
October 2015

Partial Birth Biopolitics

Joshua E. Perry

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>

Recommended Citation

Joshua E. Perry, *Partial Birth Biopolitics*, 11 DePaul J. Health Care L. 247 (2008)
Available at: <https://via.library.depaul.edu/jhcl/vol11/iss2/6>

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

PARTIAL BIRTH BIOPOLITICS*

Joshua E. Perry, J.D., M.T.S.

INTRODUCTION

On April 18, 2007, the United States Supreme Court issued its decision in *Gonzales v. Carhart*.¹ The dispute before the Court was triggered by LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar, doctors whose practices include second-trimester abortions.² These physicians sought a permanent injunction against enforcement of the Partial-Birth Abortion Ban Act of 2003 (Act) and argued that the Act was unconstitutional because, *inter alia*, it lacked an exception allowing the procedure when necessary to protect the health of the mother. In a 5-4 decision authored by Justice Anthony Kennedy, the Court upheld the constitutionality of the Act, holding that the Act's failure to include a health exception does not impose an undue burden on a woman's right to abortion.³

The Court's decision in *Carhart* opens new doors for future politicized governmental interference in the lives of patients and their doctors. Regulation of physician practices that protects public health and safety is a legitimate and worthwhile legislative pursuit. The

* Josh Perry is based in the Center for Biomedical Ethics and Society at Vanderbilt University where he is Assistant Professor in the School of Medicine and Adjunct Professor in the Law School. Professor Perry is grateful to Jeff Bishop, Rebecca Brown, Larry Churchill, Ellen Clayton, and Marshall Kapp for helpful and generous comments on preliminary drafts.

¹ 127 S.Ct. 1610 (2007).

² *Id.* at 1611.

³ The physicians also made two other arguments. First, they argued that the Act is facially void because its language describing specific procedures and physician intent was unconstitutionally vague. The Court dismissed this argument, citing *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525-26 (1994) (stating "[The Act] sets forth 'relatively clear guidelines as to prohibited conduct' and provides 'objective criteria' to evaluate whether a doctor has performed a prohibited procedure.") *Id.* at 1628. Second, they argued that the Act imposes an undue burden, as a facial matter, because, according to the physicians, the Act's text proscribes *all* dilation and extraction abortion procedures, which constitute the most common second-trimester abortion method. The Court rejected this contention and pointed to language in the Act distinguishing the prohibited form of *intact* dilation and evacuation (D&E) involving a still-living, intact fetus, from *standard* D&E procedures involving removal of the fetus in pieces, which according to the Court's interpretation is excluded from the Act. *Id.* at 1630-32 (emphasis added).

Court's decision in *Carhart*, however, is troubling because the Act regulates medical practices on the basis of legislative repugnance regarding procedural details of a specific and complicated abortion method.⁴ Moreover, the Court's *Carhart* decision fails to distinguish between appropriate governmental regulation premised on a public safety concern and legislative intervention motivated by moral outrage that threatens a recognized liberty interest of individual citizens. Those concerned with biopolitics—the use of governmental power to regulate and control the personal and private space of one's health care decisions—have new reasons to be worried about the future of reproductive freedoms and the exercise of clinical medical judgment.⁵

I. PARTIAL BIRTH ABORTION JURISPRUDENCE

After the Act was signed by President Bush, its enforcement was immediately enjoined, and challenges to the ban's constitutionality began the long and winding road leading to the Supreme Court. Initial reviews by six different District and Circuit courts found the Act unconstitutional, based primarily on Congress's failure to include an exception for the mother's health. These lower courts were following and applying the precedents of *Planned Parenthood v. Casey* and *Stenberg v. Carhart*.

