Upholding the Ban on Partial Birth Abortion: Gonzales v. Carhart, 127 U.S. 1610 (2007)

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A. The Long Abortion Build Up

On April 18, 2007, in *Gonzalez v. Carhart*, The United States Supreme Court upheld the Congressionally enacted Partial-Birth Abortion Ban Act[2] on what has been termed partial-birth abortion.[3] In the wake of landmark abortion

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[2] 18 U.S.C. §1531 (2003).

[3] 18 U.S. C. §1531 (**b**) As used in this section--**(1)** the term "partial-birth abortion" means an abortion in which the person performing the abortion--

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body

cases such as *Roe v. Wade*[4] and *Planned Parenthood of Southeastern Pa. v. Casey*[5], cases arose that dealt with the timing and procedures of abortion methods. The first major case to deal with the debated practice of second-semester abortion was *Stenberg v. Carhart*.[6] Here, the Court held a Nebraska statute banning all partial-birth abortions unconstitutional because, by disallowing both dilation and evacuation ("D & E") techniques and dilation and extraction and ("intact D & E") techniques, it unduly burdened the right of abortion itself.[7]

A direct response to *Stenberg*, the purpose of the Partial-Birth Abortion Ban Act was to limit second-semester abortion procedures by disallowing intact D & E abortions.[8]

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of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus

[4] 410 U.S. 113 (1973).

[5] 505 U.S. 833 (1992).

[6] 530 U.S. 914 (2000).

[7] *Id.*

[8] 18 U.S.C. § 1531(b)(1)(b). (The Act does this by outlawing performing "the overt act, other than completion

When challenged in district court cases[9], the Attorney General was enjoined from enforcing the ban. These decisions were later affirmed in the Eighth Circuit[10] and in the Ninth Circuit.[11]

B. Specific Issues of *Carhart*

At issue in this case were the rights for an exception allowing for the health of the mother, and the proposition that the Act prohibited D & E procedures as well as intact D & E ones.[12] The Supreme Court focused on the third of the three principals of Casey[13] in holding that the state interest in protecting fetal life was served here. It also focused on the mechanical differences between D & E[14] and

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of delivery, that kills the partially delivered living fetus.").

[9] See *Carhart v. Ashcroft*, 331 F.Supp. 2d 805 (D.Neb. 2004); *Planned Parenthood Federation of Am. V. Ashcroft*, 320 F.Supp.2d 957 (N.D. Cal. 2004).

[10] *Carhart v. Gonzalez*, 413 F.3d 791 (8th Cir. 2005).

[11] *Planned Parenthood Federation of Am. V. Gonzalez*, 435 F.3d 1163 (9th Cir. 2006).

[12] Carhart v. Gonzalez, 127 U.S. 1610 (2007).

[13] *Casey*, 505 U.S. at 846 (1992)("And third the State has legitimate interests from the pregnancy's outset in protecting the health of the woman and the life of the fetus that may become a child.").

[14] *Carhart*, 127 U.S. at 1621 ("The doctor grips a fetal part with forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance

intact D & E[15] to reach the holding that this procedure was morally wrong and unnecessary.

When comparing the majority and the dissent in this case, it is obvious that there are factual disputes that are essential to the holding. While the majority contends that there is no definite proof that these procedures are sometimes necessary and the safest means available[16], Justice Ginsburg argues in dissent that intact D & E offer safety advantages for women with medical conditions such as "uterine scarring, bleeding disorders, or compromised immune systems."[17] The majority and dissent also disagree with the application of D & E procedures to medical students. While the majority states that "Congress determined no medical schools provide instruction on the

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from the cervix. The friction causes the fetus to tear apart…The process of evacuating the fetus piece by piece continues until it has been completely removed.").

[15] *Id.* Although methods differ, the similarity is that the doctor takes a few passes to extract the fetus through the cervix, then pierces or crushes the skull.

[16] *Id.* at 1625.

