

particularly when it came to how we—

Mrs. BOXER. This is appropriations. These are two votes.

Mr. SANTORUM. In that case, you are talking about the mandatory spending issue, and I do not believe—

Mrs. BOXER. No.

Mr. SANTORUM. That is my understanding.

Mrs. BOXER. I appreciate the Senator has not seen it.

Mr. SANTORUM. I have not seen it. I know I voted against mandatory spending for IDEA, but I voted consistently for increases.

Mrs. BOXER. These are two votes for 2 years in a row.

Mr. SANTORUM. As the Senator from California knows, since Republicans took control of the Chamber in 1995, IDEA funding has gone up from 5 percent to, I believe, about 15 to 20 percent right now through the initiative of many of us who saw this as a real scourge on the Congress for mandating something, saying we would fund it, and then we do not.

I do support it. I may not support the level of increases. As the Senator knows, when a hefty increase is supported, then somebody comes along and tries to double or triple that and blow a hole in the budget. I think my record is clear that I voted for responsible and steady increases to get us up to the 40 percent, and I have made a pledge to do so.

Mrs. BOXER. I ask unanimous consent that the record of these votes be printed in the RECORD.

Mr. SANTORUM. I have no objection.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

H.R. 4577

AMENDMENT NO. 3699

Harkin motion to waive section 302(f) of the Budget Act to permit consideration of the Harkin-Wellstone amendment which provides full funding for the Individuals with Disabilities Education Act (IDEA) by increasing it from \$7.35 billion to \$15.8 billion.

Motion rejected: Yeas—40; nays—55; not voting—5.

Mr. SANTORUM. I want to counter a couple of other things. The Senator from New Jersey says I keep referring to the Bergen County Record, and he made a statement that has been proven false. I can say that the Bergen County Record has never printed a retraction to the story and claims to this day that their investigative reporter was not wrong. So there is an honest disagreement. The paper stands by their story, has not printed a retraction, and has said publicly that they have no intention of doing so. So just because Senator LAUTENBERG found somebody who disagrees with the story does not mean it is not true.

I want to go, finally—and then I will be happy to yield back to the Senator from California—to what this health exception means.

Under *Doe v. Bolton*, the health exception means—and I am going to read the case. “Health” was broadly defined.

Medical judgment may be exercised in 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. This allows the attending physician the room he needs to make his best medical judgment.

So just understand what this amendment does. It strips out the language of the partial-birth abortion ban, replaces it with the language basically from *Doe v. Bolton*, which is the current law, which is no exceptions. In other words, there are no limitations under current law, by the courts, for any abortion at any time. There simply are no limits.

So that may be where many Members of this Chamber are, and I respect that. I disagree with them, but I respect that. To simply restate the law and then claim that one is for the partial-birth abortion bill, I think, falls hollow on the Chamber and hopefully we can defeat this amendment.

UNANIMOUS CONSENT AGREEMENT EXECUTIVE CALENDAR NO. 38

Mr. SANTORUM. As in executive session, I ask unanimous consent that following the vote in relation to the Feinstein amendment, the Senate proceed to executive session, and an immediate vote on the confirmation of Calendar No. 38, William Quarles, to be U.S. District Judge for the District of Maryland, with no intervening action or debate; further, I ask that following that vote, the President be immediately notified of the Senate’s action, and the Senate then resume legislative session.

The PRESIDING OFFICER (Mr. ALEXANDER). Without objection, it is so ordered.

The Senator from California.

Mrs. FEINSTEIN. I want to make a couple of comments. The first comment is that comparing my amendment with the Dred Scott decision is ridiculous. Having said that, the distinguished Senator from Pennsylvania is right about one thing. In a sense, this is a codification of Roe.

I have sat on the Judiciary Committee. I ask my colleagues the question: What do you think of *Roe v. Wade*? Overwhelmingly, most would say it is well-settled law. The States have adapted to it, and *Roe v. Wade* allows States to restrict abortion severely, if the fetus is viable, that is, can be sustained outside of the uterus. And over 40 States have banned or severely restricted postviability abortions.

S. 3 is duplicitous because it says it does one thing but does another. It says that it bans partial-birth abortion, but it does not adequately define it, and so bans much more than this method. Moreover, the bill does not define D&X in a medical context.

Respectfully, Senator SANTORUM is not a physician, and, respectfully, he is not going to be carrying out a surgical procedure. But there are hundreds of

thousands of physicians out there who are carrying out this medical procedure. And Senator SANTORUM wants to leave them with an unclear definition in this bill. And the precise, medically accurate definition I read into the RECORD, the definition of D&X as proposed by the American College of Obstetricians and Gynecologists, is not the definition in the bill.

What I have done is tried to write a simple, straightforward bill that essentially sustains *Roe v. Wade*. So those who believe in *Roe v. Wade* should vote for my amendment. It says that any abortion is illegal once the fetus is viable, once the doctor determines that the fetus can sustain itself outside of the womb, unless the life and the health of the woman are in jeopardy. That is *Roe v. Wade*. The amendment is also consistent with a whole host of federal court decisions which I read and in the Supreme Court’s decision in *Stenberg v. Carhart* where Justice Breyer, Justice O’Connor, and three other justices very clearly said that a Nebraska statute very similar to S. 3 falls because there is no exception for the health of the woman.

The Senator has talked about the liberty clause. And *Roe v. Wade*, yes, did come from the liberty clause of the due process clause of the 14th amendment and other parts of the Constitution. *Roe* helped establish a basic right of privacy for women.

