

Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence

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INTRODUCTION¹

In *Gonzales v. Carhart*,² the Court reversed course from *Stenberg v. Carhart*,³ a decision issued just seven years before and, in a 5-4 decision written by Justice Kennedy, upheld the “Partial-Birth Abortion Ban Act of 2003” (“the Act”). As counsel for the losing side in *Gonzales v. Carhart*,⁴ I joined in bemoaning the decision and what I saw, and still see, as the misapplication and betrayal of many of the principles of *Planned Parenthood v. Casey*.⁵ There is certainly much to decry about the opinion. However, in the months that have passed, I have begun to ask myself what is left. Can we see the glass as half-full nonetheless?

The good news is that there is much in the opinion that reaffirms the *Casey* framework, and much of that framework remains viable and intact. Specifically, this paper argues that *Carhart* eliminates neither the core decision-

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² 127 S. Ct. 1610 (2007).

³ 530 U.S. 914 (2000).

⁴ As Director of the Domestic Legal Program at the Center for Reproductive Rights, I was lead trial counsel for, and argued, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), in the U.S. Supreme Court; my colleague and friend at Planned Parenthood Federation of America, Eve Gartner, was lead trial counsel for, and argued, the companion case, *Gonzales v. Planned Parenthood Federation of America*, 127 S. Ct. 1610 (2007).

⁵ See Postings of Priscilla J. Smith to Balkinization blog, <http://balkin.blogspot.com/search?q=priscilla+Smith+and+carhart> (April 26, 2007, 15:23 EST); *id.* (May 9, 2007, 12:18 EST) both available at <http://balkin.blogspot.com/search?q=priscilla+Smith+and+carhart>; see also Posting of Michael Dorf to Dorf on Law blog, <http://michaeldorf.org> (May 6, 2007, 00:47 EST); see generally Postings by Jack Balkin to Balkinization blog, <http://balkin.blogspot.com/search?q=Carhart> (April 18th, 2007); *id.* (April 19th, 2007); Posting by Marty Lederman to Balkinization blog, <http://balkin.blogspot.com/search?q=Carhart> (June 4, 2007, 00:35 EST); Posting by Andrew Koppelman to Balkinization blog, <http://balkin.blogspot.com/search?q=Carhart> (Apr. 23, 2007, 18:12 EST); and Posting by Mark Graber to Balkinization blog, <http://balkin.blogspot.com/search?q=Carhart> (May 4, 2007, 21:12 EST). *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

making aspect of the right to abortion, nor the rule that a state may not restrict access to abortions that are “necessary, in appropriate medical judgment, for preservation of the life or health of the mother.”⁶ I also argue that the language in *Carhart* about preventing women from regretting their abortions is *sui generis*, limited to method bans, like this one, which: 1) the Court believes ban only the intact D&E method of abortion,⁷ a procedure the Court finds disgusting⁸ and completely without merit for health or any other reasons;⁹ and 2) the Court believes would impact only a tiny percentage of abortion procedures, all of which can still be performed by an alternative procedure which the Court believes is just as safe.¹⁰ It is only in these circumstances, and where a regulation does not otherwise impose an undue burden, that “the State may use its regulatory power to bar certain procedures *and substitute others*.”¹¹

The question after *Carhart*, then, is how we can prevent *Carhart* from being extended by those intent on *Roe*'s destruction. We must start by illuminating the ways Justice Kennedy limited himself, recognizing and appealing to the aspect of Justice Kennedy that remains a moderating influence on the other four in his *Carhart* majority—his Dr. Jekyll. Anti-abortion advocates will certainly be trying to find and appeal to his more emotional Mr. Hyde.¹²

⁶ See, e.g., *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327-328 (2006) (quoting *Casey*, 505 U.S., at 879); see also *Thornburgh v. Amer. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 768-769 (1986); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 482-486 (1983) (opinion of Powell, J.); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 79, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

⁷ *Carhart*, 127 S. Ct. at 1629-32. Dilation and evacuation abortions (D&Es) make up approximately 90% of all second trimester abortions. “Intact D&Es”, less frequently known as “dilation and extraction” or D&X abortions, are a variant of D&Es in which the fetus is removed intact to reduce instrumentation in the uterus, thus lowering the risks of the most serious complications of D&E. These procedures constitute a small, though unknown, percentage of D&Es. Guttmacher Institute, *Supreme Court Upholds Federal Abortion Ban, Opens Door for Further Restrictions by States*, 10:2 GUTTMACHER POL'Y REV. (2007), available at <http://www.guttmacher.org/pubs/gpr/10/2/gpr100219.html>.

⁸ *Stenberg v. Carhart*, 530 U.S. 914, 961-63 (2000) (Kennedy, J., dissenting).

