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## A Sign of Contradiction

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# A SIGN OF CONTRADICTION

DAVID F. FORTE\*

## I.

Professor Hadley Arkes has wontedly provided an insight into the debate over partial birth abortion that is at once elegant, incisive, logical, passionate, and dismaying. He focuses on the significant fact that the Court must face the standard of deference that must be applied to abortion regulatory statutes. The current standard derived from *Planned Parenthood v. Casey*<sup>1</sup>—the “undue burden” test—is at odds with the normal deference given to Congressional statutes articulated by the Court in *United States v. Salerno*.<sup>2</sup> Under *Salerno*, a court must uphold a challenged law on its face unless the law would be invalid under any conceivable circumstance.<sup>3</sup> The “undue burden” test under *Casey*, on the other hand, instructs courts to strike down a law on its face if the law might pose a burden on the abortion right in any possible circumstance.<sup>4</sup> That view was confirmed in *Stenberg v. Carhart*, where the majority placed the burden of proof on the state to show that the statute could not possibly pose an “undue burden.”<sup>5</sup> Like most of the rest of the Court’s aberrational jurisprudence on abortion, the “undue burden” standard of review is opposed to the normal canons of interpretation.

With meticulous care, Professor Arkes unravels the oral arguments before the Supreme Court in *Gonzales v. Carhart*,<sup>6</sup> in which the validity of the federal ban on partial birth abortion is at issue, to reveal the apparent leanings of Justice Anthony Kennedy. Professor Arkes detects in Justice Kennedy’s questioning during the oral argument that Kennedy might be willing to apply the *Salerno* standard, leaving “as applied” challenges to the

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1. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

2. *United States v. Salerno*, 481 U.S. 739 (1987).

3. *Id.* at 745 (“[T]he challenger must establish that no set of circumstances exists under which the act would be valid.”).

4. *See Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013 (1993).

5. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

6. *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006), rev’d, 550 U.S. --, 127 S.Ct. 1610 (2007).

statute still available by a “pre-enforcement challenge.”<sup>7</sup> That result would permit the statute to stand and require Planned Parenthood or other plaintiffs to seek to enjoin the law as applied to a particular plaintiff. But Professor Arkes is not happy with this prospect. He believes such a result would continue to legitimize *Casey* and would co-opt conservative judges into maintaining the abortion regime because standard legal norms of interpretation would now apply. He believes such a result would take the wind out of further Congressional attempts to protect pre-born persons, even if a conservative Republican majority might return. Lastly, he remains thoroughly dismayed by the failure of the political branches, particularly the executive, to force the moral issue of the rights of unborn children onto center stage. There is no doubt but that Professor Arkes hankers after a Lincoln.

I believe that Hadley Arkes’ perception of the dynamics surrounding *Carhart* and the Congressional statute outlawing partial birth abortion is entirely accurate. He is correct, I think, in surmising that the Court may dismiss the suit and return it to the lower courts, instructing them to apply *Salerno’s* more deferential test. But I do not think, as does Professor Arkes, that this would necessarily be a bad result for the pro-life movement. If statutes may not be dismissed on their face, then there will be more room, not less, for legislative experimentation with methods that protect the unborn.

We should also remember that in the Court’s recent abortion cases, the Court has actually assisted the pro-life movement by applying standard rules of interpretation. First, in *Ayotte v. Planned Parenthood of Northern New England*,<sup>8</sup> a unanimous Supreme Court declared that lower courts must henceforth sever those parts of an abortion regulatory statute that may be unconstitutional from the rest of the statute. Previously, lower courts routinely threw out entire statutes simply because one part was deemed to constitute an “undue burden” on the abortion right. Second, in *Scheidler v. National Organization for Women*, the Court, in a unanimous decision, ruled that damages under the RICO statute are unavailable to abortion providers suing pro-life demonstrators.<sup>9</sup> No longer can the pro-abortion forces attempt to beggar the pro-life movement by foisting the damage done by the illegal actions of a few onto the mainstream pro-life movement.

There is still one other major procedural benefit that abortionists enjoy

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7. Transcript of Oral Argument at 23, *Gonzales v. Carhart*, 126 S. Ct. 1314 (No. 05–380), 2006 WL 3230271 (U.S.).

8. *Ayotte v. Planned Parenthood of Northern New England*, 544 U.S. 1048 (2005).

