US SUPREME COURT RECOGNIZES THAT STATES HAVE LEGITIMATE AUTHORITY TO PROTECT WOMEN AND UNBORN HUMAN LIFE

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The US Supreme Court ("**Court**") recently issued a ruling in Gonzales v. Carhart ("**Gonzales**")[1] that recognizes the legitimate authority of states and the federal government to protect the health of women and unborn human life. Gonzales is the latest Court decision addressing the issue of abortion under the Constitution. The specific ruling in Gonzales upheld the constitutionality of the federal Partial Birth Abortion Ban Act of 2003. More generally, the decision serves as the most significant abortion case since John Roberts and Samuel Alito joined the Court, and demonstrates that a majority of this newly-constituted Court is willing to afford greater recognition to the authority of states to establish incremental laws to protect women and unborn human life. Taken in context with prior cases, such constitutional, incremental laws can include state law protections such as **parental notice or consent laws** (requiring the notification or consent of a parent or guardian before a minor daughter has an abortion), **women's right-to-know laws** ("consumer protection" requirements to provide women with information about the procedure and its risks before an abortion), **medical standards regulations** (requiring abortions to be performed by licensed physicians and to meet other medical standards), and other common sense measures. Thus, even though the "central holding" in Roe v. Wade ("**Roe**"),[2] as affirmed in Planned Parenthood of Southeastern Pennsylvania v. Casey ("**Casey**"),[3] remains controlling precedent at the present time (i.e., that states cannot impose an "undue burden" on previability abortions), the current Court appears more willing than any other time in recent memory to uphold incremental state legislation. The logical conclusion is that the time is right for Illinois to adopt and enforce such common sense laws. This article provides a brief overview of the constitutional framework governing these issues, along with a description of the Supreme Court's jurisprudence in this area, culminating with the Gonzales case.

I. THE CONSTITUTIONAL FRAMEWORK

The Constitution of the United States ("**Constitution**") establishes our democracy as a "federalist" system, meaning that the three branches of the federal government (legislative, executive, and judicial) co-exist with the various state governments. The Constitution, federal laws, and treaties are the supreme law of the land, and take precedence over conflicting state constitutions and laws. However, powers that are not conferred on the federal government by the Constitution are reserved to the states or to the people.

With respect to the issue of abortion, perhaps the most critical features of this framework are: (i) the preeminence of the Constitution over all other laws and regulations (including federal and state laws), and (ii) the role of the Court in the interpretation of the meaning of the provisions in the Constitution. As such, any law adopted by Congress or any of the states will not be enforceable to the extent that it violates the Constitution, as interpreted by the Court.

[1] Gonzales v. Carhart, 127 S. Ct. 1610 (2007).
[2] Roe v. Wade, 93 S. Ct. 705 (1973).
[3] Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992).

II. ROE V. WADE

Roe v. Wade is the original Court opinion that recognized a right to abortion in the Constitution. Prior to Roe, virtually all of the states had constitutional and enforceable laws prohibiting or restricting abortion. Because of the role of the Constitution as the supreme law of the land, and the power of the Court to declare what the Constitution means, Roe had the effect of striking down all of the then-existing state laws on abortion.[4]

Roe involved a challenge to the constitutionality of a Texas statute that largely prohibited abortion. The Court's decision in Roe was built on earlier Court precedent concerning contraception and the "privacy" of the marital bedroom, as well as a general right to privacy that the Court found in the "penumbra" of various constitutional rights under the 1st, 3rd, 4th, 5th, 9th and 14th Amendments (note that no explicit right to abortion exists in the Constitution). The Court in Roe also determined that unborn human life is not a "person" that is protected under the Constitution, and therefore did not accord any meaningful weight to any constitutional rights of unborn human life. On the basis of these and other considerations, the Court proceeded to strike down the Texas statute as violating this constitutional "right to privacy," and set forth a detailed "trimester" framework to evaluate the constitutionality of any state or federal laws on abortion.

It is fair to say that Roe is not the finest example of rigorous and disciplined legal analysis by the Court. The decision has been subject to almost universal criticism by conservative commentators, and frequent criticism by liberal commentators (who liked the outcome, but recognized the shortcomings of the analysis). Many subsequent court cases cast doubt on the holding of Roe, culminating in a reconsideration of Roe in 1992 in a case called "Casey."

III. PLANNED PARENTHOOD OF SOUTHEAST PENNSYLVANIA V. CASEY

Casey involved a constitutional challenge to a Pennsylvania statute that imposed a number of restrictions on abortions, including: an **informed consent requirement** (requiring the provision of information to the woman about the nature of the abortion procedure, the gestational age of her unborn child, and other information; also requiring a 24 hour waiting period after the provision of such information); a **parental consent requirement** (requiring the consent of a parent or guardian before an unemancipated minor daughter could have an abortion); and, a **spousal notification requirement** (requiring a woman to notify her husband before having an abortion).