[17] *Id.* at 1644-45 (J. Ginsburg, dissenting).

prohibited procedure,"[18] the dissent lists medical schools that do teach the technique.[19]

C. **The Abortion Debate Subtext**

Aside from the debate over the issues in *Carhart*, it is apparent that the decision has a not-so-subtle secondary meaning to it. Justice Ginsburg begins her dissent by reciting the famous introduction to *Casey* that, "liberty finds no refuge in a jurisprudence of doubt."[20] Through provocative language, stunning imagery and pointed references to abortion case history, the majority uses intact D & E procedures to accomplish the overarching goal of reintroducing a jurisprudence of doubt.

In the opinion, Justice Kennedy emphasizes the extreme nature of the procedures used in intact D & E procedures, citing Congress' finding that it was "a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[21] Kennedy notes how difficult it is

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[18] *Id.* at 1638.

[19] *Id.* at 1643-44 (*quoting* Brief for ACOG as Amicus Curiae 18)("Among the schools that now teach the intact variant are Columbia, Cornell, Yale, New York University, Northwestern, University of Pittsburgh, University of Pennsylvania, University of Rochester, and University of Chicago.").

[20] *Id.* at 1640 (J. Ginsburg, dissenting).

[21] *Id.* at 1624.

for the medical staff to be part of this process.[22] He even includes a vivid recital from a nurse who assisted in a procedure.[23] Again taking differing perspectives, while Justice Ginsburg sees the issue as one of protecting a woman's right to have 'control over her own destiny' as provided for in Casey[24], the majority takes more of a protective approach – maintaining that the state should not allow a woman to suffer even more when going through an abortion by realizing that, "she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[25]

The majority consistently uses such abortion key words as "human form,"[26] that seem to address a greater issue than intact D & E procedures. Justice Kennedy notes that Congress determined these abortions were the equivalent of

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[22] *Id.* at 1623.

[23] *Id.* at 1622-23. ("The Doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp…He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.").

[24] *Id.* at 1641. (J. Ginsburg, dissenting).

[25] *Id.* at 1634.

[26] *Id.*

"killing a newborn infant,"[27] and that at issue was the "delivery of a living fetus."[28] Kennedy continues with similar language in reference to doctors saying they know they "will kill [it]."[29] Along the same lines, when writing about the difficulty of the staff dealing with the procedure, Kennedy states that the fetus has "some viability."[30] In the dissent, Ginsburg views this and other references as heavy-handed.[31] Kennedy even adds a political angle to the opinion by noting that the partial-birth abortion ban was vetoed twice by President Clinton, but President Bush finally signed the act into law on November 5, 2003.[32]

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[27] *Id.* at 1617.

[28] *Id.* at 1618.

[29] *Id.* at 1628.

[30] *Id.* at 1623.

[31] *Id.* at 1650 ("The Court's hostility to the right Roe and Casey secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor.").

[32] *Id.* at 1623-24.

D. Analysis of the Opinion

Unfortunately, there is little doubt that the "jurisprudence of doubt"[33] Justice O'Connor spoke about will continue in the abortion debate. As the balance of political power shifts in the White House, in Congress and especially on the Supreme Court, abortion jurisprudence will evolve with it. However, the roundabout way that the majority in *Carhart* addresses the overall issue of abortion seems misguided.

Both in the majority and dissenting opinions, the debate over intact D & E procedures seem to be based more on opinion than fact. The evidence of the necessity of this procedure in certain circumstances or the acceptance of it in the medical community is contested. Whether or not the procedure is valuable because it is less intrusive is contested.[34] Of course, the biggest yet unspoken contest of all is whether any of these things even matter.

The intact D & E abortion method is something that should be closely evaluated. While the majority purposely strikes a blow with the gruesome details of the exact

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[33] *Casey*, 505 U.S. at 844 (1992).

[34] *Carhart*, 127 U.S. at 1628. Some feel that since intact D & E takes fewer passes with surgical instruments it decreases the risk of cervical laceration or uterine perforation. *Id*.

procedures, it does so for a reason. For everyone involved in the abortion decision process – from the heights of the Supreme Court and Congress to the pregnant woman in the doctor's office – knowing the details is crucial to making an informed decision.

The fault in the majority's opinion is that it blatantly uses the controversial issue of intact D & E procedures to attack abortion as a whole. If the issue of abortion is going to be reviewed again, it must be done so properly. By injecting personal views on abortion practice in general in its opinion, the majority lost a valuable opportunity to present a fair and reasoned argument against intact D & E.