

## ABSTRACT

### The 1995 Congressional Debate Over Partial Birth Abortion: President Clinton's Veto and the Aftermath

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In 1995 Congress voted to ban a late-term abortion method known as Partial Birth Abortion (PBA). The contentious debate saw many typically pro-choice representatives joining pro-life members of Congress to oppose PBA. Major components of the debates are expert testimonies and use of public moral argument. President Clinton vetoed this popular bill. In addition to sending a press release to Congress, Clinton staged an emotional press conference during which women told the media about their abortions. This strategy focused the media on these women and their stories, rather than the Congressional arguments. Since 1995 Congress has continued its efforts to chip away at the broad grant of abortion rights in *Roe v. Wade*; they discovered new ways to place federal restrictions upon abortion. Congress has continued to develop new legislation modeled after the 1995 PBA Ban and likely will continue to do so in the future.

The 1995 Congressional Debate Over Partial Birth Abortion:  
President Clinton's Veto and the Aftermath

by

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A Thesis

Approved by the Department of Communication Studies

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## EPIGRAPH

Each step [piece of legislation] would remind people that it was indeed possible to speak about the grounds on which abortions could be judged as justified or unjustified. The saving of even a handful of lives could be a sufficient satisfaction in itself. But beyond that, there was a good to be attained in principle simply by planting the notion that it was possible, once again, to have a conversation about the rights and wrongs of the matter, and to establish anew a point once taken as commonplace: namely, that this conversation, among ordinary folk, could find a reflection in the laws.

Hadley Arkes, *Natural Rights and the Right to Choose*, 96.

## CHAPTER ONE

### Introduction

Abortion is an extremely salient and divisive issue in American politics. It is one that has continued to dominate the political landscape more than thirty years after the landmark *Roe v. Wade* decision. “Life” issues, such as embryonic stem cell research, assisted suicide, and—most prominently—abortion have become the most obvious distinctions between the two major parties today.<sup>1</sup> As Hadley Arkes explains, “the ideological core of the Democratic party had come to regard this issue [abortion] as the touchstone for those moral and religious differences that defined the “culture war”—and the main mission now of the liberal party in American politics.<sup>2</sup> The parties have become so identified with their pro-life and pro-choice platforms that deviants are rebuked and shunned.<sup>3</sup> This makes achieving a consensus or crafting a bipartisan piece of legislation extremely difficult.

In the fall of 1995, however, that bipartisan consensus seemed to emerge. Pro-life forces attacked an extremely narrowly defined abortion procedure; they gave it a horrific name; their descriptions of it were repeated over and over until even the staunchest of pro-choice supporters had difficulty denying the repulsiveness of the technique. The Partial Birth Abortion (PBA) Ban Act passed the House by an overwhelming majority; it passed the Senate with a more narrow majority. President Clinton, however, vetoed the bill. Reports in the media ran the gamut from being extremely supportive to being extremely critical of his decision.



I hope that by focusing on this very narrow portion of the abortion debate I can understand better the arguments that are made by both sides. This is critical, because the debate about the PBA procedure still rages all these years later.

### *Method*

The knowledge of the audience was an extremely important for both the Congressional debate and President Clinton's veto. Both were highly aware of to whom they were speaking. In both chapters three and four audience analysis is a crucial component of understanding the debate. A close analysis of the audience these messages were directed to reveals some of the motivations of the actors involved.

A thematic analysis also helps to uncover some of the motivations and intentions of the speakers. The themes of the debates and the veto can be interpreted to reveal a deeper understanding of the goals of those who are speaking.

### *Literature Review*

There are a number of relevant areas that need to be researched for a topic such as this. This section includes a general overview of scholarship on the rhetoric of the pro-life movement. This overview will be followed by a closer look at literature on several components of pro-life rhetoric; specifically this section will address use of images of the fetus, naming the child/fetus, and the terms "Partial Birth Abortion" versus "Dilation and Extraction." From there this chapter will look at studies of congressional debates as a whole, then move to a closer look at research on experts and on public moral argument. Finally, several articles concerning possibilities for compromises will be summarized here.

*The Rhetoric of the Pro-life Movement*

A number of rhetoricians have looked at the pro-life/pro-choice issue. Celeste Condit's book, *Decoding Abortion Rhetoric*,<sup>4</sup> provides one effort to examine the roots of the current controversy and the rhetoric surrounding it. Reaching even further back, Nathan Stormer examines the rhetoric of abortion in the eighteenth hundreds.<sup>5</sup> Working more narrowly, Marsha Vanderford published an in-depth study of the rhetoric of vilification in two specific pro-choice and pro-life groups in Minnesota. She found that they used very similar rhetorical strategies to achieve their aims: "Both pro-lifers and pro-choicers see abortion as an important social, political, and moral issue that should be regulated (either by restrictive or protective measures) by legislation; both expect that their views should be upheld in court; and both engage in extensive vilification of their opponents".<sup>6</sup> Anne Esacove writes that abortion activists generally agree that all abortions result from three main causes: 1. medical reasons, 2. social reasons, and 3. personal reasons.<sup>7</sup> While pro-choice activists focus on the first category to argue on behalf of abortion rights, pro-life activists tend to focus on the latter two reasons for abortions to explain their opposition to abortion.

Other scholars have looked at the rhetoric of "sidewalk counselors," noting that their rhetoric is "absolutist;" it "insists that there is only one way of viewing abortion, and dismisses all opposing arguments as trivial."<sup>8</sup> Many have also examined the use of rhetoric and images of the fetus in pro-life films such as *The Silent Scream* and *Eclipse of Reason*, noting how these films are told from the point of view of the fetus in men's voices.<sup>9</sup> Pro-choice films, on the other hand, were told by the women themselves and "provided 'a face' to go along with the arguments of why women choose abortion,"<sup>10</sup> a

tactic that was used frequently in the Sixties and early Seventies to argue in favor of laxer abortion laws.<sup>11</sup>

### *Images of the Fetus*

From the pro-life perspective, the fetus is central and of the utmost importance. For the pro-choice activist, however, the woman is and ought to be the central focus of the debate. The two key ways that activists shape the debate in their favor are through the use of images and the manipulation of terminology.

Pro-life images, both of fully formed fetuses and of “butchered fetuses” are indeed pervasive in pro-life literature. As Cynthia Gorney writes, “what the ambivalent and unconvinced need, from the perspective of the indefatigable right-to-life tactician, is visuals—literal visuals, to shock people from complacency.”<sup>12</sup> Celeste Condit argues that “without these compelling and brutal photographs the American abortion controversy probably would not continue.”<sup>13</sup> She credits the fetal images pro-lifers use for “the timidity of liberal Congressional representatives, and for the rarity of pro-Choice arguments directed at denying the Right to Life of a fetus.”<sup>14</sup>

Pro-life images rely heavily on use of synecdoche and metonymy to make their messages. Condit is critical of the manipulation of these images, which also rely heavily on overstatement when trying to construct the embryo or blastocyst as the equivalent of a “full human baby.”<sup>15</sup> However, in the case of PBA, the fetus is in the second or third trimester, making arguments about the humanity and personhood of the fetus easier to prove.

Perhaps the most powerful tools used by the pro-Ban legislators were the drawings of Jenny Westberg, “a homemaker and occasional clinic protester” from

Oregon. Upon reading Dr. Martin Haskell's description of his new abortion method, Westberg drew up a series of line drawings to illustrate what actually occurred during the procedure. These drawings differed from the usual images of the pro-life movement in that:

They were gruesome but not gory, which proved to be a critical distinction. The fact that they were cartoonish line drawings made them widely reproducible without the aversion factor; and more to the point, the Westberg pictures made D&X compelling to look at for the very reason Martin Haskell had wanted to tell his colleagues about it: the fetus was intact. It looked human. It looked human and helpless and small, and the rendering of the scissors and suction catheter made visible, as far as the viewer was able to discern, the instant of the ending of its life.<sup>16</sup>

These pictures were widely reproduced and distributed on a national level. Anti-Ban members of Congress sought to counter the drawings with photos of their own—pictures of the women and families that were saved by the procedure. These photographs were never able to capture the moral conscience in the way that the others were, though. The significance of drawings like Westberg's, as Condit explains is that: "Like narratives, visual images provide concrete enactments of abstract values and thereby allow a different kind of understanding of the meaning and impact of an ideographic claim about public life. They help 'envision' the material impacts of abstract policy commitments."<sup>17</sup> The Westberg drawings did precisely that for the members of Congress in a way that the photographs were not able to capture adequately—it forced them to consider exactly what procedure their vote would ban.

Changes in technology have had an impact on this debate as well, with ultrasounds and fetal surgery being the most significant developments since *Roe*. Pro-life literature on ultrasound technology has long emphasized the importance of showing the pregnant woman the fetus within her to persuade her not to abort.<sup>18</sup> The ability to operate

on the fetus as a “second patient” has also led to a change in the way the fetus is viewed, increasing the humanity of the unborn child. This change often comes at the expense of the pregnant woman. In the words of a midwife, “[i]f you’re even talking about surgery, then you’re going to see that baby now as a person.” The problem, however, as another states, is that “the focus is on the fetus. . .the decision is very fetus oriented and there is very little mention in those discussions ever about the mother.” Unfortunately, “women have the potential to become less visible during discussions about fetal surgery. . . There appears to be an inherent paradox, whereby the potential transformation of the fetus into a patient may increase the responsibilities of the pregnant woman, whilst concurrently decreasing her visibility.”<sup>19</sup> It is this paradox that the pro-choice members of Congress sought to address by showing the photographs of the women who were saved by late-term abortions. Ultimately in Congress the images of the fetus triumphed over the images of the women. President Clinton’s veto shifted the focus back to the women by including five women who had late-term abortions in his veto ceremony.

### *Naming the Child/Fetus*

Another issue central to the PBA Ban (or any law concerning abortion) is the naming of the child/fetus. A number of books and articles have been written from both sides of the issue, though not many from a communication/rhetorical standpoint. For instance, Dr. Jean Garton’s self described “pro-life classic” *Who Broke the Baby* criticizes the distinction between “fetus” and “baby” as being merely a “seduction by semantics.” In the chapter by that title, she bemoans the fact that “words, not facts. . . shape reality for many people.”<sup>20</sup> “Language,” she writes, should “describe reality (not create it),” if we are to be able to “make sound moral choices.”<sup>21</sup>

Communication scholar Celeste Condit makes a more detailed analysis of the language choices in the abortion debate. In fact, she writes that the repeated pro-life labeling the fetus as a baby has influenced and “strengthen[ed] the public association between ‘fetus’ and ‘baby.’”<sup>22</sup> She continues, noting that “more skillful [pro-life] rhetors used an even greater tool—‘identification’—to encourage audiences to see the fetus not only as ‘human’ but as the same as one’s self.”<sup>23</sup> This technique is used by pro-Ban advocates, who stress that the unborn child is just inches from being born—a majority of us were born that way, but victims of PBA, though inches from being born and fully human, do not receive the privileges we received (i.e. a live birth).

The rhetoric of pro-choice activists has also entered “as a legitimate component of the national repertoire,” according to Condit. It has changed, though, from the original “substantive demand for real choices in one’s life to a permissive liberal demand to prevent active government interference in whatever choices one might economically, socially, and personally have”<sup>24</sup> This focus on freedom from government interference in a woman’s private choice about what to do with her own body is of particular importance in the PBA Ban debate.

The language used to define the terms in the debate is not an issue to be viewed lightly. Indeed, Condit argues that control of language is the key to seeing one’s interests adopted “in order to see one’s vocabulary and interests fully enacted, one must not only persuade the public of the appropriateness of one’s own terms but also refute or respond to the terms of the opposition. This is not always done by movement rhetors, and in some cases it cannot be done”.<sup>25</sup> We cannot overlook Gorney’s penetrating statement on the issue, though, which is very telling about Americans at large: “Warring vocabularies

have buffeted most Americans into a defensive crouch when the topic of abortion is raised; half the time they can't remember which side uses 'pro-choice' and which uses 'pro-life.'"<sup>26</sup> In the words of another author, "when I listen to this kind of debate, I hear the slogans of war. Like many conscientious objectors, I avert my eyes, cover my ears, and proceed with my life saddened by a debate that tears at the fabric of society."<sup>27</sup>

*"Partial Birth Abortion" Versus "Dilation and Extraction"*

Beyond merely encountering the problems inherent in the "baby" v. "fetus" debate, the naming of the ban itself (and thereby the procedure) raised the ire of many opponents of the ban and contributed to the finding of the PBA ban as unconstitutional when it was eventually signed into law in 2003.

As Garton bluntly states: "D&X is one abbreviation we all ought to know. It is shorthand for Dilation and Extraction. In legislation it is not called D&X but 'partial-birth abortion.' People in the abortion business don't like that label at all! They say it is 'offensive, upsetting, and vague.' It *is* offensive and it *is* upsetting precisely because it *isn't* vague".<sup>28</sup> She continues, "Is it any wonder that abortion advocates prefer the term D&X? It helps to hide the reality that it is *Deadly* and *X*cruciating for the unborn child."<sup>29</sup> Garton gives no explanation, however, of why legislators chose one term (PBA) over the other (D&X). An interview with one of the individuals who helped draft the 1995 PBA Ban, however, is instructive on this point: "The label 'partial-birth abortion,' Keri Folmar [nee Harrison] says, emerged from a meeting that included herself; her boss, the Florida Republican congressman Charles Canady; and the longtime National Right to Life Committee lobbyist Douglas Johnson. 'We called it the most descriptive thing we

could call it,' Folmar recalls. 'We were throwing around terms. We didn't want it to be inflammatory. We wanted a name that rang true.'"<sup>30</sup>

Pro-life forces continue to defend the term "partial birth abortion" as being a "legal term of art" in the same way "heart attack" is a term of art for "myocardial infarction,"<sup>31</sup> thus making the term (in their eyes) an acceptable one.

Pro-choice forces, however "contended that 'partial-birth abortions,' as defined, were so broad as to allow for *any* abortion to be outlawed under its definition. This is often referred to as 'overbreadth' of a vaguely worded statute."<sup>32</sup> As one author writes, "The term 'partial-birth abortion' was invented for purposes of writing legislation. There is no textbook reference to any operative procedure or medical state called 'partial birth.' There are a few published medical references to 'dilation and extraction,' or 'intact dilation and evacuation,' both of which are terms certain physicians have given to the forceps-aided extraction of an aborted fetus all in one piece."<sup>33</sup> This argument was made repeatedly by anti-Ban members of Congress as well as by President Clinton when he vetoed the bill in the Spring of 1996. "There is, it seems, no precise way to define the procedure that passes muster with the Supreme Court, since state bans using different terminology have been ruled unconstitutional upon reaching the highest court. And, in fact, the courts would eventually favor the vagueness arguments of those opposed to the 2003 PBA Ban. Some are critical of their ruling, though, because although the medical community recognizes a difference between 'intact D & E' and 'D & X,' the Supreme Court chose to use the terms interchangeably."<sup>34</sup>



*The Rhetoric of Congress*

Despite these studies looking at the rhetoric of the pro-life and pro-choice movements, rhetorical analyses of particular bills in the Congress is lacking. The studies in the rhetorical field have been primarily geared toward gaining an understanding of the wider movement as a whole. They have not attempted to understand the goals of the movements by looking at small slices, as this study seeks to do. Congressional debates are an understudied area in the literature, even if one expands the search beyond the field of rhetoric. One scholar who has researched in this area is G. Thomas Goodnight. Goodnight's close analysis of congressional hearings contains insights helpful for this project.

Although the framing of an issue can be easily overlooked, Goodnight cautions readers to look closely at the framework created by those who are speaking. The structure of the arguments is indeed a constructed one; it creates limits on time and space which "constrain" and "recompose" the public's ability to view the situation.<sup>35</sup> Importantly, an "examination of the discourse itself may reveal discursive systems that have formulated the issues in such a way that a resolution of the debate productive to the culture cannot be reached."<sup>36</sup> This type of public discourse is fragmented, often with no resolution being reached upon the conclusion of a hearing or a debate.<sup>37</sup>

*"Expertness"*

Debates that occur within the modern public sphere are dominated by experts. Although in theory the information ought to be accessible and comprehensible by the public to whom it is seemingly addressed, this is not the case. As Goodnight writes, "expertise has relegated public decisions to specialized forums."<sup>38</sup> For example, during

the Cold War, experts placed heavy emphasis upon technical reasoning in order to push their agendas. By denying “public access” to the reasoning their conclusions were based upon, experts effectively eliminated the ability of the public to reach conclusions on the issues being discussed.<sup>39</sup> In the case Goodnight analyzed, despite the presence of experts who testified contrary to the Reagan administration’s policy proposal, “the subcommittee was not able to effectively penetrate the insulation provided [by] the technical sphere of argument.”<sup>40</sup> Essentially the experts that Congress relies to heavily upon to prove their points keep them from reaching sound policy conclusions.

Scientific jargon, a component of expertise, also stifles public participation. As Toker explains, decision making among members of the public is far different from those who often have the power to decide. For example, “the public assesses risk according to the values of their culture.” These values include “voluntariness, control, personal ability to influence the risk, familiarity with the hazard, and catastrophic potential.”<sup>41</sup> Decision-makers, however, generally use “quantitative risk analysis and corresponding risk management.”<sup>42</sup> In today’s world of experts, “when lay assessments are different from technical assessments, they are disregarded.”<sup>43</sup> Thus, those without specialized knowledge in a given subject area—which includes Senators and Representatives as well as “ordinary” people—are left unable to understand the explanations, unable to weigh them against their own values, and sometimes even unable to draw conclusions about the information they have been given.

Thomas Goodnight’s analysis of public debate contains another interesting insight. He writes that “what is euphemistically called public discussion and debate is often nothing more nor less than propaganda campaigns disjointly conducted by opposing

interest groups.”<sup>44</sup> Similarly, Caitlin Toker recognizes that once science attains the status of “social authority,” rhetoric becomes nothing more than “another procedure by which the ‘special findings’ of scientific knowledge are conveyed in a neutral and objective fashion.”<sup>45</sup> This is unfortunate for a number of reasons, among them that this relegation of rhetoric to insignificance limits human potential to reshape morality and limits lay participation.

Fortunately, though, rhetorical critics have the ability to short-circuit these campaigns. By creating awareness of what is being said and why, the critic can, in the words of Thomas Goodnight, “enhance the ability of a public to knowledgably choose its own fate.”<sup>46</sup> This thesis strives to be a part of this awareness by breaking apart several arguments advanced by both sides of the debate.

Scientific jargon is just one type of authority that is present in the PBA debates. Women’s narratives serve as prominent sources of authority. They are, as Cheree Carlson notes, a stark contrast to masculine-oriented, fact-based explanation: “More emotional and ornamental than masculine speech, womanly speech emphasized personal narrative over logical argument in an attempt to win an audience.”<sup>47</sup> A major form of argument offered by many senators against the ban and even President himself, these stories are often given no credit when compared to the testimonies of experts who come prepared with statistics. Despite the typical rejection of such forms of proof, however, these testimonies were picked up by the media and broadcast widely.

### *Public Moral Argument*

A theme closely related to the issue of experts and jargon is that of public moral argument. Who the members of Congress were addressing when they stood to speak is a significant component of the 1995 PBA debate and cannot be overlooked.

Argumentation aimed at increasing public awareness of issues and changing their perceptions through education is known as public moral argument. Celeste Condit, in her article, “Crafting Virtue: The Rhetorical Construction of Public Morality,” explains that morality is indeed a rhetorical construction. It is not a static entity that merely exists that humans are handed when they are born; rather, we shape morality through our words daily. As she points out, if we do not recognize that morality is “an open process of crafting,” our morality will stagnate and we will no longer continue to adapt and adjust to new moral situations.<sup>48</sup> In fact, Condit writes, “Without rhetoric to produce and maintain morality, human life would be more seriously diminished. Ultimately, then, to recognize morality as a collective craft is also to call ourselves to account for our participation in the ebb and flow of human morality.”<sup>49</sup> Ultimately, then, the words used in debates, such as those in Congress, shape the development of human morality much more strongly than one might originally recognize.

Significantly, individual arguments about specific moral decisions are what ultimately make the “collective moral code.”<sup>50</sup> Condit continues, “Individuals will attempt to enact what they think everyone ‘ought’ to do as cultural rights and restrictions. Battles between the individual and social realm will be augmented by arguments about what is really a ‘universal principle’ and what [is] merely a social or individual preference. It is the interactive dynamic of these three realms that provides us a wealth of

moral protections (even if also creating a great deal of confusion about morality).”<sup>51</sup> It is within this framework that the PBA debates, and a number of other congressional policy debates, fall.

Dominant groups, unfortunately, can overpower their opposition, limiting the potential for morality to evolve over time as it should. Condit explains the impact this can have: “To the extent that dominant elites control the means of communication and the public vocabulary, they can represent *singular* partisan interests as universal or moral ones. . . . Dominant elites thus hijack the moral potential for partisan ends.”<sup>52</sup> Often in Congress what seems to be a consensus may actually be the elites taking control of a topic. Only a close analysis of the arguments can reveal if this is the case.

One further element of public moral argument is that it is a form of discourse that changes our perception of “otherness” into recognition of similarity with ourselves. Using the movement for the abolition of slavery as an example, Condit chronicles the early days of slavery. During those years the differences between Whites and Blacks were overemphasized and the similarities were essentially ignored. Over time the system was challenged as cultural differences decreased (with Blacks taking up Western traditions of dress and language, for example) and (as a result of Whites having increasing contact with Blacks) Whites began to recognize the real equality of all persons.<sup>53</sup> This recognition of the “other” as similar to ourselves is called “perspective taking.”<sup>54</sup> Arguments from the perspective of the fetus, the pregnant woman, or the doctor performing the abortion are all perspective taking type arguments.

### *A Language of Compromise*

The right to choose abortion is considered by the majority of Americans to indeed be a right, but not one that can be exercised without restrictions: “Polled Americans are all over the place on legal abortion, and have been for several generations: they don't want it outlawed; they don't want it unrestricted; they think it's a woman's private decision but they disapprove, often agreeing to some version of the statement ‘should not

be legal under these circumstances’ when presented with nearly all the reasons women commonly give for seeking abortions.”<sup>55</sup> Perhaps central to this issue, “the failure of the [PBA] ban pointed to a key problem between the two factions: if compromise could not be reached on this ban, there would appear to be no room for negotiation of any kind.”<sup>56</sup> Herring continues, claiming that the underlying fear of most people is that “the failure of late-term or partial-birth abortion bans in *Stenberg* serves to underscore how contentious abortion will remain. If *this* method of abortion cannot be restricted, then, really, is there any method of abortion that states have a right to proscribe? If states cannot prohibit abortions that execute the unborn shortly before delivery, then what form of abortion can ever be devised that would be ‘too much’?”<sup>57</sup>

Despite what the public at large seems to desire, though, pro-choice activists continue to be repulsed by efforts at limiting abortion access, claiming that “lawmakers who support a limited right to choose abortion may mistakenly see these legislative battles as cover—a chance to appease anti-choice constituencies while claiming to pro-choice voters that they are pro-choice because they do not believe all or most abortions should be illegal.”<sup>58</sup> The same article continues, “it is our hope that, in the future, the pro-choice movement will never forget that small but successive incursions on our liberties can, in the long term, be as damaging as a giant step backwards.”<sup>59</sup>

Pro-life activists are equally repulsed by efforts at compromise. When offered bills that restrict abortion except in cases of “serious, adverse health consequences,”<sup>60</sup> they reject them, claiming the loopholes are so large as to make the law worthless. There is some merit to the argument that a “health” exception is too broad. In the 1973 *Doe v. Bolton* case the Supreme Court ruled that, “the medical judgment may be exercised in the

light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health.”<sup>61</sup> As Cynthia Gorney somewhat cynically commented: “If the doctor attests that she needs it, in other words, *Roe* and *Doe* say the state is not supposed to interfere, no matter how advanced her pregnancy is. This is not right-to-life cant. It's one of several aspects of the abortion rulings that went so much further than what either side expected that within a few weeks of January 1973 dozens of scattered opposition groups had coalesced into a passionate, implacable national opposition movement devoted to either a constitutional human-life amendment or a complete reversal of *Roe*.”<sup>62</sup> However, to reject the offered olive branch out of fear of the exploitation of loopholes may not be the wisest course for pro-life legislators to follow.

### *Chapter Preview*

The second chapter of this work examines the aftermath of the 1973 *Roe v. Wade* and *Doe v. Bolton* decisions. Particularly, these decisions mobilized the pro-life forces into the movement we would recognize today. In the 1990's, however, pro-life forces found that “wedge” issues (framed as bipartisan maneuvers) to limit abortion rights in certain circumstances were more likely to pass Congress and be signed into law. This led to the identification of a particularly heinous procedure, which anti-abortion forces named “Partial Birth Abortion.”

Chapter three of this thesis looks at the Congressional debate on the procedure. The PBA bill was first introduced in the House of Representatives in October 1995 as H.R. 1833. The debate itself took place over two days (October 30 and November 1). It passed by a vote of 237 to 190. The bill was introduced soon afterwards in the Senate,

but was referred to committee.<sup>63</sup> The actual Senate debate over the bill took place from December 4 to December 7, 1995. An initial reading of the text reveals that the audience is not merely the other members of Congress present to hear the speeches. Indeed, with C-SPAN and the easy availability of Congressional Journals online, representatives shape their words with an eye on educating the public and swaying their opinions, rather than simply swaying the predominantly predetermined votes of their peers, as the theory of public moral argument addresses. Another significant theme in the debates is the reliance on expert testimonies. Although the two sides deploy their experts in a slightly manner, both craft their arguments in ways that focus attention on the knowledge of these authorities.

Chapter four examines President Clinton's Veto. On April 10, 1996, President Clinton vetoed the bill. His veto statement is hardly more than a page long, but twice he says he "cannot sign" the bill; he never uses the word veto. Clinton also staged a veto ceremony, highlighting testimonies of five women who went through late-term abortions. These messages are very different, with the statement encouraging Congress to amend the bill and send it back to him, and the Ceremony focusing the media's attention on Clinton's desire for a health exception.

The fifth chapter of this thesis looks at the media response to the veto. Particularly interesting are the extreme views expressed in the articles. For a news media that publicly prides itself on remaining unbiased, the articles published in the weeks following the veto are particularly partisan. Though a number of these biases are expressed in editorials, some are not. Depending on the writer, one side or the other comes across looking extreme; quotes from people like the presumptive Republican



nominee, Bob Dole, accusing Clinton of being extreme on abortion further emphasize the idea that one of these groups is not mainstream of public opinion. Most accounts also talk about the politics involved behind the bill—how this will affect Clinton’s run for reelection, the strength the veto gives to abortion opponents (including Senator Dole), and what effect it would have on voters.

