Gonzales v. Carhart: What Hath Kennedy Wrought?

*By Hadley Arkes**

Once more the question echoes: What hath Justice Kennedy wrought? This time in the decision upholding the federal bill on partial-birth abortion. My friends in the Federalist Society are likely to know of my own absorbing interest in this issue over the last twenty years, for I have been identified with the strategy of "incrementalism" or taking "the most modest first steps" in legislating on abortion. The federal bill on partial-birth abortion sprung directly from that strategy, but as the work of Douglas Johnson at National Right to Life. That bill had been preceded by the Born-Alive Infants' Protection Act (2002), the Act that cast the protections of the law on the child who *survived* an abortion. In the aftermath of Justice Kennedy's opinion for the Court in *Gonzales v. Carhart*, that first legislative act promises to become ever more important as the main lever in the hands of the government in seeking to extend the protections of the law to children in the womb. But that point becomes clearer as one looks closely at the decision that Justice Kennedy has shaped for the Court in *Carhart.* And Kennedy's moves may in turn become clearer in their import when they are set against the kind of decision I had been mapping out in my own hopes for the case, in the pieces I wrote as the case made its way to the Supreme Court.

I had made the point in those pieces that the Court was highly unlikely to use this case as the occasion for overruling *Roe v. Wade*, the outcome that some pro-lifers seemed genuinely to expect, and some defenders of abortion rights seemed genuinely to fear. A move of that kind did not strike me as a prudent move at this moment; nor did it seem necessary. If the Court could simply have flipped the decision on partial-birth from seven years earlier, in *Stenberg v. Carhart*, that would have been enough, I said. That decision could mark the end of the regime of *Roe v. Wade,* even if the Court did not pronounce that decision overruled. For the judgment could simply convey this cardinal point: that the Court is now in business to begin weighing seriously, and sustaining, restrictions on abortion. And in a chain of enactments they would begin coming from the states. They might be measures to bar abortions for the sake of "sex-selection" (getting rid of females), abortions on minors without the consent of parents, or abortions performed because the child might be deaf or afflicted with other disabilities. Each measure would have the support of about 70 per cent of the country, including people who called themselves pro-choice. That sense of things would be conveyed more clearly if the federal bill on partial-birth abortion had been sustained in a firm opinion, written by Chief Justice Roberts, without taking the occasion to sing again the praises of *Roe v. Wade*. And all the better if the decision gave a clear direction to the lower federal courts that the Supreme Court wanted this matter to be regarded as settled. No loose ends, no looking for alternative paths to litigate this issue, yet again.

But that kind of decision seemed foreclosed by the oral argument on the case in November. It became clear that Justice Kennedy, as the new swing vote, would make ample use of his leverage. He had been in strong dissent when the Supreme Court had struck down the law on partial-birth abortion in Nebraska in *Stenberg v. Carhart*. But now he seemed to be wavering, expressing concern for the pregnant woman affected with cancer who might have thinner membranes in the uterine wall, and perhaps more at risk with procedures that involved the insertion of instruments into the uterus. After the oral argument, I sketched for the journal *First Things* the shape of the opinion that the Court did in fact come to hand down: Justice Kennedy would write the opinion, and he would compel his colleagues to settle the judgment on the narrow (but quite useful) point of rejecting facial challenges to these bills on partial-birth abortion. In other kinds of cases, the Court will not strike down legislative enactments on their face unless there is no conceivable set of circumstances on which the Act could be constitutional. But the complaint, emanating even from federal judges, is that the rules have been entirely reversed for laws restricting abortion: Those laws will be struck down on their face if there is any conceivable set of circumstances in which they might—*might*—be unconstitutional. Justice Kennedy would reverse that rule, which would be no small accomplishment for the people who seek to legislate restrictions on abortion. But Kennedy would keep the question open for a "preenforcement challenge," a challenge brought by a woman who could plausibly contend now, in a concrete case, that her own, demonstrable condition made a partial-birth abortion the surgery of choice. Fair enough, for those kinds of cases would be exceedingly hard to find, and in the meantime, the bill on partial-birth would be confirmed in the law.

