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Some of the Politics Surrounding Abortion Policy

> [T]he abortion issue poses constitutional problems not simply for judges but for every federal, state, or local official who must at some point address the issue. (Tribe 1992, 77)

INTRODUCTION

When the Supreme Court upheld the congressional Partial-Birth Abortion Ban Act in *Gonzales v. Carhart*, Robin Toner wrote in the *New York Times* that the case represented a successful new tactic in abortion politics (2007). Both the U.S. Congress and the Supreme Court accepted a new understanding, or framing, of the abortion issue. Abortion was, at least for the moment, framed as being a danger to the interests of women. Pro-life groups had sought to reframe the abortion debate along these lines for some time. Indeed, proponents on each side of the issue have sought to control the language used to describe a fetus – language that is then sometimes reflected in law.

How did abortion move from an issue of choice or an issue of morality to an issue that – judged by the Supreme Court – posed dangers for women? The framing and reframing of the abortion issue has been ongoing for decades. Legislators, judges, the public, and those individuals most directly affected by abortion procedures have understood and explained the issues tied to abortion in diverse ways. The framing of the abortion debate in the 1800s maintained that the practice was wrong unless *medically* necessary, which was best determined by a licensed physician. The conflict at this time was not simply grounded on moral argument; there was considerable tension between doctors and midwives over the

provision of medical services to women (e.g., Craig 1993). Abortion politics was enmeshed in the debates about who should be allowed to practice medicine and whether physicians should be granted market protections.[1] In the end, the doctors won the argument and, by 1910, abortions were illegal in all states except one and in all cases except when the abortion was necessary to save the life of a woman.[2]

In the 1960s, states began to debate legislation to ease restrictions on abortion that had been put into place in the latter half of the 1800s and the first decade of the twentieth century. By the 1960s, the abortion debate began to resemble the debates that most Americans living today would recognize. On one side of the debate were organizations concerned about women's rights. Abortion was fundamentally a choice emblematic of individuals living in a free society. Limits on abortion were interpreted as limits on women's freedoms. Abortion attracted greater, widespread public attention at this time in part because of the links between the sedative thalidomide and birth defects. Although few Americans were exposed to thalidomide, it was readily available in European countries – and sometimes sold over the counter. The infant mortalities and the severity of the birth defects linked to thalidomide prompted many Americans to reconsider their attitudes toward abortion. Autonomy over birth decisions, coupled with the sexual revolution and the arrival (and legal protection of access to) birth control, made abortion a prominent issue of discussion in the 1960s.

The liberalization of state-level abortion laws from 1967 to 1973, during which time the number of states allowing abortions increased from three to more than fifteen, and the concomitant rise in the number of abortions occurring nationally, led to a rise in pro-life interest group activity. The U.S. Catholic Conference and the National Committee for a Human Life Amendment spearheaded the opposition to relaxed abortion laws at the state level in the 1960s and 1970s. Most antiabortion groups were associated with churches but important antiabortion advocates emerged most directly from the antiwar movement (Risen and Thomas 1998).

With the issuance of the *Roe v. Wade* decision in 1973 by the U.S. Supreme Court, pro-life groups were energized anew to fight the

[1] The American Medical Association (AMA), formed in 1847 and incorporated in 1897, played a key role in the regulation of medical services. For a critique of the AMA's role in the creation of market protections for physicians, see Milton Friedman's *Capitalism and Freedom* (1962).

[2] At this juncture, we do not address the differences between de jure and de facto limits on abortion.

expansion of abortion rights. The Roman Catholic Church issued many proclamations stating their strong opposition to abortions. The Church asked members to engage in civil disobedience if asked to perform any activities related to abortion and noted that church members who were involved in abortion activities could be excommunicated. The National Conference of Catholic Bishops also mobilized against the *Roe* decision, funding many pro-life activities (Rubin 1987). In the mid and late 1970s, the National Right to Life Committee and the Moral Majority augmented the Roman Catholic mobilization against abortion. The language in *Roe* indicated that constitutional rights were central to the current understandings of abortion. To attack *Roe*, therefore, required a constitutional counterattack. Antiabortion mobilization centered on efforts to pass a constitutional amendment to ban all abortions.