In *Stenberg*—the first “partial birth abortion case”—the Supreme Court considered the constitutionality of a Nebraska law banning the intact dilation and evacuation (D&E) abortion procedure. Despite the plain language in *Casey* requiring all abortion regulations to include an exception for procedures “‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother,’” Nebraska legislators had failed to include any such health

⁴ Arguably, the Act does not have the effect of actually curtailing the number of abortions. Rather, the Act is aimed at one particular abortion procedure referred to as *intact* dilation and evacuation (D&E) (or “dilation and extraction” (D&X) or “intact D&X”), a variation on *standard* D&E. According to the Court, the main difference between the two procedures is that in intact D&E proscribed by the Act, “a doctor extracts the [living] fetus intact or largely intact,” instead of pulling it apart and extracting body parts during 10 to 15 passes through the uterus. *Id.* at 1616. The Court clarifies in its conclusion that “an injection that kills the fetus is a [legal] alternative under the Act that allows the doctor to perform the [intact D&E] procedure.” *Id.* at 1638.

⁵ Jeffrey P. Bishop & Fabrice Jotterand, *Bioethics as Biopolitics*, 31 J. MED. & PHIL., 205-12 (2006).

exception.⁶ Following the *Casey* precedent, the *Stenberg* Court struck down Nebraska's prohibition on the grounds that it imposed an unconstitutional "undue burden" because substantial medical authority supported the proposition that banning the intact D&E (a.k.a. "partial birth") procedure could endanger the health of some women.⁷ Writing for *Stenberg*'s 5-4 majority, Justice Stephen Breyer noted that, "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, [Supreme Court precedent] requires the statute to include a health exception."⁸

Six years later, medical authorities such as the American College of Obstetricians and Gynecologists still considered the intact D&E procedure medically necessary in certain cases.⁹ The 5-4 majority in *Carhart*, however, reached a different constitutional conclusion than the *Stenberg* Court on the question of whether a nationwide ban on this procedure—without an exception for the health of the mother—would constitute an undue burden to some women seeking an abortion after the first trimester.

Relatively early in the legal analysis portion of the majority opinion, Justice Kennedy notes past Court precedents requiring governmental regulatory schemes to maintain the delicate balance between protecting the life of the fetus that may become a child *and* the health of the woman.¹⁰ Later in his opinion, however, when he addresses the merits of the case, his analysis fails to include discussion of the State's interest in protecting the health of the woman. Rather, he places sole emphasis on protection of the life of the fetus and neglects the balancing that he addressed earlier in the opinion.¹¹

Kennedy argues that if the governmental regulation does not impose an "undue burden, the State may [in regulating the medical profession] use its regulatory power . . . to promote respect for life, including life of the unborn."¹² The majority's opinion concludes—in contradiction to a "significant body of medical opinion [holding that

⁶ *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992)).

⁷ *Id.*

⁸ *Id.*

⁹ ACOG News Release, *ACOG Files Amicus Brief in Gonzales v. Carhart and Gonzales v. PPF* (Sept. 22, 2006), available at http://www.acog.org/from_home/publications/press_releases/nr09-22-06.cfm (last visited Feb. 28, 2008).

¹⁰ See *Carhart*, 127 S.Ct. at 1626.

¹¹ *Id.* at 1633-36.

¹² *Id.* at 1633.

intact dilation and evacuation] has some safety advantages . . . for some women in some circumstances”—that the Act does not impose an undue burden.¹³ As noted by Justice Ginsburg in her dissent, this conclusion is perplexing given the fact that seven years earlier in *Stenberg*—a case presenting materially identical circumstances—the Court found the absence of a health exception to be an unconstitutional undue burden upon all women for whom it is relevant, “women who, in the judgment of their doctors, require an intact D&E because other procedures would place their health at risk.”¹⁴

Although Kennedy writes that “[u]ncritical deference to Congress’ factual findings” is “inappropriate,” he rejects an interpretation of *Stenberg* that would require a health exception if substantial medical authority concluded that legislative regulation might endanger a woman’s health.¹⁵ Kennedy’s reading of *Stenberg* creates an uneasy tension between politicians and doctors when he argues that “considerations of marginal safety, including the balance of risks, are within *the legislative competence*.”¹⁶ As interpreted by dissenting Justice Ginsburg, this analysis fails to take seriously the necessity of exceptions safeguarding a woman’s health as articulated in *Casey* and *Stenberg*.¹⁷

Finally, the Court’s failure to maintain an appropriate emphasis on protecting women’s health is made more troubling by the rationale offered to bolster its argument. In support of his position, Justice Kennedy suggests that some women are unlikely to understand the medical procedure to which they are consenting because of failure on the part of physicians to disclose details of the intact D&E procedure in clear and precise terms.¹⁸ However, instead of mandating a requirement that physicians fully inform their patients of the specific abortion procedure, and of its potential physical and emotional risks, “the Court [instead] deprives women of the right to make an autonomous choice, even at the expense of their safety.”¹⁹ Kennedy’s opinion assumes that doctors who perform intact D&E procedures will not honor their obligation to inform fully their patients or that the

¹³ *Id.* at 1636.

