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Pushing the Limits of *Roe v. Wade*

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Abortion law is often regarded as very controversial. The momentous court case *Roe v. Wade* (1973) was supposed to end the inconsistencies in state laws and establish the legality of abortion for all citizens of America. *Roe v. Wade* ruled that abortion is legally permissible under most circumstances because of privacy rights guaranteed by the Fourteenth Amendment. This ruling overturned all state and federal laws in violation of this principle; however, it did not end the debate over whether abortion is immoral or should be illegal. Since the Court's decision in 1973, many politicians at the national, state, and local level have been looking for ways to overturn the ruling. The most notable Supreme Court cases have been *Planned Parenthood of Southern Pennsylvania v. Casey* (1992) and *Gonzales v. Carhart* (2007).

Since the 1973 ruling of *Roe v. Wade*, South Dakota has severely limited physical access to abortion and in 2006, the state legislature passed the Human Health and Life Protection Act, which re-criminalized virtually every abortion procedure. However, the Human Health and Life Protection Act was quickly overturned by a popular referendum. What do these events in South Dakota prove about American's current stance on abortion? Is the controversy of abortion becoming outdated or are people just adverse to rapid dramatic change? With a more conservative Supreme Court already taking stabs at America's current abortion law, attempts at implementing a conservative new abortion law like South Dakota's may have more merit if taken to the courts than they would have in the past.

The most prominent case directly following *Roe v. Wade* was *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In *Planned Parenthood v. Casey*, the Supreme Court did not grant the highest level of constitutional protection to abortion.

However, Wharton and Kolbert alleged in their 2006 legal review, “Preserving the core of *Roe*: Reflections on *Planned Parenthood v. Casey*” that “the Supreme Court nonetheless promised to preserve *Roe v. Wade*’s core objectives by instituting the undue burden standard for measuring the constitutionality of restrictions on abortion” (p. 318). The Supreme Court defined this undue burden standard by saying that no regulation could be placed on abortion to create “a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” (Wharton et al., 2006, p. 318). Basically, this ruling ensures that no state can make a law that requires women to fulfill some unreasonable requirement that would result in limiting her from being able to have the procedure done.

However, what situations may constitute the undue burden standard vary based on factors such as income status, geographic location and age. In fact, Wharton et al.’s (2006) review asserts that the undue burden standard is meaningless if the courts ignore “the current real life challenges of poverty, violence, youth, and geography that make access to abortion very difficult for some women” (p. 318). The courts also must “give careful consideration to the ways in which an abortion restriction, operating with” other difficult circumstances “can exploit and exacerbate those difficulties to the point that access to abortion is effectively denied” (p. 318). However, in the years succeeding the case women’s ability to have an abortion has been increasingly limited by the government at state, and local levels in many ways; for example some states only have one abortion clinic in the entire state (Wharton et al., 2006, p. 318). If state governments and the courts interpret the undue burden standard to be one only based on the average

American woman than the new interpretation is demeaning to the rights the standard was intended to protect.

Fifteen years after the Casey decision, abortion was back in the headlines with *Gonzales v. Carhart*, a Supreme Court case challenging the federal Abortion Procedure ban to be unconstitutional. The federal Abortion Procedure ban outlawed the partial-birth abortion procedure – a procedure typically used to abort the still nonviable fetus in the second trimester. On April 18, 2007 the Supreme Court decided in a 5-4 ruling that the federal Abortion Procedure ban is legal. Bill Mears wrote, in his article “Justices uphold ban on abortion procedure,” that the law “sends a possible signal of the court's willingness, under Chief Justice John Roberts, to someday revisit the basic right to abortion guaranteed in the 1973 *Roe v. Wade* case” (2007, p. 2). A major drawback of the Supreme Court ruling in this case is that the ban lacks a health exception for women whose life or health is seriously in danger – a right very clearly established by *Roe v. Wade* (2007, p. 6). The ruling actually allowed a new restriction on women's right to an abortion with absolutely no exceptions available. While the procedure is not that common, outlawing it is still another step in the agenda to overturn *Roe v. Wade*.

After the verdict was declared, the only female justice in the high court, Justice Ruth Bader Ginsburg validated the premise that this ruling was just an attempt to re-criminalize abortion, and said in great dissent that the majority's opinion “cannot be understood as anything other than an effort to chip away a right declared again and again by this court, and with increasing comprehension of its centrality to women's lives” (Mears, 2007, p. 8). Justice Ginsburg found the ruling “alarming” and mentioned that the conservative majority “applauds federal intervention to ban nationwide a procedure found

necessary and proper in certain cases" by doctor's groups, including gynecologists (Mears, 2007, p. 9). Justice Ginsburg was not alone in her concerns with the bill. The case was overruled by three federal appeals courts on the same premise that the bill "does not provide a 'health exception' for pregnant women facing a medical emergency" before it got to the Supreme Court (Mears, 2007 p. 16). More specifically, those three federal appeals courts noted that the "pregnant women having the procedure most often have their health threatened by cancer, heart disease, high blood pressure or risk of stroke" (Mears, 2007, p. 17). The ruling in *Gonzalez* that day invalidated every court before the Supreme Court's verdict that the federal Partial-Birth Abortion Ban Act of 2003 is unconstitutional. Apparently the Supreme Court did not find it an undue burden to ban a procedure typically performed on women suffering from life threatening illnesses.