⁹ The only reason for performing an intact D&E that Kennedy seems to credit is “mere convenience.” *Carhart*, 127 S. Ct. at 1638; see *id.* at 1650 (Ginsburg, J., dissenting). Indeed, one would never know from reading the majority opinion that there was significant evidence in this case, accepted by the American College of Obstetricians and Gynecologists as well as the Supreme Court itself in *Stenberg*, that the intact D&E is the safest method of abortion and provides significant safety benefits in certain circumstances.

¹⁰ *Carhart*, 127 S. Ct. at 1627.

¹¹ *Id.* at 1633 (emphasis added).

¹² Many topics are not covered here, such as the Court's strained interpretation of the scope of the Act, see, e.g., *id.* at 1629-32; the Court's elevation of congressional findings over district court findings of fact, see Judith Resnik, *Courts and Democracy: The Production and Reproduction of Constitutional Conflict* 4-5 in *THE COURTS AND SOCIAL POLICY IN THE UNITED STATES* (Oxford: Foundation for Law, Justice and Society) (forthcoming 2008); Linda Greenhouse, “The Counter-Factual Court,” presented as the Brandeis Lecture, *Louis D. Brandeis School of Law, University of Louisville* (March 5, 2008) (on file with author); Pamela Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School, Irvine Lecture at Cornell Law School: The

Unfortunately, while the legal impact of the decision should be minimal, I'm afraid the practical impact will not be. In the opinion of the American College of Obstetricians and Gynecologists, as well as many of the most-respected experts and experienced practitioners in the field, the procedure the Court has clearly authorized banning provides significant safety benefits for some women, especially those whose risks of complications are higher than normal. It is true that risks of these serious complications from second trimester surgical abortions are relatively low.¹³ But, as one doctor said to me in a different situation, if it happens to you, it's 100%.

I. THE CAMPAIGN TO BAN PARTIAL-BIRTH ABORTION AND *STENBERG V. CARHART*

One of the strategies for overturning *Roe* documented in a 1987 article by Victor Rosenblum and Thomas Marzen was to attack the viability line that prohibits states from banning abortions pre-viability, and to attack the requirement that abortion restrictions must never put women's health in jeopardy, even post-viability.¹⁴ The authors saw these two bedrock principles of *Roe* as both the greatest doctrinal impediments to overturning the decision and as "conceptually weak" and "difficult . . . to defend."¹⁵

First, to attack the viability line, they recommended using statutes which "rais[ed] critical biological issues," and "emphasi[zed] the biologically human character of the fetus," all with the goal of laying the "groundwork for recognizing the constitutional personhood of the unborn."¹⁶ The main goal, they wrote, was "the passage of legislation offering an opportunity for a willing Supreme Court to begin the reversal process by discarding 'viability' as a valid criterion for the onset of a compelling state interest in protecting life."¹⁷ Second, Rosenblum and Marzen recommended a campaign to "limit the scope of criteria which may justify an abortion on grounds of 'maternal health,' . . . [with] the goal being the limitation of the 'health' concept to the most narrow set of possible circumstances."¹⁸

Law of Small Numbers: Some Emerging Themes on the Roberts Court (August 2007); and the many dangerous aspects of the case, ripe for exploitation in future cases, *see, e.g., Carhart*, 127 S. Ct. at 1649 n.7 (Ginsburg, J., dissenting) (discussing the Court's reliance on discredited claims that abortion harms women); *id.* at 1641 (Ginsburg, J., dissenting) (discussing "blur[red]" distinction between pre and post-viability abortions), *id.* at 1635-39 (shifting burden of proof on proving health claims).

¹³ Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 729-737 (2004); GYNECOLOGIC, OBSTETRIC, AND RELATED SURGERY 1045-46 (D. Nichols & D. Clarke-Pearson eds., 2000).

¹⁴ *See* Victor G. Rosenblum and Thomas J. Marzen, *Strategies for Reversing Roe v. Wade through the Courts in ABORTION AND THE CONSTITUTION*, 195-214 (Dennis J. Horan, et al. eds., Georgetown Univ. Press 1987).

¹⁵ *Id.* at 198.

¹⁶ *Id.*

¹⁷ *Id.* at 199.

¹⁸ *Id.* at 199-200.

This strategy suffered a defeat in *Planned Parenthood v. Casey*,¹⁹ where the Court reaffirmed *Roe*'s "essential holding," upholding a woman's right to choose an abortion pre-viability.²⁰ On the other hand, the case was a victory for anti-abortion advocates because it applied a lower level of scrutiny to the Pennsylvania mandatory information law at issue, asking whether the regulations imposed an "undue burden" on the woman's decision.²¹ The Court defined an "undue burden" as a regulation having the "purpose or effect [of] plac[ing] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."²²