Still, this mode of "settling" the case seemed to contain the ingredients for unsettling it. There was the prospect, ever lively, that the same litigants who had claimed to be "chilled" by the laws on partial-abortion in the states, and chilled again by the federal law, would find some other pretext for challenging the law on yet other grounds. The old, implausible charge of "vagueness" could be rolled out again, and one could count on Judge Richard Kopf in Nebraska to sustain that claim, or virtually any other colorable ground that people were audacious enough to offer as a ground for challenging the law. Perhaps even the clause on Letters of Marque and Reprisal would offer some tangential reason to challenge this law. In that path, as I argued, lay debility. I feared that the bill on partial-birth abortion would be ground down in litigation as the federal judges, who saw themselves now as "forming the regime," made it clear that they just would not have any of this.

And yet, that path was decisively foreclosed by Justice Kennedy in his opinion, along with several other paths for countering this legislation and enjoining its enforcement. Kennedy made it clear that there was not the slightest doubt on the part of doctors as to when they were performing these abortions. They had to make provisions in advance for the dilation of the cervix and the turning of the child in a breech birth. But even more critically, Kennedy forestalled that ready

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and implausible appeal to a "health exception" to encumber this legislation. Justice Scalia had remarked years earlier in the *Stenberg* case that any attachment of a "health exception" virtually rendered the law null. As Scalia wrote, the requirement of a "health exception" would simply invite the abortionist "to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)." And to attach that requirement is "to give live-birth abortion free rein." The law already contained an exception for the cases, exceedingly rare, when a woman's life would be in danger. And if a partial-birth procedure did not seem "indicated," the federal court of appeals in New York had noted that the abortion could take place in the ways now common or conventional, and so there were other, safe methods still available. The claim that partial-birth abortions were safer forms of surgery had been found, by Judge Casey in New York, to be a claim wholly speculative and theoretical, without any evidence offered in support. In the meantime, said Justice Kennedy "medical uncertainty does not foreclose the exercise of legislative power." He seemed content then to respect the judgment of Congress that the banning of this hideous procedure should not be withheld on the possibility, quite unlikely, that this surgery would ever be necessary for the health of any woman.

With these moves, Kennedy seemed to block off the kinds of challenges that could keep this Act tied up in litigation for years. On the other hand, he seemed to close off at the same time that modest opening I had been hoping for: As Kennedy carefully limited the holding, he seemed to close off virtually any possibility of taking this decision as the ground for pressing even modest restrictions on abortion earlier in the pregnancy. Kennedy made a high point of the fact that the federal bill on partial-birth abortion marked off, quite precisely, the standards for judging whether a child was substantially removed from the birth canal, in a state of partial delivery. The critical points involved the "anatomical landmarks," where "either the fetal head or the fetal trunk past the navel is outside the body of the mother." If the child has not come out that far, then all restraints were virtually off: abortionists would be as free as ever to dismember the child in the familiar "D & E [Dilation and Evacuation] procedure in which the fetus is removed in parts." And beyond that, Kennedy lingered to note, there was a serious requirement of "scienter" with this bill. The Act barred doctors who "deliberately and intentionally" delivered a child to one of the anatomical landmarks before killing it. But if there was any inadvertence or accident, it would be quite hard to prove a deliberate intent to kill a live child at the point of birth. As Kennedy assured his readers on the pro-choice, this was the kind of bill that seriously narrowed the discretion of a prosecutor. This might have been taken as Kennedy's "wink from the bench": he had made the bill almost impossible to challenge further in the courts, but at the same time, he indicated how remarkably easy it might be to avoid prosecution, even if there were an Administration interested in enforcing the bill with any vigor.

