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The High Court Upholds the Federal Partial Birth Abortion Ban Act: *The Supreme Court's Decision in Gonzales v. Carhart*

On April 18, 2007, the Supreme Court handed abortion opponents a major victory, ruling that the federal Partial Birth Abortion Ban Act does not violate the constitutional right to abortion. The 5-4 decision charts a new direction for the high court and its abortion jurisprudence. Just seven years earlier, the court had struck down a similar Nebraska statute.

In this latest ruling – the result of two related cases, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* – the court for the first time upheld a law that bans a specific abortion method. Furthermore, the majority in *Carhart* and *Planned Parenthood* (together referred to from now on as *Carhart*) declared the federal statute to be constitutional even though it does not contain an explicit exception in cases in which a woman's health is in danger. This is a significant departure from earlier abortion rulings, which had required that laws restricting abortion include such a health provision.

The decision also reflects the impact of recent personnel changes on the court, notably the replacement in 2006 of Justice Sandra Day O'Connor with Justice Samuel Alito. O'Connor had provided the fifth and deciding vote in *Stenberg v. Carhart* (2000), the earlier ruling striking down a Nebraska partial birth abortion ban that was in many ways similar to the law at issue this time. By ruling with the court's conservative wing, Alito provided the crucial fifth vote needed to uphold the law.

The procedure banned under the act, known in medical circles as dilation and extraction (D&X) or intact dilation and evacuation, involves dilating the cervix, extracting from the uterus all but the head of the fetus, puncturing the skull and removing the brain tissue through suction. This method, which is usually performed after 20 weeks or more of pregnancy, is employed in only a relatively small number of abortions each year. Indeed,

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LEGAL BACKGROUND

roughly 90 percent of abortions occur in the first trimester, and the partial birth or D&X procedure is not even the most common method of terminating later pregnancies.

Even though the partial birth or D&X method is rarely used, it has become a focal point in the abortion debate. Legislation banning the method has been enacted in 31 states. And during the 1990s, Congress twice passed – and President Clinton twice vetoed – a nationwide ban on the procedure. These congressional measures had substantial bipartisan support, perhaps reflecting the fact that a significant majority of the American people (72 percent according to a May 2007 Gallup poll) oppose the procedure. In 2003, Congress again passed a partial birth ban, this time with the support of President Bush, who signed it into law on Nov. 5, 2003. A number of federal district and appeals courts quickly struck down the new law, prompting the Supreme Court, in November 2006, to hear arguments in two of these cases.

The majority opinion in *Carhart* was penned by Justice Anthony Kennedy, who in 2006 had replaced O'Connor as the person most likely to be the high court's "swing vote" in very close decisions. Indeed, prior to this ruling, some legal analysts had argued that Kennedy's recent attempts to position himself between the court's liberal and conservative wings meant that he could not be reliably placed with either side in the partial birth decision, even though he had voted with the conservative minority in *Stenberg* and had authored a passionate dissent criticizing the majority for striking down Nebraska's partial birth ban. But the decision in *Carhart* made it clear that Kennedy's views had not significantly changed

since *Stenberg*. The only difference was that now he was writing for the majority.

Kennedy, who along with Alito was joined by Chief Justice John Roberts and Justices Antonin Scalia and Clarence Thomas, devoted a substantial part of his opinion to differentiating the federal statute from the Nebraska law struck down by the court seven years earlier in *Stenberg*. Indeed, even though he strenuously dissented in *Stenberg*, Kennedy's opinion did not overturn that decision and instead attempted to fit the Federal Partial Birth Abortion Ban Act within its parameters.

THE "UNDUE BURDEN" STANDARD

Throughout his opinion, Kennedy also repeatedly referred back to another prior ruling, *Planned Parenthood v. Casey* (1992), which is considered the most significant abortion decision after *Roe v. Wade* (1973). In *Casey*, the court determined that a state could regulate abortion throughout a woman's pregnancy. But, the court added, these regulations could not impose an "undue burden" on a woman's right to abortion in the months of pregnancy prior to fetal viability. "Undue burden" was defined as any regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." What became known as the "undue burden" standard did not apply to restrictions on post-viability abortions, the court ruled, adding that these restrictions were constitutional as long as exceptions were made for the life and health of the mother.

