

# The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart* (2007)

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## ABSTRACT

This paper considers the Supreme Court's decision in *Gonzales v. Carhart*, in which the Court upheld the constitutionality of the Partial-Birth Abortion Act of 2003 (the Act). First, I will consider the Court's prior treatment of abortion from *Roe v. Wade* through *Stenberg v. Carhart*, the Court's decision in 2000 that invalidated Nebraska's ban on partial-birth abortion. Second, I will consider the Congressional treatment of the issue of partial-birth abortion, which resulted in the enactment of the Partial-Birth Abortion Ban Act of 2003. Third, I will briefly describe the lower court decisions that all held the Act unconstitutional. Fourth, I will discuss the Court's April 18, 2007 decision in *Gonzales v. Carhart*. Fifth, I will offer some general observations about the impact that this decision will have. I believe that the Court's decision in *Gonzales v. Carhart* will help to bring us closer to the day when *Roe v. Wade* and *Planned Parenthood v. Casey* will be overruled.

## I. THE SUPREME COURT'S ABORTION CASES

It is important to begin any discussion of the Supreme Court and abortion with an accurate description of the relevant law. It is quite common for even knowledgeable observers to fail to describe the full impact of the Court's abortion jurisprudence.<sup>1</sup> For example, as Clarke Forsythe and Stephen Presser noted recently, “[i]n her book, *The Majesty of the Law*, Justice O'Connor—not once but twice—inaccurately describes the *Roe* decision as legalizing abortion only in ‘the first three months of preg-

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<sup>1</sup> See Richard S. Myers, “Reflections on ‘Looking Back of Planned Parenthood v. Casey’” in *Life and Learning XIII: The Proceedings of the Thirteenth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: UFL, 2004), noting this point, pp. 3, 5-6.

nancy’.”<sup>2</sup> This description just does not do justice to what the Court has done in this area, and so before discussing *Gonzales v. Carhart*,<sup>3</sup> I will briefly review the major cases.

In *Roe v. Wade*,<sup>4</sup> the Court set forth the trimester framework. The Court did acknowledge that the state had an important interest in the health of the pregnant woman and “another important and legitimate interest in protecting the potentiality of human life[.]”<sup>5</sup> and that at some point during pregnancy “each becomes ‘compelling’.”<sup>6</sup> Perhaps these statements and Chief Justice Burger’s comment in his concurring opinion that “the Court today rejects any claim that the Constitution requires abortions on demand[.]”<sup>7</sup> created some confusion on this score. It was, however, clear to Justice White that the Court had basically accepted the claim that “for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc...or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.”<sup>8</sup> This seems clear from a close reading of *Roe v. Wade* and *Doe v. Bolton*.

*Roe*’s trimester framework gave states the ability to regulate abortion after the first trimester “in ways that are reasonably related to maternal health.”<sup>9</sup> Under *Roe*, the state had the ability to proscribe abortion after

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<sup>2</sup> Clarke D. Forsythe & Stephen B. Presser, “The Tragic Failure of *Roe v. Wade*: Why Abortion Should be Returned to the States,” 10 *Tex. Rev. L. & Pol.* 85, 136-137 (2005), quoting Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (New York NY: Random House, 2003), p. 45.

<sup>3</sup> 127 S. Ct. 1610 (2007).

<sup>4</sup> 410 U. S. 113 (1973).

<sup>5</sup> 410 U. S. at 162.

<sup>6</sup> 410 U. S. at 163.

<sup>7</sup> *Doe v. Bolton*, 410 U. S. 179, 208 (Burger, C. J., concurring).

<sup>8</sup> *Doe*, 410 U. S. at 221 (White, J., dissenting).

<sup>9</sup> 410 U. S. at 164.

viability, but the Court added the proviso—“except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>10</sup> In discussing the physician’s medical judgment, the Court in *Doe* explained that this would 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. [The Court noted that a]ll these factors relate to health.”<sup>11</sup> Although there is some ambiguity here (the Court in *Doe* was discussing a vagueness challenge and not addressing the constitutionality of a law that failed to contain this broad formulation of health), the conclusion seems inescapable that the Court thought these factors would inform the interpretation of the “health” exception that *Roe* stated was required by the Constitution.<sup>12</sup>

This broad reading of the right to abortion as set forth in *Roe* and *Doe* was made plain in cases decided from 1973 up until and including the Court’s 1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists*.<sup>13</sup> In *Thornburgh* the Court invalidated a variety of abortion regulations, including an informed consent provision that required that certain information be provided to the woman seeking an abortion. This decision finally drove Chief Justice Burger to realize that his 1973 assessment that *Roe* did not endorse abortion on demand had been undermined by the Court’s post-*Roe* decisions. In a dissent that called for the reexamination of *Roe*, he stated: “We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the ‘demand’ will not even have to be the result of an informed choice.”<sup>14</sup>

The Court did begin to move away from these more extreme readings, primarily in the 1989 decision in *Webster v. Reproductive*

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<sup>10</sup> 410 U. S. at 165.

<sup>11</sup> 410 U. S. at 192.

<sup>12</sup> See Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge MA: Harvard Univ. Press, 1987), p. 22. See also Forsythe & Presser, *supra* n2, at pp. 95-96.

<sup>13</sup> 476 U. S. 747 (1986).

<sup>14</sup> 476 U. S. at 783-784 (Burger, C.J., dissenting).

*Health Services*<sup>15</sup> and in the 1992 decision in *Planned Parenthood v. Casey*.<sup>16</sup> In *Casey*, the Court did abandon the trimester framework in favor of the undue burden approach. This approach explicitly acknowledged that prior decisions had not given sufficient weight to the state's "interest in protecting fetal life or potential life."<sup>17</sup> Under the undue burden approach, the Court accepted certain regulations, such as an informed consent provision and a 24-hour waiting provision, that it would have invalidated under its past decisions.<sup>18</sup> It was this modification that led one prominent scholar to describe *Casey* as a "compromise[,...]"<sup>19</sup> that has allegedly confined the right to abortion to "a minimal existence, protected only against the most overwhelming of state incursions."<sup>20</sup>

This reading is not, however, very persuasive. The joint opinion in *Casey* itself noted that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."<sup>21</sup> And, even after viability, the *Roe* "exceptions" were explicitly retained: "We also affirm *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother'."<sup>22</sup>

Under the undue burden standard, a State may regulate but it seems

<sup>15</sup> 492 U. S. 490 (1989).

