kopf’s stated that the statute was void because of its vagueness and this was the reason why he found the Nebraska “partial birth abortion” ban act unconstitutional as applied to Dr. Carhart and his patients. Justice Kopf claimed that the phrase “substantial portion” was imprecise as to its meaning. He stated that every physician that testified including both the plaintiff and defense’s experts were unable to understand the outer limits of the term and that the term could be interpreted in a multitude of ways by fair minded individuals. This law would criminalize actions that were not clearly defined and consequently would not give fair warning to a physician and
thus made it reasonable to see the statute as too vague. Justice Kopf based his decision of the unconstitutionality of the statute on the evaluation of the non-viable fetal life over the health and life of the woman, and, in addition, that the statute is void for vagueness.\textsuperscript{12}

The testimony that influenced Justice Kopf’s decision came from physicians representing both the plaintiff and defense’s side, the Center for Disease Control (CDC), American College of Gynecology and Obstetrics (ACOG), American Medical Association, and general statistics on the risks and frequencies associated with abortion procedures. The ACOG released a statement in which they stated that bans which prohibit “specific medical practices, such as intact D&amp;X, may outlaw techniques that are crucial to the lives and health of American Women. The intervention of legislative bodies into medical decision making is inappropriate, ill advised, and dangerous.”\textsuperscript{13} Similarly, the AMA in reference to ID&amp;E/D&amp;X procedures published an opinion that the procedure “may minimize trauma to the women’s uterus, cervix, and other vital organs.”\textsuperscript{14} These two powerful health organizations were quite influential in effectively advocating for physician’s rights over legislative bodies erecting statutes that would compromise a physician’s decisions and patient’s privileges.

Justice Kopf also evaluated the credibility of the medical testimony given by the witnesses, and found that Drs. Carhart, Hodgson Stubblefield and Boehm to be credible based on their knowledge, training and experience. However, he did not find credible Dr. Christopher Riegel an obstetrician, gynecologist, and infertility specialist who morally objected to abortion and so refrained from performing abortions. His testimony on behalf of the defendants was found not credible, because he had never observed or himself performed either a D&amp;E or an ID&amp;E/D&amp;X. Dr Riegel also claimed that the ID&amp;E/D&amp;X
procedure does not exist, which displayed his ignorance of the medical procedures surrounding the case.

Dr. Stubblefield, a professor and Chairman of the Department of Obstetrics and Gynecology at the Boston University of Medicine as well as the Chief of Obstetrics and Gynecology at the Boston Medical Center, was found to be the most credible witness by Justice Kopf. Dr. Stubblefield had the most comprehensive training, practice and in addition the knowledge from teaching numerous abortion procedures. In Dr. Stubblefield’s testimony he stressed the importance of the ability of a physician to perform an ID&E/D&X procedure. The ability to remove a fetus with fewer instruments entering the uterus allows a greater chance that the uterus will not be perforated and that fetal tissue will not remain behind and cause infection. These statements of Dr. Stubblefield complemented statements of both Dr. Hodgson and Dr. Carhart. Dr Hodgson claimed that the “D&X procedure is ‘an advance in technology’ because by removing the fetus intact there is ‘less instrument manipulation,’ which means, ‘of course, the higher your safety.’” Dr. Carhart testified that the ability for him to compress the fetal skull during an ID&E/D&X allows him to dilate the cervix less which reduces maternal complications. An example he cited was an incompetent cervix, which could be problematic if a woman wanted to carry a future pregnancy to term.

Statistically it was quite clear that the risks and frequencies associated with abortion procedures were supporting physicians and their patients’ right to have performed D&E procedures. The American Medical Association did a comparative analysis of the maternal mortality rate with the three abortion procedures; hysterectomy/hysterotomy, labor induction and D&E. The analysis looked at three
different gestation periods in the second trimester.

<table>
<thead>
<tr>
<th>Gestation</th>
<th>Hysterectomy/Hysterotomy</th>
<th>Labor Induction</th>
<th>D&amp;E</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 weeks</td>
<td>51.6 per/100,000</td>
<td>7.1 per/100,000</td>
<td>3.7 per/100,000</td>
</tr>
<tr>
<td>16 weeks</td>
<td>N/A</td>
<td>7.9 per/100,000</td>
<td>6.5 per/100,000</td>
</tr>
<tr>
<td>21 weeks</td>
<td>N/A</td>
<td>10.3 per/100,000</td>
<td>11.9 per/100,000</td>
</tr>
</tbody>
</table>

The two procedures, labor induction and hysterectomy/hysterotomy caused a greater likelihood of maternal mortality in all but one time period, in which there was about a one percent increase in risk. These statistics were important because the defendant’s medical experts had testified that both hysterectomy/hystertomy and labor induction were safe equivalents to a D&E procedure. However, it was evident that these procedures were not sound options, and restriction on D&E procedures as well as ID&E/D&X procedures would only increase the risk a woman would face when obtaining an abortion.

The Center for Disease Control in 1992 released a report that stated that nationwide eighty-six percent of abortions performed past fifteen weeks gestation are either curettage or D&E whereas, only ten percent during the same period were labor induction. The data for supporting equivalent alternatives to D&E procedures simply did not exist.\(^{17}\)

**Court of Appeals for the Eighth Circuit**

The state of Nebraska adopted the tactics of the anti-choice groups relentlessly attacking reproductive rights. Nebraska clearly saw the precedent set by the Supreme Court cases of the previous decade including *Webster v. Reproductive Health Services* (1989), *Ohio v. Akron for Reproductive Health* (1990), *Rust v. Sullivan* (1991) and
Planned Parenthood v. Casey (1992). The Supreme Court had upheld the state legislation in these cases, which restricted reproductive rights. These cases included legislation that prohibited public employees and facilities from performing abortions, required parental notification for minors, prohibited recipients of family planning funds of the Public Health Service Act from providing counseling or referrals for abortions and twenty-four hour waiting periods. The success of past state restrictions on the Federal level provided a clear strategy for the state of Nebraska to follow. The next stage in the progression of the case was appeal to the Court of Appeals for the Eighth Circuit. By appeal the state was refusing to accept the lower courts ruling protecting reproductive rights. Justice Richard S. Arnold delivered the opinion that was filed on September 27, 1999, who agreed with the District Court’s rational in finding the state statute unconstitutional. The undue burden placed upon Dr. Carhart and his patients, from providing and receiving the safest possible abortion procedure. The application of the ban prohibited D&E procedures, the most common second term abortion procedures. Secondly, the language of the statute, “substantial portion” was void for vagueness.18

The Court of Appeals for the Eighth Circuit also cited past state cases of “partial birth abortion” ban acts to use as historical evidence for their justification. All of the cases that had reached the Court of Appeals level except one state ban, Wisconsin, had been found unconstitutional, because of the lack of a health exception and the vagueness of the language of the statute. The Eighth Circuit evaluated the specific aspects of the Nebraska statute in which three elements were seen as in violation of the law: it criminalized the intention to partially deliver a living fetus vaginally, kill the fetus, and complete the delivery. All three of these aspects are intentionally performed to complete
a D&E procedure. The statute was banning more than the ID&E/D&X procedure that the state of Nebraska testified. However, Justice Arnold’s affirmation of the District Court’s decision did not stop the state of Nebraska which continued to push for their agenda. The next step was an appeal to the Supreme Court of the United States. This was another example of using the tactic of relentless attack in the hopes of a change in judicial opinion, as well as weakening the pro-choice movement.

