

Trying to Stop the Pro-Life Train

Abortion advocates resort to court orders to delay new pro-life laws.

BY STEVE WEATHERBE 09/21/2011

TOPEKA, Kan. — Until this spring, advocates of legal abortion could count on one of two checks built into the legislative system to slow the rising tide of pro-life legislation at the state level. They could rely on either pro-abortion governors or at least one of the legislative houses having a pro-abortion majority.

But that strategy broke down as the Republican onslaught of last November swept through both legislatures and governors' mansions, resulting in more than 60 pro-life bills making it onto the statute books across the U.S. in the 2011 legislative sessions.

Now abortion advocates must resort to temporary injunctions to keep abortion businesses running.

In Kansas, a leading pro-life state, one federal judge has issued a temporary injunction, putting a hold on one enactment diverting "Title X" federal family-planning funding to public clinics and hospitals and away from private agencies that provide abortions.

A second federal judge has issued a temporary injunction delaying the enforcement of new, more demanding standards that would have shut down two of the state's three abortion clinics.

Their peers in other federal courts have issued injunctions against similar laws in Texas, South Dakota, Indiana and North Carolina.

Planned Parenthood's CEO for Kansas and Mid-Missouri, Peter Brownlie, called the injunction against defunding "a clear victory for the health and safety of Kansas women and families. [But] we are disappointed the state continues to waste precious taxpayer resources on expensive private attorneys and other legal expense in their relentless effort to deny thousands of low-income women and families access to essential health services." The state has appealed.

Kansans for Life's legislative director, Kathy Ostrowski, says the injunction against the new licensing regulations is a weak one, based solely on the clinics' claim they need more time to measure up to the new standards. As for the diversion of Title X federal funds, it has been carefully crafted to avoid challenges faced in other states, which specifically denied such funds to organizations that provide abortions.

"The Kansas provision," Ostrowski told the Register, "simply said that Title X funds for family-planning education should go first to public clinics and hospitals." While the judge accepted Planned Parenthood's argument that the move restricted a woman's constitutional right to choose her medical-service provider and caused immediate and irreparable harm, Ostrowski is sure that wiser heads in higher courts will disregard these arguments. Instead, she expects the day to be carried by the state government's right to decide with whom it will do business.

Fetal Pain

The recent injunctions have not touched Kansas' new fetal-suffering law, pioneered last year by Nebraska and now enacted in half a dozen states. Fetal-pain laws ban abortions after 20 weeks, when the developing fetus can feel pain, according to new but hotly contested medical findings. This advances the bar several weeks from that set by *Roe v. Wade*, which said abortions cannot be banned before the fetus is viable. At the end of August, Idaho's fetal-pain law was challenged as unconstitutional by a woman who was briefly charged with receiving an illegal abortion.

But according to Emily Bazelon, senior research scholar in law at Yale Law School and a columnist at *Slate* and *The New York Times*, this may be a strategic mistake for abortion advocates. Fetal-pain laws affect very few pregnancies. Their real purpose, like that of the partial-birth abortion ban, she says, is to shift public opinion by depicting the pro-abortion side as willing to inflict pain on tiny fetuses.

"Only 1.5% of abortions occur late in the second trimester," Bazelon said. "And in three of the five states that recently banned the procedure, no doctor provided late-term abortions anyway. In other words, these particular restrictions are largely symbolic. If the abortion-rights groups were to sue, they would risk returning to dangerous political ground."

Others disagree. They see the fetal-pain issue as a way to significantly roll back the fetal age where total abortion bans can be enacted. Worries Robin Marty, writing in [RH Reality Check](#), "Once they can get the court to rule that 'fetal pain' is the point in which the fetus' existence outweighs the wishes of the woman carrying it, they will then begin to introduce more 'evidence,' this time claiming that fetuses can feel pain at 13 and 1/2 weeks."

Bazelon warns that the pro-life side is not only passing emotive laws as "bait" to attract pro-abortion challenges, but has adopted the "clever incremental strategy" of reducing abortions through many minor restrictions with a "devastating" cumulative effect.

She urges the pro-abortion side to be equally selective, opposing those laws that restrict women's access to health services, including insurance.

Walter Olson of the Cato Institute's Center for Constitutional Studies says Bazelon's advice may be an easier-said-than-done case. The current plethora of pro-life legislation is the result of several long-term developments, not least of which is the cultivation of the young, conservative legal minds that are now drafting laws tailored to exploit the U.S. Supreme Court's latest decisions and to defend them in trial.

"The liberals have had this kind of sophisticated legal advice all along. Now, conservatives are getting it too," said Olson, citing many conservative legal foundations which sprang up after *Roe*, such as the Federalist Society, to encourage the education of conservative lawyers and legal thinking.

Conservatives initially spent much of their energy lamenting the trend of judges to become legislators through legally groundless interpretations of the U.S. Constitution. Now they are imitating techniques pioneered by the American Civil Liberties Union and other liberal organizations by passing multiple versions of the same law in many states.

"The less-appealing cases can be dropped so that the case with the most sympathetic circumstances for your side actually moves up," Olson said.

The assumption now, he says, is that since the U.S. Supreme Court has already gone out on a limb by issuing decisions that are not based on the Constitution, the high court is even more susceptible to public opinion and popular appeal.

"That is why the pro-choice side brings up rape and incest and why the pro-life side makes laws about partial-birth abortion or fetal pain at 20 weeks. These may not affect very many pregnancies, but they have a big impact on the popular mind."

Justice Kennedy

Bazon confirms that the pro-choice legal leadership is looking for cases that will appeal especially to Justice Anthony Kennedy, the "swing vote" on the Supreme Court most likely to decide a groundbreaking case. On what kind of measure might Kennedy be expected to vote to maintain *Roe*? Bazon suggests one passed in several states this year that requires the physician performing the abortion to first read to his patient a list of "made-up" medical consequences of the operation.

But given the new sophistication on the right, Olson predicts that the pro-life side will also be tailoring cases for Kennedy and ensuring that many new measures survive the injunctions and other legal challenges.