Gonzales v. Carhart: Justice Kennedy at the Intersection of Life Interests, Medical Practice and Government Regulations

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I. INTRODUCTION

Over one million abortions are performed each year. Nearly all abortions are performed during the first trimester. Of the few abortions that are performed during the second trimester, nearly all are D&E, or “dilation and evacuation,” procedures.

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2 Planned Parenthood Fed’n of Am., 320 F. Supp. 2d at 961 n.4 (explaining of the 1.3 million abortions performed each year, eighty-five percent occur during the first trimester); BLACK’S MEDICAL DICTIONARY 637 (40th ed. 2004) (noting that the “first trimester” is the first three months, or twelve weeks, of pregnancy); cf. Stenberg v. Carhart, 530 U.S. 914, 926 (2000) (stating that D&E is a safer abortion procedure between the twelfth and twentieth weeks of gestation “than those accompanying induced labor procedures”).

3 BLACK’S MEDICAL DICTIONARY 637 (40th ed. 2004) (noting the “second trimester” is the second three months, or weeks thirteen to twenty-four, of pregnancy).

4 See, e.g., Gonzales, 127 S. Ct. at 1620 (noting that the surgical procedure referred to as “dilation and evacuation” or “D&E” is the usual abortion method in the second trimester); Planned Parenthood Fed’n
Every state regulates abortions and, as of roughly five years ago, more than half of states prohibit physicians from performing intact D&E procedures. However, the medical community remains divided on whether intact D&E is ever medically necessary to save the life of the mother.

D&E is a regular second trimester abortion procedure. There is no uniform procedure for performing D&E, although the steps for any D&E procedure are generally the same. A physician will first dilate the cervix with osmotic dilators, with the resulting dilation being non-uniform. Once the cervix is dilated to the extent needed, the woman is placed under general anesthesia or conscious sedation. The physician then removes “at least some fetal tissue using nonvacuum instruments” and then suctions or scrapes out the remaining fetal material out of the uterus.

Intact D&E, which stands for “dilation and extraction,” is a less-common second trimester abortion procedure; it is a variant of D&E, where the fetus is extracted largely intact. Intact D&E is used when the fetal skull becomes too large to remove through the cervix. Like D&E, intact D&E begins with the dilation of the cervix. Intact D&E then proceeds as per the presentation of the fetus. During a vertex presentation, the fetus presents head-first, the doctor collapses the skull and then removes the entire fetus from the cervix. During a breech presentation, the fetus presents feet-first, and “the doctor pulls the fetal body through the cervix,

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7 American Medical Association (AMA), Late-Term Pregnancy Termination Techniques (2007) H-5.982(2).

8 Planned Parenthood Fed’n of Am., 320 F. Supp. 2d at 961.

9 Gonzales, 127 S. Ct. at 1620.

10 Id.

11 Id. at 1621.

12 Stenberg v. Carhart, 530 U.S. 914, 925 (2000); Gonzales, 127 S. Ct. at 1621 (“The doctor . . . inserts grasping forceps through the woman’s cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina . . . . The friction causes the fetus to tear apart . . . . The process of evacuating the fetus piece by piece continues until it has been completely removed.”).

13 Gonzales, 127 S. Ct. at 1621.


16 Stenberg, 530 U.S. at 927 (explaining that after 16 weeks into gestation the fetus skull becomes too large to remove it through the cervix (citing Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998))).

17 Id.; Gonzales, 127 S. Ct. at 1621.

18 Stenberg, 530 U.S. at 927.

19 Id.
collapses the skull, and extracts the fetus through the cervix.”

In Gonzales v. Carhart, four physicians brought an action challenging the constitutionality of the Partial Birth Abortion Act of 2003 (the “Act”). The Act prohibited physicians from performing intact D&E. In reversing the Eighth and Ninth Circuits, Gonzales held that the Act’s prohibition of intact D&E was not void for vagueness, the Act did not include prototypical D&Es, the Act did not pose a substantial obstacle to women seeking second trimester abortions, the Act furthered a legitimate medical purpose and the absence of a life exception for the health of the mother did not render the Act void. Gonzales is the latest in line of Justice Kennedy opinions that find when a “life interest” and the practice of medicine intersect, it is a legitimate government interest, whether state or federal, to regulate that medical practice, even despite medical uncertainty or physician objections. “Life interest,” as used herein, is not a synonym for a “liberty interest;” it connotes

20 Id. Breech presentation is the most common form of intact D&E. Id. A more detailed medical general description of intact D&E by Dr. Martin Haskell, who operates three abortion clinics, was included in a House Judiciary Committee Report on the Partial Birth Abortion Act of 2003. H.R. Rep. No. 108-58, pt. 2, at 2-3 (2003). Here is a firsthand eye witness account from a registered nurse who has assisted Dr. Haskell in performing an intact D&E procedure:

Dr. Haskell went in with forceps and grabbed the baby’s legs and pulled them down into the birth canal. Then he delivered the baby’s body and the arms—everything but the head. The doctor kept the head right inside the uterus. . . . The baby’s little fingers were clapping and unclapping, 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 . . . . The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby’s brains out. . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.

Id. 21 127 S. Ct. 1610 (2007).

22 18 U.S.C. § 1531(a) (2006) (“Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.”).

23 Gonzales, 127 S. Ct. at 1619.


25 Gonzales, 127 S. Ct. at 1627, 1629, 1632-33, 1639.

26 See, e.g., id. at 1633 (“There can be no doubt the government ‘has an interest in protecting the integrity and ethics of the medical profession.’” (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997))).

27 Of the following four cases, Justice Kennedy either wrote the majority opinion or a dissenting opinion, with the exception of Glucksberg, where he joined the majority opinion: Gonzales, 127 S. Ct. at 1632-35 (explaining that Congress has a legitimate interest in regulating partial birth abortions and can prohibit intact D&E, rather than deferring to physicians); Gonzales v. Oregon, 546 U.S. 243, 270-75 (2006) (explaining that Oregon has a legitimate interest in regulating assisted suicide, the Attorney General lacks the statutory authority to prohibit assisted suicide, and it is constitutional for Oregon to permit assisted suicide); Stenberg v. Carhart, 530 U.S. 914, 964 (2000) (Kennedy, J., dissenting) (explaining that Nebraska has a legitimate interest in regulating partial birth abortions and can prohibit intact D&E, rather than giving physicians a veto power over a choice made by democratically elected representatives); Glucksberg, 521 U.S. at 735 (explaining that Washington has a legitimate interest in regulating assisted suicide and it is constitutional for Washington to prohibit assisted suicide).