¹⁴ *Id.* at 1651 (Ginsburg, J., dissenting).

¹⁵ *Carhart*, 127 S.Ct., at 1636.

¹⁶ *Id.* at 1636-37 (emphasis added).

¹⁷ *Id.* at 1641 (Ginsburg, J., dissenting).

¹⁸ *Id.* at 1634.

¹⁹ *Id.* at 1640-42 (Ginsburg, J. dissenting).

women lack the capacity to make a “free” choice that is in their best interest. These assumptions highlight a troubling emotionalism in Kennedy’s appeal precisely where one would hope to find a solid grounding in precedent and protection of the affected persons’ individual liberty interests. Perhaps even more problematic, Justice Kennedy’s rationale signals a biopolitical power shift in decision-making away from a woman and her physician and, in combination with his deference to “legislative competence,” an alarming willingness by the third branch of government to defer to biopolitical regulation of women’s bodies by legislative bodies.

II. FOUCAULT, BIOWEIGHT, AND THE RISE OF BIOWEIGHTS²⁰

Beginning with lectures in the mid-1970s and continuing in *The History of Sexuality*, Michel Foucault developed the concept of biopower – a theory that sought to explain a state’s political power over “life and its mechanisms” and critique those ways in which the state’s regulatory power became “an agent of the transformation of human life” used to control the bodies of the body politic.²¹ For Foucault, individual rights to life, death, health, sex—“to rediscover what one is and all that one can be”—were all threatened by the twentieth century rise of regimes intent on a calculated exercise of biopower to “make live and let die.”²² Further developing Foucault’s thesis, Italian political philosopher Giorgio Agamben notes that as these individual rights became more politicized, so too did the power of the state increase:

²⁰ For a more detailed discussion of Foucault and application of his biopower and biopolitics critical theories across other domains, see Joshua E. Perry, *Biopolitics at the Bedside: Proxy Wars and Feeding Tubes*, 28 J. LEGAL MED. 171, 174-182 (June 2007).

²¹ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* [hereinafter *SEXUALITY*] 143 (Robert Hurley trans., Vintage Books 1978). For a helpful discussion of biopower and biopolitics, see Paul Rabinow, *Introduction to THE FOUCAULT READER* 3, 12-23 (Paul Rabinow ed., Pantheon Books, 1984).

²² See generally MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE (1975-76)* (David Macey trans., Picador New York, 2003) [hereinafter *LECTURES*]. See also Joshua E. Perry, *Biopolitics at the Bedside: Proxy Wars and Feeding Tubes*, 28 J. LEGAL MED. 171, 174 (June 2007) (“The rise of contemporary Western society, therefore, was fueled by the development of this biopower phenomenon; this is a phenomenon that Foucault describes as the rise of state power over all “living things”—the power to regulate, discipline, and take control of life and life processes.”).

It is almost as if, starting from a certain point, every decisive political event were double sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.²³

Thus, as Jeff Bishop observes, the state comes to wield both an enabling *and* a repressive power over life.²⁴ And, in the West – particularly in the U.S. – this biopower quickly manifests as a regulatory authority over the lives and bodies of individuals.

On Foucault's account, the era of biopower emerged as Western states attempted to cope with booming urban populations by formalizing state control over life and death.²⁵ This state exercise of discipline, control, and power over life and death came in the form of anatomo-politics and biopolitics.²⁶ Anatomo-politics refers to state attempts to refine and standardize individuals via controls over the human body as it is incorporated into and for the benefit of the capitalistic state.²⁷ Biopolitics refers to control over the whole population, with the problems of urbanization creating state concern over fertility, public health, and life expectancy.²⁸ Foucault argued that biopolitics ultimately problematizes the entire population and, inevitably, gives rise to the "power of regularization."²⁹

²³ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 121 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

²⁴ Jeffrey P. Bishop, *Bioethics, Biopolitics, and the Sovereign Subject of Death* (unpublished manuscript on file with author).