<sup>16</sup> 505 U. S. 833 (1992). For a devastating commentary on *Casey*, see Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," 78 *Notre Dame L. Rev.* 995 (2003).

<sup>17</sup> 505 U. S. at 876.

<sup>18</sup> See *Casey*, 505 U. S. at 934-940 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), explaining why all of these provisions would have been invalidated under the Court's precedents.

<sup>19</sup> Chris Whitman, "Looking Back on *Planned Parenthood v. Casey*," 100 *Mich. L. Rev.* 1980, 1981 (2002).

<sup>20</sup> Whitman, p. 1980.

<sup>21</sup> 505 U. S. at 879.

<sup>22</sup> 505 U. S. at 879, quoting *Roe v. Wade*, 410 U. S. at 164-165.

clear never actually legally prohibit an abortion. And, this undue burden standard does not eviscerate the right to an abortion, as some scholars contend. As Justice Scalia's dissent maintained "in the 'undue burden' standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence."<sup>23</sup> As Justice Scalia noted "despite flowery rhetoric about the State's 'substantial' and 'profound' interest in 'potential human life,' and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful."<sup>24</sup>

Justice Scalia's reading is borne out by the Court's 2000 decision in the partial-birth abortion case, *Stenberg v. Carhart*.<sup>25</sup> In *Stenberg*, the Court invalidated a Nebraska law banning partial birth abortions. As the dissents in *Stenberg* make clear, the current law on abortion is not fairly characterized as providing only "a minimal existence"<sup>26</sup> for the right to abortion. *Stenberg* protected a woman's right to a partial-birth abortion even though banning that method of abortion would deny no woman the right to choose an abortion—other still-legal methods of abortion were freely available. The Court's major reason for invalidating the Nebraska law was that the law did not contain a health exception.<sup>27</sup> This conclusion required the Court to "cast aside the views of distinguished physicians and the statements of leading medical organizations, and...[to] award each physician a veto power over the State's judgment that the procedures

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<sup>23</sup> 505 U. S. at 992 (Scalia, J, concurring in the judgment in part and dissenting in part).

<sup>24</sup> 505 U. S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>25</sup> 530 U. S. 914 (2000).

<sup>26</sup> Whitman, *supra* n19, at p. 1980.

<sup>27</sup> The Court also relied on the view that the Nebraska statute might apply to D & E abortions as well as to D & X abortions and that therefore the statute created an undue burden on the right to abortion. As the dissents explained, this reading of the statute was not persuasive. See *Stenberg*, 530 U. S. at 972-979 (Kennedy, J., dissenting); 530 U. S. at 983-1005 (Thomas, J., dissenting). Justice O'Connor's opinion primarily rests on the health exception point, which Professor Whitman notes.

should not be performed.”<sup>28</sup>

I think this opinion confirmed how bad the legal situation in this country had become. What we see here, and I am borrowing a phrase from the writings of Pope John Paul II, is the institutionalization of the culture of death.<sup>29</sup>

The Nebraska ban on partial-birth abortion, like the other bans enacted in nearly 30 other states, was admittedly going to have very little or no impact on the availability of abortion. The bans simply made illegal one particularly gruesome method of abortion. The bans were largely symbolic. Yet they were met with an overwhelmingly hostile reaction from a majority of the Supreme Court.

The case was before the Court entirely on the assumption that *Roe* and *Casey* were good law, and the Court considered only how partial-birth abortion statutes ought to be treated under *Casey*'s undue burden framework. In my view, the effort to ban partial-birth abortion was only symbolic. As one lower court opinion (by Judge Posner, who was dissenting in the Seventh Circuit case that upheld some partial-birth abortion statutes) discussed, “there is no meaningful difference”<sup>30</sup> between partial-birth abortion and the abortions that are constitutionally protected. “No reason of policy or morality that would allow the one would forbid the other.”<sup>31</sup> As Judge Posner noted, “[t]he states want to dramatize the

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<sup>28</sup> *Stenberg*, 530 U. S. at 964 (Kennedy, J., dissenting).

<sup>29</sup> For a discussion of this point, see Richard S. Myers, “An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching,” 72 *U. Det. Mercy L. Rev.* 771, 782 (1995), discussing the views of Pope John Paul II; see generally William C. Brennan, “Culture of Death,” in *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy*, ed. M. Coulter, S. Krason, R. Myers & J. Varacalli (Lanham MD: Scarecrow Press, 2007), pp. 268-69. For a commentary on *Stenberg*, see John M. Breen & Michael A. Scaperlanda, “Never Get Out’a the Boat: *Stenberg v. Carhart* and the Future of American Law,” 39 *Conn. L. Rev.* 297 (2006).

<sup>30</sup> *Hope Clinic v. Ryan*, 195 F. 3d 857, 879 (7th Cir. 1999)(en banc)(5-4) (Posner, C. J., dissenting), vacated and remanded, 530 U. S. 1271 (2000).

<sup>31</sup> 195 F. 3d at 879 (Posner, C.J., dissenting).

ugliness of abortion.”<sup>32</sup> Doing so may help in the long term to change peoples’ hearts and minds about the reality of abortion, but these partial-birth abortion bans do not actually prohibit any abortions at all—other methods are available, and constitutionally protected.

I do not mean to suggest that the effort to ban partial-birth abortion was a waste of time. I think the effort was largely designed to educate the public about the reality of abortion. One benefit of the Supreme Court’s treatment of the issue is that the dissents spent considerable time describing the reality of partial-birth abortion. As Justice Scalia noted in his dissent—“[t]he method of killing a human child—one cannot [he said] even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion.”<sup>33</sup> Justice Thomas’s dissent made an effort to counter the sanitized description set forth in the majority opinion. Justice Thomas explained that a partial-birth abortion is performed on mid to late second trimester and sometimes third trimester fetuses. “After dilating the cervix, the abortionist will grab the baby by its feet and pull its body out of the uterus and into the vaginal cavity.... [The baby’s] head [, which at this stage of development,] is the largest part of the baby’s body [,] ...will be held inside the mother’s uterus by the cervix. While the baby is stuck in this position, dangling partly out of the woman’s body, and just a few inches from a completed birth, the abortionist uses an instrument such as a pair of scissors to tear or perforate the baby’s skull. The abortionist will then either crush the skull or will use a vacuum to remove the brain and other intracranial contents from the baby’s skull, collapse its head, and pull the baby from the uterus.”<sup>34</sup> The Supreme Court held that it would violate the mother’s fundamental constitutional rights to limit her access to this method of abortion. That conclusion is almost beyond belief.<sup>35</sup>

Another noteworthy feature of *Stenberg* was the dissent by Justice Kennedy. Justice Kennedy was one of the co-authors of the joint opinion

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<sup>32</sup> 195 F. 3d at 879 (Posner, C.J., dissenting).

