

Gonzales v. Carhart: An Alternate Opinion

*Brannon P. Denning**

SUPREME COURT OF THE UNITED STATES

Nos. 05-380 and 05-1382

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LEROY CARHART ET AL.,
RESPONDENTS.

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

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.
ET AL.,
RESPONDENTS.

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

[April 18, 2007]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

*Professor and Director of Faculty Development, Cumberland School of Law at Samford University. This article is fondly dedicated to the memory of Boris I. Bittker (1916–2005), who was a master at the article-as-judicial-opinion. See Boris I. Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years after Flast v. Cohen*, 36 U. Chi. L. Rev. 364 (1969); Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 Yale L.J. 1387 (1962).

167

These cases require us to consider the constitutionality of 18 U.S.C. § 1531 (2000 ed., Supp. IV), the Partial-Birth Abortion Ban Act of 2003 (hereinafter the “Act”). After extensive trials and appeals in the two cases, the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Ninth Circuit affirmed lower court decisions enjoining the enforcement of the Act. See *Planned Parenthood Federation of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005); *Planned Parenthood Federation of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004). The Courts of Appeals based their rulings on our prior decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which, in turn, employed the framework developed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) grounding the right to abortion in the Due Process Clause of the Fourteenth Amendment. In addition to the due process issue, we granted certiorari on “whether 18 U.S.C. § 1531 is a valid exercise of congressional power under the Commerce Clause.” We conclude that it is not, thus affirming the lower courts, but without reaching the respondents’ due process claims.

I

Congress passed the Act in response to legislators’ and constituents’ disapproval of, indeed revulsion at, a particular method of late-term abortion termed “dilation and evacuation” (“D&E”), in which the physician dilates the woman and partially exposes the fetus outside the womb before piercing its brain and suctioning out the brain’s contents. This so-called “intact” D&E differs from the standard D&E because the latter sometimes results in dismemberment of the fetus during the procedure. Further, though the evidence here is disputed, the intact D&E procedure may result in less risk to the mother in terms of scarring and bleeding than the standard D&E. Congress approved the Act in 1996 and 1997, but both times it was vetoed by President Clinton. The Act was then passed again in 2003, and signed by President Bush on November 5, 2003. Specifically, the Act reads, in relevant part:

- (a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection

does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

(b) As used in this section—

(1) the term “partial-birth abortion” means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

(2) the term “physician” means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, however, that any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

...

(d) (1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician’s conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

18 U.S.C. § 1531 (2000 ed., Supp. IV). Congress included extensive findings with the Act, which we discuss below, but a threshold

question is whether Congress has the power, under the Commerce Clause of Article I, section 8, to pass the Act in the first place.¹ For the answer to that question, we must review our recent Commerce Clause jurisprudence. See *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

II

A

Time was, claims that a statute exceeded congressional power under the Commerce Clause had replaced equal protection claims as the “usual last resort of constitutional arguments. . . .” *Buck v. Bell*, 274 U.S. 200, 208 (1927). That changed in 1995 when this Court invalidated the Gun Free School Zones Act (“GFSZA”), which prohibited the knowing possession of “a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). We concluded in *Lopez* that the GFSZA regulated activity—mere possession of a firearm—that could in no way “substantially affect” interstate commerce. *Lopez*, 514 U.S. at 552. Five years later, we similarly concluded that Congress did not have power under the Commerce Clause or the Fourteenth Amendment to create a federal civil cause of action for violence motivated by “gender-based animus.” *Morrison*, 529 U.S. at 617-18 (striking down 42 U.S.C. § 13981). The activity in question, we held, did not constitute activity that had a substantial effect on interstate commerce. But two terms ago we upheld the application of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, prohibiting the sale or possession of Schedule I drugs, like marijuana, to one who grows or uses marijuana pursuant to a state law permitting such growth or possession for medicinal use. *Raich*, 545 U.S. at 32-33. We concluded in *Raich* that if Congress could, as all the litigants conceded, eliminate a market in interstate commerce *in toto*, then it could regulate every single instance of that market, no matter

¹We are aware that Congress also claimed authority to pass the statute under its “power to enforce, by appropriate legislation, the provisions of” the Fourteenth Amendment. U.S. Const. amend. XIV, § 5. Whether that basis for the Act is consistent with our interpretation of section 5 in *City of Boerne v. Flores*, 521 U.S. 507 (1997) is a question that we must leave for another time as it is not properly before this Court today.

how local or non-commercial the activity. *Id.* (“[T]he case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the [Controlled Substances Act (“CSA”)] and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.”)

