Written by **Raven Clabough** on July 23, 2015

Appeals Court Affirms Ruling Against North Dakota Restrictive Abortion Law

On Wednesday, a federal appeals court affirmed a 2014 ruling that struck down North Dakota's restrictive law banning abortions when a fetal heartbeat can be detected. U.S. District Judge Daniel Hovland ruled the law unconstitutional last year in response to a suit brought by the state's abortion clinic.

Enacted in 2013, North Dakota's fetal heartbeat law has been described as the strictest in the country by abortion "rights" supporters.

In addition to signing this measure into law, Republican Governor Jack Dalrymple has also signed other restrictive abortion bills, including one requiring an abortionist to be a doctor with admitting privileges at a local hospital, and another outlawing abortions for sex selection or in cases of genetic abnormalities.

Of course, restricting abortions based on certain criteria such as the detection of a fetal heartbeat does not address the fundamental issue that, if human life is sacred, then innocent human life should enjoy the protection of the law regardless of whether a heartbeat may be detected. But pro-lifers support whatever restrictions can be enacted into the law, recognizing that those restrictions will save many from the abortion chambers, while the abortion lobby supports abortion on demand.

Under the North Dakota law, abortions could be illegal as early as six weeks into the pregnancy. Supporters viewed the restriction as a direct challenge the 1973 *Roe v. Wade* ruling that legalized abortion until a fetus is considered viable, approximately 22 to 24 weeks into the pregnancy. As explained by Governor Dalrymple, the law was a "legitimate attempt by a state Legislature to discover the boundaries of *Roe v. Wade*."

In his 2014 ruling, Judge Hovland called the law "invalid and unconstitutional," stating it would not be able to withstand a constitutional challenge. "The United States Supreme Court has spoken and has unequivocally said no state may deprive a woman of the choice to terminate her pregnancy at a point prior to viability," Hovland wrote in his ruling. "The controversy over a woman's right to choose to have an abortion will never end. The issue is undoubtedly one of the most divisive of social issues. The United States Supreme Court will eventually weigh in on this emotionally-fraught issue but, until that occurs, this Court is obligated to uphold existing Supreme Court precedent."

In this week's decision, the federal appeals court pointed to the Supreme Court's 1973 ruling as well. "Because there is no genuine dispute that (North Dakota's law) generally prohibits abortions before viability — as the Supreme Court has defined that concept — and because we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions, we must affirm the district court's grant of summary judgment to the plaintiffs," the appeals court ruling said.

However, the three-member panel of the Circuit did note that it was perhaps time for the Supreme Court to revisit the standard it set in 1973. "The continued application of the Supreme Court's viability standard discounts the legislative branch's recognized interest in protecting unborn children," the court wrote, adding that "good reasons exist for the (Supreme) Court to reevaluate its jurisprudence." The judges observed that a 24-week-old fetus in the 1970s may have been deemed nonviable, but advancements in the medical field have increased survivability for younger fetuses. The Supreme Court, they noted, has tied viability to "developments in obstetrics, not to developments in the unborn."

And while the court did not agree with the argument that children conceived *outside* the womb through IVF means that viability begins at conception, it did admit that IVF and similarly advanced technologies are proof that the amount of time an "embryonic unborn child" can live outside the womb will only increase further. Overall, the judges determined that a more defined benchmark than viability will better serve states and their "interest in protecting unborn children." But not, apparently, when human life begins.

Yet at least one pro-life group, though disagreeing with the appeals court's decision to strike down North Dakota's fetal heartbeat law, did find some good in what the court wrote. "Though we are obviously disappointed by the ultimate outcome of the case, the Eighth Circuit gave us a thoughtful decision that outlines the many impervious, unwise and plainly unscientific aspects of the Supreme Court's abortion jurisprudence," said Penny Nance, president and chief executive of Concerned Women for America (CWA).

Of course, the states do not have to be at the behest of the unconstitutional whims of the judicial branch of the U.S. government and can turn to nullification and simply refuse to enforce the laws that they recognize are unconstitutional. Thomas Jefferson said, **"**Where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy."

When the Supreme Court ruled in 1973 that women had the right to an abortion under a constitutional right to privacy that can be enforced through the due process clause of the 14th Amendment, the court might as well have said "Constitution be damned." An enumerated right to privacy exists nowhere in the Constitution.

Justice Bryon White noted as much in his dissent in *Roe v. Wade*:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.

The Tenth Amendment Center contends, "Court rulings carry no weight when they defy the Constitution, and states should simply refuse to enforce them." The judicial branch has no right to decide on abortion. Instead it falls to the states.

North Dakota is not out of options.