

The Freedom of Choice Act: Radical Attempt to Prematurely End Debate over Abortion

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Nearly two years ago, the public debate over abortion was irrevocably altered. In the landmark *Gonzales v. Carhart* decision, the U.S. Supreme Court upheld the federal ban on partial-birth abortion and, more importantly, abdicated, at least in part, its role as the “National Abortion Control Board.” Miserable

In its decision, the Court signaled an increasing willingness to blunt attempts by abortion extremists to use the federal courts to unilaterally impose their radical agenda. The immediate reaction of activists and some members of Congress confirmed this critical shift.

Abortion advocates, including some members of Congress, hastily recycled the hyperbolic rhetoric of the 1970s. In one public statement after another, they condemned the decision and the Court, predicting--like modern-day Chicken Littles--that the outlawing of abortion was at hand and that women were about to be relegated to “second-class” status. For example, then-Presidential candidate Barack Obama stated, “I am extremely concerned that this ruling will embolden state legislatures to enact further measures to restrict a woman’s right to choose, and that the conservative Supreme Court justices will look for other opportunities to erode *Roe v. Wade*, which is established federal law and a matter of equal rights for women.”

Recognizing that the federal courts would no longer be a reliable and viable tool for actualizing their demands for unlimited and unregulated abortion, abortion supporters began to look elsewhere for the means to advance their radical agenda.

In late April 2007, Obama along with Senator Hillary Clinton and others, immediately re-introduced the federal *Freedom of Choice Act* (FOCA), a radical attempt to enshrine abortion-on-demand into American law, to sweep aside existing laws that the majority of Americans support-- such as requirements that licensed physicians perform abortions, fully-informed consent, and parental involvement-- and to prevent states from enacting similar protective measures in the future.

More importantly, FOCA is a cynical attempt to prematurely end the debate over abortion and declare “victory” in the face of mounting evidence that (a) the American public does not support the vast majority of abortions being performed in the U.S. each year and (b) abortion has a substantial negative impact on women.

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Thirty-five years after *Roe*, abortion supporters are dismayed that abortion remains a divisive issue and that their radical agenda has not been submissively accepted by the American public. Their weapon to impose their will on the unwilling American public is FOCA.

History of FOCA

Even before *Roe v. Wade* was decided in 1973, there were attempts by Congress to legalize abortion. For example in 1970, Senator Robert Packwood introduced the *National Abortion Act*, which sought to legalize abortion nationwide and preempt state laws restricting or regulating abortion.² Although the *National Abortion Act* was unsuccessful, Senator Packwood later joined with Senator Alan Cranston to introduce the inaugural version of the *Freedom of Choice Act* (FOCA) in 1989.³

FOCA was introduced at a time when some in Congress feared that *Roe v. Wade* might imminently be overturned (as a result of on-going litigation over abortion-related laws and restrictions including those at issue in *Planned Parenthood v. Casey*), and were seeking a means to prevent states from enacting laws prohibiting or regulating abortion. FOCA's main goals were to create a "fundamental right to abortion" and to eliminate any federal, state, or local government action (including the enactment of abortion-related legislation) that limited or "impeded" access to abortion.

Relying on specific portions of the Supreme Court's decision in *Roe*, abortion supporters argued that FOCA would protect a woman's right to an abortion prior to "fetal viability or at any time...to protect the life or health of the woman" and that states could, within enumerated limits, enact protective laws that did not interfere with a woman's right to abortion.

Over the next several years, substantially-similar versions of FOCA were repeatedly re-introduced in Congress until 1993, when the provision allowing states to enact protective legislation was removed. The 1993 version of FOCA instead included criticism of the Supreme Court for abandoning the "strict scrutiny standard" (of reviewing abortion-related laws) for the "undue burden" standard that had recently been announced in *Planned Parenthood v. Casey*.⁴ Notably, under the new "undue burden" standard, requirements such as informed consent, reflection periods, and parental involvement for abortion were deemed constitutional.