The question in this case, thus, is whether the Act is more like those invalidated in *Lopez* and *Morrison*, or more like the application of the CSA upheld in *Raich*. We are aided somewhat by the nature of the respondents’ claim: unlike the respondent in *Raich*, the parties here are challenging the Act on its face, just as the GFSZA and the civil-suit provision at issue in *Morrison* were. As was noted at the time, that difference was a significant one between *Lopez* and *Morrison* on the one hand, and *Raich* on the other. Randy E. Barnett, *Limiting Raich*, 9 Lewis & Clark L. Rev. 743, 744–45 (2005) (“In one important respect, the holdings of *Lopez* and *Morrison* survive completely intact: a statute that is on its face entirely outside the powers of Congress described by the Commerce and Necessary and Proper Clauses is unconstitutional”) (footnote omitted). We will thus analyze the Act using the framework developed in *Lopez* and applied in *Morrison*, though, as will become apparent below, *Raich* is not without significance.

B

In *Lopez*, after an extensive survey of this Court’s case law, Chief Justice Rehnquist concluded that Congress could regulate three broad classes of activities: (i) the channels of interstate commerce; (ii) instrumentalities of interstate commerce, including things and persons moving in interstate commerce; and (iii) intrastate activities that nevertheless “substantially affect” interstate commerce. *Lopez*, 514 U.S. at 558–59; see also *Morrison*, 529 U.S. at 608–09. No claim is made that the Act regulates the channels of interstate commerce, or its instrumentalities. The Act criminalizes a service performed in a single state usually on a person who resides in that state. Thus, we must analyze the Act under the third of *Lopez*’s categories—local activities that have a “substantial effect” on interstate commerce.

The Act uses the language “in or affecting interstate or foreign commerce” in section (a), thus signaling Congress’s intent to exercise

its power to the maximum. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (noting that the words “affecting commerce” “are broader than the often found words of art ‘in commerce.’ They therefore cover more than ‘only persons or activities within the flow of interstate commerce’”) (quoting *United States v. American Building Maintenance Industries*, 422 U.S. 271, 276 (1975), quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)); see also *Gulf Oil Corp.*, 419 U.S. at 195 (defining “in commerce” as related to the “flow” and defining the “flow” to include “the generation of goods and services for interstate markets and their transport and distribution to the consumer”). As we noted in *Allied-Bruce Terminix*, “[t]hat phrase—‘affecting commerce’—normally signals a congressional intent to exercise its Commerce Clause powers to the full.” *Allied-Bruce Terminix Cos.*, 513 U.S. at 273. Therefore, if the Act is to be upheld, it must satisfy the *Lopez* and *Morrison* factors used to determine whether intrastate activity nevertheless substantially affected commerce such that it could be reached by Congress.

C

In *Lopez*, the majority opinion listed criteria by which the impact on interstate commerce could be assessed: (i) whether the regulated activity was economic or non-economic; (ii) whether there was a jurisdictional element tying the regulated activity to interstate commerce so as to permit a case-by-case inquiry when the connection to interstate commerce was not apparent; (iii) whether the statute was accompanied by congressional findings describing the connection of the regulated activity to interstate commerce; (iv) whether the regulation was part of a nationwide regulatory scheme whose efficacy would be undermined if Congress could not reach the activity; and (v) whether accepting arguments regarding the connection of interstate activity would mean, as a practical matter, that the commerce power had no enforceable limit.² *Lopez*, 514 U.S. at 559–61. Justices Kennedy and O’Connor also urged the Court to consider

²This has been referred to as the “non-infinity principle,” *i.e.*, no interpretation of the Commerce Clause that permits Congress infinite power under that clause can be the correct interpretation of it. See David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 Conn. L. Rev. 59, 69 (1997). We think this term accurately—and more elegantly—captures the point that we were trying to make in *Lopez*.

whether this was an area of traditional state (as opposed to federal) concern. *Id.* at 577 (Kennedy, J., concurring) (“Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory”). The Court included this in its list of factors in *Morrison*, 529 U.S. at 618 (noting that in striking down the civil suit provision, “we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce *has always been the province of the States*”) (emphasis added).