The *Casey* test, which Justice Kennedy was in part responsible for formulating, has three distinct elements that are relevant here. First, the Court must strike a regulation if it has the *effect* of placing a substantial obstacle in the path of a woman seeking a previability abortion. Second, the Court must strike a regulation if it has the *purpose* of placing a substantial obstacle in the path of a woman seeking a previability abortion. Finally, the Court must strike a regulation if it does not adequately protect women's health.²³

After *Casey*, undeterred anti-abortion advocates went back to the drawing board and beginning in the mid-1990s, launched a nationwide campaign to ban what they referred to as "partial-birth abortion." The campaign tracked the strategy advocated in the late 1980s by Rosenblum and Marzen. To reach its goal of undermining *Roe*, particularly by attacking the viability line, the campaign relied on two myths. The first was that the term "partial-birth abortion" referred to a specific procedure. In fact, the term itself was developed as part of the campaign and has no medical meaning. Its legal meaning varies from statute to statute. The second myth was that a "partial-birth" abortion had something to do with abortions taking place *at birth*, in other words, at full term or at least "post-viability." This post-viability myth was easy to disprove in court; after all, the laws had no gestational limits and used broad language that could apply to abortions starting at least early in the second trimester and in some cases earlier. But coupled with drawings of babies born at full term used to promote the bills in advertising and legislative advocacy, the post-viability myth has been so successful that even after ten years of work to correct this notion successfully in

¹⁹ 505 U.S. 833 (1992).

²⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

²¹ *Id.*

²² *Id.* at 878. The Court also reaffirmed "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health," and "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." *Id.* at 846.

²³ In some cases, such as mandatory delay or parental consent regulations, this third test, the "health requirement," translates into a requirement that a regulation include an "exception" from its provisions to allow a procedure where enforcing the regulation would harm a woman's health. In other circumstances, the health requirement may mean that the entire regulation must fall as did the ban on saline amniocentesis, a second trimester abortion procedure in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

the courts and less successfully in the press, the belief that “partial-birth abortions” are “post-viability” abortions is still prevalent among the public.

In *Stenberg v. Carhart*, the Court struck down a Nebraska statute that was part of the first wave of state statutes banning so-called “partial-birth abortions.” The Court gave two reasons for its decision. First, the Court held that the statute was unconstitutional because it would ban D&E abortions, which account for approximately 90% of all second-trimester abortions, and not just intact D&E abortions as Nebraska claimed.²⁴

Second, the Court also struck the statute for its failure to contain any provision that would allow physicians to perform banned procedures where necessary to protect the health of women seeking abortions.²⁵ The Court held that where a “significant body of medical opinion” “supports the proposition that banning a particular abortion procedure could endanger women's health,” the existence of a “division of medical opinion about the matter,” will not defeat *Casey*'s requirement of an exception “for the preservation of the life or health of the mother.”²⁶ The Court explained that:

[A] division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. . . . Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that [intact D&E] is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.²⁷

I used to call this the “tie goes to the woman” rule which is another way of saying that the State had the burden of proving that “a health exception is ‘never necessary to preserve the health of women.’”²⁸

²⁴ *Stenberg v. Carhart*, 530 U.S. 914, 938-45 (2000).

²⁵ *Id.* at 937.

²⁶ *Id.* at 938 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992)).

²⁷ *Id.* at 937. The Court's analysis here reflects use of a “regret matrix,” a well-established business model of conflict resolution and guide for decision-making under uncertainty. See, e.g., *Decision Making: Descriptive, Normative, and Prescriptive Interactions* (David E. Bell et al., eds., 1988) (collection of papers from conference held in June 1983 at Harvard Business School); B. Krass & H. Krauss, *Interpersonal Conflict*, in 1 ANN. REV. OF CONFLICT KNOWLEDGE & CONFLICT RESOLUTION 1, 1-32 (J. Gittler, ed., 1989).

²⁸ *Stenberg*, 530 U.S. at 937-38 (quoting Petitioner's Reply Brief at 4).

II. GONZALES V. CARHART AND THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003

Dissatisfied with the result in *Stenberg*, Congress, just three years later, enacted its own ban, the Partial-Birth Abortion Ban Act of 2003 (“the Act”) (codified at 18 U.S.C. § 1531).²⁹ Rather than enacting a law that conformed to *Stenberg*, Congress sought to overturn that ruling, and adopted findings in the Act that conflicted with those accepted by the Supreme Court in *Stenberg*. The Act’s chief Senate sponsor, former Senator Rick Santorum (R-PA), directed his comments to the Court: “I hope the Justices read this record because I am talking to you. . . . [T]here is no reason for a health exception.”³⁰ In the Act, Congress attacked the district court findings in *Stenberg* as “questionable” and based on a “dearth of evidence,” claimed that the *Stenberg* Court had been “required to accept” those findings, and then demanded that the Court defer to Congress’s contrary findings, namely, that “partial-birth abortion is never necessary to preserve the health of a woman” and actually “poses significant health risks.”³¹