Since *Planned Parenthood v. Casey* the Supreme Court's composition has changed, especially with the addition of two very socially conservative justices – Chief Justice Roberts and Justice Alito to the court. Now, major abortion cases like *Gonzalez v. Carhart* that are brought before the Supreme Court may have different outcomes than in the past. This issue is only heightened with the absence of Sandra Day O'Connor, who was an avid abortion rights supporter for the entirety of the lengthy time period she served on the bench (Mears, 2007, p. 13). In fact, as Mears (2007) alleged, the new presence of the two very conservative additions gave current United States President George Bush the "solid conservative majority needed to allow the federal ban to go into effect, with Kennedy providing the key fifth vote for a majority" (2007, p. 12). The Supreme Court decision in *Gonzales v. Carhart* was the first major success in the pro-life movement's quest to reverse *Roe v. Wade* and *Planned Parenthood v. Casey*. Wharton et

al. (2006) suggested that “with the highly visible confirmation hearings of Chief Justice Roberts and Justice Alito still fresh in the nation's memory” and the federal Abortion Procedure Ban now approved by the Supreme Court that the media is going to be consumed with “whether the newly constituted Court will overrule *Roe*” (p. 321). For the first time in over thirty years America is wondering if the landmark court case of *Roe v. Wade* is being seriously threatened.

Not every stab at abortion law is made at the federal level. Attempts to challenge *Roe v. Wade* take other forms than Supreme Court Cases and federal law. States are taking numerous measures on their own to challenge the national order and restrict abortion with the intent of pushing the boundaries of what is legal. Wharton et al. (2006) noted that “in the first four months of 2006 alone, legislators in fourteen states, proposed measures to ban virtually all abortion procedures” (p. 320). While some state attempts to restrict abortion law do have the purpose of ultimately landing in the Supreme Court to overturn *Roe v. Wade*, often times state legislatures are satisfied working within the national law to keep abortion as low in their territory as possible.

One way states are legally reducing abortion is by limiting the number of clinics the state will allow to perform the procedure. As Wharton et al. (2006) discerned: “as governmental restrictions have mounted, the number of abortion providers in the United States has continued to decline. Three states - North Dakota, Mississippi, and South Dakota - now have only one abortion provider in the entire state” (p. 321). With transportation costs rising, only having access to one abortion clinic can force people living below the poverty line to be unable to afford an abortion. Not only does South Dakota only have one abortion clinic, but Evelyn Nieves pointed out in her 2006 article

“S.D. Abortion Bill Takes Aim at 'Roe'” that the “one clinic, the Planned Parenthood clinic in Sioux Falls, offers the procedure only once a week” (p. A01). Also, Nieves (2006) noted “four doctors who fly in from Minnesota on a rotating basis perform the abortions, since no doctor in South Dakota will do so because of the heavy stigma attached” (p. A01).

Those physical restrictions are not the only restrictions states have placed on abortion; South Dakota also has a law that makes women who want an abortion complete a physician-only counseling requirement prior to the procedure (Wharton et al., 2006, p. 361). Wharton et al. (2006) suggested that since there is only one abortion clinic in all of South Dakota and because forcing the “doctor to make the required telephone calls would take him seven hours per week,” each abortion now costs an additional sixty dollars to perform (p. 361). With South Dakota’s poverty rate exceeding the national average, sixty dollars is a large increase for most potential patients (Wharton et al., 2006, p. 361).

Almost a fifth of patients have to travel over 300 miles each way to get to South Dakota’s single abortion clinic. This inconvenience forces women to endure increased transportation costs, and miss work shifts (Wharton et al., 2006, p. 361). As a result poor women are left with a heavy burden to deal with if they need an abortion (Wharton et al., 2006, p. 361). However, Wharton et al. (2006) pointed out that the South Dakota legal system ignored “the impact that this cost increase would have on teenagers, poor women, or those who lived long distances from South Dakota's sole abortion provider;” lawmakers assumed that the law “would affect all women equally, ignoring the real differences in the lives and vulnerability of middle-and upper-class women as compared to low-income women, teenagers, domestic violence survivors, and others disparately

affected by the cost increase” (p. 361). South Dakota courts assumed if the restriction is not an undue burden for the average middle class woman then it can be legal. At this point in South Dakota and numerous other states, abortion law has gotten so strict and there are so many obstacles in the way of having the procedure that it does not matter if abortion is legal; lawmakers have found ways to make it almost impossible for the women who truly need the procedure to have access to it.