I get so annoyed when men constantly strive to take away hard-won rights from women. Respectfully, I don’t want Senator SANTORUM taking away my reproductive rights. I respect his views. I respect his rights. I respect his moral code, his religion, his conversations with his physician. Why can’t those who happen to be pro-choice receive the same respect, particularly when a fetus is not viable, when a fetus cannot sustain life outside the womb? That is what this is all about.

Make no mistake, if you believe in choice, you will support my amendment. If you do not, you will support S. 3. That is the clear division of the house on this. If there were a clear medically accurate definition in S. 3, I would not be saying what I am saying. I would say: Members, you are voting on a particular medical procedure; you are prohibiting a particular medical procedure. But if you are voting for S. 3, you are voting to prohibit much more than just the medical procedure that has been put on this floor. You are also prohibiting D&E abortions as well. That has been the finding not of me but of obstetricians and gynecologists, some of them from the finest medical schools in our country, and numerous federal courts, including the Supreme Court.

S. 3’s infringement on women’s right to choose reminds me of another woman’s right. It was not until 1920 that we got the vote. And when this Nation was founded and we go back to our days of—for some—glory, women could not

get a higher education, women could not own property, women could not inherit. Every single right we have won has been fought for. And the right to choose has been fought for as well.

There are probably few people in this body who have seen a young woman ready to commit suicide from an unwanted pregnancy. I have. I went to college when abortion was illegal in the United States. I saw what happened. I saw the back-alley abortionist set up and do business. And then later I set sentences for women who had been convicted of felonies for having illegal abortions. I did that for 6 years. And I saw the tragedy they caused. We cannot go back to those days.

This is a step—let there be no doubt about it—back to those days. We have before us an imprecise piece of legislation, not just banning D&X but covering many more abortion methods than the S.3's supporters have said they aim to cover. A vote for my amendment will be a vote with the 80 percent of the population who believe in a women's right to choose to protect their health because my amendment is, Senator SANTORUM is correct, in essence a codification of Roe v. Wade.

I am hopeful that those who voted for the Harkin Roe v. Wade amendment will also vote yes on this amendment.

I reserve the remainder of my time, and I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, I appreciate the Senator from California in her direct response to the issue of what this amendment does. She said this codifies Roe v. Wade, but Members have had a chance to voice their opinion on Roe v. Wade. We just had an amendment on that. It is clear where our Members were.

That is not the issue before the Senate. The issue is not, Do we need another vote on Roe v. Wade. We already had one. The question is, Do we want a ban on partial-birth abortion? If you want a ban on partial-birth abortion, you do not get rid of the ban and replace it with nothing. I suggest you cannot vote for the bill on final passage and vote for this because you have just voted to kill the bill and replace it with nothing.

I think the Senator from California would agree with that. She says all we are doing is restating current law. So it does not accomplish anything.

At least the Durbin amendment, arguably, you could make the claim—I don't agree, but you could make the claim that this is accomplishing something. The Senator from Illinois made the claim, and you could stand up with the legislative crafting he did and at least make a claim to that. The Senator from California is not attempting to make a claim to that.

I encourage those who support the ban to vote against something that strips the ban and replaces it with nothing.

The Senator from California said that 80 percent of the public supports

this right. That is not the case. There is simply poll after poll after poll after poll that shows if you understand what Roe v. Wade does—which is abortion any time, for any reason during pregnancy—probably less than 20 percent, in every poll I have seen, certainly less than 25 percent, support that.

In most polls I have seen, less than 20 percent support an absolute right to abortion. But that is Roe v. Wade.

I make the argument that 80 percent oppose Roe v. Wade. There may be a larger percentage. Certainly there is a larger percentage than 20 percent who support some limited right to abortion. But they do not support Roe v. Wade because Roe v. Wade is an absolute right to an abortion at any time during pregnancy. I wanted to make that clear.

If this bill passes, it will go to conference. We will report it back here and hopefully pass it and send it on to the President.

You are right. Several have said we are going to bring it to court. Of course it will go to court. The Supreme Court will have a chance to look at this, to see whether we have jumped through the hoops the Supreme Court made us jump through.

With respect to the amendment of the Senator again, going back to her amendment, I would posit a question. I don't know if anybody has the answer to it. I don't know if there are any statistics. How many human postviability abortions are stopped by Roe v. Wade today?

I believe Roe is an absolute right. I would have some Members who disagree with that, saying there are restrictions. If that is the case, I would certainly like to know how many abortions are blocked in this country because of Roe v. Wade. If there are some, I would certainly be interested in hearing. If the answer is none, then I think my statement stands, which is this is an absolute right to abortion in this country.

With respect to the statement of the Senator from California that I am comparing her amendment to the Dred Scott decision, that is not necessarily correct. I said her amendment is a restatement of Roe. And Roe is like the Dred Scott decision. I repeat, Roe is like the Dred Scott decision because Roe v. Wade put liberty rights ahead of life rights.

As I said, the founding documents stated we are endowed by our creator with certain inalienable liberties. We have ordered liberties—rights: Life, liberty, pursuit of happiness. Not liberty, life, pursuit of happiness. You must have liberty to enjoy life. You must have true liberty to enjoy happiness. They put them in order for a reason.

What Roe v. Wade does is take the liberty rights of an individual and puts them ahead of the life rights of another individual. That is exactly what happened in Dred Scott. They took the liberty rights of the slaveholder and put them ahead of the life rights of the slave.

So, as I said, I am not condemning her amendment or trying to say anything derogatory about what she put on paper. I am not saying that at all. I guess I am saying something derogatory about the decision of Roe v. Wade because I think it gets it wrong. The Supreme Court got it wrong.