In 2007, when a newly constituted Court – with Justice Alito having replaced Justice O’Connor – considered the constitutionality of the federal ban, the Court abruptly changed course and upheld the law as a ban on intact D&E that it claimed would leave “most” non-intact D&Es unrestricted.³² In the 5-4 decision written by Justice Kennedy, the Court upheld the ban despite its lack of a health exception and ignored the findings of the two district courts before it – and the numerous district courts in previous opinions – which found that intact D&E procedures were significantly safer than non-intact procedures.³³

A. Holding on the Scope of the Statute

The plaintiffs in *Carhart* argued that the definition of banned procedures in the Act, like that in the Nebraska statute in *Stenberg* and most other state statutes banning so-called “partial-birth abortions,” was written so broadly that it would ban non-intact D&Es, as well as intact D&Es.³⁴ The Court rejected this claim and instead interpreted the statute to ban only intact D&Es. In this way, by limiting application of the statute to what he believed was only a tiny number of abortions, Justice Kennedy can be seen as signaling his continued support for second trimester abortions.

²⁹ Pub. L. No. 108-105, 117 Stat. 1201.

³⁰ 149 Cong. Rec. S3456, S3486 (daily ed. Mar. 11, 2003) (statement of Sen. Santorum).

³¹ See Act §§ 2(5)-(7), Appendix to Petitioners’ Brief 2a-3a.

³² The Court also held that the Act was not unconstitutionally vague. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1628-29 (2007).

³³ *Id.* at 1636-38.

³⁴ As noted above, D&Es constitute 90% of second trimester procedures. They are performed starting as early as 12-14 weeks of pregnancy. See *supra* note 7.

By prohibiting women from obtaining non-intact D&Es, the procedure used in 90% of second trimester abortions, the plaintiffs further argued that the Act placed a substantial obstacle in the path of a woman seeking a pre-viability abortion, thus imposing an unconstitutional undue burden on the right to abortion.³⁵ The Court rejected the plaintiffs' argument. It held that "interpreting the Act so that it does not prohibit what it referred to as "standard" D&E³⁶ and only prohibits intact D&E, is the "most reasonable reading and understanding of its terms."³⁷ Once the Court had convinced itself that the Act could be interpreted to apply only to intact D&Es and not to "the vast majority of D&E abortions," and that it would therefore not impose a "substantial obstacle" to obtaining an abortion, the ruling on the "effect prong" of the undue burden standard was easy.³⁸

Some of us disagree vehemently with the Court's analysis of the scope claim. I find the Court's interpretation of the statute bizarre and am troubled by the implication that the government could ban safe methods of abortion simply because they are not yet common enough that banning them would impose a substantial obstacle for women seeking abortions. However, the opinion is a straightforward application of the *Casey* principles which the Court recited as follows:

Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.' It also may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path

³⁵ Unlike in *Stenberg*, this was plaintiffs' sole liberty claim related to the scope of the statute. In *Stenberg*, the plaintiffs had argued that the ban on intact D&E also violated the liberty right under a strict scrutiny analysis. The undue burden test, they argued, was inapplicable to regulations that restrict methods of abortion, those that impact the physical or bodily integrity aspect of the right; the undue burden test applied under *Casey* only to biased counseling or "informed consent" regulations, those that impact the decisional-autonomy aspect of the right. See Respondents' Br., *Stenberg v. Carhart*, No. 99-830, 2000 WL 340275 at *29, *et seq.* (March 29, 2000). In *Stenberg*, the Court did not need to reach the issue because it struck down the law in its entirety on the more limited undue burden and health claims.

³⁶ It is disturbing that the Court defined "standard" D&E to exclude some non-intact D&Es, see Posting of Priscilla J. Smith (April 26, 2007, 15:23 EST), *supra* note 5. However, this must be read as a reference to circumstances where a physician has the specific intent at the outset to remove the fetus completely intact, succeeds in removing a fetus intact to the anatomical landmarks, but fails to remove the fetus completely intact. The result is a non-intact D&E that is banned by the Act. Any non-intact D&E performed by the physician without this specific intent is not banned. See *Carhart*, 127 S. Ct. at 1629 ("If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability.").

³⁷ *Carhart*, 127 S. Ct. at 1631; *id.* at 1629-32 (the Act should be interpreted so that it does not prohibit non-intact D&Es).

³⁸ See *id.* at 1632.

of a woman seeking an abortion before the fetus attains viability.³⁹

In fact, the Court's tortured interpretation of the law to exclude non-intact D&Es can be seen as signaling Justice Kennedy's continued support for second trimester abortions. If we take the Court at its word that it is – as it claims – protecting “standard D&E” procedures (meaning procedures that are used to perform the vast majority of second trimester abortions), *Carhart* does not impact this aspect of *Casey*'s undue burden standard.