9. *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006) (Justice Samuel Alito took no part in the consideration or decision of the case).

that others do not. In *Singleton v. Wulff*,<sup>10</sup> the Court permitted abortion providers with standing to represent the interests of pregnant women in challenging a statute, even though there might be a clear conflict of interest between the two parties. Why, for example, should an abortion clinic have standing to represent women in contesting an informed consent law? That law is supposed to work for women against the clinic. This aberration too must go, although that issue is not now before the Supreme Court.

Finally, in evaluating his critique of the Bush administration's reticent stance on pushing for pro-life legislation, we have to credit Professor Arkes' observation, but only partially. Contrary to prevailing "educated" opinion, and even against the wishes of many leaders in his own party, the President has fought against federal funding for experimentation on embryos, making it clear that he thinks that there is a human individual present even at that early stage in life. He even used his first veto to prevent such legislation from becoming law.

Yet in all, these differences between Professor Arkes and me in evaluating the possible outcome of the Court in *Carhart* are mere quibbles between friends. Where I do have a weightier disagreement is in Professor Arkes' analysis of the constitutional basis of Congress' power to restrict partial birth abortions in the first place. And it is to that issue which I now turn.

## II.

Pro-life conservatives face a dilemma in the *Carhart* case. As originalists with a concern for the structure of federalism, we should regard congressional attempts to regulate a local moral issue such as abortion as problematic at best. On the other hand, the federal courts have been stonewalling state attempts to regulate abortion all along, leaving congressional legislation as the only possibly effective alternative. How to find a way out of this conundrum?

In the amicus brief that Professor Arkes and Professor John Eastman submitted to the Supreme Court, the authors argue that a proper application of the original understanding of the Commerce Power would not permit Congress to regulate partial birth abortions (nor most other kinds of abortion if one applies the logic), but that under the Court's current (albeit wrong) interpretation of the Commerce Power, such a regulation would be legal.<sup>11</sup> Therefore, it is acceptable under current Supreme Court doctrine

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10. *Singleton v. Wulff*, 428 U.S. 106 (1976).

11. See Brief for Hadley Arkes and The Claremont Institute Center for Constitutional Jurisprudence as Amici Curiae Supporting Respondents, *Gonzales v. Planned Parenthood*, 127 S. Ct. 31 (2006) (No. 05-1382), 2006 WL 2252506 (companion case to *Gonzales v. Carhart*).

for Congress to regulate abortion. There is something dicey about this argument. It creates a new aphorism: not having one's cake, but eating it anyway.

The fear that Professor Arkes evinces is that a man of integrity, specifically Justice Clarence Thomas, who has resolutely called for a return to an originalist Commerce Clause jurisprudence, might be tempted to join the four pro-abortion rights members of the Court to strike down the partial birth abortion statute, though not, of course, on substantive due process grounds, but on the principle that the Constitution does not grant Congress power to regulate such a local activity. But Professor Arkes consoles himself with two observations. First, he notes that when the Court repudiated a narrower construction of the Commerce Clause in *Gonzales v. Raich*,<sup>12</sup> allowing federal regulation of locally grown and locally consumed medical marijuana, and then contradicted itself in *Gonzales v. Oregon*<sup>13</sup> by striking down the attorney general's application of the same federal law to prescriptions of lethal drugs, Justice Thomas noted the blatant contradiction, but ruefully stated that the issue of the extent of the Commerce Power was now "water over the dam."<sup>14</sup> Professor Arkes suggests that Justice Thomas was staking out a position to avoid his being recruited mainly for the sake of sinking the law on partial birth abortion. In other words, *he would not play the "useful idiot."*<sup>15</sup> Professor Arkes' second consolation is that not even the opponents of the law briefed the Commerce Clause issue. Originalists like Thomas could ignore the issue because it had not been raised.

Hadley Arkes is, however, never comfortable with an ethical compromise; that is why Abraham Lincoln is rightly a hero to him. Hadley Arkes' own life and work resounds with the same ethical integrity. What Professor Arkes wishes to do is to provide an alternative justification for congressional regulation of abortion, so that Justice Thomas need not give up on or be forced to ignore his own commitment to an original understanding of the Commerce Clause. Thus, Professor Arkes offers two routes to legitimize congressional power to regulate abortion: 1) general principles, and 2) Section 5 of the Fourteenth Amendment.