<sup>33</sup> *Stenberg*, 530 U. S. at 953-954 (Scalia, J., dissenting).

<sup>34</sup> 530 U. S. at 987 (Thomas, J., dissenting)(citations omitted).

<sup>35</sup> See generally Breen & Scaperlanda, *supra* n29.

in *Casey* and so the view he expressed in *Stenberg* that the Court had misapplied *Casey* was quite significant. It was also noteworthy that his dissent was so impassioned. Reading that dissent in light of later developments and later comments from Justice Kennedy, the clear sense one gets is of betrayal. Justice Kennedy had changed his initial vote in *Casey* to support a Solomonic solution to the problem of abortion. That solution included a recognition that abortion on demand was too extreme and that other state interests had to be acknowledged. For Justice Kennedy, the Court's decision in *Stenberg* to invalidate the Nebraska law banning partial-birth abortion seemed a rejection of (a turning away from) these premises.<sup>36</sup> As Justice Kennedy concluded: "The Court's decision... [in *Stenberg*], in my submission, repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon the right. The legislation is well within the State's competence to enact. Having concluded Nebraska's law survives the scrutiny dictated by a proper understanding of *Casey*, I dissent from the judgment invalidating it."<sup>37</sup>

## II. CONGRESSIONAL RESPONSE

Congress had considered banning partial-birth abortion since 1995. On two occasions (1996 and 1997) Congress passed such bans but President Clinton vetoed them.<sup>38</sup> In *Stenberg*, the Court applied the undue burden approach of *Casey* and by a 5-4 vote invalidated Nebraska's ban on

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<sup>36</sup> Justice Kennedy explained that "a central premise [of *Casey*] was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed. The political processes of the State are not to be foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus." 530 U. S. at 956-957 (Kennedy, J., dissenting)(citations omitted).

<sup>37</sup> *Id.* at 957 (Kennedy, J., dissenting).

<sup>38</sup> *Gonzales v. Carhart*, 127 S. Ct. at 1623, describing these earlier Congressional actions.



partial-birth abortion.<sup>39</sup> Justice Kennedy was one of the four dissenters. After the Court's *Stenberg* decision and after more hearings, Congress passed and President Bush signed the Partial-Birth Abortion Ban Act of 2003.<sup>40</sup> The Act was expressly designed to deal with the deficiencies the Court identified in *Stenberg*.

First, Congress made detailed factual findings to address the "health" issue. Congress expressly found that "partial-birth abortion...is a gruesome and inhumane procedure that is never medically necessary...to preserve the health of the mother..."<sup>41</sup> Accordingly, Congress did not include a statutory exception for cases in which a partial-birth abortion is necessary to preserve the mother's health. Second, Congress adopted a more specific definition of partial-birth abortion to address the *Stenberg* Court's concern that the Nebraska statute had been written in a manner that would have proscribed standard D & E abortions.<sup>42</sup>

### III. LOWER COURT DECISIONS

The Partial-Birth Abortion Act of 2003 was immediately challenged and three separate federal courts of appeals held the Act unconstitutional.<sup>43</sup> In

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<sup>39</sup> 530 U. S. 914 (2000).

<sup>40</sup> 18 U. S. C. section 1531 (2000 ed. Supp. IV).

<sup>41</sup> Congressional findings 1 & 2 (Act of Nov. 5, 2003, P. L. 108-105, section 2, 117 Stat. 1201).

<sup>42</sup> The Act's definition of partial-birth abortion states: "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 fetus." 18 U. S. C. section 1531 (b)(1).

<sup>43</sup> See *Carhart v. Gonzales*, 413 F. 3d 791 (8th Cir. 2005), rev'd, 127 S. Ct. 1610 (2007); *Planned Parenthood Federation of America v. Gonzales*, 435 F. 3d 1163 (9th Cir. 2006), rev'd, 127 S. Ct. 1610 (2007); *National Abortion Federation v. Gonzales*, 437 F. 3d 278 (2d Cir. 2006), vacated, 2007 U. S. App. LEXIS 11497 (May 16, 2007); see also *Richmond Medical Center for Women v. Hicks*, 409 F.

*Carhart*, the Eighth Circuit relied on *Stenberg*, refused to defer to Congress's factual findings, and invalidated the Act because it lacked a health exception.<sup>44</sup> In *Planned Parenthood Federation of America*, the Ninth Circuit also emphasized the lack of a health exception.<sup>45</sup> In *National Abortion Federation v. Gonzales*, the Second Circuit also relied on the absence of a health exception.<sup>46</sup> The Supreme Court granted Attorney General Gonzales's petition for writ of certiorari in the *Carhart* case on February 21, 2006<sup>47</sup> and in the *Planned Parenthood* case on June 19, 2006<sup>48</sup> and the cases were both argued before the Supreme Court on November 8, 2006.

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3d 619 (4th Cir.), holding Virginia's statute unconstitutional, rehearing en banc denied, 422 F. 3d 160 (4th Cir. 2005), vacated and remanded, 127 S. Ct. 2094 (2007).

<sup>44</sup> 413 F. 3d 791(8th Cir. 2005), rev'd, 127 S. Ct. 1610 (2007).

<sup>45</sup> 435 F. 3d 1163 (9th Cir. 2006), rev'd, 127 S. Ct. 1610 (2007). The court also relied on its views that the Act covered certain D & E abortions and that the statutory definition was unconstitutionally vague.