The Senator from California said nominees coming before the Congress say Roe v. Wade is settled law. I suspect nominees in the 1850s and 1860, early 1860s, who came before the Senate said the Dred Scott case was settled law. That doesn't mean it was right. That does not mean it is constitutional, the way we look at liberty and the way we look at life, and the way we look at the order of those rights.

I just suggest these are important issues. But I underscore this. If you vote for this amendment, you vote to strip the bill and replace it with nothing. I think the Senator from California would agree with that. It is simply a restatement of law. That doesn't get you to a ban on this procedure and the eventual court challenge that we know is ahead of us on this issue.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. I would like to respond in this way, if I may. The distinguished Senator said that if you vote for my amendment, you don't specifically ban D&X. That is true. You ban all postviability abortions, including all use of D&X postviability.

Let me also reiterate that S. 3 does not specifically ban D&X either. In fact, D&X procedure isn't defined in Senator SANTORUM's bill. The most knowledgeable people in the country have looked at S. 3, the nation's leading obstetricians and gynecologists, and what they tell me is that S. 3 will affect much more than D&X because S. 3's definition is incomplete and flawed. It is not me saying this, it is the American College of Obstetricians and Gynecologists. I have entered their letter into the RECORD.

The Senator could have used that definition in the bill, and then we would know what we were voting on. But he did not. I believe that, from the beginning, it has been intentional not to include a specific medically accurate definition in the bill. The bill is a Trojan horse. It could impact D&E abortions, the most common abortion method used, but the Senator refuses to admit it. The bill violates Roe and other Supreme Court opinions because it doesn't protect the health of the woman.

So what Senator STABENOW, Senator EDWARDS, and I have done in this amendment is say that any abortion after the point of a fetus' viability, as determined by the physician, is illegal—except to protect the health or life of the woman.

My amendment follows the Constitution. It is constitutional.

We just had 52 votes supporting Roe v. Wade. If those 52 votes are real, then

the same senators will vote for my amendment because both Senator SANTORUM and I agree that this codifies *Roe v. Wade*.

I have listened to the debate over D&X as a member of the Judiciary Committee now in three Congresses. In every Congress I have asked: Why don't you put in the medical definition? And in every Congress the other side refuses to put in the medical definition. It makes you suspicious. Why wouldn't their bill use the generally accepted medical definition, unless it truly is a Trojan horse? Unless they are truly trying to mask what they are trying to do, which is to strike at the heart of a woman's right to choose.

I think I will now close off this debate. I urge those who voted on the Harkin amendment to please sustain that vote, to vote consistently, and to vote for the Feinstein-Stabenow-Edwards amendment.

I yield the remainder of my time.

The PRESIDING OFFICER. The time of the Senator has expired.

The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, having now gone through the process of trying to pass a piece of legislation that was found unconstitutional by the Court, let me be very clear, it is not my intention to try to pass another piece of legislation that is going to be unconstitutional. If the Senator is suggesting that my motive here is to pass a piece of legislation and pull one over on the Court, let me make very clear I have no intention of trying to pull one over on anybody. This Court is not a friendly Court on this issue.

I realize I have, and the people who have worked on the drafting of this legislation have, a heavy burden to carry. So I am not being cute. I am not being deceptive. I am simply trying, to the best of my ability, to adequately and sufficiently describe a procedure to include that procedure and exclude all others. Because that is what the Court asked us to do—to define this procedure so specifically as to exclude others.

The Court went through great detail, talking about other procedures where a child could still be alive and portions of that child could be outside the mother. They could be doing another form of abortion and an arm or a leg or some portion of the body could go outside of the mother in the process of killing the child in the womb. So they said the original definition was not clear enough. So we came back and made it crystal clear. We said the person performing the abortion:

... deliberately and intentionally vaginally delivers a living fetus, in the case of head-first presentation the entire fetal head is outside the body of the mother.

You do not do any other procedures where you present the head. You don't do it. I don't think any doctor in the land would say you do any of these other abortions where you present the head. It is just not done.

Second:

... or in the case of breech presentation, any part of the fetal trunk past the navel.

So it is not a hand or a foot or an arm. It is the legs, the feet, the buttocks, and the lower part of the abdomen is outside of the mother, and in most cases the arms—the hands and arms.

That is a pretty clear definition of this procedure and cannot be—from all of the descriptions we have received in testimony—confused with any other procedure.

The AMA board of trustees said:

The procedure is ethically different from other destructive abortion techniques because the fetus, normally 20 weeks or longer in gestation, is killed outside of the womb.

These other procedures are done inside the womb. That doesn't mean maybe a portion of the baby may be outside. But it is killed by the doctor inside the womb.

The "partial-birth" gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own baby.

This is the American Medical Association. They recognize that this is different. Courts say they may recognize it is different, but you haven't adequately defined it. Now we have adequately defined it. We have said the entire baby, basically, except for the head is outside of the mother. That is a pretty clear definition.

This idea that it is somehow vague and we have not addressed that issue I reject. We have addressed that issue. We have gone through the health exceptions, the Senator from California did. And I will not argue against myself. I think we have been successful in stating that we have rebutted the health exception by the stipulations that we have made in the bill.

Let me remind Members this is a vote to excise the underlying bill, eliminate it, substitute for it, strike it, and insert existing law—nothing, no change. This bill would have the effect of being on the floor of the Senate and have no meaning whatsoever. It simply is a restatement of *Roe v. Wade*. If you are for eliminating this procedure, you cannot vote for this amendment. It doesn't even try to do anything else. At least the Durbin amendment was a substitute. You eliminated the partial-birth. You could make the argument that we were eliminating all postviability abortions.