### III.

The general principle that Professor Arkes relies upon is Kantian universality. Because the Supreme Court has made abortion a national

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12. *Gonzales v. Raich*, 545 U.S. 1 (2005).

13. *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006).

14. *Id.* at 941 (Thomas, J., dissenting).

15. See William Safire, *On Language*, N.Y. TIMES, Apr. 12, 1987, at §6 p. 8.

right, he argues, it follows that Congress now has the jurisdiction to legislate upon that same subject. As he put it in his brief before the Court,

Any issue that comes within the competence of the judicial branch must come, presumptively at least, within the reach of the legislative and executive branches as well. If the Court can articulate new rights under the Constitution—as in a right to abortion—the legislative branch must have the authority to legislate regarding those same rights on precisely the same ground established by the courts as the constitutional ground of those rights.<sup>16</sup>

Professor Arkes' position may have the attractiveness and the symmetry of the Kantian principle of universality. What is a right for one person must be recognized by that person as a right for all other persons. What is a subject of interest for our national Supreme Court must be recognized by that same Court as a fit subject of national interest for the other branches of government. But of course our government does not act that way and is not set up that way. However appealing the principle of universality is as stated, it does not necessarily follow as a matter of *constitutional* logic. Functions and jurisdictions differ among the various branches, within the Congress, and between the federal government and the states. There is a particularity about legislation, about the executive power, about adjudication. In fact, the genius of our government lies in its asymmetry.

The Supreme Court does not, even Professor Arkes admits, have the power to adjudicate any federal issue. Such issues must be within the jurisdictional limits of the federal courts and of the Supreme Court in particular. Some issues are not appropriate for judicial determination. Those are "political questions." The Court, moreover, does not initiate actions at will. Initiative is left up to the legislature and, to some extent, the executive departments. For his part, unless it is within his exclusive powers, the President may not exceed the mandate set for him by Congress. He cannot rewrite the laws and be faithful to their execution.<sup>17</sup> But where an action is within the President's exclusive powers, he can and will assert an independence from Congress. In turn, Congress cannot take away his Commander-in-Chief power. In other words, simply because one branch has a competency, it does not follow that other branches have a like competency. The Court has a different and more limited competency from both Congress and the President, but the exercise of their respective powers

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16. Brief for Hadley Arkes and The Claremont Institute Center for Constitutional Jurisprudence as Amici Curiae Supporting Respondents at 18, *Gonzales v. Planned Parenthood*, 127 S. Ct. 31 (2006) (No. 05-1382), 2006 WL 2252506.

17. This is the source of the recent controversy over Presidential signing statements.

does not, in any way, implicitly grant the other branches the right to exercise them as well.

Checks and balances do not define the separation of powers. They are only mechanisms for maintaining the separation. The separation itself is based on differing and largely incommensurable functions. There is a nature to legislation, a nature to execution, and a nature to adjudication. As Chief Justice John Marshall emphasized in *Marbury v. Madison*, each department of government has its own peculiar function, and each is morally bound to recognize its own limitations within that function.<sup>18</sup> Powers are distinct, not fungible. In our constitutional scheme, the sauce that waters the goose is not that which wets the gander.

Professor Arkes, as we all know, is one of the most distinguished Kantians of the current era, as all of his influential works make clear. But I do not think Kantian symmetry is the principle upon which all of our understanding of the Constitution should rest, nor, as I have explained, is it adequate to explain the asymmetrical functions of our dispersed sovereignty. As an alternative methodology, I believe that the modern school of Phenomenology may be more helpful. Where Kant seeks to demonstrate that certain irreducible first principles must exist for man, the rational animal, to be man irrespective of what his senses tell him, Phenomenology holds that the value of being human is in the apprehension of truth through the very experience of being. Kant rightly disputed Hume's skepticism, which Hume based on empirical observation. But in my view, both Kant and Hume confused experience with empiricism.

Experience constitutes the starting point of Phenomenology (but unlike Existentialism, experience is not also the end point of our understanding of ourselves). Experience tells us that we are each a self, an "I," a subject, a self-conscious being. We don't reach that truth through reason, but through the very experience of being (and a rational reflection upon it). Further, when we experience a relation with another subject, with another "I," that experience produces what the phenomenologists call "intersubjectivity," an apprehension of the selfhood of the other person, which is constituent in my understanding of my own selfhood.