Questions remained after *Lopez*. For example, it was unclear whether the presence of all factors was *required* to support a finding of “substantially affects” interstate commerce. If not, then which ones were more important? See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez*, or *What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis. L. Rev. 369, 375–78 (discussing questions that remained after *Lopez*). *Lopez* itself was not clear; we offered no rank ordering of the criteria, nor prescribed relative weights to be assigned to each factor.

Five years later, *Morrison* answered some, if not all of these questions. The Court clarified that the economic or non-economic nature of the regulated activity was “central to our decision in” *Lopez*. 529 U.S. at 610–11 (“[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case”); we also stressed the importance of the jurisdictional element. 529 U.S. at 611–12 (“Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that [the statute] is sufficiently tied to interstate commerce, Congress elected to cast [its] remedy over a wider, and more purely intrastate, body of violent crime”) (footnote omitted).

Further, though the civil suit provision in question was accompanied by extensive congressional findings, the Court emphasized that mere recitation of a connection between the regulated activity and interstate commerce would not suffice. In our opinion, the findings in *Morrison* were “substantially weakened by the fact that they rel[ied] so heavily on a method of reasoning that we have already

rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* at 615. Specifically, we rejected the rationale that would have permitted Congress "to regulate any crime as long as the nationwide, aggregate impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.*

With these principles in mind, we turn to the question of the Act's constitutionality.

III

A

The first question concerns the nature of the regulated activity; the correct characterization of the regulated activity lies at the heart of our recent Commerce Clause jurisprudence. As commentators noted at the time, *Lopez* tended to use the terms "economic" and "commercial" interchangeably. Reynolds & Denning, *supra*, at 375 & n.39 (quoting *Lopez*, 514 U.S. at 560, 561, 566, 567). In *Morrison*, however, we focused on whether the regulated activity was, in some sense, "economic," even if it was not strictly "commercial." 529 U.S. at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case"). While we declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity" in *Morrison*, we noted that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613.

Applying the teachings of *Lopez* and *Morrison*, we concluded in *Raich* that "[u]nlike those at issue in [our prior cases] the activities regulated by the [Controlled Substances Act] are quintessentially economic," which, the Court went on to define as "the production, distribution, and consumption of commodities." 545 U.S. at 25. Since the CSA regulated "the presumption, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market," the Court had "no difficulty concluding that Congress acted rationally in determining that" locally-produced, consumed, or possessed marijuana—even for medicinal purposes—was covered by the CSA. *Id.* at 26–27. As Justice Scalia explained in his concurring opinion:

In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including

marijuana. The Commerce Clause unquestionably permits this. . . . To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with intent to distribute) and noneconomic activities (simple possession). . . . That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress’s authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

Id. at 39–40 (Scalia, J., concurring).

Following our cases, then, the question presented by the Act is whether a prohibition on the provision of even a noncommercial, locally-rendered, medical service by a physician should be considered “economic”?

The government asserts vigorously that it is regulating the provision of medical services, an economic activity. In part, the government relies on the definition of “economic” activity adopted in *Raich*. Specifically, the Government urges us to view abortion merely as one class of activities within the broad field of “health care,” which, because of its size, the Government argues, is surely amenable to congressional regulation. In its brief and at oral argument it quoted one expert who testified that

The provision of abortion services is commerce . . . at least where payment is received from some source. . . . Abortion services would generally be classed with the broader category of medical and health care services for purposes of Commerce Clause analysis. Health care constitutes . . . a large and significant portion of the national economy, and it would seem absurd to hold that an industry comprising one-seventh of the national economy could not be regulated under the Commerce Clause.

Partial Birth Abortion: Hearing on H.R. 1833 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong. 102 (1995) (testimony of David M. Smolin, Professor of Law, Cumberland School of Law). Further, the Government cites our conclusion in

Raich that if Congress can eliminate the interstate market in a particular item or activity, it may apply its prohibition to even the most local, non-commercial instance, at least as long as Congress had a rational basis for concluding that leaving those local instances “outside federal control would . . . affect price and market conditions” generally. *Raich*, 545 U.S. at 19.

We begin our analysis with a couple of observations. First, our decision in *Raich* offers little guidance for deciding the present case. In it, the constitutionality of the Controlled Substances Act itself, as opposed to a particular application of it, was not at issue; plaintiffs conceded its constitutionality. *Id.* at 15 (“Respondents in this case do not dispute that the passage of the CSA, as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress’ commerce power. . . . Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority.”). Here, by contrast, the very ability to regulate partial-birth abortions *at all* is the issue.

