

HEALTH LAW, ETHICS, AND HUMAN RIGHTS

The Supreme Court and Abortion Rights

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Since the Supreme Court's landmark 1973 abortion-rights decision in *Roe v. Wade*,¹ the law has taken the lead in defining the contours of the continuing public debate over reproductive liberty. Ever since then, abortion opponents have tried to make abortion more burdensome by limiting *Roe*, and these continuing challenges are the reason there have been so many Supreme Court decisions about abortion, including the Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,² which unexpectedly reaffirmed the core of *Roe*.

In the wake of *Casey*, political efforts to restrict abortion have switched to outlawing one specific medical procedure, which its opponents label "partial-birth abortion," and more than 30 states and the federal government have made it a crime to perform this procedure. In 2000, in *Stenberg v. Carhart*,³ the Court ruled 5 to 4 that these laws are unconstitutional. In April 2007, also by a 5 to 4 vote, the Court reached the opposite conclusion in *Gonzales v. Carhart*.⁴ This is the first time the Court has ever held that physicians can be prohibited from using a medical procedure deemed necessary by the physician to benefit the patient's health. The importance of the decision to physicians and their patients cannot be appreciated without an understanding of the constitutional law of reproductive liberty as it has developed during the past 40 years.

THE RIGHT TO PRIVACY

The first case to embrace the concept of reproductive liberty was *Griswold v. Connecticut*, in which the Court ruled in 1965 that a Connecticut statute criminalizing the use of contraceptives violated the constitutional right to privacy that married couples had in sexual relations.⁵ Later, in 1972, the Court found that even outside marriage, a person had a "right to privacy . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."⁶

The following year, in *Roe*, the Court struck down a Texas law that made it a crime for physicians to perform an abortion unless it was necessary to save the life of the patient; there were no exceptions for the woman's health. The Court held that women have a constitutional right of privacy that is fundamental and "broad enough to encompass a woman's decision . . . to terminate her pregnancy."¹ Because the right is fundamental, states that wish to restrict abortion rights were required to demonstrate a compelling interest to restrict the exercise of this right. The Court ruled that the state's interest in the life of the fetus became compelling only at the point of viability, when the fetus can survive independently of its mother. Even after the point of viability, the state cannot favor the life of the fetus over the life or health of the pregnant woman. Under the right of privacy, physicians must be free to use their "medical judgment for the preservation of the life or health of the mother."¹ On the same day that the Court decided *Roe*, it also decided *Doe v. Bolton*,⁷ in which the Court defined health very broadly:

The medical judgment may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.⁷

Roe and *Doe* together established that both physician and patient were protected by the constitutional right of privacy. In later cases, the Court continued to defer to the medical judgment of the attending physician. For example, in 1976 in *Planned Parenthood of Central Missouri v. Danforth*, the Court concluded that state legislatures could not determine when viability occurred; rather this "essentially medical concept . . . is, and must be, a matter for the judgment of the responsible

attending physician.”⁸ By the end of the 1980s, a pattern in Court decisions could be discerned in which abortion regulations that significantly burdened a woman’s decision, treated abortion differently from other similar medical or surgical procedures, interfered with the exercise of professional judgment by the attending physician, or were stricter than accepted medical standards were struck down by the Court.⁹

Privacy as a constitutional right became a one-word description of liberty to make decisions regarding marriage, procreation, contraception, sterilization, abortion, family relationships, child rearing, and sexual relationships free of governmental interference.^{2,10}

THE RIGHT TO LIBERTY

One strategy to change *Roe* was to change the composition of the Supreme Court by appointing anti-*Roe* justices. Because of new justices on the Court in 1992, in *Casey*, the Court had its first real opportunity to overturn *Roe v. Wade*. Many Court observers thought it would. Instead, in an unusual procedure for the Court, three potentially anti-*Roe* justices, Justices Sandra Day O’Connor, David Souter, and Anthony Kennedy, joined together to write a joint opinion confirming the “core holding” of *Roe*. (They were joined in most of their opinion by two justices who would have simply upheld *Roe*, making this a 5-to-4 decision.) Most centrally, the authors of the joint opinion believed that although the pressure to overrule *Roe* has grown “more intense,” doing so would severely and unnecessary damage the Court’s legitimacy by undermining “the Nation’s commitment to the rule of law.”²²