The Media

The media keyed in on many issues surrounding Stenberg v. Carhart when the Supreme Court decided to hear the case. The media focused on the anti-choice movement’s use of false imagery of “partial birth abortion,” which eliminated the woman completely from the discussion. However, this imagery was never acknowledged by the media as anything but the truth. The use of the term “partial birth abortion” as a medical term by the media also reinforced the public’s incorrect notion of what the ban actually would prohibit. However, media sources that disagreed with the Nebraska legislation focused on the lack of a health exception in the law. One of Dr. Carhart’s attorneys, Simon Heller, stated that the ban was limiting abortion rights based on the “fetus location in the woman’s body.” Heller’s choice of words was important. He placed the focus of the issue on the woman and not the fetus. The statute however, placed the fetus outside of the body of the woman to create two separate identities. After the Supreme Court had agreed to hear Stenberg v. Carhart, but prior to the opinion, Justice Richard Posner, a conservative appeals court judge appointed by Regan wrote about the “partial birth abortion” ban act. He stated that “fetal life is more valuable than women's health. It's up
to the Supreme Court now to put the woman back in the picture.”

A columnist for the Boston Globe, Ellen Goodman, wrote an article that was published on April 25, 2000 the day the Supreme Court began hearing *Stenberg v. Carhart*. Goodman addressed the issue of the term “partial birth abortion” and how it had no fixed meaning in the medical field. In her article she posed a few questions that asked her readers if the state was to decide when and which abortion procedures are necessary to save the life of a woman. Goodman also asked if the lack of a health exception would allow for a woman’s uterus, kidneys or eyesight to be stripped from her. The outcome of The Supreme Court case affected all aspects of the media, and brought more attention than the previous “partial birth abortion” ban acts that were attempted to be passed in Congress.

The Supreme Court

On June 28th, 2000 Justice Breyer delivered the lead opinion of the Supreme Court’s decision regarding *Stenberg v. Carhart*, in which he was joined by Stevens, O’Connor, Souter and Ginsberg. The dissenters in this decision were Rehnquist, Scalia and Kennedy. The opinion was a five to four decision, which showed the volatility of the issue. Justice Breyer in delivering his opinion evaluated the case within the three principles that were determined by *Casey*. First that pre-viability, a woman has the right to terminate her pregnancy. Second the state statute that promotes a state interest in fetal viability and imposes an “undue burden” on a woman’s decision pre-viability is unconstitutional. Third, after viability the state may promote its own interests in potential life through regulation, but the state must preserve the life or health of the mother. Using
these principles, Justice Breyer writing for the majority, stated that the Nebraska ban violates the Constitution, for it lacked a health exception and imposed an “undue burden” on a woman’s ability to choose to have a D&E abortion. Justice Breyer claimed that Nebraska failed to demonstrate that the ban without a health exception would not create a significant health risk for women, given that the medical testimony and data proved that ID&E/D&X procedures are in some circumstances the safest procedure.23

The eight arguments that the state used to defend the constitutionality of the “partial birth abortion” ban act were found insufficient to override the lack of a health exception. These eight arguments included: that ID&E/D&X procedures are used rarely: performed by a handful of physicians; D&E and labor inductions are always safe alternatives; the ban would not increase the risk of rare abortion complications; there are specific risks associated with ID&E/D&X procedures; and there is no statistical data establishing the safety of an ID&E/D&X procedure. The defendants also utilized a statement made by the AMA in 1997 that there was no instance when an ID&E/D&X procedure is the only appropriate procedure. They also put forth a statement made by the ACOG that they could not identify any circumstance when an ID&E/D&X would be the only procedure to save the life or preserve the health of a woman. Justice Breyer countered these contentions with a multitude of arguments. First, the rarity of a procedure does not reduce its need as it may be the best procedure in a few situations, even if only a few physicians perform such procedures. In regard to the safety of ID&E/D&X, the District Court had found that ID&E/D&X was the safest method for abortion in certain circumstances. Justice Breyer did not contend that there was a lack of data. However, he stated that a lack of data on ID&E/D&X procedures does not
subsequently make the procedure unsafe. Justice Breyer, responding to the statements published by the AMA and ACOG stated these organizations have in more recent statements countered these declarations and written about the need for the safest method to be available to physicians pre and post viability.\textsuperscript{24}

The language of the ban act was also addressed in the lead opinion. Justice Breyer stated that the language of the statute was not clear as to what procedure(s) were included and excluded. The state of Nebraska claimed that only ID&EE/D&X abortions would be included in the “partial birth abortion” ban act. However, the dissenters argued that the law intent to bar only ID&EE/D&X procedures was both incorrect and irrelevant. The relevant question rather is not if the legislation wanted to ban ID&EE/D&X procedures, but if the legislation was intended to apply only to ID&EE/D&X. Breyer stated that the language of the statute covered both ID&EE/D&X and D&E procedures. Nebraska had the ability to clearly write a statute that would only ban an ID&EE/D&X procedure, yet the legislators chose otherwise.\textsuperscript{25}

In their dissent, Justices Rehnquist, Kennedy and Thomas stated that the Nebraska “partial birth abortion” ban act was constitutional. The two Justices claimed that the legislation did not place an “undue burden” on a woman who is on the path to obtaining an abortion, but rather the state statute is promoting a critical state interest. The statute in the eyes of these Justices was clearly prohibiting and criminalizing only ID&EE/D&X abortions. Justice Scalia wrote a separate dissent. Scalia was the only dissenter in the \textit{Casey} opinion and applied the same arguments in that case to \textit{Stenberg v. Carhart}. Scalia claimed that \textit{Casey} was wrong and needs to be overruled and that abortion decisions should be returned to the states. Scalia reasoned that \textit{Casey} was wrong for the
“undue burden” standard was “ultimately standardless” and that “a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the application of Casey, but with it existence.”26

The lead opinion in Stenberg v. Carhart reaffirmed that the Casey opinion was the precedent against which proposed restrictive legislation would be held. At that time the Supreme Court had recommitted itself to the basic principle defined in Roe, which is the right to an abortion.27

