

## HIGH NOON IN THE ABORTION BATTLE? *ROE* “REALITY” POST *GONZALES v. CARHART*

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### INTRODUCTION

In my little Vermont village stands a wooden covered bridge that stops leaf peepers in their camera-toting tracks every fall. Cars with New York and Connecticut license plates regularly park in the middle of the road to admire the construction’s quaintness (while we with Vermont plates, who are trying to get to school or work, quietly fume). Few visitors know that beneath the pegged timbers, classic Haupt trusses, and wide wooden floorboards lie four heavy-duty steel beams.<sup>1</sup>

Sometimes seeing is not always believing, even in the law. Chief Justice Rehnquist declared, in his dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that “*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”<sup>2</sup> Although the first words in *Casey* explicitly affirm “*Roe*’s essential holding”—a woman’s decision whether to bear a child lies at the core of her “dignity and autonomy,” her “personhood” and “destiny”—the regulatory paradigm shift from *Roe*’s trimester demarcation to *Casey*’s undue burden test left no doubt that the Court had struck a new balance between the state’s interest in protecting life and a woman’s right to choose.<sup>3</sup> Post-*Casey*, a state may not prohibit a woman from having an abortion pre-viability, but may regulate the procedure as long as it poses no “undue interference.”<sup>4</sup> From 1992 until 2000, the Court applied the undue

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1. See Thetford Center Covered Bridge, National Registration Nomination Information, <http://www.crjc.org/heritage/V13-20.htm> (last visited Jan. 24, 2008) (“[T]he timber deck structure was replaced by four longitudinal steel beams and a central pier was built under the span.”).

2. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

3. *Id.* at 846 (majority opinion); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1640 (2007) (Ginsburg, J., dissenting).

4. *Casey*, 505 U.S. at 851–52.

5. See *Carhart*, 127 S. Ct. at 1626–27 (applying *Casey* to determine whether a federal statute banning partial-birth abortions placed an “undue burden” on a woman’s “right to choose”).

6. *Id.* at 1626. The Court explained that this interference comes in the form of an “undue burden, which exists if a regulation’s ‘purpose or effect is to place a substantial obstacle in the path of a woman.’” *Id.* (quoting *Casey*, 505 U.S. at 878). These kinds of obstacles are “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn.” *Id.* at 1627 (alteration in original) (quoting *Casey*, 505 U.S. at 877).

burden test to six kinds of state abortion regulations,<sup>7</sup> declaring only two of them unconstitutional because they placed an undue burden on a woman's right to choose.<sup>8</sup> A revived emphasis on the state's interest in protecting life filled out Justice Rehnquist's picture of abortion's facade.

As Nadine Strossen thoughtfully pointed out in her speech celebrating the twenty-fifth anniversary of the Women's Law Group at Vermont Law School, the path toward reproductive rights in the United States has been filled with twists and turns.<sup>9</sup> She agrees with Justice Blackmun's dire warning pre-*Casey*<sup>10</sup> that "[f]or today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."<sup>11</sup> But Strossen chose to put on a warm coat during her March 2006 visit to Vermont and to view *Casey* both as a glass half-empty and half-full.<sup>12</sup> This Essay responds to Ms. Strossen's analysis of the positive bend in the reproductive rights pathway that *Casey* produced—namely, its "concern for women's equality and empowerment"<sup>13</sup>—by applying it to the Court's decision to uphold the Federal Partial-Birth Abortion Ban Act of 2003<sup>14</sup> in *Gonzales v. Carhart*.<sup>15</sup>

### I. A GLASS HALF-FULL: THE PARADOX OF FEMINIST FOCUS IN *CASEY*

No pro-choice advocate would hide the fact that *Casey*'s undue burden test was a giant leap backward for womankind, in that it obliterated the absolute right to a first-trimester abortion established in *Roe* and replaced it with an "inherently nebulous standard" that provides states with a high degree of regulatory flexibility.<sup>16</sup> But Strossen points to an interesting silver lining: For the first time, the Supreme Court grounded women's reproductive rights and, specifically, the constitutional right to an abortion,

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7. The six state regulations examined by the Court included informed consent, a twenty-four-hour waiting period, parental consent, spousal notification, provider reporting requirements, and the so-called partial-birth abortion ban. The first five were at issue in *Casey*, 505 U.S. at 844, and the last one in *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

8. These two are Pennsylvania's spousal notification requirement, *Casey*, 505 U.S. at 898, and Nebraska's partial-birth abortion ban, *Stenberg*, 530 U.S. at 945–46.