Even with all the previously mentioned restrictions on abortion, South Dakota government officials were still not content with the current efforts to end abortion in the state and on March 6, 2006 South Dakota Governor Mike Rounds signed into law the South Dakota Women’s Health and Human Life Protection Act (HB 1215) (Wharton et al., 2006, p. 387). The Women’s Health and Human Life Protection Act is the strictest abortion legislation ever to be passed since the landmark court case *Roe v. Wade* (Nieves, 2006, p. A01). This new law significantly overstepped the state’s authority in restricting abortion and is completely in violation of everything *Roe v. Wade* established that states cannot do. The bill states that life begins at the time of conception, and the pregnant mother and her unborn child each possess a natural and inalienable right to life; an abortion can only be performed if the mother’s life is seriously in danger, and then serious efforts must be taken to protect both the child and the mother (South Dakota Women’s Health and Human Life Protection Act (HB 1215), 2006). The bill does not allow for exceptions in cases like rape because South Dakota Rep. Roger W. Hunt declared, “‘special circumstances’ would have diluted the bill and its impact on the national scene” (Nieves, 2006, p. A01). Oesterle (2006) brings up how the bill even goes as far as affirming, “physicians and others who perform abortions commit a felony unless



the procedure is ‘designed or intended to prevent the death of a pregnant mother’” (p. 122).

The Women’s Health and Human Life Protection Act is an example of a political attempt to force the reexamination of all previous abortion court decisions in hopes of ultimately having the original 1973 *Roe v. Wade* decision overturned. The new abortion law in South Dakota shows that not only national politicians strive to rewrite the laws for all of America to follow. South Dakota is not the only state to implement laws like this one; according to Nieves (2006) “Ohio, Indiana, Georgia, Tennessee and Kentucky have introduced similar measures” (p. A01). Many attempts to change our national law, like South Dakota banning abortion with no exceptions, will start at the state level when the state’s legislature passes laws with the purpose of challenging national order. Oesterle (2006) asserted that “the declared purpose of the South Dakota Act is to offer the Supreme Court an opportunity to overturn its land-mark decision in *Roe v. Wade*” (p. 122). Rep. Hunt felt “the momentum for a change in the national policy on abortion is going to come in the not-too-distant future” as a result of the Women’s Health and Human Life Protection Act (Nieves, 2006, p. A01).

As soon as the bill began to stir up controversy, propaganda began flying in both directions to determine what must be done with the bill. There was a commercial, “130 South Dakota Doctors Endorse Abortion Ban,” proclaiming that the abortion ban is backed by over one hundred medical professionals (2006). The commercial also alleged that doctors believed science has discovered that human life begins at the time of conception and it is important to protect the fetuses’ right to life, and for women to stop using abortion as another form of birth control (“130 South Dakota Doctors,” 2006). The

doctors in the commercial also claim that victims of rape and incest still have the morning after pill as an option, so not allowing any exceptions for those circumstances is not unreasonable (“130 South Dakota Doctors,” 2006). Pro-choice advocates attacked the ad campaign for being deceitful since it claims that science has discovered when human life begins without providing any evidence support to that statement. This aspect of the commercials is especially controversial since South Dakota was already overruled in 2005 by the courts for trying to force doctors to tell a woman who is having an abortion that she is ending the “life of a whole, separate, unique human being” (Nieves, 2006, p. A01).

Opponents of the bill responded with propaganda of their own. They countered the “130 South Dakota Doctors Endorse Abortion Ban” with the commercial (2006) “First Ad Running in Campaign to Overturn South Dakota's Abortion Ban” that pointed out that the Women’s Health and Human Life Protection Act makes no exceptions for women who need abortions because they were victims of rape and sexual abuse or women whose health is going to be compromised by going through with the pregnancy. Also, many political cartoons opposing the bill were published nationally. One cartoon, “Rape and Incest. Tea and Sympathy,” by Mark Cohen (2006) portrayed a South Dakota jail cell where there are 4 prisoners: one prisoner is asking what the others are in for, one prisoner is answering rape, one – incest, and the last prisoner is an abortion doctor with a scared young girl who is in jail for performing abortion illegally for a rape and incest victim. This cartoon shows how absurd it is that doctors can go to jail for helping the victims of violent sex crimes. The doctor is also much smaller than the other prisoners

symbolizing that there are bigger crimes that people should be put away for than performing an abortion.