The Senator from California says this wouldn't change the law one bit—not one bit. All you are doing is killing the underlying bill and replacing it with nothing. That means you are voting against the bill.

I hope a good, strong majority of Members will vote for this bill and not simply strip this bill and replace it with nothing because that would be a pretty clear sign they are not in favor of the bill.

I yield the remainder of my time.

Mr. LAUTENBERG. Mr. President, earlier this evening I pointed out that the junior Senator from Pennsylvania

continues to refer to a September 15, 1996 article in the *Bergen Record* that contained incorrect information about the number and type of abortions performed at Metropolitan Medical Associates, MMA. After I spoke on the floor he offered the following rebuttal, which I am paraphrasing because a formal transcript isn't available yet:

I want to counter a couple of things to the Senator from—the Senator from New Jersey says I keep referring to the *Bergen Record* I can just say that the *Bergen Record* never did print a retraction to the story and claims that their investigative reporter was not wrong. There is an honest disagreement. The paper stands by their story and has not printed a retraction and said publicly that they have no intention of doing so. So just because Senator LAUTENBERG found somebody who disagrees with the story doesn't mean it isn't true.

It so happens that the "somebody" who "disagreed" with the above mentioned *Bergen Record* article was the management of Metropolitan Medical Associates.

I ask unanimous consent that the full text of the letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

DEAR MR. RITT. We, the physicians and administration of Metropolitan Medical Associates, are deeply concerned about the many inaccuracies in the article printed in September 15, 1996 titled "The Facts on Partial-Birth Abortions".

The article incorrectly asserts that MMA "performs 3,000 abortions a year on fetuses between 20 and 24 weeks, of which at least half are by intact dilation and evacuation." This claim is false as is shown in reports to the New Jersey Department of Health and documents submitted semiannually to the New Jersey State Board of Medical Examiners. These statistics show that the total annual number of abortions for the period between 12 and 23.3 weeks is about 4,000, with the majority of these procedures being between 12 and 16 weeks. The intact D&E procedure (erroneously labeled by abortion opponents as "partial birth abortion") is used only in a small percentage of cases between 20 and 23.3 weeks, when a physician determines that it is the safest method available for the woman involved. Certainly, the number of intact D&E procedures performed is nowhere near the 1,500 estimated in your article. MMA perform no third trimester abortions, where the State is permitted to ban abortions except in cases of life and health endangerment.

Second, the article erroneously states that most women undergoing intact D&E procedures have no medical reason for termination. The article then misquotes a physician from our clinic stating that "most are Medicaid patients . . . and most are for elective, not medical, reasons . . . Most are teenagers." This is a misrepresentation of the information provided to the reporter. Consistent with *Roe v. Wade* and New Jersey State law, we do not record a woman's specific reason for having an abortion. However, all procedures for our Medicaid patients are certified as medically necessary as required by the New Jersey Department of Human Services.

Because of the sensitive and controversial nature of the abortion issue, we feel that it is critically important to set the record straight.

THE MANAGEMENT OF  
METROPOLITAN MEDICAL ASSOCIATES.

Mr. SANTORUM. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the amendment. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. FRIST. I announce that the Senator from Kentucky (Mr. MCCONNELL) and the Senator from Oklahoma (Mr. NICKLES) are necessarily absent.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from North Carolina (Mr. EDWARDS), and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) would vote "aye".

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 35, nays 60, as follows:

[Rollcall Vote No. 49 Leg.]

YEAS—35

Akaka	Dodd	Levin
Baucus	Durbin	Lieberman
Bayh	Feinstein	Lincoln
Bingaman	Graham (FL)	Mikulski
Boxer	Harkin	Murray
Cantwell	Inouye	Nelson (FL)
Carper	Jeffords	Reed
Chafee	Johnson	Sarbanes
Clinton	Kennedy	Schumer
Corzine	Kohl	Stabenow
Daschle	Lautenberg	Wyden
Dayton	Leahy	

NAYS—60

Alexander	Dole	McCain
Allard	Domenici	Miller
Allen	Dorgan	Murkowski
Bennett	Ensign	Nelson (NE)
Bond	Enzi	Pryor
Breaux	Feingold	Reid
Brownback	Fitzgerald	Roberts
Bunning	Frist	Rockefeller
Burns	Graham (SC)	Santorum
Byrd	Grassley	Sessions
Campbell	Gregg	Shelby
Chambliss	Hagel	Smith
Cochran	Hatch	Snowe
Coleman	Hollings	Specter
Collins	Hutchison	Stevens
Conrad	Inhofe	Sununu
Cornyn	Kyl	Talent
Craig	Landrieu	Thomas
Crapo	Lott	Voinovich
DeWine	Lugar	Warner

NOT VOTING—5

Biden	Kerry	Nickles
Edwards	McConnell	

The amendment (No. 261) was rejected.

Mr. JEFFORDS. Mr. President, I rise today to express my concerns with S. 3, the "so-called" Partial-Birth Abortion Ban Act of 2003.

Shortly before my election to Congress, the Supreme Court made its landmark decision in *Roe v. Wade* to constitutionally protect a woman's right to choose. During my time in Congress, there has been no other issue that has engendered more passion or debate than this decision.

While I ardently support a woman's right to choose, I have spent my time

in Congress trying to ensure that abortions are as rare as possible. We can reduce the number of abortions through strong support of Title X, encouraging adoption, educating on the use of emergency contraceptives, and requiring insurance policies to cover contraceptives. In that manner we can ensure that women control their own reproductive destiny.