28 BLACK’S LAW DICTIONARY 371 (3d pocket ed. 2006) (defining “liberty interest” as “[a]n interest protected by the due-process clauses of state and federal constitutions”).
those acts which extinguish life, regardless of whether or not there is a liberty interest to those acts protected by the Fourteenth Amendment.\textsuperscript{29} For example, there is a liberty interest to an abortion, but no liberty interest to physician-assisted suicide; however, each procedure implicates a life interest.\textsuperscript{30}

In reaffirming that the government has a legitimate interest in regulating partial birth abortions,\textsuperscript{31} \textit{Gonzales} held that prohibiting intact D&E did not pose a substantial obstacle to a mother choosing to have an abortion.\textsuperscript{32} In applying the undue burden standard\textsuperscript{33} required by \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{34} the Court extended deferential review to the facts submitted by Congress,\textsuperscript{35} an act more consistent with rational basis review.\textsuperscript{36} Through this review, the Court affirmed Congress’ finding that intact D&E was never medically necessary to save the life of the mother.\textsuperscript{37} Consequently, the Court held that the Act was not unconstitutional for omitting a life exception to safeguard the health of the mother.\textsuperscript{38} The Act, however, should have been deemed unconstitutional for its misapplication of the undue burden standard and applying a rational basis review in its absence.\textsuperscript{39} This misapplication of the undue burden standard is rooted in Justice Kennedy’s aforementioned emphasis on the Act implicating a life interest.\textsuperscript{40}

Section II discusses prior abortion law and Justice Kennedy’s opinions where a life interest intersects a government regulation of a medical procedure. Section III explains the facts and procedural history of \textit{Gonzales}. Section IV details the

\textsuperscript{29} \textit{Glucksberg}, 521 U.S. at 720-21 (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ [citation omitted] and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” (quoting \textit{Moore v. City of E. Cleveland, Ohio}, 431 U.S. 494, 503 (1977) (plurality opinion); \textit{Palko v. Connecticut}, 58 S. Ct. 149, 152 (U.S. 1937))).

\textsuperscript{30} E.g., \textit{Glucksberg}, 521 U.S. at 731 (holding there is no liberty interest in physician-assisted suicide); \textit{Roe v. Wade}, 410 U.S. 113, 154 (1973) (holding there is a liberty interest to an abortion).

\textsuperscript{31} \textit{Gonzales}, 127 S. Ct. at 1633.

\textsuperscript{32} \textit{Id.} at 1641 (Ginsburg, J., dissenting).

\textsuperscript{33} \textit{Planned Parenthood of Se. Pa. v. Casey}, 505 U.S. 833, 877 (1992) (plurality opinion) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

\textsuperscript{34} \textit{Gonzales}, 127 S. Ct. at 1626-27.

\textsuperscript{35} \textit{Id.} at 1637.

\textsuperscript{36} \textit{BLACK’S LAW DICTIONARY} 592-93 (3d pocket ed. 2006) (defining “rational-basis test” as “[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective”).

\textsuperscript{37} \textit{Gonzales}, 127 S. Ct. at 1638.

\textsuperscript{38} \textit{Id.} at 1639. \textit{But see id.} at 1641 (Ginsburg, J., dissenting) (noting that this is the first time the Supreme Court found a statute that did not include a health exception to be constitutional).

\textsuperscript{39} \textit{Id.} at 1641 (Ginsburg, J., dissenting) (“Today’s decision is alarming. It refuses to take \textit{Casey} and \textit{Stenberg} seriously. . . . It blurs the line, firmly drawn in \textit{Casey}, between previability and postviability abortions. And, for the first time since \textit{Roe}, the Court blesses a prohibition with no exception safeguarding a woman’s health. . . . [T]he Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman’s reproductive choices.”).

\textsuperscript{40} \textit{See id.} at 1632-35 (majority opinion) (explaining that Congress has a legitimate interest in regulating partial birth abortions and can prohibit intact D&E, rather than deferring to physicians). \textit{But see Gonzales}, 127 S. Ct. at 1652 (Ginsburg, J., dissenting) (“[T]he 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.”).
No. 2]  

Gonzales v. Carhart

295

Gonzales opinion and Justice Ginsburg’s dissent.\(^{41}\) Section V will analyze Justice Kennedy’s imperfect analogy between the government’s interest in regulating physician-assisted suicide and partial birth abortion and its consequences on the undue burden standard.

II. PRIOR LAW ON THE INTERSECTION OF LIFE INTERESTS, MEDICAL PRACTICES AND GOVERNMENT REGULATIONS

A. Regulating Assisted-Suicide

In *Washington v. Glucksberg*, Washington prohibited physicians from assisting terminally ill patients in committing suicide.\(^{42}\) The plaintiffs in *Glucksberg* argued that there was a liberty interest for “mentally competent, terminally ill adult[s] to commit physician-assisted suicide” that was protected by the Fourteenth Amendment.\(^{43}\) *Glucksberg* held that when the life interest of the right to die intersected with the medical practice of assisted suicide it was a legitimate government interest to prohibit the medical practice.\(^{44}\)

The Court found that physician-assisted suicide was not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment,\(^{45}\) given the long tradition of prohibiting the practice in nearly every state.\(^{46}\) Although the Court found no liberty interest in assisted suicide, it was required to determine whether the state prohibition against assisted suicide was rationally related to a legitimate government interest.\(^{47}\) The Court held the statute was constitutional\(^{48}\) because it was rationally related to the state’s interests of preserving life\(^{49}\) and

\(^{41}\) This comment will not discuss Justice Thomas’s concurring opinion. *Id.* at 1639-40 (Thomas, J., concurring).

\(^{42}\) 521 U.S. 702, 707 (1997). Justice Kennedy joined the majority opinion written by Chief Justice Rehnquist. *Id.* See generally WASH. REV. CODE ANN. § 9A.36.060 (West 2007) (“(1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide. (2) Promoting a suicide attempt is a class C felony.”); WASH. REV. CODE ANN. § 9A.20.021 (defining the punishment for a class C felony). But see WASH. REV. CODE ANN. § 70.122.070(1) (“The withholding or withdrawal of life-sustaining treatment from a qualified patient pursuant to the patient’s directive in accordance with the provisions of this chapter shall not, for any purpose, constitute a suicide or a homicide.”).

\(^{43}\) *Glucksberg*, 521 U.S. at 708 (quoting Compassion in Dying v. Washington, 850 F. Supp. 1454, 1456-57 (W.D. Wash. 1994)).

\(^{44}\) See *id.* at 735 (holding the statute prohibiting physician-assisted suicide was constitutional).

\(^{45}\) *Id.* at 729. The Court noted that in order to be considered a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, the asserted interest must be “‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Id.* at 720-21 (citing Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 58 S. Ct. 749, 152 (U.S. 1937)). See also *id.* at 723 (finding a liberty interest in the right to assisted suicide would require overturning the policy choice of nearly every state).


\(^{47}\) *Id.* at 735.

\(^{48}\) *Id.* at 728 (“The State’s prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest.”).
“protecting the integrity and ethics of the medical profession.”

In reaching its judgment, the Court in *Glucksberg* used restraint in deciding the issue of assisted suicide, rather than interjecting itself into the highly controversial state-by-state issue of assisted suicide. The Court’s holding allowed each state to determine for itself whether or not to permit assisted suicide and ensured that the federal government would not foreclose this decision from the voters and legislators of each state.

In *Gonzales v. Oregon*, the U.S. Attorney General challenged the constitutionality of the Oregon Death with Dignity Act (ODWDA), arguing it violated the federal Controlled Substances Act (CSA). *Oregon* held that when a state government regulated the life interest of the right to die and imposed requirements for medical practice, such as assisting in the suicide of terminally-ill patients in certain circumstances, the federal government cannot impede on the rights of the state government to enforce the state regulations of this medical practice.

