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The Supreme Court and Partial-Birth Abortion: Questions and Answers

Since the 1973 case of *Roe v. Wade*, when the U.S. Supreme Court legalized abortion nationwide, the Court has not allowed a legislature to prohibit any method of abortion. Many of the core principles of *Roe* were upheld in *Planned Parenthood v. Casey* (1992). Then these were interpreted to invalidate even Nebraska's ban on the grisly partial-birth abortion method, and similar bans in about 30 other states, in *Stenberg v. Carhart* ("*Carhart I*," 2000). Finally, in April 2007, the Court upheld a differently worded federal ban on this procedure in *Gonzales v. Carhart* ("*Carhart II*").

What is the significance of *Carhart II*? Does it signal a new direction for the Court? This backgrounder provides some answers.

1. What is partial-birth abortion?

Partial-birth abortion (PBA) is the name Congress has used to describe a procedure that crosses the line from abortion to infanticide. The doctor delivers a substantial portion of the living child outside his mother's body – the entire head in a head-first delivery or the trunk past the navel in a feet-first delivery – then kills the child by crushing his skull or removing his brain by suction.

2. Why would anyone use this procedure?

Some abortion doctors use PBA in the middle and last months of pregnancy, when dismembering a child becomes more difficult due to the child's stronger bones and ligaments. After the mother undergoes two to three days of cervical dilation (increasing her risk of infection and subsequent preterm births), the doctor in minutes can partially deliver the child "intact" before killing him or her and completing delivery. In the more commonly used dismemberment method, the mother's cervix is dilated manually only enough to remove the child's severed body parts; dismemberment and removal takes the doctor longer to complete.

3. Does *Roe v. Wade* protect an abortion method as extreme as PBA?

In *Carhart I* the Supreme Court treated PBA as just another method of abortion, largely ignoring the fact that the child is almost completely delivered when he or she is killed. Yet even when the Court struck down Texas's abortion statute in *Roe*, it had left standing a provision of Texas law that prohibited killing a child in the process of being delivered.

4. Why was a ban on this procedure needed? Don't most states already have laws against late-term abortions?

Such laws exist in most states but they generally have two deficiencies. First, they apply only after "viability" – when the child if delivered could survive indefinitely outside the womb – and PBA is used to kill mostly-delivered children before this stage. Second, as required by *Roe* and *Casey*, even laws restricting abortion after viability allow abortion when it is deemed necessary to preserve the mother's "health" – and "health" was defined in *Roe*'s companion case *Doe v. Bolton* to include "all factors" – emotional, familial, age, and so on – related to "well-being." This "health" loophole allows abortions to be performed on request during all nine months of pregnancy, for virtually any reason.

5. What reasons did the Court give in *Carhart I* for finding Nebraska's ban on PBA unconstitutional?

First, Nebraska defined partial-birth abortion as a procedure in which the doctor delivers a "substantial portion of the fetus" into the vagina before committing an act which kills the fetus. The Court ruled that this description was vague and could also refer to dismemberment abortions, so the law may ban almost all abortions after 18-20 weeks.

Second, presented with conflicting medical evidence on the marginal health benefit PBA was said to provide over the dismemberment method, the trial judge gave greater weight to the testimony of a PBA practitioner (Dr. Carhart) than to the testimony of experts in maternal-fetal medicine. On this basis the judge found the law unconstitutional because it lacked a "health" exception, and the Supreme Court agreed.

6. What did Congress do to ban partial-birth abortion?

Congress twice passed bills banning PBA, but they were vetoed by President Bill Clinton. Before the third such bill was passed by Congress, the Supreme Court issued its *Carhart I* decision. Congress then redrafted its bill to address the Court's specific objections to the Nebraska law. The Partial-Birth Abortion Ban Act of 2003 was signed into law by President George W. Bush.

7. How does the federal law differ from Nebraska's ban?

Congress wrote a very clear description of the banned procedure, to cover only the intentional delivery of a living fetus outside the mother beyond certain anatomical points, followed by the deliberate killing of the child (see answer 1 above). Second, based on years of hearings and documentary evidence, Congress concluded that a health exception allowing PBA is never medically necessary. The federal ban recited these findings concerning the lack of health benefits and even additional health risks from PBA, compared to other methods.

8. What happened to the federal ban on PBA in federal court?

The day it was signed into law, Dr. Carhart, the Planned Parenthood Federation of America and the National Abortion Federation filed suits against the federal law in three federal district courts. Each trial judge enjoined the law from being enforced. Then, citing the Court's ruling on the Nebraska law in *Carhart I*, the trial judges and all but one appellate court judge found the federal ban unconstitutional. However, the Supreme Court reviewed two of these rulings and overturned them on April 18, 2007, finding the federal ban constitutionally valid (*Carhart II*). The majority opinion by Justice Anthony Kennedy was signed by five of the nine Justices. The federal ban on PBA will now be enforceable nationwide for the first time.

9. Why did the Court arrive at a different decision in *Carhart I* and *Carhart II*?

First, the statutes were written differently, with the federal ban describing the banned procedure with greater clarity and specificity. Second, the Court was convinced that in a facial challenge, a lack of complete consensus in medical opinion should not foreclose Congress's ability to legislate in this area. More generally, the Court in *Carhart II* applied the standards of *Casey* and resolved to eliminate what has come to be known as "abortion distortion" – the Court's tendency in past abortion cases to deviate from the ordinary rules it uses to decide other kinds of cases.