Finally, the sixth chapter will draw some conclusions on the research as a whole. This segment explains the significance of looking at an issue from eleven years ago. The 1995 PBA bill was a watershed. In the words of one author: ‘The ‘bomb’ that was *Roe v. Wade* is now a quarter of a century old, and I believe that when history looks back at this time—a time when America betrayed her own children—it will point to the partial-birth abortion debate as the watershed of the abortion issue. Exposing that barbaric procedure in the public arena caused the earth to shift.’<sup>64</sup> Others have remarked that “Far from ending the issue, the [Clinton] veto led to reintroduction of the bill in the 105<sup>th</sup> Congress and fueled similar actions in at least half the state legislatures within the first few months in 1997.”<sup>65</sup> This chapter addresses such comments.

### *Questions*

There are two main groups of questions this thesis attempts to answer. Firstly, to whom do politicians address their arguments? For example, are their arguments directed primarily at their peers, their opponents, or their constituents? After these arguments have been made, how, then, does the media interpret their actions? Many of the aspects one group sought to emphasize may not, in the end, be perceived at all by the media. What sorts of things do newspapers pick out as significant?

The second set of questions has to do with the broader question of finding a common ground. This debate certainly has implications for whether pro-lifers and pro-choicers can ever find a compromise that doesn't ask one side or the other to abandon their values. Does this debate reveal anything about what the middle ground should look like or how it should be constructed? Can arguments that emphasize dependence upon expert testimonies truly help individuals reach consensus? Or, must the focus shift to a different set of criteria, as yet to be determined?

*Notes*

1. As one writer stated: “The Republican Party – on this issue as on others – is something of a political (and ethical) hodgepodge. Not so the Democratic Party. At their Los Angeles convention, we heard again and again assurances that their party is decidedly for ‘choice.’ Republicans support the ‘big-tent’ theory – let’s keep those pro-aborts close at hand. By contrast, the Democrats are principled: they keep the minuscule number of pro-lifers in their midst (like Pennsylvania’s Bob Casey) at arm’s length. Democrats are serious about protecting the right to murder. Republicans are tepid about protecting the lives of unborn children.” P. Andrew Sandlin, “The Respectable Murderers,” *Lew Rockwell*, <http://www.lewrockwell.com/orig/sandlin3.html>

And as one analyst stated before the 1992 election, “We’ve given voters no alternative except to vote Republican if they feel strongly on abortion.” See Fred Barnes, “No womb for debate: do pro-life Democrats exist?” *The New Republic*, July 27, 1992, [http://www.swiss.ai.mit.edu/~rauch/nvp/politics/newrepublic\\_democrats.html](http://www.swiss.ai.mit.edu/~rauch/nvp/politics/newrepublic_democrats.html)

2. Arkes, Hadley, *Natural Rights and the Right to Choose* (Cambridge: University of Cambridge, 2002), 105.

3. For example, pro-life Democrat Robert Casey (D, PA) was not allowed to speak at the 1992 Democratic National Convention because of his desire to give a pro-life speech. For further information see The Media Report, *The Truth About Gov. Bob Casey and The 1992 DNC Convention*, <http://www.themediareport.com/special/casey-1992-dnc.htm>

4. Celeste Michelle Condit, *Decoding Abortion Rhetoric: Communicating Social Change* (Champaign-Urbana, IL: University of Illinois, 1990), 79.

5. Nathan Stormer, *Articulating Life’s Memory: U.S. Medical Rhetoric About Abortion in the Nineteenth Century* (Lanham, Maryland: Lexington Books, 2002).

6. Marsha L. Vanderford, “Vilification and Social Movements: A Case Study of Pro-Life and Pro-Choice Rhetoric,” *Quarterly Journal of Speech*, 75 (1989): 166.

7. Anne Esacove, “Dialogic Framing: The Framing/Counterframing of ‘Partial Birth’ Abortion,” *Sociological Inquiry* 74, no. 1 (2004): 76.

8. Anne E. Shaw and Alane C. Spinney, “Rhetoric, Repetition, and Violence: A Case Study of Clinic Conflict in Milwaukee,” *College Literature* 26.1 (1999): 175.

9. See Barbara A. Pickering, “Women’s Voices as Evidence: Personal Testimony is Pro-Choice Films,” *Argumentation and Advocacy* 40, no. 1 (2003) and Jessie Givner, “Reproducing Reproductive Discourse: Optical Technologies in *The Silent Scream* and *Eclipse of Reason*,” *Journal of Popular Culture* 28, no. 3 (1994): 229-244.

10. Barbara A. Pickering, “Women’s Voices as Evidence.”

11. See Esacove, "Dialogic Framing" and Condit, *Decoding Abortion Rhetoric*.
12. Cynthia Gorney, "Why Both Sides Think They Have Everything to Lose," *Harper's*, November 2004, <http://harpers.org/GamblingWithAbortion.html>.
13. Condit, *Decoding*, 79.
14. Condit, *Decoding*, 82.
15. Condit, *Decoding*, 90-91.
16. Gorney, "Gambling."
17. Condit, *Decoding*, 81.
18. See Condit, *Decoding Abortion Rhetoric* or Randy Alcorn, *Why Pro-Life?* (Sisters, Oregon: Multnomah Publishers, Inc, 2004).
19. Williams, "Framing the fetus," *Social Science & Medicine* 60 (2005): 2091. See also Jessie Givner, "Reproducing Reproductive Discourse: Optical Technologies in *The Silent Scream* and *Eclipse of Reason*," *Journal of Popular Culture* 28, no. 3 (1994): 229-244.
20. Garton, *Who Broke the Baby* (Minneapolis: Bethany House Publishers, 1998), 20.
21. Garton, *Who Broke the Baby*, 18.
22. Condit, *Decoding*, 86.
23. Condit, *Decoding*, 86.
24. Condit, *Decoding*, 116.
25. Condit, *Decoding*, 117.
26. Gorney, "Gambling."
27. Michael D. Mumford, "Finding Solutions in No-Man's Land," *Society* 35, no. 5 (1997).
28. Garton, *Who Broke the Baby*, 95.
29. Garton, *Who Broke the Baby*, 96.
30. Gorney, "Gambling."

31. Douglas Johnson, "The Partial-Birth Abortion Ban Act -- Misconceptions And Realities," National Right to Life Committee (NRLC), November 5, 2003, <http://www.nrlc.org/abortion/pba/PBAa1110403.html>

32. Mark Y. Herring, *The Pro-Life/Choice Debate*, Historic Guides to Contemporary Issues in America (Westport: Greenwood Press, 2003), 168.

33. Gorney, "Gambling."

34. Herring, *Pro-Life/Choice*, 176.

35. Goodnight, G. Thomas "Public Discourse," *Critical Studies in Mass Communication* 4, no. 4 (1987): 431. <http://search.epnet.com/>

36. G. Thomas Goodnight, "On Questions of Evacuation and Survival in Nuclear Conflict: A Case Study in Public Argument and Rhetorical Criticism," in *Argument in Transition: Proceedings of the Third Summer Conference on Argumentation*, ed. David Zarefsky, Malcolm O. Sillars, and Jack Rhodes (Annandale, VA: Speech Communication Association, 1983), 319.

37. Goodnight, "Evacuation and Survival," 323.

38. Goodnight, "Public Discourse," 431.

39. Goodnight, "Evacuation and Survival," 332.

40. Goodnight, "Evacuation and Survival," 337.

41. Toker, "What Out to Be," 61.

42. Toker, "What Out to Be," 59.

43. Toker, "What Out to Be," 75.

44. Goodnight, "Evacuation and Survival," 326.

45. Toker, "What Out to Be," 54.

46. Goodnight, "Evacuation and Survival," 321.

47. Carlson, "Role of Character," 43.

48. Condit, "Crafting," 93.

49. Condit, "Crafting," 94.

50. Condit, "Crafting," 94.

51. Condit, "Crafting," 86.
52. Condit, "Crafting," 83.
53. Condit, "Crafting," 90.
54. Condit, "Crafting," 89.
55. Gorney, "Gambling."
56. Herring, *Pro-Life/Choice*, 164.
57. Herring, *Pro-Life/Choice*, 181.
58. Kathryn Kolbert and Andrea Miller, "Legal Strategies for Abortion Rights in the Twenty-first Century," in *Abortion Wars: A Half Century of Struggle, 1950-2000*, ed. Rickie Solinger (London: University of California Press, 1998), 102.
59. Kolbert and Miller, "Legal Strategies," 99.
60. Herring, *Pro-Life/Choice*, 173.
61. *Doe v. Bolton*, 410 U.S. 179 (1973).
62. Gorney, "Gambling."
63. I will not be studying the committee hearings in this work, since the relevant portions were later read into the record.
64. Garton, *Who Broke the Baby*, 97.
65. Kolbert and Miller, "Legal Strategies," 102.

## CHAPTER TWO

### The Setting of the Conflict

A number of other authors have attempted to write a comprehensive history of the Right to Life<sup>1</sup> movement including Celeste Condit, James R. Kelly, Keith Cassidy, and others.<sup>2</sup> This chapter, then, is not an effort to duplicate these works, but rather an effort to describe the events leading to the introduction of the 1995 Partial Birth Abortion Ban. The years prior to the introduction of the ban reveal information about why the authors of the bill may have sought to make a law banning a particular medical procedure as well as why they approached the subject as they did.

#### *1970s*

The monumental 1973 decision, *Roe v. Wade*, established a trimester system for pregnancy and abortion. The court declared that abortion may not be restricted in any way during the first trimester; some limitations may be placed during the second trimester “in ways that are reasonably related to maternal health.” During the third trimester the state may, if it wishes, ban abortions entirely— except “where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>3</sup>

The companion case to *Roe*—and the one most people are unaware of—was decided on the same day.<sup>4</sup> *Doe v. Bolton*, an abortion-rights case from Georgia, named a number of factors as falling under the heading of “health”: “We agree with the District Court, . . . that the medical judgment may be exercised in the light of all factors— physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient. All these factors may relate to health.”<sup>5</sup> In the words of

Professor Cynthia Gorney, “If the doctor attests that she needs it. . . *Roe* and *Doe* say the state is not supposed to interfere, no matter how advanced her pregnancy is.”<sup>6</sup> This little known definition of the term “health” would have significant implications on every abortion case and law thereafter.

Reactions to this case, obviously, varied greatly. Cardinal Cooke of New York asked “How many millions of children. . . will never live to see the light of day because of the shocking action of the majority of the U.S. Supreme Court?”<sup>7</sup> The Catholic Church, using the structures largely already in place in its parishes, would become one of the largest players in the early pro-life movement.<sup>8</sup> Pro-life activist Joe Scheidler of Chicago recalls thinking that his wife, who was pregnant with their fourth child at the time, could abort their child without even consulting him. The thought chilled him and, as a devout Catholic, compelled him to take action against abortion for the first time.<sup>9</sup> Upon attending his first Right to Life meeting after *Roe* he was shocked to see how few people were there; the effects of *Roe* were slow in being felt by Americans as a whole.<sup>10</sup> One group, however, which did take steps to form into a formally structured organization right after *Roe* was the National Right to Life Committee (NRLC). The NRLC held its first meeting within a few months of *Roe*. It has since become the largest pro-life lobbying organization in America.<sup>11</sup>

Pro-choice organizations rejoiced that *Roe* signaled the end of dangerous back-alley abortions. For example, Molly Ginty’s article titled “Before *Roe*” presents the testimonies of several individuals. The recurring theme is that before *Roe*, women were forced into dangerous, unhealthy situations because abortions were illegal. These physicians and clergy expressed their joy that legalization meant women would now be



safer.<sup>12</sup> Lee Gidding, executive director of the National Association for Repeal of Abortion Laws (NARAL) was quoted as saying, “We really haven’t gotten over it. . .It was such a shock. We didn’t expect it to be so sweeping. It’s just superb.”<sup>13</sup>

Immediately after the ruling both sides began to make predictions about who would eventually win the tide of public opinion. As a columnist at the time wrote:

The foes of abortion haven’t give up, but they are talking now about long-range hopes for a Constitutional amendment or a change in the make-up of the High Court. “I feel this opinion will be reversed,” says Monsignor James McHugh, director of the Family Life Division of the U.S. Catholic Conference. “It may take a quarter of a century. It may take 50 years. But I think it will happen.” Lee Gidding disagrees: “Before you know it this will be past history and abortion will be just another medical procedure. People will forget about this whole thing.”<sup>14</sup>

Edwin Roberts of the *National Observer* wrote, “There is good reason to believe history will one day mark it [*Roe v. Wade*] a hideous error.”<sup>15</sup>

There was little action in Congress in the immediate wake of the court’s decision. Finally in May of 1973, Senator James L. Buckley (R, NY) introduced the very first Constitutional amendment to “protect unborn children at every stage in their development.”<sup>16</sup> This proposed amendment became the “basic formula” for subsequent suggested anti-abortion Constitutional amendments.<sup>17</sup> In his speech on the floor of the Senate, Buckley deplored the Court’s decision:

The Court has extended to government, it would seem, the power to decide the terms and conditions under which membership in good standing in the human race is determined. . . When, for example, the Court states that the unborn are not recognized by the law as “persons in the whole sense,” and when, further, it uses as a precondition for legal protection the test whether one has a “capability of meaningful life,” a thoughtful man [sic] is necessarily invited to speculate on what the logical extension of such arguments might be. If constitutional rights are deemed to hinge on one’s being a “person in the whole sense,” where does one draw the line between “whole” and something less than “whole”? [Is it] simply a question of physical or mental development? . . . Might we not someday determine that a child does not become a “whole” person until sometime after birth, or never become “whole if born with serious defects? . . . Will it one day be

found that a person, by virtue of mental illness, or serious accident, or senility, ceases to be a “person in the whole sense” . . . and is no longer entitled to the full protection of the law?<sup>18</sup>

These speculations have become a familiar “slippery slope” style argument among Right to Life groups. Such argumentation is found in the PBA debates as well, with many pro-Ban speakers arguing that the baby in this procedure is a mere “3 inches away from being recognized by the Supreme Court of the United States as being a person and being protected by the full rights of the Constitution.”<sup>19</sup>

Writing a decade after the decision, law professor Lawrence M. Friedman reflected on the reactions to *Roe*: “The abortion issue, however, turned out to be more difficult than the Court expected. The decision provoked enormous controversy. The reaction was volcanic—a slow rumble, followed by eruptions. No one predicted so strong a response. Yet after a decade, the controversy is still essentially legal and electoral. Nobody has taken to the street. Compared to the aftermath of *Brown v. Board of Education*, for example, the reaction to *Roe v. Wade*—for all its sound and fury—has been relatively toothless.”<sup>20</sup> The initial reactions to *Roe* by those who opposed it are well summed up here—full of fury but relatively toothless. A number of pro-life organizations continue to focus on legislation, as lobbying for the PBA Ban and similar legislation shows.

In 1975 Dr. Kenneth Edelin was charged with manslaughter after performing an abortion in the state of Massachusetts. Prosecutors charged that the fetus, aborted in the second trimester qualified as a “person” under the law. The jury found Edelin guilty, though the decision was overturned upon appeal.<sup>21</sup> Science magazine wrote that the case was purely about politics and that the district attorney, Garrett H. Byrne was merely

trying to gain the votes of Boston's many Catholics.<sup>22</sup> Rumors after the trial also circulated that one juror had made a racist remark about Edelin, an African-American, concluding that he was guilty before hearing the evidence.<sup>23</sup> The combination of abortion, religion, and race made for an extremely controversial case. Despite the eventual overturn of the decision, the case set a precedent for laws recognizing the state's ability to prosecute crimes against the fetus. Thirty-four states currently have laws stating that an unborn baby that dies in the commission of a crime is a person for the purposes of prosecution.<sup>24</sup>

In the years immediately following *Roe*, a number of state legislatures passed laws seeking to limit abortion within the limits defined by the Supreme Court. The courts were divided over whether these restrictions were Constitutional or not. Finally in 1976 the High Court agreed to hear a case involving state restrictions on abortion, *Planned Parenthood v. Danforth*. Importantly for future events, a portion of the law at issue in *Danforth* banned the performance of saline abortions. The court concluded, however, that since this method was "widely accepted in medical circles" (i.e. by "experts") as the proper method of performing a late-term abortion, it could not be banned without eliminating a woman's right to choose abortion in the second trimester.<sup>25</sup>

The Supreme Court also ruled to allow a few limited restrictions on abortion in *Danforth*. For example, they upheld a law requiring a woman to sign a form stating that her consent to the abortion was not coerced. The Court also upheld enhanced recordkeeping and reporting requirements, "which can be useful to the State's interest in protecting the health of its female citizens and which may be of medical value."<sup>26</sup> The

ruling to allow some restrictions on abortion was seized by pro-life groups who stepped up efforts encouraging states to pass parental notification and informed consent laws.<sup>27</sup>

In 1976 the first ever Hyde Amendment to Medicaid appropriations passed. This has been called the “first major triumph” for pro-life forces.<sup>28</sup> Abortion rights groups challenged this amendment, claiming that it violated the First Amendment separation of church and state clause.<sup>29</sup> In a surprising victory for those opposing public funding of abortions, the court upheld this funding restriction in the 1977 cases *Beal v. Doe*, *Maher v. Roe*, and *Poelker v. Doe*.<sup>30</sup> (*Harris v. McRae* (1980) would also find these restrictions constitutional.) The results of the Hyde Amendments are staggering. A recent Heritage Foundation study by Michael New concluded that the withdrawal of Medicaid abortion funding cut the abortion rate of minors by 23 percent over fifteen years; there was a similar reduction among adult women.<sup>31</sup>

According to a count by the Congressional Research Service, the 96<sup>th</sup> Congress (1979-1980) saw the introduction of 73 bills seeking to limit abortion in some way, whether through constitutional amendments, statutes prohibiting abortion, Hyde-type funding limitations, or laws limiting the federal court’s jurisdiction.<sup>32</sup> A number of these bills found their way to the president’s desk, causing abortion rights activists to fear the chipping away of rights gained in *Roe*. As one author writes: “Though radical feminists warned that the limited nature of the victory [in *Roe*] made it vulnerable to erosion and even reversal, most of us assumed in 1973 that the battle was over—that our right to abortion was virtually assured. The Cassandras were right, of course.”<sup>33</sup> The 1979 case of *Colautti v. Franklin* addressed the question of expert testimony and definitional problems in an abortion case. According to reporter Morton Mintz, during the oral

arguments, “The justices quickly found themselves in a thicket of vague legal language and the uncertainties of medical science.”<sup>34</sup> In the end, the court deferred to the doctors, observing that “viability” is “a matter for medical judgment.” Moreover, the majority wrote,

Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him [sic], there is a reasonable likelihood of the fetus’ sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus.<sup>35</sup>

In other words, the Supreme Court ordered state and national legislatures as well as lower courts to defer to experts in the medical field. They also made clear their belief that laws may not choose an exact gestation and declare that to be the time that all fetuses become viable; again, only a doctor may decide this in each particular instance.

### *1980s*

In the 97<sup>th</sup> Congress (1981-1982), 72 bills were introduced which placed limitations upon abortion.<sup>36</sup> In the words of Lewis, Rosenberg, and Porter, “Congress continues to be, a forum for proposed legislation and constitutional amendments aimed at limiting or prohibiting the practice of abortion.”<sup>37</sup> By 1981, “government-financed abortions [were] legal only if the pregnancy threatened the woman’s life.”<sup>38</sup> This has continued to be true to the present day, though Medicaid funding has been extended to include the small number of abortions because of rape and incest.

A major goal of the Right to Life movement during the 1980s was the passage of a constitutional amendment against abortion. Indeed, this had been a strategic goal of

Right to Life organizations since the passage of *Roe*. These amendments took two forms. The first type were federalism-type amendments, like the Hatch-Eagleton Amendment of 1982, which sought to give control of the abortion issue back to the states. The second type was the passage of a Human Life Amendment (HLA). The HLA would grant the fetus personhood status, thus guaranteeing the fetus protection under the 14<sup>th</sup> Amendment. Senator Jesse Helms (R, NC) was a major proponent of this type of amendment; Helms would continue to push for this amendment and a variety of pro-life bills over the next two decades.

Controversy over which type of amendment was best deeply divided the pro-life movement. When it really came down to the nitty-gritty of determining the exact language of an amendment, it became difficult to keep together the broad coalition of individuals who had formed the countermovement against *Roe*. Although 19 states applied to send the Amendment to a Constitutional Convention by 1984, the amendment never made it any further than that. Activists in the Right to Life movement were deeply disappointed; this marked the first time of many that the movement would be divided over goals and methodology.

Pro-life groups for the most part shifted their focus to the incremental rollback of *Roe* and its acceptance of abortion on demand after giving up on the passage of an amendment. Keith Cassidy chronicles the work of the movement in the 80's succinctly:

These incremental restrictions would not be the victory sought, but they could prepare the way for it and in the meantime keep the movement alive by showing its supporters that victories were possible. The list of legislation connected to the pro-life movement was considerable. Conscience clauses for doctors and hospitals opposed to abortion had been passed early in the abortion struggle, as had prohibitions on the use of foreign-aid funds for abortions. As well, the movement worked against the authorization of experiments on fetal-tissue transplants and RU-486. The most significant movement victories were the

regular passage of “Hyde Amendment” restrictions on abortion funding. . . . While the HLA did not pass, the movement did have a real impact on Congress and could point to real political impact in a number of areas.<sup>39</sup>

Moreover, in 1988 President Reagan Proposed the Pro-life Act of 1988, which would eliminate federal funding for abortions except when the mother’s life was in danger. The Title X “gag rule” was introduced in the same year. This rule prohibited federally funded family planning clinics from providing referrals for abortions. In 1989 George H. W. Bush vetoed Medicaid funding of abortions for rape and incest as well as a measure allowing D.C. tax revenues to be used to fund abortion.<sup>40</sup>

Also important in the pro-life struggle during the 80’s, though not related to legislation, was the 1984 release of the video *The Silent Scream*. This video showed the destruction of a fetus in the womb; a former abortionist narrated the entire video and explained what viewers were supposed to see in each frame.<sup>41</sup> The release of this film coincided with a pro-choice “slump;” it spurred a number of pro-choice “speak-outs” to shift the issue away from the fetus and onto the woman.<sup>42</sup> By 1989 abortion rights groups began to introduce their own legislation, starting with Freedom of Choice Act (FOCA). This legislation used the 14<sup>th</sup> Amendment as a justification for prohibiting restrictions on abortion. The FOCA continued to be introduced, unsuccessfully, during each year of the Bush presidency and the early years of the Clinton presidency.

Also in 1989 came a monumental 5-4 decision by the Supreme Court. *Webster v. Reproductive Health Services*<sup>43</sup> while not overruling *Roe*, did allow for “substantial state regulation and hence restriction” of abortion.<sup>44</sup> The media rushed to get President Bush’s reaction “to this apparent breakthrough. They found the president on the golf course. So affected he was by the significance that freighted this moment—with the new

possibilities suddenly opened for the saving of lives—that he was not quite inspired even to remove the wooden tee placed between his teeth. Speaking past the tee, he blurted out to the reporters something to the effect that there would be a statement on all of that later.<sup>45</sup> Unfortunately for the pro-life movement, Bush’s lack of leadership left many members of Congress who had previously called themselves “pro-life” without direction. Many of these men and women “were moved to abandon the pro-life position and become ‘pro-choice’ overnight.”<sup>46</sup> While before *Webster* these people could hide behind Congress’s inability to pass anti-abortion legislation, now they had no such political cover. They concluded that calling themselves personally pro-life but publicly in favor of a legal “right to choose” was the safest route politically. Arkes reflects that Bush had the power to prevent these defections “by coming forth with a statement to steady everyone, define the moment, and mark off some steps that virtually every fair-minded person would have been able to accept.”<sup>47</sup> The president never did make any statement to that effect, though. Not until later, with efforts like the 1995 PBA Ban, did individuals seek to mark out this ground that “every fair-minded person” ought to have been able to accept.

The perceptible loss of freedoms resulting from *Webster* revitalized pro-choice forces but split pro-life forces between pragmatists and purists. Pragmatists, like those in National Right to Life Committee (NRLC), immediately began to work preparing laws that states could pass limiting abortion. Purists, however, “objected strenuously to any steps that would, in their eyes, acquiesce in abortion by settling for anything other than a complete end to the practice.”<sup>48</sup> Again the pro-life movement was divided; this divide



has persisted and continually flares up in discussions between pro-life pragmatists and pro-life purists.

An interesting and unexpected by-product of the *Webster* decision, Cassidy notes, is the loss of a “selling point” of the movement against legalized abortion. The Right to Life movement initially had been able to use the Court’s judicial fiat of abortion rights in *Roe* to win the hearts of the public. However, now that the *Webster* decision allowed for increased regulations on abortion, that movement lost some of its previous power.<sup>49</sup> The National Abortion Rights Action League (NARAL) began their “Who decides—You or the politicians” campaign after *Webster*. They sought to capture some of the public support that the Right to Life movement had previously monopolized.<sup>50</sup> The campaign continues to the present day, reporting information on state and federal abortion-related legislation to all who visit their website.<sup>51</sup>

#### *1990s*

In 1990, perhaps as a direct result of the *Webster* decision, pro-choice advocates were remarkably successful in their state campaigns. State governors in favor of legalized abortion went up from 16 to 27 and state legislative bodies in favor of abortion went up from 23 to 45.<sup>52</sup> President Bush continued to struggle with the Congress during this time, with Congress passing changes to the Title X “gag rule,” which he immediately vetoed. In 1992 Bush would go on to veto the appropriations bill, the Family Planning Amendments Act of 1992, and the Aborted Fetal Tissue Use Bill, to name a few, all for reasons directly related to abortion.