²⁵ Perry, *Biopolitics at the Bedside: Proxy Wars and Feeding Tubes*, 28 J. LEGAL MED. 171, 174 (June 2007).

²⁶ FOUCAULT, *SEXUALITY*, *supra* note 21, at 139.

²⁷ See generally Michel Foucault, *The Political Technology of Individuals*, in *TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT* 152 (Luther H. Martin, et al. eds., Univ. of Mass. Press 1988) ([G]overnment has to worry about [individual citizens] only insofar as they are somehow relevant for the reinforcement of the state's strength: what they do, their life, their death, their activity, their individual behavior, their work, and so on . . . [S]ometimes what [the citizen] has to do for the state is to live, to work, to produce, to consume; and sometimes what he has to do is to die.").

²⁸ Perry, *Biopolitics at the Bedside: Proxy Wars and Feeding Tubes*, 28 J. LEGAL MED. 171, 174-75 (June 2007) (citations omitted).

²⁹ FOUCAULT, *LECTURES*, *supra* note 24, at 247.

Ultimately, it is the use of this political power of regulation over the body politic that is cause for some concern. Surely, some instances of social benefit can be imagined.³⁰ However, as contemporary issues of life and death trigger power dynamics between individuals, an administratively-bureaucratized state, and a conservative ideological movement which seeks to regulate the culture via legislation advancing its version of the common good, perhaps it is inevitable that biopower more often gives rise to a more objectionable brand of biopolitics.³¹ For instance, in the realm of reproductive rights one finds increasing attempts by the state to control mechanisms relating to the biological beginnings of life, even as individuals attempt to assert claims to autonomy and rights to self-determination. It is to this particular expression of biopolitics that our discussion now returns.

III. BIOPOLITICAL EXAMPLE *PAR EXCELLENCE*

Abortion is the biopolitical example *par excellence*—“a medical procedure every aspect of which is heavily regulated.”³² Indeed, a woman seeking to exercise her abortion rights must, in many states, navigate through a regulatory labyrinth of consent procedures and waiting periods, heretofore all allegedly premised on the State’s interest in protecting her health. Paradoxically, however, a woman desiring to assert her legal right to control her body is not freed from the confines of the regulatory state; she is only enmeshed in it all the more.³³ As Professor Parry notes, some regulation is presumably motivated by concern for the woman’s health and has nothing at all to do with politics.³⁴ Yet, the politicized nature of much of the regulation, i.e., the required reading material discussing fetal development, is, for many, a more problematic ideologically-driven expression of biopolitics. While

³⁰ As I note in *Biopolitics at the Bedside*, Foucault suggests lowering the mortality rate, raising life expectancy, and stimulating the birth rate as political biopower and control that operates at a level of social generality and, arguably, beneficial social utility.

³¹ I say much more about this conservative ideological movement, i.e., the Religious Right, and the phenomena of *Biblical BioPolitics* in Joshua E. Perry, *Biblical BioPolitics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond*, 16 HEALTH MATRIX 553-650 (2006) [hereinafter *Biblical BioPolitics*].

³² John T. Parry, “*Society Must Be [Regulated]*”: *Biopolitics and the Commerce Clause in Gonzalez v. Raich*, 9 LEWIS & CLARK L. REV. 853, 872 (2005) [hereinafter *Society Must be Regulated*].

³³ *Id.*

³⁴ *Id.* at 871-72.

many might argue that even these obstacles are unduly burdensome, at least these regulations are each accompanied with health exception clauses that void the restriction if, in a particular case, it threatens to compromise the woman's health.