Abortion was not a prominent issue in the immediate elections after the *Roe* decision. Both President Gerald Ford and the 1976 Democratic presidential candidate, Jimmy Carter, were pro-life, albeit with different views on how the abortion decision should be handled. By 1980, abortion did become a major issue, as conservative groups linked liberal members of Congress to pro-choice positions, even when the individuals in question were not pro-choice (Rubin 1987, 110). At this point, abortion started to become linked to ideology and party in ways that had not occurred before.

The pro-choice community had its own mobilizations during this same period of time, with organizations such as NARAL – the National Abortion Rights Action League (formerly the National Association for the Repeal of Abortion Laws) – Planned Parenthood, and the National Association of Women spearheading efforts to maintain a woman's right to choose to have (or not have) an abortion. Pro-choice groups watched with considerable concern as an increasingly conservative U.S. Supreme Court heard *Webster v. Reproductive Health Services*, *Planned Parenthood v. Casey*, and other cases challenging *Roe*. The *Carhart* decision, however, was unique because it was the first time a majority on the Supreme Court had used a framing in an abortion decision that questioned the ability of women to make rational choices related to abortion. The ability of women to make reasoned choices about abortion has been questioned by state legislatures at numerous times. Some state legislatures have adopted legislation that requires women to receive information and counseling about the effects of the abortion on the embryo and the mother. Ostensibly, the counseling is meant to protect women from their own poorly informed choices. Consider the language

mandated by South Dakota law (Sections 1 and 7, H.B. 1166, 2005).[3] Any physician discussing abortion services with a woman must state that an abortion "will terminate the life of a whole, separate, unique living *human being*" (italics added). In some localities, women are encouraged or even required to undergo ultrasound procedures so that they can see an image of the fetus. Again, proponents of these regulations seek to protect women from their own uninformed choices. These laws are also part of a general effort to move away from the traditional debate, which pitted pro-choice groups arguing for the interests of women versus the pro-life groups arguing about the rights of fetuses, and it was this new issue framing that was cited by Justice Anthony Kennedy in his majority opinion in *Gonzales v. Carhart*. Kennedy writes that it is "unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[4]

Two points related to the Kennedy decision have received considerable attention. First, Kennedy clearly states that some women come to regret their choices about abortion. The Court decision seeks to protect women who might otherwise feel badly about their abortion choice. Critics of the decision were quick to note the paternalism; there are many decisions protected by constitutional rights that one might make only to regret them later.[5] Why was abortion treated differently? The Court would protect women from making decisions about abortion that they themselves might regret at a later date. Second, the fetus is referred to as an infant. The decision did not focus on questions about the beginning of life or fetal viability. Instead, Kennedy stated that an *infant's life* was in the balance. In a rare move, which typically signals deep dissatisfaction with the Court's reasoning and the case outcome, Justice Ruth Bader-Ginsberg read her dissent aloud to the Court. In part, she wrote that the decision "blurs the line, firmly drawn in *Casey*, between pre-viability and post-viability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health."[6] The earlier framing of the abortion issue and abortion restrictions that referred to fetuses and relied on pre- and post-viability for the fetus was swept away.

[3] House Bill 1166 amended South Dakota common law S.D.C.L. § 34–23A-10.1.

[4] This decision can be found at http://74.125.155.132/search?q=cache:M29LfndYw-cJ:www.supremecourtus.gov/opinions/06pdf/05–380.pdf+gonzalez+v.+carhart&cd=2&hl=en&ct=clnk&gl=us with the quote taken from page 29 of the decision.

[5] See Ladwein (2008).

[6] This quote can be found on page 19 of her dissent.

The *Carhart* decision is profound but its ultimate impact remains unknown. Many commentators have speculated that the Supreme Court decision will result in numerous states enacting so-called "informed consent" laws and mandatory pregnancy counseling for women seeking abortions.[7] By most accounts the *Carhart* decision portends great change, but will it prevent abortions? Informed consent and counseling requirement laws do not deny or *directly* limit the right of a woman to receive an abortion. Both sides of the abortion debate are focused more intently on the indirect effects of the policy changes. Even the Partial-Birth Abortion Ban Act, which is a ban on a specific abortion-related procedure, will directly ban only a small number of abortion procedures annually and some number of the individuals affected by the partial-birth ban will still have abortions but will do so using a different medical procedure.[8]

