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STUDENT COMMENT

EXPANDING CONGRESSIONAL POWER IN GONZALES V. CARHART

Justin Weinstein-Tull[*]

IN *Gonzales v. Carhart* (*Carhart II*),[1] the Court delivered a setback to a woman's right to choose by affirming the constitutionality of the Partial-Birth Abortion Ban Act of 2003 ("Ban Act").[2] In doing so, however, the Court enlarged the scope of congressional power. The Court deferred to Congress's factual findings and allowed Congress to determine for itself that an exception for the health of the mother was unnecessary. This deference, although disheartening in *Carhart II*, is promising for future civil rights legislation.

Seven years ago in *Stenberg v. Carhart* (*Carhart I*),[3] the Court held that substantive due process requires that every piece of abortion legislation contain an exception for the health of the mother. *Carhart I* interpreted *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] to mandate a health exception when "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health."[5] The Court in *Carhart I* did not specify whether Congress or the Court is

[*] Yale Law School, J.D. expected June 2008.
[1] 127 S. Ct. 1610 (2007).
[2] 18 U.S.C. § 1531 (2000 & Supp. III 2003).
[3] 530 U.S. 914 (2000).
[4] 505 U.S. 833 (1992).
[5] *Carhart I*, 530 U.S. at 938.

the appropriate body to judge the strength of the medical authority and determine whether a health exception is necessary.

Writing for the Court in *Carhart II*, Justice Kennedy made it clear that it is Congress that has the authority to make factual findings on the need for the health exception. Moreover, the Court found that this authority directly implicated Congress's power to enact legislation. Sidestepping three lower courts' conclusions that Congress erred in finding that the Ban Act would not endanger women's health,[6] the Court in *Carhart II* found that the health exception requirement was "too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."[7] This passage is startling not only because it suggests that government regulation that infringes on a constitutional right is subject only to rational basis review, but also because Justice Kennedy is privileging congressional findings of scientific fact over judicial findings of scientific fact generated in the face of a judicially imposed safety requirement.

Deferring to congressional judgment that legislation complies with a constitutionally mandated requirement moves the Court away from its congressional power doctrine born in *Boerne v. City of Flores*.[8] In *Boerne*, the Court struck down the Religious Freedom Restoration Act on the ground that Congress did not have power under Section 5 of the Fourteenth Amendment to pass the Act. *Boerne* was grounded in the legal belief that the Court, and not Congress, is the sole interpreter of the Constitution. The *Boerne* Court held that through Section 5, Congress "has been given the power 'to enforce,' not the power to determine what constituted a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'"[9] The Court cre-

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[6] See Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1011 (D. Neb. 2004); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 482 (S.D.N.Y. 2004); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1019 (N.D. Cal. 2004).

[7] *Carhart II*, 127 S. Ct. at 1639.

[8] 521 U.S. 507 (1997).

[9] Id. at 519 (alterations in original).

ated a test to determine whether a piece of legislation appropriately enforces the Fourteenth Amendment, or impermissibly alters its meaning: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[10] Civil rights legislation that Congress seeks to pass pursuant to its Section 5 powers must satisfy this judicially imposed requirement.

Since *Boerne*, the Court has three times struck down civil rights statutes on the ground that Congress exceeded its Commerce Clause and Section 5 powers because the legislation it enacted failed the congruence and proportionality test.[11] In each case, the Court paid close attention to the factual findings made by Congress. Yet in each case, the Court declined to defer to Congress and judged its factual findings to be insufficient. In *Kimel v. Florida Board of Regents*, the Court found that the Age Discrimination in Employment Act failed the congruence and proportionality test, partially because the evidence compiled to show that Congress carefully considered the evil it intended to rectify (age discrimination) "consist[ed] almost entirely of isolated sentences clipped from floor debates and legislative reports."[12] And again in *Board of Trustees of the University of Alabama v. Garrett*, the Court invalidated a section of the Americans with Disabilities Act for failing to meet the same congruence and proportionality test.[13] The Court dissected and dismissed the congressional record, this time designed to demonstrate pervasive discrimination against the disabled. Although Justice Breyer, in dissent, described Congress's findings as a "vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities,"[14] the Court did not defer to Congress as a constitutional factfinder and found these vast findings lacking. In both cases, the Court dismissed legis-

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[10] Id. at 508.

[11] See Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Age Discrimination in Employment Act).

[12] *Kimel*, 528 U.S. at 89.

[13] *Garrett*, 531 U.S. at 356.

[14] Id. at 377 (Breyer, J., dissenting) (citations omitted).

lative records and findings as insufficient to satisfy the judicially imposed congruence and proportionality test.

But perhaps the most instructive comparison to *Carhart II* comes from *United States v. Morrison*.[15] In *Morrison*, the Court struck down the civil remedy provision of the Violence Against Women Act because it found that gender-motivated violence did not have a substantial effect on interstate commerce. In both *Morrison* and *Carhart II*, Congress passed a statute pursuant to its Commerce Clause power. In both cases, Congress was restricted by Court-imposed constitutional requirements: in *Morrison*, Congress was required to show that the gender-motivated violence it sought to prevent "substantially affect[ed] interstate commerce"[16]; in *Carhart II*, Congress was required to show that prohibiting intact dilation and extraction would not adversely affect women's health. Yet the Court assessed Congress's approach to the two requirements differently.

