

PUT THE CORK BACK IN THE CHAMPAGNE BOTTLE (or, don't panic): WHAT *GONZALES v. CARHART* REALLY SAYS

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To judge by much of the coverage of the Supreme Court's ruling in *Carhart v. Gonzales*,¹ in which the court declined to strike down the Federal Partial-birth Abortion Ban Act of 2003 (FPBAA),² one might think this was a dramatic reenactment of Revelation 16:16-17. While the decision is certainly important, and will have inordinate political valence (NARAL must be jumping for joy at this short in the arm for its fundraising efforts), it's worth pausing to reflect on the narrowness of this ruling relative to the fuss it has generated.

I.

Two pieces of background must first be established.

First, while *Roe v. Wade*³ remains the great shibboleth of the culture wars, the touchstone case in American abortion law is not *Roe* but *Planned Parenthood v. Casey*,⁴ which enunciated the principle that prior to viability, a law “designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s decision before fetal viability”⁵ is unconstitutional. (Also worth noting here is that *Casey* was an unusual opinion with three co-authors: Justices Sandra Day O'Connor, David Souter and Anthony Kennedy – the latter also authoring the instant decision, *Carhart*.)

Second, there are two ways in which laws are ordinarily challenged in Federal courts: an *as-applied* challenge, where plaintiffs must, to over-simplify somewhat, establish only that the law would be unconstitutional if it was applied specifically to a person in the plaintiffs’ circumstances, and a *facial* challenge, where plaintiffs must establish that “no set of circumstances exists under which the Act would be valid. The fact that ... [a particular law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.”⁶ It is the latter type of challenge that was brought against the FPBAA in the instant case, and which the court rejected.

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¹ *Gonzales v. Carhart*, no. 05-380. This case has been variously referred to by the shorthand of both “Gonzales” and “Carhart”; I prefer the latter and adopt it for purposes of this essay,

² PUB. L. 108-105, 117 STAT. 1201, codified at 18 U.S.C. § 1531.

³ 410 U.S. 113 (1973).

⁴ 505 U.S. 833 (1992).

⁵ *Id.* at 877.

⁶ *United States v. Salerno*, 481 U.S. 739, 745 (1987).

II.

In *Carhart*, the court held only this much: that a federal ban on a very specific and rare method of carrying out abortion – intact D&E, as opposed to the more prevalent standard D&E⁷ – survived a facial challenge under the *Casey* test. To say that this ruling threatens to make abortion in general illegal is rather like saying a ban on importing cigars from Cuba threatens to criminalize smoking.

For one thing, the ruling did not close the door on a future as-applied challenge (indeed, the Court could scarcely have dropped a bigger hint that he was open to jumping the fence in such a challenge). In rejecting the facial challenge, the court said only that plaintiffs had failed to demonstrate that “no set of circumstances exists under which the Act [c]ould be valid[ly]”⁸ enforced. “The Act is open to a proper as-applied challenge in a discrete case,”⁹ said the court, and one might compare the McCain-Feingold campaign finance law, which was held facially constitutional in *McConnell v. FEC*,¹⁰ but has subsequently come under fire in an as-applied challenge being heard this term.

Nor did the court say affirmatively that the ban was constitutional: it merely said that a facial attack under *Casey* could not prevail. As Justice Thomas noted in a concurrence, joined by Justice Scalia, no litigants in the case raised the question of whether Congress had the power to pass the statute in the first place, and as has been its usual (and prudent) practice, the court was not about to strike down a federal law approved by two elected chambers of Congress and signed by an elected President on grounds neither briefed nor argued by the parties.¹¹ Given Justice Thomas’ expressed view of federal power,¹² (and despite suggestions otherwise, Justice Scalia’s concurrence in *Gonzales v. Raich*¹³ is not to the contrary), it is very likely that at least those two Justices from the *Carhart* majority might vote to strike down the law in an appropriate challenge.¹⁴

Moreover, the court made clear that FPBAA survived review precisely because the type of procedure it reached was very narrowly limited: it provided clear and consistently-applicable guidance to doctors, law enforcement officers and lower courts for determining what conduct is

⁷ In the standard Dilation & Evacuation procedure, the abortionist will reach through the cervix using surgical instruments, dismember the unborn child, and extract the remains. (There is something quite Orwellian about describing a procedure in which a human being is ripped limb from limb as a “standard” anything, but such are the parameters of the abortion debate.) By contrast, in the Intact Dilation and Extraction procedure, “[t]he fetus is rotated and forceps are used to grasp and pull the legs, shoulders and arms through the birth canal. A small incision is [then] made at the base of the skull to allow a suction catheter inside. The catheter removes the cerebral material” – obfuscatory medical terminology for the partially-born child’s brain – “until the skull collapses. Then the fetus is completely removed.” <http://americanpregnancy.org/unplannedpregnancy/surgicalabortions.html>. By far, the standard D&E procedure is far more prevalent, intact D&E accounting for only “0.17% of all abortions in the US in 2000.” <http://www.guttmacher.org/pubs/journals/3500603.html>.