Now what does this all-too-simplistic summary of Phenomenology have to do with the asymmetry of the American governmental system? It is this: You and I may be radically equal in our selfhood, and our relationship necessarily recognizes the individual selfhood of the other, but our relationship is also necessarily asymmetrical. We are not identical; we are each unique. In no way could we deny our individuality and reduce

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18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

ourselves to Rawls' original position without denying our very humanity.<sup>19</sup> Neither are we fungible in our rationality.

And here is the key: *It is out of the asymmetry of our relationship that harmony arises.* Two identical notes cannot make a chord, but two notes of asymmetrical sound waves can. Notice that in the harmonious relationship of asymmetrical entities, something is produced, something that is dependent on the individual entities, but something that nevertheless exists in its own right. The chord exists as a separate entity from the notes that make it up. The chord is one, though it be made up of different notes. It is in the asymmetry of Hadley Arkes and me that produces our friendship. We are not just friends. We are that, but we have something more. We have some *thing* called friendship. The friendship is one, though it be made up of different individuals. It is an objective reality produced by the relationship of two subjects. And it is unique because it is not the same as other friendships that Professor Arkes and I may possess with other persons. The thousands of asymmetrical contracts that we make every day when we purchase something or park our car or hire a handyman produce the thing we call the market. The reliance of each person's promise in the market over time and over the whole society produces the rule of law, which is antecedent to its articulation by the state.

Now, of course, not all asymmetry produces harmony. Two notes can produce a dissonance. A relationship between two individuals may be conflicted. Asymmetry produces harmony when the differences are complementary, most clearly seen in a successful marriage. So how do we discern what is complementary and what is not? In terms of the larger sweep of relations between humans, natural law provides the norms of complementarity, but this larger issue is well beyond the purview of this comment. But we can see that in terms of our constitutional order, the mechanism of checks and balances is designed to protect and reaffirm the complementary relationship among the differing functions of the various departments of government.

So it is that in the asymmetrical dynamic that our separation of powers is produced an entity that we call Republican Government. The American version is unique. It exists over time, and would not be the same thing were it not for the peculiar nature of our separation of powers. Thus, to say that

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19. In John Rawls' famous "original position," he hypothesizes a state in which individuals consider themselves without any of the attributes of their present individuality and particularity. In the original position, "[N]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities." JOHN RAWLS, A THEORY OF JUSTICE 12 (Harvard Univ. Press 1971).



because the Supreme Court can rule on abortion, other branches can do so as well, denies the unique personae of the other branches in our constitutional structure, and undermines the very asymmetry than can produce anything of value, whether it be music, or friendship, or marriage or republican government. It follows neither in our Constitution nor in logic nor, as I have indicated, in the nature of things, that simply because the Supreme Court can declare abortion a right, Congress can legislate upon it.

#### IV.

Professor Arkes, however, does not rest his argument solely on the proposition that what the Supreme Court can do, Congress can do also. He has sought to tie Congress' right to legislate on abortion more particularly within the text of the Constitution. He has opted for the positive law of the Constitution in Section 5 of the Fourteenth Amendment.<sup>20</sup> As he put it in his article in *First Things*, "If the Supreme Court can articulate new rights under the Constitution—if it can find, in the Fourteenth Amendment, the right to an abortion—then the legislative branch must be able to act on the same clause in the Constitution in vindicating those same rights."<sup>21</sup> But this formulation brings us other problems.

In order to explain these problems, I must oversimplify once again with an exercise in symbolic logic. Let us take A to mean a particular proposition. Say, for example, the dean of the law school declares, "Students learn better if they have frequent feedback from their professors." That we can call proposition A. Now let us state a proposition called A', which will be the following: after hearing proposition A from the dean, I as a professor shall have my students turn in one page essays each week for correction and comment. My A' is therefore derivative from A. By stating A', I am affirming the validity of A and with it, the authority of the Dean to state A. Now there can be a number of different A's. Another professor may give a number of multiple choice tests, with feedback (A'').. Or another may have weekly meetings with groups of students (A'''). But in each case their propositions are derivative and thereby validating the primary A proposition of the Dean.