This was not, to put it mildly, the kind of decision for which I had been pining. To make matters worse, Justice Kennedy took the occasion, not to invite further, incremental moves to protect the child in the womb; he used the occasion rather to trumpet the point yet again that *Roe v. Wade* and *Casey v. Planned Parenthood*, are still reigning unimpaired, still defining (he insisted) the law of the land. This was the kind of opinion, in the past, virtually certain to elicit from Justice Scalia one of his legendary, inspired dissents. One could have expected here at least a controlled explosion of outrage. That separate, concurring opinion did arrive, but it was a notably muted affair. Justices Scalia and Thomas noted that of course they rejected everything about *Roe v. Wade* apart from its font, and regarded *Casey v. Planned Parenthood* as so much extraneous rubbish. But this was an opinion, remarkably brief, written by Justice Thomas, with Scalia signing on. No separate opinion from Scalia.

My own surmise offered two possibilities: The silence of Scalia might have been extorted by Kennedy, as the price of Kennedy joining the band of five to sustain the bill on partial-birth abortion. Without that emphatic affirmation of *Roe* and *Casey*, Kennedy could have shaded the same opinion in a slightly different way to explain a vote on the other side, as he wrote for the same Court in striking down the federal bill on partial-birth abortion. The second possibility was that the new Chief, John Roberts, had prevailed upon Scalia not to unleash his terrible, swift sword: just let this decision be carried for the judgment it delivered, as cabined, as constricted, as it was. For this was the first time since *Roe v. Wade* that the Supreme Court would actually sustain a restriction on the freedom to order and perform an abortion. That is the point that evidently came through to the partisans of "abortion rights," and set them off in a cascade of invective, mingled with panic. Kennedy had sought so carefully to limit this judgment, and purge it of any significance spilling over to affect any other case of abortion. And yet the partisans of abortion understood this to be the first assault in series virtually invited now, and virtually certain to come.

But what might come from a decision so crabbed? For one thing, about thirty states had passed laws on partial-birth abortion before they were invalidated in *Stenberg v. Carhart* in 2000. The states can now pass their own version of the federal bill, just tracking the language of that bill. That is all good practice. And once legislators get used to legislating again, other things may readily follow, along the lines marked off by Justice Kennedy. The partisans of abortion rights had become his constituency, but the Justice managed to elicit now the most scathing reactions from them when he remarked in his opinion on the regrets, and the other deep misgivings suffered by women who had been through abortions. Many of them, he thought, would like to have had more precise information about the surgery they were ordering, and the condition of the child they were aborting. Kennedy seemed to invite then some serious measures under the head of "informed consent." He pointed out that the Court in *Casey* had upheld the requirements of informed consent. The legislatures could now start enacting those provisions again—most notably, they could provide for the use of sonograms to assure that the pregnant woman has something more than a vague impression of the child she is carrying. The viewing of a sonogram could be required, or it may simply be offered in the interest of letting a woman know what she is choosing.

In India, the use of sonograms has penetrated even poor areas, and brought the beginnings of a demographic crisis: Families anxious for sons have been altogether too willing to abort female babies. A provision on informed consent may quickly beget a decision to bar abortions carried out solely because of the gender of the child. With that move, the public mind could be prepared for reasoning about the next step: barring abortions based on the disability of the child. In surveys in the past, more than half of the public were opposed to aborting a child if the child was likely to be born deaf. The opposition seemed to be invariant by the period of gestation. My own reading was that, if people thought it was wrong to kill someone because of his deafness, they did not think that the wrong varied with the age of the victim.

Here the legislatures could invoke the body of their laws dealing with discriminations against the disabled. And then perhaps they could get to the point of banning abortions after the onset of a beating heart. That beating can actually be detected now only about twenty-one days after conception. Whether the broad public is aware of the fact or not, one survey recently found that around 62 per cent of the public would support that kind of restriction. It is worth noticing, too, that in none of these cases except that of the beating heart, would the legislation start offering protections based on trimesters or the age of the child. There would be no need to play along, and confirm, the perverse fiction that the child somehow becomes more human somewhere in this scale of age, or that it is legitimate to kill smaller people with reasons less compelling than the reasons we would need in killing bigger people. But the main point, on political and judicial statecraft, is that each of these moves would command the support of about 70 per cent of the public, including people who describe themselves as pro-choice. In the aftermath of the *Carhart* case, there were reports of the legislature in Alabama moving to ban all abortions. That would be, in my judgment, a serious mistake, and it would lose the possibilities now opened in *Gonzales v. Carhart*. One step, modestly framed, may follow another; each one draws wide support in the public; and step by step people become accustomed again to the notion that it is reasonable to deliberate about the grounds on which abortions may be justified and unjustified. And what is more, the judgments that people arrive at in this way may be enacted now, in legislatures, with the force of law.