⁸ See Salerno, *supra* note 6.

⁹ *Carhart*, *supra* note 1, slip op. at 38.

¹⁰ 540 U.S. 93 (2003).

¹¹ See generally Adam Milarni & Michael Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002).

¹² See *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

¹³ 545 U.S. 1 (2005).

¹⁴ Perhaps joined by the *Carhart* dissenters, under the rubric of “any port in a storm,” but that seems unlikely given that the same four justices who find themselves in dissent here have been found in dissent in virtually every major federalism and sovereign immunity case since *Lopez* with the principle exceptions of *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).

proscribed and how to deal with cases arising under this law, and thus avoided overbreadth concerns. The procedure banned by FPBAA specifically and exclusively reaches the intact D&E procedure, *not* the more common (if no less brutal) standard D&E. It is for this reason in particular that the pundits claiming this decision overrules the court's decision seven years ago in *Stenberg v. Carhart*¹⁵ are wrong.¹⁶ It simply isn't true that this ruling leaves *Stenberg* either dead or – in Justice Frankfurter's evocative phrase – a “derelict on the waters of law,”¹⁷ joining cases such as *Garcia v. San Antonio Metro Transit Authority*¹⁸ in a netherworld of cases that are neither buried fully six feet under nor up and attending lectures. As even the *New York Times* conceded, there are salient differences between the Nebraska statute at issue in *Stenberg* and the federal statute at issue in the instant case.¹⁹ In the former, the court decided that the Nebraska statute fell afoul of the *Casey* test in part because “[e]ven if the statute’s basic aim is to ban D&X, its language ... also covers a much broader category of procedures,”²⁰ such as standard D&E. In *Carhart*, the court appears to reason that *Stenberg* left open a question submerged in the question it *did* answer: whether the Nebraska statute would have passed muster if it *couldn't* also be read to bar standard D&E. Thus, to the extent that the court’s opinion in the instant case makes it clear that a piece of legislation is capable of passing muster under *Carhart*, yet still failing *Stenberg*’s test, the former does not overrule the latter.²¹

III.

Quite aside from the narrowness of the ruling itself, another reason why the hysteria – euphoria among pro-lifers, despair among pro-choicers – is misplaced is that predictions that this case signals the thin end of a wedge leading to the demise of either *Roe* or *Casey* are very much exaggerated.

As noted above, the author of this decision was Justice Kennedy. It is his vote that will determine how far the court will go in permitting regulation of abortion, and this decision – in Justice Kennedy’s eyes – is arrived at not by *undermining* the standards enunciated by *Casey*, but by *applying* them. “To Kennedy, ... in *Stenberg*, ... [the court] ignored key interests he thought were so important in *Casey*. [*Carhart*], he’d say, just took the Court back to what he’d said in *Casey*, when he provided the key fifth vote that preserved *Roe*.”²² While Kennedy might like to

¹⁵ 530 U.S. 914 (2000).

¹⁶ See, e.g., posting of Geoff Stone to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html (Apr. 20, 2007, 15:01 CST) (*Carhart* “reversed an earlier decision, *Stenberg*”); posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2007/04/profound-effects-of-justice-oconnors.html> (Apr. 18, 2007, 10:34 EST) (“in the wake of Justice O’Connor’s retirement ... *Stenberg v. Carhart* was hanging by a thread. Today, the thread snapped, as a five-Justice majority upheld the federal ‘partial-birth abortion’ prohibition. ... [T]he Court effectively overruled *Stenberg*’s ‘undue burden’ test for facial challenges to abortion-restriction statutes”); Lynn Paltrow, *Miscarriage of Justice* in THE AMERICAN PROSPECT, 4/19/2007 (available online at <http://www.prospect.org/web/page.wv?section=root&name=ViewWeb&articleId=1380>) (“the newly reconfigured Supreme Court overturned the opinions of three lower federal courts and its own precedent”).

¹⁷ *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., concurring) (quoted in Steven Calabresi, *The Tradition of the Written Constitution: Text, Precedent and Burke*, 57 ALA. L. REV. 635, 673 (2006)).

