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HOW CONGRESS PAVED THE WAY FOR THE REHNQUIST COURT'S FEDERALISM REVIVAL: LESSONS FROM THE FEDERAL PARTIAL BIRTH ABORTION BAN

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In the pages that follow, I will link congressional debates over partial birth abortion legislation to the Rehnquist Court's 1995-2001 revival of federalism. My claim is simple: The Rehnquist Court was able to revive federalism, in part, because there was no reason for the Court to fear political retaliation for its federalism decisions. Congress, interest groups, and the American people do not care about federalism. On abortion-related issues, pro-choice interests care about the pro-choice agenda; pro-life interests care about the pro-life agenda. Federalism does not figure into these agendas and, as such, it is politically irrelevant to the debate over abortion. The political fight over partial birth abortion exemplifies Congress's uninterest in federalism. Specifically, there are virtually no references to Rehnquist Court commerce clause decisions in the debate over partial birth abortion legislation—even though these decisions cast doubt on the constitutionality of a federal ban on partial birth abortion.

Before turning to Congress's enactment of partial birth abortion legislation, I will provide a brief summary of my larger claim, that is, that the Rehnquist Court's revival of federalism is tied to the fact that voters, interest groups, and lawmakers routinely tradeoff federalism in pursuit of their favored

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substantive policy agenda. Unlike issues such as gun control, same sex marriage, and the death penalty, federalism is too "abstract and complicated . . . to engage the passion of citizens." Consequently, federalism is routinely undervalued in the political process; voters, lawmakers, and interest groups, even those who understand and value federalism, will nevertheless have strong overriding preferences about one or more substantive issues.

Single issue voters are a classic and extreme example of this phenomenon. These voters are willing to subordinate secondary preferences (including federalism) in order to secure their first order preferences (typically the environment, civil rights, gun control, or abortion). Abortion is a classic and extreme example of this phenomenon. Pro-choice voters support freedom of clinic access legislation and oppose bans on partial birth abortion. It is simply irrelevant to pro-choice interests that both bills embrace a broad view of congressional power under the Commerce Clause. For their part, pro-life voters are equally uninterested in embracing a consistent view of Congress's commerce clause power. They oppose clinic access legislation and support bans on partial birth abortion. Likewise, pro-life interests traded off federalism values in the Terri Schiavo case. Rather than accept state court rulings that Ms. Schiavo's feeding tube should be removed, pro-life interests backed federal legislation remanding the case to the federal courts. For pro-life interests, only one thing mattered: the culture of life.

Single issue voters are certainly the exception, not the rule. But the willingness of voters, interest groups, and lawmakers to manipulate federalism in order to secure preferred substantive policies is the rule. Self-interested voters and interest groups are able to "move freely from one level of government to another in an attempt to find the level at which they might try most


advantageously to get what they want." Elected officials understand this—invoking federalism when it comports with their substantive policy agenda but otherwise ignoring the federal-state balance.

The historical record makes clear that all players in the American political process are “willing to contemplate the exercise of power by either level of government, depending upon which level can more persuasively demonstrate that it can do the better job.” Consider, for example, the Reagan administration. On the one hand, the administration strongly backed federalism—issuing an executive order on federalism, pushing for state control of federal grants, and asking the Supreme Court to return power to states on abortion, school desegregation, and prayer. Despite this commitment to federalism, the administration was willing to intervene at the state and local level to advance its own agenda. In order to protect powerful business interest groups, the administration sometimes backed away from its federalism executive order. On social issues, the administration intervened in the Baby Doe case, arguing that federal standards ought to govern medical decisions involving infants born with severe handicaps.

From the Supreme Court’s perspective, the lesson here is simple: Unless judicial interpretations foreclose the pursuit of first order policy priorities, it is unlikely that elected officials, interest groups, or voters will formally and consistently embrace any theory of federalism. More to the point: The Court need not

7 See DOUGLAS W. KMIEC, THE ATTORNEY GENERAL’S LAWYER: INSIDE THE MESEE JUSTICE DEPARTMENT 143-49 (1992) (demonstrating how the Reagan administration was willing to circumvent federalism at times in order to advance its own agenda).
8 The George W. Bush administration has similarly abandoned its ostensible commitment to states’ rights in order to pursue its social policy agenda. Among other things, the administration sought to limit Oregon’s physician assisted suicide law and California’s medical marijuana initiative. See Linda Greenhouse, Justices Explore U.S. Authority Over States on Assisted Suicide, N.Y. TIMES, Oct. 6, 2005, at A5. The Bush White House has also pushed for national standards on same-sex marriage and partial birth abortion. See Carl Hulse, Senate Rebuffs Same-Sex Marriage Ban, N.Y. TIMES, June 8, 2006, at A20; see also Linda Greenhouse, Justices to Expand Review of ‘Partial-Birth’ Abortion Ban, N.Y. TIMES, June 20, 2006, at A14.
fear a political backlash by embracing one or another theory of federalism (or inconsistently pursuing a theory of federalism).

