The U.S. Supreme Court's View of Late-Term Abortion

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The United States Supreme Court has considered the issue of late-term abortion in several cases. The Court's decisions lead to the inevitable conclusion that, at least until the membership of the Court changes, the only time an unborn child can be protected under state law is at or after viability. The most recent affirmation of this was in the case of *Gonzales v. Carhart*, (550 U.S. 124, 2007). In this case, Justice Kennedy, speaking for the majority, affirmed the government's "legitimate and substantial interest in preserving and promoting fetal life." At the same time, he restricted that concern to viable unborn children when he said: "We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." (505 U. S., at 879 (plurality opinion)). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.*, at 878."

This paper will review the major issues confronting the Court as they consider future state legislation attempting to ban late-term abortion as well as the major United Supreme Court cases in which late-term abortion has been considered.

LEGAL ISSUES

The Legal Standard for Determining Viability

The Supreme Court has held that States must leave the determination of viability up to the judgment of the physician and cannot specify a particular gestational age when viability occurs. "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri v. Danforth* 428 U.S. 52, 64 (1976). Rebuttable presumptions of viability at some point in pregnancy are acceptable, however. The Supreme Court has upheld a statute which effectively created a presumption of viability at *twenty* weeks. *Webster v. Reproductive Health Services*, 492 U.S. 490, 515 (1989).

The Health Exception

A critical question is whether the Court would seek to preserve a health exception in some form when it returns authority to ban abortion to the states. Currently, in order for a regulation involving abortion to be constitutional, the Court has determined that there must be an exception for health situations that involve a "substantial impairment of major bodily function" (462 U.S.at 880 (1992) *Stenberg v. Carhart*, the partial-birth abortion decision from 2000

expanded the exception and implied that "health" was whatever the doctor decided it was. If the Court were to include this type of health exception requirement, it would be impossible to draft an effective prohibition law. Any time a doctor would want to do an abortion, all he or she would have to do is to declare that a woman's health was at risk. Some have argued that this is appropriate, since doctors should be able to determine what is in the best interest of their patients. If the objective is to allow abortion only for serious health reasons this amount of ambiguity would probably lead to an unlimited abortion license. When abortions were permitted for mental health reasons in California by its abortion law, 98% of the abortions were performed for mental health reasons. (*Barksdale v. California*, 503 P 2cnd at 265 (1972))

It is unlikely that this great percentage of women had mental health issues, and it is more likely that such diagnosis was not based on medical reasons.

In the 2007 case that found the federal ban on partial birth abortions constitutional, *Gonzalez v. Carhart*, the Court pulled back from the liberal interpretation of "health" contained in its 2000 partial birth abortion decision. In *Gonzalez*, the Court re-affirmed *Casey's* requirement that a state law cannot have "the effect of imposing an unconstitutional burden on the abortion right because it does not allow the use of the banned procedure where 'necessary, in appropriate medical judgment, for [the] preservation of the …health of the mother.'" But the Court also rejected an open-ended health exception, declaring that the States' regulatory authority "cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. *Gonzalez* seems to indicate that legislatures can adopt somewhat restrictive medical emergency exceptions, probably along the lines of the exception approved in *Casey*. The matter of a prohibition law is totally different, of course, than the regulatory laws the Court has considered since *Roe*. Whether the Court would require the same type of health exception or any health exception for a prohibition law is not known.

There is good reason to believe that the Court would conclude that the *Doe* health exception does not apply to post-viability abortion. First, in *Doe*, the Supreme Court was not reviewing a post-viability ban. Instead, the Court was considering the validity of what remained of a Georgia abortion statute after most of its limitations on the circumstances under which abortions could be performed had been declared unconstitutional and enjoined by a federal district court. As a result of the district court's decision, the Georgia statute provided that a physician could perform an abortion whenever he or she determined that it was "necessary." At issue in the Supreme Court was whether this language was impermissibly vague. It was in response to a vagueness challenge to the Georgia abortion statute, as interpreted by the district court, that the Supreme Court used the broad and open-ended language quoted in the previous paragraph of this analysis. That language was not meant or intended to set forth any limitations on the States' authority to prohibit post-viability abortions. The Supreme Court has never said– in *Roe*, *Doe* or any subsequent case– that the *Doe* language applies to post-viability abortions. As Justice Thomas explained in his dissent from the Court's refusal to review the Sixth Circuit's decision (a dissent in which Chief Justice Rehnquist and Justice Scalia joined), "Our conclusion that the statutory phrase at issue in *Doe* was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception *is required as a matter of federal constitutional law*. *Doe* simply did not address that question." *Voinovich v. Women's Medical Professional Corp*., 523 U.S. 1036, 1039 (1998) (emphasis in original).