B. Holding on Women's Health

But what of the Court's second holding rejecting plaintiffs' claim that the Act was unconstitutional because it did not allow use of the banned procedures where “necessary, in appropriate medical judgment, for the preservation of the . . . health” of the woman?⁴⁰ Although there is much that is wrong with the Court's treatment of the record and analysis of the facts, the decision leaves room for a challenge to a statute that lacks a health exception when the statute would impose significant risks to a woman's health. In this way, I believe that Justice Kennedy does not believe the case eliminated the underlying rule that abortion regulations are unconstitutional if they fail “to require that maternal health be the physician's paramount consideration.”⁴¹ He does, however, believe this rule is limited to circumstances where there are “significant” health concerns at stake.

The Court viewed the health question here – “whether the Act creates significant health risks for women” – as “a contested factual question.”⁴² The plaintiffs' problem, our problem, was that in Justice Kennedy's view the plaintiffs did not sufficiently undermine the testimony of the government's witnesses that the Act did not endanger women's health. The stature and relevant experience of our witnesses versus the stature and relevant experience of the government's witnesses, coupled with the opinion of the American College of Obstetricians and Gynecologists and the admissions by government witnesses under cross-examination, were not enough to convince him. Nor were the findings of numerous lower courts, including the two district courts at issue here, that intact D&E offered “significant” safety advantages for all women, and was particularly safe for women with certain serious medical conditions, such as chorioamnionitis, an dangerous infection of the uterine lining, or a bleeding placenta previa, a placenta covering the cervix that begins to bleed. We can argue about his treatment of the record, and question whether – given that record – anything

³⁹ *Id.* at 1627 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 877-79 (1992)).

⁴⁰ *Casey*, 505 U.S. at 879 (1992).

⁴¹ See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986).

⁴² *Gonzales v. Carhart*, 127 S.Ct. 1610, 1635 (2007).

could have convinced him.⁴³ The important fact remains, though, that Justice Kennedy wasn't buying it. His decision was a decision based on what he saw as a failure of proof, rather than an elimination of the underlying rule. So, while I believe the rule was in fact violated in this case, we can still make a strong argument in other cases that the health requirement is intact.⁴⁴

One could argue that *Carhart* means that governments are free to regulate abortion in ways that prevent women's health from being the physician's paramount consideration. This argument is especially seductive when one believes, as I do, that the Act *does* in fact subject women to significant health risks, the "unnecessary risk of tragic health consequences" of which the majority in *Stenberg* warned.⁴⁵ But the Court did not uphold the Act by eliminating the health requirement; it upheld the Act because it held that the Act did not violate the health requirement.

One could also argue that to the extent there is *some* health requirement, it has been limited and does not cover what Justice Kennedy has referred to in the past as "marginal" threats to health.⁴⁶ Indeed, in his dissent in *Stenberg* Justice Kennedy wrote, "[u]nsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right." *Id.* But the holding dictated by Justice Kennedy in *Carhart* is limited to his determination that there was "uncertainty over whether the barred procedure is *ever* necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives."⁴⁷ It is true, though, that as long as Justice Kennedy remains the deciding vote, plaintiffs will likely have to prove that regulations impose *significant* health differences,⁴⁸

⁴³ See *id.* at 1644 (Ginsburg, J., dissenting) ("[d]uring the District Court trials, 'numerous' 'extraordinarily accomplished' and 'very experienced' medical experts explained that, in certain circumstances and for certain women, intact D & E – the procedure banned by the Act approved by the Court – is safer than alternative procedures and necessary to protect women's health") (quoting trial court, *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1024-1027 (D. Neb. 2004)); *id.* ("If anything . . . the congressional record establishes that there was a 'consensus' in favor of the banned procedure," not against it.) (citing trial court *Carhart v. Ashcroft*, 331 F. Supp. 2d at 1008-09); *id.* at 1644 (Ginsburg, J., dissenting) (nine prominent professional associations, including the American College of Obstetricians and Gynecologists, "attest[ed] that intact D&E carries meaningful safety advantages over other methods," while "no comparable medical groups supported the ban.").

⁴⁴ *Id.* at 1635 ("The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks.'").

⁴⁵ *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

⁴⁶ See also *id.* at 967 ("[w]here the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method.") (Kennedy, J. dissenting).;

⁴⁷ *Carhart*, 127 S. Ct. at 1638 (emphasis added).