One might think that the anti-choice groups would see that “partial birth abortion” ban acts were not successful in either Federal legislation or the Supreme Court, and so would pick other avenues to attack the right to an abortion. However, these anti-choice groups were able to see the 2000 election as a new opportunity to advance their agenda. The Christian Right sought to utilize both Congressional elections, as well as the Presidential election to push its agenda. Governor George W. Bush was the perfect candidate for the right wing to coordinate its agenda of “family values,” which could restrict reproductive health and rights. So, once again, lobbying for federal legislation that would prohibit “partial birth abortions” became a valid option for the anti-choice movement. The Federal 2003 “Partial Birth Abortion” Ban Act quickly became the anti-choice’s newest vehicle to restrict reproductive rights. This act only slightly differed from the Nebraska “partial birth abortion” ban, but it was significantly different from any other State or Federal ban act, for the bill was supported by both Congress and the President.
State of Nebraska Statutes, Partial-birth abortion; prohibition; violation; penalties (Nebraska: State Legislature of Nebraska, 1997)
State of Nebraska Statutes, Partial-birth abortion; prohibition; violation; penalties (Nebraska: State Legislature of Nebraska, 1997)
Carhart v. Stenberg 530 U.S. 914, 120 S.Ct. 2597, 200 U.S. Supreme
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Chapter Six: “Partial Birth Abortion” Ban Act 2003 and Beyond

President George W. Bush took office in January 2001, and with his inauguration, presidential policy toward abortion and contraception changed quickly. Reproductive rights were among the most prominent targets of the Bush administration. Abortion rights are deeply connected to privacy rights in this country. *Roe v Wade* the US Supreme Court case, which established a woman’s right to an abortion, was argued under a privacy rights framework. The decision emphasized the right to privacy between a physician and patient to make a determination regarding abortion.

George W. Bush pushed his anti-choice agenda from his first few moments as president. On January 22, 2001, the twenty-eighth anniversary of the *Roe v. Wade* decision and his second day as president, Bush reinstated the Global Gag Rule on international family planning assistance. The Gag Rule prevents non-governmental organizations’ operating in international countries which receive funding from the U.S. for family planning assistance from using their own money (non-U.S. money) to provide abortion services, counseling, referrals or to support and/or advocate for legislation to change abortion bans. In his first budget, President Bush also stripped contraceptive coverage from medical insurance plans offered to federal employees. However, Congress disagreed with this action and reinstated the coverage.¹

Nationwide, the rights of physicians and patients (to privacy) to access and provide abortion services began to erode. Less than seven months into his presidency, Bush announced that he would limit federal funding for embryonic stem cell research and stated that no additional embryos could be used for research.² In October 2002, the Bush
Administration gave “human status” to embryos in the Health and Human Services Secretary’s Advisory Committee on Human Research Protection Charter.

Through these actions Bush violated his own much touted support of women rights with his decision to reverse the U.S. position supporting the Cairo Program of Action, developed at the International Conference of Population and Development. The Cairo Program of Action affirmed the right of all individuals and couples to make proper decisions for themselves and their family, concerning the number and spacing of the children they desired. It further granted people the right to have the information and means to achieve these goals. Throughout his first term in office Bush appointed adamant anti-choice and abstinence-only education proponents to Judicial positions, advisory committees to the Center for Disease Control, as well as to key cabinet positions, including the Secretary of Health and Human Services and Reproductive Health Drugs Advisory Committee of the Food and Drug Administration.³

The anti choice movement finally had a winning hand at the Federal level. The federal “partial birth abortion” ban acts of the mid 1990s had lacked presidential support. At that point the anti-choice movement unleashed its lobbying efforts on individual states. This strategy met with substantial success. More than 30 states passed “partial birth abortion ban acts. When President Bush was elected under the banner of family values, anti choice proponents returned full throttle to the federal arena. This time it had a candidate who would sign the legislation.
The most decisive attack on reproductive health and rights during President Bush’s first five years in office was not initiated publicly by him. Rather, the One Hundred and Eighth Congress passed the “Partial Birth Abortion” Ban Act of 2003 on October 23, 2003. Congressional leaders knew that President Bush would not veto the bill as President Clinton had twice during his presidency. On November 5, President Bush signed the “Partial Birth Abortion” Ban Act of 2003 into law. Pro-choice critics were quick to point to the anti-woman bias in the signing ceremony. Bush was surrounded by a room full of men, without a single woman present.

This act was the first law to criminalize medical procedures, specifically abortion procedures. After the bill was signed, U.S. Attorney General John Ashcroft delegated the enforcement of the act to the Justice Department’s Civil Rights division. Ashcroft stated that the enforcement of the civil rights of the fetus needed to be insured. Utilizing the language of the bill, President Bush stated that he signed the act because the procedure it would ban was “directed against children who are inches from birth.”

According to some anti-choice advocates the intention of the bill was not to decrease the number of abortions performed, but rather to prohibit certain types of abortions, which would increase the risks to a woman’s health. One highly notable anti-choice proponent, Randall Terry, the founder of Operation Rescue, claimed in September 2003, before Congress had passed the legislation, that if the bill became law it “may not save one child’s life…The major benefit of this bill is the debate that surrounds it.” Terry realized that the legislation was initiated not for the purpose of “saving innocent
lives,” but rather that it was part of a strategic plan by anti-choice groups. This plan centered on the idea of gaining support from legislators and constituents for restrictive reproductive health legislation. The bill was passed, despite the direct opposition of the American College of Obstetrics and Gynecology, the American Nurses Association, and the American Medical Women’s Association, among many other organizations concerned with the health and well being of American women.

The “Partial Birth Abortion” Ban Act of 2003 was similar to the Nebraska “Partial Birth Abortion” ban act that was the center piece of the case, *Stenberg v. Carhart*. As we have seen, the US Supreme Court found the Nebraska legislation unconstitutional in 2000. The 2003 ban ignored the US Supreme Court findings regarding “partial birth abortion” ban acts that stated the bans were unconstitutional because they were not clearly written and lacked health exceptions. The 2003 “Partial Birth Abortion” Ban Act had the same problems. It failed to limit the stage of the pregnancy, and as written, applied to all stages pre-viability, questionable viability and post-viability. The bill failed to explicitly exclude D&E or suction and curettage, which is one of two clear instructions handed down by the Supreme Court in the decision of *Stenberg v Carhart*. In the wording of the bill there was a failure to define what the phrases “completion of delivery” and “living fetus” meant exactly. The second instruction from the Supreme Court that the One Hundred and Eighth Congress as well as President Bush consciously overlooked was the act’s failure to have a health exception. This was a deliberate violation of a fundamental principle of abortion jurisprudence.7
However, anti-choice groups saw the ability to pass this federal legislation, which excluded a health exception, as revolutionary, for all abortion bans that were struck down, because of a lack of a health exception could now be reversed and upheld. This would allow for much more restrictive legislation to be passed.