Specifically, the three justices wrote that they were reaffirming “*Roe*’s essential holding” that before the point of viability a woman has a right to choose abortion without undue state interference, that after the point of viability the state can restrict abortion “if the law contains exceptions for pregnancies which endanger the woman’s life or health,” and 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.” The Court applied these principles to uphold laws mandating much more detailed requirements for abortion, as well as a mandatory 24-hour waiting period, but struck down a spousal-notification

requirement as an “undue burden.” Thus, after *Casey*, *Roe* stood for the proposition that pregnant women have a “personal liberty” right (“privacy” went unmentioned) to choose to terminate their pregnancies before the point of viability and that the state cannot “unduly burden” such a right by erecting barriers that effectively prevent the exercise of that choice.^{2,11} Of course, a major problem was definitional: burdensome regulations were acceptable, “unduly burdensome” ones were not — but it was not clear what qualified as which. Put another way, the state could demonstrate its concern for life by requiring that physicians make women seeking abortions jump through new and burdensome hoops (including offers of detailed and accurate information on abortion, the status of the fetus, adoption, sources of help for childbirth, and a 24-hour waiting period), as long as doing so did not “unduly burden” women by actually preventing them from being able to make a decision to have an abortion.

With the loss of all hope that the Court would overrule *Roe* wholesale, anti-*Roe* advocates switched strategies dramatically, focusing on criminalizing a specific procedure that they believed would horrify most Americans and that they labeled “partial-birth abortion.” The first such bill passed Congress in 1996 and was vetoed by President Bill Clinton because the prohibition did not contain an exception for the health of the woman, as required by *Roe* and *Casey*. In 1997, this time with the support of the American Medical Association, the bill passed Congress again. President Clinton vetoed it, again for failure to contain a health exception.¹²

“PARTIAL-BIRTH ABORTION” AND THE STATES

Proponents of the ban took their cause to the individual states, a majority of which enacted substantially identical laws. In 2000, Nebraska’s partial-birth abortion law reached the Supreme Court. The Nebraska law carried a penalty of up to 20 years in prison for physicians who performed the procedure. The law reads in relevant part:

No partial-birth abortion shall be performed in this state, unless such a procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or phys-

ical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

[A “partial-birth abortion” is] an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. . . . [The statute further defines the phrase “partially delivers vaginally a living unborn child before killing the unborn child” as] 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 child³ [emphasis added].

This ban applies throughout pregnancy and has no exception to protect the woman’s health, only to save her life. In a 5-to-4 opinion in *Stenberg v. Carhart*,^{3,13} the Court found this law unconstitutional for two reasons. First, the description of the banned procedure was too close to dilation and evacuation (D&E), another procedure that was permitted and widely used for second-trimester abortions. Therefore, this law would discourage physicians from using the lawful procedure, which would place an undue burden on their patients. Second, the law failed to provide an exception for instances in which the procedure was deemed necessary by the physician to protect the woman’s health, as required by *Roe* and *Casey*. Justice John Paul Stevens, in his concurring opinion, noted that the extreme anti-*Roe* rhetoric as exemplified in the partial-birth abortion debate obscured the fact that during the 27-year period since *Roe* was decided, the core holding of *Roe* “has been endorsed by all but 4 of the 17 Justices who have addressed the issue.”³

A notable dissenting opinion was written by Justice Kennedy, who had specifically endorsed the core of *Roe* in *Casey*. Kennedy argued that the outlawing of “partial-birth abortion” was consistent with *Casey* because of the interest the state has throughout pregnancy in protecting the life of the fetus that may become a child. In his view, the banned procedure conflates abortion and childbirth in a way that “might cause the medi-

cal profession or society as a whole to become insensitive, even disdainful, to life, including life of the human fetus.” He also argued that such a ban was not unduly burdensome to women because state legislatures can determine that specific medical procedures, like this one, are not medically necessary.³

“PARTIAL-BIRTH ABORTION”
AND CONGRESS

Justice Stephen Breyer, the author of the *Stenberg* majority opinion, stated that a more precise law, with a health exception, could be constitutional.³ In 2003, Congress passed a slightly revised law. It did not contain a health exception, but its preface did contain a declaration that the outlawed procedure was never medically necessary for the health of the woman. President Bush signed it into law on November 5, 2003. By the time the Court ruled on the constitutionality of this law in April 2007, in *Gonzales v. Carhart*, there were two important changes in the composition of the Court: a new chief justice, John Roberts, who replaced the consistently anti-*Roe* Chief William Rehnquist, and Justice Samuel Alito, who replaced Justice Sandra Day O’Connor, who was consistently pro-*Roe* (as interpreted in *Casey*). The federal law provides that

(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial birth abortion that is *necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.* . . .

(b) (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 of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) Performs the overt act, other than completion of delivery, that kills the partially delivered living fetus⁴ [emphasis added].