The data on abortion generally show that the estimated number of abortions performed annually in the United States grew from between 850,000 and 1,000,000 in 1975 to between 1.3 million and 1.5 million in the 1980s.[9] The peak year for abortions was 1990, when an estimated 1.5 million abortions were performed. Current estimates suggest there are now about 1.3 million abortions performed annually. In 2005, 60.8 percent of all abortions occurred at fewer than eight weeks after gestation and 77.6 percent occurred in the first ten weeks. The Centers for Disease Control and Prevention (CDC) reports that 1.3 percent of abortions occurred after twenty weeks of gestation; 5.0 percent of abortions occur after the fifteenth week of pregnancy.[10] The partial-birth ban focuses exclusively on the 1.3 percent of abortions that occur after twenty

[7] Informed consent requires that a woman seeking an abortion first be told of the risks and implications of the procedure.

[8] There are questions about the medical relevance of the ban on partial-birth abortions because "partial-birth abortion" is not a medical term. However, it is generally recognized that the ban is intended to address the use of some intact dilation and extraction procedures.

[9] There are two primary sources of data on abortions in the United States. The Centers for Disease Control and Prevention (CDC) conducts an annual abortion survey. The report has only received consistent abortion data from 46 jurisdictions since 1995 and the nonreporting jurisdictions include New York City and California. (See http://www.cdc.gov/reproductivehealth/Data_Stats/Abortion.htm.) The other primary source of abortion incidence data is the Alan Guttmacher Institute (AGI; http://www.guttmacher.org/sections/abortion.php). AGI generally reports higher incidents of abortions than does the CDC, in part because CDC obtains its data from state health departments and AGI obtains its data from abortion providers. National Right to Life reports both data on its Web site.

[10] These data come from the CDC Abortion Surveillance Report 2005, Table 6, available online at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5713a1.htm?s_cid=ss5713a1_e.

weeks of pregnancy, and even for late-term abortions, partial-birth procedures were used less than 20 percent of the time. Given that more than one million abortions are performed annually in the United States, the partial-birth ban will affect very few cases. Of course, the eventual impact of informed consent and the partial-birth ban remains unknown. Some women may continue to opt for legal abortion procedures, but others may sense that abortion procedures are increasingly difficult to secure and avoid seeking any information at all about abortion services. For some pro-choice advocates, the greatest concern about *Gonzales v. Carhart* was the court's decision not to reaffirm or retain earlier holdings in *Planned Parenthood v. Casey* or even in *Roe v. Wade*. To be certain, the *Carhart* decision was a loss for pro-choice advocates, but much of their anxiety was focused on what might come next. Given the small number of abortions that are affected by the Partial-Birth Abortion Ban Act, one might even ask whether the *Carhart* decision is a Pyrrhic victory for pro-life groups. Indeed, some elements in the pro-life community remain deeply concerned about limited measures to affect abortion policy (Davey 2006; Saletan 2009). In their view, if an "infant life" were at stake, then why would any abortion measure be acceptable?

The *Gonzales v. Carhart* decision reflects aspects of the long-held strategies adopted by pro-life proponents. Pro-life advocates have repeatedly sought legislative gains in the states (e.g., McFarlane and Meier 2001; Rose 2006; Segers and Byrnes 1995) as well as in the U.S. Congress. In this book, we explore how members of the U.S. House of Representatives have handled abortion policy. Given the tremendous prominence of *Roe v. Wade* and subsequent abortion decisions by the U.S. Supreme Court, one might presume that abortion policy is largely a legal affair. However, since the pronouncement of *Roe v. Wade* in 1973, pro-life advocates in the U.S. House of Representatives steadily pursued a legislative strategy of incremental change.[11] The partial-birth abortion ban, as affected by *Carhart*, is simply the latest in a long series of attempts to alter abortion policy incrementally.

Incrementalism is not typically the strategy that we think of when we consider the abortion debate. Abortion politics is often framed as an all or nothing debate. "Do you support the right of a woman to choose what happens to her body?" Stark language is often employed. "Do you support the murder of innocent children?" Although some nuance does

[11] See Meernik and Ignagni (1997) for a review of the conditions that lead Congress to reverse Court findings with the passage of new legislation.

exist in this debate – pro-choice supporters do not necessarily support abortions when the fetus can be viably delivered, and pro-life supporters do not necessarily oppose a woman obtaining an abortion if the child is the product of a rape or incest or if the birth of the child could seriously harm the mother – these nuances are not stressed in the heated debates over abortion.