Second, Professor Smolin’s testimony, on which the Government has heavily relied, is not helpful to its case for two reasons. Whatever the scope of Congress’s power to regulate “health care” generally—a question that is not before us today—the fact is that the Act purports to regulate only one aspect of health care: partial-birth abortions. Further, the Act itself regulates *all* partial-birth abortions, not simply those in which the physician performing the procedure receives a fee.

As one commentator put it, the Act “regulates only the noneconomic part of the transaction, namely, the performance of the medical procedure.” Allen Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 *Const. Comment.* 441, 446 (2003–2004). This is not surprising, of course, since “Congress prohibited partial-birth abortions on the ground that they are morally objectionable (like all crimes), not because they are commercial activity requiring uniform national regulation.” Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 *Harv. J. on Legis.* 319, 335 (2005).

In *Lopez* and *Morrison*, we declined to characterize as “economic” either simple possession of an item not otherwise connected to interstate commerce by the statute or violence committed against a victim because of their gender. *Lopez*, 514 U.S. at 516 (noting that the Act

was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”) (footnote omitted); *Morrison*, 529 U.S. at 613 (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity”). In this case, we decline to find that a statute criminalizing the performance of a medical procedure on another is, without more, “economic” activity. One commentator put it succinctly:

The performance of a partial-birth abortion bears a close resemblance to the noneconomic possession of a gun. Just as possession of a gun can occur without any commercial element, the performance of a partial-birth abortion—indeed, the performance of any medical procedure—can be accomplished without a commercial overlay. It may be that most medical procedures, including partial-birth abortions, are done for hire. But this does not alter the simple fact that the procedure itself, unadorned by any commercial exchange, is noneconomic in the same sense as gun possession.

Ides, supra, at 446.

The Government’s argument rests on the premise that provision of a service, like a partial-birth abortion, involves some sort of wealth transfer from one person to another and, thus, in the broadest possible sense of the word could be understood to be “economic.” We reject such a broad construction of that term for several reasons.

First, the Constitution speaks of the ability to regulate “commerce among the several states”; while we need not adopt a cramped construction of that phrase and limit Congress to regulating only that activity that could be considered “commercial,” we hesitate to err in the other direction, and risk losing sight of Chief Justice Marshall’s observation that the “enumeration” of powers “presupposes something *not* enumerated.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 74 (1824) (emphasis added). To forget Chief Justice Marshall’s admonition would be to countenance what this Court has always denied: that the Federal Government possesses a general police power akin to that retained by state governments. *See Lopez*, 514 U.S. at 566 (responding to dissent’s claim that decision produced “legal uncertainty” with observation that “[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation”).

Even were we to accept the Government's argument that performance of a partial-birth abortion is "economic," it is not sufficient for us to conclude that the Act is constitutional. At most such a conclusion merely renders the activity eligible for aggregation, which may demonstrate that the regulated activity "substantially affects" interstate commerce as our case law requires. Figures given for the number of partial birth abortions vary widely; some claim that 500 or fewer are performed each year, while others claim the number performed annually is closer to ten times that. Whatever number is correct, it is a tiny number of procedures compared to other fairly common medical procedures performed around the country. For example, in 1996, the last year comprehensive statistics are available, over 287,000 children under the age of 15 underwent tonsillectomies. Joseph Gigante, *Tonsillectomy and Adenoidectomy*, 26 *Pediatrics in Review* 199 (2005). According to the American Academy of Family Physicians, over one million caesarian sections are performed each year. American Academy of Family Physicians, *Caesarian Delivery in Family Medicine*, at <http://www.aafp.org/online/en/home/policy/policies/c/cesarean.html> (2003). Even when considered alongside the number of abortions generally performed in this country—nearly 750,000 of which were performed in 2003, according to the Centers for Disease Control—the number of partial-birth abortions are miniscule by comparison.