¹⁸ 469 U.S. 528 (1985).

¹⁹ See graphic accompanying Linda Greenhouse, *In Reversal, Justices Back Ban on Method of Abortion* in THE NEW YORK TIMES, 4/19/2007 (image available online at <http://www.nytimes.com/2007/04/19/washington/0419-nat-webSCOTUS2TH.gif>) (on file with author).

²⁰ *Stenberg*, supra note 15, 530 U.S. at 939.

²¹ But see discussion infra Part IV.

²² Posting of Jan Crawford Greenburg to Legalities, http://blogs.abcnews.com/legalities/2007/04/the_last_word.html (Apr. 19, 2007).

go further than he did in *Carhart* and outright overrule *Stenberg*, it is unlikely that he would go any further than that. To Justice Kennedy's mind, *Carhart* is not the beginning of the end of *Casey*: it is a straightforward *application* of *Casey*, and thus a reaffirmation of the ongoing validity of that rule.

It's certainly true that there are two members of the court who would like to overrule *Roe-Casey* – one less, it must be said, than when President Bush was elected. It is even possible that the new arrivals, Chief Justice Roberts and Justice Alito, might go along with that (neither joined the Thomas concurrence, however, suggesting at a very minimum that they don't want to weigh in on the validity of *Roe-Casey* just yet). But even if they *did*, that makes four votes in a court with nine members which operates on majority rule. Unless or until Justice Kennedy or one of the four *Carhart* dissenters (none of whom show any signs of going anywhere) are replaced, *Roe-Casey* is (lamentably) an unassailable keep.

Something else that one might infer from this ruling about the position of the Chief Justice and Justice Alito: As previously noted, this case doesn't simply revisit *Stenberg*, overrule it, and substitute Justice Kennedy's dissent in that case. Why not? Justices Scalia and Thomas would likely have supported Kennedy if he'd chosen to overrule instead of distinguishing *Stenberg*. Nor are narrowly-written opinions or reticence in overruling precedent a hallmark of Justice Kennedy's jurisprudence: quite the opposite. *Lawrence v. Texas*²³ would be a convenient example. So why resolve the case this way? One has to see the hand of the Chief Justice – “[i]f it's not necessary to decide more to dispose of a case, in my view, it is necessary not to decide more”²⁴ – in this. This case could be decided narrowly; the question is what Roberts and Alito will do in a case where it *is* necessary to decide more.²⁵

IV.

Having dwelled on why this ruling is narrow, let me change gear and explain why it should not be underread any more than it is overread. In particular, while *Stenberg* has not been quite reduced to “a derelict on the waters of law,” a significant number of its crew have fallen overboard.

Since *Casey*, “the governing standard requires an exception ‘where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.’”²⁶ But as the *Stenberg* court implicitly conceded, “[t]he law does not require a health exception unless there is a *need* for such an exception.”²⁷ To illustrate the point rather crudely, a statute banning abortion by method of shotgun blast to the mother's stomach would not require a health

²³ 539 U.S. 558 (2003).

²⁴ See posting of Simon Dodd to Stubborn Facts, http://stubbornfacts.us/domestic_policy/jurisprudence/rehnquistian_pragmatic_formalism_is_chief_justice_roberts_really_a_minimalist (Jun. 9, 2006).

²⁵ Concededly, an equally-plausible alternative reading might simply be the surpassing desire of the court for this opinion to be seen as modest and minimal, to minimize charges of breaking with precedent in general and to elide charges that a mere change in personnel produced a changed result. But that concern, too, seems to bear the stamp of the Chief Justice.

²⁶ *Stenberg*, supra note 15, 530 U.S. at 931 (quoting *Casey*, supra note 4, 505 U.S. at 879).

²⁷ *Stenberg* at 931 (emphasis added).

exception, because such a procedure could *never* be medically necessary. The Nebraska statute in *Stenberg*, however, regulated a procedure where there *might* be a need for an exception in the kind of law at issue in that case: “where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health, *Casey* requires the statute to include a health exception when the procedure is ‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’”²⁸

Whether it is ever medically necessary to perform an intact D&E is a disputed question; “[t]here is documented medical disagreement whether the Act’s prohibitions would ever impose significant health risks on women.”²⁹ Here, then, is *Carhart*’s point-of-departure from *Stenberg*, both in terms of input and output: in FPBAA, Congress made a number of findings that boil down to elaborations on the first finding: that intact D&E is a “gruesome and inhumane procedure that is never medically necessary and should be prohibited.”³⁰ Those findings, the court decided, serve as a counterweight (one absent in *Stenberg*) to the contrary factual findings by the district courts. Thus, concluded the court, in view of the fact that the question of “whether the Act creates significant health risks for women has been a contested factual question[,] [and] [t]he evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position,”³¹ and in view of longstanding precedent for the court’s “giv[ing] state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,”³² “[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”³³ That is, when there is dispute over whether a particular procedure is ever medically necessary, *Carhart* says, the courts may defer to legislative judgment.