Another monumental abortion-related case was decided in 1992. *Planned Parenthood v. Casey*, like *Webster* before it, upheld a number of restrictions on abortion,

including 24-hour waiting periods, informed consent, parental notification, and new reporting laws for clinics that perform abortions. The court ruled spousal consent unconstitutional, however. The following passage by Suzanne Staggenborg perhaps best explains the atmosphere after the justices' decision was announced:

Interestingly, both sides in the abortion battle eagerly declared themselves the losers in the *Casey* decision, understanding, no doubt, the value of a good threat for mobilizing supporters. Abortion rights forces emphasized the burdens on women allowed by the law and the need to fight attempts by the states to impose further restrictions on abortion. The decision certainly did create new battles at the state level, as well as a real opportunity for anti-abortion forces to impose new restrictions on abortion. Despite the new opportunities to restrict access to abortion, however, the *Casey* ruling was a great victory for pro-choice forces in that the Supreme Court refused to overturn *Roe v. Wade* and prohibit abortion outright. Moreover, the restrictions allowed by the Court, although significant, are subject to review if "undue burden" can be shown.<sup>53</sup>

Basile Uddo declared that, "in several particulars, *Casey* rewrites *Roe*, not only preserving it, but making it an ever greater obstacle to abortion regulation."<sup>54</sup>

In fact, the justices specifically upheld *Roe* in their decision, writing that the principle of stare decisis demands they abide by their original ruling. The majority defends *Roe*, claiming that "Although *Roe* has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable;" and "no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for its overruling."<sup>55</sup> The majority bemoans that the United States "as it has done in five other cases in the last decade, again asks us to overrule *Roe*." This, they write, is inconceivable "19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages."<sup>56</sup> As Arkes keenly observes, the concurring opinion of Justices O'Connor, Kennedy, and Souter "argued that the right to abortion had been too long settled to be

unsettled now. . . The argument, cast in these terms, bore a critical resemblance to the argument offered. . . in defending the laws on racial segregation. . . Once again, there was an understanding of precedents and law *quite detached from the moral content of the law*.<sup>57</sup> Although the courts obviously sought with this ruling to end the argument on abortion rights once and for all, this decision did not interrupt the government's endless cycle of cases which it brought before the court. Abortion cases continue to appear on the high court's docket on a regular basis.

Central to the holdings of *Casey* is the creation of a "bimester" system which would replace the trimester system of *Roe*. This new system focused on viability of the fetus (though the court did not state exactly at what point in pregnancy viability was reached); indeed the only justification for choosing the new "viability" standard is that it seemed "workable" to the court.<sup>58</sup>

Many in the pro-life movement were dejected at the court's decision, still having hoped for the overruling of *Roe*. As author Basile Uddo wrote: "the future holds little promise. *Casey* creates a mercurial standard that is unlikely to permit any legislation that actually affects the massive U.S. abortion business. Indeed, we may have seen all that *Casey* will allow in those provisions of the Pennsylvania law upheld."<sup>59</sup> The dissenting opinion notes this possibility as well, writing that "to evaluate abortion regulations under that standard, judges will have to make the subjective, unguided determination whether the regulations place 'substantial obstacles' in the path of a woman seeking an abortion, undoubtedly engendering a variety of conflicting views."<sup>60</sup> The dissenters continue, arguing that "the standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to

continue to impart its own preferences on the States in the form of a complex abortion code.”<sup>61</sup> This is a rather ironic outcome, since the justices of the majority write specifically that they hope this decision will provide “adequate guidance on the subject” to “state and federal courts and legislatures,” since previous rulings may have been contradictory.<sup>62</sup>

A significant foreshadowing of the 1995 partial birth abortion debate is Basile Uddo’s complaint that, “the new undue burden test, unlike its predecessor with its deference to most state decisions, unfortunately is nothing more than a subjective tool, that easily may be wielded against state abortion legislation. In addition because the undue burden test is so dependent on the factual record, it becomes increasingly difficult to depend upon any consistency in the abortion area.”<sup>63</sup> Here Uddo predicts the expert reliance that the *Casey* decision forces the legislatures and courts to rely upon. He continues,

Yet, my greater fear is that *Casey* could succeed in quelling the public policy debate. Touted as a Solomonic compromise reflective of public opinion, it will be wielded as a good reason for doing nothing and assuming the issue is settled. However, *Casey* does not reflect public opinion. True, the Pennsylvania statute reflected restrictions that are overwhelmingly supported by the American people; but the best polls also show they reject abortion on demand and any abortion performed in the absence of a compelling reason or exceptional cause. But abortion on demand without compelling justification is precisely what *Casey* maintains, for that is the core holding of *Roe*.<sup>64</sup>

Uddo’s predictions on this point did not come to pass; *Casey* certainly did not stop the tide of the movement against abortion rights. Indeed, these restrictions that public opinion seemed to demand would become the central focus of the PBA Ban.

Another important event which also took place in 1992 was the election of Bill Clinton to the presidency. During his campaign, Clinton took the stance that abortion

should be “safe, legal, and rare,” and that although he was personally opposed to the procedure, it should remain legal. However, some, such as Basile Uddo, believed his goals went deeper: “President Clinton has made clear his commitment to undo every hard-won abortion restriction within the control of the executive branch and his support for the dismantling of all others beyond his immediate control.”<sup>65</sup>

The election of a supporter of abortion-rights to the presidency caused a dramatic shift in the goals of the Right to Life movement. Some have gone so far as to claim that “in the weeks that followed Bill Clinton’s election to the presidency, several leading pro-life strategists essentially surrendered the twenty-year struggle to outlaw abortion.”<sup>66</sup> Notably, Cal Thomas, former vice president of the Moral Majority, encouraged his peers “to work not to outlaw but to influence each woman’s abortion decision.”<sup>67</sup> After the election “several pro-life commentators stressed that the movement had to create a strategy that recognized the reality of public opinion and therefore proceeded in an incremental and piecemeal fashion.”<sup>68</sup> The election of Clinton, then, in addition to the ruling in *Casey*, may have significantly altered the legislative goals among those in the anti-abortion movement.

The early days of the Clinton presidency were certainly an effort to show his support for the pro-choice lobbyists. On January 22, the 19<sup>th</sup> Anniversary of *Roe v. Wade* and the third day of his presidency, Clinton signed five executive orders reversing pro-life gains under the previous presidency: “he reversed the ban on abortion counseling in federally funded family planning clinics; overturned the moratorium on federally funded research involving the use of fetal tissue; ordered a study of the current ban on import of RU-486, the French abortion pill, for personal use; revoked the prohibition on abortions

in military hospitals; and voided the ‘Mexico City policy,’ which forbade U.S. foreign aid funds to agencies permitting abortions.”<sup>69</sup> Indeed, Clinton proved himself to be a staunch ally of the pro-choice movement, as Hadley Arkes explains, “Over the next several years, Bill Clinton would waver on many things, but he made it clear, from his first moments in office, that his administration would regard abortion, not merely as a ‘regrettable choice,’ but as a positive good—as something to be promoted at every turn, even with the use of public funds.”<sup>70</sup>

Soon after Clinton took office, two special senate elections were held. Democratic Senator Wyche Fowler of Georgia, a cosponsor of FOCA was defeated by a pro-choice Republican, Paul Coverdell. Although Coverdell was pro-choice, he favored such restrictions as parental notification laws and withdrawal of federal financing of abortions. The second special election saw Kay Bailey Hutchison (R, TX) defeat another FOCA cosponsor, Bob Kruger (D, TX). Hutchison, like Coverdell, was pro-choice but she favored restrictions on abortion while he did not. Republican Party chairperson Haley Barbour called these two elections “harbingers” of the Republican party’s new “pragmatism” in the area of abortion, for now the party would pursue restrictions rather than outright bans on abortion.<sup>71</sup>

The next two big issues were the regular Hyde-amendment, banning federal funding of all abortions except when the mother’s life was in danger, and the Freedom of Choice Act, seeking to codify *Roe*. In both arenas the pro-life forces showed themselves to be stronger than their opposition by passing the Hyde Amendment and blocking FOCA. This was due, in part, to Clinton’s refusal to lobby Congress on either issue.<sup>72</sup>

The Right to Life forces weren't 100% successful at keeping to their agenda, however. In order to garner the votes necessary to pass the Hyde Amendment, Representative Hyde (R, IL) had to make the concession of adding an exemption for cases of rape and incest. Ultimately, though, "the concession paid off. On June 30, the House voted 255 to 178 to renew the Hyde amendment. Pro-choice lawmakers were dumbfounded. Even the freshman class, elected on the ostensibly pro-choice tide of 1992, backed the amendment."<sup>73</sup>

A further defeat at that time was the inability of pro-choice forces to make progress on FOCA. This legislation had been a goal of abortion rights activists ever since the *Webster* decision; now with a pro-choice president in office they hoped to pass their bill. It is here that Partial Birth Abortion makes its first appearance, though it did not yet have that name. Upon reading Dr. Haskell's 1992 American Medical Association paper describing his new "Dilation and Extraction" abortion procedure, Jenny Westberg, "a homemaker and occasional clinic protester," drew a set of cartoon-ish line drawings depicting the procedure. These were published in a local Right to Life magazine, but were soon picked up by the National Right to Life Committee. These drawings were then published nationwide under the heading: "Do these drawings shock you? We're sorry, but we think you should know the truth."<sup>74</sup>

Eventually, after receiving no support from the president and "unable to muster enough votes to defeat additional weakening amendments, FOCA's congressional managers refused to bring the bill to the House floor for debate. That fall, the bill languished and died."<sup>75</sup> William Saletan's remarks on this point bear repeating: "FOCA's troubles laid bare the abortion rights movement's dilemma. The purpose of a federal pro-

choice bill was to block restrictions that state legislatures favored. Legislatures favored these restrictions largely because voters favored them. And because voters favored them, members of Congress demanded that FOCA be amended to permit them. FOCA could pass Congress only by shedding any pretense of challenging the status quo.”<sup>76</sup>

Recognition of the popularity of restrictions among the public would become the focus of pro-life groups in the 1990’s, much to the dismay of those in the pro-choice movement.

1993 continued in an unsurprising manner. Clinton’s cabinet nominees (for example Janet Reno as Attorney General and Joyce Elders as Surgeon General) and Supreme Court nominee (Ruth Bader Ginsburg) were heavily pro-choice. Changes were approved to Title X funding, allowing family planning clinics to counsel and refer women for abortions.

During this time tensions flared over President and Mrs. Clinton’s National Health Care plan. Part of the problem was that two-thirds of private insurance companies covered abortion at the time. Cutting this funding would eliminate a right many women had come to expect their insurance would help them pay for; not surprisingly pro-choice individuals argued against cutting abortion from their coverage. However, pro-life groups were concerned that by combining public and private funds, as Clinton’s plan did, there would be no way to keep their monies from being used to provide abortions. Though this wasn’t the only matter the health care plan was struggling against, it certainly did hamper efforts to pass it. The plan was finally chalked up as a loss after Democrats suffered defeat in the November 1994 mid-term elections.<sup>77</sup>

In January of 1994, the Supreme Court ruled against abortion protesters in *NOW v. Scheidler I*.<sup>78</sup> The court concluded that the Racketeer Influenced and Corrupt



Organizations Act (RICO), originally intended for the prosecution of mob bosses, could be used to prosecute pro-life protesters at abortion clinics. Significantly, pro-life activists could be charged with treble damages on any jury award under RICO.

Anti-abortion activists faced two more substantial set-backs in May of 1994. The first was the passage of the Freedom of Access to Clinic Entrances (FACE) Act of 1994. This bill sought to decrease violence at abortion clinic entrances and to give stricter punishments to those who blocked entrances. This bill passed 69-30 in Senate and 241-174 in House. The second setback was that, after intense pressure from the Clinton administration, the French manufacturer donated patent rights on RU-486 to the American based Population Council so they might begin clinical trials on the abortion pill. Eleanor Smeal from the Fund for the Feminist Majority proclaimed that “with a one-two punch, the Clinton administration has increased abortion access dramatically.”<sup>79</sup>

Pro-life Republicans again ascended to power in 1994. They managed to chip away at abortion in a variety of ways, as William Saletan says: “often with Clinton’s acquiescence, the Republicans exterminated the vestiges of pro-choice liberalism. They barred federal employees’ health insurance from covering abortions. They outlawed the use of American military hospitals for abortions on U.S. servicewomen and dependents of soldiers stationed abroad. They banned federal funding of abortions for federal prisoners. And they eliminated 35 percent of U.S. aid to international family planning programs.”<sup>80</sup> These reforms greatly pleased the Right to Life activists. Unfortunately for them, welfare reform loomed ahead.

The Republican welfare reforms sought to limit the number of babies born to unwed mothers by implanting these women with Norplant (a long-term birth control

substance), conditioning the monies they would receive from the government (such as demanding a young mother live with her parents or spouse and mandatory school attendance), or placing restrictions (a “cap”) upon the number of children a woman on welfare could have. Unfortunately for Republicans, the battle “forced pro-life and pro-choice activists into an awkward alliance.” Both sides agreed that caps would leave women with no choice but to abort when faced with a crisis pregnancy.<sup>81</sup> The battle also caused a rift among pro-lifers along religious lines. Protestant groups favored the cap because it encouraged a return to the traditional two-parent family. Catholic groups, however, focused on the sanctity of life and preferred that a child was born out of wedlock than not born at all.<sup>82</sup>

Another prominent piece of legislation introduced by Republicans at this time was the Parental Rights and Responsibilities Act (RPPA). The “moral conservatives” introduced the bill, which would keep the government from interfering in decisions of the parents of minors. Some pro-life activists feared this would allow parents to coerce their minor daughters into having abortions and leave the government powerless to prevent them, and thus opposed the bill.<sup>83</sup> Thus Republicans had alienated and splintered their pro-life contingent twice in a narrow time span. These two events are described by Saletan: “Republican presidential candidate-hopefuls began to declare their support for abortion restrictions such as parental notification laws and federal funding bans. However, by early 1995, every ‘prominent’ candidate (with the exception of Pat Buchanan) ‘had assured voters that he wouldn’t seriously pursue a constitutional ban on abortion.’”<sup>84</sup> The Republican Party, then, was firmly committed to the idea of eliminating abortion rights piecemeal, rather than by a frontal assault.

### *Conclusion*

An interesting situation faced pro-life members of Congress. Republicans needed an issue to regain their credibility with their pro-life constituents. They had also seen in the past (for example, at the passage of the regular Hyde Amendments) that pro-choice supporters could often be persuaded to vote for reasonable restrictions on abortion. Moreover, in the words of Arkes, the 1990s were a particularly crucial time for both the legislative and judicial branches:

The defenders of abortion seemed to be skillful in staging the public argument by putting the focus on those “hard cases” of rape and incest. And yet, those kinds of cases represented only about half of 1 percent of the abortions performed in any year. But the scheme of modest first steps would have the effect of shifting the burden and making the debate take place on the terrain of the hardest cases for the partisans of abortion—not rape and incest, but the abortions that took place at the point of birth. As the judges summoned the nerve to defend abortions even at the point of birth, they began to defend abortion with a language far less affected by a sense of inhibition, reluctance, or regret. In the sweep of their convictions, they began to put in place premises that made the case for abortion even more radically than they had made it in the past. And indeed, they were moved to install now premises that were at war with jurisprudence itself.<sup>85</sup>

The PBA Ban represented a monumental effort to shift the grounds of the debate from the hard cases used as examples by the pro-choice lobby to the hard cases used as examples by the pro-life lobby.

As for the executive branch, President Clinton continued to show himself as completely loyal to the pro-choice movement. The Republican ban could not be merely another bill attempting to cut back on abortion, then; it needed to be one that would pass by an overwhelming majority, in case Clinton were to veto it. If the primary goal was merely to pass the legislation, the supermajority would be necessary. Evidence suggests, though, that this was not the only intent of those who proposed the bill.

*Notes*

1. This chapter will use the terms pro-life, Right to Life, and pro-choice in a manner that reflects the self-identification of members of these groups.
2. See for example: Celeste Michelle Condit, *Decoding Abortion Rhetoric*; Keith Cassidy, "The Right to Life Movement: Sources, Development, and Strategies," in *The Politics of Abortion and Birth Control in Historical Perspectives*, ed. Donald T. Critchlow (University Park, PA: Pennsylvania State University Press, 1996); James R. Kelly, "Seeking a Sociologically Correct Name for Abortion Opponents," in *Abortion Politics in the United States and Canada: Studies in Public Opinion*, eds. Ted G. Jelen and Marthe A. Chandler (Westport, CT: Praeger, 1994).
3. *Roe v. Wade*, 410 U.S. 113 (1973).
4. The first line of the *Roe v. Wade* decision, proper, reads: "This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, post, p. 179, present constitutional challenges to state criminal abortion legislation."
5. *Doe v. Bolton*, 410 U.S. 179, 188 (1973).
6. Cynthia Gorney, "Why Both Sides Think They Have Everything to Lose," *Harper's*, November 2004, <http://harpers.org/GamblingWithAbortion.html>.
7. Michael T. Malloy, "Despite Court's Ruling Abortion Fight Goes On," *National Observer*, February 3, 1973 quoted in *The Abortion Controversy: A Documentary History*, ed. Eva R. Rubin, (Westwood, Connecticut: Greenwood Press, 1994), 144.
8. Condit, *Decoding*, 52-53 and Rubin, *The Abortion Controversy*, 171.
9. Joe Scheidler, "Pro-Life Action Comes of Age," <http://www.prolifeaction.org/news/2005v24n1/history.htm>
10. Joe Scheidler, "Fundraising letter," February 1, 2005, Pro-Life Action League (PLAL), Available upon request from PLAL.
11. National Right to Life Committee, "Mission Statement," <http://www.nrlc.org/Missionstatement.htm>
12. Molly M. Ginty, "Before Roe," *Planned Parenthood Federation of America, Inc.*, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/abortion-access/before-roe-6159.htm>
13. Malloy, "Despite Court's Ruling" in *The Abortion Controversy*: 144.

14. Malloy, "Despite Court's Ruling," in *The Abortion Controversy*: 144.
15. Edwin A. Roberts, Jr., "High Court's Abortion Legislation," *National Observer*, March 10, 1973 quoted in *The Abortion Controversy*, 149.
16. Rubin, *The Abortion Controversy*, 152.
17. Rubin, *The Abortion Controversy*, 152.
18. James L. Buckley, *Congressional Record*, May 31, 1973, S 17538-39 quoted in *The Abortion Controversy*, 159.
19. Weldon, *Congressional Record—House*, 104th Cong., 1st sess., October 30, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): H 11426.
20. Lawrence M. Friedman, "The Conflict over Constitutional Legitimacy," in *The Abortion Dispute and the American System* quoted in *The Abortion Controversy*, 168.
21. Rubin, *The Abortion Controversy*, 186.
22. *Science*, October 25, 1974: 328 in Susan Garvin "About the Edelin case: Late term abortion," <http://www.holysmoke.org/fem/fem0379.htm>
23. Susan Garvin "About the Edelin case: Late term abortion," <http://www.holysmoke.org/fem/fem0379.htm>
24. As of December 30, 2006, NRLC reported that 34 states have some sort of law for punishing the death of an unborn child. National Right to Life Committee, "State Homicide Laws That Recognize Unborn Victims," [http://www.nrlc.org/Unborn\\_Victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html)
25. Karen J. Lewis, Morton Rosenberg, and Allison I. Porter, "Abortion: Judicial and Legislative Control," *Congressional Research Service Major Issues System* (updated 01/10/1984), 8.
26. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).
27. Karen O'Connor, *No Neutral Ground? Abortion Politics in an Age of Absolutes*, Dilemmas in American Politics, ed. L. Sandy Maisel (Boulder, Colorado: Westview Press, 1996), 96.
28. Suzanne Staggenborg, "The Survival of the Pro-Choice Movement," in *The Politics of Abortion and Birth Control in Historical Perspectives*, ed. Donald T. Critchlow (University Park, PA: Pennsylvania State University Press, 1996), 164.

29. *Washington Post*, "Medicaid-Abortion Conflict," December 5, 1978, A9.
30. Lewis, Rosenberg, and Porter, "Judicial and Legislative Control," 6.
31. The study looked at data from 1985 to 1999. While not directly within the timeframe of this study, it is suggestive of the impact pro-life laws have on abortion rates. Michael New, "Analyzing the Effect of State Legislation on the Incidence of Abortion Among Minors," *Heritage Foundation Center for Data Analysis Report*, February 5, 2007, <http://www.heritage.org/Research/Family/cda07-01.cfm>
32. See Lewis, Rosenberg, and Porter, "Judicial and Legislative Control," 16.
33. Ninia Baehr, *Abortion Without Apology* (Boston, MA: South End Press, 1990), 48.
34. Morton Mintz, "In High Court, State and Doctors Argue Over Abortion," *Washington Post*, October 4, 1978, A11.
35. *Colautti v. Franklin*, 439 U.S. 379 (1979).
36. See Lewis, Rosenberg, and Porter, "Judicial and Legislative Control," 16.
37. See Lewis, Rosenberg, and Porter, "Judicial and Legislative Control," 1.
38. Mary C. Segers, "The Pro-Choice Movement Post-*Casey*: Preserving Access," in *Abortion Politics in American States*, ed. Mary C. Segers and Timothy A. Byrnes (Armonk, NY: M.E. Sharpe, 1995), 238.
39. Keith Cassidy, "The Right to Life Movement: Sources, Development, and Strategies," in *The Politics of Abortion and Birth Control in Historical Perspectives*, ed. Donald T. Critchlow (University Park, PA: Pennsylvania State University Press, 1996), 146.
40. Seeger, "The Pro-Choice Movement Post-*Casey*," 228.
41. Condit's *Decoding Abortion Rhetoric* provides a very interesting look at the film, citing her experiences of showing her classes the film with and without the audio track. Without the narrative, Condit writes, viewers do not usually understand what the makers of the video wanted them to see. Also see Jessie Givner, "Reproducing Reproductive Discourse: Optical Technologies in *The Silent Scream* and *Eclipse of Reason*," *Journal of Popular Culture* 28, no. 3 (1994): 229-224 and Marilyn M. Mehaffy, "Fetal Attractions: The Limit of Cyborg Theory," *Women's Studies* 29, no. 2 (2000): 177-195.

42. Suzanne Staggenborg, "The Survival of the Pro-Choice Movement," in *The Politics of Abortion and Birth Control in Historical Perspectives*, ed. Donald T. Critchlow (University Park, PA: Pennsylvania State University Press, 1996), 167.
43. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).
44. Cassidy, "The Right to Life Movement," 150.
45. Arkes, *Natural Rights*, 91.
46. Arkes, *Natural Rights*, 92.
47. Arkes, *Natural Rights*, 92.
48. Cassidy, "The Right to Life Movement," 150.
49. Cassidy, "The Right to Life Movement," 138.
50. Cassidy, "The Right to Life Movement," 138.
51. NARAL Pro-Choice America, "Who Decides: The Status of Women's Reproductive Rights in the United States," [http://www.naral.org/choice-action-center/in\\_your\\_state/who-decides/](http://www.naral.org/choice-action-center/in_your_state/who-decides/)
52. Seeger, "The Pro-Choice Movement Post-Casey," 228.
53. Staggenborg, "The Survival of the Pro-Choice Movement," 169.
54. Basile J. Uddo, "The Public Law of Abortion: A Constitutional and Statutory Review of the Present and Future Legal Landscape," in *Abortion and Public Policy: An Interdisciplinary Investigation within the Catholic Tradition*, ed. R. Randall Rainey and Gerard Magill (Omaha, NE: Creighton University Press, 1996), 166.
55. *Planned Parenthood of Southeastern PA (P.P.) v. Casey*, 505 U.S. 833 (1992).
56. *P.P. v. Casey*.
57. Arkes, *Natural Rights*, 79. Emphasis in original.
58. Uddo, "Public Law of Abortion," 166.
59. Uddo, "Public Law of Abortion," 179.
60. *P.P. v. Casey*.

61. *P.P. v. Casey*.
62. *P.P. v. Casey*.
63. Uddo, "Public Law of Abortion," 173.
64. Uddo, "Public Law of Abortion," 179.
65. Uddo, "Public Law of Abortion," 163.
66. William Saletan, *Bearing Right: How Conservatives Won the Abortion War* (Los Angeles: University of California Press, 2003), 218.
67. Saletan, *Bearing Right*, 218.
68. Cassidy, "The Right to Life Movement," 151.
69. Seeger, "The Pro-Choice Movement Post-Casey," 231.
70. Arkes, *Natural Rights*, 97.
71. Saletan, *Bearing Right*, 220.
72. Saletan, *Bearing Right*, 221.
73. Saletan, *Bearing Right*, 221.
74. Gorney, "Everything to Lose."
75. Saletan, *Bearing Right*, 223.
76. Saletan, *Bearing Right*, 223.
77. See Saletan, *Bearing Right*, 226-229.
78. *National Organization For Women, Inc. v. Scheidler* 510 U.S. 249 (1994).
79. Seeger, "The Pro-Choice Movement Post-Casey," 233.
80. Saletan, *Bearing Right*, 229.
81. Saletan, *Bearing Right*, 230.
82. Saletan, *Bearing Right*, 231.
83. Saletan, *Bearing Right*, 232.



84. Saletan, *Bearing Right*, 229.

85. Arkes, *Natural Rights*, 122.

## CHAPTER THREE

### The Congressional Debate

The debate in the House of Representatives occurred over two days, October 30 and November 1, under a closed rule which limited the length of the debate and allowed the introduction of no amendments. The debate in the Senate took longer, occurring over four days: December 4 through 7. Although a great number of issues were introduced during these debates that is of interest, several points deserve more attention. This chapter analyzes two major issues that arose during these debates. The first half of the chapter looks at experts. Sometimes doctors were portrayed as the most highly qualified experts, while other times those with personal experience were described as the most highly qualified. When viewed merely by who had the best experts, the anti-ban speakers seemed to have the upper hand, though pro-ban forces did make inroads at discrediting the opposition's claims.

The second major issue of the debates is determining what the real purpose of the bill may have been. With Clinton's veto as well as claims of unconstitutionality looming over the bill at all times, educating the public emerges as a major goal of the legislation.

#### *Expert Testimonies*

A central issue in these debates is what makes one expert better than another. Some doctors are able to list more degrees or more prestigious credentials behind their names than other. Some women are able to speak about what they themselves witness or experience, while others are not. Some members of Congress are simply better at

phrasing their arguments and are able to work in facts and statistics in a more convincing manner than others are. A debate about a medical issue, such as this one, must rely to some extent upon experts, since members of Congress are not required to hold medical degrees. Someone who has spent years studying a topic can obviously contribute much to a discussion of abortion procedures. This section examines a number of these expert-based arguments to see how they are employed by both proponents and opponents of the ban. It also tries to identify at what point this reliance upon experts begins to debilitate Congress's ability to make judgments on important matters and what these individuals can do to combat the problem of weighing competing claims from experts.

#### *Doctors and Organizations as Experts*

People with medical degrees and training are the most obvious source of expert testimony in this debate; those with knowledge of abortion methods or who have performed abortions seem to be even more particularly qualified to make claims about the PBA procedure. Each side chose a number of experts who, in their opinion, best made the arguments for their position on the bill. The types of arguments made on the floor of Congress were necessarily influenced by who their side had found to make their points; each side would, of course present their experts in the most positive light available to them.