Under the ODWDA, Oregon physicians who dispensed or prescribed lethal doses of drugs to terminally ill patients were exempted from civil and criminal liability. The drugs that were typically prescribed under the ODWDA, however, were subject to regulation by the CSA. According to the CSA, controlled substances could only be prescribed by a registered physician and only for a “legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”

The U.S. Attorney General issued an Interpretive Rule that challenged the ODWDA, arguing that prescribing controlled substances to assist in suicide did not constitute a legitimate medical purpose and, therefore, was in violation of the CSA.

In finding the ODWDA constitutional, the Court found that the CSA did not grant the U.S. Attorney General the explicit authority to make “a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically

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50 *Glucksberg*, 521 U.S. at 731 (“[P]hysician-assisted suicide could . . . undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.”).
51 *Id.* at 735.
52 *Id.* (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”).
54 OR. REV. STAT. ANN. § 127.800 (West 2007); OR. REV. STAT. ANN. § 127.885(1) (“No person shall be subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with ORS 127.800 to 127.897. This includes being present when a qualified patient takes the prescribed medication to end his or her life in a humane and dignified manner.”).
56 *See Oregon*, 546 U.S. at 270-75 (holding that the CSA does not authorize the U.S. Attorney General to prohibit physicians from prescribing drugs for use in physician-assisted suicide, as per the ODWA).
57 *Id.* at 251-52.
58 *Id.*
59 21 C.F.R. § 1306.04 (2005); *Oregon*, 546 U.S. at 250.
60 *Oregon*, 546 U.S. at 254. In claiming that the ODWDA violated the CSA, the Attorney General concluded that physicians who dispensed controlled substances under the ODWDA could face license suspension or revocation. *Id.*
61 *Id.* at 257.
authorized under state law.” In support of this argument, the Court found that the structure of the CSA demonstrated Congress’ “unwillingness to cede medical judgments to an Executive official who lacks medical expertise.” Moreover, the CSA did not grant the U.S. Attorney General the implicit power to enact this Interpretative Rule. While acknowledging the debate and uncertainty surrounding assisted suicide, the Court found that the Interpretative Rule was directly at odds with the intent of the CSA, which was deliberately silent on regulating uniform medical practices outside of recreational drug use.

B. Regulating Abortions

_Gonzales_ operates within the constitutional abortion framework established in _Casey_. In _Casey_, a plurality of the Court held a provision of the Pennsylvania Abortion Control Act of 1982 was unconstitutional because it created an undue burden on a woman’s right to choose.

Although the Court reaffirmed _Roe v. Wade_’s essential holding, it rejected _Roe’s_ “rigid” trimester framework. A plurality of the Court adopted the point of viability as the fulcrum for state regulation. Before viability, a “woman has a right to choose to terminate her pregnancy” and the State cannot prohibit that exercise; however, after viability the State’s interest in preserving the life of the child can override the mother’s right to terminate the pregnancy. At any time, before or after viability, the regulations imposed by the State cannot produce an undue burden for a

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62 Id. at 258.
63 Id. at 266.
64 Oregon, 546 at 267 (finding that Congress did not grant the Attorney General such broad authority).
65 Id.
66 Id. at 272. In so finding, the Court explained that “Oregon’s regime is an example of the state regulation of medical practice that the CSA presupposes. Rather than simply decriminalizing assisted suicide, ODWDA limits its exercise to the attending physicians of terminally ill patients, physicians who must be licensed by Oregon’s Board of Medical Examiners.” Id. at 271.
68 18 PA. CONS. STAT. ANN. § 3203 (West 2007).
69 18 PA. CONS. STAT. ANN. § 3209 (West 2007) (requiring married women who seek abortions to provide a signed statement from her husband acknowledging that the husband was aware of the abortion before a physician could perform an abortion). See 18 PA. CONS. STAT. ANN. § 3209 (removing consent of husband in the event of a medical emergency).
70 410 U.S. 113 (1973).
71 The _Casey_ Court interpreted the essential holding of _Roe_ to be that (1) a woman has a right to obtain an abortion before viability “without undue influence from the State,” (2) the State can regulate abortions after viability, as long as they include a health exception for the life of the mother, and (3) the State has a legitimate interest in preserving the health of the mother and the fetus that may become a child from conception. _Casey_, 505 U.S. at 846.
72 Id. at 875 (finding that “in practice [the trimester framework] undervalues the State’s interest in the potential life within the woman”).
73 Id. at 870.
74 Id. The Court relied on its interpretation that “[t]he woman’s right to terminate her pregnancy before viability is the most central principle of _Roe v. Wade_.” Id. at 871.
75 _Casey_, 505 U.S. at 870 (“[Viability] is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”). The Court explained that “a woman who fails to act before viability has consented to the State’s intervention on behalf of the developing child.” Id.
woman’s right to choose to terminate her pregnancy.\textsuperscript{76} A State produces an “undue burden” on a woman’s right to choose to terminate her pregnancy where “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\textsuperscript{77} Any regulation imposed after viability must include a health exception for the life of the mother.\textsuperscript{78}

Prior to Gonzales, Stenberg v. Carhart was the leading case on the constitutionality of regulating partial birth abortions.\textsuperscript{79} In Stenberg, the medical practice of performing partial birth abortions implicated the life interest of the right to an abortion, which clashed with a government regulation prohibiting all partial birth abortions.\textsuperscript{80} Stenberg held that, although it is a the legitimate government interest to regulate partial birth abortions, the government cannot prohibit partial birth abortions previability.\textsuperscript{81}

In Stenberg, the Nebraska legislature prohibited physicians from performing partial birth abortions,\textsuperscript{82} except when “necessary to save the life of the mother.”\textsuperscript{83} The Court found that the statute had two flaws.\textsuperscript{84} First, because the aforementioned life exception did not distinguish between partial birth abortions performed before viability and those performed after viability, the Court found the statute applied to all partial birth abortions.\textsuperscript{85} The Court reaffirmed that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”\textsuperscript{86} The Court

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\textsuperscript{76} Id. at 874 (holding that only when a regulation poses an undue burden on a woman’s right to choose is it unconstitutional). Further, a regulation causes an undue burden when a statute places a “substantial obstacle” in the path of a woman’s choice to undergo an abortion. \textit{Id.} at 877.

\textsuperscript{77} \textit{Id.} at 877.

\textsuperscript{78} \textit{Casey}, 505 U.S. at 879 (“[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973))).

\textsuperscript{79} Stenberg v. Carhart, 530 U.S. 914 (2000).

\textsuperscript{80} \textit{Id.} at 922-23.

\textsuperscript{81} See \textit{id.} at 945-46 (holding the Nebraska statute unconstitutional for prohibiting partial birth abortions previability).

\textsuperscript{82} NEB. REV. STAT. § 28-328 (2007) (defining “partial birth abortion” as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery”).

\textsuperscript{83} NEB. REV. STAT. § 28-328.

\textsuperscript{84} Stenberg, 530 U.S. at 938, 946.