While this makes a lot of sense in terms of democratic theory (legislatures, unlike the courts, are democratically-accountable, and thus can easily be corrected by the electorate should they reach a determination unacceptable to the public: if the public is genuinely horrified by the prospect of partial-birth abortion being outlawed, Congress could respond by repealing FPBAA), it’s potentially in tension with *Stenberg*, where the court found that because *Casey* was understood to “require[] a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation,”³⁴ and “because the record show[ed] that significant medical authority support[ed] the proposition that in some circumstances, D&X would be the safest procedure,”³⁵ the Nebraska statute needed a health exception. Simply put, *Carhart* appears to stand for the proposition that (at least in the limited context of a facial attack) legislative efforts to regulate abortion *may* survive if they are

²⁸ *Stenberg* at 938 (quoting *Casey* at 879).

²⁹ *Carhart*, *supra* note 1, slip op. at 32.

³⁰ 117 STAT. 1201. Cf. *id.* at 1203:

“[Congress found that] [t]here exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a ‘health’ exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care. Congress was informed by extensive hearings held during the 104th, 105th, 107th, and 108th Congresses....”

³¹ *Carhart*, slip op. at 31.

³² *Id.* at 33.

³³ *Id.* at 34.

³⁴ *Stenberg* at 930.

³⁵ *Id.* at 932. Of course, all invocations of “safety” in the context of abortion beg the question: “safer for *whom*?” If one believes the unborn child to be a human life, abortion is fatal in 100% of successful procedures. It’s a clever piece of framing - see George Lakoff, *MORAL POLITICS* (2002) - on the part of pro-choicers.

narrowly-drawn to specifically target a procedure where a showing is made that there is legitimate dispute in the medical community as to whether the procedure is ever necessary to preserve the health of the mother, and this is buttressed by legislative findings.

In more general terms, when read in tandem with last term's unanimous decision in *Ayotte v. Planned Parenthood*,³⁶ it seems clear (to me, at least) that the landscape in which state legislatures act to regulate abortion has shifted, if not in geology, then at least in weather. Henceforth, legislatures have an incrementally broader substantive scope in which to regulate abortion. But more importantly, *Carhart*'s bluff warning that abortion regulations should be challenged through as-applied challenges rather than facial challenges, and *Ayotte*'s warning to lower courts to salvage as much of the statute as possible when contemplating remedies to statutes found to transgress *Casey*'s limits, should embolden state legislators: they can now act free from the assumption that their handiwork will be haled into Federal courts and invalidated before the ink is dry on the Governor's signature. This is not quite a return to Justice Brandeis' celebrated laboratories of democracy concept,³⁷ but it is certainly an improvement over the soporific straightjacket on state regulation that *Casey* has been interpreted to impose – a misinterpretation of that case in any event, one of its authors now tells us. Far from threatening *Casey*'s prospective vigor, *Carhart* returns to active duty the long-MIA third prong of *Casey*: that “the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”³⁸

* * *

In the last analysis, the reason why this case might be something of a tempest in a teapot is that notwithstanding some reporting to the contrary, the Supreme Court didn't “strike down” partial-birth abortion – it merely affirmed that Congress didn't act out-of-bounds when *Congress* acted to ban this procedure. Even if that determination didn't come with a lengthy list of caveats and addendums (which it does), the point is that if you disagree with banning partial-birth abortion, your anger is misdirected if it's directed at the Supreme Court: this is an act of Congress, and legislation Congress decides to enact, it can decide to repeal.

This case also makes for a somewhat peculiar situation, in that it is now possible (although not certain) that states can permissibly ban a method of abortion that is a “visibly brutal means of eliminating our half-born posterity,”³⁹ intact D&E, yet not a method that “is in some respects as brutal, if not more [so], than intact D&E.”⁴⁰ Nevertheless, this incoherency is of the court's own making, and could not have been seriously advanced as a basis for striking down a law banning *only* intact D&E; as the court observes, “[t]here would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude [in *Stenberg* that] a ban on both D&E *and* intact D&E was overbroad[,] and then to say [in *Carhart* that] it is irrational to ban *only* intact

³⁶ 546 U.S. 320 (2006).

