GONZALES v. CARHART (2007)

Following the Supreme Court decision in Stenberg v. Carhart (2000), *which struck down a Nebraska statute outlawing "partial birth abortion, Congress passed the Partial-Birth Abortion Act of 2003. This statute was designed to meet the constitutional objections the Court had in* Stenberg, *while reaffirming the* Planned Parenthood *principle that government "has a legitimate, substantial interest in preserving the promoting fetal life…."*

JUSTICE KENNEDY delivered the opinion of the Court….

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in Stenberg prohibited "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.'" The Court concluded that this statute encompassed D&E because "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." The Court also rejected the limiting interpretation urged by Nebraska's Attorney General that the statute's reference to a "procedure" that "'kill[s] the unborn child'" was to a distinct procedure, not to the abortion procedure as a whole.

Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus instead of "'delivering . . . a living unborn child, or a substantial portion thereof.'" The Act's language, unlike the statute in *Stenberg*, expresses the usual meaning of "deliver" when used in connection with "fetus," namely, extraction of an entire fetus rather than removal of fetal pieces. The Act thus displaces the interpretation of "delivering" dictated by the Nebraska statute's reference to a "substantial portion" of the fetus. In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. Here, unlike in *Stenberg*, the language does not require a departure from the ordinary meaning. D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix….

Under the [*Casey*] principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." The abortions affected by the Act's regulations take place both previability and post viability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the

congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain: "Partial-birth abortion…confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life."

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." Under our precedents it is clear the State has a significant role to play in regulating the medical profession.

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after Roe had "undervalue[d] the State's interest in potential life." The plurality opinion indicated "the fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." This was not an idle assertion. The three premises of Casey must coexist. The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting Casey's requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. 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, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," and thus it was concerned with "drawing a bright line that clearly distinguishes abortion and infanticide." The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned.

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional

burden on the abortion right because it does not allow use of the barred procedure where "'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother.'"…Whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position….

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

This traditional rule is consistent with Casey, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community….

While *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty [, such a] zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of Southeastern Pa. v. Casey*. I write separately to reiterate my view that the Court's abortion jurisprudence, including Casey and *Roe v. Wade* has no basis in the Constitution. I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting….

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in Casey, between previability and post viability abortions. And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices….

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. "There is no line [more workable] than viability," the Court explained in Casey, for viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."

Today, the Court blurs that line, maintaining that "the Act [legitimately] applies both previability and post viability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed.

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." 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 special-ties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby,"; second-trimester, previability abortions are referred to as "late-term"; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. And, most troubling, *Casey's* principles, confirming the continuing vitality of "the essential holding of *Roe*," are merely "assumed" for the moment rather than "retained" or "reaffirmed."…