

Take the Fifth South Dakota's invitation to snuff your embryo.

By William Saletan

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Monday morning, Gov. Mike Rounds signed into law a ban on nearly all abortions in South Dakota. He called it a "[direct challenge](#)" to *Roe v. Wade*. But the ban also poses a direct challenge to the pro-life movement, and to itself, by permitting the destruction of what it calls unborn human beings.

According to Section 1 of the [law](#), "life begins at the time of conception," and "each human being is totally unique immediately at fertilization." Accordingly, Section 2 bans the administration "to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being." Section 5 defines "unborn human being" as "the unborn child from fertilization to full gestation."

In short, if you terminate life after [fertilization](#), you've killed a human being, and you're going to jail.

Section 3, however, tells a different story: "Nothing in section 2 of this Act may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing."

Look at that language carefully. It doesn't just say you can take a contraceptive drug before sex. It says you can take such a drug *after* sex, as long as it's before conventional tests can detect a pregnancy.

Conventional tests [can't detect a pregnancy at fertilization](#). They detect hormonal changes at implantation, which begins around the [fifth](#) day after fertilization and can take another [week](#) to complete.

In other words, South Dakota gives you five days to kill what it calls your unborn child.

How? By taking a morning-after pill such as [Plan B](#). According to the [Food and Drug Administration](#), Plan B "acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation)." Fertilized egg, in South Dakotan, means human being. And prevention of implantation means death.

Why the loophole? Are South Dakota lawmakers confused about when life begins? Section 2 of their legislation says the ban applies only to a "pregnant woman." Do they think, as some [moderate pro-lifers](#) do, that pregnancy and life begin at implantation? Nope. Section 5 of the ban defines "pregnant" as "having a living unborn human being within [your] body throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation." Pregnancy begins at fertilization, as does life.

Is the loophole just a matter of enforceability? If conventional tests can't prove a woman was fertilized, prosecutors can't nail her pill provider for abortion. But that's an argument for omitting the loophole as unnecessary, not for inserting it.

What's curious about the loophole is that its supporters not only included it; they advertise it. In the second paragraph of his signing statement, Rounds pointed out that the ban "does not prohibit the taking of contraceptive drugs before a pregnancy is determined, such as in the case of rape or incest."

There's your answer. The purpose of the loophole is to give rape victims a grace period. Americans [overwhelmingly think abortion should be allowed](#) in cases of rape. Rape victims are the women most likely to know immediately after sex that they're at high risk of unwanted pregnancy. Give them morning-after pills, and you've solved the political problem.

But now you've got a scientific, moral, and legal problem. The South Dakota law purports to supersede *Roe* because "scientific advances since the 1973 decision" show that "life begins at the time of conception." It concludes that unborn children, "from fertilization to full gestation," have an "inalienable right to life." Nobody who seriously believed these things would give you five days to kill an embryo, any more than they'd give you five days to kill a baby. The loophole discredits the law's rationale.

Welcome to world of ambiguity, pro-lifers. Out of compassion for women in tragic but medically non-threatening circumstances, you agree that unborn life, up to a certain stage of development, may be aborted. Now we're just quibbling over the details.

The Road From *Roe*

Can technology break the abortion stalemate?

By William Saletan

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For the first time in nearly 14 years, legal abortion in the United States is in serious jeopardy.

In recent days, the shape of this assault has become clear. First, on the morning of Justice Samuel Alito's debut, the Supreme Court [announced](#) that it would review the constitutionality of the Partial-Birth Abortion Ban Act, setting up what pro-lifers hope will be the beginning of the end of *Roe v. Wade*. The next day, South Dakota lawmakers [passed](#) a ban on virtually all abortions, and pro-choicers vowed to litigate it all the way to the high court, which would force the justices either to overturn or reaffirm *Roe*. A few days later, the court told pro-choicers they could no longer use racketeering laws to halt blockades and protests at abortion clinics.

The impending legal battles put us on the verge of repeating the last two decades of the abortion war: pro-life victory, pro-choice backlash, pro-choice complacency, pro-life revival. At the end of the cycle 20 years from now, we'll be right back where we are today. Unless, that is, we find a way out.

And that means moving beyond *Roe*.

Politically, legally, and technologically, the 33-year-old court decision is increasingly obsolete as a framework for managing decisions about reproduction. But pro-lifers can't launch the post-*Roe* era, because they're determined to abolish its guarantee of individual autonomy, and the public won't stand for that. Only pro-choicers can give the public what it wants: abortion reduction within a framework of autonomy.