\textsuperscript{85} \textit{Id.} at 930 (“Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.” (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 880 (1992) (plurality opinion)). The Court further explained that “a State may promote but not endanger a woman’s health when it regulates the methods of abortion.” \textit{Id.} at 931 (citing Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 768-69 (1986); Colautti v. Franklin, 439 U.S. 379, 400 (1979); Doe v. Bolton, 410 U.S. 179, 197 (1973))).

\textsuperscript{86} \textit{Id.} at 930 (quoting \textit{Casey}, 505 U.S. at 879 (1992), in turn quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)). \textit{See also} \textit{Casey}, 505 U.S. at 870 (holding the point of viability is the fulcrum for state regulation); \textit{id.} at 870-71 (holding \textit{before} viability, a “woman has a right to choose to terminate her pregnancy” and the State cannot prohibit that exercise; however, \textit{after} viability the State’s interest in preserving the life of the child can override the mother’s right to terminate the pregnancy); \textit{id.} at 874, 877 (holding at any time, before or after viability, the regulations imposed by the State cannot produce
found that the Nebraska statute lacked any health exception for the preservation of the life of the mother,\textsuperscript{87} which was required by \textit{Casey}.\textsuperscript{88} Second, while the statute was arguably intended to prohibit only intact D&E,\textsuperscript{89} the language was read by the Court to prohibit both intact D&E and D&E.\textsuperscript{90} This had the effect of putting physicians in fear of “prosecution, conviction and imprisonment” for using any D&E procedure, the most common previability second trimester abortion procedure.\textsuperscript{91} In applying the statute to \textit{Casey}’s undue burden analysis,\textsuperscript{92} the Court held that the statute posed an undue burden a women’s right to choose to have a partial birth abortion before viability.\textsuperscript{93}

In his dissent, Justice Kennedy argued that the Nebraska statute did not prohibit any woman from obtaining a partial birth abortion and it did not pose a substantial obstacle to a woman’s right to choose.\textsuperscript{94} Justice Kennedy argued the intersection of a life interest, the right to an abortion, and a medical practice, performing partial birth abortions, permitted the government to prohibit partial birth abortions.\textsuperscript{95}

First, the Act furthered the legitimate government interest of choosing a side in the abortion debate\textsuperscript{96} and ensuring that medical procedures do not allow the medical community or society to become “disdainful” of the right to life.\textsuperscript{97} Justice Kennedy argued that “[a] State may take measures to ensure the [members of the] medical profession . . . are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life.”\textsuperscript{98} Justice Kennedy argued that \textit{Casey} grants states a tangible power to promote a respect for life.\textsuperscript{99}
When a state has established a moral difference between medical procedures in order to further a respect for life, the Court should defer to state’s determination. Since Nebraska had determined a moral difference between D&E and intact D&E, with D&E representing a stronger respect for life than intact D&E, the Court should honor this determination.

Second, Justice Kennedy argued that the majority was incorrect in determining the Act was unconstitutional for not including a life exception to perform intact D&E when a physician believed it would necessary to preserve the health of the mother. Rather than relying on legislative fact finding, the majority gave “each physician a veto power of the [s]tate’s judgment that the procedure should not be performed.” Nebraska was entitled to conclude that prohibiting intact D&E did not pose a substantial obstacle to the life of the mother because there were no identified circumstances where intact D&E was the only procedure to save the life of the mother. In the presence of medical uncertainty, Justice Kennedy contended that the majority should have deferred to the state legislature, rather than giving deference to a physician’s treatment decision.

Third, Justice Kennedy argued that the majority misapplied the doctrine of statutory construction in construing the Act to apply to both intact D&E and D&E. In doing so, the majority subjected the Nebraska legislature to “unattainable standards of statutory craftsmanship,” which, in effect, prohibit state regulation entirely. Medical descriptions about partial birth abortion procedures supported the interpretation that the terms used in the Act only applied to intact D&E. Therefore, Justice Kennedy argued that the majority was incorrect for subjecting the Act to a “strict scrutiny review,” rather than allowing Nebraska leeway.

In 2003, after the Supreme Court’s decision in Stenberg, the 108th Congress passed the Partial Birth Abortion Act of 2003 (the Act). The Act was a direct

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100 Id. at 964.
101 Id.
102 Id.
103 Id. at 964 (reasoning that it is not the role of the courts to determine the relative worth of surgical procedures); Stenberg, 530 U.S. at 968 (Kennedy, J., dissenting) (arguing that courts need to defer to legislatures because they have “superior fact finding capabilities” and that courts are “not suited to be ‘the Nation’s ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States (citation omitted)’”).
104 Id. at 964.
105 Id. at 965 (“Nebraska . . . was entitled to conclude that its ban . . . deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman.”); id. at 965-66 (noting that the American College of Obstetricians and Gynecologists . . . found no circumstances where intact D&E was the only available procedure to save the life of the mother); id. at 967-68 (adding the marginal safety differences between intact D&E and D&E do not amount to a substantial obstacle to the right to an abortion).
106 Stenberg, 530 U.S. at 970 (Kennedy, J., dissenting).
107 Id. at 973.
108 Id. (“Like the ruling requiring a physician veto, requiring a State to meet unattainable standards of statutory craftsmanship in order to have its voice heard on this grave and difficult subject is no different from foreclosing state participation altogether.”).
109 Id. at 975-76.
110 Id. at 976-77 (noting that not only does Casey reject strict scrutiny review, but states must be given latitude when regulating medical procedures).
response to *Stenberg*. First, Congress chose not to accept the district court’s “very questionable” fact findings in *Stenberg*. Instead, congressional hearings found that intact D&E “[was] never necessary to preserve the health of a woman, never pose[d] significant health risks to a woman upon whom the procedure [was] performed and [was] outside the standard of medical care.” Second, the text of the Act varied considerably from the unconstitutional text in *Stenberg*.

### III. FACTS AND PROCEDURAL HISTORY OF GONZALES V. CARHART

In *Carhart v. Ashcroft*, one of the two district court cases that was later consolidated into *Gonzales v. Carhart*, four physicians brought an action against the U.S. Attorney General challenging the constitutionality of the Partial Birth Abortion Act of 2003 (the Act). The district court engaged in exhaustive fact finding and concluded that the Act was unconstitutional on two grounds. First, the Act failed to include the necessary health exception for the life of the mother, which was proscribed by *Casey*. In doing so, the district court rejected the congressional findings and adopted its own findings in regard to intact D&E. Second, the Act covered both intact D&E as well as other forms of D&E. On appeal, the Court of Appeals for the Eighth Circuit only addressed the lack of the life exception issue. The Eighth Circuit found the evidentiary record the same as it was in *Stenberg* and, therefore, it was bound by *Stenberg*’s requirement of a health...
exception for the life of the mother.\textsuperscript{124} Since the Act did not contain a health exception, it was unconstitutional.\textsuperscript{125}