After consideration of detailed briefs and oral arguments, the Court decided to retain the "central holding" in Roe that the Constitution contains an abortion right; however, the Court significantly revised the rationale and standards relating to such rights.[5] Specifically, the Court rejected Roe's "trimester" framework for evaluating abortion restrictions, and replaced that approach with three

[4] It is worthwhile to note that today, most of the state laws proscribing abortion have been repealed or superseded, and some states have adopted state constitutional provisions recognizing a right for a woman to choose an abortion. The result is that if Roe v. Wade was overruled tomorrow, abortion would still be legal in at least 43 states. *See* The Day After Roe, Clarke D. Forsythe, DEFENDING LIFE 2007 (a publication of Americans United For Life) (2007). If Roe was overruled, the states would need to proceed through the legislative process to adopt any new laws to regulate abortion, and accordingly any laws proscribing abortion during all or part of pregnancy would reflect the opinion of the people in that state, as expressed through their state legislatures.

[5] The vote was 5 to 4, with Stevens, Blackmun, O'Connor, Souter and Kennedy voting to retain Roe, and Rehnquist, White, Scalia, and Thomas voting to overturn Roe.

fundamental standards for evaluating abortion-related laws: (i) a woman may choose to have an abortion prior to viability without the imposition of any "undue burden" by the state; (ii) a state may restrict abortions after the age of viability, provided that the law contains exceptions for the life or health of the mother; and (iii) a state has legitimate interests from the outset of the pregnancy to protect the health of the woman and the unborn human life.

The Court then evaluated the Pennsylvania statute under these newly articulated standards. It upheld the **informed consent requirement** (requiring the provision of information to the woman about the nature and risks of the abortion procedure, the gestational age of the unborn child, and a 24 hour waiting period). It also upheld the **parental consent requirement** (requiring the consent of a parent before an unemancipated minor daughter could have an abortion). It struck down the **spousal notification requirement** (which would have required a woman to notify her husband before having an abortion).

Stare Decisis

The Court in Casey indicated that it might not have found a right to abortion in the Constitution if it was evaluating the issue fresh and without prior precedent in Roe. Specifically, the Court noted that it was bound by the doctrine of *stare decisis*, which provides that prior court precedent should not be overruled lightly. The Court explained that the decision whether to overrule an earlier case depends on various considerations, including whether: the rule in the earlier case has proven to be unworkable; the rule is subject to reliance that would create special hardship if the rule was overruled; the principles of law have developed to the point where the old rule is no more than a remnant of abandoned doctrine; or the facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. The Court then found that these considerations balanced in favor of retaining the central holding in Roe.

Chief Justice Rehnquist and Justice Scalia wrote separate dissenting opinions in the case, stating concerns about the majority's reliance on *stare decisis* and other aspects of the decision. Chief Justice Rehnquist pointed out that *stare decisis* does not require the Court to adhere to prior precedent that is erroneous. As a case in point, Rehnquist discussed how the Court, in the landmark case of Brown v. Board of Education in 1954,[6] properly rejected the erroneous "separate but equal" doctrine regarding racial segregation that the Court had established in Plessy v. Ferguson in 1896.[7] Rehnquist speculated that if the Brown Court had adopted the same approach to *stare decisis* as the majority in Casey, the Brown Court would have adhered to the erroneous "separate but equal" doctrine in Plessy.

Justice Scalia provided an unequivocal criticism of the majority's reliance on *stare decisis*, and its "undue burden" standard. An excerpt of Scalia's dissent is as follows:

> The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep what you want and throw away the rest version….
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> I am certainly not in a good position to dispute that the Court *has saved* the "central holding" of *Roe*, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the

[6] Brown v. Board of Education, 347 U.S. 483 (1954).
[7] Plessy v. Ferguson, 163 U.S. 537 (1896).

> arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the "undue burden" test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* "has in no sense proven 'unworkable,'" *ante*, at 13. I suppose the Court is entitled to call a "central holding" whatever it wants to call a "central holding" – which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*…
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> I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous Constitutional decision must be strongly influenced – *against* overruling, no less – by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error filled history book that described the deeply divided country brought together by *Roe*…
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> But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution has an evolving meaning; that the Ninth Amendment's reference to "othe[r]" rights is not a disclaimer, but a charter for action; and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition – then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change - to show how little they intimidate us…
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> We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

Opinion of Scalia, J., dissenting in Casey. Perhaps the only certainty in this area is that the "central holding" in Roe (and now Casey) will continue to be a controversial issue, both for the Court and the public, until such time as it is overturned, and the issue returned to the states.