9. Nadine Strossen, *Reproducing Women's Rights: All Over Again*, 31 VT. L. REV. 1, 1–3 (2006).

10. *Id.* at 17–18.

11. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part and dissenting in part).

12. See Strossen, *supra* note 9, at 27–35 (describing the holding as "[o]nly [h]alf-[e]mpty" and the reasoning used to reach it as "half-full").

13. *Id.* at 31.

14. 18 U.S.C. § 1531 (Supp. V 2005).

15. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

16. Strossen, *supra* note 9, at 31.

in terms of “women’s equality and empowerment.”<sup>17</sup> She highlights, for example, that *Roe* framed the abortion right as one belonging to the doctor, exercising his individual professional judgment: “[T]he attending physician, in consultation with his patient, is free to determine . . . that, in his medical judgment, the patient’s pregnancy should be terminated. . . . [T]he abortion decision . . . must be left to the medical judgment of the pregnant woman’s attending physician.”<sup>18</sup> This is logical, not only given the historical period, but because the Texas criminal statutes at issue prosecuted physicians for conducting abortions and not women for having them.<sup>19</sup>

As Strossen adeptly observes, fast forward almost two decades and we see the Court characterizing this constitutional right as belonging to women.<sup>20</sup> As she puts it, the pregnant woman has moved “from a supporting role as the male doctor’s patient to the starring role as someone whose liberty and equality are uniquely at stake.”<sup>21</sup> The “‘essential holding’ of *Roe*” includes “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.”<sup>22</sup> She also highlights how the plurality opinion links the right to choose with women’s equality: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>23</sup> The basis for this equality comes from exercising one’s individual autonomy, which the *Roe* Court inferred from the Due Process Clause’s liberty language.<sup>24</sup> Strossen quoted a passage from the opinion:

[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the

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17. *Id.*

18. *Id.* at 32 (alterations in original) (quoting *Roe v. Wade*, 410 U.S. 113, 163–64 (1973)).

19. See *Roe*, 410 U.S. at 117–18 (“The Texas statutes that concern us here . . . make it a crime to ‘procure an abortion . . . .’”).

20. Strossen, *supra* note 9, at 34.

21. *Id.* at 33.

22. *Id.* at 32 n.151 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–46 (1992)). Strossen also observes how the sexist language has disappeared with time: “In this respect, the statute does not prevent the physician from exercising *his* or *her* medical judgment.” *Id.* at 32 n.152 (quoting *Casey*, 505 U.S. at 884).

23. *Id.* at 32 n.153 (quoting *Casey*, 505 U.S. at 856).

24. *Roe*, 410 U.S. at 164.

State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>25</sup>

In this manner, *Casey* presents a paradox: while on one hand it downgrades judicial scrutiny of the challenged governmental restriction on abortion, on the other it firmly places the link between abortion and women's rights center stage, thereby providing "a promising source of future support for such rights."<sup>26</sup>

## II. FROM CASEY TO CARHART: A PROMISING SOURCE FULFILLED?

The *Carhart* majority opinion shows a sharp turn away from framing the abortion debate in terms of women's rights and empowerment. In holding that the Partial-Birth Abortion Ban Act of 2003 does not pose an undue burden on a woman's constitutional right to an abortion, the Court explicitly values protecting fetal rights over women's rights.<sup>27</sup> The majority opinion achieves this outcome by framing the legitimacy of the governmental interest in terms of the procedure's unseemly nature, the impact it has on society, its deleterious effect on women in particular, and the need to protect women, physicians, and the rest of society.<sup>28</sup> Step by analytical step, the *Carhart* Court disempowers women.

The Court begins its opinion by focusing on the graphic details of the prohibited abortion procedure, known to the medical community as intact D & E.<sup>29</sup> It does this by juxtaposing a physician's and nurse's descriptions of the procedure, in a "he said, she said" fashion. The "*abortion doctor's* clinical description" includes "forc[ing] the [surgical] scissors into the base of the [fetus's] skull," enlarging the hole by spreading them, and then "evacuat[ing] the skull contents" via a suction catheter.<sup>30</sup> The nurse's

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25. Strossen, *supra* note 9, at 33 (alteration in original) (quoting *Casey*, 505 U.S. at 852).

26. *Id.* at 35.

