SUPREME COURT OF THE UNITED STATES

No. 99–830

DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, ET AL., PETITIONERS *v.* LEROY CARHART

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 28, 2000]

JUSTICE SCALIA, dissenting.

I am optimistic enough to believe that, one day, *Stenberg* v. *Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child— one cannot even accurately say an entirely unborn human child— proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception"— which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)— is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

Even so, I had not intended to write separately here until the focus of the other separate writings (including the one I have joined) gave me cause to fear that this case

might be taken to stand for an error different from the one that it actually exemplifies. Because of the Court's practice of publishing dissents in the order of the seniority of their authors, this writing will appear in the reports before those others, but the reader will not comprehend what follows unless he reads them first.

* * *

The two lengthy dissents in this case have, appropriately enough, set out to establish that today's result does not follow from this Court's most recent pronouncement on the matter of abortion, *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). It would be unfortunate, however, if those who disagree with the result were induced to regard it as merely a regrettable misapplication of *Casey*. It is not that, but is *Casey*'s logical and entirely predictable consequence. To be sure, the Court's construction of this statute so as to make it include procedures other than live-birth abortion involves not only a disregard of fair meaning, but an abandonment of the principle that even ambiguous statutes should be interpreted in such fashion as to render them valid rather than void. *Casey* does not permit *that* jurisprudential novelty– which must be chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue. It is of a piece, in other words, with *Hill* v. *Colorado, ante,* p. ___, also decided today.

But the Court gives a second and independent reason for invalidating this humane (not to say anti-barbarian) law: That it fails to allow an exception for the situation in which the abortionist believes that this live-birth method of destroying the child might be safer for the woman. (As pointed out by JUSTICE THOMAS, and elaborated upon by JUSTICE KENNEDY, there is no good reason to believe this is ever the case, but– who knows?– it sometime *might* be.)

I have joined JUSTICE THOMAS's dissent because I agree that today's decision is an "unprecedented expansio[n]" of our prior cases, *post*, at 35, "is not mandated" by *Casey*'s "undue burden" test, *post*, at 33, and can even be called (though this pushes me to the limit of my belief) "obviously irreconcilable with *Casey*'s explication of what its undue-burden standard requires," *post*, at 4. But I never put much stock in *Casey*'s explication of the inexplicable. In the last analysis, my judgment that *Casey* does not support today's tragic result can be traced to the fact that what I consider to be an "undue burden" is different from what the majority considers to be an "undue burden"– a conclusion that can not be demonstrated true or false by factual inquiry or legal reasoning. It is a value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill it. Evidently, the five Justices in today's majority value the former less, or the latter more, (or both), than the four of us in dissent. Case closed. There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised– a democratic vote by nine lawyers, not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"– *i.e.*, goes too far.

In my dissent in *Casey*, I wrote that the "undue burden" test made law by the joint opinion created a standard that was "as doubtful in application as it is unprincipled in origin," *Casey*, 505 U. S., at 985; "hopelessly unworkable in practice," *id.*, at 986; "ultimately standardless," *id.*, at

987. Today's decision is the proof. As long as we are debating this issue of necessity for a health-of-the-mother exception on the basis of *Casey*, it is really quite impossible for us dissenters to contend that the majority is *wrong* on the law— any more than it could be said that one is *wrong in law* to support or oppose the death penalty, or to support or oppose mandatory minimum sentences. The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the joint opinion's expressed belief that *Roe* v. *Wade* had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," *Casey*, 505 U. S., at 867, and that the decision in *Casey* would ratify that happy truce. It seemed to me, quite to the contrary, that "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since"; and that, "by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees." *Id.*, at 995–996. Today's decision, that the Constitution of the United States prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism— as well it should. I cannot understand why those who *acknowledge* that, in the opening words of JUSTICE O'CONNOR's concurrence, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society," *ante*, at 1, persist in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve that

contention and controversy rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people— where the Constitution, by its silence on the subject, left it— and let *them* decide, State by State, whether this practice should be allowed. *Casey* must be overruled.