Against this jurisprudential background, Kennedy addressed the key constitutional

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arguments set forth in *Carhart*, beginning with the contention that the law is too vague to be appropriately enforced. In particular, opponents of the law had argued that it was unclear exactly what abortion method was being banned, making it possible that the statute could prohibit more than just the partial birth or D&X procedure.

The question of vagueness in this case is important in part because overly broad or vague statutory language would impose an “undue burden” on a woman’s right to an abortion. Indeed, in *Stenberg*, the court struck down the Nebraska partial birth law in part because it did not adequately define what exactly was being banned. The majority determined that, as a result, doctors might believe that other abortion procedures, some used prior to fetal viability, were prohibited. Such vagueness thus violated *Casey*’s “undue burden” standard, making the Nebraska statute unconstitutional.

With regard to the federal partial birth ban, however, it is very clear what exactly is covered under the law, Justice Kennedy argued. The statute very specifically states that for the procedure to be a “partial birth abortion” as defined under the act, the fetus must be delivered “until, in the case of a head-first presentation, the entire fetal head is outside the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother,” he wrote. Furthermore, Kennedy stated, in order for a doctor to violate the law, he or she had to deliberately deliver the fetus with the intent to kill it. By contrast, Kennedy pointed out, the Nebraska statute struck down in *Stenberg* prohibited an abortion after “a substantial portion” of the fetus had been

delivered and contains none of the “anatomical landmarks” written into the federal law.

But Kennedy recognized that even a law that clearly bans only the partial birth or D&X procedure has the potential to apply to cases before fetal viability. This is so, he wrote, because this particular method can be and has been used when a fetus is not yet able to survive outside the womb – usually the period before the 24th week of pregnancy. The question then

becomes: Even if the law is not too vague, did it still fail *Casey*’s “undue burden” test by placing “a substantial obstacle in the path of a woman seeking an abortion?” The answer, Justice Kennedy determined, is “no,” for two reasons.

First, Kennedy saw no evidence that Congress had set out to create such an obstacle when it passed the law and instead was acting to further legitimate legislative interests. Indeed, Kennedy noted, in *Casey* and other rulings, the Supreme Court explicitly acknowledged that the government has a legitimate interest in promoting the respect for and the protection of human life, including fetal life. “Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others ... in order to promote respect for life, including life of the unborn,” he wrote. In this case, Kennedy added, Congress determined that the partial birth abortion procedure had a “disturbing similarity to the killing of a newborn infant” and thus was within its rights to ban the procedure in the interest of promoting the respect for life.

Prior decisions, including *Roe* and *Casey*, also speak to the government’s legitimate interest in

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protecting maternal health as well the integrity of the medical profession, Kennedy noted. In particular, he pointed out, the state has an interest in helping to guide mothers and their doctors to make the best possible decisions concerning their pregnancy so as to avoid later regrets or difficulties. "It is self-evident," he wrote, "that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event ... that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child assuming the human form." In other words, Kennedy reasoned, Congress can prohibit what it sees as a particularly inhumane abortion procedure in the interest of protecting pregnant women and the integrity of the medical profession.

In looking at the second reason why the statute does not impose an "undue burden," Kennedy addressed what is probably the most important and controversial question presented in the case: Can the statute survive constitutional challenge even though it contains no exception for a mother's health? *Roe*, *Casey* and subsequent decisions have held that abortion restrictions cannot be enforced in cases in which abortion is "necessary, in appropriate medical judgment for [the] preservation of the ... health of the mother." In the past, laws that restricted abortion but did not contain an exception or waiver to safeguard a woman's health were declared unconstitutional because they imposed an undue burden on a woman's right to abortion. In *Stenberg*, for instance, one of the reasons the court ruled the Nebraska statute to

be unconstitutional was that it lacked a health exception.

But in his majority opinion in *Carhart*, Justice Kennedy argued that if a banned abortion procedure is *never* medically necessary to preserve a mother's health, the constitutional need for a health exception is obviated. Kennedy acknowledged that, in the case of partial birth abortion or D&X, medical experts and others disagree over whether the procedure is ever "medically necessary" to preserve a woman's health. However, he wrote, "medical uncertainty does not foreclose the exercise of legislative power." In other words, Congress can take sides in the debate (in this case agreeing with those who say that partial birth abortion or D&X is never medically necessary) and then act accordingly. The appeals courts that earlier struck down the federal partial birth ban incorrectly constricted this congressional latitude, Kennedy argued, leaving "no margin of error for legislatures to act in the face of medical uncertainty."