27. Gonzales v. Carhart, 127 S. Ct. 1610, 1633–34, 1639 (2007).

28. *Id.*

29. D & E (dilation and evacuation) is the common method used for second-trimester abortions. *Id.* at 1620. In this procedure, a fetus is extracted in pieces after dilating the cervix. *Id.* at 1621. In intact D & E or intact D & X (dilation and extraction), the fetus is removed intact, requiring that the physician collapse the skull to allow it to pass through the dilated cervix. *Id.* at 1620–23.

30. *Id.* at 1622 (emphasis added). Other physician descriptions detailed "squeez[ing] the skull . . . so that enough brain tissue exudes to allow the head to pass through," "crush[ing] the fetus' skull" with forceps, and "pull[ing] the fetus out of the woman until it disarticulates at the neck, in effect

description uses entirely different language: The doctor “grabbed the *baby’s* legs” and “*delivered*” all “but the head” while

“[t]he *baby’s* little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the *baby’s* arms jerked out, like a startle reaction, like a flinch, like a *baby* does when he thinks he is going to fall.

“The doctor . . . sucked the *baby’s* brains out. Now the *baby* went completely limp . . . .

. . . “[The doctor] threw the *baby* in a pan, along with the placenta and the instruments he had just used.”<sup>31</sup>

This opening language foreshadows the Court’s ultimate view that the state interest in protecting the almost-born is legitimate.<sup>32</sup>

Specifically, the Court uses the graphic details of the procedure and the value-laden language about babies, delivery, and abortion doctors to lend support to the Act’s congressional findings. For example, Congress found that “[i]mplicitly 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.”<sup>33</sup> Moreover, it found that this abortion procedure “confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a *child*, whom he or she had just *delivered*, all but the head, out of the womb, in order to end that life.”<sup>34</sup> Protecting society in general and physicians in particular is thus cast as a legitimate and important governmental objective. The Court unequivocally states that the new balancing of interests post-*Casey* supports a government using “its voice and its regulatory authority to show its profound respect for the life within the woman.”<sup>35</sup>

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decapitating it.” *Id.* at 1623.

31. *Id.* at 1622–23 (emphasis added) (quoting H.R. REP. No. 108-58, at 3 (2003)). The dissent interpreted this use of language as showing that “[t]he Court’s hostility to the right *Roe* and *Casey* secured is not concealed.” *Id.* at 1650 (Ginsburg, J., dissenting).

32. See *id.* at 1632–33 (majority opinion) (“The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process.”).

33. *Id.* at 1633 (emphasis added) (quoting 18 U.S.C. § 1531 note (Supp. IV 2004) (Findings (14)(N))).

34. *Id.* (emphasis added) (quoting 18 U.S.C. § 1531 note (Supp. IV 2004) (Findings (14)(J))).

35. *Id.* Yet as the dissent carefully observes, the Act does not protect the life of the fetus,

More alarming,<sup>36</sup> in light of Ms. Strossen's glass-half-full analysis, is the Court's use of *Casey*'s "bond of love" language to enslave a woman to the fetus inside her, even pre-viability.<sup>37</sup> The Act, according to the majority, recognizes that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."<sup>38</sup> Because of this bond and "abortion requires a difficult and painful moral decision[,] . . . it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."<sup>39</sup> Notably, the Court comes to this conclusion while explicitly stating that "we find no reliable data to measure the phenomenon."<sup>40</sup> Later in this section, despite this admitted lack of scientific support, the Court again asserts:

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 . . . 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>41</sup>

Given that the abortion decision is "so fraught with emotional consequence," the Court opines that "some doctors may prefer not to disclose precise details of the means that will be used" and thus "precisely this lack of information . . . is of legitimate concern to the State."<sup>42</sup>

Despite states having created a robust common law requiring physicians to obtain informed consent before rendering medical care,<sup>43</sup> the *Carhart* Court concludes that a constitutionally grounded remedy is in order.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage

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because "[t]he law saves not a single fetus from destruction, for it targets only a method of performing abortion." *Id.* at 1647 (Ginsburg, J., dissenting) (emphasis omitted).

36. "Today's decision is alarming." *Id.* at 1641 (Ginsburg, J., dissenting).

37. *Id.* at 1634 (majority opinion).

38. *Id.*

39. *Id.* (citation omitted).

40. *Id.* The Court further noted that this regret can lead to "[s]evere depression and loss of esteem." *Id.* (citing Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner at 22–24, *Carhart*, 127 S. Ct. 1610 (No. 05-380)).

