Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Personal Freedom and Public Morality/Abortion

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Gonzales v. Carhart, 550 U.S. 124 (2007)

Leroy Carhart was a doctor in Nebraska who regularly performed second trimester abortions. In 2003, Congress passed the Partial-Birth Abortion Ban Act, which forbade and abortion method known as an "intact D& E" or "intact D & X," but more commonly known as a partial-birth abortion. Dr. Carhart objected to the bill both because he believed the ban on partial birth abortions unduly burdened a woman's right to have an abortion under Planned Parenthood v. Casey *(1992) and because the lack of any health exception violated the due process clause of the Fourteenth Amendment. Carhart filed a lawsuit asking for an injunction prohibiting the attorney general of the United States, Alberto Gonzales, from implementing the Partial-Birth Abortion Ban Act. The local federal court declared the ban on partial birth abortions unconstitutional and that decision was affirmed by the Court of Appeals for the Eighth Circuit. Gonzales appealed to the Supreme Court of the United States.*

The ban on partial birth abortions advanced both strategies that pro-life political activists at the turn of the twenty-first century adopted for narrowing and eventually overruling Supreme Court decisions protecting abortion rights. The first strategy centered on passing those restrictions on abortion that enjoyed the most public support. Legislative adoption and judicial affirmation of such statues, many on both sides of the abortion debate believed, would make Roe *a hollow shell which protected little of any substance. The second strategy focused on highlighting how abortion rights allegedly harmed women. If medical and social science evidence demonstrated that bans on abortion benefitted women, then the due process and sex equality prongs of judicial solicitude for abortion rights would be severely undercut.[1] Proposed bans on so-called "partial-birth" abortions served both purposes. Public opinion polls consistently demonstrated that most Americans favored prohibiting medical procedures that required doctors to crush the skull of the fetus in order to fully remove the fetus from the woman's body. Opponents of abortion also produced empirical studies they claimed proved that many women suffered emotional distress after abortion, and that such distress was heightened when they learned their abortion was performed using what they believed was a particularly gruesome procedure. Pro-choice activists and prominent medical organizations, in turn, insisted that partial-birth abortions were the safest method for terminating pregnancies for women with various physical ailments and that women were no more likely to regret abortion than any other medical procedure or, for that matter, childbirth. In their view, pro-life forces were using misleading propaganda and pseudo-science in an effort to undermine the constitutional foundations for abortion rights.*

Gonzalez v. Carhart *was the second occasion in which the Supreme Court considered Dr. Carhart's challenge to a ban on partial-birth abortions. The Supreme Court in* Stenberg v. Carhart *(2000) by a 5–4 vote declared unconstitutional a state ban on partial-birth abortions. Justice Stephen Breyer's majority opinion found two defects with the Nebraska statute under constitutional attack. First, he interpreted the measure as prohibiting the most popular form of second trimester abortion, the D&E, as well as partial-birth abortions, alternatively known as "D&X" or "intact D&E" abortions. Such a wide-ranging ban, Breyer insisted, placed an "undue burden" on a woman's decision to terminate a pregnancy. Second, Breyer maintained that state laws restricting abortion could not compel women to undergo riskier means for terminating pregnancies. That some doctors disputed this position, Breyer claimed, did not make a constitutional difference. In his view,*

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[1] For a discussion of this campaign, see Reva B. Siegel, "The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions," *U. Ill. Law. Rev*. 2007 (2007): 991.

> *(W)here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.*

Justice Anthony Kennedy, a member of the Casey *majority, joined the three* Casey *dissenters in* Stenberg. *While agreeing with the majority that bans on D&E abortions placed on undue burden on women seeking to terminate pregnancies, Kennedy argued that the Nebraska law was best interpreted as prohibiting only D&X or partial-birth abortions. More important, Kennedy maintained that the Nebraska law did not put maternal health in jeopardy. In his view,*

> *Substantial evidence supports Nebraska's conclusion that its law denies no woman a safe abortion. The most to be said for the D&X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient.*

Given what he perceived to be a dispute among medical authorities over the virtues of different abortion procedures, Kennedy called for judicial deference. "Courts," he wrote, "are ill-equipped to evaluate the relative worth of particular surgical procedures. The legislatures of the several States have superior factfinding capabilities in this regard."