<sup>46</sup> 437 F. 3d 278, vacated, 2007 U. S. App. LEXIS 11497 (May 16, 2007). In his concurring opinion, Chief Judge Walker considered himself bound by *Stenberg* but expressed his strong disagreement with the then-existing state of the law. Chief Judge Walker stated: "In today's case, we are compelled by precedent to invalidate a statute that bans a morally repugnant practice, not because it poses a significant health risk, but because its application might deny some unproven number of women a marginal health benefit. Is it too much to hope for a better approach to the law of abortion—one that accommodates the reasonable policy judgments of Congress and the state legislatures without departing from established, generally applicable, tenets of constitutional law?" 437 F. 3d at 296 (Walker, Ch. J., concurring). In his dissenting opinion, Judge Straub relied heavily on Congressional findings and stated that he did not believe that *Roe* or *Casey* "extend[ed] to the destruction of a child that is substantially outside of ...[the mother's] body, and that the State has a compelling interest in drawing a bright line between abortion and infanticide...." Id. at 298 (Straub, J., dissenting). Judge Straub also stated that he found "the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable." Id. at 312 (Straub, J., dissenting).

<sup>47</sup> 546 U. S. 1169 (2006).

<sup>48</sup> 126 S. Ct. 2901 (2006).

IV. *GONZALES V. CARHART* IN THE SUPREME COURT

*Changes in personnel.* The first issue to consider is the Court's changing composition. *Stenberg* was a 5-4 decision and the four dissenters were Chief Justice Rehnquist, Justice Scalia, Justice Kennedy (who had been part of the key joint opinion in *Casey*), and Justice Thomas. Since 2000, Chief Justice Rehnquist and Justice O'Connor, who was in the majority in *Stenberg*, have left the Court. The issue of abortion figured prominently during the confirmation hearings for their replacements, John Roberts and Samuel Alito.<sup>49</sup> Prior to the Court's decision in *Gonzales v. Carhart*, there was good reason to believe that Roberts and Alito would not be enthusiastic supporters of *Roe* and *Casey*. Roberts is most often cited as in the mold of Chief Justice Rehnquist and Rehnquist was one of the two original dissenters in *Roe v. Wade* and he consistently opposed *Roe* and *Casey* over the years. Alito, while applying for and working in the Reagan Justice Department made it clear that he opposed *Roe v. Wade*<sup>50</sup> and I said a year ago that I didn't think there was any reason to think he had changed his views on this issue.

*Options.* In deciding *Gonzales v. Carhart*, the Court had various options. One option would have been for the Court to take the opportunity presented in *Gonzales v. Carhart* to reverse *Roe* and *Casey*. That issue is on the table every time the Court addresses the constitutionality of legislative restrictions on abortion. I think that is what the Court ought to have done. The Court ought to reverse *Roe* and *Casey* at the first available

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<sup>49</sup> For a discussion of the abortion issue and the nomination of John Roberts, see Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York NY: Penguin Press, 2007), pp. 221-35. For a discussion of the abortion issue and the confirmation hearings of Samuel Alito, see David Stout, "Democrats Press Alito for Specifics on Abortion," *The New York Times*, January 11, 2006; Mary Meehan, "Lessons from the Alito Hearings," 32 *Hum. Life Rev.* 7 (Winter 2006).

<sup>50</sup> See Meehan, *supra* n49.

opportunity, as I have argued elsewhere.<sup>51</sup>

I said a year ago that I thought there was virtually no possibility that the Court would do so in *Gonzales v. Carhart*. The Justice Department had not argued that the Court ought to do so (although some amicus briefs had so argued).<sup>52</sup> The Justice Department's brief accepted the legitimacy of *Roe* and *Casey*, although the brief argued that the Court ought to overrule *Stenberg* if that proved necessary to uphold the statute before the Court.

Moreover, reversing *Roe* and *Casey* would have required Justice Kennedy to change his mind on this issue. (To be more accurate, I should say that he would have to change his mind again because Justice Kennedy had joined an opinion in *Webster* that would have effectively reversed *Roe*,<sup>53</sup> and he apparently had initially voted to reverse *Roe v. Wade* at the time of *Casey*.<sup>54</sup>) Justice Kennedy did dissent in *Stenberg* but that was because he thought that the *Stenberg* majority had misapplied *Casey*.<sup>55</sup> Perhaps Justice Kennedy might now realize the errors of the undue burden approach of the *Casey* joint opinion but I did not think there was much prospect of that. Justice Kennedy's other opinions, most notably his alarming opinion in *Lawrence v. Texas*,<sup>56</sup> do not support the view that he has become an advocate of a more restrained judicial role.

One year ago I speculated that the likely outcome of *Gonzales v. Carhart* would be for the Court to retain the undue burden approach set forth in *Casey* and *Stenberg*. If the Court had applied *Casey* in the

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<sup>51</sup> See Richard S. Myers, "A Critique of John Noonan's Approach to Development of Doctrine," 1 *St. Thomas L. J.* 285, 286 & 286 n13 (2003); Richard S. Myers, "The End of Substantive Due Process?" 45 *Wash. & Lee L. Rev.* 557 (1988).

<sup>52</sup> See, e.g., the amicus brief filed by the U.S. Conference of Catholic Bishops, <http://www.usccb.org/ogc/AlbertoRGonzalesAttorneyGeneralvLeroyCarhartetal.pdf>.

<sup>53</sup> For a discussion of this point, see Greenburg, *supra* n49, at 154-63.

<sup>54</sup> *Id.*

<sup>55</sup> *Stenberg*, 530 U. S. at 956-979 (Kennedy, J., dissenting).

<sup>56</sup> *Lawrence v. Texas*, 539 U. S. 558 (2003). For commentary on *Lawrence*, see Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," 6 *Ave Maria L. Rev.* 101 (2008).

aggressive fashion of *Stenberg*, the Court would have invalidated the federal statute, as did the federal courts of appeals who addressed the issue. I thought a year ago that it was far more likely that the Court would uphold the federal statute. I said that the Court could retain both *Casey* and *Stenberg* and uphold the statute by deferring to the fact-finding of Congress.

This is in fact largely what the Court did in *Gonzales v. Carhart*. Justice Kennedy wrote for a 5-4 majority that also included Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Justice Thomas also wrote a concurring opinion that was joined by Justice Scalia. Justice Ginsburg wrote a dissent that was joined by Justices Stevens, Souter, and Breyer.

Justice Kennedy's opinion began by assuming "for the purposes of this opinion..."<sup>57</sup> that the principles set forth in *Casey* controlled. As described by Justice Kennedy, "*Casey*, in short, struck a balance. The balance was central to its holding."<sup>58</sup>

Justice Kennedy first concluded that the federal statute was not unconstitutionally vague and didn't impose an undue burden from any overbreadth. In so holding, the Court used the more typical canons of statutory construction and avoided an interpretation of the statute that would have prohibited standard D & E abortions.