The "so-called" Partial-Birth Abortion Ban Act is one of many attempts to overtly or covertly undermine and overturn the constitutional right afforded women in *Roe v. Wade*. It is imperative that Congress not be the entity making a woman's decision on this most personal of issues. This is a decision to be made by a woman in consultation with her doctor and others she chooses to include. The bill we consider today will place the Federal Government in the middle of the most intimate of discussions between a woman and her physician.

I would like to take this opportunity to discuss with my colleagues the constitutional deficiencies contained in this legislation. Let me start with the title of this legislation, the Partial-Birth Abortion Ban Act.

Ask any doctor if they have ever performed a partial-birth abortion and the response is no such medical term exists. So what are we banning? For that answer we turn to the definition of a partial birth-abortion contained in the bill. What we find is a very broad—overly broad—definition that is strikingly similar to the over broad definition found unconstitutional by the United States Supreme Court in the *Carhart* decision.

You will hear my colleagues say this definition is limited to late term abortions, or abortions performed during the third trimester or postviability. However, if you examine the definition contained in this legislation, its breadth would cover safe abortion procedures that are used in the second trimester or previability of the fetus. Why have my colleagues chosen to use a definition that is over broad?

Enactment of this legislation, if upheld, would erode the *Roe* decision by banning an abortion procedure that is used previability of the fetus. Thus, this legislation can be clearly seen as an attempt to undermine the legal underpinnings of the *Roe* decision.

Another critical constitutional deficiency in this legislation is the absence of a health exception for the mother. The original *Roe* decision, and most recently the Supreme Court *Carhart* decision, required that any ban on an abortion procedure have an exception for the health of the mother. The proponents of this legislation will point to the pages of findings contained in the legislation as to why it is unnecessary to have an exception for the health of the mother. There are two problems with this rationale, first the Supreme Court has shown an unwillingness to consider Congressional findings of fact in recent decisions, such as *Morrison*,

*VAWA*, and *Kimmel*, *ADEA*. Second, during the debate on the *Carhart* decision, the Supreme Court had knowledge of these findings, yet still ruled that because the Nebraska statute did not have an explicit health exception the law was unconstitutional.

So why do my colleagues seek to move this legislation forward even with these glaring constitutional deficiencies? I can reach no other conclusion, based on the facts, than it is an attempt to erode the constitutional protections provided to women in the *Roe* decision. Mark my words, this legislation is one step in the process of attempting to overturn the *Roe* decision, and I will fight that outcome every step of the way.

Mr. FEINGOLD. Mr. President, I will oppose S. 3, the Partial Birth Abortion Ban Act, and instead will support a constitutionally sound alternative.

Mr. President, I understand that people on all sides of this issue hold sincere and strongly held views. I respect the deeply held views of those who oppose abortion under any circumstances. Like most Americans, I would prefer to live in a world where abortion is unnecessary. I support efforts to reduce the number of abortions through family planning and counseling to avoid unintended pregnancies.

I have always believed that the decisions in this area are best handled by the individuals involved, in consultation with their doctors and guided by their own beliefs and unique circumstances, rather than by government mandates. I support *Roe v. Wade*, which means that I agree that government can restrict abortions when there is a compelling State interest at stake. I have previously voted to ban postviability abortions unless the woman's life is at risk or the procedure is necessary to protect the woman from grievous injury to her physical health, which is why I will again be voting for the Durbin alternative to S. 3.

Since the Senate last debated this issue in 1999, the Supreme Court has ruled on a statute that is almost identical to the language of the bill before us today. In June 2000, in *Stenberg v. Carhart*, the Court held that the State law, a Nebraska statute, banning so-called partial birth abortions was unconstitutional. The Court found that the law was so vague and overbroad that it posed an undue burden on a woman's right to choose by encompassing safe and common abortion procedures used prior to viability. The Court also found that, even in banning abortion procedures after viability, the State must include an exception for the health of the mother.

The Senate now has the Supreme Court's guidance, as we consider legislation regulating late-term abortions. This is guidance that the Senate did not have when we previously debated legislation like S. 3. I feel very strongly that Congress should seek to regulate abortions only within the constitutional parameters set forth by the

U.S. Supreme Court. Yet in light of the Supreme Court's 2000 decision, the bill before us today, S. 3, is unconstitutional on its face. It is so vague and overbroad that it, too, could unduly burden a woman's right to choose prior to viability.

I might add that I would have preferred that S. 3 had been first reviewed by the Judiciary Committee on which I serve, rather than having been brought straight to the Senate floor. The Judiciary Committee should hold hearings and review the bill prior to its consideration by the full Senate. This is especially important because the Supreme Court has now struck down a law that is almost identical to the bill before us today. There have been no hearings in the Senate Judiciary Committee to consider this bill since the Court's *Carhart* decision. Perhaps, if the Judiciary Committee had more thoroughly reviewed this legislation, it would have reported a bill that could have withstood constitutional scrutiny.

The Durbin alternative amendment would ban abortions by any method after a fetus is viable, except when serious medical situations dictate otherwise. I support the Durbin amendment because it recognizes that, in some circumstances, women suffer from severely debilitating diseases specifically caused or exacerbated by a pregnancy, or are unable to obtain necessary treatment for a life-threatening condition while carrying a pregnancy to term. The exceptions in the Durbin amendment are limited to conditions for which termination of the pregnancy is medically indicated. It correctly retains the option of abortion for mothers facing extraordinary medical conditions—such as breast cancer, preeclampsia, uterine rupture, or non-Hodgkin's lymphoma—for which termination of the pregnancy may be recommended by the woman's physician due to the risk of grievous injury to the mother's physical health or life. By clearly limiting the medical circumstances where postviability abortions are permitted, the Durbin amendment protects fetal life in cases where the mother's health is not at such high risk. In contrast, S. 3 provides no exception at all to protect the health of the mother.