The Court decided, 5 to 4, that this law was constitutional. Justice Kennedy wrote the majority opinion for himself, Justices Antonin Scalia and Clarence Thomas, and the two new justices. In it he substantially adopts his dissenting opinion in *Stenberg* as the Court's new majority opinion. Although he concludes that his decision is consistent with *Stenberg*, all three U.S. District courts and all three Courts of Appeal that had examined this federal law found it unconstitutional under the principles in *Casey* and *Stenberg*, primarily because of the vagueness of the definition and the lack of a health exception.⁴

As to the vagueness argument, Kennedy writes that the new law is no longer vague because it clarifies the distinction between the prohibited procedure (which he calls "intact D&E") and standard D&E abortions because the former requires the delivery of an intact fetus, whereas the latter requires "the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix." In addition, the new federal law specifies fetal landmarks (e.g., the "navel") instead of the vague description of a "substantial portion" of the "unborn child."⁴

Since the law applies to fetuses both before and after the point of viability, Kennedy concedes that under *Casey* the law 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."⁴ Kennedy finds Congress's purpose is twofold: first, lawmakers wanted to "express respect for the dignity of human life" by outlawing "a method of abortion in which a fetus is killed just inches before completion of the birth process," because use of this procedure "will further coarsen society to the humanity of not only newborns, but of all vulnerable and innocent human life. . . ." Second, Congress wanted to protect medical ethics, finding that this

procedure "confuses the medical, legal and ethical duties of physicians to preserve and promote life. . . ."⁴

The key to Kennedy's legal analysis is his conclusion that these reasons are constitutionally sufficient to justify the ban because under *Casey* "the State, from the inception of pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child [and this interest] cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing the doctor to choose the abortion method he or she might prefer."⁴

Kennedy then goes on to write that "respect for human life finds an ultimate expression in the bond of love the mother has for her child," and that "while no reliable data" exist on the subject, "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow." Such regret, Justice Kennedy believes, can be caused or exacerbated if women later learn what the procedure entails, suggesting that physicians fail to describe it to patients because they "may prefer not to disclose precise details of the means [of abortion] that will be used. . . ."⁴

The final, important issue is whether the prohibition would "ever impose significant health risks on women" and whether physicians or Congress should make this determination. Kennedy picks Congress: "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. . . . Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."⁴ Furthermore, Kennedy argues, the law does not impose an "undue burden" on women for another reason: alternative ways of killing a fetus have not been prohibited. In his words, "If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure."⁴

JUSTICE GINSBURG'S DISSENT

Writing for the four justices in the minority, Justice Ruth Bader Ginsburg observes, "Today's de-

cision 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 (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health."⁴

Ginsburg argues that the majority of the Court has overruled the conclusion in *Stenberg* that a health exception is required when "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health. . . ." ⁴ This conclusion, bolstered by evidence presented by nine professional organizations, including the ACOG, and conclusions by all three U.S. District Courts that heard evidence concerning the Act and its effects, directly contradicted the congressional declaration that "there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." Even Justice Kennedy agreed that Congress's finding was untenable.

Justice Ginsburg concludes that this leaves only "flimsy and transparent justifications" for upholding the ban. She rejects those justifications, arguing that the state's interest in "preserving and promoting fetal life" cannot be furthered by a ban that targets only a method of abortion and that cannot save "a single fetus from destruction" by its own terms but may put women's health at risk.⁴ Ultimately, she believes that the decision rests entirely on the proposition, never before enshrined in a majority opinion and explicitly repudiated in *Casey*, that "ethical and moral concerns" unrelated to the government's interest in "preserving life" can overcome what had been considered fundamental rights of citizens.

The majority seeks to bolster its conclusion by describing pregnant women as in a fragile emotional state that physicians may take advantage of by withholding information about abortion procedures. Justice Ginsburg concludes that the majority's solution to this hypothetical problem is to "deprive women of the right to make an autonomous choice, even at the expense of their safety."⁴ She continues, "This way of thinking [that men must protect women by restricting their choices] reflects ancient notions about women's

place in the family and under the Constitution — ideas that have long since been discredited."⁴

Ginsburg further notes that the majority simply cannot contain its hostility to reproductive rights as articulated in *Roe* and *Casey*, calling physicians "abortion doctors," describing the fetus as an "unborn child" and as a "baby," labeling second-trimester abortions as "late term," and dismissing "the reasoned medical judgments of highly trained doctors . . . as 'preferences' motivated by 'mere convenience.'"⁴

Ginsburg makes two final points. First, although the Court invites a lawsuit to challenge the Act "as applied," it gives "no clue" as to how such a lawsuit should be brought. Surely, she asks, "the Court cannot mean that no suit to challenge the ban [based on how it affects an actual woman or her physician] may be brought until a woman's health is immediately jeopardized." Second, she argues that the opinion threatens to undercut the "rule of law" and the "principle of stare decisis," both of which the Court affirmed in *Casey*, concluding that, "A decision so at odds with our jurisprudence should not have staying power."⁴ As described in *Casey*, stare decisis is a doctrine that obligates courts to follow the principles set forth in prior cases, called precedents, to assure continuity in the law, and precedents should not be abandoned under "political pressure" or as an "unprincipled emotional reaction."²