The widespread disapproval for the bill led concerned citizens to actively take steps to repeal it. Overall, South Dakotans viewed the Women's Health and Human Life Protection Act as too intrusive, so a referendum to repeal it was placed on ballot for the November 2006 statewide election as a result of a successful petition by the organization "South Dakota Healthy Families." On May 30, over 38,000 petition signatures were filed, which is more than twice the 17,200 required to place a measure on the ballot (Oesterle, 2006, p. 123). The South Dakota electorate then repealed the law on November 7th, 2006 by a 55-45% margin (South Dakota Campaign for Healthy Families, 2007, p. 2).

Unfortunately for the anti-abortion proponents in office in South Dakota, the new law did not stay in place long enough for the court challenge they had hoped for.

The South Dakota case proves that putting a controversial measure on a ballot is a great way to get voters involved in the policy making process. Oesterle (2006) suggests, "abortion would be less divisive if routinely subjected to popular vote" and the South Dakota situation put this theory to the test (p. 123). Knowing their state law allowed for referendums, why didn't Gov. Rounds or any of the other South Dakota elected officials find a way to manipulate an emergency clause of their state's legislation to prevent one from taking place? Oesterle (2006) argues that the South Dakota legislature did not take the possibility of a popular referendum seriously and only thought they would be dealing with an immediate court challenge; apparently the bill sponsors "believed that opponents of the Act would prefer the expediency of filing a quick court challenge over the time and effort required to gather 17,200 signatures" (p. 124).

Is the quick repeal of this act a sign that abortion law will never get stricter, and that the pro-life movement is losing numbers? Abortion is widely perceived as one of the most controversial ethical questions for which there may never be a satisfactory answer. However, *Roe v. Wade* was decided over a generation ago; the legalization of abortion is no longer a contemporary idea – it is the status quo. One might even go as far as inferring the legal debate over abortion is almost outdated. People are so used to abortion being legal that currently, it does not matter whether one supports abortion or would get one herself because, according to the “Abortion Poll” (2000), almost seventy percent of Americans agree that abortion is a “decision that has to be made by a woman and her doctor” (p.1). This evidence suggests that even if someone believes abortion is immoral they probably have accepted and support that it is up to the woman considering the operation to decide if she wants to have the procedure done. In fact, only eight percent of Americans believe that there are no circumstances where abortion should be illegal (Abortion Poll, 2000). Almost everyone agrees that there are some circumstances that warrant an abortion.

That high statistic proving Americans generally agree that there are certain circumstances where abortion needs to be legal at least in part explains why the people of South Dakota – a state already pushing the limits of illegalizing abortion with restrictive acts and only one legal abortion clinic in the state – quickly assembled twice the amount of signatures necessary to place the new law on the ballots. According to Carson Walker in his 2006 article “South Dakota abortion ban has decades-long history” South Dakota has such a strong stance against abortion that even “South Dakota's Democrats dropped abortion rights from their party platform” (p. 2). The commercial against the bill seemed

generally opposed to abortion except under special circumstances (“First Ad Running,” 2006). It proclaimed that South Dakotans do want to reduce the number of abortions in South Dakota; however, the new law was too radical and left victims of rape, and sexual abuse or women whose health was threatened no options (“First Ad Running,” 2006). The anti-bill stance was that the proposed act went too far. Many people against the bill still felt that abortion procedures should be reduced as much as possible; they just did not feel it was fair to make abortion that illegal. Even people who are strongly against abortion are not necessarily against abortion being legal.

However, it is possible that people do still want to further regulate abortion but not to the extent that the Women’s Health and Human Life Protection Act – the most extreme abortion legislation passed since *Roe v. Wade* – would have allowed. Maybe people rejected the act due to its extremity because people dislike radical or sudden large changes. It would be conceivable, given South Dakota’s history of strict abortion policy, that South Dakota would have been more successful had their abortion restrictions gradually been increased to the level they tried to put it at all at once. Maybe then a bill like the Women’s Health and Human Life Protection Act could have stayed in place long enough to be brought to the Supreme Court thus forcing a reexamination of *Roe v. Wade*. Perhaps the now more conservative Supreme Court would have been able to use the case as an excuse to overturn all previous abortion cases and ban the procedure all together.

South Dakota’s quest to criminalize abortion shows that abortion law is still controversial. However, its failure with the Women’s Health and Human Life Protection Act proves that the pro-choice coalition has enough support now to not need to rely on the courts to overrule challenges to *Roe v. Wade*. It also proves that it may take more than

a few extreme acts to end American's right to an abortion. However, although statistics show that the legal debate over abortion has become less controversial, the debate is not gone for good as seen in *Gonzalez v. Carhart*. It is also unlikely that South Dakota will be the last state legislature to enact an ambitious bill to make American abortion law stricter or re-criminalize the procedure all together. Regardless, the referendum tactic was very successful in South Dakota; as a result, fewer cases regarding abortion may make it to the courts to challenge the status quo.

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