

# The Legislative Process Is Not Fit for the Abortion Debate

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by David Orentlicher

In the wake of Republican gains in November 2010, anti-abortion bills were common and aggressive during the 2011 legislative sessions.<sup>1</sup> State general assemblies passed statutes that include provisions to (a) block abortions after twenty weeks of gestation, (b) require doctors to tell pregnant women that fetuses feel pain at or before twenty weeks of gestation, (c) prevent state or federal health care dollars from reaching clinics and physician groups that provide abortions as part of their services,<sup>2</sup> and (d) require doctors to describe the ultrasound images of the fetus and offer women the option to view the ultrasound and listen to the fetal heartbeat before an abortion.<sup>3</sup>

These statutes are troubling for a number of reasons. Many of their provisions violate constitutional principles enunciated by the Supreme Court in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>4</sup> For example, the Court has held that states must leave the determination of fetal viability to the medical judgment of physicians rather than defining viability at a specific point in pregnancy (like twenty weeks of gestation).<sup>5</sup> The Court also has insisted that when states mandate disclosures to patients, they may not prescribe information that is nontruthful or misleading.<sup>6</sup> The statements about fetal pain misrepresent medical understanding.<sup>7</sup> As for federal health care funding, states may choose how to allocate their own dollars, but their efforts to interfere with the

implementation of federal spending decisions may run afoul of the supremacy clause principle that federal law takes priority over state law.<sup>8</sup>

The state statutes also reveal flaws in the argument that divisive moral issues like abortion should be resolved through the political process rather than by courts. Some people, including Supreme Court Justice Antonin Scalia, make this argument on the grounds that our democratic system is premised on majority rule and that elected representatives are more likely than unelected judges to reflect public sentiment.<sup>9</sup> To be sure, majorities cannot override constitutional principles, but champions of the political process believe that the text of the Constitution provides little support for fundamental rights like abortion and that judges who find such rights are relying more on their own preferences than the intentions of the constitutional framers. Justice Ruth Bader Ginsburg and others have argued that deciding public policy through judicial fiat short-circuits a deliberative political process that can allow for a public consensus to evolve over time and through a laboratory of state experimentation in which different states try different approaches.<sup>10</sup>

But arguments in favor of the political process neglect the fact that many elected officials are not interested in finding common ground on divisive social issues like abortion. Indeed, candidates and public officials often prefer to exploit such controversies for

electoral gain. By running on “wedge” issues, candidates can attract voters who ordinarily would identify with the opposition.<sup>11</sup> From the late 1960s to the mid-1980s, pro-life individuals were more likely to vote Democratic and pro-choice individuals more likely to vote Republican in presidential elections.<sup>12</sup> By adopting strong antiabortion positions, Republican candidates have been able to attract voters who previously aligned themselves with the Democratic Party.<sup>13</sup>

When a political party has found a potent wedge issue, it may conclude that it has more to gain on election day by perpetuating the conflict than by resolving the issue.<sup>14</sup> As a result, policies that could reduce the demand for abortion may fail to gain support. Republicans often oppose funding for contraceptive education or products, and a bill to cut off funding for all of Planned Parenthood’s family planning and reproductive health services was passed in Indiana this year.<sup>15</sup> If it survives legal challenge, the legislation may have profound implications for unwanted pregnancies. The law may block not only any state funding but also millions of dollars in annual federal funding. Even though Planned Parenthood in the state spends only six percent of its budget on abortions, and all of the abortion dollars come from private donors, the Indiana statute was justified as a way to prevent any indirect subsidies for abortion services. However, the reduction in funding for family planning may deny many women the education and contraception that could prevent an unwanted pregnancy. Ironically, demand for abortion could increase as a result.<sup>16</sup> And the reduction in funding for reproductive health services means that fewer indigent people will be screened for cancer and sexually transmitted diseases.

This is not to say that elected officials and candidates are driven solely by political considerations when deciding how to vote on abortion-related proposals. Many officials and candidates vote on the basis of sincerely held moral views. Nevertheless, it is fair to say that other officials and candidates are

driven primarily by political considerations when shaping their views. Politicians often stake out their positions as a means to electoral victory rather than as ends to be pursued for their intrinsic value.

This is also not to say that perpetuating social conflict is a strategy unique to one side of the political divide. Republicans may be eager to exploit abortion for electoral gain. Democrats, on the other hand, often respond to Republican proposals for reform of Social Security or other entitlement programs by trying to demonize the ideas. When House Republicans suggested a voucher plan for Medicare earlier this year, Democrats might have praised the plan for its reliance on the same kind of health insurance exchanges in the Patient Protection and Affordable Care Act. Democrats also might have discussed whether a different kind of voucher could preserve Medicare as an entitlement and also harness market forces to promote greater efficiencies in health care.<sup>17</sup> Instead, they chose to exploit the Republican proposal as a way to worry Americans about the security of their Medicare benefits.<sup>18</sup>

If abortion serves an important role as a wedge issue that politicians do not want to resolve, then we have a response to a commonly held view about the politics of abortion. It is often thought that abortion remains a dominant political issue because it involves a clash between two ultimately irreconcilable positions—either the rights of the unborn must trump the rights of pregnant women, or the rights of pregnant women must trump the rights of the unborn. But as Mary Ann Glendon has observed, political leaders in other countries fashioned compromise positions that have brought a much greater stability to abortion law.<sup>19</sup> In France, for example, the public was once as bitterly divided over abortion policy as in the United States. In response, the government developed a workable body of law that subjects abortion to greater regulation than is permitted under *Roe* and *Casey*, but that also provides greater financial assistance for birth control, abortion, and child care.<sup>20</sup> In the

United States, abortion remains a political flashpoint because many elected officials prefer it to be so.