Three political asteroids are heading toward us. The first is the "partial-birth" ban. The second is the South Dakota ban. The third is the retirement of Justice John Paul Stevens. The order in which they hit us will determine how close *Roe* comes to being overturned. But one way or another, they'll reignite the cycle of victory, backlash, and defeat.

Six years ago, in the middle of the 2000 presidential campaign, the court [struck down](#) a partial-birth ban from Nebraska because it was too vague and lacked an exception for pregnancies that threatened the woman's health. The case, *Stenberg v. Carhart*, was decided on a 5-4 vote. Pro-lifers faced a choice: Add a health exception to the federal partial-birth bill to get it through the court, or refuse and gamble that a future court, populated by justices chosen by President Bush, would reverse *Stenberg* and uphold the ban.

They gambled, and the gamble paid off. In July 2005, a week before an appeals court sent the federal ban toward the Supreme Court, Justice Sandra Day O'Connor, the fifth vote in *Stenberg*, announced her retirement. Her replacement by Alito creates an almost certain five-vote majority against *Stenberg*. Justices don't overturn precedents casually, but *Stenberg* is far more vulnerable than *Roe*. *Roe* is 33 years old, was a 7-2 decision, has been used as a basis for subsequent Supreme Court opinions, and has been reaffirmed under fire (14 years ago in [Planned Parenthood v. Casey](#)). *Stenberg* is six years old, was a 5-4 decision, hasn't been woven into subsequent opinions, and was

never reaffirmed. *Roe* affects many women and is popular. *Stenberg* affects fewer women and is less popular.

A Roberts-Alito-Stevens court would probably overturn *Stenberg* in June 2007. There's no chance it would overturn *Roe*, since five of the justices who reaffirmed *Roe* in *Casey* would still be on the court. But the ruling could set off a political explosion. That's what happened 17 years ago when the court, in *Webster v. Reproductive Health Services*, [narrowed](#) its interpretation of *Roe*. Justice Harry Blackmun, *Roe*'s author, accused his colleagues of inviting legislatures to attack *Roe*, which he predicted "would not survive." That was enough to scare pro-choice voters and make them a decisive force in many states. Three years later, in *Casey*, Blackmun warned the country that he would soon have to retire, putting *Roe* in jeopardy.

A similar warning from Stevens in the partial-birth case could easily set off an explosion next summer. Or Stevens could guarantee such an explosion by retiring. If he does neither, South Dakota will do it for him. Because the South Dakota ban so flagrantly defies *Roe*, lower courts will probably strike it down quickly, moving it up the chain. If it comes out of an appeals court by the end of 2007, pro-choicers will take it straight to the high court, hoping to make *Roe* a central issue in the 2008 elections. The court might refuse to hear the case, if it's clear that five justices won't reconsider *Roe*. Or it might sit on the case till after the elections. But the explosion will happen anyway. By May 2008, Stevens will be 88, two years beyond the age at which any other recent justice died or retired. Everyone will know that he has one foot out the door, and so does *Roe*.

In short, 2008 will look a lot like 1989, with a surge of pro-choice voting and a frightened retreat by pro-life politicians. But one thing will be different: The House, Senate, and White House will be up for grabs. Instead of picking up a couple of governorships, Democrats and pro-choicers could find themselves in control of the federal government.

That's where pro-choicers need to ditch their old script. The last time they were in power, from 1993 to 1994, they tried to enshrine *Roe* into federal law and subsidize abortions through Medicaid and President Clinton's health-insurance proposal. A couple of years ago, in a book about the abortion-rights movement, I [suggested](#) that their agenda had been too ambitious. Now I think it wasn't ambitious enough. Real ambition isn't about fortifying the territory you've won. It's about moving on so that the territory behind you no longer needs defending. The territory we need to leave behind is *Roe*.

Roe established a right to abortion through the end of the second trimester. The latter part of that time frame has always been the most controversial. Improvements in neonatal care have made fetuses viable—capable of surviving delivery—earlier than was possible in 1973. That's why Justice O'Connor said *Roe* was "[on a collision course with itself](#)" and eventually led her colleagues to [abandon](#) the trimester framework. Meanwhile, sonograms and embryology have made people aware of how well-developed fetuses are while still legally vulnerable to abortion. We even do surgery on fetuses now, which makes aborting them seem that much more perverse. These developments may explain, in part, why two-thirds of Americans think abortion should be [illegal in the second trimester](#)—and why pro-lifers targeted partial-birth abortions for legislative assault.