The Court then concluded that the statute did not impose a "substantial obstacle" to a woman's choice to have an abortion. In so holding, the Court emphasized that it was considering a facial (as opposed to an as-applied) challenge. The Court rejected the view that Congress had an intent to create such an obstacle. Rather, the statute's purposes, which the Court was willing to credit, were to protect innocent human life from a brutal and inhumane procedure and to protect the ethics and reputation of the medical community. The Court also found that the statute did not have the effect of imposing an unconstitutional burden on a woman's right to an abortion. The Court so held, even though the statute did not contain a health exception. The Court assumed, again "under precedents we here

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<sup>57</sup> 127 S. Ct. at 1626.

<sup>58</sup> *Id.* at 1627.

assume to be controlling,”<sup>59</sup> that the statute would be unconstitutional if it subjected a woman to significant health risks. But the Court noted that this issue was contested and that both sides had medical support for their positions. In this instance, the Court was unwilling to give the abortionist the final word. As the Court stated: “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.”<sup>60</sup> The Court was unwilling to defer completely to the fact-finding of Congress, but the Court ultimately concluded that the statute was “not invalid on its face where there is 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.”<sup>61</sup>

This last point about the case involving a facial, as opposed to an as-applied, challenge was emphasized by the Court. The Court noted that the “health” argument could be presented in “a proper as-applied challenge in a discrete case.”<sup>62</sup> Without fully expressing a view on how facial challenges ought to be handled,<sup>63</sup> the Court explained that the plaintiffs had not “demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.”<sup>64</sup>

Justice Thomas’s brief concurrence, which was only joined by Justice Scalia, noted that he rejected *Roe* and *Casey* in their entirety, and also noted that the issue of whether the Act was within the scope of the commerce power was not before the Court.<sup>65</sup>

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<sup>59</sup> 127 S. Ct. at 1635.

<sup>60</sup> 127 S. Ct. at 1636.

<sup>61</sup> 127 S. Ct. at 1638.

<sup>62</sup> 127 S. Ct. at 1639.

<sup>63</sup> The Court noted that there had been “some question” about how to resolve facial challenges to abortion statutes. 127 S. Ct. at 1639. The Court concluded: “[w]e need not resolve that debate.” 127 S. Ct. at 1639.

<sup>64</sup> 127 S. Ct. at 1639.

<sup>65</sup> 127 S. Ct. at 1639-1640 (Thomas, J., concurring).

Justice Ginsburg's dissent was a call to arms for the supporters of abortion. She stated: "Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously."<sup>66</sup> Among other things, Justice Ginsburg's opinion sought to recast abortion as not so much an abstract matter of privacy but as more about equality,<sup>67</sup> a point she had made well before becoming a Justice on the United States Supreme Court.<sup>68</sup>

## V. IMPLICATIONS

*Current Legal Situation.* It is always difficult to tell with any certainty but it appears that the "balance" struck in *Casey* is still good law. It is clear that Justices Scalia and Thomas are opposed to *Roe* and *Casey*. Chief Justice Roberts and Justice Alito haven't expressed a view on this core issue. They didn't join Justice Thomas's opinion in *Gonzales* but I wouldn't read too much into that. I think it is fair to say that they simply didn't want to tip their hands on the core issue when it was unnecessary to do so. I suspect that Chief Justice Roberts and Justice Alito will be with Justices Scalia and Thomas on this question. That still leaves Justice Kennedy as the swing vote on this issue, as he is on many others.<sup>69</sup>

I don't think there is much reason to think that Justice Kennedy will back away from the position he took in *Casey*. His criticisms of *Stenberg* were based on the idea that Justices O'Connor and Souter didn't understand or adhere to the compromise they had crafted in *Casey*. His

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<sup>66</sup> 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

<sup>67</sup> "Thus, legal 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." 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

<sup>68</sup> Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *N.Car. L. Rev.* 375 (1985). See Reva B. Siegel, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression," 56 *Emory L. J.* 815 (2007).

<sup>69</sup> Jonathan H. Adler, "How Conservative Is this Court?" *National Review Online* (July 5, 2007), commenting on the influence of Justice Kennedy. <http://article.nationalreview.com/?q=Y2Y3NjNkM2ZkYTcxNzQwYTBhZWZkNzEyZGYyMWEzMjE=>.

comments don't suggest that he is willing to abandon *Casey* in the other direction. That is possible because he may understand that he had been duped in *Casey* but I don't think that is too likely. His hints, only assuming that *Casey* is controlling, and not reaffirming *Casey*, which irked Justice Ginsburg,<sup>70</sup> are tantalizing. I don't think, however, that Justice Kennedy is now adopting a posture of judicial restraint on these issues. Even in *Gonzales v. Carhart* he still seems committed to *Casey*-style reasoning. That is, that it is Justice Kennedy who alone has the wisdom to "resolve" these issues for us mere mortals.<sup>71</sup> His actions in other contexts, most notably *Lawrence v. Texas*,<sup>72</sup> do not suggest that he has accepted a reduced judicial role.

*Need for a change in personnel.* There is, then, a need for a change in Supreme Court personnel for any significant change in the law in this area. The ultimate reversal of *Roe* and *Casey* will, most likely still require some further changes in Supreme Court personnel. (I'm assuming just one additional vote would be needed—that is, that Chief Justice Roberts and Justice Alito will join Justices Scalia and Thomas on this). Ultimate reversal of *Roe* and *Casey* and significant protection for the unborn that such a ruling would make possible will also likely require a broader cultural shift. In the long run (as I'll explain a bit below), I'm cautiously optimistic about such a result.

Changes in personnel are of course possible (Justice Stevens is 87) but a lot of things would have to fall into place (nomination of a new Justice to replace one of the dissenters in *Gonzales v. Carhart* by a Republican president, that this nominee be committed to judicial restraint, that the nominee be confirmed by the Senate) to expect to see things

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<sup>70</sup> "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[.]'...." 127 S. Ct. at 1650 (Ginsburg, J., dissenting).

<sup>71</sup> See Jeffrey Rosen, "Supreme Leader: The Arrogance of Justice Anthony Kennedy," *The New Republic*, June 18, 2007.