⁴⁸ It is important to recognize this difference because there is a reason that the Court did not go further here. It certainly would have been easy to adopt some of these statements from Kennedy's earlier opinions and include the type of discussion of marginal v. significant health risks in this case that Justice Kennedy included in his *Stenberg* dissent. That the Court did not adopt this tells us something is different. Whether something in this record, as opposed to the

given these statements from the past and especially considering the *Carhart* Court's statement in dicta that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."⁴⁹

On the other hand, there is no question that the Court overruled the *Stenberg* "tie goes to the woman" rule.⁵⁰ This case presented even more evidence of the "substantial medical authority," and an even more "significant body of medical opinion" supporting plaintiffs, than was in front of the *Stenberg* Court, and remarkably weak evidence to the contrary.⁵¹ Nevertheless, the Court in *Carhart* held that "medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude *in this facial attack* that the Act does not impose an undue burden" (emphasis added).⁵² Citing to a number of cases which, like the Court in *Stenberg*, balanced uncertainty in favor of the protection of the public health rather than against it, the Court holds that "medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."⁵³ The tie now goes to the state; the burden of persuasion now lies upon the woman.

C. Holding on the "Purpose Prong"

The most disturbing segment of the *Carhart* opinion is the Court's examination of whether the Act imposes an undue burden because "its purpose . . . is to place a substantial obstacle in the path of a woman seeking a

record in *Stenberg* made a difference, whether Justice Kennedy recognizes the difficulty of drawing a line between marginal and significant risks we cannot know. But what he was willing to adopt as the basis of the opinion was narrower.

⁴⁹ *Id.*

⁵⁰ In a bizarre attempt to distance itself from the *Stenberg* holding, the Court tries to pass off *Stenberg's* holding as merely the plaintiffs' "interpretation" of *Stenberg* by quoting the respondents quoting *Stenberg*, as follows:

. . . relying on the Court's opinion in *Stenberg*, respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'"

Id. (quoting Brief for Respondents in No. 05-380, p. 19 (quoting *Stenberg*, 530 U.S. at 938)).

⁵¹ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1642-46 (2007) (Ginsburg, J., dissenting).

⁵² *Id.* at 1637. The Court's limitation of this ruling to a "facial attack," see *id.* at 1636 ("[An] [a]ct can survive this facial attack...when this medical uncertainty persists") leaves open the possibility that the Court would resolve a similar evidentiary "tie" in the woman's favor if faced with one in an as-applied challenge. The problem is that few women and doctors have the time, much less the inclination or ability, to bring their case before the Supreme Court when faced with a difficult medical diagnosis, such as a bleeding placenta previa, or chorioamnionitis (infection of the uterine lining), which requires immediate medical action.

⁵³ *Id.* at 1637.

[pre-viability] abortion.”⁵⁴ In that segment, the Court expounds at great length on the government’s ability to “use its voice and its regulatory authority to show its profound respect for the life within the woman.”⁵⁵ This aspect of the decision provoked horror in progressives⁵⁶ because it seemed to accept a great anti-abortion myth, that abortion harms women by causing “severe depression and loss of esteem.”⁵⁷ It brought on disdain for its claim that there was “no reliable data to measure the phenomenon,”⁵⁸ and it caused great concern and offense with its use of terms like “infant life,” and “child assuming the human form” to describe the fetus.⁵⁹ Finally, it was soundly criticized for its justification of a total ban of a procedure on the basis that women do not receive enough information about the procedure.⁶⁰

One of the more puzzling aspects of this discussion is why it is in the case at all. The plaintiffs did not make a claim that the law imposed an undue burden because it had the purpose of placing a substantial obstacle in the path of a woman obtaining an abortion.⁶¹ Plaintiffs’ “substantial obstacle” undue burden claim was based, as indicated above, on the claim that the prohibition would have the “effect” of preventing physicians from performing the non-intact D&E, the procedure used for approximately 90% of second-trimester abortion. There was no “purpose prong” claim for the Court to “reject.”⁶² The Court clearly went out of its way to add this discussion.

⁵⁴ See *id.* at 1632, 1632-1635,

⁵⁵ *Id.* at 1633.

⁵⁶ See, e.g., Postings of Balkin and Koppelman, *supra* note 5.

⁵⁷ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007). For a discussion of the anti-abortion campaign, see generally Reva Siegel, *The New Politics of Abortion: an Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

⁵⁸ *Carhart*, 127 S. Ct. at 1634 (writing that it seems “unexceptionable to conclude” that some women will come to regret their choice to abort, and “it is self-evident” that a woman who comes to regret her choice); see Karlan, “The Law of Small Numbers,” *supra* note 12; see generally Commentary on Balkinization, <http://balkin.blogspot.com/search?q=carhart>. See *Carhart*, 127 S. Ct. at 1648 & n.7 (Ginsburg, J., dissenting) (“neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman’s long-term mental health than delivering and parenting a child that she did not intend to have”) (quoting Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL’Y REV. 8 (2006)).

⁵⁹ *Carhart*, 127 S. Ct. at 1634. Cf. *Roe v. Wade*, 410 U.S. 113, 156-160 (1973) (declining to adopt one theory of life and recognizing the importance of the judiciary showing respect for the “wide divergence of thinking on this most sensitive and difficult question”).