In *Morrison* (an opinion that Justice Kennedy joined), the Court was clear that congressional findings deserved little deference. To show that gender-motivated violence affected interstate commerce, Congress had developed a massive record of factual findings, including "testimony from physicians and law professors . . . reports on gender bias from task forces in 21 States, and . . . specific factual findings in the eight separate Reports issued by Congress and its committees."[17] But the Court held that "'[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'"[18] The question of Congress's authority to exercise its Commerce Clause power "'is ultimately a judicial rather than a legislative question.'"[19]

In *Carhart II*, by contrast, Justice Kennedy treated Congress's factual findings with a critical deference.[20] The striking similarity between Justice Kennedy's congressional deference argument in

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[15] 529 U.S. at 598.
[16] Id. at 609.
[17] Id. at 629–31 (Souter, J., dissenting) (citations omitted).
[18] Id. at 614 (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).
[19] Id.
[20] *Carhart II*, 127 S. Ct. at 1637 ("Although we review congressional factfinding under a deferential standard, ... [t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

Carhart II[21] and Justice Souter's *dissent* in *Morrison* illustrates how far Justice Kennedy has strayed from the majority opinion in *Morrison*. In *Morrison*, Justice Souter wrote that "[t]he business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact."[22] Though "the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed," Justice Souter wrote, the correct question is whether Congress's "conclusion [is] irrational given the data amassed."[23] Although Justice Kennedy mildly criticized Congress's findings in *Carhart II*, he ultimately deferred to Congress on matters of medical safety and moved the Court nearer to the deferential position that Justice Souter advocated in his *Morrison* dissent. There is, of course, a difference between findings that show economic influence on interstate commerce and findings that evaluate medical safety. There is also a difference between what Congress must find in order to exercise its Commerce Clause and Section 5 powers. The critical similarity between these cases, however, is that the Court must decide whether or not to defer to the technical findings that Congress makes in response to constitutional requirements set by the Court. In *Carhart II*, the Court moved away from its recent precedent and deferred.

Furthermore, Justice Kennedy's argument in *Carhart II* that "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty"[24] raises the question of what qualifies as "scientific uncertainty." The Court's argument for broad discretion in the face of scientific uncertainty derives from a pre-*Boerne* case, *Marshall v. United States*, where the Court upheld the Narcotic Addict Rehabilitation Act of 1966.[25] In *Marshall*, the Court held that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem

[21] See supra note 7 and accompanying text.
[22] *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).
[23] Id. at 634.
[24] *Carhart II*, 127 S. Ct. at 1636.
[25] 414 U.S. 417 (1974).

might make wiser choices."[26] That Justice Kennedy invoked a case from an era when the Court was more dedicated to judicial restraint suggests that "scientific" could be extended beyond the medical sciences.

Although the *Marshall* Court does not fully explain the logic behind its argument for congressional flexibility, we can extrapolate two plausible rationales consistent with extending its argument to areas of scientific uncertainty broadly defined. First, in areas of scientific uncertainty, Congress's superior factfinding ability is particularly important, and courts should defer because they lack the resources necessary to fully evaluate the policy in question. Second, where there is no scientifically established answer, members of Congress—as our primary policymakers—should feel free to evaluate uncertainty in light of the popular values they were elected to represent. Courts should make an effort to refrain from usurping the policymaking role by imposing their own understanding of uncertainty onto legislative decisions. Both of those rationales are easily extended to other, nonmedical areas of scientific uncertainty.

Such an extension would have significant implications for Congress's power to enact legislation that either affects interstate commerce or deters discrimination. *Nevada Department of Human Resources v. Hibbs* most recently reaffirmed the *Boerne* test that "valid [prophylactic] § 5 legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[27] *Carhart II's* grant of authority is relevant to that test in two locations: identifying the injury to be prevented and evaluating the remedy. There is plenty of social, scientific, and economic uncertainty surrounding the harms of and remedies for discrimination. If *Carhart II* stands for the proposition that Congress deserves deference in evaluating that uncertainty, we should also view *Carhart II* as an expansion of congressional space to evaluate and enact antidiscrimination legislation based on its Section 5 and Commerce Clause powers.

In a recent *New York Times* op-ed, former Solicitor General Charles Fried wrote that *Carhart II* was "disturbing" because it

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[26] Id. at 427.

[27] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (quoting *Boerne v. City of Flores*, 521 U.S. 507, 520 (1997)).

signaled a willingness on the part of the Court to "allow Congress to overturn constitutional law by bogus fact finding."[28] To Fried, *Carhart II* is dangerous because it could lead to decisions that affirm Congress's power to pass civil rights legislation. To me, *Carhart II* is encouraging for the same reason. Although *Carhart II* is a setback for a woman's right to choose, it is also an expansion of judicial deference to congressional factfinding and an enlargement of congressional power, and an avenue for upholding the constitutionality of future antidiscrimination legislation.

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[28] Charles Fried, Op-Ed., Supreme Confusion, N.Y. Times, Apr. 26, 2007, at A25.