Prior to passing the legislation, Congress declared that new information had been uncovered to make a case for supporting the “Partial Birth Abortion” ban act of 2003. The most pressing and published finding was the there was no moral, medical or ethical consensus that performing a “partial birth abortion” is ever medically necessary. The procedure should be prohibited, without the need to have a health exception. The Congressional findings claimed that the “partial birth abortions” presented long-term health risks to women and in some circumstances their lives.

The One Hundred and Eighth Congress refuted the findings in the Supreme Court case, *Stenberg v. Carhart*, which were based on the hearings from the District Court of Nebraska. These findings had claimed that “partial birth abortions” were as safe as and safer in some circumstances than other abortion procedures. Congress claimed that the information that was found to show that “partial birth abortions” are never medically necessary was discovered, after the District Court’s hearing. Thus, information had not been included in the testimony of *Stenberg v. Carhart*. Congress also stated that it is not bound to accept the same factual findings as the Supreme Court was in *Stenberg v. Carhart*, under the “clearly erroneous” standard. A “clearly erroneous” standard is a type of review that appellate courts apply to a trial court’s treatment of factual issues. An
appellate court can reverse the judgment of a trial court if the appellate court “is left with the firm conviction that an error has been committed,” without this conviction the appellate court must accept the lower courts finding.\(^9\)

The specific language of the “Partial Birth Abortion” Ban Act of 2003 defined “partial birth abortion” as deliberately and intentionally vaginally delivers a living a 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 an overt act, other than completion of delivery, that kills the partially delivered living, fetus

The statute never specified that the banned abortion procedure had to be an ID&E/D&X. Instead the language of the statute was quite broad and included D&E procedures. In addition, the statute did not specify what constituted a partially delivered fetus and how this was to be determined medically. The statute focused upon physical ailments that would endanger a woman’s life as the only exception to the prohibition.

The bill also granted the right to pursue civil action to the father, if married to the woman, or to the maternal grandparents, if the woman was not eighteen years old. This bill included the right to monetary damages for injuries, psychological or physical and statutory damages equal to three times the cost of the “partial birth abortion.” The bill protected a woman from being prosecuted for having a “partial birth abortion.”\(^{10}\) Interestingly, the ban grants financial compensation to the woman’s family if she suffers
from psychological and physical injuries. However these same health complications are not included as a health exception in the ban, so that a woman could obtain an abortion. The statute deems a woman’s health as not important enough to grant an exception while she is pregnant, but it is only after her pregnancy is terminated by a “partial birth abortion,” her health becomes a worthy topic. The discrepancy in the law is never defined clearly, but rather the inconsistency is frames the woman as a victim of a “partial birth abortion” even if she consents to the procedure. A woman under this ban, like all “partial birth abortion” ban acts can never be prosecuted for a criminal or civil offence.

The Political Reactions to the “Partial Birth Abortion” Ban Act of 2003

Reproductive Rights groups went on high alert when President Bush entered office in January 2001. Aware of President Bush’s anti-choice agenda these groups realized the threat the new Administration posed to women’s rights specifically regarding abortion. Once the 108th Congress passed the “Partial Birth Abortion” Ban Act of 2003, the Center for Reproductive Rights prepared for a case to counter this legislative action. On October 31, 2003, it filed a lawsuit in the U.S. District Court for the District of Nebraska., on the behalf of Dr. LeRoy Carhart. When President Bush signed the legislation into law on November 5, 2003, U.S. District Court Judge Richard G. Kopf issued a temporary restraining order.

This temporary restraining order restricted Attorney General John Ashcroft and his employees from enforcing the “Partial Birth Abortion” Ban Act of 2003. This
temporary injunction was the first counterattack from reproductive health and rights
groups and pro-choice physicians. This temporary restriction evolved into the court case
*Carhart v. Ashcroft*, which began March 29, 2004. Following Carhart’s lead, two other
cases were filed in federal courts in the Southern District of New York, *National
Abortion Federation v. Ashcroft* and in the Northern District of California, *Planned
Parenthood Federation of American v. Ashcroft*. On June 1, 2004, the U.S. District
Court for the Northern District of California declared the Federal ban on “partial birth
abortions” unconstitutional for two reasons. First, the ban failed to provide a health
exception and second it placed an undue burden on women and was void for vagueness.
Less than three months later, August 26, 2004, the U.S. District Court for the Southern
District of New York found that the Federal “partial birth abortion” ban act was
unconstitutional because it failed to have a health exception. Although there were three
separate cases arguing the legitimacy of the Federal “Partial Birth Abortion” Ban Act of
2003 in three different U.S. District Courts, *Carhart v. Ashcroft* gained the most
publicity.

On September 8th 2004, Judge Kopf issued the finding that the Federal abortion
ban was unconstitutional because it failed to have a health exception and imposed an
“undue burden” on women seeking abortions by banning some D&E procedures. Justice
Kopf came to the same conclusion in *Stenberg v. Carhart*, six years earlier. The
unconstitutionality of the Federal “Partial Birth Abortion” Ban Act of 2003 only applied
“when the fetus is not viable or when there is a doubt about the viability of the fetus in
the appropriate medical judgment of the doctor performing the abortion.” This secured
the rights of physicians to perform all types of abortion procedures as long as the fetus was determined, by their medical judgment, to be either non-viable or of questionable viability. Justice Kopf made it clear in his memorandum and order that the U.S. District Court for the District of Nebraska’s evaluation of the constitutionality of the legislation did not apply when the viability of the fetus is indisputable. The court ordered Attorney General John Ashcroft and his employees, agents and successors permanently enjoined from enforcing the Federal “Partial Birth Abortion” Ban Act of 2003, if the fetus was determined to be pre-viability or viability was in question.  

Judge Kopf’s opinion was two hundred and sixty-nine pages long. In his decision, Judge Kopf reviewed the Congressional record and findings, in addition to the testimony presented at trial. He concluded that the Congressional record did not support the Congressional findings. Judge Kopf stated that according to reasonable medical opinion, there are clearly times in which the prohibited procedure would be medically necessary to preserve the health of a woman and that a “respectful reading of the Congressional record proves that point.” Justice Kopf found that no reasonable and unbiased person could come to a different conclusion. Judge Kopf declared that the evidence introduced at trial proved that the banned abortion procedure is medically necessary in order to protect the health of a woman in some circumstances. As in *Stenberg v. Carhart*, Judge Kopf found that the ban included some D&E procedures, making the ban unconstitutional.