As evident from the congressional record detailing the motivations underlying passage of the Act at issue in *Carhart*, regulation of reproductive freedoms features heavily-politicized rhetoric and ideologically-inspired expressions of biopolitics.³⁵ Disturbingly, however, as noted by Justice Ginsburg's dissent, much of this same politicized ideology, in addition to Kennedy's paternalistic comments regarding women's decision-making capabilities, creeps into the Court's rhetoric. For instance, Kennedy repeatedly uses the deprecatory label "abortion doctor" to refer to the obstetricians-gynecologists and surgeons who provide women with these medical services, and even, at an early point in his opinion, refers to the fetus as an "unborn child."³⁶ As noted by Professor George Annas, it is this combination of "infantilizing pregnant women as incapable of making serious decisions about their lives and health" and "categorizing physicians as unprincipled 'abortion doctors'" that propels the Court's departure from settled precedent regarding the necessity of a health care exception.³⁷

Those who value constitutional principles of liberty, privacy, and autonomy should fear governmental biopolitical regulation that interferes with the medical judgment of a physician and threatens to compromise the health of patients. Such fears are heightened by this newly-configured Court and its apparent willingness to reinforce an encroachment on individual liberty that is rooted in the "ethical and moral concerns" of a congressional majority.³⁸ The Court's acknowledgment and approval of the role played by congressional "moral concerns" signals an uneasy shift away from the previously controlling precedent of *Casey*, in which the Court noted that its "obligation is to define the liberty of all, not to mandate [its] own moral code."³⁹

³⁵ For comparisons to similar expressions of political and ideological rhetoric in the context of biopolitics, see generally Joshua E. Perry, *Biblical Biopolitics*, *supra* note 31.

³⁶ *Carhart*, 127 S.Ct. at 1650 (Ginsberg, J., dissenting).

³⁷ George J. Annas, *The Supreme Court and Abortion Rights*, 356 N. ENGL. J. MED., (2007) 2201-07.

³⁸ *Carhart*, 127 S.Ct. at 1633.

³⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992).

In general, over the last forty years, the Supreme Court has increasingly taken a dim view of governmental regulations premised primarily on a legislative majority's conception of morality. Instead, the Court has closely guarded an individual's right to safety, health, liberty, privacy and autonomy against moralistic legislative action. For example, in 1965 the Court ruled unconstitutional a Connecticut statute banning the distribution of contraceptives and their use by married individuals. The Court's reasoning emphasized the limits of governmental regulation in the arena of individual liberties.⁴⁰ Seven years later the Court considered a similar law in Massachusetts banning the use of contraceptives by single individuals.⁴¹ In ruling the statute unconstitutional, the Court noted its codification under the heading "Crimes Against Chastity, Morality, Decency, and Good Order," and its failure to include an exception for distribution of contraceptives necessary for the protection of a patient's health. While regulation of some medical matters may be necessary for the protection of public health, governmental regulation of a patient's body and private life premised on legislative notions of morality and decency has a long history of judicial repudiation.

Biopolitics, therefore, is about the exercise of political power to control persons' bodies (and their meanings) and governmental strategies used to dictate and regulate the terms on which individuals make choices regarding how they live their lives. Prior to the Court's opinion in *Carhart*, the most recent biopolitical bonanza was the legislative intervention in decisions regarding Terri Schiavo's end-of-life trajectory. In that episode—in which we witnessed a literal body become a political battleground—the judiciary demonstrated restraint in its failure to acquiesce to the politicized regulations urged by state and federal legislatures.⁴² Instead of "erring on the side of life"—as urged by a host of politicians, courts at every level opted to err on the side of liberty and self-determination as they protected Ms. Schiavo's legal right not to receive a continuing course of medical intervention that evidence demonstrated she did not desire and could not restore her neural devastation.⁴³

⁴⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴¹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁴² Joshua E. Perry, Larry R. Churchill, & Howard S. Kirshner, *The Terri Schiavo Case: Legal, Ethical and Medical Perspectives*, 143 ANNALS OF INTERNAL MED., 744-48 (2005).

⁴³ *In re Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at *6-7 (Fla. Cir. Ct. Feb. 11, 2000); *In re Guardianship of Schiavo*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, 792 So. 2d 551, 555 (Fla. Dist.

