US Supreme Court rules in favor of abortion restrictions

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In a highly significant decision released Wednesday morning, the US Supreme Court for the first time upheld a law banning certain types of abortion. The ruling sets the stage for further legal restrictions on abortion rights throughout the country. It represents a further attack on democratic rights and the separation of church and state.

Reversing previous court precedents and employing shoddy legal reasoning, the court upheld the Partial-Birth Abortion Ban Act of 2003. That Act, basing itself on false medical conclusions and not including an exception for safeguarding the health of the pregnant woman, mandates fines and jail times of up to two years for doctors performing a type of abortion known as intact dilation and evacuation (intact D&E) or dilation and extraction (D&X). The procedure, which involves the partial extraction of the fetus before it is aborted, is employed rarely and usually only under extraordinary conditions involving the health of the mother or deformations to the fetus.

The 5-4 vote on the court overturns the decisions of three district courts and three appellate courts, which all found the act unconstitutional. The decision combined two cases before the court, *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*.

Justice Anthony Kennedy wrote the opinion, and was joined by Chief Justice John Roberts and Justices Samuel Alito, Antonin Scalia and Clarence Thomas. Thomas and Scalia added a separate opinion repeating their view that the court's entire previous abortion jurisprudence, including the 1973 case of *Roe v. Wade*,"has no basis in the Constitution."

A sharp dissenting opinion was written by Justice Ruth Bader Ginsburg and was joined by Justices Stephen Breyer, David Souter and John Paul Stevens. In an unusual step, Ginsburg read her dissent out loud before the court. The dissent concludes with the warning, "In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court," the right to an abortion.

The decision is a victory for Christian conservatives, who see it as a first step in the drive to overturn the *Roe* decision itself. Representative John Boehner, Republican leader in the House of Representatives, responded by saying that the ruling "sets the stage for further progress in the fight to ensure our nation's laws respect the sanctity of unborn human life." President Bush also praised the ruling, saying that it upholds the ability of Congress to pass laws "reflecting the compassion and humanity of America"—i.e., the religious prejudices of Christian fundamentalists.

The ruling follows Bush's appointment of Chief Justice John Roberts in September 2005 and Justice Samuel Alito in January 2006, who have shifted the court significantly to the right on a number of issues, including presidential powers, corporate regulation, and the separation of church and state.

The Democratic Party played an important role in facilitating both nominations. In the case of Roberts, the Senate voted overwhelmingly (78-22) to confirm the nomination, while in the case of Alito, Democrats refused to mount a serious filibuster attempt, even though this was at the time the only way the nomination could be blocked. The Senate voted 72-25 to close debate on Alito's nomination.

The Partial-Birth Abortion Ban Act itself passed with significant Democratic Party support, sailing through the Senate in a 64-33 vote and the House in a 281-142 vote. The Democratic Party has no serious commitment to democratic rights, including the right to an abortion, and the Supreme Court decision is only the final product of a lengthy period of Democratic Party prostration.

The Supreme Court ruling is significant in a number of respects. Most directly, it represents a repudiation of a 2000 decision in *Stenberg v. Carhart*, in which the Supreme Court overturned a Nebraska law banning intact D&E. Its legal reasoning also undermines the court's decision in the 1992 case *Planned Parenthood of Southeastern Pa. v. Casey*, which placed definite restrictions on any legislation regulating abortion rights.

"Today's decision is alarming," Ginsburg wrote in the dissent. "It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG).... And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health."

Wednesday's ruling overturns the requirement, expressly stated in *Casey*, that any law regulating abortion procedures "contains exceptions for pregnancies which endanger the woman's life or health." This requirement applied only "after fetal viability"—i.e., after the fetus could live on its own. In cases "before viability," a woman had an unrestricted right to an abortion "without undue interference from the State."

In conflict with the decision in *Casey*, the majority ruled that there is "uncertainty" within the medical community as to whether or not the intact D&E procedure is sometimes necessary for health reasons as opposed to other methods. The ruling makes the extraordinary statement, "Medical uncertainty does not foreclose the exercise of legislative powers in the abortion context any more than it does in other contexts."

In other words, because there is supposedly some uncertainty as to whether intact D&E is sometimes necessary for health reasons, Congress has the power to ban it altogether. In making this claim, the Court deliberately obscures the distinction between "after viability"

and "before viability," upholding the ban on the procedure in all cases.

The dissent notes that in the 2000 *Stenberg* case, the Court ruled that the health exceptions in *Casey* "cannot...require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment." In overturning the Partial-Birth Abortion Ban Act, the lower courts ruled that where there is any uncertainty on this question, the law must err on the side of granting rights to the woman to have the procedure performed. In any case, these lower courts found, medical evidence indicated that the health concerns were legitimate.

In fact, the "uncertainty" about whether or not the procedure is sometime necessary for health reasons is entirely manufactured by abortion opponents. Included in the 2003 Act is a statement by the Congress that "there is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." As the dissent notes, however, this claim is manifestly false, as are other statements of fact included in the 2003 Act.

"The congressional record," the dissent writes, "includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods."

The procedure is particularly important for women with certain medical conditions such as uterine scarring, bleeding disorders, heart disease or immune problems, because there is a lower danger of damaging the uterus than other methods. It is also used when the fetus suffers from extreme birth abnormalities, such as severe inflammation of the head.

All of this is dismissed by the majority. The dissent writes that "despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive 'when...medical uncertainty persists.' This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty; it give short shrift to the records before us, carefully canvassed by the District Courts."

In justifying its decision, the majority made the additional extraordinary claim that opponents of the law "have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases." The Court suggests that it would be willing to reconsider the constitutionality of the law if specific cases were brought before it—presumably by women who had their health endangered because the method was proscribed.

This reasoning is in flagrant violation of prior court rulings. By not including an exception to safeguard the health of the pregnant woman, the law violates the constitutional rights of all those women who may require the procedure.

The dissent notes that in demanding abortion-rights advocates argue specific instances where the procedure is necessary, the Court is endangering the lives and health of women. "Even if courts were able to carve-out exceptions through piecemeal litigation for 'discrete and well-defined instances' women whose circumstances have not been anticipated by prior litigation could well be left unprotected," the defense notes. "In treating these women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients."

Behind the pseudo-legal reasoning applied by the majority are fundamentally religious conceptions that aim ultimately at outlawing abortion altogether. The majority speaks of the state's "legitimate, substantial interests in preserving and promoting fetal life." It acknowledges that there are "moral concerns" involved, and that "Congress could...conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."

Such "moral concerns" could be invoked to eventually overturn *Roe*. The dissent notes, "The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctors.' A fetus is described as an 'unborn child,' and as a 'baby;'... And, most troubling, *Casey*'sprinciples, confirming the continuing vitality of 'the essential holding of *Roe*,' are merely 'assume[d]' for the moment, rather than 'retained' or 'reaffirmed.' "

Finally, there are fundamental constitutional issues at stake, in addition to the right to an abortion, involving the separation of powers. The Partial-Birth Abortion Ban Act was passed in direct response to the 2000 decision in *Stenberg* overturning a similar state law. The Act contains clearly fraudulent statements and defies the constitutional rights of women. Several district courts recognized this and declared the Act unconstitutional.

In upholding the Act, the Court is sanctioning a congressional reversal of constitutional rights. As the dissent notes, "Although Congress's findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings. A decision so at odds with our jurisprudence should not have staying power...."

There is every reason to believe that similar reasoning will be used to overturn other democratic rights previously upheld by the Supreme Court.