For example, the most commonly cited supporting organization among those in favor of the ban was the American Medical Association's Council on Legislation. These twelve doctors voted unanimously to endorse the bill.<sup>1</sup> Significantly, though, as those who opposed the ban were sure to point out on every occasion the Legislative Council's

endorsement was mentioned, the committee as a whole had ignored this recommendation and refused to endorse the bill.<sup>2</sup>

As a likely result of not having a superiority of numbers, those in favor of the ban highlighted the authority of those on their side by emphasizing their credentials and repeating the medical jargon used by those doctors. For example, Senator Hatch (R, UT) cites the testimony of Dr. Nancy Romer: “a professor in the department of obstetrics and gynecology at the Wright State University School of Medicine and the vice chair of the department of obstetrics and gynecology at Miami Valley Hospital.”<sup>3</sup> Romer, who explains that she works with two high-risk obstetricians and in a department of 40 obstetricians, asks “If this procedure were absolutely necessary, then I would ask you, why does no one that I work with do it?”<sup>4</sup>

Senator Helms (R, NC) specifically tells his colleagues to rely on the testimony of their highly qualified witnesses: “Don't take it from me. Take it from Dr. Pamela E. Smith, Director of Medical Education in the Department of Obstetrics and Gynecology at Chicago's Mount Sinai Hospital.”<sup>5</sup> Smith's credibility is further enhanced by her use of jargon. Phrases such as “living intrauterine pregnancy,” “istrogenically produced cervical incompetence,” and “obstetrical situations” pepper her testimony and letters, which Helms reads large portions of into the record.<sup>6</sup> In a letter read by Senator Helms, Smith explains her opposition to the procedure in these terms:

Uterine rupture is a well known complication associated with this procedure. In fact, partial birth abortion is a “variant” of internal podalic version. . . However, internal podalic version, in this country, has been gradually replaced by Cesarean section in the interest of maternal as well as fetal well being (see excerpts from the standard text Williams Obstetrics pages 520, 521, 865 and 866). Furthermore, obstetrical emergencies (such as entrapment of the head of a hydrocephalic fetus or of a footling breech that has partially delivered on its own) are never handled by employing this abortion technique. Cephalocentesis,

(drainage of fluid from the head of a hydrocephalic fetus) frequently results in the birth of a living child. Relaxing the uterus with anesthesia, cutting the cervix (Dührssen's incision) and Cesarean section are the standard of care for a normal, head entrapped breech fetus.<sup>7</sup>

Smith offers immediate descriptions of terms such as “Cephalocentesis,” knowing that her audience will be unfamiliar with them; even in her explanation, though, Smith’s language is above that of the common person. She offers several alternative suggestions as to the typical “standard of care” (a medical term of art) for situations faced by those doctors who perform Partial Birth Abortions, something which only an experienced doctor could do. She also directs her audience to Williams *Obstetrics*, the authoritative work in the field. That a highly used text in the area of birth and delivery describes a similar procedure as dangerous only enhances the authority Smith speaks with.

The words Smith uses create a distinction between herself and her audience. Her ability to use these words with ease mark her as superior to the rest of the group. Smith’s letter is written with the explicit purpose of showing her knowledge of the subject. Those without a knowledge of what these words mean or how these procedures are performed would find themselves incapable of disputing her testimony. As any good expert does, then, Smith sets herself in an irrefutable position of authority to which her audience must submit.

Moreover, by listing the possible procedures a specialist could do, Smith attempts to portray the opposition as less intelligent, lazy, or even careless of the mother’s health. If they truly cared, she implies, they would perform the procedures that are within the “standard of care” for such situations. In contrast, those in favor of the ban are willing to go the extra step to take care of both the pregnant woman and her baby. Smith is able to use her technical expertise to identify a major argument of the pro-ban speakers—that

this procedure is simply about greater ease on the part of the doctor performing the abortion, rather than any real medical necessity.

The direct quotation of her letter is also powerful. While those against the ban typically rely upon indirect quotations during their speeches, those in favor of the ban assault their listeners with highly technical jargon. This allows people like Helms to speak with the credibility of the person s/he is quoting, which is presumably higher than their own non-medical *ethos* on the subject. Finally, by reading this letter, Helms gives the pro-ban position added standing as well, since this proves that those in favor of the ban have intelligent, well researched doctors on their side.

One further example of expert testimony is the use of abortion rights supporters' testimonies against themselves. Senator Robert Smith (R, NH) spoke about the testimony of Professor Courtland Robinson of John Hopkins University Medical School. Robinson was a witness testifying on behalf of the National Abortion Federation. When questioned by Representative Canady about the drawings that had been used on the House floor, Robinson "agreed that they were technically accurate, commenting 'this is exactly probably what is occurring at the hands of the physicians involved.'"<sup>8</sup> Moreover, Senator Hatch quoted an interview with Dr. Haskell (one "inventor" of the procedure in question) in the American Medical Association (AMA) News, during which Haskell testified to the accuracy of the drawings.<sup>9</sup>

Dr. Hern was quoted a number of times by proponents of the ban as well. This is significant because Hern performs second trimester abortions and literally "wrote the book" on abortion methods. Jesse Helms (R, NC) read into the record an article from the American Medical News which clearly explains Hern's beliefs on partial birth abortions:

“I have very serious reservations about this procedure. . . I would dispute any statement that this is the safest procedure to use. Turning the fetus to a breech position is ‘potentially dangerous,’ he added. ‘You have to be concerned about causing amniotic fluid embolism or placental abruption if you do that.’”<sup>10</sup> Conrad Burns (R, MT) paraphrased Dr. Hern as saying “he could not imagine a circumstance in which the partial-birth abortion procedure would be the safest.”<sup>11</sup>

Using the words of doctors who perform abortions to prove that the technique is unsafe was another significant strategy of those in favor of banning PBA. It implies that all the experts the anti-ban speakers had found were tainted. No matter what defenders of PBA might say during the hearings, their fellow abortion providers stood against the procedure. Knowing this could undermine the credibility of those defenders in the mind of someone who was undecided about whether to allow PBA to continue.

Pro-ban speakers described the PBA procedure in words over and over; they also showed diagrams of it on the floor of the House and the Senate. It was important for them to prove that these descriptions were accurate. The best way to do so was by using abortion experts, in particular the man who gained notoriety for inventing the D&X. Quoting Haskell, who grudgingly admitted that the diagrams were accurate helped the pro-ban speakers prove that they were not simply trying to manipulate people’s emotions. Because these diagrams were completely accurate, even according to the opposition, pro-ban speakers both solidified their arguments and gained an excuse to continue showing their diagrams.

In contrast to this emphasis on the qualifications of individual speakers, the opposition spent a their time emphasizing the large numbers of doctors and nurses who

urged rejection of the ban. Among these groups were the California Medical Association (38,000 doctors), the American Medical Women's Association (13,000 women doctors),<sup>12</sup> the American College of Obstetricians and Gynecologists (ACOG) (35,000 doctors), and the American Nurse's Association (2.2 million nurses).<sup>13</sup> Representative Patricia Schroeder (D, CO) sums it up by saying, "No medical organization supports congressional censorship of treatment alternatives. None."<sup>14</sup> The credentials of those against the ban were also highlighted occasionally, such as when Senator Simon (D, IL) took the time to read letters from doctors in the Department of Obstetrics and Gynecology at a number of prominent Chicago area hospitals, including the University of Chicago.<sup>15</sup>

In contrast to the technical jargon read into the record by Helms and others, individuals like Representative Schroeder (D, CO) read aloud portions of letters, like this one from the California Medical Society (CMS), which avoided such terminology: "when serious fetal anomalies are discovered late in a pregnancy. . . abortion, however heart wrenching, may be medically necessary. And in such cases the procedure described in this bill would be outlawed, and it would prohibit all sorts of medical benefits and the chance to give safer alternatives to her by maintaining uterine integrity, reducing blood loss, and other potential complications."<sup>16</sup>

Rather than using jargon, the CMS letter uses vaguely worded phrases. Importantly, these phrases, unlike those in Dr. Smith's letter, are comprehensible to the lay-hearer. By speaking so that the common person can understand what is being said, anti-ban speakers sought to give the impression that they were the voice of the common person. They wanted to give the impression that they had the interests of common



people—like Coreen Costello and Viki Wilson—at heart. Moreover, because the average person doesn't know what it means to “prohibit all sorts of medical benefits,” they would likely defer to the expertise of the doctor, who presumably knows precisely what those benefits are. Avoiding specific mention of what a doctor could do in such a situation eliminates the lay person's ability to judge which options would work best, since they do not know the options available. This forces dependence upon the expert, if a person hopes to avoid the terrifying “other potential complications” that could arise.

Elsewhere Schroeder summarizes the alternatives available to the women who find out they are pregnant with a child that will not survive outside the womb or whose lives are in danger by carrying the pregnancy to term. The only two options, she argues, that are available to these women are a c-section or a partial birth abortion:

I am truly appalled at the flipness with which the proponents of this bill suggest she can have a cesarean. It is almost criminal. Women die every year of the complications of cesarean sections. C-sections have four times the fatality rate of vaginal births. Why? Why would my colleagues ask their daughter to shoulder this small but real risk of death for a fetus with no potential of life? . . . Another alternative? Cesarean section is one. *The only other alternative* to this kind of vaginal delivery through which a needle is used to reduce the circumference of the head so that the delivery can take place. . .in order to avoid the terrible dangers to a woman's reproductive health and to her life that the other method posed.<sup>17</sup>

Schroeder summarizes her opposition to the bill in words that even a person with no medical experience can understand. Through the use of enthymeme, Schroeder suggests that by eliminating PBA, women will be forced to undergo dangerous c-sections, which will pose “terrible dangers” and “complications.” Interestingly, though, nowhere does she cite the testimony of doctors or nurses; she makes no reference to any medical text explaining that these are the only two options available. This creation of a forced choice also eliminates a person's ability to make a judgment outside of the one offered by the

speaker. The rhetor presents the choice of dangerous surgery versus a safe partial birth abortion; when portrayed in this way, there is no real decision to be made, since one option is very obviously the wrong one.

The quasi-medical explanation of Representative Schroeder is interspersed with emotional appeals asking the audience to imagine a loved one or themselves in this situation. Schroeder completes her defense of the procedure by stating: “Why? Because it is the safest. Less bleeding, lower complication rate for the mother, less painful, and the geneticists can better determine what went wrong and counsel the couple for future pregnancies.”<sup>18</sup> Again, Schroeder paraphrases the testimonies from the Senate Hearings that had been held earlier but doesn’t cite any particular individual’s testimony to support her contentions. As before, she hoped that by bringing the discussion down to a level that everyone could understand that they would recognize their inability to form judgments in this area and, as a result, would defer to her interpretation of events.

#### *Experts Created Through Personal Experience*

The personal narratives of Coreen Costello and Viki Wilson also function as expert sources for those against the ban. In particular, Senator Barbara Boxer (D, CA) relies on the testimonies of these women in her statements on the floor. The lived experiences of these women proves that this bill is the wrong thing to do. These women, their doctors, and their husbands are experts when it comes to facing these tragedies, not the men in Congress who will never give birth. As Senator Boxer stated with outrage: “And yet this bill would deny the Coreen Costellos and the Viki Wilsons an option to save their life, to protect their fertility, and their health because a majority of men in this

Senate decided they know better than Viki and Viki's husband and Viki's doctors. What arrogance of power. That is what this debate is all about.”<sup>19</sup>

Senators Moseley-Braun and Boxer have an exchange about this on the floor, as well:

Ms. Moseley-Braun: I never cease to find it a little amusing—I know this gets on some difficult ground in these debates, but most of this debate takes place with people who themselves have never been pregnant.

Mrs. Boxer: That is correct.

Ms. Moseley-Braun. Quite frankly, having been there. . . I can tell you I gained 40 pounds, my teeth started to rot, I wound up hospitalized three times. . . . So who can relate to the tragedy and to the emotion and to the physical demand of being in Viki's shoes, being here, pregnant out to here. . . . only to discover the child that you are carrying, that you have an identification with, has no brain, and this legislation would force that child to be born? . . . I say to you that I think it is also very important that those who cannot be pregnant really should think twice before they talk about this issue. I thank the Senator.

Mrs. Boxer: I say to my friend, she makes a very good point, because we hear men in this Chamber talk about the joys of birth and the travel through the birth canal, and, yes, we hope every pregnancy is a joyous, wonderful, problem-free moment for every single woman in this country, regardless of her status in the country. . . . And to have people in this Chamber stand up and say they want to be in that living room, in that hospital room, in that family conversation, frankly, makes me feel sick because we were not elected to be part of this family or any other family. . . . Coreen Costello, the woman I have talked about over these last couple of days, said it best. When she found out this tragic news, she fell to her knees and prayed. . . . And she said “the last thing I wanted at that moment was a politician telling me what to do.”

The majority of those speaking in favor of the PBA Ban were men; thus this conversation between Moseley-Braun and Boxer drives home their point: only a woman in the situation can make the decision of whether to abort. Only she truly understands the pain she is going through. No one can put himself (or herself) into her shoes. Having been through this pain, these women are experts and the Congress should defer to them on this issue.

As Boxer put it: “That testimony cannot be derided by anyone in this Chamber, regardless of his or her view. Those people told the truth about their lives, and they were backed up by their families, and no one could contradict them.”<sup>20</sup> Feminist Standpoint Theory defends this assertion. As Sandra Harding wrote, “when people speak from the opposite sides of power relations, the perspective from the lives of the less powerful can provide a more objective view than the perspective from the lives of the more powerful.”<sup>21</sup> The men in the chamber who wanted to ban PBA, then, were speaking from their privileged standpoint. The fact that they could never become pregnant and therefore face all of the attendant troubles meant that they had no right to oppose women like Boxer and Moseley-Braun, who had been pregnant and had given birth, or Costello and Wilson, who had been forced to choose abortion. In other words, all members of Congress who had not been in this situation themselves (i.e. every single person) ought to defer to Costello and Wilson, experts in this area.

Despite Boxer’s argument that no one can contradict their testimonies, several senators picked apart the narratives presented by Costello and Wilson. Specifically they point to sections of their testimonies where women’s descriptions of the method differs from the doctor’s descriptions of the method (which had been confirmed by abortionists as being accurate). Coreen Costello, for example, says that her baby died from the anesthesia administered prior to the procedure. Afterwards she was able to hold her baby, who “was not missing any part of her brain. She had not been stabbed in the head with scissors.”<sup>22</sup> Similarly, Viki Wilson states, “My daughter died with dignity inside my womb [from the anesthesia]. She was not stabbed in the back of the head with scissors,

no one dragged her out half alive and then killed her, we would never have allowed that to happen.”<sup>23</sup>

Advocates of the ban isolated several perceived falsehoods. First, anesthesia does not kill a fetus in the womb. A number of experts were cited by those in favor of the ban dismissing this idea as completely false. Most prominent was the testimony of Dr. Norig Ellison, president of the American Society of Anesthesiologists. Senator Hatch (R, UT) summarized his testimony this way:

Dr. Ellison. . . stated that the American Society of Anesthesiologists, while not taking a position on the bill. . . have nonetheless felt it our responsibility as physicians specializing in the provision of anesthesia care to seek every available forum in which to contradict Dr. McMahon's testimony. Only in that way, we believe, can we provide assurance to pregnant women that they can undergo necessary surgical procedures safely, both for mother and unborn child. Dr. Ellison also noted that, in his medical judgment, in order to achieve neurological demise of the fetus in a partial-birth abortion procedure, it would be necessary to anesthetize the mother to such a degree as to place her own health in jeopardy.<sup>24</sup>

Senator DeWine (R, OH) reminded his colleagues that, at the hearing, Dr. Campbell (a physician who had initially affirmed that anesthesia could cause the death of the fetus) changed her position upon hearing the testimony of Dr. Ellison, who had more expertise in the area than she did.<sup>25</sup> Summarizing a portions of Haskell’s interview with the American Medical News, Hatch emphasizes that Haskell admitted that two-thirds of the fetuses aborted via this method were still alive when he began to deliver them.<sup>26</sup> There was, then, no basis to believe that Costello and Wilson’s babies had died from anesthesia. Their personal experience was wrong.

Secondly, the description of a Partial Birth Abortion, which proponents of the ban had read aloud numerous times, very specifically states that the fetus is stabbed in the back of the head. Opponents of the ban had, at several points conceded that a “spinal

needle” was inserted into the head to remove “fluid” in order to minimize the size of the head and thus minimize the amount of dilation required to complete the delivery.<sup>27</sup> A physician who had assisted Dr. McMahon in his performance of an Intact Dilation and Extraction (his name for PBA) wrote in a letter to Representative Hyde (R, IL) that after Dr. McMahon delivers the fetus up to the shoulders, he removes “cerebrospinal fluid from the brain causing instant brain herniation and death.”<sup>28</sup> It seems, then, that the question is whether surgical scissors or a spinal needle is used and whether it removes “fluid” or brain tissue. Not being an expert, I do not know the differences, though they are surely significant. Again the jargon used by the experts obscured the issues and made it so that a layperson could not understand what exactly was being debated.

It is for these two reasons that Smith (R, NH) claims to have entirely debunked these two women’s testimonies:

The next two witnesses that the supporters of partial-birth abortion presented—and this is the interesting part—were two women who had late-term abortions. Interestingly enough, however—and this was not brought out by the Senator from California—neither one of them had a partial-birth abortion. The Senator from Ohio pointed it out when he was speaking, that neither one of the women had a partial-birth abortion. . . Clearly, what Ms. Costello described is something else. I do not intend, Mr. President, to make light of the agony that Ms. Costello's anguish caused her over her baby's condition and her abortion. The only thing I want to point out is that this debate is about partial-birth abortions.<sup>29</sup>

Because these women have not accurately described the event of their abortions, their testimonies are worth far less than that of the experts offered by Smith and others.

Senator Boxer (D, CA) replies that Viki Wilson (a registered nurse) and her husband (an emergency room physician) as well as Coreen Costello clearly believe that their abortions were the type described in the bill. In fact, Dr. McMahon (the doctor named in addition to Haskell as being the major performer of PBAs) was the one to

perform their procedures. She reads from a letter she received from these women: “ We are shocked and outraged by attempts by you to dismiss our significance as witnesses against the partial-birth abortion bill.<sup>30</sup> She goes on to explain that even if these women didn’t have PBAs, that only proves the vagueness of the bill—that a person who lived through this procedure can’t understand what the senators on the other side are saying means that the bill itself is flawed. This vagueness claim is one that was also paraded constantly by anti-ban speakers as a reason to vote against the ban. This only gave pro-ban speakers another reason to bring out their diagrams and descriptions. As a person with no medical training, it seems difficult to understand how one could not know if the back of the fetus’ skull had been punctured. Again the lack of medical expertise makes it almost impossible for one to make a determination of who is telling the truth.

After discrediting the narratives of those Costello and Wilson, those in favor of the ban offered a narrative of their own, that of nurse Brenda Pratt Schafer. This was perhaps the most widely known story to emerge from the PBA Ban Hearings. Schafer, a pro-choice nurse, was temporarily assigned to work for Dr. Haskell’s clinic. Her graphic description of the method, of the baby’s arms flinching as he was stabbed, and of the mother’s sorrow after the abortion made Schafer’s story particularly poignant:

I stood at a doctor's side as he performed the partial-birth abortion procedure, and what I saw is branded forever on my mind. The mother was 6 months pregnant. The baby's heartbeat was visible, clearly, on the ultrasound. The doctor went in with forceps and grabbed the baby's legs and pulled them down through the birth canal. Then he delivered the baby's body and the arms, everything but the head. The doctor kept the baby's head just inside the uterus. The baby's little fingers were clasping and unclasping and his feet were swinging. Then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinched, startled reaction, like a baby does when he thinks he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now, the baby was completely limp. . .

I never went back to that clinic, but I am still haunted by the face of that little boy—it was the most perfect, angelic face I have ever seen.<sup>31</sup>

Not only does her experience as a nurse of thirteen years make Schafer an “expert” in favor of banning PBA, but her position as pro-choice—until she saw this procedure—adds to her credibility. Schafer, a “victim” of the procedure was horrified but what she saw; all those who heard her testimony could identify with that horror, almost as if they had experienced it themselves. Thus her narrative has wide appeal to the public, which is likely why those in favor of the ban spread it so far and wide.<sup>32</sup>

There are of course a number of indictments made against Schafer’s testimony. Christie Gallivan, the nurse who served as Schafer’s supervisor for her three days at the clinic, strongly objected to the accuracy of Schafer’s testimony:

Finally, at no point during a dilatation and extraction [D&X] or intact D&E [IDE] is there any fetal movement or response that would indicate awareness, pain or struggle. Ms. Pratt [Schafer] absolutely could not have witnessed fetal movement as she describes. We do not train temporary nurses in second trimester dilatation and extraction, since it is a highly technical procedure and would not be performed by someone in a temporary capacity. If, indeed, Ms. Pratt [Schafer] entered the operating room at any point during a D&X procedure, she clearly either is misrepresenting what she saw or remembers it incorrectly.<sup>33</sup>

Gallivan continues, adding that Dr. Haskell never used ultrasound during the performance of the procedure. He also has a “self-imposed” limit which he “scrupulously adheres to.” Haskell never performed PBAs after 24 weeks of pregnancy (though Schafer reportedly saw him perform abortions at 25 and 26 weeks).<sup>34</sup>

If the clinic never trained temporary nurses to assist with D&X abortions, then Schafer’s testimony itself must be completely false. Her credibility is severely questioned, since a person reading Gallivan’s letter must wonder how Schafer came to see the abortion, if indeed she did. Also, by refuting such an obvious claim—whether



Haskell used ultrasound or not—Gallivan made Schafer look incompetent. If she was wrong about something so simple, how could any of her story be true? As a supervisor and nurse who worked with Haskell for years, Gallivan’s willing defense of her employer carried more weight than the testimony of a temporary nurse who was only there for a few days. Also interestingly, Gallivan’s letter portrayed Haskell as a man of principle: he wouldn’t simply do abortions on any woman at any time in her pregnancy. He set a limit on the abortions he performed. Haskell, a man routinely attacked by pro-ban speakers for his willingness to kill babies at any time for any reason, was restored somewhat by his nurse’s careful choice of words.

Gallivan’s charges were responded to by various senators who quote Haskell’s own papers and interviews. His original paper describing the D&X procedure, published by the National Abortion Federation, explains that he uses ultrasound to locate the fetus in the womb.<sup>35</sup> Moreover, according to an article read into the record by Senator Smith (R, NH), Haskell’s paper itself said that he “‘routinely performs this procedure on all patients 20 through 24 weeks LMP (i.e., from last menstrual period) with certain exceptions’ (4 1/2 to 5 1/2 months). He also wrote that he used the procedure through 26 weeks (six months) ‘on selected patients.’”<sup>36</sup> In an interview with American Medical Association News (AMA News), Haskell also admitted that at least two-thirds of the infants he performed this procedure on were alive at the time they were partially delivered.<sup>37</sup> Smith further emphasized the unreliability of Haskell (and by association, those he worked with) by continuing: “Haskell later tried to claim he had been misquoted. It turns out, however, that the AMA News tape recorded the interview. They

tape recorded it. They prepared a transcript. There was not any misquoting in there. Dr. Haskell was quoted accurately.”<sup>38</sup>

Again advocates of the ban relied upon the testimony of the man who performed the abortions himself. Haskell’s own words proved that his nurse could not possibly be telling the truth.<sup>39</sup> The AMA News implicitly contained a high level of authority as well, since it represented so many medical professionals. Haskell’s interview with them also proved that his nurse was inaccurate in her letter. The doctor himself now looked like a liar and a cheat for claiming that he was misquoted when he had not been. With Haskell’s authority seemingly completely destroyed, Schafer’s narrative could again be cited as the ultimate reason to ban this type of abortion.

#### *Weighing of the Experts*

Given the conflicting evidence provided by numerous individuals identifying themselves as experts on the topic, members of Congress need a method to weigh the testimonies against each other. In a contest of sheer numbers, those opposed to the ban would win out. Those in favor of the ban, though, had made a number of inroads at undermining the veracity of the statements made by the opposition. They had also presented experts who appeared more qualified, either through the positions and titles they held or through their use of jargon.

In the end, though, proponents of the ban relied on the argument that it was simply an immoral option, in part because the experts had explained that it was not medically necessary and in part because all persons have a right to life. A statement by Senator Burns (R, MT) emphasized precisely these points:

Dr. Pamela Smith, up at Mt. Sinai Hospital in Chicago, recently wrote that “There are absolutely no obstetrical situations encountered in this country which require a partially delivered human fetus to be destroyed to preserve the life of the mother.” . . . Why not just finish the birth? I will tell you why. Because once the head is out, it is a child, a human being by legal standards, with all the constitutional rights that come with being alive and then it cannot be killed. But by common sense. . . that fetus is not any less human just because the head is still in the birth canal.<sup>40</sup>

Rick Santorum (R, PA) objected to Barbara Boxer’s (D, CA) photos of happy families which were “preserved” by PBA: “There is no medical evidence to support that partial birth abortion is the right thing to do, this is the moral thing to do, that this is what our society should stand for. No, you put up pictures of happy, smiling faces. You pull at the heartstrings on the other side and hope that all the truth just gets pushed in the background.”<sup>41</sup> The “truth” that Santorum wants brought to the fore is that experts have declared this procedure is not “the moral thing to do.” In essence, the two arguments have become conflated—PBA is wrong because experts believe it’s immoral. Whether this conflation is intentional or not, this is the message that was largely presented by those in favor of the ban during the 1995 debates.

The opposition, however, made a far more nuanced argument. Admitting that there were some experts who believed the procedure was unnecessary, they continued to ask, ‘What should be done when experts are in conflict?’ The answer, they proposed, was to continue to leave the decision to those very same experts. By rejecting the ban each doctor would be free to make the choices s/he felt were necessary for the health and safety of their patients. Several senators phrased it very succinctly: “Some physicians believe the intact D&E abortion procedure represents the safest late-term abortion option. Others disagree. Politicians are not equipped to make decisions banning specific medical procedures when the medical community itself cannot even reach agreement on these

decisions. We should not be voting to criminalize a specific medical procedure when doctors themselves are divided on the matter.”<sup>42</sup> Another example comes from Senator Simpson (D, RI): “Mr. President, what this debate told me is that there is room for disagreement between physicians about specific medical procedures; it is not for Congress to determine which side of this debate is right or wrong. These are medical questions which ought to be decided by medical professionals, not Members of Congress.”<sup>43</sup>

This way of stating the issue gives laypersons an excuse to simply refuse to make a judgment on the necessity of the PBA procedure. In a world dominated by expert testimonies, presenting a road that allows both sides to be somewhat right (there may be alternatives to PBA, but each doctor needs to make that decision on a case by case basis), those opposed to the ban present something of a middle-of-the-road approach for those who are undecided to take.

