

# The Campaign Against ‘Partial-Birth’ Abortion: Status and Fallout

*After four years, the effort to ban “partial-birth” abortions has yielded little new law, but it has successfully shifted public focus away from early abortion to those performed “late” in pregnancy. One result has been the introduction of a raft of bills that would outlaw virtually all postviability abortions. The measures have undeniable political appeal, but they also worry partisans on both sides of the issue.*

By Susan A. Cohen and Rebekah Saul

Almost four years have passed since opponents of reproductive rights kicked off a nationwide campaign against so-called partial-birth abortion, and the issue has been the focal point of the antiabortion agenda ever since. Across the country, the campaign has generated countless hours of debate and scores of legislative votes. Members of Congress have considered the federal Partial-Birth Abortion Ban Act in each of the last four years, passing it twice and failing just barely to override the president’s veto, while 28 states have enacted bans—including nine in 1998 alone.

When challenged, however, virtually all of the new state restrictions have been struck down. Ban proponents’ rhetoric notwithstanding, courts have found that the measures do not proscribe a specific, late-term abortion

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method but, rather, are so broad and vague as to effectively outlaw a range of abortion methods, both before and after fetal viability.

These court actions have served not only to clarify the meaning of the various bills themselves, but also to elucidate the underlying goals of the “partial-birth” abortion campaign—which, at least for now, seem aimed more at promoting an issue than at enacting new law. Indeed, reproductive rights opponents have attempted

to use the “partial-birth” issue both as an electoral strategy to unseat prochoice lawmakers and as a public relations strategy to shift the focus of the abortion debate away from women to a “personalized” fetus by concentrating on abortions “late” in pregnancy.

As an electoral strategy, the campaign—to date—has met with a stunning lack of success. But, to a large extent, it *has* refocused the abortion debate and, in so doing, has put many traditionally prochoice legislators on the defensive. One response has been the introduction in Congress of a raft of measures, sponsored largely by prochoice members, that would ban abortions by any method after fetal viability, with only very limited exceptions.

For the most ardent antiabortion activists, these measures are still too permissive and only divert attention from the “partial birth” campaign. From the prochoice perspective, they all retreat—albeit to varying degrees—from the principles established in *Roe v. Wade*. Yet their potential to appeal to the public in general is undeniable. Accordingly, grappling with them likely presents the next major test for advocates on both sides of the abortion rights divide.

## Banning What, When?

In 1995, Ohio enacted a law banning “dilation and extraction” abortion. Michigan later moved to outlaw something called “partial-birth” abortion, and Utah followed suit with a law prohibiting *postviability* “partial-birth” abortion. Collectively, these moves cemented the issue that would become the core of the antiabortion agenda, and also initiated the confusion over the intent and meaning of the legislation.

Because “partial-birth” abortion is a nonmedical term coined by opponents of reproductive rights, the crux of the confusion has to do with *what* the measures aim to outlaw, and *when*. Largely as a result of ban proponents’ literature and rhetoric, the phrase “partial-birth” was initially understood to be tantamount to “intact dilation and extraction” (D&X), a medically accepted term that describes a specific clinical abortion procedure used during the late second and third trimesters of pregnancy.<sup>1</sup>

1. According to a new survey of abortion providers by The Alan Guttmacher Institute (AGI), the D&X procedure—as defined by ACOG—is rarely used, accounting for about 0.03%–0.05% of all abortions in 1996. Collectively, facilities reported having provided 363 D&X abortions in 1996 and 201 during the first half of 1997. Adjusting for the nonresponse rate of abortion facilities, AGI projects a total of about 650 D&X abortions were provided in 1996. The large majority of D&X abortions were provided at 20 to 24 weeks of pregnancy (as measured from the first day of the last menstrual period). See Henshaw SK, Abortion services in the United States, 1995–1996, *Family Planning Perspectives*, 1998, 30(6):263–270 & 287.

## 'Partial-Birth' Abortion Bans In the States\*

BANS ENACTED (28)	IN EFFECT (11)	ENFORCEMENT TEMPORARILY BLOCKED (7)	ENFORCEMENT PERMANENTLY BLOCKED (10)
ALABAMA	X <sup>1</sup>		
ALASKA			X
ARIZONA			X
ARKANSAS			X
FLORIDA			X
GEORGIA	X <sup>2</sup>		
IDAHO		X	
ILLINOIS			X
INDIANA	X <sup>**</sup>		
IOWA		X	
KANSAS	X <sup>**3</sup>		
KENTUCKY			X
LOUISIANA		X	
MICHIGAN			X
MISSISSIPPI	X <sup>**</sup>		
MONTANA			X
NEBRASKA			X
NEW JERSEY		X	
OHIO			X <sup>4</sup>
OKLAHOMA	X <sup>**</sup>		
RHODE ISLAND		X	
SOUTH CAROLINA	X <sup>**</sup>		
SOUTH DAKOTA	X <sup>**</sup>		
TENNESSEE	X <sup>**</sup>		
UTAH	X <sup>**5</sup>		
VIRGINIA	X		
WEST VIRGINIA		X	
WISCONSIN		X	