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Against this backdrop, Congress's consideration of partial birth abortion legislation is especially instructive. Even though the bill's constitutionality under the Commerce Clause was anything but clear, lawmakers, interest groups, and the American people ignored the bill's federalism implications. As I will soon explain, there was no incentive for bill proponents or opponents to discuss possible federalism objections to the bill. Consequently, lawmakers never discussed federalism—making the fight over partial birth abortion a fight over first order policy preferences (freedom of choice vs. sanctity of life).

To start, a few words about why the partial birth abortion ban implicates the federal-state balance: When Congress first debated the partial birth abortion ban (in 1995), the Rehnquist Court had just decided United States v. Lopez, a decision reinvigorating judicial limits on Congress's commerce power. When enacting the Partial-Birth Abortion Ban Act of 2003 (PBABA), Congress acted in the shadow of United States v Morrison, a 2000 Supreme Court decision strengthening Lopez. Lopez and Morrison spoke of the need for Congress to regulate economic activity which substantially affects interstate commerce. Under this standard, the constitutionality of the PBABA is debatable. First, there is reason to question whether

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10 For reasons that the author and others have detailed, the Court must make sure that its decisions are acceptable to the American people and their elected officials. See Devins & Fisher, supra note 6; see also JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH (2006); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).


13 529 U.S. 598 (2000). In 2005, the Rehnquist Court embraced a broader view of Congress' commerce power in Gonzales v. Raich, 125 S. Ct. 2195 (2005). And while Raich certainly strengthens the commerce clause foundations of the PBABA, it is irrelevant to the author's analysis. The author's concern is Congress' interest in federalism when enacting the PBABA. At that time, the relevant cases were Lopez and Morrison.

the regulation of a medical procedure is in fact, economic regulation. Just as gun possession and domestic violence are not commercial activities (notwithstanding their impact on the economy), the absolute prohibition of one type of abortion (irrespective of whether there is a monetary exchange) is arguably a statement about morality that does not implicate any commercial activity. Second, even if such abortions constitute commerce, it may be that this infrequently used procedure does not "substantially" impact commerce. After all, "a few million dollars is a drop in the ocean of our national economy."15

This is not to say that the PBABA cannot be reconciled with Lopez and Morrison. A strong case can be made that the PBABA comports with Rehnquist Court federalism decisions.16 Nevertheless, the federalism issue is hardly a throw-away. In 1995, three law professor witnesses flagged this issue in congressional hearings on the PBABA.17 Starting in 1997, law

15 Pushaw, supra note 14, at 336 (characterizing how an opponent of the PBABA would argue that Congress lacks commerce clause authority to enact the bill).

16 For an explanation of how PBABA can be reconciled with other of the Rehnquist Court's decisions see Pushaw, supra note 14, at 326. Indeed, federalism played no part in lower court rulings on the PBABA. In fact, all lower court rulings have invalidated the PBABA as inconsistent with the Supreme Court's 2000 invalidation of a state ban on partial-birth abortions. See Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006); Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005); Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006). On Feb. 21, 2006, the Supreme Court agreed to review the Carhart decision. See Gonzales v. Carhart, 126 S. Ct. 1314 (2006). The Commerce Clause issue was not raised in filings before the Court and there is no reason to think that the Justices will tackle this question. Likewise, in deciding (on June 19, 2006) to review the Planned Parenthood v. Gonzales decision, the Justices gave no indication that they would be considering federalism issues. See Gonzales v. Planned Parenthood Fed'n of Am., Inc., 126 S. Ct. 2901 (2006). On Nov. 8, 2006, the Supreme Court heard oral arguments in the PBABA cases. Federalism played next to no role in the oral arguments; it was not raised in the Carhart oral arguments and received just two brief mentions in the Planned Parenthood Fed'n oral arguments. The first and most significant mention occurred when Justice Ginsburg noted that the PBABA was the first instance of Congress regulating abortion procedures and asked Solicitor General Paul Clement "[h]ow should that weigh in this case?" Clement's response was telling; he remarked that federalism should not figure into the Court's decisions "principally because the other side in neither case makes a challenge based on the Commerce Clause." Transcript of Oral Argument at 19-20, Gonzales, 126 S. Ct. 2901 (2006) (No. 05-1382). The second mention was a question by Justice Stevens about whether the Commerce Clause would support application of the PBABA to "free clinics." Solicitor General Clement noted that the government did not take a definitive position on this question because the federalism issue had not been raised by plaintiffs in their challenge to the PBABA and, consequently, the issue had not been briefed. Id. at 21-22.