If one attempts to assess the monetary value represented by paid partial-birth abortions using the largest estimate of number of procedures performed, moreover, the total value, according to one estimate, was only \$12 million.³ If that number is small when compared to the fees generated by *all* abortions, estimated to "generate[] hundreds of millions of dollars in direct fees (and many more times that amount in overall economic activity)," Pushaw, *supra*, at 334 n.104, it is infinitesimal when compared to the \$1.8 trillion spent on U.S. health care in 2004.⁴

Moreover, other factors support our conclusion that the Government fails to demonstrate that the activities regulated by the Act "substantially affect" interstate commerce.

³Pushaw, *supra*, at 334 & n.104. He notes that this is only a rough estimate, given the scarcity of "accurate financial statistics on partial-birth abortions. . . ." *Id.* n.104.

⁴Marc Kaufman & Rob Stein, *Record Share of Economy Spent on Health Care*, Wash. Post, Jan. 10, 2006, at A01.

B

The Government points to the presence of the Act's "jurisdictional hook," which, it argues, distinguishes it from the acts invalidated in both *Lopez* and *Morrison*, and insulates it from a facial challenge like that mounted here. It is true that we regarded the absence of the hook as an important factor in our previous decisions; however, we never intimated that the mere presence of such language would, in all cases, preclude a finding that a statute exceeded Congress's powers. To do otherwise would be to make "*Lopez* stand[] for nothing more than a drafting guide. . . ." *Raich*, 545 U.S. at 46 (O'Connor, J., dissenting).

The language of the Act reads: "Any physician who, *in or affecting interstate or foreign commerce*, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both." 18 U.S.C. § 1531 (emphasis added). As we noted above, the Act purports to do more than, for example, punish a physician or a patient who crosses state lines to perform or receive a partial-birth abortion. Moreover, it does not seek to prohibit the use of anything that *itself* has traveled in interstate commerce to perform a partial-birth abortion. *See, e.g.*, 18 U.S.C. § 2252(a)(4)(B) (prohibiting possession of child pornography produced with material that had traveled in interstate commerce); *United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999) (upholding statute against constitutional challenge).

It is difficult to see how a physician could meaningfully perform a procedure "in" interstate commerce, unless the physician performed the procedure in a mobile unit that kept moving throughout the operation. Whether the performance of partial-birth abortions "affects" interstate commerce does not get us very far in our inquiry either, because it simply raises that question that we are considering: Do partial-birth abortions substantially affect the national economy?⁵

C

As we noted in *Lopez* and *Morrison*, where an effect on interstate commerce is not apparent, we can look to congressional findings to

⁵As one scholar put it, the Act's "jurisdictional element does not in any fashion resolve the critical question—namely, whether the performance of partial-birth abortions, either singly or in the aggregate, *substantially* affects interstate commerce." *Ides, supra*, at 458.

assist us in our inquiry. *Lopez*, 514 U.S. at 562 (“[A]s part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce. . . .”), 563 (noting that “congressional findings [can] enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye”); *Morrison*, 529 U.S. at 612 (quoting *Lopez*).

The Act was accompanied by extensive findings—set forth in the Appendix— regarding the nature of the procedure, the frequency, and the lack of need for a health exception. Most of the findings detail the deference that this Court has claimed to show to congressional findings in particular cases. Other findings express Congress’s opinion that partial-birth abortion is a morally repugnant procedure that ought never be performed, and need never be performed to protect a mother’s health. Significantly, *none* of the findings address the connection between partial-birth abortions and the economy or interstate commerce, much less describing how, even in the aggregate, partial-birth abortions “substantially affect” the latter. Thus, we even lack evidence that Congress had a rational basis for concluding that substantial effects are present.

D

Further, the Act is not “part of a national regulatory scheme” whose efficacy would be undermined if the local activity is not reached. *See Lopez*, 514 U.S. at 561 (“Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”). This case is unlike *Raich* or *Wickard*, in which a goal clearly within federal power—the elimination of an interstate market in Schedule I drugs or raising the price of agricultural commodities through limits on production—would be compromised by individual evasions, no matter how minor or trivial each might be in and of itself. As we declared in *Raich*:

Wickard . . . establishes that Congress can regulate purely intrastate activity that it not itself “commercial,” in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the

interstate market in that commodity. . . . While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress's commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on the supply and demand in the national market for that commodity.

545 U.S. at 18–19 (footnote omitted).

In contrast to those cases, the Act represents a stand-alone ban on a medical procedure that members of Congress found inhumane and immoral. The regulated activity thus looks more like the simple possession of a gun in a school zone or the creation of a civil remedy for gender-based violence invalidated in *Lopez* and *Morrison*. At the very least, this is not a case involving an attempt to carve out a class of regulated activities as too local or too noncommercial to be included within the class of activities Congress clearly has authority to regulate.