\*UNLESS OTHERWISE NOTED, PROHIBITS "PARTIAL-BIRTH" ABORTION WITHOUT REGARD TO THE STAGE OF PREGNANCY AND WITHOUT AN EXCEPTION TO PROTECT A WOMAN'S HEALTH. \*\* HAS NOT BEEN CHALLENGED IN COURT. 1. PURSUANT TO AN ATTORNEY GENERAL OPINION, IS BEING ENFORCED ONLY AFTER VIABILITY. 2. PURSUANT TO A COURT SETTLEMENT, PROHIBITS "INTACT DILATION AND EXTRACTION" ABORTION, AS DEFINED BY ACOG, AFTER VIABILITY AND INCLUDES A HEALTH EXCEPTION. 3. PROHIBITS "PARTIAL-BIRTH" ABORTION AFTER VIABILITY AND INCLUDES A NARROW HEALTH EXCEPTION. 4. PROHIBITS "DILATION AND EXTRACTION" ABORTION, AS DEFINED BY THE LEGISLATURE. 5. PROHIBITS "PARTIAL-BIRTH," "DILATION AND EXTRACTION" AND SALINE ABORTION, AS DEFINED BY THE LEGISLATURE, AFTER VIABILITY AND INCLUDES A HEALTH EXCEPTION.

However, the definition of D&X abortion in the Ohio law does not correspond to the procedure as defined by the American College of Obstetricians and Gynecologists (ACOG), and the term "partial-birth" abortion—as used in the Michigan law and subsequent state and federal measures—does not incorporate medical terminology at all.

The other source of confusion has to do with when in pregnancy the bans would apply. Early on in their efforts to prohibit "partial-birth" abortion, proponents developed materials that uniformly included a drawing depicting the procedure as performed extremely late in pregnancy. Reproductive rights advocates initially responded by explaining the need for D&X abortion in wanted, postvia-

bility pregnancies "gone terribly wrong"—in which the fetus is severely incapacitated or the woman's health or life was at grave risk. However, the typical "partial-birth" measure has no gestational parameters, and therefore is not limited to postviability abortions.

### Court Findings

With the public debate raging in the foreground, courts for three years quietly have tackled the 20 lawsuits filed against state "partial-birth" abortion bans. To date, in every case except one, the laws have been struck down or limited; ten measures have been permanently enjoined (see table). Taking the definition and the lack of timing specifications together, the courts have concluded that the broad measures proscribe much more than postviability D&X abortions.

In the lawsuit against Michigan's "partial-birth" abortion statute—the first typical ban to become permanently enjoined—United States District Court Judge Gerald Rosen concluded, based on the testimonies of physician witnesses for the plaintiffs *and* for the defendants, that what the law aims to prohibit is unclear. "All of the witnesses agreed, the term 'partial-birth' abortion is not

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one found in the medical literature," Rosen noted in his opinion. "Nor is it defined in the statute in medical terms. And, the 'plain language' of the statute clearly left the physicians who testified confused as to its meaning and application."

This ambiguity of what exactly would be banned, judges have held, is compounded by the question of when in pregnancy a prohibition on "partial-birth" abortion would apply. With a couple of exceptions, the state laws would disallow "partial-birth" abortion without regard to gestational age, and therefore would tread on a woman's constitutional right to previability abortions. Courts have agreed with Rosen's assessment that the typical "partial-birth" abortion ban is "hopelessly ambiguous" and would encompass the most common post-first-trimester abortion procedures—and perhaps much more.

Finally, a handful of judges have additionally struck down the ban on the basis that it does not provide an exception for a woman's health. Most measures would allow a physician to perform a "partial-birth" abortion only if necessary "to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury." Since the Supreme Court has

## THE SUPREME COURT ON ABORTION AND THE PREGNANT WOMAN'S 'HEALTH'

1971

"Webster's Dictionary, in accord with...common usage, properly defines health as 'the state of being sound in body or mind.' Viewed in this light, the term 'health' presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." (*United States v. Vuitch*)

1973

"For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (*Roe v. Wade*)

"[M]edical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." (*Doe v. Bolton*)

1992

"We...reaffirm Roe's holding that 'subsequent to viability, the State in promoting its interest in the potential of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" (*Planned Parenthood of Southeastern Pennsylvania v. Casey*)

repeatedly held that an abortion may be performed at any point in pregnancy if it is necessary to preserve a woman's life or health, this constitutional defect would undermine the measures even if they were interpreted to outlaw a specific, late-term procedure.