The fate of national bans on partial birth abortions depended on partisan control of the White House. Consistent with the general pro-choice commitment of most Democrats, President Clinton rejected legislation banning partial-birth abortions that did not contain what he believed was the constitutionally mandated health exception. His veto of a 1996 bill declared,

> *I cannot sign H.R. 1833, as passed, because it fails to protect women in such dire circumstances, because by treating doctors who perform the procedure in these tragic cases as criminals, the bill poses a danger of serious harm to women. This bill, in curtailing the ability of women and their doctors to choose the procedure for sound medical reasons, violates the constitutional command that any law regulating abortion protect both the life and the health of the woman. The bill's overbroad criminal prohibition risks that women will suffer serious injury.*
>
> *That is why I implored Congress to add an exemption for the small number of compelling cases where selection of the procedure, in the medical judgment of the attending physician, was necessary to preserve the life of the woman or avert serious adverse consequences to her health. The life exception in the current bill only covers cases where the doctor believes that the woman will die. It fails to cover cases where, absent the procedure, serious physical harm, often including losing the ability to have more children, is very likely to occur. I told Congress that I would sign H.R. 1833 if it were amended to add an exception for serious health consequences. A bill amended in this way would strike a proper balance, remedying the constitutional and human defect of H.R. 1833. If such a bill were presented to me, I would sign it now.*

President Bush reversed this practice upon taken office. When signing the Partial Birth Act of 2003, he declared,

> *In passing this legislation, members of the House and Senate made a studied decision based upon compelling evidence. The best case against partial birth abortion is a simple description of what happens and to whom it happens. It involves the partial delivery of a live boy or girl, and a sudden, violent end of that life. Our nation owes its children a different and better welcome. The bill I am about to sign protecting innocent new life from this practice reflects the compassion and humanity of America.*

In the course of the congressional debate, the facts became clear. Each year, thousands of partial birth abortions are committed. As Doctor C. Everett Koop, the pediatrician and former Surgeon General has pointed out, the majority of partial birth abortions are not required by medical emergency. As Congress has found, the practice is widely regarded within the medical profession as unnecessary, not only cruel to the child, but harmful to the mother, and a violation of medical ethics.

The Supreme Court by a 5-4 vote sustained the federal ban on partial-birth abortions. Justice Kennedy's majority opinion held that the ban did not unduly burden the abortion right both because the abortion method was brutal and alternatives to partial-birth abortions existed. The tribunal that adjudicated Gonzales v. Carhart *differed from the one that struck down the partial-birth abortion ban in* Stenberg. *Most notably, Justice O'Connor, who had joined Justice Breyer's opinion in* Stenberg, *had been replaced by Justice Samuel Alito, who was reputed to be opposed to* Stenberg. *While neither Justice Alito nor Chief Justice John Roberts in* Gonzales *indicated whether they would provide any constitutional support for abortion rights, their votes enabled Justice Kennedy to write his views into law. Kennedy did observe (and the dissent seemed to agree) that the Congressional bill made a clearer distinction than did the Nebraska legislation struck down in* Stenberg *between prohibited partial-birth abortions and legal D&E abortions. He continued to insist, however, that Congress could determine whether banning partial-birth abortions presented any significant risks to maternal health. As you read the opinions in* Gonzales v. Carhart, *consider whether Kennedy appropriately deferred to legislative judgments about maternal health, even when those judgments were based on dubious scientific evidence. Are crucial New Deal measures based on better data? If not, do reasons exist why the justices should defer to dubious legislative findings about the national economy, but not dubious legislative findings about medical procedures? Note also how Justice Ginsburg's dissent highlighted the equal protection grounds of the abortion right. Was this a shift in the constitutional defense of abortion rights?*

JUSTICE KENNEDY delivered the opinion of the Court.

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey* (1992) . . . did not find support from all those who join the instant opinion. . . . Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

. . .

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." . . . It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." . . . . On the other hand, "[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 are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." . . .

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. . . The Act prohibits intact D & E; and, notwithstanding respondents' arguments, it does not prohibit the D & E procedure in which the fetus is removed in parts.

The Act prohibits a doctor from intentionally performing an intact D & E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure. First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. . . . Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt-act requirement because it kills the fetus and is distinct from delivery. . . . The Act's intent requirements, however, limit its reach to those physicians who carry out the intact D & E after intending to undertake both steps at the outset.

The Act excludes most D & E's in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D & E procedure can often "tak[e] about 10-15 'passes' through the uterus to remove the entire fetus." . . . Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery. . . .

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Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*.

The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." . . . The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain:

Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. . . .

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

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

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

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 decision. . . . 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. . . .

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. . . .

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . 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.

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

It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D & E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.". . .

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where "'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother.'" . . . [W]hether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

. . . There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. . . .