In *Carhart*, however, the regulation of a woman's body and her medical treatment is endorsed in problematic terms. Of particular note is the Court's departure from previous precedents requiring regulatory exceptions to protect a woman's health and the Court's reference to a disturbingly paternalistic rationale. Moreover, Kennedy's majority opinion offers no reason why future Court decisions impacting individual bodies might not also defer to the "ethical and moral" judgment of any given legislative body, regardless of the impact on individual health or liberties.⁴⁴ Ultimately, a governmental scheme that abrogates the physician's arsenal of available medical procedures and allows whoever holds a majority in Congress to supersede the medical judgment of a physician regarding the health of her patient is a form of biopolitical regulation one would expect the high court to curtail, particularly in light of its most recent precedents on highly-charged social issues.

The Court's majority opinion, however, is unequivocal in its emphasis that "the State has a significant role to play in regulating the medical profession."⁴⁵ Indeed, strong precedents exist suggesting the government does have a legitimate regulatory role in some medical contexts with direct bearing on the protection of public health and safety, as well as the preservation of life, including, for example, the issuance and revocation of medical licenses and banning of physician-assisted suicide.⁴⁶ Yet, regulation of late-term abortion procedures as outlined in the Act does not share a similar relationship to these legitimate protections of public health because neither public health and safety nor the preservation of life is ultimately driving this legislation.⁴⁷

Ct. App. 2001); *In re Guardianship of Schiavo*, 800 So. 2d 640, 641-44 (Fla. Dist. Ct. App. 2001); *In re Guardianship of Schiavo*, No. 90-2908-GB-003, 2002 WL 31817960, at *5 (Fla. Cir. Ct. Nov. 22, 2002); *In re Guardianship of Schiavo*, 851 So. 2d 182, 186 (Fla. Dist. Ct. App. 2003); *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1387 (M.D. Fla. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005), *rev'g en banc denied*, 403 F.3d 1261 (11th Cir. 2005).

⁴⁴ Of course this does not necessarily mean that *Roe* is in immediate danger of being overturned. See *supra* Annas, *supra* note 37, at 2206 (stating "[a]lthough Justice Alito has replaced Justice O'Connor and is likely to vote in the opposite direction on *Roe*-related issues, Justice Kennedy is the new swing vote on the Court, and he insists that he is upholding the principles of *Roe v. Wade* as reaffirmed in *Casey*.")

⁴⁵ *Carhart*, 127 S.Ct. at 1633.

⁴⁶ *Dent v. West Virginia*, 129 U.S. 114, 122-23 (1889); *Washington v. Glucksberg*, 521 U.S. 702, 794-95 (1997).

⁴⁷ *Carhart*, 127 S.Ct. at 1647 (Ginsburg, J., dissenting) (stating "[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. . . .

Rather, as the Court admits, “moral concerns” are what animated the regulations imposed by Congress.⁴⁸ Such a rationale is not a constitutionally legitimate basis for legislative interference with physician practice and patient health.

As applied in this reproductive rights context and without following the *Casey* Court’s concern for balancing fetal life with the health of the mother, Kennedy’s majority opinion signals a judicial tipping of the scales in favor of moralistic legislative action. State and federal legislatures will now encounter lower hurdles the next time they see fit to regulate the health of a woman carrying a fetus in the second or third trimester and the medical appropriateness of her physician’s choice of procedures for terminating her pregnancy.⁴⁹

Our confidence in the Court’s willingness to curb such biopolitical machinations—particularly those instances when a legislative majority seeks to impose its own moral judgments and usurp medical judgments regarding what procedures are most appropriate for safeguarding the health of individual patients—has been weakened by this most recent ruling in the ongoing evolution of abortion jurisprudence.

And surely the statute was not designed to protect the lives or health of pregnant women”).

⁴⁸ *Id.* at 1633.

⁴⁹ As painstakingly depicted in the Court’s opinion, it is the framing of intact D&E as a gruesome and brutal variation of infanticide that seems to be driving the legislative agenda and, to a significant extent, the Court’s analysis. Yet, the Court’s implicit equation of a fetus aborted in a late second trimester intact D&E with the killing of a baby marks a conceptual move away from the abortion jurisprudence of *Roe* and *Casey*.

“[*Carhart*] 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.” *Id.* at 1641 (Ginsburg, J., dissenting).