10. What are some examples of "abortion distortion"?

Some of the special rules that have made it very difficult to have pro-life laws upheld relate to: (a) the type of challenge allowed, "facial" versus "as-applied"; (b) the standard of review; (c) how the meaning of statutory language is determined; and (d) the treatment of abortion doctors as a privileged class. A final distortion is evident in (e) euphemisms and inaccurate descriptions of the unborn child and abortion.

(a) Facial vs. as-applied challenges:

In an "as-applied" challenge, opponents seek to show that a law is unconstitutional because it has caused or will cause great harm only "as applied" to their specific circumstances. If the Court agrees with them, it may create a narrow exception to block the law from being applied to them and others who are similarly situated, while allowing the law to remain valid in every other respect. In the abortion context, however, the Court has typically allowed abortion doctors to bring "facial challenges," arguing that abortion clients presenting certain specific circumstances – however rare and unlikely – will be harmed by the law; on this basis the Court has invalidated entire statutes.

In *Carhart II*, the Court rejected such widespread use of facial challenges in cases like this one, where it is claimed that the statutory ban will compromise the health of some women. This means the PBA law can be challenged only as applied to those particular cases.

(b) The standard of review:

Courts apply a deferential standard of review (usually called “rational basis” review) in most areas of law and a very tough standard (“strict scrutiny”) where a law restricts a fundamental freedom (e.g., free speech) or treats people differently based on some suspect classification such as race. Before *Casey*, abortion cases were examined under strict or “heightened” scrutiny. *Casey* called for the use of a more lenient, intermediate standard of review, making it easier for abortion regulations to be upheld. *Carhart II* applies this intermediate standard to uphold the PBA ban.

(c) How the Court determines the meaning of statutory language:

Normally, a court determines lawmakers’ intent by giving words their common meaning. Courts generally give lawmakers the benefit of the doubt: “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” In *Carhart II*, the Court admitted that this maxim had “fallen by the wayside when the Court confronted a statute regulating abortion.” Instead courts seemed to go out of their way to find an *unconstitutional* meaning to *invalidate* an abortion law. *Carhart II* repeats *Casey*’s promise to follow the customary rule of construction (which many say the Court ignored in *Carhart I*).

(d) Treating abortion doctors as a privileged class:

The Court signals that the bias in favor of abortion doctors, shown in many earlier cases, should end: “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.” The Court rejected a “zero tolerance policy,” in which legislatures were forbidden to regulate abortion whenever an abortion doctor objected.

In the area of evidence, too, courts have sometimes treated abortion doctors as the ultimate authorities on health or safety, and on what constitutes informed consent. By contrast, opposing testimony by board-certified medical specialists in obstetrics and maternal-fetal medicine have often been given less weight. Justice Kennedy had objected to this bias in his dissent in *Carhart I*: “The standard of medical practice cannot depend on the individual views of Dr. Carhart and his supporters... A ban which depends on the ‘appropriate medical judgment’ of Dr. Carhart is no ban at all.” In judging whether PBA provides a “health” benefit, *Carhart II* gave fairer treatment to the testimony of medical specialists on whom Congress relied, who contradicted Dr. Carhart. Noting that disagreements remained, the Court said: “Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”

(e) The pretense that abortion is something other than the killing of a human being:

Beginning with *Roe*, the Supreme Court has often spoken less than candidly about what an abortion does. The Court has often referred to the unborn human as only a “potential life,” and spoken vaguely about the choice to terminate a pregnancy instead of about the choice to end a human life. When, as in *Carhart I*, the Court was forced to describe the procedures by which children are brutally killed in the later stages of pregnancy, they resorted to Latinate words like *calvarium* for skull and *disarticulation* for tearing limb from limb. The *Carhart II* opinion does not mince words. The humanity of the “unborn child,” the fact that abortion means “killing” that child, and the prospect that a mother may feel regret, sorrow, emotional distress, and even anguish over this decision are openly discussed.

11. What does *Carhart II* say about the State’s interests in regulating and restricting abortion?

Carhart II recognizes legitimate interests of the State which may provide a valid basis for future legislation:

- (a) Unborn Life:** promoting “respect for the dignity of human life” by “preserving and promoting fetal life” from “the inception of pregnancy”;
- (b) Professional Ethics:** “protecting the integrity and ethics of the medical profession” and “regulating the medical profession in order to promote respect for life, including the life of the unborn”; and
- (c) Women’s Interests:** providing “a reasonable framework for a woman to make a decision that has such profound and lasting meaning,” so she will not suffer “grief more anguished and sorrow more profound” upon learning too late what her abortion entailed.

12. What does *Carhart II* mean for future abortion cases and regulations?

The Court will probably uphold abortion regulations that require providing more accurate information to women about the method of abortion, its effect on the child, and risks to the mother. (Medical literature suggests that these risks include: premature births or miscarriages in later pregnancies; a serious pregnancy complication in subsequent pregnancies called placenta previa, in which the placenta attaches too close to the cervix and obstructs normal delivery; higher risk of breast cancer; psychological difficulties after abortion; drug and alcohol abuse; and increased risk of suicide.) Laws recognizing the humanity of the unborn child, and allowing government to encourage childbirth as a better option than abortion, should also be given greater deference. In the longer term, the Court’s renewed attention to the facts on abortion and its new evenhandedness in assessing arguments on both sides of the issue provide a basis for renewed hope among pro-life advocates.