<sup>72</sup> 539 U. S. 558 (2003). See Myers, *supra* n56. Justice Kennedy's opinions on the Eighth Amendment reflect the same type of approach. See also *Roper v. Simmons*, 543 U. S. 551 (2005).



improve.

*An improvement the law.* In this area *Gonzales v. Carhart* does improve things a bit and in the remainder of this paper I will focus on the implications of the decision.

1. This decision changes the momentum. The Court's decision in *Gonzalez v. Carhart* puts off the day of reckoning about the ultimate fate of *Roe* and *Casey*. The decision to uphold the Act, even on the narrow grounds I just described, is still important. Such a ruling, on an issue of major symbolic (although not practical) significance, changes the momentum on this issue. Even though the Court did not overrule *Casey* or *Stenberg*, the existing legal structure has been destabilized. Although her comments were a bit overstated (and were probably more for political consumption), I think Justice Ginsburg is probably correct that the Court refused to take *Stenberg* seriously.<sup>73</sup> Certainly the Court's whole approach is a rejection of *Stenberg*, although that decision was not formally overruled. This backing away from *Stenberg* is important. Part of the discussion at the most recent confirmation hearings dealt with the many reaffirmations of *Roe* and to the extent the *Gonzales v. Carhart* is viewed as a departure from earlier cases this changes the dynamic on the stare decisis issue.<sup>74</sup> This may make it easier for the Court to ultimately reverse *Roe* and *Casey*.

The Court's decision to uphold the Act also changes the momentum in the political realm. This ruling certainly has provided encouragement for the pro-life movement as one can see from the many discussions of new pro-life initiatives. Most think that further regulations (if not yet prohibitions) will now be fairly considered and upheld by the courts.

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<sup>73</sup> Justice Ginsburg stated: "Today's decision... refuses to take *Casey* and *Stenberg* seriously." 127 S. Ct. at 1641 (Ginsburg, J., dissenting). At the end of her dissent, Justice Ginsburg commented that the Court should not feel bound by its decision in *Gonzales v. Carhart*. She stated: "A decision so at odds with our jurisprudence should not have staying power." 127 S. Ct. at 1653 (Ginsburg, J., dissenting).

<sup>74</sup> This "precedent" argument is not that strong. See Robert F. Nagel, "Bowing to Precedent: A decent respect for the Constitution should cause the Supreme Court to reconsider some past decisions," *Weekly Standard* (April 17, 2006).

Further slow, incremental change is more of a possibility.

2. *Gonzales v. Carhart* (along with *Ayotte*<sup>75</sup>) is getting rid of the “abortion distortion.” One of the troublesome features about the courts’ treatment of abortion in the last 34 years is that the normal rules of constitutional adjudication didn’t seem to apply. This is sometimes referred to as the “abortion distortion.”<sup>76</sup> There are many examples of this, and it perhaps will suffice to note Justice Kennedy’s observation in *Gonzales v. Carhart* that “It is true that this longstanding maxim of statutory interpretation [that every reasonable construction of a statute must be resorted to in order to uphold the constitutionality of a statute] has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion.”<sup>77</sup> The Court’s recent decisions—*Ayotte v. Planned Parenthood*<sup>78</sup> and now *Gonzales v. Carhart*—seem to be abandoning this approach, and this increases the likelihood that restrictions on abortion will be upheld.

3. *Gonzales v. Carhart* holds that a health exception is not always required. The Court’s decision to uphold the statute without a health exception is significant. Justice Ginsburg noted that “for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health.”<sup>79</sup> This is certainly of some significance but the key point is that the Court did not view the ban on partial-birth abortion as a law that would actually prohibit a woman from obtaining an abortion. The Court viewed the ban on partial- birth abortion as a “regulation” and not as a “prohibition” because the Act did not limit access to “other abortion

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<sup>75</sup> *Ayotte v. Planned Parenthood of Northern New England*, 546 U. S. 320 (2006).

<sup>76</sup> Teresa Collett has commented: “*Gonzales v. Carhart* is a valuable first step in reducing what some commentators have called “abortion distortion”—the Court’s disregard of generally applicable rules of law when the case involves abortion.” Teresa Collett, “*Gonzales v. Carhart* and Judge Easterbrook’s Pickle,” SCOTUSBLOG, April 19, 2007, <[http://www.scotusblog.com/movabletype/archives/2007/04/gonzales\\_v\\_carh.html](http://www.scotusblog.com/movabletype/archives/2007/04/gonzales_v_carh.html)>.

<sup>77</sup> 127 S. Ct. at 1631.

<sup>78</sup> 546 U. S. 320 (2006).

<sup>79</sup> 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

procedures that are considered to be safe alternatives.”<sup>80</sup> This approach may, however, help in subsequent cases involving challenges to regulations that do not contain health exceptions as broad as that contemplated by *Doe*.<sup>81</sup>

4. Facial/applied challenges. One of the difficult questions in this area of the law has been what standard applies to facial challenges to the constitutionality of legislation.<sup>82</sup> Although this seems like a narrow technical legal issue, it is of tremendous importance. In certain cases, the Court has used the *Salerno* standard under which a law will be held unconstitutional only when “no set of circumstances exists under which the Act would be valid.”<sup>83</sup> In others, such as *Casey*, the Court has used a different standard and only required the plaintiff to show that the statute operates unconstitutionally in a “large fraction” of cases.<sup>84</sup> This issue has caused confusion in the lower courts.<sup>85</sup> In *Gonzales v. Carhart*, Justice Kennedy noted this issue but stated, “[w]e need not resolve that debate.”<sup>86</sup> Nevertheless, the Court’s preference (also expressed in *Ayotte*<sup>87</sup>) now

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<sup>80</sup> 127 S. Ct. at 1638.

<sup>81</sup> For example, the Child Interstate Abortion Notification Act, which was passed by the U.S. House, did not contain a broad health exception. For discussion of the constitutional issue presented, see Hearing before The Subcommittee on the Constitution of the Committee on the Judiciary on H. R. 748, March 3, 2005. [http://commdocs.house.gov/committees/judiciary/hju99583.000/hju99583\\_0.H.TM](http://commdocs.house.gov/committees/judiciary/hju99583.000/hju99583_0.H.TM).

<sup>82</sup> See Collett, *supra* n76, discussing the proper standard of review for facial challenges. For a general discussion of this issue, see also, Edward A. Hartnett, “Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts,” 59 *SMU L. Rev.* 1735 (2006).