17 For a discussion of this issue in the context of the 1995 Congressional hearings see Partial-Birth Abortion: Hearing before the Subcomm. on the Constitution of the House
reviews started publishing articles questioning Congress's commerce clause power to enact the PBABA. The Washington Post, The National Review, and the Legal Times also published opinion pieces raising federalism objections to the PBABA.

But when Congress enacted the PBABA in 2003, these federalism issues received no meaningful attention. 1/4 out of 214 pages of congressional debate raised the federalism issue. And while 40 Senators and 98 House members commented on the PBABA, only two legislators (Senator Diane Feinstein (D-Calif.) and Representative Ron Paul (R-Tx.)) spoke about federalism.

More than that, Feinstein was the only lawmaker to suggest that the bill was inconsistent with Rehnquist Court federalism decisions. For its part, the House Judiciary Committee did tackle the federalism issue in its report (although the report makes no mention of the amount of money flowing nationwide from partial-birth abortions). At the same time, Committee members did not engage each other on this question. Outside of a passing reference to the commerce clause issue by one law professor witness, committee hearings did not consider federalism issues at all. Likewise, the fourteen House Judiciary

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18 For examples of law reviews that published articles questioning whether Congress had the power to enact PBABA see Kopel & Reynolds, supra note 14; Law, supra note 14; Ides, supra note 14; Pushaw, supra note 14.


20 See Memo from Joshua McKinley to Prof. Devins, Federalism in the Congressional Record on the Partial Birth Abortion Ban Act, June 1, 2006 (copy on file with the author).


Committee members who attached their “dissenting views” to the Committee Report made no mention of the Commerce Clause.24

Congress’s earlier consideration of the PBABA (in 1995 and 1997) also gave short shrift to federalism.25 In 1995, federalism barely registered in congressional debates. Even though the Supreme Court had just decided Lopez,26 less than 3 pages (out of roughly 687 pages) of congressional debate touched on federalism-related issues. More than that, much of what lawmakers had to say about federalism had nothing to do with the constitutionality of the PBABA; the focus, instead, was about the propriety of Congress intruding on state healthcare prerogatives.27 Likewise, the House Committee Report on the 1995 PBABA never addressed the commerce clause issue; the only mention of federalism is a reference (by those who voted against the bill) to partial birth abortion being “properly a state criminal and civil issue.”28

States’ rights arguments were virtually nonexistent in the debates and hearings surrounding the 1997 version of the Act. Only one lawmaker raised federalism in 158 pages of congressional debates and that lawmaker (Senator Diane Feinstein) did not speak about the bill’s constitutionality under the commerce clause. Instead, Feinstein spoke generally about

26 514 U.S. 549.
27 These arguments were made by both Democrats and Republicans, including Republican opponents on the legislation. See 141 Cong. Rec. S16730 (daily ed. Nov. 7, 1995) (statement of Mr. Dole).
28 For a copy of the dissenting views to the PBABA, including the argument that partial birth abortion is a state and not a federal issue see H.R. REP. NO. 104-267, at 23 (1995). To their credit, the House and Senate Judiciary Committees did receive testimony about the Commerce Clause from three law professor witnesses and one Senator. See Partial-Birth Abortion: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 101-02 (1995). At that hearing, the Committee received the statement of David M. Smolin, Professor of Law, Cumberland Law School, Samford University. See The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the S. Comm. on the Judiciary, 104th Cong. 189, 193, 202-04 (1995) for the statement of Louis Michael Seidman, Professor of Law, Georgetown University Law Center, and the statement of Douglas W. Kmiec, Professor of Constitutional Law, University of Notre Dame; and the statement of Sen. Orrin G. Hatch, Chairman, Comm. on the Judiciary.
states' rights issues. There was only one mention of federalism in the 170 pages of published hearing testimony.

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Federalism did not figure into the debate over partial birth abortion because neither pro-choice nor right-to-life interests had any incentive to talk about such mundane issues as whether abortion regulations are "economic" and whether the aggregate impact of partial birth abortions "substantially affects interstate commerce." Pro-choice lawmakers and their constituents (who had previously backed a broad view of congressional power when pushing for freedom of access to abortion clinic legislation) cared about abortion rights, not the federal-state balance. They saw the debate as a moral and legal debate about the right to choose, especially efforts by right-to-life interests to chip away at Roe through the PBABA. Pro-choice lawmakers, in other words, spoke to their base by speaking about abortion rights. Indeed, because close to 70% of Americans backed the ban on partial birth abortions, lawmakers who voted against the ban had strong pro-choice leanings. For these lawmakers, the right to choose was especially important to their constituents. By opposing the PBABA, these lawmakers sent a message that resonated with their base.