But if medical technology has helped to expose this moral problem, it can also help us solve it. Second-trimester abortions are becoming not just harder to stomach, but easier to avoid. In 1973, according to the Alan Guttmacher Institute, fewer than 40 percent of abortions took place before the ninth week of gestation. By 2000, the latest year for which data have been analyzed, the percentage was [nearly 60 and rising](#). The same high-resolution ultrasound that makes you queasy about aborting a 12-week fetus has made it

safer to perform abortions at [four or five weeks](#) instead of waiting, as women were once routinely told to do. In 1993, only 7 percent of abortion providers could end a pregnancy at four weeks or earlier; by 2001, [37 percent](#) could do it. And by 2002, two-thirds of clinics belonging to the National Abortion Federation were offering [pills](#) that abort pregnancies in the first [seven weeks](#).

Better yet, technology is helping many women avoid unwanted pregnancies altogether. According to the Centers for Disease Control, "emergency contraception"—high-dose birth-control pills that you can take [after sex](#) to block ovulation, fertilization, or implantation—was almost unheard of a decade ago. By 2002, however, about [10 percent](#) of women between the ages of 18 and 24 had used such pills. Pro-life activists are [fighting these pills](#) in many states and at the Food and Drug Administration, but polls [suggest](#) that even most people who oppose legal abortion would tolerate the pills.

The most widely accepted moral solution, short of abstinence, is contraception that's taken before sex. Here, again, the news is basically good: Contraceptive use rose [11 percent](#) from 1982 to 2002 (though progress was uneven), and during this period, the abortion rate dropped by about [30 percent](#).

Birth control isn't just more common; it's more effective. The weak link in contraception is the human being who's too excited, impatient, or forgetful to take it or use it carefully. But with proper safeguards, technology can circumvent that weak link. When the CDC began tracking birth-control methods in 1982, it had no category for long-lasting [injectable contraceptives](#) or implants. By 2002, it found that [4 percent](#) of women were using these methods. Some injectables require refills every three months, but implants have improved considerably. The maker of [Implanon](#), for instance, says that this implant takes barely a minute to insert, begins working within 24 hours, prevents pregnancy for up to three years, and can be removed in less than three minutes with a 90 percent probability that you'll resume ovulating next month. In clinical trials, says the company, "no pregnancies occurred during use over approximately 73,000 monthly cycles," largely because the "user cannot forget to take the product."

Technology can't avert all our failings or tragedies. There will always be abortions. But when you look at the trends—more foolproof contraception, more access to morning-after pills, earlier and fewer abortions—you can begin to envision a gradual, voluntary exodus from at least half the time frame protected by *Roe*. That's the half the public doesn't support. Maybe that six-month window made more sense in 1973 than it does today. Maybe, if we spend the next 10 years helping women avoid second-trimester abortions, we won't have to spend the next 20 or 40 years defending them. Maybe the best way to end the assault on *Roe* is to make it irrelevant.

The road out of *Roe* won't be easy. Conservatives are already fighting early-abortion pills, morning-after pills, sex education, and birth control. But that's a different fight from the one we've been stuck in since 1973. It's a more winnable fight, and a more righteous one. Five hundred years from now, people will look back on our surgical abortions the way we look back on the butchery of medieval barbers. Like the barbers, we're just trying to help people to the best of our ability. But our ability is growing. So should our wisdom, and our ambitions.

Never Say Never

The arrogance of the partial-birth abortion ban.

By William Saletan

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Three days ago, the U.S. Supreme Court [announced](#) that it would review the constitutionality of the Partial-Birth Abortion Ban Act. The announcement signaled a possible rescue of the law, which had been struck down by appellate courts. Pro-lifers [rejoiced](#). Pro-choicers [fumed](#). The press saw it as a possible [turning point](#) in the campaign to overturn *Roe v. Wade*.

Here's a different way to think about the case. It isn't about whether you're for or against abortion. It's about how confident you are that an unwelcome medical scenario will never happen.

The ban has become so politically central to the abortion debate that it's easy to forget how medically marginal it is. At most, it would affect [fewer than one in 250](#) U.S. abortions. Of these 2,000 to 5,000 unborn babies—if that's what you believe they are—it would save none. It doesn't ban abortions beyond a stage of pregnancy; it just regulates the methods by which they're done.

Despite this empty result—or maybe because of it—many pro-choice politicians are willing to accept the ban. If you can end a pregnancy safely by other means, it seems gratuitously revolting to partially extract the fetus during the procedure. But that's a big if. What pro-choicers demand, and pro-lifers reject, is an exception to allow this method in situations where it's ostensibly necessary to protect the woman's health. According to the National Right to Life Committee, "the vast majority of partial-birth abortions [do not involve](#) any acute medical circumstances." So, in theory, the dispute is confined to a fraction of a fraction of all abortions.