DISCUSSION

The major change in the law this opinion brings with it is the new willingness of Congress and the Court to disregard the health of pregnant women and the medical judgment of their physicians.¹⁴⁻¹⁶ This departure from precedent was made possible by categorizing physicians as unprincipled "abortion doctors" and infantilizing pregnant women as incapable of making serious decisions about their lives and health. The majority opinion ignores or marginalizes long-standing principles of constitutional law, substituting the personal morality of Justice Kennedy and four of his colleagues.

The majority asserts that giving Congress constitutional authority to regulate medical practice is not new but identifies no case in which Congress had ever outlawed a medical procedure. Its reliance on the more than 100-year-old case of *Jacobson v. Massachusetts* is especially inapt.¹⁷ *Jacob-*

son was about mandatory smallpox vaccination during an epidemic. The statute had an exception for “children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination,” and the Court implied that a similar medical exception would be constitutionally required for adults. It is not just abortion regulations that have had a health exception for physicians and their patients — all health regulations have.¹⁶⁻¹⁸

On the other hand, those who expect *Roe* to be overturned by this Court may be disappointed. Although Justice Alito has replaced Justice O'Connor and is likely to vote in the opposite direction on *Roe*-related issues, Justice Kennedy is the new swing vote on the Court, and he insists that he is upholding the principles of *Roe v. Wade* as reaffirmed in *Casey*.³ Just as the question of whether a specific abortion regulation was an “undue burden” was once a determination Justice O'Connor could effectively make for the Court, the meaning of *Roe v. Wade* is, at least for now, up to Justice Kennedy.

CONCLUSIONS

Some physicians will surely be tempted to view the decision as a narrow victory for antiabortion forces that is unlikely to have more than a marginal effect on medical practice. This view is understandable but misses the potential broader impact of the opinion on the regulation of medical practice and the doctor–patient relationship generally. Until this opinion, the Court recognized the importance of not interfering with medical judgments made by physicians to protect a patient's interest.¹⁶ For the first time, the Court permits congressional judgment to replace medical judgment.

For physicians who are disturbed or dismayed by this opinion — for example, the ACOG has termed it “shameful and incomprehensible”¹⁹ — there are concrete actions to consider. One is to seek an amendment of the act in Congress to protect women's health — for instance, by adding a specific exemption for cases in which “in the reasonable medical judgment of the attending physician, an alternative procedure poses a significant risk to the health of the pregnant woman.” Although it would be better simply to repeal the law, this amendment could actually pass because it permits legislators to be against using

the despised procedure but at the same time protecting the health of women.

A second, admittedly much more difficult, response is for physicians to become conscientious objectors in particular circumstances. This means doctors will do what is medically necessary to preserve and protect the lives and health of their patients as required by medical ethics, regardless of what politicians attempt to dictate. Unlike antiabortion conscientious objection, this kind does not come with legal immunity. There is danger of prosecution, and this approach will be a viable option only if physicians are assured of the financial and moral support of the medical profession (especially of the ACOG) and, I think, of the legal profession as well. I believe the American Bar Association should agree as an organization to actively support any physician who is prosecuted under this law for doing what he or she believed at the time was in the patient's best medical interests. This strategy means that a physician who is accused of violating this law would challenge its constitutionality as part of his or her defense in the criminal action, what the Court seemed to mean by an “as applied” case.

Many state legislatures will now enact new laws restricting abortion access to see how far they can go, just as happened after *Roe*. Other states, especially those like New York that had made abortion legal before *Roe*, may codify the basic protections of *Roe* into state law.²⁰ In anti-*Roe* states, there are likely to be increased requirements for physicians to present their patients with more and more information designed to discourage pregnant women from having abortions, such as viewing ultrasonographic images of their fetuses. Some states will also attempt to outlaw other abortion procedures that the members of their legislatures find personally or religiously objectionable, including standard D&E. In the past, members of state legislatures could vote for all sorts of restrictions and bans, knowing that the courts would almost certainly find them unconstitutional. Thus, they could be publicly in favor of abortion restrictions and at the same time privately assure their pro-choice constituents that such restrictions would have no effect on women. Now that states (and Congress) have been given the green light to regulate medicine on the basis of their own views of morals and ethics, detached from medicine and science, these legislators may have to make real decisions.

For the sake of their patients and the profession of medicine, physicians will have to pay more attention to politics.

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No potential conflict of interest relevant to this article was reported.

This article (10.1056/NEJMhle072595) was published at www.nejm.org on May 2, 2007.

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