In 2003, moreover, pro-choice interests understood that their legal position was strengthened by the Supreme Court's 2000 invalidation of Nebraska's partial birth abortion ban in Stenberg v. Carhart. Perhaps for this reason, pro-choice lawmakers thought that the courts would likely strike down the federal law

29 For the statement of Sen. Feinstein in regards to states' rights issues, see 144 CONG. REC. S10551, 10560 (daily ed. Sept. 18, 1998). This statement was made in connection to congressional efforts to override President Clinton's veto of the 1997 bill.
34 530 U.S. 914 (2000).
and, as such, they could speak to their base about those issues that truly mattered to them. In 1995 and 1997, pro-choice lawmakers—knowing that President Clinton would veto the bill—also thought they could speak to their base about first order policy preferences.

For right to life lawmakers, the federalism issue was likewise irrelevant. These lawmakers had previously backed a broad view of congressional power when supporting legislation limiting the transport of minors across state lines to have an abortion and legislation making it a crime to harm an unborn child when committing a violent crime against the mother. The thought of opposing the PBABA because it threatened the federal-state balance was a non-starter for these lawmakers. Their constituents were intensely interested in right-to-life issues, not federalism. Moreover, since pro-choice interests were not attacking the bill on commerce clause grounds, there was no need to start a conversation about an issue that was irrelevant to their base. And with the Supreme Court’s Carhart decision casting its shadow on the 2003 debates, right-to-life lawmakers focused their legalistic energies on distinguishing the federal PPABA from the Nebraska statute invalidated in Carhart.

The dearth of discussion about the Commerce Clause or states’ rights issues in the legislative hearings, reports and debates over partial birth abortion is to be expected. Interest groups, the American people, and lawmakers care about first order policy priorities. Sometimes that means supporting measures that embrace a broad view of congressional power; sometimes that means opposing such measures. As such, there is nothing to be gained and much to be lost by taking federalism seriously and


36 The fact that lawmakers could have strengthened their handiwork by making specific findings about the economic impact of the PBABA did not matter to right to life lawmakers. See Pushaw, supra note 14, at 336. Instead, reflecting Congress’s general uninterest in constitutional questions, lawmakers focused their energies on symbolic statements that mattered most to their constituents. See Devins, supra note 33, at 1328-29.

37 530 U.S. 914.

38 Id.
calling upon the courts and Congress to police the federal-state balance. After all, neither pro-life nor pro-choice interests want their views of the federal-state balance to cabin their ability to support legislation that backs up their favored policies.

It therefore comes as no surprise that the national political process will not police federalism-based limits on Congress's powers. Likewise, because federalism is a low salience issue, the courts have substantial leeway to reinvigorate federalism. Unless Court federalism decisions significantly limit the dominant political coalition's first order policy priorities, there will be no federalism constituency pushing elected officials to retaliate against a too aggressive Court. Consider, for example, the PBABA. Were the Court to invalidate the statute on commerce clause grounds, pro-life interests would turn their attention to other "culture of life" issues. Rather than pursue a reconfiguration of Court federalism decision making (most of which has nothing to do with abortion), these interests would pursue other measures restricting abortion and, more generally, embrace states' rights on abortion-related decision making. For their part, pro-choice interests will not embrace limitations on Congress's Commerce Clause power—even if the Court were to invalidate the PBABA on Commerce Clause grounds. In particular, pro-choice interests recognize that they too would pay a price if the Court were to narrow Congress's powers—for pro-choice interests sometimes push for laws that embrace a broad view of Congress's powers under either the Commerce Clause or Section 5 of the Fourteenth Amendment.

39 For more detailed discussion, see Devins, supra note 33, at 1320-23.

40 For reasons detailed above, it seems unlikely that the Commerce Clause issue will be considered by the Supreme Court in its review of the PBABA. This is because the most pressing issues raised by the PBABA do not surround the Commerce Clause. Instead they center on a person's views towards abortion in general. For a discussion on PBABA and the Commerce Clause see Kopel & Reynolds, supra note 14; Law, supra note 14, Ides, supra note 14, Pushaw, supra note 14. See also supra text accompanying note 16, remarking that federalism played no meaningful role at oral arguments in PBABA cases.

It is time to wrap up: The Partial Birth Abortion Ban Act of 2003 exemplifies the irrelevance of federalism to the American political process. Even though this piece of legislation was extremely controversial, lawmakers, interest groups, and the American people ignored federalism based objections to the law.\(^4\) The PBABA is also instructive in understanding the Rehnquist Court's 1995-2002 revival of federalism. Not only were lawmakers unlikely to police federalism in any meaningful way, there was little reason for the Court to fear that its revival of federalism would prompt a political backlash. Interest groups care about their substantive agenda, an agenda which sometimes supports and other times opposes a broad view of national power. The PBABA is a classic example of this phenomenon: There was absolutely no reason for pro-choice or pro-life interests to think that a narrow or expansive approach to federalism would meaningfully assist them. As such, there was no reason to resist or embrace Court rulings on federalism-based limits to congressional power.