As federal District Court Judge Richard Bilby wrote in his decision against the Arizona law, "the fact that the Act does not provide an exception where the proscribed conduct is in the best interest of the health of a woman is an additional reason to find that the Act is unconstitutional."

### From 'Partial-Birth' to Postviability

Despite consistent legal problems with the construction of "partial-birth" abortion legislation, reproductive rights opponents have continued the campaign virtually unchanged; the core of the ban language and the strategy around it have not been altered since enactment of the Michigan law. This suggests that the campaign's underlying motivation has more to do with *politics* than *policy*.

Clearly, ban proponents have tried to use "partial-birth" abortion as an electoral issue. In 1996, they stalled the veto override vote on the federal Partial-Birth Abortion Ban Act until the last possible minute, using it to stoke

their grassroots and paint President Clinton as an extremist just days before his re-election bid. However, the issue did little—if anything—to derail Clinton's second term.

The same strategy failed in November 1998, when prominent ban opponents Barbara Boxer (D-CA), Russell Feingold (D-WI) and Patty Murray (D-WA) retained their seats in the United States Senate in the face of massive efforts by antiabortion activists to highlight their "partial-birth" votes. Proposed "partial-birth" abortion bans were likewise defeated in statewide referenda in Colorado and Washington (see *For the Record*, page 11).

On the other hand, the "partial-birth" abortion campaign has much better served the second antiabortion goal of focusing the debate on "late" abortions. Whether, as abortion foes desire, this will translate over time into greater public discomfort over abortion in general remains to be seen, but it certainly has prompted a

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defensive reaction among some reliably prochoice lawmakers who are now actively searching, in the words of Senate Minority Leader Tom Daschle (D-ND), for "common ground." That common ground—in the form of legislation that would ban *all* post-viability abortions, with certain limited exceptions—has opened a new, perhaps even more difficult, battleground in the abortion debate.

### The Critical Health Exception

The first appearance of federal legislation outlawing post-viability abortions came on the last day of the 1996 congressional session with a bill introduced by prochoice stalwart Rep. Steny Hoyer (D-MD). The Hoyer bill, which was reintroduced early in 1997 with the cosponsorship of solidly prochoice Rep. Jim Greenwood (R-PA), would prohibit all abortions after fetal viability except when necessary to preserve the life of the woman or to avert "serious adverse health consequences."

Antiabortion activists immediately blasted the Hoyer-Greenwood bill as a sham. They charged that it was introduced as political "cover" to make it easier for members of Congress to vote against the "partial-birth" ban, which was in part true. They also alleged that, despite its being a ban on all late abortions as opposed to a prohibition on a particular kind of procedure, its health exception was so broad as to constitute a huge "loophole."

The prochoice side, however, faced the more difficult dilemma. Relegated to the defensive on the "partial-

birth” issue, prochoice groups sympathized with the need for a political alternative. Yet, they felt compelled to distance themselves from any deviations from the standards established by the Supreme Court in *Roe*—and there is no denying that the health exception in the Hoyer-Greenwood proposal represented a step back from those standards.

In *Roe*, the Supreme Court established a right to an abortion subject to certain limitations. The Court determined that after the point of fetal viability, the states may impose restrictions on or even prohibit abortion altogether except that they must allow for those abortions necessary to preserve the woman’s life or health. From the time *Roe* was decided (and, in fact, even before), the Court has held that the term “health” must be broadly defined to reflect a state of both psychological and physical well-being. In addition, the Court has made clear that the determination of what constitutes a valid health reason for an abortion, as well as whether a fetus has attained the point of viability, must be reserved for the attending physician (see box).

In light of these rulings, then, any attempt to qualify the health exception would appear to be in conflict with the current state of constitutional law. Yet, that is exactly what the Hoyer-Greenwood bill would do—and bills that depart from the *Roe* standard even more have been introduced by prochoice members in its wake.

A few months after the Hoyer-Greenwood bill was introduced, Daschle introduced the “Comprehensive Abortion Ban Act.” The Daschle bill would make all abortions after viability illegal unless continuation of the pregnancy would threaten the woman’s life or “risk grievous injury to her *physical* health” (emphasis added). Daschle’s proposal would exclude the possibility of a late abortion for any mental health condition, no matter how severe. Moreover, the mental health excep-

tion has been the aegis under which most abortions in cases of severe fetal abnormality have been justified. Further, Daschle’s bill would limit even physical health cases to those defined as “a severely debilitating disease or impairment *specifically caused by the pregnancy* (emphasis added).”