Second, in reaffirming *Roe's* holding that, after viability, States may "'proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,'" *Planned Parenthood v. Casey*, 505 U.S. at 879, quoting *Roe v. Wade*, 410 U.S. at 164-5), the Supreme Court did not cite *Doe v. Bolton.* It is unlikely that this omission was inadvertent. It is more likely that the Court does not regard *Doe* as the source of the health exception for late-term abortions. This is evident from the Court's recognition that the circumstances in which pregnancy is itself a danger to the woman's life or health are "rare." *Casey*, 505 U.S. at 851. Moreover, the Court stated that "in some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Casey*, 505 U.S. at 870. Combining that with the number of times the *Casey* Court confirmed the State's interest in protecting the post-viability unborn child, and it seems likely that the Court would approve a limited health exception for post-viability prohibitions.

Enforcement Issues

Many laws are not enforced due to lack or resources or other reasons. Abortion laws are particularly susceptible because the subject matter is controversial and the procedure itself is kept secret, by both victims. In order to make it more likely that a post-viability ban would be enforced, it may be advisable to make both the medical emergency and the physical health exceptions affirmative defenses. Under *Simopolous v. Virginia*, affirmative defenses in abortion laws are constitutional. "Placing upon the defendant the burden of going forward with the evidence on an affirmative defense is normally permissible." (*Simopoulos v. Virginia*, 462 U.S. 510) An affirmative defense is an attempt to compensate for the use of a subjective, and therefore weaker standard. There is always a concern that with a subjective standard the state is "opening the barn door" thereby allowing the law to be largely circumvented. By using affirmative defenses instead of just creating exceptions, the burden of going forward with the evidence as well as with the proof is with the late-term abortionist. All the State has to do is prove that the physician performed an abortion on a viable child. Requiring the physician to demonstrate via an affirmative defense that s/he did all of the testing required by the law does not eliminate the responsibility of the State to prove its *prima facie* case, including the viability of the child victim. It is the defendant physician's burden to go forward with the evidence of a good faith belief, either as to the non-viability or the existence of the other defenses involving the medical emergency, medical necessity or other requirements.

CASELAW REVIEW

Roe v. Wade 410 U.S. 113

"With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe the abortion during that period, except when it is necessary to preserve the life or health of the mother." (410 U.S. 113, 164)

"The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment

according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." (410 U.S. 113, 166)

"Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interimpoint at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." (410 U.S. 160)

Doe v. Bolton 410 U.S. 179 (1973)

This case was decided the same day as *Roe.* In *Roe* the Court said that Roe and *Doe* "are to be read together." (*Roe*,410 U.S. at 165) In *Doe*, the Court was evaluating a Georgia abortion statute that permitted abortion if it was "necessary because a continuation of the pregnancy would endanger the life or the pregnant woman or would seriously and permanently injure her health." (410 U.S. at 183) To save the statute from a finding of unconstitutional vagueness, the Court defined health should be defined very broadly and said that "that the medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage of, the pregnant woman." (410 U.S. 179, 192)

Lower courts have subsequently used this definition of health as the standard against which to measure state legislation that attempts to prohibit post-viability abortion. The net result is a loophole that renders the prohibition meaningless. Yet the Court never said, in *Roe* or any subsequent case that the *Doe* language applies to post-viability abortions. The *Doe* Court was merely trying to resolve a vagueness problem in a law which applied throughout pregnancy. In the dissent from the denial of certiorari involving Ohio's 1995 post-viability ban, Chief Justice Rehnquist, Justices Scalia and Thomas suggested an alternate reading of *Doe.* "Our conclusion that the statutory phrase in *Doe* was not vague because it included emotional and psychological considerations in no way supports the proposition that, after viability, a mental health exception *is required as a matter of federal constitutional law. Doe* simply did not address that question."