Pro-ban speakers uncovered a number of inaccuracies (or, perhaps, lies) in the testimonies of anti-ban speakers; they did not exploit these enough to make headway against their opponent’s framing of the argument, though. If the experts who disagree with the ban have been shown, in general, to be wrong about the details, then there is no reason to defer to their opinions. A complete listing towards the end of the debate of all of the anti-ban speakers’ inaccurate statements might have decreased their credibility significantly.

Pro-ban speakers likely would have been more persuasive if they had shifted more of the focus away from experts. As Senator Smith (R, NH) argued at the very end of the debate, members of Congress are constantly called upon to make decisions over

situations they have never been in; “we send troops into Bosnia. . . and I assure you that every Senator who votes to send them there has never served in combat and probably never been there. That is for sure. We vote on Medicare and we vote on Medicaid and not everybody here is a senior citizen.”<sup>44</sup> From this he concluded that saying “that somehow we cannot vote for something or talk about something because we are not doctors. . . is absolutely ludicrous and frankly insulting.” Here Smith reached the crux of the matter—Congress’s job is about legislating in areas individuals may not have complete knowledge of. Despite this, they must make the most moral decision they are capable of making. Instead of only talking about experts or personhood, pro-ban speakers could have emphasized three other points instead: first, the opposition doesn’t portray the facts accurately; second, there are no studies proving PBA *is* safer than a c-section; and third, choosing abortion always results in fetal death, whereas another method only *might* cause maternal and/or fetal death. It may be that through shifting the focus away from experts sooner, pro-ban speakers may have been able to win the votes necessary in the Senate to overcome the veto Clinton threatened.

### *The True Purpose of the Bill*

#### *Veto Predictions*

Although President Clinton had threatened to veto the bill from the beginning, those who urged the bill’s passage didn’t immediately concede defeat. Representative Canady (R, FL) stated: “This is a bill that this House needs to pass, this Congress needs to pass, and President Clinton needs to sign into law.”<sup>45</sup> Senator Chris Smith (R, NH), referencing comments made at an earlier date, said:

It is interesting. We have heard on the floor here that President Clinton will veto this horrible bill as soon as he gets to it, this bill to ban partial-birth abortions that execute innocent children, three-quarters of the way out of the womb, but we heard it proudly stated on the floor that the President is going to veto this bill. I might say to the President of the United States—I know he is not listening tonight, probably—but if he is, I would like to have the opportunity to have 15 minutes in the Oval Office to discuss this bill with him, because I do not believe, if he looked at the facts, that he would veto it because this process is so horrible.”<sup>46</sup>

An argument made repeatedly by those in favor of the ban was that education on the issue would cause people’s hearts and minds to change. Thus many seemed to have truly held out hope of persuading the President to sign the bill—or at least of persuading enough members of Congress to support the bill to override his veto.

Generally those who were opposed to the ban were far more certain of Clinton’s veto. Senator Simon (D, IL) said that he “trust[ed] that the President of the United States has the courage to veto this legislation.”<sup>47</sup> Senator Helms (R, NC), who was in favor of the bill, acknowledged that Clinton had stated he was “more than ready. . .to use his veto pen” if limitations were not placed on the bill.<sup>48</sup> Indeed, after the defeat of the Boxer Amendment to add these restrictions (specifically to allow PBA if the mother’s life or health were in danger), Boxer herself declared: “We know he will, in fact, veto this bill because the Senate now voted this [the Boxer Amendment] down.”<sup>49</sup> Later she adds, “since there is no exception for the life of the mother the President has said he would veto it. I applaud that.”<sup>50</sup> Boxer and Simon speak of the veto as though it is a foregone conclusion. Actual enactment of the law may not have been the primary intent of the legislation; certainly it was not the only goal.

*Commerce Clause versus Personhood as Constitutional Grounds*

Curiously, although the text of the bill itself states that “whoever, 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,”<sup>51</sup> pro-ban speakers never explicitly defended their use of the commerce clause. While those opposed to the ban continually questioned the extension of congressional power to cover a medical procedure, nearly all justifications of congressional authority in this area were related to the humanity of the unborn child rather than the use of the commerce clause.

Two individuals raised particularly pointed objections to the use of the commerce clause to ban abortions. Representative Barney Frank (D, MA) was particularly sarcastic in his questions:

It says this only involves abortions as crimes which are in or affect interstate or foreign commerce. How does the woman know that she is in foreign commerce or interstate commerce? Is her head in Canada and her feet in Detroit? What kind of nonsense are we talking about? What they are is embarrassed that they are so blatantly preempting the States, because they know how much it differs with what they profess. It says we will make it a criminal procedure if it happens to be in interstate commerce. . . Nothing in here tells the doctor whether he [sic] is in interstate commerce or not.<sup>52</sup>

Senator Feinstein’s (D, CA) opposition is more mildly stated: “Let me touch for a moment on the commerce clause. I believe, and others do as well, that this legislation is meaningless under the commerce clause because it would only apply to patients or doctors who cross State lines in order to perform an abortion under these specific circumstances, whatever they may eventually be adjudicated to be. So what is the point?”<sup>53</sup> The interpretation of Franks and Feinstein is that interstate commerce must be

directly involving two states (or two nations, in the case of foreign commerce). They limit the meaning of the clause to only such cases as these.

Only one true defense is made of the use of the commerce clause. While several claim in passing that the government has a right to regulate “legitimate state interests,”<sup>54</sup> only one explicitly defends the choice of the commerce clause for this bill. Senator Hatch (R, UT) responds in the following manner:

First, there are those who argue that Congress lacks power under the interstate commerce clause to regulate the practice of abortion. It is incredible to me that those who were in favor of the Freedom of Choice Act and the Access to Clinics Act would raise such an argument. Nonetheless, I will give it the swift dismissal that it deserves.

Whatever one might think about the expansion of Federal power under the commerce clause, whether H.R. 1833 falls within this power “poses an easy case under current interpretation,” as Professor McConnell puts it.

We can all agree that the provision of medical services are commercial activities and that abortions are medical services. Even after the decision last Term in *Lopez*, the Court has been fairly clear that Congress may regulate all commercial activities, because they frequently involve an interstate market. If Congress can regulate health care, which it does today in myriad different ways, it can regulate abortions. And, if this bill is unconstitutional, then a whole host of other laws, starting with the Access to Clinics Act, are unconstitutional as well.<sup>55</sup>

By characterizing this question as “incredible” and “deserv[ing]” a “swift dismissal,” Hatch minimizes the argument. Further, by claiming that the laws supported by the opposing party are likely to be overturned, he threatens them to remain quiet on this point—lest they lose laws dear to themselves. He also uses their argument of “abortion is simply health care” against them: if abortion falls under the category of health care and Congress regulates health care in the status quo, then Congress can regulate abortion. Hatch also cites two authorities to defend his position—legal theorist Dr. Michael McConnell and the Supreme Court, while Franks and Feinstein cited none.



Despite these assurances from Hatch, a number of his peers target the belief that the fetus is a person deserving of the protection of the Constitution. Senator Smith (R, NH) was particularly adamant in his belief in the personhood of the child in question:

Even in *Roe versus Wade*. . . the Supreme Court said that the born child. . . is a “person” entitled to “the equal protection of the law.” . . . How can anyone reasonably say that a child—feet, legs, toes, little soft rear end, torso, shoulders, arms, hands, part of the neck out of the birth canal, born—is not a child or a person because the head still remains inside the birth canal? . . . Suppose it was reversed, Mr. President, and the child's head came first and he began to breathe, is he then born? You bet he is. . . So what do we do? We reverse the position in the womb, so that the feet come first. . . That is a child. How can anyone say that does not deserve protection under the Constitution of the United States?<sup>56</sup>

Senator Hatch (R, UT) goes so far as to state that: “because of the timing in the birth process in which these abortions occur, these fetuses may actually qualify as persons under the Constitution. As such, they are entitled to all of the protections of the law that all other American citizens receive under the Bill of Rights, particularly the 5th and the 14th amendments to the Constitution.”<sup>57</sup> Senator Gramm (R, TX) sought to reduce it to the simplest explanation he could: “It really boils down to this. This procedure is almost always used with a late-term baby, which is generally viable outside the womb. And when the baby is 3 inches away from the full protection of the Constitution, the baby's life is terminated in a violent manner that I think is objectionable in a civilized society.”<sup>58</sup>

The PBA procedure is performed on infants a mere “three inches” from “the full protection of the Constitution.” Despite this often repeated phrase, the Constitution was not used as the justification in the text of the bill. If those who proposed the bill truly believed that the fetus was a person, why would they not go this route to ban late-term abortions? Perhaps in part it was because there had been so little success at passing a Human Life Amendment in the past. Perhaps the authors of the bill also knew that the

Supreme Court would not view the issue as they did. Likely this was a moot point, however, since passing the bill was less important than making the arguments for its passage heard by the public.

### *Public Moral Argument*

One crucial issue in the PBA debates is the contention that the public doesn't want to look at or know about this issue. Abortion has become an implicitly accepted part of American culture among most Americans.<sup>59</sup> In the words of Representative Linda Smith (R, WA), "I suspect the majority of the American people will never have heard of this heinous procedure. This is not surprising, because, as a Nation, we have created a veil of silence when it comes to the reality of abortion procedures."<sup>60</sup> Refusal to discuss abortion, then, is a real problem from the perspective of the pro-ban speakers.

The driving belief of the ban is that as soon as Americans are confronted with the reality of what occurs during a Partial Birth Abortion, they'll repent and reject it. Dr. Pamela Smith testified that "The cruelty of this treatment of the human fetus is quite evident to those who do not avert their gaze or close their minds."<sup>61</sup> Representative Smith (R, WA) added, "If I had had this procedure before me, and had to be faced with the humanity of the baby, I would have changed to being for life sooner."<sup>62</sup>

The characterization of the public was an important part of the argument. Since words do, in fact, create and define reality for individuals, the names and descriptors of people can become self-fulfilling prophecies.<sup>63</sup> By defining the public as being opposed to extreme measures (which PBA was categorized as), the members of Congress molded people so that they would to view themselves as opposed to PBA.

The majority of Americans were further characterized as already opposing this procedure. Human nature desires to be on the popular or winning side. Thus if the “majority” already rejects this procedure, then over time a true majority may develop that does hold this belief. For example, Senator Helms (R, NC) explicitly makes this appeal to the majority on two separate occasions: “Let me add, if Senators miss this opportunity to criminalize partial-birth abortions, they will be thumbing their noses at the American public whose outcry against partial-birth abortions is overwhelming.”<sup>64</sup> Elsewhere he remarks: “I suggest we ask the American people who are ringing the phones off the hooks of Senate offices whether they see eye to eye with NARAL and other pro-abortion groups. They are not fooled. They recognize these semantic games as a smokescreen to demand abortion at any time, for any reason.”<sup>65</sup> Essentially, the “public” demands reasonable restrictions on abortion. The “public” as a whole is moderate on abortion, while those who defend PBA are not moderate and are not in line with the desires of the people. As a result, all Representatives and Senators must vote to reject PBA.

Those in favor of the ban sought to characterize those people who want to continue to allow PBA as extreme—in order to avoid receiving the label themselves. In the words of Senator Smith (R, NH), “Senator Kennedy got it wrong, with all due respect to my colleague. The real extremists are those who believe that partial-birth abortions should be legal through all 9 months of pregnancy. . . .That is who the extremists are.”<sup>66</sup> Smith further clarified that supporting the ban is a mark of a reasonable individual: “Why did a pro-choice Republican woman like Susan Molinari vote for it? Why did a liberal Democrat like Patrick Kennedy, son of Senator Ted Kennedy, vote for it? Because it is reasonable. Because it is sickening to think of the fact that we would do this to our

children here in America. That is the reason. This is not a radical, extremist position. The radicals and the extremists are the people who do this.”<sup>67</sup> This effort to align those in favor of the ban on the side of reasonability and those opposed to the ban on the side of extremism plays well in the strategy of the pro-ban speakers as a whole, which is to get people to realize that all reasonable people oppose PBA.

### *Humanity/Lack of Humanity of the Child/Fetus*

In order to create a successful public moral argument, proponents of the ban needed to identify the fetus as a human child, just like any other. To combat this, opponents would have to argue that these “children” aren’t really fully human in the sense that babies are fully human. Thus there is no need to take action to prevent these individuals from being aborted.

References to the yet unborn fetus as a “baby” or a “child” are too numerous to count.<sup>68</sup> It is not the naming alone that rhetorically shaped the fetus into a person; the descriptions of the PBA procedure enhance this image for the audience. Senator Helms (R, NC) for example, states that “opponents of the bill have done their best to explain the medical necessity of a procedure that legally allows a doctor to partially deliver a baby, feet-first from the womb, only to have his or her brains brutally removed via the doctor’s instruments.”<sup>69</sup>

Rhetors placed an emphasis on the fact that this baby was “three inches” from being fully delivered. Among those making this argument was Senator Smith (R, NH) who argued “what is relevant today in this discussion is whether or not we have the right, morally or otherwise, to kill an unborn child who is held in the hands of this doctor with the exception of the head. Three or four more inches and that doctor could place that tiny

little head into his hand and cradle it. But, instead, he turns that baby over and executes him—with no Novocain, no anesthetic, nothing—with a pair of scissors and a catheter, a child.”<sup>70</sup> That child is about to enter the world just as babies do every day; however this one will be met with a pair of scissors a mere three inches before breathing her first breath. This overly simplistic description of the PBA and its simplistic comparison to a normal birth emphasize the pro-ban speaker’s belief that the issue truly is easily comprehensible and easily rejected as proper medical care.

In one touching memory, Linda Smith (R, WA) recalls that she was a breech baby, just like those babies delivered via this procedure:

I just about did not make it. America needs to realize that this procedure we are talking about tonight, if it had been me, they would have stopped the birth. My mother would have gone into labor, my feet would have come out, and they would have stopped my head from coming out. Because we were pretty poor at that time and my mother had physical problems, she probably would have qualified for this if she could get a doctor to do it. They would have been able to kill me and then deliver me, and say that I had never been living. This is what we are facing tonight, with this procedure.<sup>71</sup>

Although Smith’s testimony is not likely technically accurate (her life wasn’t really at risk), her identification with the babies being aborted in this procedure is significant. These babies being aborted are truly, in the words of the pro-ban speakers, just like any of us.

The other side made monumental efforts to explain why this was not the case. The fetuses PBA is performed on are not healthy, they are not fully formed. It is because they were not “normal” that these fetuses had been targeted for this procedure in the first place. Phrases such as “severely deformed fetuses”<sup>72</sup> and “a fetus with no potential of life”<sup>73</sup> were among those used to refer to these babies. More detailed descriptions sought to sketch an image for the audience of a fetus that was something other than human.

Carol Moseley-Braun (D, IL) described it in this way: “Viki and her husband found out after the second ultrasound was performed that their child had no brain – no brain. There were eight abnormalities in all.”<sup>74</sup> Boxer (D, CA) told her peers that “Tammy Watt's daughter, McKenzie, had no eyes, six fingers, six toes and large kidneys which were failing. The baby had a mass growing outside of her stomach involving her bowel and bladder and affecting her heart and other major organs.”<sup>75</sup>

Perhaps the most blatant example of this distancing, though, comes from Senator Feinstein (D, CA): “Some women carry fetuses with severe birth defects late into pregnancy without knowing it. For example, fetal deformities that are not easy to spot early on in the pregnancy include: cases where the brain forms outside the skull, or the stomach and intestines form outside the body, or do not form at all; or fetuses with no eyes, ears, mouths, legs, or kidneys-sometimes *tragically unrecognizable as human* at all.”<sup>76</sup> Because these fetuses were not fully formed or fully human, anti-ban speakers implied, the arguments of the pro-ban speakers did not apply.

Also importantly, the fetus is not yet a citizen protected under the Constitution. The woman who is pregnant, on the other hand, certainly is a citizen. As Senator Moseley-Braun (D, IL) advised: “we have no right, I believe, to intervene in the relationship between a woman and her own body, a citizen, in behalf of the fetus that is not yet a citizen.”<sup>77</sup> Again, the fetus is something different from us—unlike the individuals capable of hearing the arguments made (and capable of voting in the next election), the fetus is not a constitutionally protected person. That puts it in a quite separate category from the pregnant woman, who is most certainly protected under the Constitution.

*Purpose of the Debate*

The ultimate purpose of the debate differs dramatically between the groups. The belief among those arguing in favor of the ban was that if the public only knew about this procedure they would reject it—knowledge is power, in a sense. Thus the purpose on the one side was to inform the public in order to get them to reject abortion (either as a whole or at least in this specific instance). Not having brought the bill before Congress, those opposed to the ban were in a far more defensive position. Their stated goal was to keep the procedure legal by both persuading the public that experts are more capable of deciding (as the section on expert testimonies suggests) and by keeping the stories of the women who chose this procedure—quite unwillingly—in the public eye.

Speakers in favor of the ban made particularly clear that any person who understood what was happening during a PBA would be revolted. In the words of Representative Jon Christensen (R, NE), “What I do want to talk about though is that this procedure is so grotesque, any American who understands what this procedure is about would be against it.”<sup>78</sup> And as Mark Souder (R, IN) proclaimed: “the knowledge is just so overwhelming and that is where if the American people knew the truth about the abortion issue it would not be tolerated. You would not allow this type of thing. . . . How can this be happening in this country? As a father I do not understand how a people can take their children that we love so dearly and that we care and do this cruel and inhumane punishment to them.”<sup>79</sup> For this reason the procedure was described over and over in the record.

In an interview by Diane Gianelli (whose article was read into the record by Senator Helms), Representative Chris Smith (R, NJ) claimed he brought PBA before the

Congress in order to “force citizens and elected officials to move beyond a philosophical discussion of ‘a woman's right to choose,’ and focus on the reality of abortion.”<sup>80</sup>

Senator Rick Santorum (R, PA) does confess to hoping for both a change in hearts and a change in legislation:

I thought, as do many folks who vote pro-life here, that the issue is one that we have to educate and we have to change hearts and we have to go out to the public and sensitize the public to the horrors of abortion in this country. . . I always felt uncomfortable talking about legislating abortion. I have to say, I felt compelled to come up and talk about this. This is not about pro-life or pro-choice. This is about a horrific procedure that should shock the conscience of anyone who has heard how this procedure is done.<sup>81</sup>

Given the choice between the two goals, pro-ban forces appear to have chosen to focus on educating the American people—with passage of the legislation as a bonus that might be attained at some date in the future.

While the greater goal was to reach the entire nation, certainly the pro-ban speakers hoped to persuade their peers in Congress as well. As Senator Robert Smith (R, NH) admitted on the floor: “Ultimately, however, I agreed to support the motion to refer the bill to the committee for the hearing because I was convinced that the more my colleagues could learn about this procedure about the brutality and the inhumaneness [sic] of it, the so-called partial-birth abortion procedure, I believed that the more my colleagues learned, the more I would have an opportunity to get more votes, frankly, in opposition to it. I believe that the bill will. . . garner support to outlaw this procedure.”<sup>82</sup>

That goal appears to have been achieved in part, since a great number of typically “pro-choice” members of Congress voted to ban the procedure. It was, however, not without its detractors.



Among those who spoke most vehemently against the ban was Senator Barbara Boxer (D, CA). It was Boxer who showed the other senators the pictures of happy families—families which she asserted were preserved by partial birth abortions and could have been preserved by no other procedure. Boxer pleaded with the senators to remember the “other healthy children” who belonged to women like Viki Wilson and Coreen Costello.<sup>83</sup> She urged, “Let us think about those babies as well.”<sup>84</sup> She protested against the diagrams of PBA which showed only the lower half of the woman, “almost as if a woman's body is a vessel. It does not show the woman's face. It does not show her anguish when she learns that her baby is in serious trouble and could even die if she went forward with birth. So it is my intention to put that face on.”<sup>85</sup> Speakers like Boxer tried to show their colleagues and the American people that this is an issue affecting real people who have real families and whose lives are in real danger. As those against the ban often stated, a late-term abortion is a tough choice, not one undertaken lightly. They hoped to persuade those listening that this choice was made responsibly and for the good of the women and families in the pictures.

### *Conclusion*

The rhetorical situation faced by the members of Congress at the end of 1995 was unique. Past experience had shown them that a full-blown assault on abortion rights would not succeed. Thus they chose a gruesome procedure and forced the pro-choice lobby to defend it. The debate became one dominated by expert testimonies. In the end, only the opposition to the ban was able to give an argument of what should be done when experts don't agree: let them continue to make the best decisions for themselves individually. While not an actual resolution to the problem of conflicting testimonies, it

does at least help one make an informed decision. Pro-ban speakers allowed the arguments to center around experts, though their stronger arguments were the indictments of the facts presented by the opposition and their claims about the morality of the procedure.

The second half of this chapter tries to determine the true purpose of the legislation. Although intent is hidden and deeply personal, the types of arguments made by those who proposed the ban reveal some of the reasons for proposing the bill. A veto appeared inevitable; those pushing the bill must have expected Clinton to side with the abortion rights lobby, so passage of the bill was likely not their only goal. Additionally, rather than defending their use of the commerce clause as a constitutional basis for Congress's involvement, pro-ban speakers returned time and again to the personhood of the fetus. This leads one to believe that a primary goal of the debate was to bring the issue before the public eye. There is educational value in parading these sketches and testimonies to the public; this was likely the major goal of the legislation. At the least, that was the major achievement of the 1995 PBA ban.

*Notes*

1. See, for example, Canady, *Congressional Record—House*, 104th Cong., 1st sess., October 30, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): H 11426 and Smith, *Congressional Record—Senate*, 104th Cong., 1st sess., December 6, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): S 18071
2. See, for example, Schroeder, *Congressional Record—House*, 104th Cong., 1st sess., October 31, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): H 11593.
3. Hatch, *Congressional Record—Senate*, 104th Cong., 1st sess., December 4, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): S 17881.
4. Hatch, *Senate*, 4 December 1995.
5. Helms, *Senate*, 6 December 1995.
6. Helms, *Senate*, 6 December 1995.
7. Pamela Smith, Ph.D. to Charles Canady quoted in Helms, *Senate*, 6 December 1995.
8. Smith, *Senate*, 4 December 1995.
9. Hatch, *Senate*, 4 December 1995: “In a tape recorded interview with the AMA News on July 5, 1993, Dr. Haskell himself said: The drawings are accurate from a technical point of view.”
10. Diane M. Gianelli, “Outlawing Abortion Method,” *American Medical News*, Nov. 20, 1995 quoted in Helms, *Senate*, 6 December 1995.
11. Burns, *Congressional Record—Senate*, 104th Cong., 1st sess., December 5, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): S 18002.
12. Schroeder, *House*, 1 November 1995.
13. Boxer, *Senate*, 6 and 7 December 1995.
14. Schroeder, *House*, 1 November 1995.

15. Simon, *Senate*, 4 December 1995.
16. Schroeder, *House*, 1 November 1995.
17. Schroeder, *House*, 1 November 1995. Emphasis added.
18. Schroeder, *House*, 1 November 1995.
19. Boxer, *Senate*, 6 December 1995.
20. Boxer, *Senate*, 4 December 1995.
21. Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Ithaca, N.Y., Cornell University Press, 1991) quoted in Em Griffin, *A First Look at Communication Theory*, 5th ed. (New York, N.Y.: McGraw-Hill, 2003), 476.
22. Coreen Costello, "Testimony Before Senate Judiciary Committee in Opposition to H.R. 1833/S. 939," November 17, 1995 quoted in Boxer, *Senate*, 4 December 1995.
23. Viki Wilson "Testimony of Viki Wilson to the Senate Judiciary Committee in Opposition to H.R. 1833/S. 939," November 17, 1995 quoted in Simon, *Senate*, 4 December 1995.
24. Hatch, *Senate*, 4 December 1995.
25. Hatch, *Senate*, 4 December 1995.
26. Hatch, *Senate*, 4 December 1995.
27. Jackson-Lee, *House*, 1 November 1995.
28. Canady, *House*, 30 October 1995.
29. Smith, *Senate*, 4 December 1995.
30. Boxer, *Congressional Record—Senate*, 104th Cong., 1st sess., December 7, 1995 [on-line]; available from *Lexis-Nexis Academic Universe, Congressional*, <<http://web.lexis-nexis.com/universe>> (accessed 30 September 2006): S 18183.
31. Brenda Schafer, R.N., "Testimony to the Senate Judiciary Committee," quoted in Hatch, *Senate*, 4 December 1995.
32. For example, Maggie Gallagher, "A Perfectly Legal Procedure," *American Enterprise*, September-October 1995 quoted in Vucanovich, *House*, October 30, 1995.

33. Christie Gallivan, R.N. to Congresswoman Schroeder, "Letter from Brenda Pratt Schafer's supervisor," quoted in Boxer, *Senate*, 4 December 1995.
34. Gallivan, "Letter," quoted in Boxer, *Senate*, 4 December 1995.
35. Martin Haskell, "Second Trimester D&X. 20 Wks and Beyond" *Second Trimester Abortion: From Every Angle, Fall Risk Management Seminar* (National Abortion Federation, 1992): 30. Accessed at <http://www.nrlc.org/abortion/pba/Haskellinstructional.pdf>
36. Smith, *Senate*, 5 December 1995.
37. Diane M. Gianelli, "Outlawing Abortion Method," *American Medical News*, Nov. 20, 1995, Accessed at <http://www.nrlc.org/abortion/pba/AMA%20News%201995%20Hern.pdf>
38. Smith, *Senate*, 4 December 1995.
39. Or, at best, she wasn't telling the full story. The actual paper states that an assistant uses the ultrasound to determine the orientation of the fetus. Haskell, "Second Trimester D&X."
40. Burns, *Senate*, 5 December 1995.
41. Santorum, *Senate*, 7 December 1995.
42. Levin, *Senate*, 7 December 1995.
43. Simpson, *Senate*, 7 December 1995.
44. Smith, *Senate*, 7 December 1995.
45. Canady, *House*, 30 October 1995.
46. Smith, *Senate*, 5 December 1995.
47. Simon, *Senate*, 4 December 1995.
48. Helms, *Senate*, 6 December 1995.
49. Boxer, *Senate*, 7 December 1995.
50. Boxer, *Senate*, 7 December 1995.
51. *House*, 1 November 1995.