1. R. Abcarian, “Abortion is the Hot Topic; Since GOP Gains Last Fall, Bills to Restrict the Procedure Have Inundated Statehouses,” *Los Angeles Times*, May 8, 2011; E. Bazelon, “The Reincarnation of Pro-Life,” *New York Times*, May 29, 2011.

2. House Bill 1210 was passed in Indiana with the provisions in (a), (b) and (c). House Bill 1888 was passed in Oklahoma with the provision in (a).

3. Texas House Bill 15 and Arizona House Bill 2416 were passed with the provisions in (d), except that listening to the doctor’s description of the ultrasound is optional for women under the Arizona law. Under South Dakota’s House Enrolled Act 1217, a pregnant woman may not have an abortion until she has had a consultation at a “pregnancy help center” to encourage her to maintain the pregnancy and give birth. The act also imposes a seventy-two-hour waiting period between the time that a woman meets with her physician to discuss the procedure and the time at which the abortion is performed.

4. 410 U.S. 113 (1973); 505 U.S. 833 (1992).

5. *Colautti v. Franklin*, 439 U.S. 379, 388-389 (1979).

6. *Planned Parenthood*, 505 U.S. at 882.

7. Research indicates that fetuses are not likely to feel pain before the third trimester, but fetal pain provisions require doctors to discuss fetal pain before all abortions, even though more than 98 percent are performed before twenty-one weeks of gestation. S.J. Lee et al., “Fetal Pain: A Systematic Multidisciplinary Review of the Evidence,” *Journal of the American Medical Association* 294, no. 8 (2005): 947-54.

8. According to federal officials, when Indiana’s new law blocked the flow of federal funds to Planned Parenthood for family planning and reproductive health services, the state violated Medicaid’s requirement that patients be allowed to choose their health care providers. R. Pear, “U.S. Says New Indiana Law Improperly Limits Medicaid,” *New York Times*, June 2, 2011.

9. *Planned Parenthood*, 505 U.S. at 989-990 (Scalia, J., concurring); G.R. Stone et al., *Constitutional Law*, 6th ed. (New York: Aspen Publishers, 2009), 43.

10. R.B. Ginsburg, “Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*,” *North Carolina Law Review* 63, no. 2 (1985): 375-86, at 381-82; Stone et al., *Constitutional Law*, 171.

11. D.S. Hillygus and T.G. Shields, *The Persuadable Voter: Wedge Issues in Presidential Campaigns* (Princeton, N.J.: Princeton University Press, 2008), 1-2.

12. G.D. Adams, “Abortion: Evidence of an Issue Evolution,” *American Journal of Political Science* 41, no. 3 (1997): 718-37, at 731-33.

13. The empirical data indicate that shifts in abortion positions by elected officials led voters to change party affiliation rather than elected officials having changed their positions in response to shifts in voter sentiment. *Ibid.*, 733-35.

14. Although the Republican Party has been able to attract Democrats with its emphasis on cultural values, it also has pushed Republicans to the Democratic Party. Overall, the Republican Party may have suffered a net loss of support. R. Liscio, J.M. Stonecash, and M.D. Brewer, “Unintended Consequences: Republican Strategy and Winning and Losing Voters,” in *The State of the Parties: The Changing Roles of Contemporary American Parties*, 6th ed., ed. J.C. Green and D.J. Coffey (Lanham, Md.: Rowman and Littlefield, 2010).

15. Indiana House Enrolled Act 1210 (2011). While the act was designed to cut off funding for Planned Parenthood, it was written to apply to any state dollars, or to federal dollars administered by the state, for clinics and physician groups that provide abortion services. Trying to exploit wedge issues may also backfire. The U.S. House of Representatives also voted to halt funding for Planned Parenthood, but the Senate did not go along.

16. V. Simpson, “High Cost of Cutting Off Planned Parenthood,” *Indianapolis Star*, May 9, 2011.

17. For examples of efforts to engage the voucher question, see D. Orentlicher, “Medicare Plan Starts Dialogue,” *Indianapolis Star*, April 15, 2011; G.R. Wilensky, “Reforming Medicare—Toward a Modified Ryan Plan,” *New England Journal of Medicine* 364 (2011): 1890-92.

18. When Democrats won a U.S. House seat in a special election in New York, analysts credited the victory to voter concern about the proposal. R. Hernandez, “Gaining Upset, Democrats Win New York Seat,” *New York Times*, May 25, 2011.

19. M.A. Glendon, *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University Press, 1987), 40.

20. *Ibid.*, at 15-22.

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