After its subsequent re-introduction in 1995, FOCA was not again introduced until 2004 when it was offered by Representative Jerrold Nadler in the House of Representatives and Senator Barbara Boxer in the Senate. In her accompanying press release, Senator Boxer explained that FOCA would "supersede all other

abortion related laws, regulations or local ordinances⁵," which included informed consent laws and any health and safety regulations imposed on abortion clinics.

The most recent version of FOCA was introduced in April 2007, following the Supreme Court's decision in *Gonzales v. Carhart*, upholding the federal ban on partial-birth abortion. This most-recent version was substantially similar to the 2004 version, but also included a section deriding the Supreme Court's decision in *Gonzalez*. Specifically, FOCA mischaracterized the prohibition of partial-birth abortion as a "legal and practical" barrier that hindered "the ability of women to participate in the economic and social life of the Nation."⁶ Further, drawing upon "abortion mythology," this version of FOCA exaggerated the numbers of Americans who availed themselves of illegal abortions in the late 1800's and early 1900's, inflating the actual figure of less than one-hundred thousand to "over one-million."⁷

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Although expressing as its goal the simple codification of *Roe*, FOCA also expressly provided that it would apply "to every Federal, State, and local statute, ordinance, regulation, administrative order, decision, policy, practice, or other action enacted, adopted, or implemented before, on, or after the date of enactment."⁸ As Senator Boxer eloquently explained in 2004, "FOCA [will]

supersede all other laws," especially those that the Supreme Court has held to be constitutional under *Roe* and its progeny.⁹

What Does FOCA Say?

FOCA provides that "[i]t is the policy of the United States that every woman has the fundamental right to choose to bear a child, to terminate a pregnancy prior to fetal viability, or to terminate a pregnancy after fetal viability when necessary to protect the life or health of the woman."

Further, FOCA would specifically invalidate any "statute, ordinance, regulation, administrative order, decision, policy, practice, or other action" of any federal, state, or local government or governmental official (or any person acting under government authority) that would "deny or interfere with a woman's right to choose" abortion, or that would "discriminate against the exercise of the right . . . in the regulation or provision of benefits, facilities, services, or information."

Clearly, its reach is very broad. This single piece of legislation would apply to any federal or state law "enacted, adopted, or implemented before, on, or after the date of [its] enactment."

What is the Legal Impact of FOCA?

FOCA creates a new and dangerously radical "right." It establishes the right to abortion as a "fundamental right," elevating it to the same status as the right to vote and the right to free speech (which, unlike the abortion license, are specifically mentioned in the U.S. Constitution). Critically, in *Roe v. Wade*, the Supreme Court did not define abortion as a "fundamental right."¹⁰ And with the exception of one justice's attempt in 1983 to distort the Court's abortion jurisprudence by framing the abortion license as a "fundamental right," the Court has not subsequently defined abortion as a "fundamental right." Thus, FOCA goes beyond any Supreme Court decision in enshrining unlimited abortion-on-demand into American law.

FOCA would also subject laws regulating or even touching on abortion to judicial review using a "strict scrutiny" framework of analysis. This is the highest standard American courts can apply and is typically reserved for laws impacting such fundamental rights as the right to free speech and the right to vote. Prior to the Supreme Court's 1992 decision in *Planned Parenthood v. Casey* (which substituted the "undue burden" standard for the more stringent "strict scrutiny" analysis), abortion-related laws (such parental involvement for minors and minimum health and safety standards for abortion clinics) were almost uniformly struck down under "strict scrutiny" analysis. If enacted, FOCA would retroactively be

applied to all federal and state abortion-related laws and would result in their invalidation.

What is the Practical Impact of FOCA?