I understand that the *Carhart* decision did not define the health exception or limit it to grievous physical injury. I recognize that it is not clear whether the narrow health exception contained in the Durbin amendment would be upheld, if it comes before the Court. To date, I have supported this narrow definition of the exception necessary to protect the physical health of the woman because I believe that it strikes the right balance between preserving a woman's right to choose and concerns that abortion procedures late in pregnancy should only be used in rare circumstances. I voted for the Daschle amendment in the 105th Congress and the Durbin amendment in the 106th Congress and again in this Congress, because they reflect this position.

The Durbin amendment properly seeks to ensure that the exceptions to the ban on postviability abortions are properly exercised. It requires a second doctor to certify the medical need for a postviability abortion. The second doctor requirement will ensure that postviability abortions take place only when continuing the pregnancy would prevent the woman from receiving treatment for a life-threatening condition related to her physical health or would cause a severely debilitating disease or impairment to her physical health.

The Durbin alternative strikes the right balance between protecting women's constitutional right to choose and the right of the state to protect future life after viability. It protects a woman's physical health throughout her pregnancy, while insisting that only grievous, medically diagnosable conditions justify aborting a viable fetus. Both fetal viability and women's health would have been determined by the physician's best medical judgment, as they must be, in concurrence with another physician.

I hope that, as the Senate considers this bill and the proposed amendments, we do so in full recognition of the strong feelings about this issue on all sides. We should respect these differences and strive to legislate in this area in a way that is constitutionally sound. That is why I will oppose S. 3 and instead will support the Durbin substitute amendment.

Mr. KENNEDY. Mr. President, the Republican leadership is wrong to ask the Senate to support legislation that has been ruled unconstitutional by numerous courts. Since the last debate in the Senate in 1999, the Supreme Court found a very similar law enacted by the State of Nebraska to be unconstitutional. This bill is unconstitutional as well.

The Republican leadership has chosen to make as its top priority a flatly unconstitutional piece of legislation at a time when so many families across the country are facing economic hardship, when communities are struggling to deal with homeland security needs, and being forced by state budget crises to cut back on education and health care.

Because of the Republican leadership's decision to act on this bill, we will do nothing this week to provide an economic stimulus plan for the Nation's families and workers. We will do nothing to provide new funding for communities struggling to protect themselves from new terrorist attacks. We will do nothing to help the millions of uninsured children in this country get the health care they need. We will do nothing for schools struggling to meet higher standards under the No Child Left Behind Act. We will do nothing to help college students struggling to pay tuition and relieve their debt. We will do nothing to help the millions of families across the Nation who are worried about their economic future.

Let us be clear as to what this bill does not do.

This bill does not stop one single abortion. The proponents of this bill distort the law and the position of our side with inflammatory rhetoric, while advocating a bill that will not stop one single abortion. This bill purports to prohibit a medical procedure that is only used in rare and dire circumstances. It is not used on healthy mothers carrying healthy babies. And if this bill is passed, a doctor could be forced to perform another, more dangerous procedure if it becomes necessary to terminate a pregnancy to protect the life and health of a woman.

This bill does not protect the health of the mother. Nowhere is there language that would allow a doctor to take the health of the mother into consideration, even if she were to suffer brain damage or otherwise be permanently impaired if the pregnancy continued.

And this bill is not needed to protect the life of babies who could live outside the mother's womb because those babies are already protected under the law of the land. In *Roe v. Wade*, the Supreme Court specifically held that unless there was a threat to the life or health of a woman, she did not have a constitutional right to terminate a pregnancy after viability.

So what is this legislation all about? It is about politics and inflammatory language and hot-button topics. But it is not about stopping abortion.

Because of the sound and fury and high emotion that surrounds this issue, I would like to make my personal views clear. I am pro-choice. But I believe that abortions should be rare. I believe that we have an obligation to create an economy and the necessary support systems to make it easier for women to choose to bring children into the world. If the proponents of this legislation were serious about limiting the number of abortions in this country, then we would be debating access to health care, quality education, the minimum wage, and the other issues of economic security that are so important to parents bringing up children. But those issues are not on the Republican leadership's agenda.

Instead, for rank political reasons, we are here this week debating so-called partial birth abortion. I do not believe that it is the role of the United States Senate to interfere with or regulate the kind of medical advice that a doctor can give to a patient. And that doctor/patient relationship and the protection of the health of the mother is really what is in jeopardy with this legislation.

From the time of the 1973 decision in *Roe v. Wade* through the *Stenberg v. Carhart* decision in 2000, the Supreme Court of the United States has made clear that the Constitution allows states to restrict post-viability abortions as long as there are protections for the life and health of the mother.

Indeed, 41 states already ban post-viability abortions, regardless of the procedure used. My own State of Massachusetts prohibits these abortions except when the woman's life is in danger or the continuation of the pregnancy would impose a substantial risk of grave impairment of the woman's health. I would vote for a post-viability ban that protects women's life and health today.

The role of the United States Senate is to protect and defend the Constitution of the United States. Each of us in this body has taken that oath of office. And that oath of office and the Constitution require me to oppose this legislation.

This bill unconstitutionally seeks to restrict abortions in cases before viability and it does not provide an exception to protect the mother's health after viability. It also impermissibly attempts to interfere with the doctor/patient relationship. For all of these reasons, I oppose this bill.