52. Frank, *House*, 1 November 1995.
53. Feinstein, US Senate, 5 December 1995.
54. See Vucanovich, *House*, 1 November 1995 and Hatch, *Senate*, 4 December 1995.
55. Hatch, *Senate*, 4 December 1995. Hatch is, I presume, referring to the Freedom of Access to Clinic Entrances Act (FACE) passed the year before.
56. Smith, *Senate*, 6 December 1995.
57. Hatch, *Senate*, 4 December 1995.
58. Gramm, *Senate*, 7 December 1995.
59. Certainly activists in the Right To Life Movement are the exception to this.
60. Smith, *Senate*, 30 October 1995.
61. Pamela Smith, "Testimony of Pamela Smith, M.D. on H.R. 1833, the Partial-Birth Abortion Ban Act," U.S. Senate Judiciary Committee, November 17, 1995 quoted in Helms, *Senate*, 6 December 1995.
62. Smith, Linda, *House*, 30 October 1995.
63. Benjamin L. Whorf, *Language, Thought and Reality: Selected Writings of Benjamin Lee Whorf*, ed. J.B. Carroll (Cambridge, Massachusetts: M.I.T. Press, 1956), 213-214.
64. Helms, *Senate*, 6 December 1995.
65. Helms, *Senate*, 6 December 1995.
66. Smith, *Senate*, 4 December 1995.
67. Smith, *Senate*, 5 December 1995.
68. On occasion those in favor of the ban do reference the fetus. For example, Senator Burns, *Senate*, 5 December 1995 states, "The debate is whether or not this procedure, a procedure that most physicians do not approve of, and that most agree is not safe for the mother-certainly not safe for the fetus-should be legal." This is by far in the minority of references, though, among pro-ban speakers.
69. Helms, *Senate*, 6 December 1995.

70. Smith, *Senate*, 5 December 1995.
71. Smith, Linda, *House*, 30 October 1995.
72. Feinstein, *Senate*, 5 December 1995.
73. Johnson, *House*, 1 November 1995.
74. Moseley-Braun, *Senate*, 6 December 1995.
75. Boxer, *Senate*, 6 December 1995.
76. Feinstein, *Senate*, 5 December 1995. Emphasis added.
77. Moseley-Braun, *Senate*, 6 December 1995.
78. Christensen, *House*, 1 November 1995.
79. Souder, *House*, 30 October 1995.
80. Gianelli, "Outlawing Abortion Method," quoted in Helms, *Senate*, 6 December 1995.
81. Santorum, *Senate*, 7 December 1995.
82. Smith, *Senate*, 4 December 1995.
83. Boxer, *Senate*, 5 December 1995.
84. Boxer, *Senate*, 5 December 1995.
85. Boxer, *Senate*, 5 December 1995.

## CHAPTER FOUR

### The Veto

After working its way through the House of Representatives and the Senate in the last months of 1995 and spending several months in a conference committee to work out minor details, HR 1833, the Partial Birth Abortion Ban Act of 1995 was sent to President Clinton. On April 10, 1996, Clinton vetoed the bill. He returned the bill to Congress with a “statement” released by the Press Secretary. Immediately after signing the veto and sending the statement, Clinton met in the Roosevelt Room for a veto “Ceremony” with five women who had had late-term abortions.<sup>1</sup> These two messages were substantially different in a number of ways. This chapter looks at these differences, comparing the audience, style, themes, and use of the word “veto” in the two texts. These distinctions suggest that the President carefully orchestrated both the statement and the Ceremony to bring awareness to different issues.

#### *Audience*

Typically the audience for a president’s veto message is the Congress. The Constitution of the United States declares that a law, having passed the House of Representatives and the Senate, “shall be presented to the President of the United States; if he [sic] approves he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated”<sup>2</sup> The veto message, then, is an “extension, rather than a termination of the legislative process.”<sup>3</sup> As Campbell and Jamieson write, “By using the veto message to invite legislative reformulation, the president is able to



engage Congress in a dialogue about the legislative agendas advanced in the State of the Union messages.”<sup>4</sup> Moreover, it serves as “a balancing mechanism that invites additional, calmer, more thoughtful consideration from legislators.”<sup>5</sup> Thus, the veto is meant to serve as a form of communication between the Executive and Legislative branches of the government.<sup>6</sup>

Congress is not always the only audience of the veto message, though. The public’s consumption of the message is increasingly becoming a concern of presidents in the drafting of these messages. As Campbell and Jamieson write, “Use of the veto power tends to bring an issue to public attention, and the veto message, particularly as part of the struggle between executive and legislature, becomes an appeal to the people.”<sup>7</sup> In fact, Spitzer notes, one of the central functions of the veto is that it “serve[s] as a key vehicle for direct appeal to the public.” Indeed, it is now perceived as “a people’s power, exercised by the country’s only nationally elected leader” for the people’s protection.<sup>8</sup>

The evolution of the modern presidency, however, has led to the increasing use of dual veto messages. FDR, for example, read his statement of his veto of the veterans’ bonus bill to a joint session of Congress, after which he delivered his message over the radio to the public.<sup>9</sup> Campbell and Jamieson observe that, “in some extraordinary cases, presidents have taken their objections to the citizenry directly. For example, Harry Truman presented a veto message to Congress arguing against the Taft-Hartley Act, but he also made a separate radio address to the people. Eisenhower followed a similar pattern when he delivered a radio message on the agriculture bill of 1958 after presenting a veto message to Congress.”<sup>10</sup> The presentation of two veto messages is not unheard of, though it is uncommon.

Four times during the 104<sup>th</sup> Congress Clinton held a press conference or ceremony in addition to the veto of a bill. In the case of the veto of the Partial Birth Abortion Ban Act, he issued a press release as well as holding a ceremony in the Roosevelt Room. Analysis of the messages reveals that the primary audience of both messages is the public, rather than Congress in the one instance and the public in the other.

For example, Clinton's veto statement refers to Congress in the third person. He doesn't speak directly to them. Instead, he says: "the Congress has fashioned a bill," "I implored Congress," "The Congress chose not to adopt the. . . proposal I made" and "I told Congress that I would sign H.R. 1833 if it were amended."<sup>11</sup> Unlike a typical veto message, Clinton is not asking for revisions of the bill from Congress. This is not a continuation of the legislative process or a communication between branches. Instead, the president is informing the public of the revisions he desires from the Congress. The members of Congress will obviously read this message as well, but they are not who this message was drafted to address. If Congress were the main audience of his statement, one would expect to see phrases such as "If the Congress amends the bill" or perhaps more informally, "If you were to amend the bill." However the way the statement was originally worded suggested that he was not speaking to those in Congress who had the power to amend the bill. Clinton is reporting the results to the public and recording his thoughts for posterity, rather than telling Congress directly to make a change.

The veto ceremony was a much more public-oriented affair. Here one would expect a message oriented to the public, since the press was specifically invited to hear Clinton's remarks and the testimonies of the five women who objected to the bill. The

style of this ceremony is more informal than the veto statement. Again Congress is the secondary, rather than the primary audience. This speech, however, is more challenging and confrontational than the statement was. The president, for example, says: “I will say again, if the Congress really wants to act out of a sincere concern. . . if they will meet my standards to protect these families, they could pass a bill that I would sign tomorrow. But these people have no business being made into political pawns.” Clinton explained that he wanted Congress to add an exemption for health, in addition to the affirmative defense that was in the bill at the time (which would protect a doctor from prosecution only if the woman would die without the procedure). Clinton also recounts an encounter with the Congress during the ceremony: “When I asked the supporters of the bill here to try to take account of this, they said, well, if we have a health exception you know you could—the doctor and the mother could say anything—they can't fit in their prom dress, that's a health exception—some terrible things like that. And I said, no, no, no, I will accept language that says serious, adverse health consequences to the mother. Those three words. . . I implored them. . . And my pleas fell on deaf ears.” These comments talk *about* Congress, rather than *to* them.

The people who are meant to hear this message are not those who have the ability to make the amendments that Clinton desired. While the public was concerned about the outcome of this bill, their only ability to amend the bill lay in their power to persuade their representatives in Congress to change it or in their ability to persuade the president to veto the bill. As Clinton himself observes in his veto statement, “in the past several months, I have heard from women who desperately wanted to have their babies” but who were forced to have late-term abortions to prevent “grave damage” to themselves.

Veto messages are usually written and, unlike most other presidential messages in the modern era, they are not usually meant for general consumption. According to Deering, Sigelman, and Saunders, they are “relatively immune to the ‘dumbing down’ . . . characteristic of presidential rhetoric in other subgenres.”<sup>12</sup> A rhetorical analysis of presidential veto messages by the same authors reveals that “The language that twentieth-century presidents employed in their veto messages was pitched, on average, at a comprehension level for which 16 to 17 years of formal education would be appropriate.”<sup>13</sup> The average for the early presidents was 19.0, whereas the average for modern presidents was 16.6.<sup>14</sup> These messages, then, are becoming more accessible, though the typical veto message is still meant to be read by a college graduate.

In the instance of Clinton’s PBA veto statement and veto ceremony, the Flesch readability scores<sup>15</sup> are consistent with Deering et al.’s observations. Although the veto statement has elements that suggest it is geared toward the public, other elements suggest that it is not for the “average” member of the public to consume. The Flesch readability score for the veto statement is 39.1. The median Flesch score for Clinton’s sixteen veto messages during the 104<sup>th</sup> Congress is 30.0; the average is 28.8. Flesch scores at about 50 are comprehensible by someone who has completed high school. The readability score for the veto ceremony, however, is much higher at 59.6. This means the message is comprehensible by someone who has completed only nine years of school.<sup>16</sup>

These numbers suggest that the intended audience of the ceremony was not the same as the intended audience of the veto statement. The anticipated audience of the veto statement, which was not read before TV cameras, was a more educated group. Perhaps the president expected that primarily members of Congress (who are college educated)

would read the statement, while members of the public would view the ceremony on the news. Of course, at 39.1, the veto statement is still within the most accessible one-third of messages written during the 104th Congress; in fact, it is far more accessible than the 8.0 scored by his least accessible message. So while both messages may have been directed to the public, the veto ceremony was at a level much more understandable by the less educated segments of the public and the veto statement was more understandable by the higher educated elements of the public.

### *Style*

The style of a typical veto message, according to Campbell and Jamieson is “deferential and conciliatory.”<sup>17</sup> They add, “The typical veto message expresses reluctance and regret at this action, praises the Congress for its efforts, indicates agreement with specific parts of the legislation, or expresses approval of the ends the bill seeks to achieve.”<sup>18</sup> Deering, et al. observe that “outwardly at least, most veto messages have been conciliatory in tone and solicitous of congressional cooperation.”<sup>19</sup> This conciliatory style is prompted, Campbell and Jamieson claim, by the president’s desire to get Congress to reconsider and amend the bill.<sup>20</sup> Again, the apparent desire of the president to reach agreement on a bill with the Congress, would lead him to use pacifying rather than angering words.

President Clinton’s veto statement is quite typical of the veto genre. For example, Clinton admits that,

The procedure described in H.R. 1833 has troubled me deeply, as it has many people. I cannot support use of that procedure on an elective basis, where the abortion is being performed for non-health related reasons and there are equally safe medical procedures available. There are, however, rare and tragic situations that can occur in a woman's pregnancy in which, in a doctor's medical judgment,

the use of this procedure may be necessary to save a woman's life or to protect her against serious injury to her health. . . the ability to choose this procedure [must] be protected.

He sympathized with Congress's desire to eliminate the use of a procedure that appears "inhumane." However, he claimed that "to eliminate it without taking into consideration the rare and tragic circumstances in which its use may be necessary would be even more inhumane." He explains to his listeners that, "I hope that we can continue to reduce the number of abortions in America. As Governor of Arkansas, I signed into law a bill that barred third trimester abortions, with an appropriate exception for life or health." He promised the Congress that if they amended the bill to add this exception he would sign it immediately. This language is very moderate. He states the disagreement and the way it can be rectified in very simple terms.

The veto ceremony, however, is significantly more confrontational than the statement. Twice Clinton comments that women who have late term abortions should not be made into "pawns" in this highly political debate. He thanks the women who came to speak at the ceremony, saying that they came "to speak out and to talk about *the real facts*, not the emotional arguments that, unfortunately, carried the day on this case."<sup>21</sup> He expresses doubt that Congress' concern is "sincere." Clinton remarks that when he asked Congress for a health exception in the PBA Ban, the "supporters of the bill" said "the doctor and the mother could say anything—they can't fit in their prom dress, that's a health exception—some *terrible things* like that."<sup>22</sup> He decries the fact that "the emotional power of the description of the procedure. . . was so great that my plea just to take a decent account of these hundreds of families every year that are in this position fell on deaf ears. . . Just because they happen to be in a tiny minority to bear a unique

burden that God imposes on just a few people every year, we can't forget our obligation to protect their lives, their children, and their families' future.” These phrases indicate a far more confrontational attitude than that evidenced in the written veto statement. The purpose of this Ceremony, then, is not—like the veto statement—to urge Congress to amend the bill. Instead, it is to sway public opinion.

There are a number of reasons President Clinton may have taken this appeal to the public. Conley and Kreppel observe that sometimes a veto is cast “not to change the legislative outcome, but to gain the attention and support of the public or some segment thereof.”<sup>23</sup> Spitzer writes that “use of the veto. . .brings an issue more directly to the attention of the people.”<sup>24</sup> Additionally, “the president, in appealing directly to the country as a whole, sets himself up as guardian and purveyor of the public interest. . . The veto emphasizes the fact that Congress, though close to the people, is composed of representatives of small, parochial constituencies, whereas the president alone possesses the single, national constituency.”<sup>25</sup> Campbell and Jamieson note that in ideological conflicts, of which abortion is certainly one, “the [veto] message is more likely to be a statement of principle, admitting of little or no compromise, addressed to the public and posterity” rather than any real attempt to amend the bill.<sup>26</sup>

Sometimes the veto is a political statement, designed to “demonstrat[e] the incompetence of the opposition party controlling Congress,” and “to urge voters to oust the opposition party from Congress.”<sup>27</sup> With the success of the Republican Party in the 1994 mid-term elections, Clinton may have had a very political aim in the veto of this bill. As an activist president, Clinton likely created numerous opportunities to bring his message before the press, in the same way Lincoln presented his emotional message at

Gettysburg and Reagan frequently put himself before TV cameras to present patriotic messages.<sup>28</sup> The veto ceremony, then, may have been one more chance for Clinton to show his opposition to the majority party. He used the ceremony to elicit emotional support for his position by emphasizing aspects of the bill that Americans might object to—those aspects that seem cruel towards women in tough situations.

### *Themes*

Deering, Sigelman, and Saunders identify four themes which are standard in presidential veto messages. These themes are constitutionality, partisanship, unity, and economy. Among these themes, two are present in the PBA veto. The veto statement contains a great number of references to constitutionality, while the veto ceremony emphasizes the theme of unity as well as highlighting a number of themes that emerged during the congressional debates.

### *Constitutionality*

Veto messages typically contain a number of references to the constitutionality of legislation. Campbell and Jamieson claim this is because of the president's "role of conservator;" his job is to "preserve the system."<sup>29</sup> He also needs to show himself as one "free from partisan considerations, executing the obligation to 'preserve, protect, and defend the Constitution' and expressing the views of all people."<sup>30</sup> Deering et al. found that veto messages among the early presidents contained 19.4 references to constitutionality per 1,000 words, while 20th Century presidents' veto messages contained 10.6 per 1,000.<sup>31</sup>



President Clinton's PBA veto statement with 11 such words<sup>32</sup> (out of 753) contains an above average number of such terms; this figures to 14.6 words per thousand. The veto ceremony, in contrast, contains only two terms related to constitutionality (2.4 words per thousand).<sup>33</sup> These numbers show a remarkably different approach in the two messages. In the veto statement, which is presumably oriented toward citizens with more education and members of Congress, Clinton seeks to emphasize Constitutionality. In the ceremony given before the press, however, this theme becomes relatively unimportant; it was trumped by other themes instead.

The veto statement is peppered with references to the Constitution and the president's job of upholding it. For example, he says, "the Congress has fashioned a bill that is consistent neither with the Constitution nor with sound public policy." He explains that "The Congress chose not to adopt the sensible and constitutionally appropriate proposal I made" to include an exception for the health of the mother; however, "a bill amended in this way would strike a proper balance, remedying the constitutional and human defect of H.R. 1833."

The ceremony, however, refers to the "bill to restrict late-term abortions, consistent with the Supreme Court decision of *Roe v. Wade*" which he signed as governor of Arkansas. The other reference is a challenge to Congress, rather than an enactment of his role as "conservator of the Constitution": "if the Congress really wants to act out of a sincere concern that some of these things are done, which are wrong, in casual ways, then if they will meet my standards to protect these families, they could pass a bill that I would sign tomorrow." Clinton implies that, by sending him a bill they knew would be vetoed (because it didn't include a health exemption), Congress was insincere in their desire to

ban the procedure. Rather than focusing on whether the bill was constitutional, and thus would be upheld in court, the ceremony shifts the focus to other topics—such as the imminent death of the fetus being aborted, the wanted-ness of the child being aborted, and that Congress was being insensitive by refusing to make a health exception.

### *Unity*

Another of the common veto message themes isolated by Deering et al. is Unity. While early presidents used key terms from this theme about 9.9 times for every thousand words, modern presidents use the terms slightly more often, at 12.9 terms per thousand.<sup>34</sup> Interestingly, the veto statement placed relatively little importance on unity, scoring a 2.7;<sup>35</sup> the ceremony, on the other hand, scored 18.2.<sup>36</sup>

In his veto statement, Clinton sympathizes with the writers of the bill, noting that “The procedure described in H.R. 1833 has troubled me deeply, as it has many people.” He identifies with his audience. However, his focus soon returns to the unconstitutionality of the bill. In contrast, the ceremony focuses attention on a joint, painful experience. Five women shared their personal experiences, with Vikki Stella explicitly commenting that “My story is basically the same thing” at those of the other women. Clinton sums this up by remarking: “This [procedure] affects staunchly pro-life families as well as people that are pro-choice. They never had a choice. . . We need more families in America like these folks. We need more parents in America like these folks. They are what America needs more of. And just because they happen to be in a tiny minority to bear a unique burden that God imposes on just a few people every year, we can't forget our obligation to protect their lives, their children, and their families' future.” The president stresses the need for all Americans to unite behind these unfortunate

people; “we” need to help them, “we” need to encourage more people to be like them. The use of these unity terms creates a single audience out of the many audiences that compose the public.<sup>37</sup> These terms urge the public to converge and agree upon a common understanding and perception of events. The unity theme seems particularly well suited for an appeal to the public through the mass media. This is exactly what the veto ceremony was.

### *Reemergence of Congressional Arguments*

Another noteworthy theme of these two texts is the reemergence of a number of themes that first arose during the congressional debate. For example, the president relies heavily upon the opinions of experts. In the veto statement, Clinton notes:

There are, however, rare and tragic situations that can occur in a woman's pregnancy in which, in a doctor's medical judgment, the use of this procedure may be necessary to save a woman's life or to protect her against serious injury to her health. . . In the past several months, I have heard from women who desperately wanted to have their babies. . . but who were advised by their doctors that this procedure was their best chance to avert the risk of death or grave harm which, in some cases, would have included an inability to ever bear children again.

After hearing the arguments for and against the ban, the president deferred to the knowledge of doctors. That was precisely the reason he continued to demand an exception for the health of the pregnant woman: “so that we don't put these women in a position and these families in a position where they will lose all possibility of future child-bearing, or where the doctor can't say that they might die, but they could clearly be substantially injured forever.” Clinton notes during the ceremony that “the emotional power of the description of the procedure” carried the day, rather than the fact-based, expert-based arguments.

Clinton was also able to portray himself in the ceremony as only pushing for a very limited health exception “for serious, adverse health consequences.” The exception, Clinton maintains, would not be for trivial things like not fitting in a prom dress, despite the arguments of the congressional sponsors. The president was able to claim this because pro-ban members of Congress never made any attempt to craft a health exemption meeting Clinton’s criteria. Because they never made an attempt to satisfy him with an exception (even one that would have applied only in such extreme situations that it would never be used in practice), Clinton made pro-ban members look like they did not care about women.

Another prominent theme from the debates in the House and Senate is that this is a “tough choice;” women don’t *choose* to have late-term abortions, they’re forced into having them by terrible circumstances. The two messages emphasize this by using phrases like “tragic situations,” “awful choice,” and “agonizing decisions.” He stresses in the statement, for example, that these women “wanted anything other than an abortion,” but that “this was not about choice—not about deciding against having a child. These babies were certain to perish before, during, or shortly after birth, and the only question was how much grave damage was going to be done to the woman.” At the end of the ceremony, Clinton repeats this message once more, to make sure his point came across clearly: “they never had a choice. This affects staunchly pro-life families as well as people that are pro-choice.” This argument about necessity rather than “choice” is one that was often mentioned by opponents of the ban. It supports the argument of doctor expertise as well, since only a doctor could determine whether a woman would need to make that “tough choice” in the first place.

*Speaking the Word "Veto"*

An intriguing observation about many of Clinton's veto messages is his studied avoidance of the word "veto." The introduction of his PBA veto statement is typical of his other written veto messages: "I am returning herewith without my approval H.R. 1833, which would prohibit doctors from performing a certain kind of abortion." Not only does Clinton send back bills "without approval," he "cannot sign H.R. 1833, as passed" and "cannot, in good conscience and consistent with [his] responsibility to uphold the law, sign this legislation." This is not unusual for a Clinton veto, however. Eleven of the fifteen vetoes Clinton issued as press releases during the 104th Congress did not contain the word veto at all; the other four each had one occurrence of the word "veto."

Notable, however, is that when the media is present for the event Clinton does not shy away from use of the word "veto." In a presentation for parents and high school students at the veto of a spending bill, he uses the word "veto" six times.<sup>38</sup> In two other cases Clinton uses the word four times each.<sup>39</sup> During the PBA veto ceremony in the Roosevelt Room, Clinton used the word veto three times. These words all occur in his concluding remarks and serve as a clear-cut explanation for why he will not sign the bill. He didn't veto the bill because he wanted to, but because Congress has turned a blind eye to these families: "my plea just to take a decent account of these hundreds of families every year that are in this position fell on deaf ears. And, therefore, I had no choice but to veto the bill. I vetoed it just a few minutes ago before I met with these families." Almost his last statement at the ceremony includes his third use of the word: "we can't

forget our obligation to protect their lives, their children, and their families' future. That is what this veto is all about.”

Perhaps because the two statements appear to address different audiences, Clinton concluded the terminology should be different. The motive of the veto statement was to convince Congress to amend the bill rather than overriding it as it was currently written. They need to understand his objections if they hoped to send him a bill later that he would be willing to sign. The motive of the ceremony, however, was to provide something the press could edit and put on the news. Including the word “veto” would clarify to a less educated audience exactly what the president had done with the bill.

### *Conclusion*

Bill Clinton was renowned for his abilities as a communicator. The distinctly different characteristics of his veto statement and veto ceremony illustrate Clinton's (and his writers') awareness of audience, as well as the importance of style, themes, and even the use of the word “veto.” By adapting his message to an audience of greater or lesser education, the president also provides himself with the opportunity to communicate different ideas to different people. To Congress he emphasizes his desire to sign a modified bill which would include a health exemption. He stresses the unconstitutional nature of the bill, discouraging an override of his veto, since it would be ruled invalid by the courts anyway. To the public, though, Clinton emphasizes the unity of the people. He seeks to sway public opinion in his favor; though he decries the “emotional language” that won Congress over, he brings five women to share their tear-filled testimonies of their abortion decisions. He creates neat sound-bites for the press to take home to their viewers at the end of the day. Though the two statements communicated different

messages, they did not conflict with each other. They presented a unified front of different reasons the president opposed the bill.

*Notes*

1. The two messages will be referred to throughout this chapter as “statement” and “ceremony” to differentiate between the two. The following citation is applicable for all references to veto messages and ceremonies throughout the chapter: The National Archives, National Archives and Records Administration, “Clinton Presidential Materials Project,” White House Virtual Library, 1996, <http://clinton6.nara.gov/>

I use the phrase “late-term” here rather than Partial Birth Abortion, because Clinton himself in the Ceremony states that these women did not have partial birth abortions: “The emotional power of the description of the procedure—which I might add did not cover the procedure these women had and did not cover all the procedures banned by the law—but the emotional power was so great that my plea just to take a decent account of these hundreds of families every year that are in this position fell on deaf ears.” (Clinton, “Ceremony,” 10 April, 1995.)

2. U.S. Constitution. art. I, § 7.
3. Deering, et al., “Rhetoric of Presidential Veto Messages,” 146.
4. Campbell and Jamieson, *Deeds Done in Words* (Chicago: University of Chicago Press, 1990), 83.
5. Campbell and Jamieson, *Deeds Done in Words*, 79.
6. Deering, et al., “Rhetoric of Presidential Veto Messages,” 147.
7. Campbell and Jamieson, *Deeds Done in Words*, 242.
8. Robert J. Spitzer, *The Presidential Veto: Touchstone of the American Presidency* (Albany: State University of New York Press, 1988), 69.
9. Spitzer, *The Presidential Veto*, 67.
10. Campbell and Jamieson, *Deeds Done in Words*, 242.
11. Bill Clinton, “Statement on Partial Birth Abortion Veto,” April 10, 1996. <http://clinton6.nara.gov/1996/04/1996-04-10-statement-on-partial-birth-abortion-veto.html>
12. Deering, et al., *Rhetoric of Presidential Veto Messages*, 149.
13. Deering, et al., *Rhetoric of Presidential Veto Messages*, 152.
14. Deering, et al., *Rhetoric of Presidential Veto Messages*, 152.



15. These numbers were computed using the Grammar Check program installed in Microsoft Word.

16. Rudolf Flesch, "How to Write," NYU Stern.  
<http://pages.stern.nyu.edu/~wstarbuc/Writing/Flesch.htm>

17. Campbell and Jamieson, *Deeds Done in Words*, 87.

18. Campbell and Jamieson, *Deeds Done in Words*, 86-87.

19. Deering, et al., "Rhetoric of Presidential Veto Messages," 146.

20. Campbell and Jamieson, *Deeds Done in Words*, 99.

21. Emphasis added.

22. Emphasis added.

23. Conley and Kreppel, "Toward a New Typology," 837.

24. Spitzer, *The Presidential Veto*, 64.

25. Spitzer, *The Presidential Veto*, 64.

26. Campbell and Jamieson, *Deeds Done in Words*, 90.

27. Campbell and Jamieson, *Deeds Done in Words*, 90.

28. Campbell and Jamieson, *Deeds Done in Words*, 95.

29. Campbell and Jamieson, *Deeds Done in Words*, 79.

30. Campbell and Jamieson, *Deeds Done in Words*, 83.

31. Deering, et al., *Rhetoric of Presidential Veto Messages*, 152.

32. Clinton uses "Congress" 5 times, "legislation" 1 time, and a form of "constitution" 5 times. These search terms come from the glossary provided by Deering, Sigelman, and Saunders in "Rhetoric of Presidential Veto Messages."

33. "Congress" 1 time; "court" 1 time.

34. Deering, et al., "Rhetoric of Presidential Veto Messages," 152.

35. "people" 1 time; "public" 1 time.