Because the justifying scenarios are exceptional, and because the rationales for the procedure are technical, the federal judge who heard testimony in this case issued an opinion short on generalizations and long on details. His opinion runs [474 pages](#). It spends 57 pages reviewing congressional testimony over a nine-year period and another 278 pages reviewing medical testimony at the trial. It discusses numerous health conditions that, according to doctors who testified, make partial-birth abortion possibly the safest procedure for the woman. It concludes, "The trial evidence establishes that a large and eminent body of medical opinion believes that partial-birth abortions provide women with significant health benefits in certain circumstances." Not all circumstances—just certain ones.

The appeals court opinion affirming this ruling takes similar care. It enumerates scenarios in which testimony and logic indicate that partial-birth abortion might be the safest procedure. It acknowledges contrary testimony but [concludes](#), "If one thing is clear from the record in this case, it is that no consensus exists in the medical community." Quoting a six-year-old [Supreme Court opinion](#), it warns that "the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence."

The ban's authors in Congress, like its defenders in the Bush administration, show no such humility. The nine years of congressional testimony that took 57 pages to describe

in the trial court's opinion are boiled down in the ban's text to [five pages](#). Every inconvenient nuance, witness statement, or piece of evidence is obliterated. The word "never" appears 10 times. "Congress finds that partial-birth abortion is never medically indicated to preserve the health of the mother," says the law, offering no details. "These findings reflect the very informed judgment of the Congress that a partial-birth abortion is never necessary to preserve the health of a woman." Who needs information when you've got informed judgment? Who needs sometimes when you've got never?

In its [brief in defense of the law](#), the Bush administration adopts the same attitude. It crafts a list of legal precedents designed to cow judges into accepting the ban's "findings" instead of trial evidence. The precedents involve the economics of television stations; the sophistication of high-school administrators in interpreting legislation; the ability of volunteers to staff non-combat military jobs; and limits on attorneys' fees in claims for veterans' benefits. It's a telling list, full of one-size-fits-all policies. Three times, the brief quotes a line that says Congress deserves deference because it's "better equipped to amass and evaluate the vast amounts of data bearing on such an issue." But vast data-crunching isn't what's needed here. What's needed is sensitivity to variable particulars.

The administration cites four cases that purportedly validate deference to Congress "on issues of medical or scientific judgment." Two of the cases pertain to treatment of people who have previously committed crimes, which begs the question of whether partial-birth abortion should be criminalized. In the third case, which was decided [during Prohibition](#), the administration's brief notes that the Supreme Court "deferred to an 'implicit congressional finding' that alcohol had no medicinal uses." The administration conveys no acknowledgment, much less embarrassment, that medical evidence now shows this finding to be [wrong](#). In the fourth case, the court upheld a congressional finding that X-rays were [too crude](#) to catch all instances of a disability-related disease. The finding was upheld because it rejected, not imposed, a glib medical generalization.

The argument made by pro-lifers against a health exception is that doctors will interpret it too broadly. Maybe so. But whom do you trust less: Doctors who apply the exception too broadly, or politicians who categorically dismiss it? As the doctors challenging the ban observe, Congress has [no "particular expertise"](#) in medicine. Only 11 of its 535 members are doctors, and only one has performed abortions. If doctors err in using partial-birth abortion when they should rely on a different procedure, the number of additional fetuses killed is zero. But if lawmakers err in ruling it out, every case they screw up is a woman subjected to medical risk.

Unlike Congress, the appeals court that affirmed the necessity of this procedure didn't purport to close the question. It [conceded](#),

This is not to say, however, that because the Supreme Court concluded "substantial medical authority" supported the need for a health exception in 2000, legislatures are forever constitutionally barred from enacting partial-birth abortion bans. Rather, the "substantial medical authority" test allows for the possibility that the evidentiary support underlying the need for a health exception might be reevaluated under appropriate circumstances. Medical technology and knowledge is constantly advancing, and it remains theoretically possible that at some point (either through an advance in knowledge or the development of new techniques, for example), the procedures prohibited by the Act will be rendered obsolete. Should that day ever come, legislatures might then be able to rely on this new evidence to prohibit partial-birth abortions without providing a health exception.

That's the kind of open-minded caution you need to adjudicate complex medical questions. And that, not life or choice, is the crucial question in the partial-birth abortion case. Which party in the dispute has more expertise? Which takes more care? Which shows more humility? By any of those standards, the doctors and judges put the politicians to shame.