But suppose, instead of giving my students a weekly essay to do, I assign them extra reading? There is no feedback. What I have done therefore is not to state A', but instead, I have stated C, a contradiction to A. A and C cannot logically co-exist. They may of course do so in time and in fact—we do live with some contradictions—but there can be no logical

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20. U.S. Const. amend. XIV, § 5.

21. Hadley Arkes, *This Heartbreaking Court*, *FIRST THINGS*, Oct. 2006, at 13.

coherence to the two of them. To hold to contrary propositions is known in the law and in philosophy as an absurdity. Either the Dean's proposition A remains valid, in which case, I must logically give up on C, or the Dean must give into to a selfish faculty member, and his proposition A falls.

But you are perhaps thinking, cannot we have an exception to A? Cannot the assignment of extra reading be an exception, E, to the rule that students must have feedback? The answer is that E is unstable. The exception E must either modify A, or it becomes C, a contradiction. So, suppose I said to my Dean, I teach legal history, and students really learn better in this course not through feedback, but through as much reading in the historical materials as possible. If the Dean accepts this proposition, my action is now an exception, an E, that is absorbed into A to create a new A, to wit: students learn better with frequent feedback from their professors, except in courses like legal history, where learning is better enhanced by extra reading.

Now what do we have with the ban on partial birth abortion? Remember Professor Arkes' argument, "If the Supreme Court can articulate new rights under the Constitution—if it can find, in the Fourteenth Amendment, the right to an abortion [proposition A]—then the legislative branch must be able to act on the same clause in the Constitution in vindicating those same rights [proposition A']."<sup>22</sup> Professor Arkes' bases the validity of his argument on the fact that it is an A' proposition. By using section 5 of the 14<sup>th</sup> Amendment, he is affirming the validity of the abortion right as part of liberty in Section 1 of the Fourteenth Amendment and the authority of the Court to define it as such. As Professor Arkes says in his seminal book, *First Things*, "If it is true to say that a thing is white, it must necessarily be white."<sup>23</sup> Using Section 5 of the 14<sup>th</sup> amendment to justify the ban on partial birth abortion is tantamount to saying, "If it is true to say (as the Supreme Court did) that abortion is a right, it must necessarily be a right." Logically and morally speaking, it would seem that the game is not worth the candle.

## V.

In truth, however, Professor Arkes does not want to affirm the validity of the abortion right or of the Court to pronounce it as such. He wants to contest it. He wants to defend the ban on partial birth abortion as a contradiction to abortion. He wants to show that there is no way a ban on partial birth abortion can even be an exception to the abortion right for the abortion right affirms that a woman may terminate her pregnancy by the

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22. *Id.*

23. HADLEY ARKES, *FIRST THINGS* 52 (Princeton Univ. Press 1986).

intentional killing of the unborn child. The law banning partial birth abortion declares that it is contrary to the dignity of a human being to turn the unborn child into a breech position, pull it out from the birth canal except for the head, puncture the base of the skull and vacuum out the brains, then crush the skull for the delivery of the dead child. That's the D&X procedure. But how can any method of intentionally killing a dependent unborn child affirm the dignity of that child? How can a D&E procedure, which tears the fetus into pieces inside the womb before extraction, be morally consistent with a ban on the D&X procedure? A ban on partial birth abortion cannot be an exception to the abortion right; it stands in utter contradiction to it, as pro-abortion rights advocates themselves know. That is why the use of section 5 of the 14<sup>th</sup> Amendment is self-contradictory. You cannot set up a contradiction to the abortion right by means that affirm its validity. That is why no matter how problematical the Commerce Clause is, or how much we may wish to make Justice Thomas comfortable in voting to uphold the ban, if we want to affirm this contradiction to the abortion right, it must be done through a means (like the Commerce Power) other than that (like section 5 of the 14<sup>th</sup> amendment), which would affirm the very thing you wish to contradict.

At least six members of the Supreme Court, perhaps eight, realize it is a contradiction. Justices Breyer, Ginsburg, Stevens and Souter know it is a contradiction and they will almost certainly vote to strike down the ban. That was evident in the discussion during the oral argument on the case of *Carhart*:

Justice Stevens: [What the law does is to require] that the lethal act be performed prior to any part of the delivery, because there is no doubt there will be a lethal act. The only issue is when it may be performed.

Solicitor General Clement: Yes, because the issue whether it's going to be performed in utero.