<sup>83</sup> 481 U. S. 739, 745 (1987).

<sup>84</sup> *Casey*, 505 U. S. at 895. As Teresa Collett explains, in *Stenberg* the Court seemed to use yet a third approach. Collett, *supra* n76.

<sup>85</sup> *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 305 F. 3d 684, 687 (7th Cir. 2002), cert. denied, 537 U. S. 1192 (2003).

<sup>86</sup> 127 S. Ct. at 1639.

<sup>87</sup> For a discussion of the Court’s approach in *Ayotte*, see Hartnett, *supra* n82, at 1757-58.

seems clear. Narrow, as-applied challenges are to be preferred. And, if possible, the courts ought to retain as much of a law as possible. This will certainly be helpful when courts consider other restrictions on abortions.

5. The Court's opinion contains helpful language, for the Court used the phrase "unborn child." The language of Supreme Court opinions can be influential. The dissenting opinions in *Stenberg* were valuable because they stated clearly what happens in a partial-birth abortion. Now, this account is in a majority opinion of the United States Supreme Court. This will help with the educational process that has always been the principal benefit of the campaign against partial-birth abortion.

Moreover, Justice Kennedy's majority opinion contains other useful language. Justice Kennedy quoted from the Congressional Findings<sup>88</sup> and noted that "[t]he Act expresses respect for the dignity of human life."<sup>89</sup> In other places, Justice Kennedy noted that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."<sup>90</sup> He referred to the State's interest in "promot[ing] respect for life, including life of the unborn."<sup>91</sup> He also used the phrase "her unborn child, a child assuming the human form."<sup>92</sup> The Court's language didn't go unnoticed. Justice Ginsburg commented: "The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor.' 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

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<sup>88</sup> 127 S. Ct. at 1633. The Court quoted Congressional finding 14 (N): 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." *Id.* at 1633.

<sup>89</sup> *Id.* at 1633.

<sup>90</sup> *Id.* at 1633.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1634.

dismissed as ‘preferences’ motivated by ‘mere convenience’.”<sup>93</sup>

It has long been a strategy of the supporters of abortion to obscure the reality of abortion and so the language in Justice Kennedy’s majority opinion should be helpful in countering this approach.

One of the more intriguing aspects of the decision was Justice Kennedy’s discussion of the potential harm of abortion to woman. He noted: “Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral choice. While we find no reliable data to measure the phenomenon, 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.”<sup>94</sup> He further noted the State’s interest in fully informing woman about the abortion procedures involved. Justice Kennedy stated: “The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”<sup>95</sup>

The reaction to this was predictable. Supporters of abortion rights have long proclaimed that access to abortion is essential to women’s emancipation. To suggest that abortion might have negative consequences for women is to strike at the heart of the very identity of abortion supporters. Justice Ginsburg’s dissent complained about these passages,<sup>96</sup>

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<sup>93</sup> 127 S. Ct. at 1650 (Ginsburg, J., dissenting)(citations omitted).

<sup>94</sup> 127 S. Ct. at 1634.

<sup>95</sup> *Id.*

<sup>96</sup> 127 S. Ct. at 1648-1649 (Ginsburg, J., dissenting). In one striking passage, Justice Ginsburg stated that “the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence...” *Id.* at 1648 (Ginsburg, J., dissenting). For a critical commentary on this passage from Justice Ginsburg’s dissent, see Susan E. Wills, “Abortion Aftermath: ‘An Antiabortion Shibboleth?’” [http://www.nrlc.org/news\\_and\\_Views/Aug07/nv080807.html](http://www.nrlc.org/news_and_Views/Aug07/nv080807.html).

and there has been impassioned commentary about this issue.<sup>97</sup> A month after the decision, the New York Times published an article entitled “Abortion Foes See Validation for New Tactic.”<sup>98</sup> The article noted that Justice Kennedy’s opinion “explicitly acknowledged this argument [that abortion is not in the best interests of women], galvanizing anti-abortion forces and setting the stage for an intensifying battle over new abortion restrictions in the states.”<sup>99</sup>

The negative effects of abortion for women have been discussed for some years now,<sup>100</sup> but Justice Kennedy’s opinion has raised this issue to a new visibility and may well promote additional research on this topic. While the focus on the unborn should certainly remain the principal focus of efforts to ban abortion, this emphasis on the impact of abortion on woman has the potential to recast the debate.

6. *Gonzales v. Carhart* is an example of judicial restraint. Another potential benefit of *Gonzales v. Carhart* is that the decision is supportive of the idea that the courts ought to be hesitant about constitutionalizing contested areas of social life. That concern (or put another way, an emphasis on judicial restraint) was certainly an important part of the Court’s decision to largely stay out of the assisted suicide debate in *Washington v. Glucksberg*.<sup>101</sup> The Court’s opinion in *Gonzales v. Carhart* (it may be important that Justice Kennedy referred to *Glucksberg*, which

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<sup>97</sup> See Linda Greenhouse, “Adjudging a Moral Harm to Women from Abortions,” *The New York Times* (April 20, 2007). <http://www.nytimes.com/2007/04/20/us/20assess.html>.

<sup>98</sup> Robin Toner, “Abortion Foes See Validation for New Tactic,” *The New York Times* (May 22, 2007), <http://www.nytimes.com/2007/05/22/washington/22abortion.html>.

<sup>99</sup> Toner, *supra* n99.

<sup>100</sup> See Myers, *supra* n1, at 10-11.

<sup>101</sup> 521 U. S. 702 (1997). For general commentary on this theme, see Richard S. Myers, “Physician-Assisted Suicide and Euthanasia: A Current Legal Perspective” in *Life and Learning XI: Proceedings of the Eleventh University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (Washington, D.C.: UFL, 2002), pp. 3-27.

had been completely ignored in *Lawrence v. Texas*<sup>102</sup>) may suggest an increased willingness on the part of the Court to adopt this attitude, at least with regard to new emerging issues. This may have an impact on issues such as cloning.

*Some Broader Cultural and Legal Reflections.* *Gonzales v. Carhart*, it seems clear, is an important decision with many positive features. It also provides reason for optimism about the ultimate success of the pro-life movement. I will briefly highlight several reasons for this optimism.