⁶⁰ *Carhart*, 127 S. Ct. at 1633-34 (the ban “furthers the Government’s objectives” because there is a “lack of information concerning the way the fetus will be killed”). See generally Commentary on Balkinization, <http://balkin.blogspot.com/search?q=carhart>.

⁶¹ See *Casey v. Planned Parenthood*, 505 U.S. 833, 878 (1992).

⁶² *Carhart*, 127 S. Ct. at 1632 (“we reject this further facial challenge to [the Act’s] validity”).

It appears that these passages resulted partly from Kennedy's desire to draw attention to what he saw as the neglected third principle of *Casey*,⁶³ viz., 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."⁶⁴ According to the Court in *Carhart*, this principle is part of a balance struck in *Casey*, a balance "central to its holding,"⁶⁵ one that was "set at naught" by the Court's opinion in *Stenberg*, which the Court now accuses of being "tantamount to allowing a doctor to choose the abortion method he or she might prefer."⁶⁶ The correct rule under *Casey*, the Court claims, is "[w]here 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 interest in regulating the medical profession in order to promote respect for life, including life of the unborn."⁶⁷

Some have asked how far this discussion can be taken, but the analysis here can be read as *sui generis* and limited to intact D&E. First, the Court is concerned here with what it claims is the unique power of intact D&E "to devalue human life,"⁶⁸ and claims that intact D&E deserves to be singled out because of what the Court refers to as "the additional ethical and moral concerns" raised by the procedure.⁶⁹ These "additional" concerns, the Court wrote, made it "reasonable for Congress to think that partial-birth abortion, more than standard D&E, 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world,'"⁷⁰ and ensured that the Act "furthers the Government's objectives."⁷¹ To the extent that the regret language means anything therefore, it bootstraps onto, and should remain limited to, these unique "moral and ethical

⁶³ I still believe my "pet theory," see Posting of Priscilla J. Smith (April 26, 2007, 15:23 EST), *supra* note 5, that the particular tenor of this discussion originates with Chief Justice Roberts. The Chief has family ties to Feminists for Life, an organization that promotes the "abortion harms women" strategy now championed by leaders in the anti-abortion movement. See SIEGEL, *supra* note 57; see also, e.g., Memorandum to Members of the South Dakota Pro-Life Leadership Coalition, et al. re inter-alia a Response to Bopp Memo from Samuel B. Casey and Harold J. Cassidy (Oct. 10, 2007) at 8 ("Casey Memo"), available at <http://www.operationrescue.org/?p=769> (arguing that a proposed abortion ban "is based upon the legitimate exercise of the State's power to prohibit abortion in order to protect, not just the life of the unborn child, but the interests, rights and health of their pregnant mothers").

⁶⁴ *Carhart*, 127 S. Ct. at 1626 (quoting *Casey*, 505 U.S. at 846) (internal quotations omitted).

⁶⁵ *Id.* at 1627.

⁶⁶ *Id.* at 1633 (Kennedy, J., dissent) (citing *Stenberg*).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1633 (2007); see also generally *id.* at 1633-34 (quoting many of the Congressional Findings included in the Act).

⁷⁰ *Id.* at 1635 (quoting Congressional Findings (14)(K), in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769).

⁷¹ *Id.* at 1633.

concerns.” Any other interpretation would be at odds with the decision’s application of *Casey* principles.

Second, the statement that the State may “bar certain procedures and substitute others” in furtherance of its interest in promoting respect for fetal life, by its terms (i.e., its requirement that others must be available for substitution), cannot apply to a ban on abortions where there are no substitutes, such as with a total ban, a ban on abortions during a certain gestational age, a ban on a medical procedure that is the only one available to a woman during certain gestational periods, or a ban on a medical procedure that is in fact the safest for women.⁷² Moreover, this discussion should be limited to evaluations under the “purpose prong” of the undue burden standard. In applying the purpose prong in the future, one would also hope that the Court undertakes a more searching evaluation of legislative purpose, rather than simply accepting the legislatures’ word at face value as it did in this case.

To summarize then, the opinion does not impact the “substantial obstacle” effect prong of the undue burden standard; pre-viability abortions still cannot be banned. This is not to say that the Court didn’t ban a method of performing pre-viability abortions, but simply that the Court believed that another option that was just as safe, or only marginally less safe, was still available. Nor does the opinion eliminate the rule that woman’s health must always remain the “physician’s paramount consideration”; regulations that don’t allow this discretion should be held unconstitutional. This is not to say that I believe that banning intact D&E didn’t violate this rule, but rather the Court thought it didn’t. Third, the regret language is limited to this context, a ban on intact D&E, which the Court felt presented “additional moral and ethical concerns.” This is not to say that I’m not horrified by the idea that the Court thinks it is okay for the government to take this choice from a woman in order to “protect” her from herself; it is just to say that someone in the majority limited this idea to the choice to obtain an intact D&E, a choice the Court can’t imagine ever being a good one.