Ms. SNOWE. Mr. President, I rise today in support of the amendment offered by Senator MURRAY, which would ensure that women have access to preventive health services—services like contraceptive coverage, and emergency contraception—to try to reduce the overall need for abortion by reducing the number of unintended pregnancies in this country. Furthermore, I support this amendment because just as critical to ensuring that women have the right to plan their families in ensuring that uninsured pregnant women have access to the care they need to have healthy pregnancies and pre-natal care.

The composition of this amendment provides women with the ability to have healthy families—which is what family planning is all about. Key to this effort is access to prescription contraceptives—including the most commonly used contraception by far, oral contraceptives. Access to these prescriptions are guaranteed under this amendment which includes legislation I have authored each year since 1997, the Equity in Prescription Insurance and Contraceptive Coverage Act.

I have led the fight for equitable coverage of contraceptives after having found out that in 1994, according to an Alan Guttmacher Institute, AGI, report, 49 percent of all large-group health plans and 49 percent of preferred provide organizations, PPOs, did not routinely cover all five methods of reversible contraceptives. That report led me to introducing EPICC for the first time in 1997. And while the statistics have improved there is more work to be done. According to a 2001 Kaiser Family Foundation report, while 98 percent of employers offer prescription drug coverage in general, still only 64 percent offer coverage of oral contraceptives. Again, this category is the most popular of all prescription contraceptives.

It's been 6 long years now since I first introduced EPICC, and according to an AGI report, in each of those 6

years women have spent over \$350 per year on prescription oral contraceptives—for a total of over \$2,100. Why? Because many insurance companies that already cover other prescription drugs do not cover prescription contraceptives. How can we continue to deny this fundamental coverage for prescription drugs that are a key component in women's reproductive health?

And that's no exaggeration, either. Take for example the known health benefits of oral contraceptives, which have been in use for over 40 years now. First, the pill has been demonstrated to lower the risk of pelvic inflammatory disease, and has been linked to reducing the risk of ovarian, endometrial and uterine cancers. And, the estrogen in the pill facilitates maintaining bone-density—a key component in the effort to fight osteoporosis and the debilitating and often life threatening results of bone fractures which are all too often faced by older women.

But if that's not enough, just consider the importance and impact of prescription contraceptives in context with what we're debating on the Senate floor this week. No matter where you are on the issues . . . no matter what your political stripe—there isn't a U.S. Senator who wouldn't want to reduce the number of abortions in America. I would guarantee that.

Knowing that approximately 50 percent of all pregnancies in the U.S. each year are unintended—the highest of all industrial nations—shouldn't that be a compelling reason to support this amendment, no matter which side of the abortion debate you're on? Indeed, I along with Senator REID—who has long been a Democrat lead on my legislation—have long believed the EPICC not only makes sense in terms of the cost of contraceptives for women, but also as a means of bridging, at least in some small way, the pro-choice pro-life chasm by helping prevent unintended pregnancies and thereby also prevent abortions.

Because, according to the Institute of Medicine Committee on Unintended Pregnancy, one of the reasons for the high rates of unintended pregnancies in the U.S. has been the failure of private health insurance to cover contraceptives—and half of these pregnancies end in abortion. Indeed, we know that there are 3 million unintended pregnancies every year in the United States. We also know that almost half of those pregnancies result from just the three million women who do not use contraceptives—while 39 million contraceptive users account for the other 53 percent of unintended pregnancies—most of which resulted from inconsistent or incorrect use.

In other words, when used properly, contraceptives work. They prevent unintended pregnancies—we know that. Yet, there are opponents of my legislation, regardless of what we know about what access to contraceptives does for both the health of women and their

children by having pregnancies better planned, and better spaced. Why? Well, it certainly shouldn't be cost.

After all, a January 2001, OPM statement on EPICC-like coverage of federal employees under the FEHBP found no effect on premiums whatsoever since implementation in 1998. Let me repeat—no effect. In fact, some—like the Alan Guttmacher Institute—argue that improved access to and use of contraception nationwide would save insurers and society money by preventing unintended pregnancies, as insurers generally pay pregnancy-related medical costs—which can range anywhere from \$5,000 to almost \$10,000. Improved access to contraception would eliminate these costs and would reduce the costs to both employers and insurers.

In 1999, the New York Business Group on Health released estimates calculated by Pharmacia and Upjohn Pharmaceuticals on the cost to employers of providing contraceptive coverage. Taking into account the cost of unintended pregnancies, Pharmacia and Upjohn estimated an overall savings of \$40 per employee when contraception is a covered benefit. An estimate that is supported by a study that estimated that not covering contraceptives in employee health plans would actually cost employers 15-17 percent more than providing the coverage due to the other pregnancy related costs.

Now, no one is saying that access to prescription contraceptives will solve the most vexing of social problems, but if access helps women plan their pregnancies, and includes in this planning assurances that they are in good health and that they will seek prenatal care, and that they have the financial stability to provide for their child—then, clearly, contraceptive coverage would significantly help improve the lives of millions of mothers and their future children.

While the facts demonstrate that this amendment is something that every senator regardless of their position on abortion should support it as it will reduce the instance of abortion while improving the health of women and their future children, I must also say that Senator MURRAY's amendment—her prevention package—even in its totality, is not enough to fix the problems in the underlying bill offered by my friend, Senator SANTORUM, which would ban late term abortions without providing for any clear exception to protect the life or the physical health of the mother. This is completely contrary to the 22-year-old landmark Supreme Court decision in *Roe v. Wade* that held that women have a constitutional right to an abortion, but after viability, States could ban abortions—as long as they allowed exceptions for cases in which a woman's life or health is endangered.