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

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

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. . . . The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D & E. One District Court found D & E to have extremely low rates of medical complications. . . . Another indicated D & E was "generally the safest method of abortion during the second trimester." . . . 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.

. . .

As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. . . . Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. . . . The testimony in the District Courts, however, demonstrated intact D & E is taught at medical schools. . . . Congress also found there existed a medical consensus that the prohibited procedure is never medically necessary. . . . The evidence presented in the District Courts contradicts that conclusion. . . . Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, . . . respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.'" . . . As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg v. Carhart* (2000) has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. . . .

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is 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.

The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. . . . This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

. . .

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of Southeastern Pa. v. Casey* (1992) . . . I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade* (1973) . . . has no basis in the Constitution. . . . I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it. . . .

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

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Today's decision is alarming. It refuses to take *Planned Parenthood of Southeastern Pa. v. Casey* (1992) and *Stenberg v. Carhart* (2008) seriously. It tolerates, indeed applauds, federal intervention to ban

nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

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As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." . . . "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." . . . Those views, this Court made clear in Casey, "are no longer consistent with our understanding of the family, the individual, or the Constitution." . . . Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." . . . Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." . . . 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. . . .

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. . . .

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. . . .

In *Stenberg*, we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception. . . . We noted that there existed a "division of medical opinion" about the relative safety of intact D & E, . . . , but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required. . . . [D]ivision in medical opinion "at most means uncertainty, a factor that signals the presence of risk, not its absence." . . .

. . . The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. . . . Many of the Act's recitations are incorrect. . . . For example, Congress determined that no medical schools provide instruction on intact D & E. . . . But in fact, numerous leading medical schools teach the procedure. . . .

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. . . . But the evidence "very clearly demonstrate[d] the opposite." . . .

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." . . . But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D & E carries meaningful safety advantages over other methods. . . . No comparable medical groups supported the ban. . . .

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During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D & E is safer than alternative procedures and necessary to protect women's health. . . .

According to the expert testimony plaintiffs introduced, the safety advantages of intact D & E are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems. . . . Further, plaintiffs' experts testified that intact D & E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such as severe hydrocephalus. . . .

Intact D & E, plaintiffs' experts explained, provides safety benefits over D & E by dismemberment for several reasons: First, intact D & E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D & E. . . . Second, removing the fetus intact, instead of dismembering it in utero, decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. . . . Third, intact D & E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. . . . Fourth, intact D & E takes less operating time than D & E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia. . . .

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The Court acknowledges some of this evidence . . . , but insists that, because some witnesses disagreed with the ACOG and other experts' assessment of risk, the Act can stand. . . . In this insistence, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D & E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D & E procedure, and many performed abortions only on rare occasions. . . . Even indulging the assumption that the Government witnesses were equally qualified to evaluate the relative risks of abortion procedures, their testimony could not erase the "significant medical authority support[ing] the proposition that in some circumstances, [intact D & E] would be the safest procedure." . . .

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D & E sans any exception to safeguard a women's health. Today's ruling, the Court declares, advances "a premise central to [*Casey*'s] conclusion"—i.e., the Government's "legitimate and substantial interest in preserving and promoting fetal life." . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion. . . .

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. . . . But why not, one might ask. Nonintact D & E could equally be characterized as "brutal,". . . involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs. . . . "[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.". . .

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Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. . . . Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. . . .

Revealing in this regard, the 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." . . . Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure. . . . 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. . . . Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. . . .

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In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. . . .

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." . . . . Instead of drawing the line at viability, the Court refers to

Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed. . . .

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." . . . The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical 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 dismissed as "preferences" motivated by "mere convenience.". . . Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. . . . And, most troubling, Casey's principles, confirming the continuing vitality of "the essential holding of Roe," are merely "assume[d]" for the moment, . . . rather than "retained" or "reaffirmed." . . .

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Without attempting to distinguish *Stenberg* and earlier decisions, the majority asserts that the Act survives review because respondents have not shown that the ban on intact D & E would be unconstitutional "in a large fraction of relevant cases." . . . But Casey makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is not "all women," nor "all pregnant women," nor even all women "seeking abortions.". . . . Rather, a provision restricting access to abortion, "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction." Thus the absence of a health exception burdens all women for whom it is relevant—women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk. . . . It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary for a large fraction of second-trimester abortions, including those for which a health exception is unnecessary: The very purpose of a health exception is to protect women in exceptional cases.

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In sum, the notion that the Partial-Birth Abortion Ban Act 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. . . . When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." . . .