But in the meantime, that procedure partial-birth abortion had not sprung from thin air. Behind the genius contriving the procedure was a motive and an incentive. And that animating motive has now been elevated by the liberal members of the Court into a need and even a cause. Justice Breyer sounded the theme in the *Stenberg* case, and it has been picked up now by Justice Ginsburg in her dissent in *Gonzales*: The procedure on partial-birth abortion promises to be safer for certain women simply because there are fewer insertions of instruments into the uterus, where a slip could cause harm. And beyond that, there are no parts of the dismembered fetus left behind in the womb, where they could cause infection. But of course, by this reckoning, there is no procedure as "safe" as the "live birth abortion": the baby is delivered alive, and placed in a refuse room of the hospital, usually uncovered, until it dies. That procedure had been practiced, famously, at the Christ Hospital in Oak Lawn, Illinois, and it became one of the points of evidence in the case for the Born-Alive Infants' Protection Act. Jill Stanek, a nurse at the Christ Hospital, blew the whistle on this procedure, and she had joined me in testifying for the bill. Since the passage of the Act in 2002, we have come to discover that this procedure, which we had thought quite rare, has been far more prevalent than we had supposed. In fact, from the testimony coming in from nurses in different states, Ms. Stanek has come to the sobering recognition that this procedure is quickly becoming the procedure of choice for certain upper middle class families, who would prefer a cleaner, safer mode of disposing of children; a method that can be performed in reputable hospitals, with real doctors offering cover.

Two years ago, a nurse at a hospital in New Jersey came forth with evidence of these "terminations" at her hospital. A lawyer took her deposition, relayed it to the Department of Justice, and there the case has languished. It has been undone in part by an investigator from the career staff, and by a White House that has shown no interest or leadership. And yet, as a result of the efforts of that nurse, the hospital has moved to rid itself of these "terminations," even while the administrators have been delivered from their fears that the Department of Justice may actually do something here.

In the aftermath of *Gonzales v. Carhart*, the Born-Alive Infants' Protection Act, that most modest of all measures, may be the most powerful and serviceable lever available to the pro-life side. The framers of the bill had deliberately removed any criminal penalties, so that the bill could function mainly to teach and plant premises. But that absence of criminal penalties had turned out to be a handicap, for it turns out to be far more complicated to enforce a law that threatens, at most, a withdrawal of federal funds from hospitals and clinics. Still, that threat is no trifling matter. Nor is the prospect of removing tax exemptions from clinics and hospitals that may stand now, as saying goes, in opposition to our "public policy," by standing in violation of a real law of the United States.

It must surely be an irony that, in the aftermath of this dramatic case in *Carhart*, that the most serviceable law will not be the law on partial-birth abortion, but the simplest law of all, the law that merely sought to protect the child born alive, after an abortion. That law is there, planted, where it could yield an immense effect even for an Administration that seeks to use it sparingly. What it requires, however, is the advent of an Administration that takes the matter seriously, as its own work, its own responsibility—rather than an Administration that prefers to hand off these vexing issues to the courts. The leading figures in the Republican party typically rail against activist judges, but they have been quite content to put on conservative judges a political burden they cannot bear. The promise of conservative appointments to the courts is that one day, perhaps, the Supreme Court will overturn *Roe v. Wade*. And with that move, the issue of abortion would be returned to the political arena. But the curious state right now of the conservative political class is that most of its members have no idea as to what they would propose—or do—on the stunning day that finally happens.