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# Verdict

April 2, 2013

Joanna L. Grossman

## What's the Matter with North Dakota and Arkansas? Two State Legislatures Pass Highly Restrictive and Unconstitutional Abortion Laws



A few weeks ago, the Arkansas legislature enacted a law prohibiting all abortions after twelve weeks of pregnancy, a shocking thumb through the teeth to the U.S. Supreme Court, which has held clearly that pre-viability abortions cannot be banned under any circumstances. The governor vetoed the bill, but the veto was overridden by the legislature and, thus, the bill became law nonetheless.

Not to be outdone, the North Dakota legislature passed even more restrictive—and more unconstitutional—provisions last week. One provision bans abortions after the fetus has a detectable heartbeat—which typically occurs only four weeks after fertilization—and another bans abortions of fetuses with severe genetic abnormalities. The governor signed both bills into law within twenty-four hours of their hitting his desk. The North Dakota legislature also queued up a personhood amendment, which says that life begins at conception for all purposes; that proposed amendment to the North Dakota Constitution will go to the state's voters in November 2013.

While these provisions are among dozens that have imposed new restrictions on abortion across the country in recent years, they are more extreme and clearly unconstitutional, and they reflect a legislative agenda that is increasingly far afield of public opinion on abortion.

### The Constitutional Right to Seek an Abortion: From *Roe* to *Casey*

Before the Supreme Court's 1973 ruling in *Roe v. Wade* (<http://supreme.justia.com/cases/federal/us/410/113/case.html>), abortion was largely criminalized by American states. Prior to *Roe*, however, there was a significant liberalization movement afoot that had led about a third of the states to repeal or narrow their criminal restrictions on abortion in the 1960s and early 1970s. Then, in *Roe*, famously, Justice Blackmun declared that the Fourteenth Amendment's Due Process Clause protected a woman's right to terminate a pregnancy, at least up to a certain point. He developed the trimester framework, under which states could not regulate abortion during the first trimester; could regulate it only to preserve the mother's health during the second; and could regulate or restrict it completely, unless abortion was necessary to save the life or health of the woman, during the third trimester because its interest in protecting fetal life becomes compelling when the fetus reaches the point of viability—that is, the point when the fetus could survive outside the womb.

The effect of this ruling was to invalidate a large number of abortion laws, or at least to restrict their potential application.

There continued to be opposition to abortion after *Roe*. Scholars debate whether this opposition was a kind of backlash to the Supreme Court's having moved too far ahead of public opinion on a controversial issue, or whether it was simply reflective of continuing disagreement over the substantive point. That backlash then became feverish and often violent in the 1980s (including the murder of one provider and the attempted murder of another, George Tiller, who was successfully murdered in 2009 while serving as an usher during Sunday church service). The Supreme Court heard many abortion cases in that decade, through which it chipped away at the right that it had boldly announced in *Roe*. It upheld a federal law excluding Medicaid coverage for abortion, for example, and a state law disallowing the use of public buildings (e.g., hospitals) for abortion even if the procedure was paid for privately.

In addition to the use of criminal behavior and fear tactics, the anti-abortion movement began to challenge *Roe* more directly by passing laws restricting abortion. A challenge to the Pennsylvania Abortion Control Act led to the Supreme Court's ruling in *Planned Parenthood v. Casey* (<http://supreme.justia.com/cases/federal/us/510/1309>), in which it reaffirmed the basic right in *Roe*, but restructured the framework for evaluating the constitutionality of state restrictions.

Under the standard announced in *Casey* in 1992, the state's interest in protecting fetal life attaches at the outset, rather than only when the fetus reaches viability. Before viability, the state can regulate abortion as long as it does not impose an undue burden on a woman's right to terminate a pregnancy. After viability, the state can restrict abortion entirely as long as it maintains an exception to preserve the life or health of the mother. Applying the new standard, the Court upheld provisions of the law mandating pre-abortion counseling and a waiting period, as well as a provision requiring parental consent for minors (with a judicial bypass option), but struck down a provision requiring married women to notify their husbands before obtaining an abortion.

*Casey* put to rest the longstanding question whether the Court would overrule *Roe*. It had the chance—and the potential votes to do so—but it didn't. But while it vindicated the basic constitutional right to seek an abortion, the *Casey* ruling drove a weakening wedge into it. It threw the door open to new restrictions on abortion that would make abortion more and more difficult to access. Anti-abortion advocates were skillful in coming up with new and creative ways to significantly impede abortion access, while generally staying within the confines of the law, at least until the last couple of years, when state legislatures have gone off the rails, a trend epitomized by the recent enactments in Arkansas and North Dakota, as I described briefly at the start of this column.