Displeased with the outcome of all three trials, Attorney General John Ashcroft appealed each of the decisions, pushing each case a step closer to the US Supreme Court. Ashcroft’s agenda included the reversal of *Stenberg v. Carhart* decision. By the time
Federal Court of Appeals reheard the three cases, Attorney General Ashcroft had been replaced with Attorney General Alberto Gonzalez. On July 8th, 2005, the U.S. Court of Appeals for the Eighth Circuit affirmed the District Court’s decision in Carhart v. Gonzales and found the “Partial Birth Abortion” Ban of 2003 unconstitutional. Judges James B Loken, Kemit E. Bye and George G. Fagg stated that they agreed with the Fourth Circuit’s claim that Stenberg v. Carhart established “a per se constitutional rule in that the constitutional requirement of a health exception applies to all abortion statutes, without regard to precisely how the statute abortion.”

The Eighth Circuit declared that the government had brought no new evidence into this case, and instead the US government had presented the same claims as those rejected by the Supreme Court in Stenberg v. Carhart. The court reviewed the testimony and found that it displayed a lack of consensus in the medical community on the medical necessity of the prohibited procedure. The Eighth Circuit stated that the Constitution requires legislatures to err on the side of protecting women’s health by including a health exception. A health exception is constitutionally required when a “substantial medical authority” defends the necessity of a medical procedure in some circumstances. In all three Courts the lack of a health exception was found to be unconstitutional.

On, September 23, 2005, after the U.S. Court of Appeals for the Eighth Circuit had affirmed the District Court’s decision in Carhart v. Gonzalez. Attorney General Gonzalez petitioned the United States Supreme Court to review the decision of Carhart v. Gonzalez. Attorney General Gonzalez reasoned that the Supreme Court was the last possible hope to overturn Stenberg v. Carhart. If successful, Gonzalez would help the Bush agenda reach a major goal in the dismantling a woman’s right to an abortion in this
country. The decisions in both *Planned Parenthood Federation of America v. Gonzalez* and *National Abortion Federation v. Gonzalez* were announced on January 31, 2006. Both the Court of Appeals for the Ninth and Second Circuit affirmed the District Courts’ rulings. In all three cases appealed by the United States via Attorney General Gonzalez the courts had found that the “Partial Birth Abortion” Ban Act of 2005 was unconstitutional. However, the Supreme Court’s decision to hear *Carhart v. Gonzalez* was still pending. On February 21, 2006, to the great dismay of pro-choice groups the Supreme Court granted review in *Gonzalez v. Carhart.*

The appointment of Chief Justice John G. Roberts in the final months of 2005 and Justice Samuel A. Alito in the first month of 2006 to the US Supreme Court seems to have made the majority of the court deeply opposed to abortion rights. Chief Justice Roberts has advocated for the reversal of *Roe v. Wade* during his entire legal career. In Robert’s co-authored brief in *Rust v. Sullivan*, he wrote "we continue to believe that *Roe* was wrongly decided and should be overruled." Justice Samuel A. Alito replaced Justice Sandra Day O’Connor on the Supreme Court, who was often the swing voter on abortion cases. This will most likely no be longer the situation, as Alito’s record show how deeply conservative he is and his great opposition to abortion. Justice Alito served on the U.S. Court of Appeals for the Third Circuit for fifteen years. Justice Alito’s most notable decision was in the case *Planned Parenthood v. Casey*, in which he argued for a “legal standard that would have permitted almost any restriction on abortion, unless it would have banned abortion outright, or given another person veto power or imposed a ‘severe limitation’ on a woman’s ability to get an abortion.”
All the decisions in *Carhart v. Gonzalez* have determined that the evidence presented in the case have shown the unconstitutionality of the ban act. However, this case comes before the Supreme Court at a key moment, when the Court can chip away at both *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* by allowing health exceptions in abortion bans to be seen as optional. The absence of health exceptions would no longer be found unconstitutional and would significantly change the standard of review for all abortion bans. The atmosphere in the abortion debate has been volatile with the recent restrictions on abortions. The only case to reach the new Supreme Court regarding abortion thus far was *Ayotte v. Planned Parenthood of Northern New England, et al.* This case challenged the New Hampshire law, which prevents doctors from performing an abortion for a teenager under the age of 18 until 48 hours after a parent has been notified. Two primary questions arose under this case, including whether an abortion restriction must include a health exemption. Second, the question whether abortion restricting legislation can be constitutionally challenged prior to the legislation taking effect. The Supreme Court did not clearly answer these questions. Instead, the Supreme Court remanded the case back to the First Circuit of Appeals Court to decide if the New Hampshire legislature would have wanted this law passed with a medical emergency exception. Even if the First Circuit Court finds that the N.H. Legislature would not have wanted a medical emergency exception, it cannot find the entire law invalid. Instead, the legislation must add a health exception. This is somewhat positive, as the state will then include a health exception. However, since the entire law will not be found unconstitutional a mandatory parental notice will take affect in the state of New Hampshire.
Early this year, the anti-choice movement enjoyed success in its latest legislative assault campaign at the state level. The South Dakota Legislature passed on February 22, 2006 a bill entitled *Women’s Health and Human Life Protection Act*. Governor Michael Rounds, a pro-life Republican signed the legislation, which includes a total ban on abortion provision except where the life of the mother is at risk. The statute was the first full ban to pass by any state since the ruling of *Roe v. Wade*. The bill, 1215, defined pregnancy as “the human female reproductive condition, of having a living unborn human being within her body throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and child birth.” The argument used to pass the bill was that life begins at conception and that scientific advancements since *Roe v. Wade* are able to justify this new concept. The constitutionality of the legislation is being challenged by Planned Parenthood Federation of America. Pro-choice activists also have filed a petition with the state to place a measure on the November ballot, which would allow South Dakotans to repeal the law. However, for this measure to appear on the ballot at least 17,000 registered South Dakotan voters must sign the petition.\(^{26}\)

The methods used by the anti-choice movement to secure passage of the South Dakota legislation have served as a spark which has spread to many other states. Anti-choice grassroots movements are working on restricting all abortion procedures in the following eight states; Alabama, Georgia, Kentucky, Louisiana, Missouri, Ohio, Oklahoma and Tennessee. However, pro-choice groups have begun to counter these attacks with grassroots movements as well. In Mississippi, pro-choice activists were able to kill legislation similar to the South Dakota ban that would have criminalized all abortion provision except in the case of the life of the mother.\(^{27}\) However, it appears that
this state by state movement to ban all abortions is not the most pressing issue. *Gonzalez v. Carhart* will be heard by the Supreme Court by the end of 2006, unlike state bans which will take a few years to be heard by the Supreme Court. It is more likely that an all out ban on abortion procedures will be seen as unconstitutional by the Supreme Court. However, it is unclear at this moment how the Supreme Court will rule on *Gonzalez v. Carhart*, and unfortunately the prognosis looks as though the Court may find the Federal statute constitutional. The standard for health exceptions would forever be changed. This will allow for a multitude of restrictive legislation to be passed that have been found unconstitutional for the lack of a health exception in the past. Thus, the change in judicial review will fulfill a major goal of the anti-choice movement, more encompassing restrictive legislation on abortion rights.