INCREMENTAL IMPERATIVE

In the language surrounding the public debates on abortion, there is little opportunity for subtlety or nuance. The lack of fine distinctions is evident in the terms that these abortion policy groups prefer using – "pro-choice" and "pro-life" – both of which reflect this lack of nuance in the debate. The "pro-life, under some conditions" or "pro-choice, up to a point" positions are not well-reflected in the public debate over abortion politics. Numerous scholars have cataloged the language and rhetoric of the two sides of the abortion debate (Condit 1990; Dillon 1993a; Ferree et al. 2002), evaluated media portrayals of the issues (Press and Cole 1999), or portrayed the lives of activists (Maxwell 2002; Munson 2009; Reiter 2000; Risen and Thomas 1998). The conclusions are straightforward. Activists and the movements they inspire are seldom moderate in their tone. In his assessment of the U.S. Congress in the 1980s, political scientist Eric Uslaner stated that "Moral issues such as … abortion … became … political dynamite. Activists on each side rejected any type of compromise" (1993, 60). Whole books have noted an absence of "neutral ground" (O'Connor 1996) in the abortion debates. "In its simple American form, the language of rights is the language of no compromise. The winner takes all, and the loser has to get out of town" (Cook, Jelen, and Wilcox 1992, 194). "Prolife and prochoice advocates alike have overwhelmingly opted for rights talk, a choice that has forced the debate into a seemingly nonnegotiable deadlock between the fetus's 'right to life' and the pregnant woman's 'right to choose'" (Glendon 1991, 66).

In the spring of 2009, the acrimony and hostility tied to the abortion debate came into sharp focus. On May 31, 2009, Dr. George Tiller was killed in Wichita, Kansas, by Scott Roeder, a radical antiabortionist who was convicted in 2010 of first-degree murder. As one of the few U.S. physicians who openly performed late-term abortions, Tiller was a lightening rod in the midst of the abortion debate. Upon Tiller's murder, numerous antiabortion groups made public statements distancing themselves from such violent measures to prevent abortions. Rightly or not,

such extremism and polarization is often blamed on interest groups or extreme media portrayals. Groups often use charged language, even when they eschew extreme actions. Interest groups are better able to mobilize their supporters when they take a strong, unequivocal position for a given policy, especially one with such a strong moral dimension as abortion. By taking a strong and unequivocal position, interest groups can keep their members energized about the issue and can portray any proposed change in abortion as either a great success or a dire threat. In such debates, and for such groups, abortion serves a symbolic purpose. It offers a way for individuals to define themselves in contrast to others and acts as a signal regarding the individual's politics, be it liberal or conservative. Symbolically, maintenance of the abortion debate can be very helpful for politicians because it serves this symbolic shorthand and definitional purpose.

If, however, one moves beyond symbolic purposes, "the increased salience of the abortion issue is not entirely welcome by politicians, who find themselves facing two opposing sets of motivated activists, each … [of which] sees the abortion issue as one in which compromise is impossible" (Cook, Jelen, and Wilcox, 1992, 161). Both sides have pushed Congress to codify their position into law, with pro-life groups wanting a constitutional amendment banning abortion and pro-choice groups wanting the tenants of the *Roe v. Wade* decision enacted in, or protected by, statute. Few legislators may be intimately involved in the pro-life or pro-choice movements, but every legislator has been called upon to cast votes on abortion-related proposals. Did members of Congress adhere to the movements' grand goals, or did they develop and follow more traditional, incremental approaches to policy change? For die-hard adherents to a movement, a gradual, incremental approach may be an anathema, but we argue that there are clear strategic underpinnings to incremental policy change.

The incremental change strategy is predicated on several basic ideas. First, there is a recognition that overturning Supreme Court decisions is difficult, making major changes to federal laws is difficult, and making sustained change to any policy takes time. Quite simply, the structure of the American policy-making system ensures that change is difficult. Consider, for the moment, the U.S. Congress. At the most basic level, one difficulty that supporters of policy change must overcome is that legislative changes require majorities of both the House and Senate to agree on the same legislative wording. For politically sensitive issues, such as those related to abortion, advocates need at least sixty senators to guard