## The New Arkansas Law

On February 26, 2013, the Arkansas legislature overrode the governor's veto to pass *An Act to Create the Pain-Capable Unborn Child Protection Act*. This law, predicated on highly controverted medical evidence about fetal pain (the mainstream medical community rejects it out of hand), criminalizes all abortions after the twentieth week of pregnancy except in cases of rape, incest, or medical emergency. That last category is defined narrowly, and specifically excludes psychological or emotional health, as well as potential harm in the case of the woman's threat of suicide or self-harm. And even when an abortion is justified by one of these exceptions, the physician must perform it in the manner that gives the fetus the "best opportunity to survive," an odd provision in an abortion law to be sure. Central to the enforcement of this law is that prior to performing abortions, doctors must use all available examinations and tests to determine the probable gestational age of the fetus, which this law says starts at fertilization. A doctor who fails to comply with this law is guilty of a Class D felony.

Anticipating a constitutional challenge, the legislature includes in the law "scientific" findings about the stages and ways in which it believes fetuses can feel pain. And while the legislature acknowledges that most medical experts disagree with its findings, it forges ahead anyway. It also states that the state has a "compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidences indicates that they are capable of feeling pain."

Just two weeks later, the Arkansas legislature again overrode the governor to pass an even stricter law, *An Act to*

*Create the Arkansas Human Heartbeat Protection Act* (Ar. S.B. 134). Under the Act, a physician is prohibited from performing an abortion if the fetus has a gestational age of twelve weeks or more, and if the physician, after performing tests required by law, detects a fetal heartbeat. The Act shortens the time for abortion even further by defining “gestational age” to run from the first date of the woman’s last menstrual period, rather than from fertilization, which typically occurs about two weeks later. The only exceptions to this striking ban are when the pregnancy is the result of rape or incest, as defined under Arkansas law; when the procedure is necessary to save the life of the mother or to prevent substantial and irreversible impairment of her major bodily functions; or when the fetus has a “highly lethal fetal disorder” as defined by the Arkansas State Medical Board. Unlike the 20-week abortion law discussed above, this prohibition is enforced through the threat of confiscating the doctor’s medical license, rather than the threat of criminal punishment.

### **North Dakota Ups the Ante with Even More Restrictive Abortion Bills**

On March 19, North Dakota passed a new abortion law designed to ban most, if not all, abortions. It requires doctors to determine whether a fetus has a “detectable heartbeat” before performing an abortion, except in medical emergencies. (Fetal heartbeats can typically be detected by transvaginal ultrasounds at around 6 weeks and by abdominal ultrasounds at around 10-12 weeks.) By the time most women go to the doctor for the first time because of a pregnancy, a heartbeat is detectable. And if the physician detects a heartbeat, then under the North Dakota law, the abortion cannot be performed. Advocates of the law in the state say that this would effectively eliminate at least 75 percent of all abortions.

A second provision bans abortions for the purpose of sex-selection or because of actual or potential genetic abnormalities such as Down Syndrome, Dwarfism, or physical disfigurement.

Even before these bills were signed into law, abortions in North Dakota were hard to come by, and about to become impossible to procure. The state has only a single abortion clinic left, which is threatened by a new law requiring that all abortion providers have admitting privileges at a hospital within 30 miles. Because most of the abortion providers come from out of state, and fly in and out as needed, they do not admit the minimum number of patients per year required by the hospitals.

### **The Clear Unconstitutionality of the North Dakota and Arkansas Laws**

Unless the Supreme Court decides to upend *Roe* completely—a longstanding goal of the anti-abortion movement, but not a likely occurrence despite the increasing conservatism of the Supreme Court—these laws are clearly unconstitutional. Neither a detectable fetal heartbeat nor the end of the first trimester is commensurate with viability, which remains the constitutional touchstone. And outright bans on abortion cannot survive the “undue burden” analysis of *Casey*, which allows states to regulate and deter, but not absolutely prevent, abortions before viability.

It’s plain, then, that the North Dakota and Arkansas legislatures are not trying to stay within the confines of federal constitutional law. The primary sponsor of North Dakota’s heartbeat bill, Bette Grande, may well be delusional, as she told the New York Times that banning abortions after 6 weeks “meets the criteria of *Roe v. Wade*.” Given that *Roe/Casey* pegs the abortion right to viability and that most fetuses are not viable until 22 to 24 weeks at the earliest, it is hard to see the justification for her position. She suggests in her quote to the newspaper that a heartbeat is “compelling and proof of life,” but the right to abortion would be quite meaningless if it included the right to terminate only those fetuses without heartbeats.

Most other supporters and anti-abortion activists concede that these bills violate *Roe/Casey* and that they are designed to provoke litigation and, they hope, a revisiting of constitutional standard. So clear is the unconstitutionality of the bill that the governor of North Dakota asked the legislature to appropriate money to defend the inevitable litigation over its validity. Legislators have launched an expensive and confrontational game of chicken with the U.S. Supreme Court.