Kennedy also noted that the procedure is rarely used, even in late-term abortions, and that women can still have an abortion using other methods. For instance, dilation and evacuation (D&E), which involves dismantling the fetus in the womb and then removing it, is "a more commonly used and generally accepted method," he wrote. Given these reasons, Kennedy argued, it is hard to make a case that the partial birth or D&X procedure is ever medically necessary to preserve health. Moreover, the act did make an exception for cases in which partial birth abortion or D&X is necessary to save a woman's life,

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and this waiver encompasses severe threats to a woman's physical health. Thus, he reasoned, the absence of a health exception in the partial birth ban does not pose an undue burden on women seeking abortions.

Kennedy concluded the majority opinion by discussing the possibility of future court challenges to the act. Both the *Carhart* and *Planned Parenthood* cases were "facial" challenges, meaning that they arose from suits filed just after the partial birth abortion ban was enacted but before it could be enforced. Generally, those making a facial challenge argue that the law in its entirety is unconstitutional and should be struck down. Another way to look at it, Kennedy said, is that they must show that there is "no set of circumstances under which the Act would be valid," something those who brought suit in *Carhart* failed to do.

But Kennedy did leave the door open for another kind of court challenge, known as an "as applied" challenge. Unlike broader facial challenges, "as applied" challenges are more narrowly focused and arise out of specific circumstances. For instance, if a pregnant woman with a serious medical condition opted to have an abortion and her doctor determined that the partial birth or D&X procedure was the best method to safeguard her health, she could bring a suit arguing that the lack of a health exception in the partial birth ban is, in this case, unconstitutional because it denies her and her physician the option of choosing the procedure best able to protect her health.

These more specific "as applied" challenges, like the one just described, are more appropriate than broad facial challenges, Kennedy argued, because they allow courts to carve out specific exceptions based on actual situations in which peo-

ple are being harmed by the law. "In an as applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack," he wrote.

THOMAS CONCURS AND GINSBURG DISSENTS

In addition to deciding with the majority, Justice Thomas, joined by Justice Scalia, issued a very brief concurrence, acknowledging that Justice Kennedy had, in these cases, applied the court's current abortion jurisprudence correctly. But, Thomas added, abortion jurisprudence "has no basis in the Constitution." Justices Thomas and Scalia have long held that there is no constitutional right to abortion and that *Roe* should be overturned. Their brief concurrence in *Carhart* reaffirmed that position.

It is worth noting that while Roberts and Alito joined the majority opinion, neither signed the Thomas concurrence. One possible reason is that they may not agree with Thomas' contention that the rights spelled out in *Roe* and the other abortion cases have no constitutional basis. Or it may be that they decided to wait and express their views on this broader constitutional question at a later time.

Justice Ruth Bader Ginsburg drafted a lengthy, stinging dissent that began by characterizing the majority opinion as nothing short of "alarming." Ginsburg, who wrote for herself and Justices Stephen Breyer, David Souter and John Paul Stevens, argued that the issues in *Carhart* concerned more than just legal principles

and went to the core of longstanding constitutional notions of equality and freedom. In particular, she argued, women must have the "ability to control their reproductive lives" if they are to realize their full potential as indi-

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viduals. Thus, she continued, legal challenges to abortion restrictions “do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course.”

Ginsburg then addressed what she perceived to be the specific mistakes and defects of Kennedy’s majority opinion, beginning with the notion that the Constitution does not require the federal partial birth ban to include a health exception. In its prior rulings, she argued, the court has always required that any abortion regulation must “at any stage of pregnancy and in all cases, safeguard a woman’s health.” Furthermore, she wrote, in *Stenberg* the court struck down a partial birth ban “in part because it lacked a health exception.” And it did so even though, as in the current cases, there was “a division of medical opinion” as to whether the banned procedure was medically necessary. But, she added, the court in *Stenberg* “made clear that as long as ‘a substantial medical authority supports the proposition that banning a particular abortion procedure could endanger a woman’s health,’ a health exception is required.” The same should have been true in the current cases, she concluded, especially since there is a substantial body of medical evidence that the D&X procedure is, at times, the safest choice for a woman seeking an abortion.