I’ll also go out on a limb here. There is nothing in the opinion renouncing two of the important limitations the plurality in *Casey* placed on the Court’s approval of statutes mandating that women receive certain information before they obtain an abortion. First, the Court should still stand behind *Casey*’s requirement that the information must be truthful and not misleading.⁷³ Second, like the statute at issue in *Casey*, statutes should still be required to allow a physician to comply with the provisions if “he or she can demonstrate . . . that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.”⁷⁴ This *Casey* limitation led a district court in Alabama to issue a limited injunction

⁷² Note here that the problem of how best to present this claim, in a facial versus an as-applied challenge, will depend on the specific circumstances, and could present a significant obstacle given that delays caused by the judicial process in most instances simply cannot be tolerated by pregnant women.

⁷³ See *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

⁷⁴ *Id.* at 883-84 (specifically noting that statute contained this exception).

against a statute that required doctors to give information about normal fetal development to women who were seeking abortions because of serious fetal anomaly.⁷⁵ (Talk about cruel – let's remind the woman with a wanted pregnancy whose fetus has either of the fatal anomalies Trisomy 13, or anencephaly (lack of a forebrain) of what her fetus would look like if it didn't have Trisomy 13 or anencephaly).

CONCLUSION

Even if we are successful in limiting the impact of *Carhart* in the future, though, the regret language reveals a weakness – and vulnerability – in Justice Kennedy's support for the liberty right.⁷⁶ That weakness is in Justice Kennedy's view of women's decision-making process, decision-making he clearly does not understand, cannot relate to in any way, and that he imagines as a process that results in the loss of maternal bliss. As Reva Siegel has outlined in great historical detail, this weakness is the very one the anti-abortion movement chose to exploit with its campaign promoting the idea that abortion harms women.⁷⁷ We have to work just as hard to better understand the process of decision-making ourselves and to explain it to the Court and the public.

One of the problems we will face in explaining women's decision-making, though, is the lack of information people have about the process and the assumptions that grow in that void, assumptions fueled by the anti-abortion movement's widespread and well-funded disinformation campaigns.⁷⁸ This assumption is the belief that the decisions are often irrational and selfish – ultimately decisions that will be regretted later. New data about the nature of the process by which women decide to obtain abortions, the extent to which these decisions are decisions not just about whether to be a mother but also about what kind of mother to be, whether to their current children or to children they hope to have,⁷⁹ offers an opportunity to increase the Court's – and the public's – understanding of the decision-making aspect of the right to abortion and the

⁷⁵ *Summit Med. Ctr. of Ala. v. Riley*, 318 F. Supp. 2d 1109 (M.D. Ala. 2003).

⁷⁶ The same weakness exists, perhaps to a much larger extent, in Justice Roberts and Alito's belief in the liberty right, to the extent they believe in it at all.

⁷⁷ Siegel, *supra* note 57; *see also* Casey Memo at 9, *supra* note 63 (arguing that “it is now clear and provable that abortion destroys the most important liberty interests women have in life,” and that making this argument is “necessary to win the votes of Chief Justice Roberts, Justice Alito, and clearly needed to win the vote of Justice Kennedy” to overturn *Roe v. Wade*).

⁷⁸ *See* Siegel, *supra* note 57 at 32.

⁷⁹ *See, e.g.*, Rachel Jones, et al., “I Would Want to Give My Child, Like, Everything in the World:” *How Issues of Motherhood Influence Women Who Have Abortions*, J. OF FAMILY ISSUES (2008); Eleanor Drey, M.D., et al., *Risk Factors Associated With Presenting for Abortion in the Second Trimester*, 107 J. OBSTET. & GYNECOL. 128, 128 (2006); Lawrence B. Finer, et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 CONTRACEPTION 334 (2006); David A. Grimes, M.D., *The Continuing Need for Late Abortions*, 280 JAMA 747, 747 (Aug. 1998).

importance of that right to women's liberty and equality. That, however will have to remain a subject for another essay.

Though a more liberal Court is probably many years away, let us dream for a moment. In our dreams, this new Court could ignore *Carhart* altogether and adopt a robust right of sexuality or a more protective liberty/dignity/autonomy analysis in this area,⁸⁰ or a more protective sex equality analysis, as Justice Ginsburg has advocated for years and argued in her dissenting opinion in *Carhart*.⁸¹ Or perhaps, given what *Carhart* did to *Stenberg*, a new Court could simply flop back to the *Stenberg* rule. But a new Court might find all this flip-flopping unseemly and come to read *Carhart* as I do – as a case applying *Casey* principles in a sloppy way, a case that was all about the facts and that can be easily distinguished from most other situations. Read this way, the decision is a limited one, a temporary way station to an uncertain future. Keep your fingers crossed.

⁸⁰ See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”).

⁸¹ *Carhart*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.”); see also Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).