In \textit{Planned Parenthood Federation of America v. Ashcroft}, the second district court case later consolidated into \textit{Gonzales v. Carhart}, Planned Parenthood sought an injunction permanently enjoining the enforcement of the Act.\textsuperscript{126} The district court found the Act unconstitutional, again citing the similarities between the Act and the Nebraska statute that was found unconstitutional in \textit{Stenberg}, but for slightly different reasons.\textsuperscript{127} First, the district court held that the Act posed an undue burden on a woman’s right to choose to have an abortion.\textsuperscript{128} Second, the district court held that the Act was constitutionally vague.\textsuperscript{129} Third, the district court found that the Act was unconstitutional for not containing a health exception for the life of the mother.\textsuperscript{130} The district court ordered a permanent injunction preventing enforcement of the Act.\textsuperscript{131}

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court’s holdings and its granting of a permanent injunction.\textsuperscript{132} Like the district court and the Eighth Circuit, the Ninth Circuit held that the Act was unconstitutional for not including a life exception for preserving the health of the mother.\textsuperscript{133} The Ninth Circuit also held that, since the textual differences in the Act were insufficient to distinguish between intact D&E and D&E, the Act posed an undue burden on women seeking second trimester abortions.\textsuperscript{134} Finally, the Ninth Circuit held that the Act was constitutionally vague because the Act did not “offer physicians clear

\textsuperscript{124} There is “no consensus in the medical community as to the safety and medical necessity of the banned procedures” and in the absence of such a consensus the district court is “bound by the Supreme Court’s conclusion [in \textit{Stenberg}] that ‘substantial medical authority’ supports the medical necessity of a health exception (emphasis added).” \textit{Carhart v. Gonzales}, 413 F.3d at 803.

\textsuperscript{125} Id. at 803-04.

\textsuperscript{126} Planned Parenthood Fed’n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 960 (N.D. Cal. 2004).

\textsuperscript{127} Id. at 960, 1034-35.

\textsuperscript{128} Id. at 971 (finding that despite the “linguistic differences” from the Nebraska statute, the Act poses an undue burden because “the Act encompasses not only intact D&E procedures, but other previability D&E procedures and possibly inductions as well, in violation of the Supreme Court’s holding”); \textit{id.} at 975 (finding the Act placed a substantial obstacle in the path of a woman’s right to choose because it did not distinguish between previability and postviability).

\textsuperscript{129} Id. at 978.

\textsuperscript{130} Planned Parenthood Fed’n of Am., 320 F. Supp. 2d at 1006-07; \textit{id.} at 1023 (“Following the district court’s decision in \textit{Stenberg} in 1998, Congress held only two hearings on the intact D&E procedure. None of the testimony received by Congress at those hearings can reasonably be considered ‘new’ medical evidence not available to the courts at the time \textit{Stenberg} was decided.”).

\textsuperscript{131} Id. at 1035.

\textsuperscript{132} Planned Parenthood Fed’n of Am. v. Gonzales, 435 F.3d 1163, 1166, 1171-72 (9th Cir. 2006).

\textsuperscript{133} \textit{Id.} at 1172; \textit{id.} at 1174-75 (“[N]o medical consensus exists that the abortion procedures outlawed by the Act are never necessary to preserve the health of a woman.”); \textit{id.} at 1175 (“In reviewing the Act's lack of a health exception, the dispositive question is . . . whether there is general agreement in the medical community that there are no circumstances in which the procedure would be necessary to preserve a woman’s health”); \textit{id.} at 1175-76 (stating that the district court “cannot defer to Congress’s finding that the procedures banned by the Act are never required to preserve the health of women,” but instead finding the district court was “compelled to hold that a health exception is constitutionally required”).

\textsuperscript{134} Planned Parenthood Fed’n of Am. v. Gonzales, 435 F.3d at 1176-77 (finding the Act unconstitutional because it “would allow prosecutors to pursue physicians who ‘use D&E procedures . . .’ and would cause all doctors performing those procedures to ‘fear prosecution, conviction, and imprisonment’” (citation omitted)).
warning of its regulatory reach.”  

IV. ANALYZING KENNEDY AND THE GONZALES COURT

A. Overview

Gonzales v. Carhart held that the Act’s prohibition of intact D&E was not void for vagueness, the Act did not include prototypical D&Es, the Act did not pose a substantial obstacle to women seeking second trimester abortions, the Act furthered a legitimate medical purpose, and the absence of a life exception for the health of the mother did not render the Act void.

B. The Act was not Void for Vagueness

The Court addressed the issue of whether the Act was facially void for vagueness. The Court held that the Act was not facially void because “[d]octors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.”

The respondents argued that the Act was facially vague. In applying the void for vagueness doctrine, the Court found that the language of the Act allowed physicians performing D&E to perform actions short of “delivering a fetus to an anatomical landmark” without constituting criminal conduct. Therefore, the Act was not void for vagueness because physicians had notice of its regulatory reach.

C. The Act did not Include Prototypical D&Es

The Court addressed the issue of whether the Act was facially overbroad by prohibiting intact D&E and D&E during the second trimester. Due to the language of the Act, most notably the linguistic differences from the Nebraska statute in Stenberg, the Court held that the Act did not apply to D&E

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136 Gonzales v. Carhart is the consolidated appeal for both the Eighth and Ninth Circuit Court of Appeals decisions on the constitutionality of the Partial Birth Abortion Act of 2003 (18 U.S.C. § 1531 (2006)).
137 Gonzales, 127 S. Ct. at 1627, 1629, 1632-33, 1639.
138 Id. at 1628. See generally BLACK’S LAW DICTIONARY 763-64 (3d pocket ed. 2006) (defining “void for vagueness” as “establishing a requirement or punishment without specifying what is required or what conduct is punishable, and therefore void because violative of due process”).
139 Gonzales, 127 S.Ct. at 1628.
140 Id. at 1619. The “Respondents” in Gonzales v. Carhart were four doctors who performed second-trimester abortions: LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar. Id.
141 Id. at 1629.
142 Id. (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).
143 Gonzales, 127 S. Ct. at 1628.
144 Id. at 1629.
145 BLACK’S LAW DICTIONARY 516 (3d pocket ed. 2006) (defining “overbreadth doctrine” as “[t]he doctrine holding that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect -- even if it also prohibits acts that may legitimately be forbidden”).
146 Gonzales, 127 S. Ct. at 1629.
147 While there are stark differences, which will be discussed in more detail, there are similarities between the two pieces of legislation. First, neither act differentiates between previability and
First, the Court interpreted the plain language of the Act. The Act had two requirements: the physician must deliver the fetus “until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation[,]” and the physician must perform the overt act of extracting the contents of the fetus’ skull. Therefore, the Court found that “[t]he Act prohibit[ed] a doctor from intentionally performing an intact D&E,” and not D&E.

Second, the Court compared the Act’s language to the unconstitutional statute in Stenberg. Unlike the Nebraska statute in Stenberg, Congress adopted the phrase “delivering a living fetus,” as opposed to “delivering into the vagina a living unborn child, or substantial portion thereof.” This was evidence that Congress
directly responded to the Court’s criticism in *Stenberg*. In addition, the Court found the anatomical landmark of delivering the fetus into the vagina demonstrated that the Act applied only to intact D&E. Furthermore, unlike the statute in *Stenberg*, Congress drew a distinction “between the overall partial-birth abortion and the distinct overt act that kills the fetus.” Since “D&E does not involve a delivery followed by a fatal act,” the Act only applied to intact D&E. Lastly, and unlike *Stenberg*, the intent requirement in the Act protected physicians who were attempting to perform D&E, but accidentally performed an intact D&E procedure, from prosecution.