41. *Id.* This lack of attention to supporting authority in the majority opinion stands in stark contrast to the dissenting opinion. Justice Ginsburg carefully cites her facts to authoritative sources, such as the American College of Obstetrics and Gynecologists. *Id.* at 1645 (Ginsburg, J., dissenting).

42. *Id.* at 1634 (majority opinion).

43. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 780–81 (D.C. Cir. 1972) (holding that a "physician is under an obligation to communicate specific information to the patient" and that a patient's "[t]rue consent . . . is the informed exercise of a choice").

some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.<sup>44</sup>

In this manner, a ban on a specific kind of abortion procedure and the concomitant limit on a physician's professional judgment are characterized as flowing from the class of informed consent laws previously deemed constitutional because they do not pose an undue burden.

The dissent challenges the majority's supposed concern about women's mental health head on. “[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from ‘[s]evere depression and loss of esteem.’”<sup>45</sup> Justice Ginsburg counters the majority's bare assertion with a well-sourced response:

“[N]either 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 . . . .”<sup>46</sup>

Moreover, even if evidence existed to support the majority's regret hypothesis, the dissent argues that protecting women by banning the procedure outright, instead of requiring doctors to obtain fully informed consent, “deprives women of the right to make an autonomous choice, even at the expense of their safety.”<sup>47</sup> This inclination to uphold the ban so as to

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44. *Carhart*, 127 S. Ct. at 1634. As the dissent observes, “The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks.” *Id.* at 1648–49 (Ginsburg, J., dissenting) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992)).

45. *Id.* at 1648 (Ginsburg, J., dissenting) (alteration in original).

46. *Id.* at 1648 n.7 (alteration in original) (quoting Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV., Summer 2006, at 8, 8). This footnote contains almost a dozen professional articles and reports to support Justice Ginsburg's assertion, with sources ranging from the Journal of the American Medical Association (JAMA) to the American Psychological Association (APA) and the Guttmacher Institute. *Id.*

47. *Id.* at 1649.

protect women “reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”<sup>48</sup>

## CONCLUSION

Despite the huffing and puffing of Justices Alito, Kennedy, Roberts, Thomas, and Scalia, the purported house of cards of a federal constitutional right to legal abortion did not collapse in *Gonzales v. Carhart*. Although the Federal Partial-Birth Abortion Ban Act was upheld and Dr. Carhart (and all of us who might use his medical services) lost, all was not lost. Abortion is still legal, although even more regulated and in an entirely new manner.

But the majority’s reasoning struck a major blow to the view that *Casey* provided a promising source of future support for women’s rights and empowerment. Accepting anecdotal evidence about post-abortion regret not only calls the Court’s fact-finding credibility into question but undermines women’s dignity and autonomy.<sup>49</sup> When the Court bans an abortion procedure in the name of protecting vulnerable women, rather than requiring full disclosure and informed decision-making, women are no longer seen as decision-making equals and thus cede control over their destiny. Likewise, when the Court skirts the informed consent law that has governed physician-patient relations for decades and labels a medical procedure as a preference that it may ban, the integrity and autonomy of the medical profession are impugned.

In sum, *Casey*’s half-full glass has just become a whole lot emptier. But should *Carhart* be viewed as the *Dred Scott* of the abortion battle?<sup>50</sup> At this point, neither a pro-life campaign to enact more stringent state regulations or outright bans, nor an active pro-choice campaign to overrule *Carhart* has taken root. Only time will tell. In the meantime, as we participate in the 2008 presidential elections, which may produce the first female nominee of a major party, we should recall the closing advice that

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48. *Id.*

49. *Cf. id.* at 1653.

In sum, the notion that the Partial-Birth Abortion Ban furthers any legitimate governmental interest is, quite simply, irrational. The Court’s defense of the statute provides no saving explanation. In candor, the Act, and the Court’s defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.

*Id.*

50. See Strossen, *supra* note 9, at 37 (“I believe that any Supreme Court decision cutting back on *Roe* would become, for our generation, what another notorious Supreme Court decision was for an earlier generation of human-rights activists.”).

Ms. Strossen gave in her speech: "History has shown that human-rights struggles can never be finally won in the courts. Instead, they must be won at the ballot box and, ultimately, in the hearts and minds of women and men."<sup>51</sup> That glass is more than half-full.

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51. *Id.*