In September 1998, Sen. Dick Durbin (D-IL), another consistent supporter of reproductive rights, went even a step further. With a bipartisan group of other prochoice senators, he introduced the “Late-Term Abortion Limitation Act,” which would incorporate Daschle’s pro-

**Sen. Daschle’s bill would exclude the possibility of a postviability abortion even in cases of severe fetal deformity—or for any mental health condition, no matter how severe.**

posal but add another requirement—that a second physician, not involved in performing the abortion, be consulted to certify that the reason for the abortion meets the narrow requirements of the bill. All told, 38 House members and 14 senators returning to Congress in 1999—who consider themselves, and always have been considered, prochoice—have cosponsored one form or another of post-viability ban legislation.

**Principles and Pragmatism**

Abortion rights opponents long have insisted that accepting any post-viability health exception amounts to countenancing a policy of “abortion on demand for any reason through all nine months of pregnancy.” Yet, the reality is that over the 26 years that this “loophole” has been in effect, only an infinitesimal percentage of all abortions have occurred after viability and that percentage has remained approximately constant over time.

Statistics from 1995, the most recent available, confirm the consistent finding that the overwhelming majority of abortions take place in the first trimester; almost 99% occur within the first 20 weeks of gestation (see table). Since abortions after that point are relatively infrequent, and state reporting requirements vary so widely, it is extremely difficult to assess exactly how many of the 1% of all abortions that are performed after 20 weeks actually occur after viability. (Current medical thinking places viability at 23–24 weeks at the earliest but more commonly at the beginning of the third trimester, or 26 weeks.) The only recent national breakdowns on abortions after 20 weeks are from 1992; according to AGI, some 320–600, or under 4/100ths of 1% of all abortions, are performed in the third trimester.

WHEN ABORTIONS OCCUR		
WEEKS’ GESTATION*	NUMBER	PERCENT
TOTAL	1,363,690	100.0
<9	727,900	53.4
9–10	317,230	23.3
11–12	152,720	11.2
13–15	90,020	6.6
21+	18,010	1.3
*Measured in number of weeks since last menstrual period. Note: Data are from 1995.		

Public opinion, whether as a cause or an effect, is basically in sync with the reality of when abortions actually take place. Most Americans believe in the basic right to abortion, but that support is inversely related to the stage in pregnancy at which a woman seeks an abortion. As reflected in a New York Times/CBS poll conducted in early 1998, almost two-thirds of those polled believe abortion should be legal in the first three months of pregnancy, but that support dwindles to only 7% in the third trimester.

It is not surprising, then, that as they have been forced to confront the issue of later abortions in a political context, some self-described prochoice lawmakers, notwithstanding the apparent conflict with *Roe*, are

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beginning to actively promote legislation banning post-viability abortions that reflects not only their perceived political needs but also public opinion and abortion practice.

The challenge this presents for the prochoice movement cannot be underestimated. So far, the major advocacy and constituency groups largely have relegated themselves to the sidelines—unwilling to publicly oppose the various “prochoice” postviability bills that have been introduced, but, at the same time, unable to embrace a health exception less expansive than that

defined by the Supreme Court over the years. However, silence may no longer be a tenable strategy; steps may need to be taken to protect the movement from becoming marginalized—not only vis-a-vis public opinion but also its dwindling core of advocates in Congress.

Nor is the challenge only a political one. The danger of continuing to opt out of the post-viability ban debate is that it leaves wide open the possibility that the most restrictive post-viability bills will forge ahead. And those measures, which include only a highly restrictive *physical* health exception, neglect the very real needs of the few but desperate women who, late in pregnancy, face terrible health crises involving severe mental and/or fetal health problems.

For its part, the antiabortion side has at least the temporary advantage of the “partial-birth” campaign to fall back on. But it soon could become a victim of its own success. The “partial-birth” issue may be failing on the electoral and judicial fronts—and likely it will fare no better as a legislative matter in the next Congress than the last. But it *has* served to intensify public and political disapproval of late abortions. Perhaps the biggest threat abortion foes face is that Congress may actually move to enact a post-viability abortion ban and, in so doing, walk away from efforts to limit abortion earlier in pregnancy.

For now, then, it would appear that in the midst of one of this country’s most polarized national debates, the post-viability bills have landed in a political no-man’s land, with advocacy groups on both sides of the abortion issue unwilling to claim them. The time of reckoning, however, may be fast approaching. ⊕