D. The Act Furthered a Legitimate Government Purpose and did not pose a Substantial Obstacle to Women Seeking a Second Trimester Abortion

The Court addressed the issue of whether the Act posed a substantial obstacle to women seeking late-term abortions before viability. The Court held that the Act did not pose a substantial obstacle to these women.

First, the Court found that the government objectives in passing the Act furthered the objectives set forth in *Casey*. The Court stated that “Congress was concerned . . . with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion.” As did it *Glucksberg*, the Court noted that “‘[t]here can be no doubt the government has an interest in protecting the integrity and ethics of the medical profession.’” Because the Court found that the Act nowhere to be found in the statute. See id. (omitting any reference to intact D&E by any of its common names or aliases, which includes D&X). Rather than including specific terminology indicating to the Court that the statute was limited to intact D&E, the statute refers to all partial birth abortions. *Id.*; *Stenberg*, 530 U.S. at 940 (“[W]e can find no difference, in terms of this statute, between the D&X procedure as described and the D&E procedure as it might be performed.”).

155 *Gonzales*, 127 S. Ct. at 1630. By using the phrase “or,” the Nebraska statute applied both to intact D&X and D&E; however, the absence of the words “or” as well as “substantial portion thereof” can only mean that the Act applies to intact D&E. *Id.* at 1628.

156 *Id.* at 1630 (“The Act’s anatomical landmarks . . . clarify that the removal of a small portion of the fetus is not prohibited . . . D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.”).

157 *Id.* at 1630-31.

158 *Gonzales*, 127 S. Ct. at 1631-32 (noting that even if a physician accidentally performs an intact D&E by delivering the fetus beyond one of the Act’s anatomical landmarks, he or she is only liable under the Act if he or she intended to perform an intact D&E at the outset); *id.* at 1632 (noting that the legislature has determined that “an intact delivery is almost always a conscious choice rather than a happenstance”); *id.* (“Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions.”).

159 *Id.*

160 *Id.*

161 *Gonzales*, 127 S. Ct. at 1632-33 (holding that the life exception required by *Casey* cannot be interpreted so it “becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer?”); *id.* at 1626 (“[A] premise central to [Casey’s] 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.”).

162 *Id.* at 1633.

163 *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *id.* at 1634 (reaffirming that the Supreme Court in the past upheld statutes that drew boundaries preventing particular practices that “extinguished life” and were “close to actions that [were] condemned”).
recognized a respect for human life, it was consistent with *Casey*,\(^{166}\) noting that other less “brutal” alternatives existed for late-term abortions.\(^{166}\)

Second, the Court found that “[t]here [was] documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women.”\(^{167}\) Despite the existence of medical uncertainty, the Court found it did not foreclose legislative action.\(^{168}\) Since medical uncertainty existed, it could not definitively be said that the Act posed a substantial obstacle to a woman’s right to undergo a partial birth abortion previability.\(^{169}\) The Court noted that alternatives procedures were available that were generally safer than intact D&E\(^{170}\) and the Act allows the safest and most common method for second trimester previability abortions, D&E.\(^{171}\) While acknowledging the flaws in the congressional fact finding, the Court held that, given the availability of alternative procedures, the Act did not pose a substantial obstacle to late-term previability abortions.\(^{172}\)

E. The Absence of a Life Exception did not Render the Act Void

The Court addressed the issue of whether the Act was unconstitutional for omitting a life exception for the health of the mother, as required by *Stenberg*.\(^{173}\) Due to the “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[,] . . . an as-applied challenge better quantifies and balances the medical risks involved in using an alternative to intact D&E then a facial attack.”\(^{174}\) The Court held that the Act was constitutional for including “preenforcement, as-applied challenges.”\(^{175}\)

F. Ginsburg’s Dissent

Justice Ginsburg’s dissent charged Justice Kennedy, as well as those Justices joining in his judgment, with not taking the precedents of *Roe*, *Casey*, or *Stenberg* seriously.\(^{176}\) According to Justice Ginsburg, not only was *Gonzales* inconsistent with stare decisis,\(^{177}\) but because the Act did not contain a life exception for the health of the mother, past precedent dictated that the Act must be found

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732 (“[T]he State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.”).
165 *Id.* at 1634-35 (“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 (citation omitted).’”).
166 *Id.* at 1636.
167 *Id.* at 1637.
168 *Id.*
170 *Gonzales*, 127 S. Ct. at 1637.
171 *Id.*
172 *Id.* at 1638 (“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.”).
175 *Gonzales*, 127 S. Ct. at 1638-39 (“No as-applied challenge need be brought if the prohibition in the Act threatens a woman’s life because the Act already contains a life exception.”).
176 *Id.* at 1641 (Ginsburg, J., dissenting).
177 *Id.* at 1652.
unconstitutional.\textsuperscript{178}

Justice Ginsburg argued that the majority was incorrect in holding that the Act was constitutional, despite omitting a life exception.\textsuperscript{179} Justice Ginsburg noted that every other abortion statute upheld by the Court has required to include a life exception for the health of the mother, at any stage of the pregnancy.\textsuperscript{180} Another precedent was 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.”\textsuperscript{181} Where medical uncertainty existed, it is a factor that “signals the presence of risk, not its absence.”\textsuperscript{182}

Not only was the absence of a life exception inconsistent with precedent, but Justice Ginsburg argued that endorsing the Act’s questionable congressional findings, instead of the district courts’ findings of fact, was also inconsistent with precedent.\textsuperscript{183} None of the six physicians who testified before Congress had ever performed intact D&E, several did not provide abortion services, and “one was not even an ob/gyn.”\textsuperscript{184} Congress was incorrect that no medical schools taught intact D&E,\textsuperscript{185} that “there was a medical consensus that the banned procedure is never necessary,”\textsuperscript{186} and that there was no credible “medical evidence proving that [intact D&E] was as safe or safer than other abortion procedures.”\textsuperscript{187} In endorsing the findings of the district courts, Justice Ginsburg found that intact D&E provides safety benefits over D&E in certain circumstances.\textsuperscript{188} Therefore, the majority was not justified in abandoning the district courts’ findings.\textsuperscript{189}

V. PERSONAL ANALYSIS

A. Introduction

Unlike the Nebraska statute in \textit{Stenberg}, the Act in \textit{Gonzales} was not ambiguous,
vague and overbroad; it expressly applied to intact D&E and only intact D&E. Gonzales, however, is inconsistent with the life exception requirement of Stenberg. Stenberg and Gonzales rest on the same set of facts and the same determination of medical uncertainty, yet each reached a different conclusion.

While the constitutionality of the omission of a health exception is arguably attributed to the congressional fact finding in Gonzales, it is the change in the position of one Justice on the Court, Justice Kennedy, which justifies its omission. While in Stenberg Justice Kennedy was in the minority of the Court, in Gonzales Justice Kennedy was not only in the majority, but the author of the majority opinion. Consequently, Justice Kennedy was able to restate an argument he has consistently endorsed: when a life interest and the practice of medicine intersect, it is a legitimate government interest, whether state or federal, to regulate that medical practice, even despite medical uncertainty or physician objections.