E

In *Lopez*, Justices Kennedy and O'Connor criticized the Gun Free School Zones Act for usurping the state role in both education and in the prevention and punishment of crime. Moreover, it noted that the federal law preempted state experimentation, depriving policymakers of the results from experiments in state "laboratories of democracy."

The statute before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evidence from its territorial operation. There are over 100,000 elementary and secondary schools in the United States.

Lopez, 514 U.S. at 583 (Kennedy, J., concurring).

Similarly, the licensing and regulation of the medical profession—and of most professions in general—is and has been the traditional province of states. If we concluded that Congress could, by exercising its commerce power, ban a procedure performed, at most, a few thousand times a year, then certainly Congress ban other procedures to which its membership objected on moral grounds. In 2004, for example, there were 11.9 million surgical and nonsurgical cosmetic procedures performed, including over 300,000 breast augmentations. The American Society for Aesthetic Plastic Surgery, Press Release, *11.9 Million Cosmetic Procedures in 2004*, available at <http://www.surgery.org/press/news-release.php?iid=395> (Feb. 17, 2006). Were we to uphold the Act, we could see no reason Congress could not, on moral grounds, outlaw non-essential plastic surgery.

We are unwilling to start down this road, especially when there has been no showing that states are incapable of banning partial-birth abortions on their own, as long as they abide by this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating Nebraska's partial-birth abortion statute based on the lack of a "health" exception). Thirty-one states have laws that ban partial-birth abortions in whole or in part. Guttmacher Institute, *State Policies in Brief: Bans on "Partial-Birth" Abortions*, available at http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf (Aug. 1, 2007). This is not an area in which problems of coordination necessitate a uniform policy imposed by Congress, or where states are constitutionally barred from legislating at all.

F

This last point also implicates what others have termed the "non-infinity principle," i.e., that any interpretation of a constitutional power that, in essence, means that power has no judicially-enforceable limit is, perforce, incorrect. In *Lopez*, we rejected the Government's proffered arguments that a federal ban on gun possession in a school zone was justified because of the costs crime imposed on the national economy and because unsafe schools produced unproductive citizens who would eventually affect the national economy. We wrote:

The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless

of how tenuously they relate to interstate commerce. . . . Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens. . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Lopez, 514 U.S. at 564. We declined "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power. . . ." *Id.* at 567. In *Morrison*, we rejected a similar "costs of crime" argument contained in the congressional findings that accompanied the civil suit provision of the Violence Against Women Act:

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violence crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption.

529 U.S. at 615.

Unlike in *Morrison*, Congress appended no findings, and there is little meaningful testimony as to how partial-birth abortions affect, much less substantially affect interstate commerce—even when aggregated. Thus, we are left to speculate on why Congress might have concluded that partial-birth abortion substantially affects interstate commerce. Unfortunately, none of the reasons that we can even imagine are sufficient to render the Act constitutional.

First, there is the claim that, whether 500 or 5,000, the annual potential life eliminated by partial-birth abortions would, over time, generate productive citizens who, when employed, would substantially affect interstate commerce over their lifetimes. Not only is this precisely the sort of attenuated chain of causation that we rejected in *Lopez* and *Morrison*, its implications are fairly radical. It would, for example, potentially validate federal power to regulate regarding marriage, procreation, and childcare that even our dissenting colleagues in *Lopez* foreswore. *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting) ("To hold this statute constitutional is not to 'obliterate' the

‘distinction between what is national and what is local’ . . . nor is it to hold that the Commerce Clause permits the Federal Government to ‘regulate any activity that it found was related to the economic productivity of individual citizens,’ to regulate ‘marriage, divorce, and child custody,’ or to regulate any and all aspects of education’’).

The other potential justification for the Act—that any medical procedure is “economic” and thus can be reached by Congress through the Commerce Clause—is equally problematic. For reasons articulated above, we decline to adopt such a broad definition of “commerce.” To do so would fly in the face of the text of the clause itself, be inconsistent with what our case law has said about the effect the regulated activity must have on the national economy, and would convert the Commerce Clause into a federal police power. All human activity, after all, can be understood to be economic in some sense.