First, our legal system has a capacity for self-correction. (Justice Scalia noted this when he opened his *Stenberg* dissent with this statement: “I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*.”<sup>103</sup>) I think the experience of the legal system from cases such as *Dred Scott*<sup>104</sup> and *Plessy v. Ferguson*<sup>105</sup> in the nineteenth century to *Brown v. Board of Education*<sup>106</sup> in 1954 is something from which we can draw some solace. Under *Dred Scott*, blacks had no rights that slaveholders were bound to respect.<sup>107</sup> *Plessy* endorsed the separate but equal doctrine, and in so doing the Court refused to recognize the reality that under this legal regime some of us were more equal than others. *Brown*, despite flaws in the way it was subsequently implemented, reflected the basic moral insight that we are all equal before the law. The progression from *Dred Scott* and *Plessy* to *Brown* was a long slow process, but the basic moral insight of the Declaration of Independence (“We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are life, liberty, and the pursuit of happiness.”) was

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<sup>102</sup> See Myers, *supra* n56.

<sup>103</sup> 530 U. S. at 953 (Scalia, J., dissenting).

<sup>104</sup> *Dred Scott v. Sandford*, 19 How. (60 U. S.) 393 (1857).

<sup>105</sup> *Plessy v. Ferguson*, 163 U. S. 537 (1986).

<sup>106</sup> 347 U. S. 483 (1954).

<sup>107</sup> 60 U. S. at 407.

ultimately vindicated by the Supreme Court.

Second, another factor that ought to encourage us all to take the long view is that truth is on our side. From a moral standpoint, supporters of abortion have no answer to the truth that the unborn child is a human life that deserves the same protection against intentional killing that the rest of us enjoy. From a legal standpoint, everyone understands that *Roe v. Wade* and *Planned Parenthood v. Casey* and *Stenberg v. Carhart* are bankrupt. That obviously does not mean that these truths have been fully accepted; yet the power of the truth should not be underestimated.<sup>108</sup>

Third, in taking the long view, we need to expand our focus beyond the law. I think we sometimes make the mistake of viewing aspects of the culture wars as simply legal problems, and to view the Supreme Court or individual Justices as the sole villains. And while Justices such as Blackmun and Brennan certainly have much for which to answer, they have not acted in isolation. In many ways the courts are simply the product of our culture and predominantly the elite culture. It is the weakness in the culture that has contributed much to the legal problems we face. This point can be illustrated by examining the situation in other western countries, which did not have a counterpart to *Roe*, and where the situation on abortion is not vastly different from our own.

The cultural signs of the times are hard to read. (My views on this change depending on what day it is.) There are lots of good signs. From a legal standpoint, it is startling that *Roe* and *Casey* have not been accepted, despite the Court's rhetoric of calling the contending sides to end their division on the issue. There continues to be lots of resistance in the law journals, in the states with many efforts to restrict abortion (e.g., South Dakota and many other less dramatic state efforts), and in the legislatures who have adopted many laws on issues that do not deal directly with abortion but that operate from different premises (e.g., The Unborn Victims of Violence Act). On the cultural front, there is the increasing pro-life sentiment among the young. This will ultimately have an effect.

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<sup>108</sup> For a summary of the errors on which the Court's abortion jurisprudence is based, see Forsythe & Presser, *supra* n2; Clarke D. Forsythe & Stephen B. Presser, "Restoring Self-Government on Abortion: A Federalism Amendment," 10 *Tex. Rev. L. & Pol.* 301 (2006).



One cultural issue that needs to be addressed is the role of religion. It is important that we have a proper understanding and appreciation for the role of religion in shaping the culture. There is a lot of cultural pressure in favor of the privatization of religion. This was made manifest by some of the reaction to the *Gonzales v. Carhart* decision and in particular the reaction that noted with alarm that the all five Justices in the majority are Catholic.

Some of this commentary was from people such as Frances Kissling who predictably complained that “the decision injected orthodox Catholic teaching into the interpretation of constitutional rights.”<sup>109</sup> But it was more telling in my view to see the same basic point made by Geoffrey Stone, one of the most prominent professors of constitutional law in the country. Stone complained that the five Catholic justices “failed to respect the fundamental difference between religious belief and morality...” and threatened the separation of church and state.<sup>110</sup> Stone was appropriately taken to task by many. Writing in the *Wall Street Journal*, John Yoo stated: “Playing the religion card is worse than silly because it shows how intellectually lazy the liberal defense of Roe has become.... Rather than develop reasoned responses to the court or the arguments of conservatives, liberal critics resort to the mystical for easy answers. They suggest that irrational religious faith or pure Catholic doctrine handed down from the Vatican drives the Justices. It is much easier to dismiss your opponents as driven by mysterious forces than to do the hard work of developing arguments based on human reason. This religious critique recalls the nativist fear of Catholicism that too often appears in U.S. history.”<sup>111</sup>

I think the responses to Professor Stone were devastating. But his commentary reflects a widespread notion in the culture (the idea of the privatization of religion) that it is important to resist.<sup>112</sup> Perhaps the focus

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<sup>109</sup> Frances Kissling, “Why I Won’t Stay Silent Anymore,” May 11, 2007. <http://www.salon.com/opinion/feature/2007/05/11/kissling/>.

<sup>110</sup> Geoffrey Stone, “Our Faith-Based Justices,” April 20, 2007. [http://uchicagolaw.typepad.com/faculty/2007/04/our\\_faithbased\\_.html](http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html).

<sup>111</sup> John Yoo, “Partial-Birth Bigotry,” *WSJ*, April 29, 2007. <http://www.opinionjournal.com/editorial/feature.html?id=110010004>.

<sup>112</sup> See Myers, *supra* n56.

on the impact of abortion on women and the work of crisis pregnancy centers (which are often sponsored by religious groups and which have been so much in the news of late<sup>113</sup>) may help in this regard. This positive example (this example of faith in action) may help to rebuild the culture of life and may help to counter the idea of the privatization of religion.

#### CONCLUSION

*Gonzales v. Carhart* is an important decision. Although the case does not have much practical significance in the sense that it doesn't prohibit one abortion, it is potentially very significant as I have described above. Of course, much remains to be seen, but if significant change is indeed forthcoming the Court's decision in *Gonzales v. Carhart* will be regarded as a landmark. Much remains in our hands as we do what we can to build a culture of life.

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<sup>113</sup> See, e.g., Nancy Gibbs, "The Grassroots Abortion War," *Time* (February 15, 2007), <http://www.time.com/time/magazine/article/0,9171,1590444,00.html>.