While addressing the constitutionality of Gonzales in the spectrum of traditional abortion precedent, this section serves to highlight the tendencies of Justice Kennedy in interpreting regulations on life interests, most notably his usage of the rational basis standard, which is evidenced by his decisions in Glucksberg, Oregon, Stenberg and Gonzales.

B. Abortion and Physician-Assisted Suicide: One in the Same?

Aside from the aforementioned abortion precedent, Gonzales is premised on

190 Id. at 1627 (majority opinion). Compare 18 U.S.C. § 1531(1) (2006) (defining “partial-birth abortion” with terms that were intact D&E-specific), with NEB. REV. STAT. § 28-326(9) (2007) (defining “partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery” with terms that applied to both D&E and intact D&E).
191 Gonzales, 127 S. Ct. at 1629.
192 Id. at 1642 (Ginsburg, J., dissenting).
193 Compare Stenberg v. Carhart, 530 U.S. 914, 946 (2000) (holding the statute is unconstitutional for omitting a health exception and for being overbroad), with Gonzales, 127 S. Ct. at 1639 (holding the statute is not overbroad and is constitutional, despite omitting a health exception), and id. at 1641 (Ginsburg, J., dissenting) (finding the statute should be found unconstitutional, since it does not include a health exception).
195 Stenberg, 505 U.S. at 956-79 (Kennedy, J., dissenting).
196 Gonzales, 127 S. Ct. at 1610.
198 Gonzales, 127 S. Ct. at 1632-35; Gonzales v. Oregon, 546 U.S. 243, 270-75 (2006); Stenberg, 530 U.S. at 964 (Kennedy, J., dissenting); Glucksberg, 521 U.S. at 735.
199 Gonzales, 127 S. Ct. at 1641 (Ginsburg, J., dissenting). As Justice Ginsburg notes in her dissent: Today’s decision is alarming. It refuses to take Casey and Stenberg seriously. . . . 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. . . . [T]he Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decree limitations on a woman’s reproductive choices.
200 Id.
201 Glucksberg, 521 U.S. at 702.
202 Oregon, 546 U.S. at 243.
203 Stenberg, 530 U.S. at 956 (Kennedy, J., dissenting).
204 Gonzales, 127 S. Ct. at 1610.
another life interest: physician-assisted suicide. Justice Kennedy, who authored the
five-to-four majority opinion in Oregon204 and joined the majority opinion in
Glucksberg,205 authored the majority opinion in Gonzales.206 Despite the fact Justice
Kennedy does not cite Oregon in his majority opinion and cites Glucksberg only
twice,207 his reliance on both cases is far from insignificant. These two cases form
the foundation of Justice Kennedy’s philosophy on life interests.

Abortion and physician-assisted suicide are more alike than they first appear.
Each is a medical procedure that necessarily implicates a life interest, though
arguably different life interests,208 and each is surrounded with medical
uncertainty.209 While the life interests and medical procedures vary, the
consequences are the same: each procedure extinguishes life.210 Given this
consequence, there should be no doubt that the government has a legitimate interest
in regulating the medical community in these areas.211

Although Glucksberg, Oregon, Stenberg, and Gonzales facially appear to stand
for divergent positions,212 all are entirely consistent with each other. In Glucksberg,
the Supreme Court upheld a state statute prohibiting physician-assisted suicide,213
whereas in Oregon the Supreme Court upheld a state statute authorizing physician-
assisted suicide.214 In Stenberg, the Supreme Court rejected a state statute
prohibiting intact D&E,215 whereas in Gonzales the Supreme Court upheld a federal
statute prohibiting intact D&E.216

In each opinion, the Supreme Court acknowledges the medical uncertainty
surrounding the medical practice217 as well as the varying state-by-state legislative
response to the procedure.218 Both physician-assisted suicide opinions are consistent
because the ultimate decision on regulating the life interest was left to the state, not to the courts. While the state of Washington determined that physician-assisted suicide posed a threat to the doctor-patient relationship, the state of Oregon determined that physician-assisted suicide preserved the right of the terminally-ill to die with dignity. Both partial birth abortion opinions by Justice Kennedy are consistent because the ultimate decision of regulating the life interest was left to the state or federal government, not to the courts. Both Nebraska and Congress determined that prohibiting partial birth abortion furthered a legitimate government interest.

All of Justice Kennedy’s opinions in these four cases stand for the proposition that it is a legitimate exercise of government to regulate a medical procedure, whether physician-assisted suicide or partial-birth abortion, especially when it intersects with a life interest, whether the right to die or the right to choose an abortion. And while the government may vary in its approach to regulating the intersection of the life interest and the medical procedure, Justice Kennedy is consistent in honoring the State’s decision.

On the other hand, regulating abortion is doctrinally different from regulating assisted-suicide. Constitutionally speaking, abortion and assisted-suicide are polar

subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with ORS 127.800 to 127.897. This includes being present when a qualified patient takes the prescribed medication to end his or her life in a humane and dignified manner.”). Compare 18 U.S.C. § 1531(1) (2006) (prohibiting only intact D&E by its use of intact D&E-specific terms), with Neb. Rev. Stat. § 28-326(9) (2007) (prohibiting both D&E and intact D&E by using generic language applicable to both procedures, although only intending to prohibit intact D&E).


Glucksberg, 521 U.S. at 731.

Oregon, 546 U.S. at 248.

Gonzales v. Carhart, 127 S. Ct. 1610, 1632 (2007); Stenberg, 530 U.S. at 964-65 (Kennedy, J., dissenting) (stating that courts need to defer to the “superior fact finding capabilities” of the legislature).

Gonzales, 127 S. Ct. at 1635 (“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.’” (quotations omitted); Stenberg, 530 U.S. at 965 (Kennedy, J., dissenting) (“Nebraska, however, was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman.”).


Gonzales, 127 S. Ct. at 1632 (holding the statute was constitutional and did not cause an undue burden on a woman’s right to choose); Stenberg, 530 U.S. at 957 (Kennedy, J., dissenting) (arguing the statute was constitutional because it did not cause an undue burden on a woman’s right to choose).


Compare 18 U.S.C. § 1531(1) (prohibiting only intact D&E by its use of intact D&E-specific terms), with Neb. Rev. Stat. § 28-326(9) (prohibiting both D&E and intact D&E by using generic language applicable to both procedures, although only intending to prohibit intact D&E).

Gonzales, 127 S. Ct. at 1639; Oregon, 546 U.S. at 275; Stenberg, 530 U.S. at 976 (Kennedy, J., dissenting); Glucksberg, 521 U.S. at 735.
While there is a constitutional right to an abortion, no such right extends to physician-assisted suicide. The deference given to legislative regulations and the standard of review applicable to these regulations varies dramatically. Abortion is subject to an undue burden analysis, which is a heightened standard of review; physician-assisted suicide is subject to a rational basis analysis, which is a de minimis standard of review. Given these differences, courts should not apply the same level of scrutiny and review to abortion regulations as they do to physician-assisted suicide regulations.