- ✓ In elevating abortion to a fundamental right, FOCA poses an undeniable and irreparable danger to common-sense laws supported by a majority of Americans. Among the more than 550 federal and state laws that FOCA would nullify are:
- ✓ *Partial Birth Abortion Ban Act of 2003*
- ✓ *Hyde Amendment* (restricting taxpayer funding of abortions)
- ✓ Restrictions on abortions performed at military hospitals
- ✓ Restrictions on insurance coverage for abortion for federal employees
- ✓ Informed consent laws
- ✓ Waiting periods
- ✓ Parental consent and notification laws
- ✓ Health and safety regulations for abortion clinics
- ✓ Requirements that licensed physicians perform abortions
- ✓ "Delayed enforcement" laws (banning abortion when *Roe v. Wade* is overturned and/or the authority to restrict abortion is returned to the states)
- ✓ Bans on partial-birth abortion
- ✓ Bans on abortion after viability. FOCA's apparent attempt to limit post-viability abortions is illusory. Under FOCA, post-viability abortions are expressly permitted to protect the woman's "health." Within the context of abortion, "health" has been interpreted so broadly that FOCA would not actually proscribe any abortion before or after viability.
- ✓ Limits on public funding for elective abortions (thus, making American taxpayers fund a procedure that many find morally objectionable)
- ✓ Limits on the use of public facilities (such as public hospitals and medical schools at state universities) for abortions
- ✓ State and federal legal protections for individual healthcare providers who decline to participate in abortions
- ✓ Legal protections for Catholic and other religiously-affiliated hospitals who, while

providing care to millions of poor and uninsured Americans, refuse to allow abortions within their facilities

Notably, pro-abortion groups do not deny FOCA's draconian impact. For example, Planned Parenthood has explained, "FOCA will supercede anti-choice laws that restrict the right to choose, including laws that prohibit the public funding of abortions for poor women or counseling and referrals for abortions. Additionally, FOCA will prohibit onerous restrictions on a woman's right to choose, such as mandated delays and targeted and medically unnecessary regulations."

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Conclusion

Clearly FOCA will not make abortion safe or rare – on the contrary, it will actively promote abortion

and do nothing to ensure its safety – so, abortion advocates' unrelenting campaign to enact FOCA is a "wake-up call" to all Americans. If implemented, FOCA would invalidate common-sense, protective laws that the majority of Americans support. It will not protect or empower women. Instead, it would protect and promote the abortion industry, sacrifice women and their health to a radical political ideology, and

silence the voices of everyday Americans who want to engage in a meaningful public discussion over the availability, safety, and even desirability of abortion.

State FOCAs

Seven states have enacted versions of FOCA, further entrenching and protecting the "right to abortion" in those states: California, Connecticut, Hawaii, Maine, Maryland, Nevada, and Washington.

Endnotes

1. This article – in substantial part -- was previously published by the Culture of Life Foundation. See Denise Burke, "The Freedom of Choice Act: Imposing Unregulated Abortion on Americans" at <http://culture-of-life.org/content/view/490/96/> (last visited November 4, 2008).
2. Johnsen, Dawn E., "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?" *Law and Contemporary Problems*, Supra note 152, available at: [http://www.law.duke.edu/shell/cite.pl?67+Law+&+Contemp.+Probs.+105+\(summer+2004\)](http://www.law.duke.edu/shell/cite.pl?67+Law+&+Contemp.+Probs.+105+(summer+2004)) (last visited November 4, 2008).
3. See S. 1912, 101st Cong. (1989); H.R. 3700, 101st Cong. (1989).
4. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and S. 25, 103d Cong. (1993); H.R. 1068, 103d Cong. (1993).
5. National Right to Life, Senator Barbara Boxer 2004 Press release, available at: <http://www.nrlc.org/FOCA/FOCA%20Boxer%20press%20release.pdf>, (last visited November 4, 2008).
6. See S. 1173, 110th Cong. (2007); H. R. 1964, 110th Cong. (2007).
7. Nathanson, Bernard. (PHD), "Confessions of an Ex-Abortinist", available at: <http://www.aboutabortions.com/Confess.html> (last visited November 4, 2008).
8. See S. 1173, 110th Cong. (2007); H. R. 1964, 110th Cong. (2007).
9. <http://www.nrlc.org/FOCA/FOCA%20Boxer%20press%20release.pdf> (last visited November 4, 2008).
10. See *City of Akron v. Akron Ctr for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983) (majority opinion authored by Justice Powell).