Thus, in order to accept that the Act regulates activity that substantially affects interstate commerce, we would again have to “pile inference upon inference” in ways we have previously declined to do. We decline to do so here, as well.

IV

We do not lightly invalidate an act of Congress, but our duty here is clear. Based on the record before us, we cannot conclude that the Act—regulating as it does local medical procedures, whether or not performed for a fee—“substantially affects” interstate commerce, as our cases require. The procedure regulated by the Act seems to us more akin to the simple possession or gender-motivated violence in *Lopez* and *Morrison*, than to either the local possession, production, or use of marijuana in *Raich* or the wheat quota enforced in *Wickard*, a case we have described as “the most far reaching example of Commerce Clause authority over intrastate activity. . . .” *Id.* at 560. Even assuming *arguendo* that partial-birth abortions constitute economic activity, thus subject to aggregation, we are unable to conclude that the aggregate effect on interstate commerce of *all* partial-birth abortions is “substantial.”

The judgments of the United States Courts of Appeals for the Eighth and Ninth Circuits are affirmed.

It is so ordered.

APPENDIX TO OPINION OF ROBERTS, C.J.

SEC. 2 FINDINGS

The Congress finds and declares the following:

(1) A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion—an abortion in which a physician delivers an unborn child’s body until only the head remains inside the womb, punctures the back of the child’s skull with a Sharp instrument, and sucks the child’s brains out before completing delivery of the dead infant—is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.

(2) Rather than being an abortion procedure that is embraced by the medical community, particularly among physicians who routinely perform other abortion procedures, partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives. As a result, at least 27 States banned the procedure as did the United States Congress which voted to ban the procedure during the 104th, 105th, and 106th Congresses.

(3) In *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000), the United States Supreme Court opined “that significant medical authority supports the proposition that in some circumstances, [partial birth abortion] would be the safest procedure” for pregnant women who wish to undergo an abortion. Thus, the Court struck down the State of Nebraska’s ban on partial-birth abortion procedures, concluding that it placed an “undue burden” on women seeking abortions because it failed to include an exception for partial-birth abortions deemed necessary to preserve the “health” of the mother.

(4) In reaching this conclusion, the Court deferred to the federal district court’s factual findings that the partial-birth abortion procedure was statistically and medically as safe as, and in many circumstances safer than, alternative abortion procedures.

(5) However, the great weight of evidence presented at the *Stenberg* trial and other trials challenging partial-birth abortion bans, as well as at extensive congressional hearings, demonstrates that a partial-birth abortion is never necessary

to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed, and is outside of the standard of medical care.

(6) Despite the dearth of evidence in the *Stenberg* trial court record supporting the district court's findings, the United States Court of Appeals for the Eighth Circuit and the Supreme Court refused to set aside the district court's factual findings because, under the applicable standard of appellate review, they were not "clearly erroneous." A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985). Under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574.

(7) Thus, in *Stenberg*, the United States Supreme Court was required to accept the very questionable findings issued by the district court judge—the effect of which was to render null and void the reasoned factual findings and policy determinations of the United States Congress and at least 27 State legislatures.

(8) However, under well-settled Supreme Court jurisprudence, the United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the "clearly erroneous" standard. Rather, the United States Congress is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence.

(9) In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court articulated its highly deferential review of Congressional factual findings when it addressed the constitutionality of section 4(e) of the Voting Rights Act of 1965. Regarding Congress' factual determination that section 4(e) would assist the Puerto Rican community in "gaining non-discriminatory treatment in public services," the Court stated

that “[i]t was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support section 4(e) in the application in question in this case.” *Id.* at 653.

(10) *Katzenbach’s* highly deferential review of Congress’s factual conclusions was relied upon by the United States District Court for the District of Columbia when it upheld the “bail-out” provisions of the Voting Rights Act of 1965, 42 U.S.C. §1973c, stating that “congressional fact finding, to which we are inclined to pay great deference, strengthens the inference that, in those jurisdictions covered by the Act, state actions discriminatory in effect are discriminatory in purpose.” *City of Rome, Georgia v. U.S.*, 472 F. Supp. 221 (D. Colo. 1979), *aff’d*, 46 U.S. 156 (1980).