36. “country” 2 times; “people” 4 times; “our” 1 times; “we” 8 times.

37. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (Cambridge, Mass.: MIT Press, 1989).

38. The National Archives, “Remarks by the President on Safe and Drug-Free Schools,” 7 June 1996, <http://clinton6.nara.gov/1995/06/1995-06-07-president-remarks-on-veto-and-drug-free-schools.html>

39. “Remarks by the President in Signing Veto Legislation, HR 2586,” 13 November 1995 and “Remarks by the President in Vetoing the Republican Budget,” 6 December 1995. The exception to this rule is the 18 December, 1995 veto (“Statement by the President on the Budget”) in the Oval Office, during which Clinton only said the word veto once. Even so, this is above average in comparison to the number of times he said the word in regular press releases.

## CHAPTER FIVE

### Media Portrayals of the Veto

#### *Introduction*

The news media is a peculiar institution. Although claiming to be objective, real life experience as well as knowledge of communication theories about persuasion and deception indicate that it is simply not possible for a reporter to be wholly unbiased. Moreover, newspapers contain editorials that are blatantly political in many instances.

In the reporting of the Clinton PBA Veto, then, articles and editorials reflected a variety of viewpoints. Though some praised the decision, others opposed it. Based on a random sampling of articles and editorials from the days after the veto,<sup>1</sup> this chapter looks at the reactions of the print media to Clinton's decision. The first section of this paper looks at the way the reporters recapped the veto for their readers, since it indicates something about the way they viewed both the veto and the President himself. The latter portion of this chapter analyzes the two major themes of the articles. First, who fits into the category of "extreme" and who is considered "mainstream"? Second, what impact does this have on the election: this means both the Dole campaign and swing voters (particularly Roman Catholics)? These two sections are intertwined, with accusations about not being in the mainstream used as an attack on the Clinton campaign. However, these sections will separate the two strands of argument as clearly as possible to show how the media viewed the veto overall.

*Representations of the Veto Statement and Ceremony*

Almost without exception, the articles analyzed mentioned only the veto ceremony and the issues it raised and not the veto statement. One exception to this trend is an editorial in the *St. Louis Post Dispatch*, lauding the president's veto. Actually quoting from the veto statement, the editors wrote: "In fact, as the president has indicated several times, he does 'not support the use of this procedure on an elective basis where it is not necessary to save the life of the woman or prevent serious risks to her health.' Mr. Clinton was prepared to support the bill as long as it included an exception to save both the life and health of the mother. Mr. Clinton wanted a bill that would pass constitutional muster."<sup>2</sup> Here the editors made the only reference to constitutionality found in this collection of articles. Apparently issues of constitutionality were not considered by reporters to be something the public would be interested in. Perhaps this is because the general population knows so little about these topics; this cycle then, is self-reinforcing, since if it is not reported by the media, most Americans have no knowledge of it.

Another article, this one by Gustav Niebuhr, referenced Clinton's desire for a health exemption: "The President unsuccessfully lobbied Congress to expand its provisions to allow the procedure in the case of a pregnancy's 'serious health consequences' to the woman."<sup>3</sup> The only place this exact phrase is used is in the veto statement, though Clinton does repeatedly refer to his belief in the necessity of a health exemption in the veto ceremony. These articles, then, indicate there are always exceptions to the rule and that although the veto statement may not have been intended for public consumption, members of the public (and therefore the media)

still had access to the message and chose to read it in order to gain a deeper understanding of the veto.

There seems to be, however, an avoidance of using the veto statement. For example, though the arguments made in both are nearly identical, the Niebuhr article chose to quote a letter rather than the veto statement. Niebuhr quoted a portion of Clinton's letter to Cardinal Hickey, the Archbishop of Washington: "The day he vetoed the bill, Mr. Clinton wrote to James Cardinal Hickey, Archbishop of Washington, to say he did not approve of the procedure except to save a woman's life and to prevent 'serious risks to her health.' 'The cases I have in mind are not those where a doctor is convinced that a woman risks death, but where the doctor knows that the woman risks grave harm,' the President wrote. He added that if Congress 'amended the bill as I have suggested,' he would sign it."<sup>4</sup> One reason for choosing to quote the letter rather than the more official veto statement might be that he simply was unaware of this statement's existence or it was not available to him. However, since the use of the "serious health consequences" quote from the veto statement in the same article indicates that Niebuhr had indeed read the statement, this could not have been the one. A second possible reason he may have quoted the letter, however, is a much more politically calculated reason. This letter helps prove that although Clinton was not doing exactly what the Roman Catholic Hierarchy wanted him to do he was extremely respectful of their beliefs. Even on the day of the veto itself, Clinton took the time to write a letter to the Cardinal, Niebuhr writes. This quote then shows the level of respect the president intended to show Catholics, despite the veto.

The issue of Clinton's desire for a health exception is one that was present in both the veto statement and the ceremony. Clinton's careful deliberation before deciding to veto the bill was noted in several articles. A reporter from the London-based *Guardian* wrote that Clinton "prayed long and hard before deciding against a ban," according to his aides.<sup>5</sup> In the words of Clinton spokesperson Mary Ellen Glynn, "Mr. Clinton 'thought very hard about the issue' before deciding to veto the bill on behalf of women like those 'standing beside him' at the ceremony. 'He didn't take this decision lightly.'"<sup>6</sup> One article, quoting Ann Lewis, Clinton's deputy campaign manager, explained that "The President is taking a principled and moral position by insisting that the health of women shall be taken seriously in any medical decision."<sup>7</sup> There is among these articles an imbalance. While reporters note Clinton's deliberation and careful decision-making, Congress's debates and hearings are not mentioned. This is perhaps a product of the dates of these articles—the veto is timely and newsworthy, while congressional debates from several months earlier are not. Of course a secondary reason for this oversight is that this emphasis helps the president look impartial and concerned only for the well-being of his citizens. It seems, then, that the media aided the president in fulfilling his role as one who uses the veto to protect the public interest, just as Spitzer noted.<sup>8</sup>

By far the most commonly reported aspect of the ceremony was the presence of the five women who gave their testimonies. Columnists took a variety of positions on the veto—some objective, most not. A number of writers were sympathetic to the women's stories. One writer noted that Clinton was "surrounded by women who had reluctantly undergone the procedure for the sake of their own health"<sup>9</sup> while another

explained, “he was flanked by five women who had undergone such abortions and who spoke tearfully about the disorders that threatened their lives and those of their fetuses and led to agonizing decisions.”<sup>10</sup> Another, elaborating further, wrote that the ceremony was “emotional” because of the presence of “five women who had undergone such abortions [who] described their decisions to do so as agonizing, prompted by health disorders that threatened their lives and those of the fetuses.”<sup>11</sup>

Some writers, particularly Alison Mitchell of the *New York Times*, were not so sympathetic: “President Clinton's decision to dramatize his veto of a bill banning a type of late-term abortion with tearful testimony from women who had undergone the procedure represented a calculation by the White House that it needed to put a human face on a potentially damaging issue.”<sup>12</sup> She continued, noting that “the careful choreography of the veto” was necessary “to generate emotional images to counter the gory details and diagrams of the procedure produced by its opponents.”<sup>13</sup> Though a minority, comments questioning the president’s intent are present. Another *New York Times* columnist, Todd Purdum, implied that the administration orchestrated the event: “the White House also took great pains to assure that Mr. Clinton's veto would not be seen as endorsing a gruesome practice. . . . In the Roosevelt Room, Mr. Clinton was accompanied by families, including self-described abortion opponents and Republicans, who told wrenching stories of dangerous pregnancies.”<sup>14</sup> Certainly the decision to have the women tell their experiences, whether orchestrated or not, was one that caught the attention of the media. The focus shifted to the women—and off of the fetus. This is precisely what members of Congress who opposed the bill had sought to do all along. President Clinton, by taking the time to let five women give

their stories (and by letting these women speak longer, combined, than he did), successfully placed the attention where opponents of the bill wanted it to be all along.

### *Identifying the Extremist Position*

Each side of the issue attempted to portray the other side as out of touch with the public and on the extremist fringe. Some reporters, analyzing polls about abortion noted that the majority of Americans fall in the middle of the spectrum—they do not want abortion banned, but they do not want it unlimited either. John McClain pointed out that *Doe v. Bolton* allows abortions throughout pregnancy for “health” reasons, which he summarized as “in other words, just about any reason will do.”<sup>15</sup> But, he notes, “if opinion polls are correct, most Americans don’t agree—especially when it comes to using the partial-birth abortion procedure.”<sup>16</sup> A forum at Catholic University addressed this tension as well, as Mary McGrory of the *Washington Post* wrote: “Commentator Mark Shields, who spoke at the forum, summed up the paradoxical nature of public opinion on abortion: ‘Whenever the debate is focused on the decision, made by the woman with her conscience and her doctor, pro-choice wins every time. But when it is about what is being decided, pro-life comes into its own.’<sup>17</sup> With a procedure like partial birth abortion, this tension is particularly strong. When the public’s focus is fixed on the health of the women, they are likely to allow the procedure. When the focus is shifted to the diagrams and descriptions of the procedure, however, they are more likely to oppose the procedure and to desire a ban on it. Again, because of President Clinton’s careful maneuvering and the media’s subsequent attention on the women, the debate was swayed in favor of those who opposed the ban.



Some articles mentioned the voting patterns in the House and Senate in addition to the public opinion. For example, Dick Williams wrote: “The partial-birth ban gave Clinton a chance to prove he can hold a moderate position. The bill passed the House with 72 Democratic votes. Among its supporters were the Democratic leader, Richard Gephardt, and the whip, David Bonior. The president had political cover. Most polls show the public supporting the ban by upward of 70 percent.”<sup>18</sup> Another author noted that Patrick Kennedy (D, RI) “who also favors abortion rights, joined 71 other House Democrats in voting for the ban on late-term abortions.”<sup>19</sup> This measure was in many respects a bipartisan one; even those who generally favored abortion rights voted for it. These articles, then, placed the president in a negative light, by showing him to be beyond what even typical supporters of abortion rights favored.

A number of articles went even further, suggesting that Clinton was kowtowing to the pro-choice lobby, rather than expressing his own views. Todd Purdum of the *New York Times* wrote that Clinton used the veto to “Align himself firmly with abortion-rights advocates in an election year.”<sup>20</sup> Purdum continues, quoting the president of the conservative Family Research Council, Gary Bauer: “Clinton's veto of the overwhelmingly supported partial-birth abortion ban act shows once again his absolute loyalty to the most extreme abortion advocates.”<sup>21</sup> A *Boston Herald* editorial raged: “Clinton has achieved previously unimagined heights of pandering—in this case, to the most militant faction of the abortion lobby. A political chameleon, the president doesn't have a principled bone in his body.”<sup>22</sup>

Dick Williams called the President “shameless,” noting that his campaign promise to make abortion “safe, legal, and rare” was obviously a lie.<sup>23</sup> Quoting pro-life democrat Robert Casey (former governor of Pennsylvania), the same article continued, “‘He’s helped make (abortion) safe, legal and everywhere.’ With his veto of the ban on partial-birth abortions, the president has joined the abortion-anytime-for-any-reason crowd.”<sup>24</sup> Of particular interest is Williams’ contrast of Clinton’s past abortion record with his current one: “Just a decade ago, Clinton was the pro-life governor of Arkansas, opposed to the use of public funds for abortions. Today he stands accused by Cardinal Bernard Law of Boston of ‘unconditional support for abortion under any circumstances and by any means whatsoever, even those bordering on infanticide.’”<sup>25</sup> Mary McGrory quoted a friend as saying, “It was a chance for him to draw the line, to lead and say, ‘We go this far and no farther,’ . . . He blew it.”<sup>26</sup> These quotes demonstrate that, despite the emphasis on women’s health, many still saw Clinton’s veto as a calculated political move. The veto was not in line with the desires of the public as a whole, but rather with a narrow segment of the population.

Another public figure particularly quoted in the aftermath of the veto was Senator Bob Dole (R, KS), the presumptive Republican candidate for president. In a statement quoted in the *New York Times*, Dole deplored Clinton’s veto, writing, “Mr. Clinton had ‘rejected a very modest and bipartisan measure reflecting the values of the great majority of Americans.’ Mr. Dole added: ‘A partial-birth abortion blurs the line between abortion and infanticide and crosses an ethical and legal line we must never cross. President Clinton now stands on the wrong side of this line.’”<sup>27</sup> Dole

also commented at a campaign stop that Clinton proved he was on the “extremist fringe” by vetoing this legislation.<sup>28</sup> Dole sought to use this categorization of Clinton as extreme to show himself as moderate by contrast.

Several articles followed up on Dole’s charges against Clinton by noting that Dole had been known to support a constitutional Amendment banning all abortion: “Dole claims Clinton is on the ‘extremist fringe’ in the abortion debate, but it is Dole who supports the true extreme position, a constitutional amendment to ban abortions.”<sup>29</sup> Abortion-rights opponents—“those on the ‘extremist fringe’ at the other end of the abortion issue”—were, moreover, “threaten[ing] to abandon” Dole if he did not promise to work to ban all abortions, including those performed because of rape and incest.<sup>30</sup> This election, then, appeared to be increasingly polarized between the two camps—those who wanted unrestricted abortion rights and those who wanted a ban on all abortion. The second major theme to emerge in the post-veto articles, then, is how this veto set the stage for the fall presidential campaign.

#### *Predictions about the Election*

A major theme of these articles was how this veto set the stage for a show-down in November. One article observed that “the abortion rights issue remains one of the most unambiguous differences between the two presidential candidates.”<sup>31</sup> Others called it a likely “flash-point,”<sup>32</sup> and “a sure-fire issue.”<sup>33</sup> Abortion, for Clinton, was a “lose-lose issue” according to the *Arkansas Democrat-Gazette*.<sup>34</sup>

Interestingly, the media reinterprets the “public moral argument” aspect of the bill. Rather than simply using this bill as a means to inform the population, the newspapers argue there was an ulterior motive: winning voters. Mindy Cameron of

the *Seattle Times* began her column by observing: “The refusal of congressional leaders, including Dole, to broaden the exception is further evidence that this is about political strategy, not regulating abortions. Clinton's signature on a bill banning some abortions would serve no purpose in the fall campaign. So the version with the narrowest of exceptions—only to save a woman's life—passed both houses. Republicans lack the votes to override the veto, but that doesn't really matter in today's Congress. The abortion chapter of the 1996 political narrative has now been written.”<sup>35</sup> Cameron blatantly criticizes the overt use of this bill to sway voters, as do others, including Tom Raum of the *Chicago Sun-Times* who writes: “The uproar is largely a matter of politics, especially as Republicans gear up to win states like Missouri—states that Mr. Clinton won narrowly in 1992 but that have strong anti-abortion organizations. It's about calculating the margins of victory.”<sup>36</sup> The real intent of the bill—at least as the media saw it following Clinton's veto in April—was to sway voters in the November election.

Some articles predicted how this would impact the election. One article, relying upon the testimonies of experts in the area, reported: “The abortion issue is one that can cut both ways politically. . . . ‘People would probably, on balance, have a hard time with the Clinton decision.’ Kohut [director of the Pew Research Center] said it is not a good political issue for either party. ‘I don't think Bob Dole any more than Bill Clinton wants the 1996 election to be a referendum on abortion,’ agreed Stuart Rothenberg, a Republican who publishes a political newsletter.”<sup>37</sup> A *Seattle Times* editorial noted that both the President and Dole were playing a risky game:

“Catering to the anti-abortion wing of his party is as politically risky for Dole as last week's veto is for the president.”<sup>38</sup>

As for Dole, who tried to capitalize on the veto by calling Clinton “extremist,” some believed this would harm his election chances. The *Sun-Times* observed that Dole’s harsh words could alienate voters in the political center—and polls showed that a majority of voters fall in the center on abortion. The article continued: “But even though Dole, like Buchanan, favors a constitutional ban on abortion, exit polls show most Republican primary voters don't. Asked, ‘Should the Republican platform support a constitutional amendment to ban abortion?’ 54 percent of GOP primary voters said no and 40 percent said yes. . . . Despite the poll numbers, many GOP strategists say the abortion issue will be a winning one for them in November.”<sup>39</sup> Obviously Bob Dole lost the 1996 election. Whether it was primarily a result of his support of the PBA Ban is impossible to tell.

A greater number of articles categorized Clinton’s veto as an attempt to retain the support of women voters and abortion-rights organizations. As Alison Mitchell commented, “But the careful choreography of the veto on Wednesday showed something more: the attention the Clinton Administration is paying to women, who it believes could well decide the outcome of the Presidential election. . . . Clinton is leading the presumed Republican nominee, Senator Bob Dole of Kansas, precisely because of his strong support among women.”<sup>40</sup> *The Guardian* made a similar observation: “Mr Clinton wanted to back a diluted version of the ban, but he was wary of alienating his feminist supporters, who regard the legislation as the first step towards banning abortion altogether. The president enjoys a huge lead among women

voters and Democrats are anxious not to jeopardise it.”<sup>41</sup> The veto, then, was primarily a response to the polls. Clinton is well known for following the advice from polls conducted by his staff. In this instance it seems, the polls said he needed to veto this bill in order to keep the support of women voters.

According to official reports from Clinton’s aides, the decision was about women’s health, not politics. Off the record, however, the same aides told reporters that because voters already knew Clinton’s position on abortion the veto would not change their votes anyhow. A White House spokesperson, when asked about the potential loss of Catholic voters, responded: “I don't know that any of us here at the White House believe that any particular religious group in America votes monolithically. . . . there's ample evidence, in fact, to suggest they don't.”<sup>42</sup>

Despite this assertion, many articles and editorials focused on how the veto would affect Catholic voters. By endearing himself to abortion-rights supporters, many believed Clinton was alienating Catholics; it was a no-win situation.

### *Catholic Voters*

One editorialist noted the difficult position Clinton was in: “In the partial birth abortion controversy, Clinton is caught between two groups that are essential blocks in his power base: Catholics and militant feminists. If Congress sends him a less restrictive partial birth abortion bill, he will again be under pressure from militant feminists to veto it.”<sup>43</sup> Thus no matter what action he took, Clinton was certain to anger one constituency.

Though not the largest voting block, Clinton’s campaign also kept an eye on the black voters. The funeral for Ron Brown, Commerce Secretary, was held on the

same day as the veto ceremony. Mary McGrory remarked: “It was an amazing week. Clinton locked up one constituency, the blacks, and alienated another, the Catholics. His performance during the wake and funeral of Ron Brown was dazzling. . . Clinton came home from a funeral fit for a president and turned around and gave Catholics the back of his hand. They took a back seat to Kate Michelman and the other abortion advocates.”<sup>44</sup> The emphasis placed by many of these articles is the same: to gain the votes of one group, a candidate must alienate another. Clearly Clinton chose not to limit abortion in any way with this veto.

The eight American Cardinals joined to condemn Clinton’s veto. Articles published about a week after the veto stressed their anger at Clinton’s action. In their frustration, the Cardinals wrote, “In the coming weeks and months, each of us. . . will do all we can to educate people about partial-birth abortions.”<sup>45</sup> The *New York Times* printed a quote from James Cardinal Hickey, the Archbishop of Washington, that summed up his views: “If we deny the humanity of a child as it is being born, whose humanity will be denied next? ... Thoughtful Americans should keep this in mind as they ponder their choices on election day.”<sup>46</sup> Pope John Paul II also let his opinion be known; he issued a “rare statement criticizing a world leader,” expressing to Clinton his disappointment with his actions.<sup>47</sup> As Gustav Niebuhr succinctly stated, “among the Catholic hierarchy, abortion remains the dominant issue.”<sup>48</sup>

Losing the Catholic vote was considered a major issue in the 1996 election. According to a *Washington Post* article, “Dr. David Walsh, chair of Catholic University's Department of Politics . . . says the president made ‘a major mistake. This could be a crystallizing issue. It will come back in all sorts of ways. The Clinton

vote could be seriously eroded.”<sup>49</sup> Though Catholics typically make up 30% of voters on Election Day, they were no longer “captives” of either party; their vote could be for either candidate.<sup>50</sup> Significantly, Ralph Reed, Director of the Christian Coalition, stated, “The Catholic vote is becoming the jump ball of American politics. . . Whoever comes down with that ball usually wins in November.”<sup>51</sup> Winning their votes, then, was heavy on the minds of both Clinton and Dole throughout the election.

Catholics were given partial credit for Clinton’s 1992 victory, meaning he wanted to keep them on his side to secure reelection. A Pew Research Center survey taken before the PBA Ban Veto showed 51% of Catholic voters backed Clinton, while only 38% backed Dole.<sup>52</sup> Moreover, until the PBA veto, he had made advances in areas important to Catholics. As Mary McGrory writes: “What discourages Democrats is that Clinton was making progress with Catholics, especially Irish Catholics, who appreciated his efforts to bring peace to Belfast. And the bishops, in a guide to voting, told their flock to examine the records of candidates on many social issues, not just abortion. Plus, many Catholics aren't crazy about Bob Dole. . . That leaves Clinton. But if the first Tuesday in November is cold or rainy, they might not get out of bed for someone who let them down so hard.”<sup>53</sup> Helen Alvare, a spokesperson for the National Conference of Catholic Bishops, took it one step further. She believed that “Clinton's support for certain abortions in the last trimester of pregnancy cast the debate in a new light. ‘This is going to stun people into a new awareness.’”<sup>54</sup>

Republicans prided themselves on capturing, for the first time ever, a majority of the Catholic vote in the 1994 mid-term elections. Alison Mitchell predicted a



major push among Republicans to use the PBA veto to keep this advantage, particularly in swing states like Illinois, Michigan, and Pennsylvania with high numbers of Catholics.<sup>55</sup> Some, like Mike Russell of the Christian Coalition, predicted that “the Pope’s personal involvement in this matter” would shift the Catholics into Dole’s camp.<sup>56</sup>

There were those, however, who predicted this veto would not change the outcome of the election. As the *Boston Globe* reported:

John White, a professor of politics at Catholic University and an expert on the Catholic vote, said he was skeptical about whether Catholics would change their votes as a result of abortion statements by church leaders. “This may be a new level of outspokenness by church leaders, but it is still very highly questionable as to whether it will change vote patterns,” White said. Noting Catholics had supported the Republican takeover of Congress in 1994, he added: “I think Catholics have been drifting to the Republican Party not because of social issues but because of long-term economic issues.”<sup>57</sup>

According to White at least, abortion was not the key issue in the debate. White was also accurate in predicting the reluctance of American Catholics to heed the advice of their bishops.

Despite the gloomy predictions, Clinton appears to have made the right choice in the 1996 election. Among Catholic voters, Clinton received 53% of the vote, while Dole received 38%.<sup>58</sup> These numbers are startlingly close to the Pew Survey taken in April before the PBA veto. One might conclude, as a result, that abortion did not play a very large role in the election after all. Perhaps more significantly, even after the Catholic hierarchy spoke out in an unusually strident tone against Clinton, its followers did not listen. Even with all of the media attention that was focused on the views of the Cardinals and the Pope, American Catholics simply did not care.

Presumably they chose Clinton for other reasons which dwarfed abortion in their minds.

Also interestingly, while Clinton was praised for gathering a “new coalition” among “women, Catholics, Hispanics and young voters,” House democrats lost voters among all of these groups.<sup>59</sup> William Saletan’s close observation of the election outcome noted that the Partial Birth Abortion issue “wasn’t enough to save Dole, but analysts agreed that the issue hurt Democrats in several House and Senate contests.”<sup>60</sup>

### *Conclusion*

The news media is a dominant feature in American society. Despite their claims to objectivity, one can often identify attempts by the media to sway public opinion. For example, by focusing on the five women who gave their testimonies at the veto ceremony, the media shifted attention off of the fetus/baby. Also, the print media concluded that the hidden agenda behind those pushing the PBA Ban was to gain votes in the November elections. Whether this was true or not,<sup>61</sup> it became true as a result of the media’s focus. Suddenly this was not about the rights of unborn babies or the health of women, but it was about spinning the issue to convert the public. Despite Dole’s efforts to show Clinton as “extreme” on abortion, the newspapers always countered it with the recollection that he was extreme in the opposite manner—by seeking an amendment to ban abortion. Though the media focused on Catholics (traditionally a pro-life group), President Clinton was able to overcome the negative portrayals to win a majority of the Catholic vote.

The media appear to have mixed success at guiding public opinion. While they do have a great deal of control over that to which people are exposed, they

cannot control the conclusions people draw from what they have read. Perhaps, though, this mixed success is only a result of the ineffectiveness of the Catholic Bishops in swaying their flock; despite the reporting of their indignation repeatedly by the press, Catholic voters paid the Bishops no attention in the long run. The media, then, may have been far more influential than this single study shows.

*Notes*

1. April 11, 1996 to April 20, 1996.
2. *St. Louis Post-Dispatch*, "The President's Veto on Late-Term Abortion," April 14, 1996, sec. Editorial. <http://www.lexis-nexis.com>.
3. Gustav Niebuhr, "Cardinals Condemn Clinton Abortion Veto," *The New York Times*, April 17, 1996, sec. A. <http://www.lexis-nexis.com>.
4. Niebuhr, "Cardinals Condemn Clinton Abortion Veto."
5. Jonathan Freedland, "Cardinals Lambast Clinton On Abortion; Late-term condemnation may sway vital votes," *The Guardian (London)*, April 18, 1996, Sec. Foreign page. <http://www.lexis-nexis.com>.
6. Niebuhr, "Cardinals Condemn Clinton Abortion Veto."
7. Timothy Clifford, "Pope Blasts Bill's Veto, Sez Nixing Abortion Ban 'Brutal,'" *Daily News (New York)*, April 20, 1996, sec. News. <http://www.lexis-nexis.com>.
8. See previous chapter and Spitzer, *The Presidential Veto*, 64.
9. Freedland, "Cardinals Lambast Clinton On Abortion."
10. Todd S. Purdum, "President Vetoes Measure Banning Type of Abortion," *The New York Times*, April 11, 1996, sec. A. <http://www.lexis-nexis.com>.
11. Niebuhr, "Cardinals Condemn Clinton Abortion Veto."
12. Alison Mitchell, "A Calculation in Tears," *The New York Times*, April 12, 1996, sec. A. <http://www.lexis-nexis.com>.
13. Mitchell, "A Calculation in Tears."
14. Purdum, "President Vetoes Measure Banning Type of Abortion."
15. John D. McClain, "Time to Start Over On Partial-Birth Ban," *Chicago Sun-Times*, April 12, 1996, sec. Editorial. <http://www.lexis-nexis.com>.
16. McClain, "Time to Start Over On Partial-Birth Ban."
17. Mary McGrory, "Clinton Vetoes Catholic Voters," *The Washington Post*, April 14, 1996, sec. Outlook. <http://www.lexis-nexis.com>.