Justice Ginsburg turned next to Kennedy’s contention that the law furthers the government’s legitimate interest in protecting fetal life. How, she asked, could the partial birth ban possibly safeguard fetal life when it “saves not a single fetus from destruction?” Women prevented from having a D&X are

still free to avail themselves of other abortion procedures, including D&E, which, Ginsburg argued, “could equally be characterized as ‘brutal’ involving as it does” pulling off the limbs of the fetus while it is still in the womb in order to make it easier to remove from a woman’s body. “The notion that either of these two equally gruesome procedures ... is

more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational,” she argued.

Ginsburg also took Kennedy and the majority to task for their concern that women could be hurt by the D&X procedure, especially if they are not fully aware of what was done until after their abortion had been performed. The idea that women’s medical options should be limited in the name of “protecting” them “reflects ancient notions about women’s place in the family and under the Constitution – ideas that have long since been discredited,” she wrote. Indeed, Ginsburg said, the solution is not to ban the procedure for fear that women will opt for it without fully realizing what is being done until it is too late. Instead, she argued, doctors should be required to fully inform women “accurately and adequately, of the different procedures and their attendant risks.”

Finally, Ginsburg questioned Justice Kennedy’s determination that “as applied” challenges are the best way for courts in the future to review the partial birth ban. “Even if courts were able to carve out exceptions through piecemeal litigation ... women whose circumstances have not been anticipated by prior litigation could well be left unprotected,” she wrote. “In treating those women,

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physicians would risk criminal prosecution, conviction and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients,” Ginsburg added.

FUTURE IMPACT

At this point, it is unclear whether Kennedy’s or Ginsburg’s position regarding “as applied” challenges will prove correct because, less than two months after the ruling, it is not yet clear how workable such challenges will be. For a pregnant woman seeking to have the partial birth or D&X procedure, it may be impossible for courts to respond before she is forced to use another abortion method or simply has the baby. At that point, there would be no one to sue, since she could no longer seek injunctive relief (because she no longer needs the procedure) and citizens generally cannot sue the government for damages.

Of course, there are other possible situations under which an “as applied” challenge could arise. For instance, if a doctor decided to perform a partial birth or D&X procedure to safeguard a patient’s health and was then prosecuted for doing so, the criminal case could ultimately lead to a review of the law and, assuming the doctor was acquitted, the creation of an exception in certain circumstances. However, this scenario seems unlikely since most doctors would probably not risk criminal prosecution by performing the procedure in a non-life-threatening situation.

Another, more likely, possibility is a class action lawsuit. Such a suit could be brought by abortion rights groups on behalf of a class or

group of pregnant women who have a particular medical condition and are at high risk of being harmed because the partial birth or D&X procedure is prohibited. The suit would seek injunctive relief so that the ban on partial birth abortion would not be enforced against women with this specific medical condition.

In addition to future court challenges to the federal partial birth ban, the *Carhart* ruling will likely trigger a flurry of activity in state legislatures. To begin with, many of the 31 states that had previously enacted partial birth bans, only to see them directly or indirectly struck down by prior court decisions like *Stenberg*, might redraft these laws along the lines of the federal ban and enact them again. Such an action may seem redundant in light of the federal statute, which covers violations throughout the United States. But more socially conservative states may want to criminalize partial birth abortion or D&X because federal prosecutors, who only take a small number of the cases that are open to them, may not choose to prosecute all the doctors who violate the ban. Such reticence on

the part of U.S. attorneys may become more pronounced under future presidents who may support abortion rights.

States also could redraft other abortion restrictions, such as a parental notification requirement, by removing the health exception. Legislatures might hope that statutes without a health waiver could survive constitutional challenge in the wake of the *Carhart* decision.

In addition, *Carhart* will likely prompt some states to craft new abortion restrictions. For instance, legislatures may pass laws banning other abortion methods, such as D&E, which

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is the most commonly used procedure in the second and third trimesters. Again, the federal partial birth ban might serve as a template for those drafting the bill, in the hopes that such language would help it survive inevitable court challenges. States may also pass laws meant to reduce the abortion rate, such as requirements that women seeking abortions be informed about alternatives to the procedure – such as adoption – or be forced, or at least offered the opportunity, to see an ultrasound of the fetus inside them.

This whirlwind of action in state legislatures will produce accompanying gusts at the nation's court houses since most, if not all, new abortion restrictions are likely to be challenged. Federal district and appeals courts, in particular, will be charged with trying to understand the contours of *Carhart* in order to apply the ruling to these various new laws and policies. If a plethora of resulting lower court cases produces different and contradictory decisions, the Supreme Court may once again need to revisit its abortion jurisprudence.

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