12 The United States District Court For The District of Nebraska, Memorandum and Order for Carhart v. Ashcroft (Nebraska: The United States District Court For The District of Nebraska, November 5th 2003) 4:03CV3385
16 The United States District Court For The District of Nebraska, Memorandum and Order for Carhart v. Ashcroft (Nebraska: The United States District Court For The District of Nebraska, November 5th 2003) 4:03CV3385
17 The United States District Court For The District of Nebraska, Memorandum and Order for Carhart v. Ashcroft (Nebraska: The United States District Court For The District of Nebraska, November 5th 2003) 4:03CV3385
20 Carhart v. Gonzalez, 413 F. 3d 791 (8th Cir. 2005)
21 Carhart v. Gonzalez, 413 F. 3d 791 (8th Cir. 2005)
26 “South Dakota Abortion Ban,” NARAL Pro-Choice America, New York, 17 April 2006 <https://secure.ga0.org/02/sdballot_can NARAL pro-choice america>.
Conclusion: The Need for Change

In this thesis, I have demonstrated the successes of the anti-choice movement. The restriction of reproductive rights and health has been a top priority of the anti-choice movement with the ultimate goal of eradicating abortion access and procedures in this country. The passage of the Hyde Amendment, twenty-four hour mandatory waiting periods between counseling and abortion services and parental consent laws are just a few of the legislative victories. In the Courts, the anti-choice movement has not been as consistently triumphant, but still it has been able to help reduce the scrutiny standards from a “compelling state interest” to an “undue burden” on abortion restrictions. Specifically on the issue of “partial birth abortion,” anti-choice advocates have been able to maintain the media and political attention on the term and bans for over a decade. Even after the 1995 and 1997 Federal bans were vetoed by President Clinton and the State bans were found to be unconstitutional, the anti-choice movement over came its defeats. The US Congress passed the 2003 ban pass and President Bush endorsed it. Anti-choice advocates have continued to fight for the constitutionality of the ban all the way to the Supreme Court level.

Why have the anti-choice groups been so successful in creating support networks, influencing the media, passing legislation and gaining power in the political arena? The anti-choice groups did not gain power in a day. Rather they have been strategically stripping reproductive rights and health from American citizens for more than thirty years. The decision in *Roe v. Wade* struck a cord that galvanized anti-choice groups. Starting in 1973, the anti-choice movement with little power and a few supporters began to diligently plan actions and strategies in order to win the battle over reproductive rights
and health. Anti-choice groups diversified their attack to include strategic language, use of imagery, capturing the media. They relentlessly assaulted both State and Federal levels of government and have mobilized grassroots movements. All of these efforts helped to establish the political powerhouse that the anti-choice movement is today.

The issue of language is central to the debate over “partial birth abortion.” The fact that the term “partial birth abortion” has been understood to be an accurate medical definition by politicians, the public and the media seems astounding once the truth is exposed. However, it has been infrequent that the truth has been represented. The term of “partial birth abortion” along with the phrases used to express the anti-choice’s view of this term has been adopted by the American media and the public. Anti-choice advocates have used phrases such as “unborn victims” and “children moments from birth” to describe fetuses. This purposely changes the framework from a focus on a woman’s health and her own life decisions to one which bestows personhood on the fetus and makes it more important. To describe the procedures that are encapsulated by the term “partial birth abortion” anti-choice advocates state that the procedures use “brain suction” to kill the “unborn child.” It is nearly impossible to counter the grotesque images that are conjured up by this language and the pictures of a “partial birth abortion” presented by the anti-choice movement. The use of specifically crafted language to enflame the human imagination and created misleading images has been a crucial factor in the success of the term “partial birth abortion” and was strategically planned by anti-choice advocates.

The language used by the Right to describe abortions and reproductive rights fits into a broader, highly successful “family values” rhetoric. The public support for
legislation restricting abortion is intimately tied to the anti-choice movement’s seizing the term “family values.” Legislation banning “partial birth abortions” has been claimed to promote the notion of life, by preventing “unborn children” and “innocent victims” from being killed. This idea is deeply connected to the concept of maintaining the heteronormative, patriarchal, status quo family. Thus opposing the restrictive language makes one against family, and anti-American values.

Anti-choice groups understood that the promotion of “partial birth abortion” ban acts had to be pursued at both the State or Federal levels. They worked on a two-tiered approach, which created media exposure and political support at both levels. After President Clinton’s veto of the 1995 and 1997 “Partial Birth Abortion” Ban Acts, the anti-choice groups focused most of their efforts on the state level bans, which had been passing since 1994. Stimulated by the failure of the 1997 Federal ban act, many states passed “partial birth abortion” bans. By 2000 thirty-one states had passed such legislation. However, in 2000, the Supreme Court found the Nebraska “partial birth abortion” ban act and in effect all state bans unconstitutional. This sparked anti-choice advocates to move toward a Federal ban, knowing that President Bush, along with a Republican majority in Congress would be supportive. This culminated with the passing of the 2003 “Partial Birth Abortion” ban act. The ability of the anti-choice advocates to maneuver between state and federal government depending on which level of government appears to be more advantageous is another key aspect of why the term “partial birth abortion” has remained at the forefront of the political battle regarding abortion.
These achievements by anti-choice advocates are due to the broader agenda of the movement’s broader agenda. “Partial birth abortion” is an important part of a broader plan to undermine reproductive rights bill by bill. Only recently with South Dakota’s all out ban on abortion, did a single bill have a possibility of accomplishing such a daring move. Prior to this, anti-choice groups have pursued an array if restrictions including: specific legislation that restricts a minor’s ability to access abortion services; passing mandatory waiting periods between abortion counseling and services; creating fetal homicide statutes; and denying any federal funds to assist in the payment of abortion services. This slow chipping away at reproductive rights and health services has been quite successful with little backlash, except from reproductive rights and health groups.

