GUEST COLUMN: MARC SPINDELMAN

Anti-abortion 'Heartbeat Bill' unlikely to withstand court

A committee of the Ohio House of Representatives recently approved an aggressive anti-abortion measure. It outlaws abortions once a fetal heartbeat is detected, hence its name: the "Heartbeat Bill." Republican leaders in the House are considering whether to bring this measure to a full vote. Like the Ohio Right to Life, they appear concerned that the legislation – if enacted – will be struck down by the federal courts in ways that will ultimately reinforce women's constitutional right to choice, setting the right-to-life movement back years or more.

Virtually everyone agrees the Heartbeat Bill violates existing constitutional abortion rules. These rules hold that, prior to fetal viability, the final abortion choice belongs to the pregnant woman.

Practically, the Heartbeat Bill can only withstand constitutional attack if the U.S. Supreme Court substantially rewrites existing rules governing women's reproductive rights. Will it?

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A Supreme Court decision issued four years ago in a case called Gonzales v. Carhart offers a tiny glimmer of hope. In this case, the court allowed the federal government to ban doctors from performing an abortion procedure known as intact dilation and evacuation, perhaps more familiarly, "partial-birth" abortion. The court reached this conclusion even though the federal abortion ban had some pre-viability applications. If the Supreme Court thought it permissible to ban partial-birth abortions before viability, might it not similarly affirm a pre-viability ban on abortions after a fetal heartbeat is detected?

Anything is possible. But defenders of the Heartbeat Bill shouldn't pin too many dreams on Gonzales v. Carhart. Yes, the decision upheld a pre-viability abortion regulation that restricted women's choice. But it didn't suggest the government possesses the power to enact more sweeping pre-viability abortion bans like the Heartbeat Bill.

To the contrary, the Carhart opinion emphasized how limited the federal abortion ban's pre-viability reach was. Crucial to the court's ruling was the fact the federal abortion ban blocked only one single (and pre-viability, an uncommon) method of abortion. Pre-viability partial-birth abortions could thus be restricted without generally restricting or unduly limiting a woman's right to choose. Women's abortion rights, somewhat diminished, were seen to remain otherwise intact.

Whatever else the Carhart decision is, it's no endorsement of aggressive pre-viability abortion bans like the Heartbeat Bill, which could block abortions as early as 6 to 8 weeks after conception. Fairly read, nothing in the Supreme Court's Carhart opinion shows a majority of the Court itching or predisposed to reconsider the basic architecture of existing abortion rules. Lest it be missed, these precedents, acknowledged and relied on by Carhart, are the same ones that must be toppled for the Heartbeat Bill's post-heartbeat, pre-viability abortion ban to stand. If that's the goal, Carhart is less solution than part of the problem.

Recognizing this, the leadership of the Ohio House of Representatives may well side with the Ohio Right to Life against other pro-life advocates of the Heartbeat Bill. If enacted, the proposed measure, when challenged in federal court, appears destined to be a vehicle for reaffirming and strengthening women's abortion rights. That's much more likely, anyway, than that the court will use the case to announce the fetus is a person, constitutionally guaranteed a right to life.

If and when that happens, the decision to pass the Heartbeat Bill into law will look, from a pro-life perspective, not like heroism, but political bumbling.

For women's reproductive rights, the message is clear: The Heartbeat Bill is a threat, but, for now at least, one that's either politically or legally doomed.

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