³⁷ See *New State Ice Co. v. Leibman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁸ *Casey*, at 846.

³⁹ *Stenberg*, supra note 15, 530 U.S. at 953 (Scalia, J., dissenting).

⁴⁰ *Carhart*, supra note 1, slip op. at 30.

D&E because that does not proscribe both procedures.”⁴¹

On the other hand, at the level of the Supreme Court, “this case” is *never* just about *this case*; “the reasoning matters at least as much as – and possibly more than – the result,”⁴² in that it is the reasoning that suggests what may happen in the *next* case. And as noted in Part IV, this case will leave its mark. At minimum, *Carhart* makes clear that *Casey* was understood by the key member of its majority to be a compromise: “I thought the *Casey* standard was one in which we said that the states do have a role,” Justice Kennedy told Jan Crawford Greenburg last year, “and that was not followed in *Stenberg*.” Justices Scalia and Thomas might not buy into *Casey*, but they are certainly pragmatic enough to sign on to opinions narrowing its scope, and that’s hardly censurable. The broader significance of *Carhart* may be, as Greenburg observes, to validate the “legitimate [state] interest in protecting and promoting the life of the unborn – and therefore in actively discouraging abortion,” which may act to “encourage states to consider other regulations to limit abortion, and it clearly indicates states can pass stronger informed consent laws. ... That’s not to say states can ban abortions. Kennedy (and therefore this Court) isn’t going to overturn *Roe*. But they can discourage them.”⁴³

To oversimplify somewhat, legal conservatives generally take the view that “when the Constitution doesn’t say anything about a subject, legislatures, and the people of each state, have a right to decide what to do.”⁴⁴ This case returns to the states some (if only a very small amount) of the power usurped by the Courts in *Roe*. But neither the *Carhart* ruling nor any conceivable future ruling from the present court prohibits abortion⁴⁵; it does not *require* states to ban partial-birth abortion, it merely *permits* democratic majorities in the states to do so. You have to wonder why the idea of having to make an argument good enough to prevail at the ballot box worries those who support legal abortion so much when they keep telling us what a benighted minority pro-lifers are. The answer, of course, is because the radical pro-choicers – including the four dissenters in this case – know as well as anyone else that the views of Americans at large are far too nuanced for their comfort.⁴⁶

⁴¹ Ibid (emphases added).

⁴² Posting of Simon Dodd to Stubborn Facts, http://stubbornfacts.us/domestic_policy/jurisprudence/althouse_on_partial_birth_abortion_and_emotional_arguments (Nov. 12, 2006).

⁴³ Greenburg, supra note 21.

⁴⁴ Mark Tushnet, *A COURT DIVIDED*, 204 (2006). This ignores, for simplicity, questions like federal preemption, and constitutional limitations on the general exercise of power by Congress.

⁴⁵ See, e.g., *Stenberg*, supra note 15, 530 U.S. at 980 (Thomas, J., dissenting) (“Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so”) (emphases in original); Antonin Scalia, Manhattan Institute Wriston Lecture, Nov. 17 1997 (available online at <http://www.manhattan-institute.org/html/wl1997.htm>):

“I’ve spoken to people who say that The Constitution not only does not require the States to permit abortion, it requires the States to prohibit abortion ... [but] I read my Constitution, my Bill of Rights, I can’t find anything in there about it. It says nothing about it....

“But the [pro-lifers] say well ‘nor shall any State deprive any person of life, liberty or property without due process of law.’ And the fetus is a person and therefore it’s covered. The only thing is the very next sentence; you see, I’m a lawyer so I do read the next sentence. I mean, talking about a text here ... [and] [t]he next sentence of the Fourteenth Amendment says representatives shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State. You think they were counting fetuses?

“I don’t think so. So reading it as a lawyer I think The Constitution says nothing either way on it. And we should stop trying to resolve profound social questions by fighting them out on the Supreme Court and having the Supreme Court make essentially policy judgements.”

⁴⁶ See Pew Forum, *Abortion and Rights of Terror Suspects Top Court Issues*, Aug. 3, 2005 (available online at <http://pewforum.org/publications/surveys/social-issues-05.pdf>) (finding, *inter alia*, that 63% of all Americans (and 63% of American women) want to limit availability of abortion, and 40% of all Americans (and 42% of American women) would ban in all cases but to save the life of the mother or in cases of rape or incest. A higher percentage of women than men would ban abortion outright, 11% vs. 8%).