**Where Have All the Pro-Choice Advocates Gone?**

The onslaught of anti-choice legislation and victories prompts the question: where is the counter force, if there is one at all? Pro-choice groups, advocates, politicians, and media seem to have all but disappeared from the abortion debate, especially concerning “partial birth abortion”. Over the last decade the media, has embraced many of the anti-choice phrases, such as “partial birth abortion.” This adaptation makes it much harder for pro-choice voices to be heard. Recently, Grace Franke-Ruta’s discusses this issue in an article entitled “Is the New York Times still Pro-Choice? You Wouldn’t know it from reading the Op-ed Page.” Franke-Ruta notes that in the last two years in the Op-ed section of the *New York Times* eighty-three percent of the articles discussing abortion were written by men and not a single one of these pieces were written by a reproductive rights advocate, pro-choice service provider, or a representative of a woman’s
organization. In all, sixty-seven authors contributed to abortion related articles and a mere seven of these authors were women. She contrasts this with the time period of 1991-1992, when Planned Parenthood v. Casey was headline news and find that thirty-six percent of the writers on abortion for the New York Times were women. It is not that a female voice has never existed in the abortion debate, but rather it has been cut by more that half in a ten year time period.³ The lack of female voices pro-choice or anti-choice is removing the debate on abortion restrictions away from the people most affected, women.

Further in, the debate concerning “partial birth abortion,” pro-choice advocates have failed to connect to the American public. The pro-choice movement was paralyzed by the term “partial birth abortion.” “Partial birth abortion” was not medical accuracy and did not just affect later trimester abortions. So, pro-choice advocates could not label “partial birth abortion” as affecting late term abortions or use the medical language of D&E and ID&E/D&X. The pro-choice movement could only claim that the term “partial birth abortion” was false and misleading. However these claims were not great enough to dissuade both politicians and the media from using the anti-choice term of “partial birth abortion.” This was a significant loss to the pro-choice agenda, because without power to control the language of the debate, medically inaccurate language has been accepted by many as the truth. More broadly, the pro-choice movement has also failed in controlling the language debate in almost all reproductive issues. The terms “family values” and pro-life are owned currently by anti-choice groups, who label restrictive reproductive legislation as pro-“family values” and pro-life, which has led to tremendous success in government bans.
However it is not simply the language that pro-choice advocates have lost. In addition, the pro-choice movement was unaware of the creation of the term “partial birth abortion.” The concentration of pro-choice groups on federal and some state initiatives left the pro-choice movement blind to what was happening at the grassroots. Anti-choice grassroots movements were circulating information about the term “partial birth abortion” and creating a support network⁴. Once legislation came before state and federal legislatures there were groups of anti-choice constituents informed about what the term meant and how to manipulate the term. The pro-choice movement was not prepared. The lack of awareness by the pro-choice movement of the capability of the anti-choice movement follows a decade of pro-choice decline in successful action. However, this can be changed by carefully studying and applying the strategies of the Right, which initially helped with the original victories of the reproductive rights movement.

**How Can Pro-Choice Advocates take Action?**

Language will always be a political tool, and so the pro-choice movement needs to regain control over how people talk about abortion. No longer can the anti-choice movement set the tone of the language that is used in the debate. Pro-choice advocates need to be proactive in claiming language. In the case of “partial birth abortion,” the voices of the women who have had abortions that would become prohibited if the “Partial Birth Abortion” Ban Act of 2003 is found constitution need to be heard. Their families also need to be heard from as well. These women and their families need to be interviewed through pro-choice media and allowed to debate in forums that present pro-choice and anti-choice side of the abortion debate. Being pro-choice means being pro-
life, the life of the woman; and it means being pro-family, the family a woman chooses.
These two terms, pro-life and pro-family, have been used to isolate the pro-choice movement from the sense of community that the pro-choice movement is so deeply connected to protecting.

A collaborative effort needs to be made by the pro-choice movement and the medical community. In American society, the opinion of the medical community is highly valued. The American Medical Association (AMA) has made statements that denounce “partial birth abortion” ban acts for the restrictions on a woman’s health and the medical need for abortion procedures that are restricted by the legislation. Claims by the AMA as well as other respected medical institutions need to be part of bringing medical validity to the pro-choice movement. The truth is more powerful than the distorted facts presented by the anti-choice movement; however it is this distortion that is receiving the most media and political attention at this time. The idea of truth is also quite complex, for both sides present their beliefs as the truth. Each side exhibits their experts, physicians, religious authorities, ethical scholars, attorneys and politicians to conduct the debate on a multitude of levels. To counter the anti-choice’s “truth” the pro-choice movement needs to expand the reaches of its voice, and be heard on more media sources.

The pro-choice movement needs to broaden their base by becoming more connected to grassroots initiatives. Grassroots organizations are able to affect localized communities, which are valuable resources for emerging information regarding both pro-choice and anti-choice ideas. At the same time pro-choice groups need to keep the pressure on state and federal government and state and federal court cases. In short,
every way in which the anti-choice groups have made progress needs to be countered by pro-choice groups. However, the pro-choice movement lacks the same resources including money, power and connections as the anti-choice movement currently enjoys. Thus, the use of coalition building at the grassroots level is the most viable option for the pro-choice movement.

Pro-choice advocates are enraged by the recent initiatives that have been proposed and/or passed by the anti-choice movement. The mobilization of the pro-choice groups is possible, but there needs to be acknowledgment of a diversity of opinions, within the pro-choice contingent. Once again, coalition building, along the idea of reproductive rights in a human rights framework, as Loretta Ross envisions will allow for the broadest inclusion of people for reproductive justice.\(^5\)


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Appendix A: Anatomy of the Cervix and Uterus

Appendix B: Medical Definitions of Hysterectomy/Hysterotomy and Labor Induction in *Carhart v. Stenberg*

**Labor Induction**

Labor induction, an alternative to D&E and what has been described above as the intact D&E or D&X, may also be used to induce abortion during the 16th to 24th week of gestation. Labor may be induced by use of hypertonic solutions such as urea or saline, or prostaglandin. (Ex. 7, at 9:1-4.)

The use of saline to induce labor requires insertion of a needle through the abdomen and injection of the amniotic sac with a concentrated salt solution, which causes fetal demise and induces uterine contractions. Over a period of several hours, the uterine contractions cause dilation of the cervix and expulsion of the contents of the uterus. (Ex. 7, at 9:5-8.)

Urea is a nitrogen-based solution that causes fetal demise when injected into the amniotic sac and is typically followed by administration of prostaglandin to induce uterine contractions which will expel the contents of the uterus. (Ex. 7, at 9:8-12.)

**Hysterotomy and Hysterectomy**

Other abortion procedures available, but not routinely used, during 16 to 24 weeks' gestation are hysterectomy and hysterotomy. According to the AMA report, "maternal mortality and morbidity associated with these procedures are significantly greater than those associated with other procedures used to induce abortion." (Ex. 7, at 9:14-16.)

Hysterotomy is major surgery and must be performed in a hospital setting. General anesthesia or anesthesia administered by epidural or spinal injection is necessary. The procedure consists of surgical delivery of the fetus through an incision in the abdomen and uterine wall, after which the fetus is removed, the umbilical cord cut, and the placenta removed. (Ex. 7, at 9:16-20.)