IV. GONZALES V. CARHART

In his confirmation hearings for Chief Justice, John Roberts promised the Senate Judiciary Committee that there would be no "sudden shifts" in jurisprudence on abortion or other issues. He has kept that promise, and has applied the Casey standards to his Court's first substantive abortion case, Gonzales v. Carhart. Having said that, the Roberts Court has applied Casey in a manner that emphasizes deference to state and federal government interests and legislation, and evaluates abortion laws in a more even-handed manner than certain prior Courts.[8]

[8] The Roberts Court also issued an important ruling on a New Hampshire parental notice law in Ayotte v. Planned Parenthood of New England, 546 U.S. 320 (2006). A lower court had struck the entire parental notification statute on the basis that the statute did not have a sufficient exception for medical emergencies. A unanimous Roberts Court issued a decision solely on the issue of remedy. It remanded to the lower court for reconsideration of whether more narrow declaratory or injunctive relief is appropriate, given that the constitutional issues are limited solely to medical emergencies (a narrow set of circumstances). This

Gonzales involved a challenge to the constitutionality of the federal Partial Birth Abortion Ban Act of 2003 ("Act"). The Act banned a particular kind of late term abortion procedure called a "partial-birth" abortion. It was a particularly brutal procedure, and the Court articulated the specifics of the method in some detail in the opinion. The Act provided an exception to the ban for situations involving the life of the mother, but not the "health" of the mother. Congress intentionally excluded a "health" exception from the Act, deciding as a factual matter that the procedure is never medically necessary to protect the health of the mother (e.g., because alternative methods are available).[9]

The Court, applying Casey, upheld the Act as constitutional.[10] The Court focused on the third standard in Casey, namely: that the government has a legitimate and substantial interest in preserving and promoting unborn human life. The Court identified several such legitimate and substantial government interests related to banning partial birth abortion, including: showing profound respect for unborn human life; prohibiting a brutal and inhumane procedure that coarsens society to the humanity of newborns and all human life; protecting women from a potentially harmful elective procedure; and protecting the medical community from a procedure that confuses the medical, legal, and ethical duties of physicians to preserve and promote life.

The Court also discussed other legitimate governmental interests, many of which can support informed consent and other incremental protective legislation for women and unborn human life. An excerpt of the Court's opinion is as follows:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptional to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.
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> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. [Quoting from a lower court decision:] "Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D&E and intact D&E] procedures entail in clear and precise terms."
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> It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. [Quoting from Casey:] "States are free to enact

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decision is significant because it demonstrates that the Roberts Court may be more balanced in its evaluation of abortion-related laws than prior Courts and (unlike in certain prior cases, e.g., the Carhart decision as discussed in footnote below) will avoid invalidating an entire abortion law on the grounds that some of its provisions or applications are unconstitutional.

[9] The Act was similar to a Nebraska statute that had been struck down by the Court in a case in 2000 (Carhart v. Stenberg, 530 U.S. 914), except that the language and definitions in the Act were more precise and addressed some of the ambiguities the Court had identified in the Nebraska statute. The Court also had different factual records than during its earlier decision in 2000. In addition, the Court in Carhart adopted an approach that struck the entire Nebraska statute, and did not consider (nor remand for a consideration of) whether a more narrow remedy would have been appropriate.

[10] The vote was 5 to 4, with Kennedy, Alito, Scalia, Thomas, and Roberts voting to uphold the Act, and Ginsburg, Stevens, Souter, and Breyer dissenting.

> laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming human form.

Opinion of the Court, by J. Kennedy. This passage demonstrates that the Roberts Court will afford substantial weight to the legitimate interests of the state to adopt laws that protect women and unborn human life. It also shows that a majority of the Roberts Court understands that the object of an abortion (at least a partial-birth abortion) is an unborn child, and that abortion can be harmful to women.

The Court next examined whether, even though the Act furthers legitimate government interests, the Act is unconstitutional because it did not contain an exception for the "health" of the mother. The Court noted that there was "documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women." The Court then held that the Act can indeed stand even when this medical uncertainty persists, noting that in other contexts "the Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."

The Court also found that the Act was not unconstitutionally void for vagueness (i.e., that the language in the Act is sufficiently clear to provide a doctor of ordinary intelligence with a reasonable opportunity to know what is prohibited), and otherwise rejected the various arguments presented that the Act was unconstitutional.[11]

V. IMPLICATIONS FOR ILLINOIS

In Gonzales, the Roberts Court adopted an approach to interpreting Casey that recognizes the rights of states and the federal government to enact and enforce laws to protect women and unborn human life. When viewed in light of earlier Court cases, it appears likely that the Roberts Court will uphold incremental state legislation on a range of important issues, such as parental notice and consent, women's right to know (informed consent), medical standards regulations, and other common sense measures. The logical conclusion is that the time is right for Illinois to adopt and enforce these kinds of mainstream laws to protect women and unborn human life.

[11] An interesting final note to the Gonzales case is the concurring opinion written by Justice Thomas and joined by Justice Scalia. Justice Thomas indicated that he joined the majority opinion because it accurately applies current jurisprudence, including Casey. However, Justice Thomas noted, "I write separately to reiterate my view that the Court's abortion jurisprudence, including Casey and Roe v. Wade, has no basis in the Constitution." It therefore appears that at least Thomas and Scalia are still pressing for the day when the Court can get out of the "abortion-umpiring" business, and return the issue in its entirety to the states.