And there should be no doubt—the underlying legislation puts women's lives and health on the line. If we vote this week to send this legislation to the President without additional changes beyond the inclusion of this

amendment—which beyond the guaranteed access to prescription contraceptives provides information about emergency contraceptives for women and doctors, access to emergency contraceptives for sexual assault victims and finally, access to health care for pregnant uninsured women—we will bear the burden of putting women's lives and health at risk by substituting the judgement of politicians for the judgement of medical doctors. And that just isn't right.

The bottom line is, women should have control over their reproductive health—whether it be through access to contraceptives, access to health care when they are pregnant or through preserving the right to choose which should include the right to terminate a pregnancy post-viability if a doctor determines that continuance of the pregnancy would result in a grievous injury to the woman's physical health.

After all, allowing women to decide what is in their best interests serves not only the woman's overall health, but their children's and their future children's health. This goal will be furthered by the amendment offered by Senator MURRAY and other amendments expected to be offered later this week by others which will ensure that we are following the guidelines laid out for us in the landmark *Roe v. Wade* decision ensuring that a woman's physical health is paramount in these decisions.

In the meantime, I urge my colleagues to join us in supporting this important amendment.

#### EXECUTIVE SESSION

#### NOMINATION OF WILLIAM D. QUARLES, JR., OF MARYLAND, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The assistant legislative clerk read the nomination of William D. Quarles, Jr., of Maryland, to be U.S. District Judge for the District of Maryland.

Mr. LEAHY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of William D. Quarles, Jr., of Maryland, to be U.S. District Judge for the District of Maryland. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The senior assistant bill clerk called the roll.

Mr. FRIST. I announce that the Senator from Missouri (Mr. BOND), the

Senator from New Mexico (Mr. DOMENICI), the Senator from Kentucky (Mr. MCCONNELL), and the Senator from Oklahoma (Mr. NICKLES) are necessarily absent.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from North Dakota (Mr. CONRAD), the Senator from South Dakota (Mr. DASCHLE), the Senator from North Carolina (Mr. EDWARDS), and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) would vote "aye".

The PRESIDING OFFICER (Mr. COLEMAN). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 91, nays 0, as follows:

#### [Rollcall Vote No. 50 Ex.]

#### YEAS—91

Akaka	Dorgan	Lugar
Alexander	Durbin	McCain
Allard	Ensign	Mikulski
Allen	Enzi	Miller
Baucus	Feingold	Murkowski
Bayh	Feinstein	Murray
Bennett	Fitzgerald	Nelson (FL)
Bingaman	Frist	Nelson (NE)
Boxer	Graham (FL)	Pryor
Breaux	Graham (SC)	Reed
Brownback	Grassley	Reid
Bunning	Gregg	Roberts
Burns	Hagel	Rockefeller
Byrd	Harkin	Santorum
Campbell	Hatch	Sarbanes
Cantwell	Hollings	Schumer
Carper	Hutchison	Sessions
Chafee	Inhofe	Shelby
Chambliss	Inouye	Smith
Clinton	Jeffords	Snowe
Cochran	Johnson	Specter
Coleman	Kennedy	Stabenow
Collins	Kohl	Stevens
Cornyn	Kyl	Sununu
Corzine	Landrieu	Talent
Craig	Lautenberg	Thomas
Crapo	Leahy	Levin
Dayton	Levin	Lieberman
DeWine	Lieberman	Lincoln
Dodd	Lincoln	Lott
Dole	Lott	

#### NOT VOTING—9

Biden	Daschle	Kerry
Bond	Domenici	McConnell
Conrad	Edwards	Nickles

The nomination was confirmed.

The PRESIDING OFFICER. The President will be notified of the Senate's action.

#### LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will return to legislative session.

Mr. SANTORUM. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SANTORUM. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### PARTIAL-BIRTH ABORTION BAN ACT OF 2003—Continued

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

#### UNANIMOUS CONSENT AGREEMENT—EXECUTIVE CALENDAR NOS. 36, 52, AND 54

Mr. SANTORUM. Mr. President, as in executive session, I ask unanimous consent that on Thursday, following the cloture vote with respect to the Estrada nomination, regardless of the outcome, the Senate proceed to the consideration of Executive Calendar No. 36, Jay S. Bybee, to be U.S. Circuit Judge for the Ninth Circuit; provided further that there be 6 hours for debate equally divided in the usual form, and that following the use or yielding back of the time, the Senate proceed to a vote on the confirmation of the nomination. I further ask consent that immediately following the vote, the Senate immediately proceed to a vote on the confirmation of Executive Calendar No. 52, the nomination of William Steele, to be U.S. District Judge for the Southern District of Alabama, to be immediately followed by a vote on the confirmation of Executive Calendar No. 54, the nomination of J. Daniel Breen to be U.S. District Judge for the Western District of Tennessee; provided further that following those votes, the President be immediately notified of the Senate's action, and the Senate then resume legislative session, with all the above occurring without intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Democratic whip.

#### COMPLETING ACTION ON S. 3

Mr. REID. Mr. President, if everyone uses all the time, tomorrow will be a long day. We do not know how much time everyone will use, but at least we have completed this very difficult legislation today. We have a circuit judge the leader has been asking for, and we have two more district court judges. So I think we have accomplished quite a bit this week.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. I thank the Senator from Nevada. Through this entire week, he has been working with this side in good faith to move forward this legislation. He did an outstanding job, in my opinion, in helping us proceed through this process. I want to thank him for the excellent work and for his willingness to move at times this heated and controversial discussion on the bill to this process where we are now poised to pass this legislation tomorrow morning. Hopefully, it will pass by a very strong vote, and we will get the bill into conference and get it back. I think the House will bring this up in a