18. Dick Williams, "Clinton Crosses the Line on Abortion," *The Atlanta Journal and Constitution*, April 13, 1996, sec. Editorial. <http://www.lexis-nexis.com>.
19. Michael Kranish, "Abortion Ban Veto May Hold Risk at Polls for Clinton," *The Boston Globe*, April 12, 1996, sec. National/Foreign. <http://www.lexis-nexis.com>.
20. Purdum, "President Vetoes Measure Banning Type of Abortion."
21. Purdum, "President Vetoes Measure Banning Type of Abortion."
22. *The Boston Herald*, "Political Veto, Political Issue," April 12, 1996, sec. Editorial.
23. Williams, "Clinton Crosses the Line on Abortion."
24. Williams, "Clinton Crosses the Line on Abortion."
25. Williams, "Clinton Crosses the Line on Abortion."
26. McGrory, "Clinton Vetoes Catholic Voters."
27. Purdum, "President Vetoes Measure Banning Type of Abortion."
28. See Cameron, "Abortion Politics, 1996;" John R. Starr, "Clinton on the Spot," *Arkansas Democrat-Gazette*, April 20, 1996, sec. Editorial; and Tom Raum, "Abortion Heating Up as Campaign Issue," *Chicago Sun-Times*, April 14, 1996, sec. Sunday News. <http://www.lexis-nexis.com>.
29. Mindy Cameron, "Abortion Politics, 1996: Hot (and Hollow) Rhetoric," *The Seattle Times*, April 14, 1996, sec. Editorial. <http://www.lexis-nexis.com>.
30. Starr, "Clinton on the Spot."
31. Ann Devroy, "Clinton Vetoes Bill to Ban Late-Stage Abortions," *Chicago Sun-Times*, April 11, 1996, sec. News. <http://www.lexis-nexis.com>.
32. Purdum, "President Vetoes Measure Banning Type of Abortion."
33. Cameron, "Abortion Politics, 1996."
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35. Cameron, "Abortion Politics, 1996."
36. Raum, "Abortion Heating Up as Campaign Issue."

37. Raum, "Abortion Heating Up as Campaign Issue."
38. Cameron, "Abortion Politics, 1996."
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43. Starr, "Clinton on the Spot."
44. McGrory, "Clinton Vetoes Catholic Voters."
45. Anthony Pilla, "National Conference of Catholic Bishops, April 16, 1996, Letter to President Clinton" *Priests for Life*, <http://www.priestsforlife.org/magisterium/cardinals/pba.html> quoted in Freedland, "Cardinals Lambast Clinton On Abortion."
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55. Mitchell, "A Calculation in Tears."
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60. Saletan, *Bearing Right*, 234.
61. See the section on Public Moral Argument for more of my opinion on this subject.

## CHAPTER SIX

### Beyond 1995

#### *Pro-Life Legislation after 1995*

##### *Partial Birth Abortion Bans, Continued*

The PBA debate did not end with Clinton's veto in April of 1996. The word "abortion" became a more concrete notion in the minds of the public as a result of the arguments in Congress; this made the public more likely to favor restrictions upon *Roe* and *Doe's* wide grants of abortion rights. As Hadley Arkes notes, "the numbers [in support of] abortion, drifting upward for a while, began steadily to move downward again."<sup>1</sup> A number of polls conducted in the years after the introduction of the ban report that a majority of Americans favored a ban on Partial Birth Abortion, showing support as low as 55% and as high as 71% among the various respondents.<sup>2</sup>

A number of states made moves in the years following to ban the partial birth abortion procedure. By the spring of 1998, 20 states had passed bans similar to the one that had been introduced in Congress; by 2000, 30 states had passed PBA Bans.<sup>3</sup> *Stenberg v. Carhart*, a case decided in 2000, struck down Nebraska's Partial Birth Abortion Ban; a number of other courts struck down similar bans as unconstitutional.<sup>4</sup> As Arkes ruefully notes, the explanations given by the various courts were frustratingly contradictory. Although some courts ruled the procedure was too vague to be distinguishable from other procedures, others ruled that this particularly defined method was the safest type to use. Arkes concludes that these decisions were because "the judges would not permit even the most modest of first steps in the restriction of



abortion, out of a concern, no doubt, that those steps would soon be followed by others, until at last the right to abortion could come directly, and seriously into question.”<sup>5</sup> Arkes criticizes these rulings for being against everything the judicial branch is supposed to stand for: “As the judges summoned the nerve to defend abortions even at the point of birth, they began to defend abortion with a language far less affected by a sense of inhibition, reluctance, or regret. In the sweep of their convictions, they began to put in place premises that made the case for abortion even more radically than they had made it in the past. And indeed, they were moved to install new premises that were at war with jurisprudence itself.”<sup>6</sup> These state court cases set up a precedent for a Supreme Court case which would inevitably arise from the controversy; they set the tone for the likely ruling by the higher court by universally ruling against the bans.

In 1997 Congress made a second major push during the Clinton administration to ban PBA. As Arkes succinctly phrases it, “Of course, anything worth doing was worth doing yet again: To reintroduce the bill in Congress, to air the issue once again, offered the chance to erode even further the willingness of the public to support a right to abortion that was never qualified, never subject to restraints under any condition.”<sup>7</sup> Members of Congress could not expect the bill to make it past Clinton this time—unless they were willing to add a “health exception,” which they were not—but they took the time again to flesh out their arguments for and against the ban.

This time the American Medical Association (AMA) worked together with the Republican Congress to guarantee their “wish list” was included in the party’s

Medicare reforms. In exchange, they endorsed the PBA Ban, writing that this method of abortion “has no history in peer reviewed medical literature or in accepted medical practice development.”<sup>8</sup> Pro-choice members of Congress complained that the doctors “took care of themselves and not the women” in making this compromise.<sup>9</sup>

Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers and a key defender of the partial birth abortion procedure in the original 1995 debate, recanted his testimony immediately prior to the start of 1997 debates. Initially claiming that the number of partial birth abortions performed every year was so small it was insignificant, Fitzsimmons “now says the procedure is performed far more often than his colleagues have acknowledged, and on healthy women bearing healthy fetuses.”<sup>10</sup> He also admitted he “lied through [his] teeth” in the earlier interview.<sup>11</sup> Fitzsimmon’s admission gave added momentum to the 1997 incarnation of the ban, as did the AMA’s endorsement. Despite this additional supporting evidence, Clinton still vetoed the ban. In fact, his veto statement was very similar to the one he made in 1996. Clinton even referenced his previous veto, telling the legislature that he chose to veto the bill again because, for the second time, they ignored his request to add a health exemption.<sup>12</sup>

In October of 1999 the Senate passed another incarnation of the PBA Ban by a vote of 63 to 34; attached to it was an amendment “declaring that *Roe* ‘secures an important constitutional right’ and ‘should not be overturned’” which passed 51 to 48.<sup>13</sup> Seemingly the PBA Ban was not in conflict with supporting a general right to abortion. Although the fear that the right to abortion would be banned outright

remained, pro-choice lawmakers showed with this vote that they were willing to place reasonable restrictions upon abortion.

### *Other Pro-Life Legislation*

The 1995 Partial Birth Abortion Ban led to a cascade of other pro-life legislation in succeeding years. Anti-abortion members of Congress were emboldened by their success in passing this bill (even if it was not enacted) to propose other significant federal restrictions on abortion.

In 1998 Republicans proposed the Child Custody Protection Act (CCPA). This bill “would prohibit adults from transporting girls across state lines to evade laws requiring parental involvement in abortion. The culprit could face a one-year jail term, and \$100,000 fine, and a civil suit by the girl’s parents.”<sup>14</sup> This bill attempted to shift the discussion away from abortion, much as the PBA Ban had attempted to do. According to William Saletan, cosponsor Ileana Ros-Lehtinen (R, FL) explained to reporters, “We’re not framing it as a pro-life issue, we’re framing it as a parental rights issue.”<sup>15</sup> Moreover, Saletan writes, “House majority leader Dick Armey agreed that abortion was irrelevant: “If I had someone bringing kids across state lines for tonsillectomies, I’d be equally outraged.”<sup>16</sup>

A year later the Unborn Victims of Violence Act (UVVA) was introduced in Congress. According to UVVA, “anyone who killed or injured a child ‘in utero’ would be punished, short of execution, as though he [sic] had killed or injured the child’s mother.”<sup>17</sup> Women seeking abortions and doctors performing abortions were, however, explicitly excluded. This was “a purely political concession.”<sup>18</sup> Lindsey Graham (R, SC), one of the bill’s cosponsors, was quick to stress that this bill was

“not about abortion,” but rather “about violence against women, violence against the unborn, and holding violent criminals accountable.”<sup>19</sup>

This bill, its sponsors explained, was completely compatible with the holdings of *Roe*; it was possible to support both, they urged. As Hadley Arkes observed, though, there still was a bit of a conflict of interest; “by the coin of that term ‘pro-choice,’ this bill might not have posed a problem: After all, the defenders of ‘choice’ were committed to the notion that, if a woman ‘wanted’ her child, that child was a real entity, who could be treated with prenatal medicine and protected in the law.”<sup>20</sup> The recognition of a fetus as a child under the law, though, was hardly an acceptable admission for pro-choice members of Congress; for, as Arkes put it, “this bill struck at their deepest premises, for it considered an unborn child as. . . a person with standing to receive the protections of the law.”<sup>21</sup> As William Saletan observed, “Pro-choice lawmakers recognized UVVA’s long-term threat. By treating feticide as homicide, albeit by a third party, it laid the groundwork for a right to life that could eventually be asserted against the right to choose.”<sup>22</sup>

Pro-choice lawmakers proposed an alternative bill which would only recognize the pregnant woman as a victim, though stiffer penalties would be applied to the crime than had been previously. Arkes keenly observed that this substitute was absolutely necessary for pro-choice individuals to defend: “That someone *actually died* was a matter that had to be screened out, denied any recognition as fact, if the ‘pro-choice’ position could sustain itself.”<sup>23</sup> The UVVA narrowly passed without this modification, but “it gave Clinton enough political cover to issue a veto threat that kept UVVA, despite its passage in the House by eighty votes, at bay for the rest of his

presidency.”<sup>24</sup> This bill would be reintroduced in the Bush presidency and would finally be signed into law in February 2004.<sup>25</sup>

Another show-down between pro-life members of Congress and President Clinton occurred in 1999, this time over American funding for abortion overseas. Congress refused to fund the United States’ dues to the United Nations until Clinton agreed to eliminate funding for overseas family planning organizations that promoted abortion. Although Clinton vowed to not back down, he did, and Congress was able to eliminate this source of public funding for abortions for the time being. As Saletan observed, “the White House boasted that since the president could tinker with the ban’s implementation, in practice, Clinton had conceded almost nothing. What he had conceded was a principle: Funding of pro-choice organizations would be presumed illegal unless the president intervened. The party that controlled the White House would control the purse strings.”<sup>26</sup> Although for the time being the person in the presidency was pro-choice, a year later that would change.

### *The Presidency of George W. Bush*

George W. Bush ran on a platform that was geared toward the courting of morally conservative voters; his anti-abortion stance was among the issues that was designed to appeal to this constituency. As the NRLC rejoiced after the election, “This has been the first full Congress since 1973. . . in which the President, the leadership of the majority party in the House of Representatives, and the leadership of the majority party in the Senate were all pro-life at the same time.”<sup>27</sup> Kate Michelman, president of the National Abortion Rights Action League (NARAL),

worried that “abortion opponents ‘have the power, and they will exercise that power to take us as close as they legally can to eliminating the right to choose.’”<sup>28</sup>

Indeed, a large number of pro-life bills and executive orders did pass in the early years of the Bush presidency. Bush reinstated the Mexico City policy of his father’s and Reagan’s administrations,<sup>29</sup> encouraged the Department of Health and Human Services to amend its rules to cover prenatal care for the baby in utero,<sup>30</sup> and signed an order limiting federal funding for embryonic stem cell research.<sup>31</sup> He also signed the PBA Ban Act of 2003; the UVVA; and a bill containing the Hyde-Weldon Abortion Non-Discrimination Amendment which prohibited government agencies from requiring that health care providers make abortion services available to women.<sup>32</sup>

These are only a sample of the many pro-life bills and initiatives passed under the current administration, but they indicate the direction the legislature is pointed. Pro-life legislators have focused on bills that protect the late-term fetus, particularly the “wanted” fetus—one to which a pregnant woman had indicated she wanted to give birth. Moreover, the late-term fetus is much more easily recognizable as a baby, enhancing the strength of the pro-life movement’s claim about the personhood of the fetus.<sup>33</sup>

### *Synthesis*

The depth of the connection between the chapters of this thesis goes beyond merely a chronological succession of how a bill attempts to become a law. By looking at these events in succession, one can see how each seemingly separate portion of argument influences the next. Arguments made in one context are taken

and repeated by the next party; unfortunately this means that when arguments are made poorly by the first speaker, they are articulated even more poorly by later speakers.

How this plays out in the PBA debate can be seen particularly in the use and reporting of expert testimonies. Initially the conflict exists between “hard” forms of science-based proof—statistics, fact-based claims—and softer forms, like personal experience. The rhetors have no way of knowing which type of evidence is more “true” or “accurate” than the other; thus they decide which type of evidence is superior based on the opinions they already have, rather than on the merits of the arguments themselves. Even within the hard, scientific proof no consensus is reached because of the limited understanding the representatives have of the information they are attempting to compare. No one is able to get at the heart of the issue or to achieve a real resolution in Congress because one side does not really grasp what the other side is saying.

These poorly made arguments are then passed to President Clinton who, because there is no legitimate chance for rebuttal, is able to portray the arguments of his side as if he is absolutely correct in his interpretation of the facts before him. The media, understanding even less of what has been said and seeking to report it to a less educated audience, has almost no chance, then, of explaining the arguments in a way that does credit to the experts who gave the testimonies in the first place.

Another impact the congressional debates have on the population at large is through lobbying organizations like the National Right to Life Committee (NRLC) which help support and push for passage of bills like the PBA Ban. After a bill

moves through Congress, groups like the NRLC circulate the arguments to the public, continuing to seek public support of the legislation. That means that arguments which were initially made in a less than excellent manner are rebroadcast through a biased channel that is convinced of its own rightness and accuracy. What the public hears, then, is only a fragmented and biased portion of the debate.

In almost no instances does the public really experience the full spectrum of the debate. It is presented with clips and sound-bites showing one side or the other in a slanted light. The public does not see how the arguments are developed or how they clash with one another. The reality of the public debate—and the idea of achieving consensus by reaching an understanding of the matter—is never visible to the public. This is bad for public education as well as for the future of public debate, since future members of Congress are currently in that category of the “general public.”

#### *Answers to the Questions*

This thesis began by listing a number of questions I hoped to answer. The first group of questions concerned to whom the politicians directed their arguments and how the media reported the story afterwards. As chapter three indicates, politicians have more than one audience in mind when they draft their arguments. Certainly they are speaking to their fellow members of Congress, particularly those important few who were still sitting on the fence during the debates. Also importantly, the most heated portions of the debate occurred when one member was directly answering arguments made by his/her opposition. These periods of direct



refutation, however, were so argumentative and emotionally charged that they were unlikely to persuade the opponent. A secondary motivation, then, was at work.

A careful reading of the text reveals that these men and women were also directing their arguments to the public. President Clinton's veto always loomed over this bill as a serious possibility, so while one aim was to persuade Clinton to sign the legislation, an important secondary goal was to garner public opposition to late-term abortions. This is proven by the reintroduction of the bill while Clinton was still in office. If the only goal had been to get a signature on the bill, advocates of the bill would have either added the "health exception" that Clinton demanded or they would have waited until they had a president who was favorable to the legislation to try to pass the bill again. Instead pro-ban members of Congress continued to parade the sketches of the procedure before the public eye as often as they could.

President Clinton's veto ceremony was able to direct attention away from much of what had occurred during the debates in Congress. Because he was the only speaker, he was able to place the attention on his own arguments without any true chance for rebuttal by those in favor of the ban. Clinton was able to accomplish what the anti-ban members of Congress had never been able to do: he shifted the focus on to the women who had late-term abortions and off of the fetus being aborted. The media, following his lead, emphasized the tragic narratives presented by the women to the exclusion of the rest of the debate. The staging of the ceremony took the focus away from the arguments that had been presented in favor of the ban; indeed the articles published after the veto spent very little time discussing the debates that had occurred several months before in Congress. This shows that the president has a

great amount of control over what the media presents as true and real. It also shows that the media has a very short attention span—the debates from November and December were too old to bother with by the time of the April veto.

It is difficult to address the second set of questions with definitive answers. “Common ground” still seems to be an illusive notion; the chasm between “pro-life” and “pro-choice” seems infinitely vast and deep. Michael Mumford calls the place between the two groups “no-man’s land.”<sup>34</sup> The very nature of Congress requires that people choose sides. Bills create a forced choice—one is either for or against a particular measure. Although amendments allow a small amount of latitude for fashioning a bill that finds the middle ground, they generally cannot eliminate the way the issue itself has been framed. Congress, then, seems to be an unlikely place to truly achieve common ground.

That does not mean that no changes can be made or that Congress ought to be ignored in rhetorical studies. On the contrary, because the arguments made in Congress can be used to influence the public, scholars must continue to analyze what these people are saying. The pro-choice/pro-life debate is constructed by the words used to articulate each position, whether it is in Congress, on the street, or in books. It is the very language the speakers use that creates the seemingly vast chasm between the two sides far more than any actual differences in interests. Both sides want what is best for women, for babies, and society—they just approach these ends through a very different set of means. By looking at the ways language is employed in argumentation we can build a bridge between the two sides. Better yet, we may find that the chasm is actually just a little fissure, something that can be easily stepped

over. However, as long as words continue to be used to alienate and demonize those who oppose one's opinions, this cannot happen.

Individuals of good-will, then, must help change the way people speak about their opponents. When a pro-ban member of Congress accuses someone against the ban of ignoring the fetus which is “three inches from full protection of the Constitution,” s/he overlooks the reasonable arguments made by those against the ban about the precise details of each situation encountered. When an anti-ban member shifts the focus entirely onto the woman, dismissing the fetus as something less than human, they overlook the will of the majority of the people, who believe that we need to find a way to care for both parties.

Furthermore, the current reliance upon experts is bad for public argument and rational decision making. When statistics are thrown around by both sides, with no way of judging which are the most accurate and unbiased, those who are not experts become less capable of making decisions that are in the best interest of the public. Although I do not claim to know what the solution to this dilemma is—since eliminating experts altogether is not a rational solution—perhaps the answer lies within what each individual is willing to do to combat this problem. Maybe simply having a greater awareness of their overreliance on experts will spur members of both Congress and the public to seek out knowledge themselves. By exposing themselves to a greater amount of information beyond that which is presented by the media and other “expert” sources, they may uncover alternate viewpoints that they were previously unaware existed.

*Significance of this Work*

I am aware of no issue other than abortion that stirs the passions of people so strongly. Gay marriage approaches this level of opposition, but even that has become less of an inflammatory issue within the last few years. Most TV shows now boast an openly gay character, despite the fact that only between one and five percent of the population is estimated to be homosexual.<sup>35</sup> Homosexuality has become at least a moderately acceptable lifestyle choice in American society.

In contrast, about one of every four women is expected to have an abortion during her lifetime.<sup>36</sup> Despite the fact that abortion is one of the most commonly performed medical procedures in America,<sup>37</sup> network television still avoids the subject.<sup>38</sup> Abortion is still not treated as just another medical procedure, as abortion advocates from the 1970s hoped. Women still feel they cannot speak openly about their decision to abort; certainly they cannot speak about this decision with pride.

Politically the issue is also taboo. Democrats have been reticent to address the issue in public, often stating that while they oppose abortion privately, they refuse to legislate morality.<sup>39</sup> A change is in the air, though. In January 2007, Democratic legislators introduced legislation designed to promote birth control and increase funding to support women in crisis pregnancies. Reporters are calling this a new effort to find “common ground” between the two sides; as James Kelly writes, “common ground” is not the same as “compromise.”<sup>40</sup> One doesn’t necessarily have to back down on the values s/he holds dear in order to find an area that people of widely divergent political opinions can happily support. These two bills may be examples of the finding of true common ground in the abortion debate.

Another factor making this study extremely timely is that the oral arguments for *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* were heard in November, 2006. The Supreme Court is due to render their decision within the next few months. The arguments presented to the High Court were very similar to those made in Congress: the personhood of the fetus, the testimonies of experts, and an element of argument directed toward swaying public opinion.<sup>41</sup> How the Court views these issues will undoubtedly differ from this thesis, which focuses on the rhetoric of the problem. However I believe it is likely that the justices will find the arguments of the experts to be difficult to sort through and may, as they have in the past, simply defer to the experts they find most persuasive. Alternately, they may choose to defer to the opinions of the lower courts. This will again be unfortunate for public argumentation and only proves the need to move beyond this paradigm into something new.

#### *Further Research*

There are a great number of areas related to this study that merit further consideration. Congressional debates certainly have been understudied in recent years. An interesting analysis would compare the typical current debate to one from an earlier era (assuming complete records were available). Also, viewing C-SPAN would allow one to analyze the non-verbal aspects of the debate in addition to the verbal components alone, as the existing research does. Since non-verbal communication is widely believed to comprise a large portion of the message, a deeper understanding of the interactions between members of Congress could be achieved by including this dimension.

Additional research could also include the public's perception of the word "veto." Depending on whether the public believes this makes the president appear stronger, more controversial, or more opinionated, researchers may gain a deeper understanding of why Clinton chose to use the word in certain situations and not in others. An interesting comparison might also be made between the comprehension level of the debate in Congress versus the veto message issued by the president. Does the level of the former determine the level of the latter, or are the two independent? An analysis of the comprehension levels might clarify whether certain portions of the debate were indeed directed to the general public while others were directed to the more highly educated Senators and Representatives.

More work should be done looking at the amount of control the president has over the topics on which the media chooses to focus. Being a visually oriented society, as well, TV newscasts ought to be included in studies of this nature. For the current study, though, this would not likely be an issue, since the TV images that presumably were used in this situation would be similar to the clips pulled for the newspaper articles—those of tearful women giving their testimonies.

### *Conclusion*

The current framing of the debate does not allow the average person to make a decision for or against the necessity of legal partial birth abortions—or for that matter many important issues of the day. Careful analysis by rhetoricians that exposes these practices for the hindrances to public debate that they are can, I believe, create greater accountability in government. By decreasing the prominence of experts who argue for one side or the other, perhaps a change can be made that allows the public to again

insert their values into the debate. A majority of Americans find themselves in the middle of the abortion debate—while they believe abortion should be legal, they believe there should be limitations upon it and that it should be exercised more responsibly than it currently is. I hope that by exposing a small part of what keeps these two sides from coming together, this thesis helps to bring about a way around the rhetoric of polarization.

## Notes

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3. Arkes, *Natural Rights*, 107.
4. Arkes, *Natural Rights*, 235.
5. Arkes, *Natural Rights*, 107.
6. Arkes, *Natural Rights*, 110-111.
7. Arkes, *Natural Rights*, 107.
8. William Saletan, *Bearing Right: How Conservatives Won the Abortion War* (Los Angeles: University of California Press, 2003), 236.
9. Saletan, *Bearing Right*, 236.
10. David Stout, "An Abortion Rights Advocate Says He Lied About Procedure," *New York Times*, February 26, 1997, Sec. A11, <http://www.nrlc.org/abortion/pba/index.html>
11. Stout, "Advocate Says He Lied."
12. National Archives, National Archives and Records Administration, "Clinton Presidential Materials Project," White House Virtual Library, Oct. 10, 1997, <http://clinton6.nara.gov/1997/10/1997-10-10-president-letter-to-the-house-on-the-veto-of-hr.html>
13. Saletan, *Bearing Right*, 237. The House did not vote on the PBA Ban during this session of Congress.
14. Saletan, *Bearing Right*, 240.
15. Saletan, *Bearing Right*, 240.
16. Saletan, *Bearing Right*, 240.



17. Saletan, *Bearing Right*, 238.
18. Saletan, *Bearing Right*, 238.
19. Saletan, *Bearing Right*, 238.
20. Arkes, *Natural Rights*, 99.
21. Arkes, *Natural Rights*, 99.
22. Saletan, *Bearing Right*, 239.
23. Arkes, *Natural Rights*, 100.
24. Saletan, *Bearing Right*, 239.
25. Douglas Johnson, "108th Congress the Most Successful Yet for Pro-Life Movement," *National Right to Life Committee*, [www.nrlc.org/Federal/108Congresswrap.html](http://www.nrlc.org/Federal/108Congresswrap.html)
26. Saletan, *Bearing Right*, 245.
27. Johnson, "108th Congress the Most Successful Yet."
28. Robert Cohen, "Abortion foes expect kinder Congress; Demos' Senate loss changes landscape," *Times-Picayune*, December 31, 2002, Sec. National.
29. Johnson, "108th Congress the Most Successful Yet."
30. Zachary Coile, "Bush Seeks Sweeping Overhaul of Federal Rules," *San Francisco Chronicle*, December 22, 2002, Sec. News. [www.lexis-nexis.com](http://www.lexis-nexis.com)
31. Johnson, "108th Congress the Most Successful Yet."
32. Johnson, "108th Congress the Most Successful Yet." Health care providers could *choose* to make these services available, but this amendment ensured that a future president or Congress could not order all hospitals, for example, to provide abortions.
33. See Condit, *Decoding Abortion Rhetoric*, chapter 5.
34. Mumford, "Finding Solutions in No-Man's Land," *Society* 35, no. 5 (1997), 17-19. <http://search.epnet.com/>
35. For a summary of studies on the topic, see *Society*, "Realities and Fallacies of Homosexuality," 30, no. 5 (1993), 2-3. <http://search.epnet.com/>; , Charles F. Turner, Maria A. Villarreal, James R. Chromy, Elizabeth Eggleston, and Susan M. Rogers, "Same-Gender Sex Among U.S. Adults," *Public Opinion*

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37. eMedicineHealth.com, "Abortion," [http://www.emedicinehealth.com/abortion/article\\_em.htm](http://www.emedicinehealth.com/abortion/article_em.htm)

38. See Condit, *Decoding Abortion Rhetoric*, for an analysis of abortion in network television series in the 1970s and 1980s.

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40. James R. Kelly, "Beyond Compromise: *Casey*, Common Ground, and the Pro-Life Movement," in *Abortion Politics in American States*, ed. Mary C. Segers and Timothy A. Byrnes (Armonk, NY: M.E. Sharpe, 1995).

41. Argument transcripts are available at Supreme Court of the United States, "Argument Transcripts," [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts.html](http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html)

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