(11) The Court continued its practice of deferring to congressional factual findings in reviewing the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. See *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997) (*Turner II*). At issue in the *Turner* cases was Congress’ legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be “seriously jeopardized.” The *Turner I* Court recognized that as an institution, “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon an issue as complex and dynamic as that presented here.” 512 U.S. at 665–66. Although the Court recognized that “the deference afforded to legislative findings does ‘not foreclose our independent judgment of the facts bearing on an issue of constitutional law,’” its “obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress’ factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.” *Id.* at 666.

(12) Three years later in *Turner II*, the Court upheld the “must-carry” provisions based upon Congress’ findings, stating the Court’s “sole obligation is ‘to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.’” 520 U.S. at 195. Citing its ruling in *Turner I*, the Court reiterated that “[w]e owe Congress’ findings deference in part because the institution ‘is far better equipped than the judiciary to “amass and evaluate the vast amounts of data” bearing upon’ legislative questions,” *id.* at 195, and added that it “owe[d] Congress’ findings an additional measure of deference out of respect for its authority to exercise the legislative power.” *Id.* at 196.

(13) There exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a “health” exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care. Congress was informed by extensive hearings held during the 104th, 105th, and 107th Congresses and passed a ban on partial-birth abortion in the 104th, 105th, and 106th Congresses. These findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman, poses serious risks to a woman’s health, and lies outside the standard of medical care, and should, therefore, be banned.

(14) Pursuant to the testimony received during extensive legislative hearings during the 104th, 105th, and 107th Congresses, Congress finds and declares that:

(A) Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure. Those risks include, among other things: an increase in a woman’s risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position, a procedure which, according to a leading obstetrics textbook, “there are very few, if any, indications for . . . other than for delivery of a second twin”; and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child’s skull while he or she is

Gonzales v. Carhart: *An Alternate Opinion*

lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.

(B) There is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures. No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods. Furthermore, there have been no articles published in peer-reviewed journals that establish that partial-birth abortions are superior in any way to established abortion procedures. Indeed, unlike other more commonly used abortion procedures, there are currently no medical schools that provide instruction on abortions that include the instruction in partial-birth abortions in their curriculum.

(C) A prominent medical association has concluded that partial-birth abortion is “not an accepted medical practice,” that it has “never been subject to even a minimal amount of the normal medical practice development,” that “the relative advantages and disadvantages of the procedure in specific circumstances remain unknown,” and that “there is no consensus among obstetricians about its use.” The association has further noted that partial-birth abortion is broadly disfavored by both medical experts and the public, is “ethically wrong,” and “is never the only appropriate procedure.”

(D) Neither the plaintiff in *Stenberg v. Carhart*, nor the experts who testified on his behalf, have identified a single circumstance during which a partial-birth abortion was necessary to preserve the health of a woman.

(E) The physician credited with developing the partial-birth abortion procedure has testified that he has never encountered a situation where a partial-birth abortion was medically necessary to achieve the desired outcome and, thus, is never medically necessary to preserve the health of a woman.

(F) A ban on the partial-birth abortion procedure will therefore advance the health interests of pregnant women seeking to terminate a pregnancy.

(G) In light of this overwhelming evidence, Congress and the States have a compelling interest in prohibiting partial-birth abortions. In addition to promoting maternal

health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life.

(H) Based upon *Roe v. Wade*, 410 U.S.113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in *Roe* when the Court noted, without comment that the Texas parturition statute, which prohibited one from killing a child “in a state of being born and before actual birth,” was not under attack. This interest becomes compelling as the child emerges from the maternal body. A child that is completely born is a full, legal person entitled to constitutional protections afforded a “person” under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a “person.” Thus, the government has a heightened interest in protecting the life of the partially-born child.

(I) This, too, has not gone unnoticed in the medical community, where a prominent medical association has recognized that partial-birth abortions are “ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside of the womb.” According to this medical association, the “‘partial birth’ gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body.”

(J) Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life. Partial-birth abortion thus appropriates the terminology and techniques used by obstetricians in the delivery of living children—obstetricians who preserve and protect the life of the mother and the child—and instead uses those techniques to end the life of the partially-born child.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun

Gonzales v. Carhart: *An Alternate Opinion*

the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

(M) The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

(N) Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting—indeed it must act—to prohibit this inhumane procedure.

(O) For these reasons, Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community; poses additional health risks to the mother; blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth; and confuses the role of the physician in childbirth and should, therefore, be banned.

117 Stat. 1201 (2003).