### **The New Wave of Anti-Abortion Restrictions: A Dizzying Array**

The new laws in Arkansas and North Dakota are now the strictest in the nation, but other states have passed laws in recent years that are also clearly unconstitutional. In just the last two years, ten other states have passed laws banning pre-viability abortions. Several of these laws have been enjoined by federal courts, a fate that will surely befall the North Dakota and Arkansas laws as well.

Before this wave of pre-viability bans and the so-called “fetal heartbeat” laws, adopted in Arkansas and North Dakota and pending in five other states, states with a strong anti-abortion sentiment had been chipping away at *Roe*, rather than attacking it head on. Dozens and dozens of abortion restrictions—92 in just the year 2011—made their way into state laws that made it practically more difficult for doctors to provide abortions, and for women to obtain them. (These provisions are catalogued and analyzed by the Guttmacher Institute in [a recent report \(http://www.guttmacher.org/media/inthenews/2013/01/02/\)](http://www.guttmacher.org/media/inthenews/2013/01/02/).) Together, these restrictions have driven abortion clinics out of business. In each of four states, only a single clinic remains.

Common abortion-specific rules and restrictions include: (1) abortions must be performed by licensed physicians and in hospitals after a certain point in pregnancy; (2) doctors and hospitals can refuse to perform abortions based on “conscience”; (3) some methods of abortion cannot be used; (4) doctors cannot use “telemedicine” to prescribe medicine necessary to induce early-stage abortions in patients who cannot get to a doctor in person; (5) women must receive mandatory counseling prior to obtaining an abortion with the counseling involving a state-mandated script that the doctor must read, whether he or she agrees with it or not; (6) the woman must wait between 24 and 72 hours, sandwiched between two in-person visits to a clinic before obtaining an abortion; (7) the doctor must report information about abortions to the state; (8) minors must obtain parental consent or the consent of a judge; (9) no federal funding can be used to pay for abortion except in rare cases, and, in most states, no state funding can be used either; (10) abortion facilities must meet the architectural and licensing regulations of hospitals, even though other outpatient facilities are not required to (so-called “TRAP” laws); and (11) abortion providers must have admitting privileges at a local hospital.

### The Mysterious Divergence Between Public Opinion and Legislative Agendas

One might conclude from the harshness of the new laws and the increasing number of other abortion restrictions that public support for abortion must be at an all-time low. But nothing could be further from the truth.

Public opinion varies over time, but since the opinion in *Roe v. Wade* (1973) was issued, the idea that first-trimester abortions should be legal has always outpolled the opposing proposition. And in an [NBC/WSJ poll \(http://www.cnbc.com/id/100397087\)](http://www.cnbc.com/id/100397087) taken on the 40th anniversary of *Roe* in January 2013, 54 percent of respondents said that abortion should be legal either always or most of the time, while only 44 percent said that it should be illegal either with or without exceptions. These numbers represent a recent flip in favor of abortion rights. Support goes even higher in this and other polls when abortion is necessary to save a woman’s life or when pregnancy is the product of rape or incest. And when asked directly about *Roe*, poll respondents strongly disagree that it should be overturned. (Other recent abortion poll results are available from [Gallup \(http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_campaign=syndication&utm\\_content=morelink&utm\\_term=All\)](http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=All) and the [Pew Forum \(http://www.pewforum.org/Abortion/roe-v-wade-at-40.aspx\)](http://www.pewforum.org/Abortion/roe-v-wade-at-40.aspx); [pollingreport.com provides results \(http://www.pollingreport.com/abortion.htm\)](http://www.pollingreport.com/abortion.htm) from a variety of polls.)

Thus, it is hard to understand the numerosity and severity of the recent abortion restrictions that we are seeing, during a time when most individuals in the United States have become more supportive of access to abortion. Would voters be as tolerant of legislatures that boldly ignored other federal constitutional rights?

### The Recent Arkansas and North Dakota Abortion Restrictions Are Doomed to Fail

The import of these new state abortion bans is likely to be limited in the short term, because federal courts will have no choice but to stop their enforcement under the federal constitutional precedents of *Roe* and *Casey*. Their effect may be muted in the long term as well, if the Supreme Court opts either not to revisit these rules at all, or upholds the existing framework regarding abortion in a new ruling. Obviously, if these laws provoke the Supreme Court to overrule *Roe*—as the anti-abortion lobby wants it to do—the game will have been completely

changed. But that is extremely unlikely.

North Dakota has been in the news recently because it has a shortage of women. The work in the oil fields has attracted droves of young, single men, who have found a scarcity of young, single women with whom to pair off. Can it be a surprise that a state that exhibits such blatant disrespect for its female citizens—and their federal constitutional rights—would find itself in such a situation?



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