Planned Parenthood of Central Missouri v. Danforth 428 U.S. 52, 96 S. Ct. 2831 (1976)

This case involved a Missouri law which defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." The law required that the physician to exercise professional care to preserve the fetus's life and health, failing which he is deemed guilty of manslaughter and is liable in an action for damages. The Supreme Court held that the definition of viability did not conflict with the definition in *Roe* but found unconstitutional the requirement that the child's life be protected pre-viability. The Court said that it was inappropriate for the legislature or the courts to place viability, basically a medical concept, at a specific point in the gestation period. "the time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." (at 64)

Colautti v. Franklin 439 U.S. 379 (1979)

The Supreme Court invalidated a Pennsylvania statute creating a standard for determination of viability of an unborn child and requiring the use of the abortion technique that provided the most likelihood of survival of the child. The Court reaffirmed its position that the determination of whether a fetus is viable must be a matter for the judgment of the responsible attending physician. The Pennsylvania law had exposed physicians to criminal liability if they failed to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus when the fetus was viable or when there was sufficient reason to believe that the fetus might be viable. The Court found that there was a mixture of objective and subjective standards of care and was concerned about how a physician would determine whether their duty to the patient was paramount to their duty to the fetus.

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft 462 U.S. 476 (1983)

The Supreme Court found it constitutional to require the attendance of a second physician at the abortion of a viable fetus. The law also required that the second physician take all reasonable steps to preserve the life and health of the viable fetus, provided that such steps did not pose an increased risk to the life or health of the woman. The Court found that the second physician requirement reasonable furthers the State's compelling interest in protecting the lives of viable fetuses. (This was different than *Thornburgh*, in which the Court was concerned that the second physician requirement did not provide for emergency situations.) The Court found that a hospitalization requirement for second trimester abortions was unconstitutional.

Thornburgh v. College of Obstetricians & Gynecologists 476 U.S. 747 (1986)

This case involved a Pennsylvania statute which required that every person who performs an abortion post-viability exercise that degree of care which would be required in order to preserve the life and health of any unborn child intended to be born and not aborted, and that the abortion technique employed be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method technique. The Court found the law to be unconstitutional.

Webster v. Reproductive Health Services (492 U.S. 490, 109 S. Ct. 3040 (1989)

This case involved a Missouri law which said that a physician, prior to performing an abortion on any woman whom he or she had reason to believe was 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing such medical examinations and tests as are necessary to make a finding of the fetus' gestational age, weight, and lung maturity;"

The Supreme Court interpreted this provision to be constitutional as long as the standard did not conflict with the other requirement that a physician apply his reasonable professional skill and judgment. The Court accepted as valid that the viability testing provision was concerned with promoting the state's interest in potential human life, rather than in maternal health, and therefore not inconsistent with *Roe*. The Court stated, in dicta, that the *Roe* trimester framework had proven to be unsound in principle and unworkable in practice. They also questioned why the State's interest in protecting potential human life should come into existence only at the point of viability.

Planned Parenthood v. Casey (505 U.S. 833)

In the 1992 case *Casey vs. Planned Parenthood,* the Court reaffirmed *Roe* but eliminated the trimester scheme and replaced it with a two-level law. The *Casey* Court said that the essential holding of *Roe* was the right of a woman to choose abortion before viability without any "undue interference" from the state and the right of a state to restrict abortion after viability as long as it makes exceptions for her life and health. The Court acknowledged the existence of state interests, throughout pregnancy, in a woman's health and the "fetus who may become a child." (*Planned Parenthood v. Casey,* 505 U.S. at 846) However, the Court has never defined what kind of health exception a post-viability ban would have to include.

"But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see supra, at 17-18, but this is an imprecision within tolerable limits, given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has as a practical matter, an element of fairness. In some broad sense, it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child. (*Casey* at 871)

"Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." *Roe*, supra, at 163. That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. See, e.g., *Akron I*, supra, at 427. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases. (*Casey* at 872)

Pennsylvania's post-viability ban was not challenged in the *Casey* case and therefore the Court did not have the opportunity to apply its undue burden and other analysis to post-viability provisions.

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