Justice Stevens: Whether the fetus is more than halfway out, and some of these fetuses I understand in the procedure are only four or five inches long. They are very different from a fully formed baby.

General Clement: Justice Stevens, again, you're right.

Justice Scalia: When it's halfway out, I guess you could call it either a child or a fetus.

General Clement: I think you could use either terminology, Justice Scalia. My point is nothing turns on the terminology. I think the point, though, is that when fetal demise is induced in utero, whatever else you think about that procedure, that is classically an abortion.

Justice Stevens: Wouldn't the fetus suffer a demise in seconds anyway?

Solicitor General Clement: Well, it may be seconds, it may be hours.

Stevens: Do you agree that it has no chance of surviving in most cases?

General Clement: I do think. . .if somebody tried to, with the fetus, you know, perfectly alive and in the hours that it might have to live, if somebody came in and ripped its head open, I think we'd call that murder.

Justice Ginsburg: General Clement, that's not what this case is about, because I think you have recognized quite appropriately that we're not talking about whether any fetus will be preserved by this legislation. The only question you are raising is whether Congress can ban a certain method of performing an abortion. So anything about infanticide, babies, all that, is just beside the point because what this bans is a method of abortion. It doesn't preserve any fetus because you just do it inside the womb instead of outside.<sup>24</sup>

Justices Scalia and Thomas also know that the ban on partial birth abortion is a contradiction to the abortion right, and that is why they will vote to uphold the ban. We do not know about Chief Justice Roberts and Justice Alito, but most people guess that they would agree with Justices Scalia and Thomas. That leaves Justice Kennedy as the deciding vote. By all rights Justice Kennedy should now realize that a ban of partial birth abortion does strike at the premise of the abortion right. In his impassioned dissent to *Stenberg*, which struck down state bans on partial birth abortions, Kennedy wrote,

The Court's failure to accord any weight to Nebraska's interest in prohibiting partial-birth abortion is erroneous and undermines its discussion and holding. The Court's approach in this regard is revealed by its description of the abortion methods at issue, which the Court is correct to describe as "clinically cold or callous." The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life.<sup>25</sup>

The decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including the

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24. Transcript of Oral Argument at 13–16, *Gonzales v. Carhart*, 126 S. Ct. 1314 (No. 05–380), 2006 WL 3230271 (U.S.).

25. *Stenberg*, 530 U.S. at 957 (Kennedy, J., dissenting).

life of the unborn.<sup>26</sup>

Yet Justice Kennedy seems to want to maintain the contradiction. He really believes that his understanding of *Casey* should hold sway, namely that before viability, virtually no law can restrict the abortion right, while after viability, the state has very great latitude to protect unborn human life. Kennedy not only authored the notorious solipsistic “mystery passage” in *Casey*, he relied upon it again in *Lawrence v. Texas*.<sup>27</sup>

## VI.

It seems, therefore, that Anthony Kennedy is the only justice on the Supreme Court willing to abide the contradiction between the abortion right first articulated in *Roe v. Wade* and a ban on partial birth abortion. Further, as Professor Arkes pointed out, Justice Kennedy’s questioning during the oral argument of *Carhart* indicated that he was looking for a way in which he could maintain the contradiction.

But what of Hadley Arkes and the principle of moral contradiction that he wants to establish with the ban on partial birth abortion? In the most trenchant part of his article, he demonstrates that the Supreme Court’s action in establishing abortion as a personal right was not only a contradiction to its appropriate judicial role (as even pro-choice scholars have affirmed); it was not only a contradiction to the principles of federalism; it was not only a contradiction to the separation of powers; it was not only a contradiction to the original understanding of the Fourteenth Amendment; it was not only a contradiction to the rule of law; but it was also a contradiction to the fundamental basis of the social compact created by the Constitution of 1787.

The great compromise of the Convention was to allow Congress and states each to exercise powers over individuals within each government’s respective jurisdictions. Within its delegated powers, Congress could regulate the behavior of private persons, and the executive and the courts would enforce those regulations. The Constitution, in order for it even to be accepted and the nation to survive, permitted the states to enfranchise individual persons to possess other persons as chattels. It was a contradiction to the original principles of the Declaration of Independence, and all knew it was a contradiction that continued to strain the normative bonds of union. But something truly revolutionary occurred in 1857. The Supreme Court defined slavery as a personal property right, protected from federal legislation by the due process clause of the Fifth Amendment.<sup>28</sup> It

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26. *Id.* at 979.

27. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

28. *Dred Scott v. Sanford*, 60 U.S. 393, 450 (1857).

was this event that drove Abraham Lincoln to his withering criticism of the Court. For he saw that what the Court had done was in fact to have legislated on private persons, enfranchising them to maintain other persons as property even in the face of legislation to the contrary. That contradiction, Lincoln argued, could not be abided without destroying the entire foundation of the social compact.

Thus, Professor Arkes argues, if we prevent Congress from legislating on abortion (paralleling Lincoln's assertion of the continuing right of Congress to make policy despite *Dred Scott*), we would face the prospect "that the federal courts can reach, with their decisions, to create licenses for private persons to destroy human lives—that the federal courts, in effect, can reach private persons with their decisions in the way that Congress cannot." And more pointedly, "[W]e would seem to be backing into this paradox: that the Supreme Court has become the truly supreme legislative chamber in the country, *for it may act more directly to enfranchise persons with lethal permissions, while the Congress can do nothing directly to offset that destruction of personal rights and human lives.*" Like Lincoln, Professor Arkes is, in fact, calling for political resistance to a decision of the Supreme Court that contradicts not only the fundamental moral basis of the social compact, but its fundamental structure as well.

## VII.

Professor Arkes' gallant efforts on behalf of unborn life have been ongoing for decades. As an intellectual with a practical bent for politics, he is without peer. Some years ago, during the discouraging days of the Clinton administration, Professor Arkes said to me, "Suppose we put in a bill to protect children once they are born, even after an 'unsuccessful' abortion. On what grounds could the opposition object? After all, even they say that once a child is born, it is a complete human being. Then, once we establish the principle that a dependent child just out of the womb is a person to be protected, we can ask, 'What about the child just before he is being born?'" So he set to work with scores of others. It took years, but in 2002, the President signed the Born Alive Infants Protection Act.<sup>29</sup> It mandates that if any child is born during any medical procedure, including abortion, it shall be treated as a human person under federal law. It means that hospitals are required to use their best efforts to preserve the life of a born-alive person no matter what the procedure and no matter what the condition of the infant.

Now, in defending the federal ban on partial birth abortion, Hadley

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29. 1 U.S.C. § 8 (2005).

Arkes makes good his promise. How can we protect an infant just born while accepting its cruel destruction just prior to being born? His words may be Kantian, but his quest is spiritual.

Professor Arkes and I first exchanged these remarks in the atrium of the University of St. Thomas School of Law. Behind us stood a marble statue of St. Thomas More. I reflected then that the coincidence was signal, for neither Thomas More nor Hadley Arkes could abide a moral contradiction. Both men lived their lives in the practice of ever present first principles.

We spoke these words at the beginning of advent. I recalled from the Gospel that after Christ's birth, Mary and Joseph brought him to the temple for the rite of presentation and to bestow upon him his name. There, Simeon waiting at the door received and held the child in his arms. He prophesized that the babe would be a sign of contradiction to many. In many ways does Hadley Arkes today become Simeon, pointing to the babe about to be killed as a sign of contradiction.

In any impious age, we need persons, including intellectuals, who are signs of contradiction. We need a Martin Niemöller, a Natan Shcharansky, a Joseph Ratzinger. As Simeon predicted, Christ himself became the sign of contradiction to an impious age. It is true that Jesus was the fulfillment of all there was in Jewish tradition of his time. With the Sadducees he sacrificed in the temple; with the Pharisees he preached in the synagogues; with the Essenes, the Hassidim, he prayed in the desert; with the zealots he wept for Jerusalem; with the poor and the sinful he sojourned. But to each he was also a contradiction. To the Sadducees, he said that their sacrifice was inadequate. To the Pharisees, he asked for a clean heart instead of clever words. To the Hassidim, he said that Messiah had come for all peoples. To the zealots he said that his kingdom was not of this world. To the poor and the sinful, he said that he would be their expiation, and that unworthy though they be, salvation would still be theirs.

Hadley Arkes does not come to this debate armed only with a prodigious mind and with principled Kantian consistency. He comes as a sign of contradiction: a sign of contradiction to an impious Court, a sign of contradiction to a self-righteous academy, a sign of contradiction, which is Christ.



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