C. What Happened to the Undue Burden Analysis?

However, this is exactly what Justice Kennedy does in *Gonzales*. Although acknowledging the flaws in congressional fact finding and the applicability of the undue burden analysis, Justice Kennedy upholds Congress’ determination that a health exception is not required in the Act. In doing so, he relegates the abortion standard of review, undue burden, to that of physician-assisted suicide, rational relations. Consequently, *Gonzales* fails to signify that prohibiting intact D&E does not pose a substantial obstacle to a mother choosing to have an abortion. While the government has a legitimate interest in regulating partial birth abortions, unlike physician-assisted suicide, that interest is not absolute; it must not pose a substantial obstacle to a woman’s right to choose. There is an inherent tension between *Glucksberg* and *Gonzales*, although Justice Kennedy unifies these

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230 Compare *Glucksberg*, 521 U.S. at 728 (holding there is no liberty interest in the right to a physician-assisted suicide), with *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding there is a liberty interest in the right to an abortion).

231 *Roe*, 410 U.S. at 154.

232 *Glucksberg*, 521 U.S. at 728.

233 Compare *Stenberg*, 530 U.S. at 938 (applying *Casey’s* undue burden analysis to the Nebraska statute (citing Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 879 (1992) (plurality opinion))), with *Glucksberg*, 521 U.S. at 728 (applying rational relations review to Washington’s prohibition on physician-assisted suicide).

234 *Casey*, 505 U.S. at 874, 877.

235 *Glucksberg*, 521 U.S. at 728 (explaining that because there is no liberty interest in a physician-assisted suicide any government regulation need only be rationally related to a legitimate government interest).

236 *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (finding that the majority failed to apply the close scrutiny it had applied in previous abortion cases, which was the undue burden analysis).

237 *Id. at 1638* (majority opinion).

238 *Id. at 1632*.

239 *Id. at 1639*.

240 *See id. at 1641* (Ginsburg, J., dissenting) (noting that the Court applied something lower than *Casey’s* undue burden analysis).

241 *Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).

242 *Id. at 1633* (majority opinion).

243 Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) (holding that only when an abortion regulation poses an undue burden on a woman’s right to choose is it unconstitutional).

244 *Id. at 877* (holding that an abortion regulation causes an undue burden when a statute places a substantial obstacle in the path of a woman’s choice to undergo an abortion).

245 *Gonzales*, 127 S. Ct. at 1634.
two cases. Justice Kennedy cites Glucksberg as evidence that in the past the Supreme Court has upheld statutes that drew boundaries preventing particular practices that “extinguished life” and were “close to actions that [were] condemned.” However, the government is permitted greater latitude when drawing boundaries for physician-assisted suicide than partial birth abortions, since physician-assisted suicide is not a liberty interest and is not subject to an undue burden analysis. But, by equating physician-assisted suicide and partial birth abortions, Justice Kennedy subordinates the role of undue burden analysis and the district courts’ findings.

In the face of the medical uncertainty regarding the necessity of intact D&E, Gonzales improperly applied deferential review to the facts submitted by Congress. In the physician-assisted suicide context, medical uncertainty does not foreclose prohibition because physician-assisted suicide is not a liberty interest. If physician-assisted suicide was a liberty interest, however, government regulations of physician-assisted suicide would be subject to heightened standard of review, not rational relations. Conversely, since partial birth abortions implicate the liberty interest of the right to choose, government regulations are subject to an undue burden analysis. This analysis renders regulations invalid if they pose a substantial obstacle to a woman’s right to choose, a fact forgotten by Justice Kennedy.

While Justice Kennedy believes the government can regulate partial birth abortions in the same manner as the government regulates physician-assisted suicide, as his opinions suggest, the analogy between the government’s legitimate interest in regulating physician-assisted suicide and partial birth abortions is misguided and problematic. In giving deference to the congressional findings, the Court extends deference to the ultimate issue in any abortion case: whether the regulation poses an undue burden to a woman’s right to choose.

Although this is problematic in any abortion case, and inconsistent with past precedent, it is a blatant disregard of the undue burden analysis when these congressional findings contain numerous flaws, like the findings in Gonzales. Congressional fact finding should not circumvent the role of undue burden

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246 Id.
247 Id.
248 See Gonzales, 127 S. Ct. at 1641 (Ginsburg, J., dissenting).
249 Id. at 1637 (majority opinion) ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."). But see Stenberg v. Carhart, 530 U.S. 914, 914 (2000) (stating that a “division of medical opinion . . . at most means uncertainty, a factor that signals the presence of risk, not its absence”).
250 Gonzales, 127 S. Ct. at 1637; id. at 1642 (Ginsburg, J., dissenting).
251 Glucksberg, 521 U.S. at 728.
252 See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) (holding because abortion implicates a liberty interest it is subject to a higher standard of review than rational relations).
253 Id.
254 Id.
255 Id. at 877.
257 See id. (noting that the Court applied something lower than Casey’s undue burden analysis).
258 Id. at 1643 (listing the numerous flaws in the congressional fact finding).
analysis. The Court should not have affirmed Congress’ finding that intact D&E was never medically necessary to save the life of the mother and should have held the Act unconstitutional. Conversely, the Court should have affirmed the lower courts’ findings that intact D&E was medically necessary to save the life of a mother in some circumstances, even finding it to be the safest abortion procedure for some women. Without such a ruling, the undue burden standard is rendered meaningless, allowing congressional fact finding to trump its relevance and imposing an imperfect analogy between partial birth abortions and physician-assisted suicide.

VI. CONCLUSION

Gonzales v. Carhart was a watershed case for abortion rights; it was the first case that permitted the federal government to prohibit an entire abortion procedure both previability and postviability, allowing the possibility of future congressional intervention in the abortion arena. While Gonzales will undoubtedly influence future state and federal abortion regulations, it is best seen as a continuation of an old idea. Gonzales is the latest in line of Justice Kennedy opinions that find when a life interest and the practice of medicine intersect, it is a legitimate government interest, whether state or federal, to regulate that medical practice, even despite medical uncertainty or physician objections. As long as Justice Kennedy continues to make the imperfect analogy between the government regulation of partial birth abortions and the government regulation of physician-assisted suicide due to the presence of life interests, the undue burden standard will remain entangled in uncertainty and irrelevance.

260  Id. at 1646.
261  Id.
262  Gonzales, 127 S. Ct. at 1646 (Ginsburg, J., dissenting).
263  Id. at 1641.
264  Id. Cf. Stenberg v. Carhart, 530 U.S. 914, 932 (2000) (noting that medical authority finds the absence of a health exception for intact D&E may create a risk to the health of the mother in those circumstances where it is the safest abortion procedure for the mother).
265  Gonzales, 127 S. Ct. at 1633-34.
266  Id. at 1633; Washington v. Glucksberg, 521 U.S. 702, 731 (1997).
267  Gonzales, 127 S. Ct. at 1632-35; Gonzales v. Oregon, 546 U.S. 243, 270-75 (2006); Stenberg, 530 U.S. at 964 (Kennedy, J., dissenting); Glucksberg, 521 U.S. at 735.
268  Gonzales, 127 S. Ct. at 1634.