Hysterectomy "is appropriate in cases in which there is a preexisting pathology, such as large leiomyomas or carcinoma in situ of the cervix." (Ex. 7, at 9:20-22.)
Appendix C: 1995 Federal “Partial Birth Abortion” Ban Act

THE PARTIAL-BIRTH ABORTION BAN ACT (HR 1833)

(Vetoed by President Clinton on April 10, 1996)

SECTION 1. SHORT TITLE.

This Act may be cited as the "Partial-Birth Abortion Ban Act of 1995."

SEC. 2. PROHIBITION ON PARTIAL-BIRTH ABORTIONS

(a) IN GENERAL. -- Title 18, United States Code, is amended by inserting after Chapter 73 the following:

CHAPTER 74 -- PARTIAL-BIRTH ABORTIONS

Sec. 1531. Partial-birth abortions prohibited.

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury: Provided, That no other medical procedure would suffice for that purpose. This paragraph shall become effective one day after enactment.

(b) (1) As used in this section, the term 'partial-birth abortion' means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(2) As used in this section, the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

(c) (1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include --
(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and

(B) statutory damages equal to three times the cost of the partial-birth abortion.

d) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.
Appendix D: Florida State “Partial Birth Abortion” Ban Act

Florida Statutes Chapter 390
TERMINATION OF PREGNANCIES

390.0111 Termination of pregnancies.--

(1) TERMINATION IN THIRD TRIMESTER; WHEN ALLOWED.--No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless:

(a) Two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman; or

(b) The physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy in the third trimester, and another physician is not available for consultation.

(2) PERFORMANCE BY PHYSICIAN REQUIRED.--No termination of pregnancy shall be performed at any time except by a physician as defined in s. 390.011.

(3) CONSENTS REQUIRED.--A termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian.

(a) Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

1. The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of:

   a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.

   b. The probable gestational age of the fetus at the time the termination of pregnancy is to be performed.

   c. The medical risks to the woman and fetus of carrying the pregnancy to term.

2. Printed materials prepared and provided by the department have been provided to the pregnant woman, if she chooses to view these materials, including:

   a. A description of the fetus.
b. A list of agencies that offer alternatives to terminating the pregnancy.

c. Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.

3. The woman acknowledges in writing, before the termination of pregnancy, that the information required to be provided under this subsection has been provided.

Nothing in this paragraph is intended to prohibit a physician from providing any additional information which

In the event no second physician is available for a corroborating opinion, the physician may proceed but shall document reasons for the medical necessity in the patient's medical records.

(c) Violation of this subsection by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015. Substantial compliance or reasonable belief that complying with the requirements of informed consent would threaten the life or health of the patient is a defense to any action brought under this paragraph.

(4) STANDARD OF MEDICAL CARE TO BE USED DURING VIABILITY.--If a termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. "Viability" means that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb. Notwithstanding the provisions of this subsection, the woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.

(5) PARTIAL-BIRTH ABORTION PROHIBITED; EXCEPTION.--

(a) No physician shall knowingly perform a partial-birth abortion.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section for a conspiracy to violate the provisions of this section.

(c) This subsection shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury, provided that no other medical procedure would suffice for that purpose.

(6) EXPERIMENTATION ON FETUS PROHIBITED; EXCEPTION.--No person shall use any live fetus or live, premature infant for any type of scientific, research, laboratory, or other kind of experimentation either prior to or subsequent to any termination of
pregnancy procedure except as necessary to protect or preserve the life and health of such fetus or premature infant.

(7) FETAL REMAINS.--Fetal remains shall be disposed of in a sanitary and appropriate manner and in accordance with standard health practices, as provided by rule of the Department of Health. Failure to dispose of fetal remains in accordance with department rules is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(8) REFUSAL TO PARTICIPATE IN TERMINATION PROCEDURE.--Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital, nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.

(9) EXCEPTION.--The provisions of this section shall not apply to the performance of a procedure which terminates a pregnancy in order to deliver a live child.

(10) PENALTIES FOR VIOLATION.--Except as provided in subsections (3) and (7):

(a) Any person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of this section commits a felony of the third degree, punishable as provided in s.

(b) Any person who performs, or actively participates in, a termination of pregnancy procedure in violation of the provisions of this section which results in the death of the woman commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(11) CIVIL ACTION PURSUANT TO PARTIAL-BIRTH ABORTION; RELIEF.--

(a) The father, if married to the mother at the time she receives a partial-birth abortion, and, if the mother has not attained the age of 18 years at the time she receives a partial-birth abortion, the maternal grandparents of the fetus may, in a civil action, obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.
(b) In a civil action under this section, appropriate relief includes:

1. Monetary damages for all injuries, psychological and physical, occasioned by the violation of subsection (5).

2. Damages equal to three times the cost of the partial-birth abortion.

History.--s. 1, ch. 79-302; s. 1, ch. 80-208; s. 6, ch. 88-97; s. 6, ch. 91-223; s. 64, ch. 91-224; s. 694, ch. 95-148; s. 2, ch. 97-151; s. 1, ch. 98-1; s. 201, ch. 99-13.

Note.--Former s. 390.001.
Appendix E: Nebraska State “Partial Birth Abortion” Ban Act

State of Nebraska Statutes

Section 28-328
Partial-birth abortion; prohibition; violation; penalties.

(1) No partial-birth abortion shall be performed in this state, unless such procedure is 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.

(2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.

(3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

(4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Director of Regulation and Licensure pursuant to sections 71-147 to 71-161.20.

(5) Upon the filing of criminal charges under this section by the Attorney General or a county attorney, the Attorney General shall also file a petition to suspend and revoke the attending physician's license to practice medicine pursuant to section 71-150. A hearing on such administrative petition shall be set in accordance with section 71-153. At such hearing, the attending physician shall have the opportunity to present evidence that the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. A defendant against whom criminal charges are brought under this section may bring a motion to delay the beginning of the trial until after the entry of an order by the Director of Regulation and Licensure pursuant to section 71-155. The findings of the Director of Regulation and Licensure as to whether the attending physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, shall be admissible in the criminal proceedings brought pursuant to this section.

Source:
Laws 1997, LB 23, § 3
Appendix F: 2003 Federal “Partial Birth Abortion” Ban Act

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 74. PARTIAL-BIRTH ABORTIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

18 USCS § 1531

§ 1531. Partial-birth abortions prohibited

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment [enacted Nov. 5, 2003].

(b) As used in this section--
(1) the term "partial-birth abortion" means an abortion in which the person performing the abortion--
(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and
(2) the term "physician" means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

(c) (1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.
(2) Such relief shall include--
(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and
(B) statutory damages equal to three times the cost of the partial-birth abortion.

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

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.
Appendix G: President George W. Bush Signing the 2003 “Partial Birth Abortion” Ban Act