

A Call to South Dakota Voters . . . From a South Dakota Son

by John Eidsmoe

I've always been proud to say I'm from South Dakota. From the stable farms and great pheasant country of eastern South Dakota, to the cattle range country west of the River and the four Presidents on Mt. Rushmore, South Dakota is America at its best.

Dad was born and raised in Beresford, where his parents homesteaded and farmed. Mom was raised north of Presho, and many of her relatives still live in the West River country. They met at Yankton College, were married, taught in the schools, and raised a family in various South Dakota communities—Hetland, Volga, and Yankton, where I was born in 1945. While I was a child they moved across the Big Sioux River to Sioux City, but always thought of themselves as South Dakotans. They are buried in the Beresford Cemetery, along with my grandparents and other relatives, where my wife and I will be buried some day. I retain my membership in Skrefsrud Lutheran Church in rural Beresford and frequently preach there when visiting. While my career in the Air Force and in law and ministry has led me elsewhere, I still think of South Dakota as home.

But in recent months I have had even more reason to be proud of South Dakota. My home state is posed to lead the nation in overturning *Roe v. Wade* and restoring the right to life for unborn children.

I speak with some authority on this subject. Besides being a lawyer and a pastor, for over 20 years I have been a Professor of Constitutional Law, first at the O.W. Coburn School of Law in Oklahoma, then at the Thomas Goode Jones School of Law in Alabama. Currently I serve as Senior Staff Attorney for the Alabama Supreme Court. I am also an ordained pastor with the Association of Free Lutheran Congregations (AFLC) and was recently elected to the Board of Directors of Lutherans for Life.

As most of you know, early in 2006 the South Dakota legislature passed H.B. 1215, a bill which defines human life as beginning at conception, affords legal protection to that human life, and prohibits abortion in all instances except to save the life of the mother. Governor Michael Rounds signed this bill into law, and it is now law. Pro-abortion forces, financed heavily by out-of-state money, gathered signatures for a referendum on this bill, and the issue will be on the November 2006 ballot. If South Dakotans vote to uphold this law, pro-abortion forces will undoubtedly challenge it in court. If the case makes its way to the U.S. Supreme Court, it will provide a perfect opportunity for the Court to overrule *Roe v. Wade*.

After four decades of studying, lecturing, debating, and writing on this subject, I am prepared to say that *Roe v. Wade*, the 1973 decision by which the U.S. Supreme Court struck down the duly-enacted laws of nearly all of the 50 states and mandated abortion on demand as a national policy, is wrong. It is wrong biblically; it is wrong morally; it is wrong factually; it is wrong legally. The blood of unborn babies all across the land cries out for its overturn. And South Dakota has the opportunity to lead the way.

***Roe v. Wade* is wrong biblically.**

As Lutherans, we believe the Bible is the ultimate authority on questions of morality. But does the Bible address abortion?

Perhaps not in express terms. But the Decalogue prohibits killing, or more precisely, murder (Exodus 20:13). But many would argue that although all murder involves killing, not all killing is murder. Murder is the intentional, unjustified taking of human life.

So as we consider whether this Commandment prohibits abortion, we have to address two questions: (1) Is the pre-born child a living human being? and (2) If so, is the killing of that child ever justified?

Is the pre-born child a living human being?

The Bible treats the pre-born child as a living human being. When Elizabeth, the mother of John the Baptist, came into the presence of Mary who was carrying Jesus in her womb, Elizabeth declared that “the babe leaped in my womb for joy” (Luke 1:44 *NIV*). That doesn’t sound like a fetus or fertilized egg; that sounds like a child! It reminds us of Rebekah, of whom we read, “And the children struggled within her... .” (Genesis 25:21-26 *ESV*). These pre-born children displayed traits that would follow them most of their lives.

The original languages used in these accounts make no distinction between born and pre-born children. Of all of the Greek words used for child, *brephos* connotes a baby or very small child. That’s the word attributed to Elizabeth: “The *brephos* leaped in my womb for joy.” We see the same word in the next chapter: “Ye shall find the *brephos* wrapped in swaddling clothes, lying in a manger.” And in 2 Timothy 3:15 Paul uses the same word: “From a *brephos* thou hast known the holy Scriptures... .” The same word is used for a child in the womb, a child newly born, and a child sometime after birth.

Another Greek word used for “son” is *huios*. In Luke 1:36 (*21st Century KJV*) the angel tells Mary, “And, behold, thy cousin, Elizabeth, she hath also conceived a *huios*.” And the angel tells Mary in Luke 1:31 (*KJV*), “Thou shalt conceive in thy womb, and bring forth a *huios*.” Two verbs, “conceive” and “bring forth,” with the same direct object, a “son” or *huios*. And years later, when Jesus is a young man, God the Father says to Him, “Thou art my beloved *huios*” (Luke 3:22). Again, the same Greek word used for a pre-born child, a newborn child, and a young man.

The same is true of the Old Testament Hebrew. The same word used for the pre-born children in Rebekah’s womb, *bne*, is also used for Ishmael when he is 13 years old (Genesis 17:25) and for Noah’s adult sons (Genesis 9:19). And Job says in his anguish, “Let the day perish wherein I was born, and the night in which it was said, ‘There is a man child (*gehver*) conceived’” (Job 3:3 *KJV*). The Old Testament uses *gehver* 65 times, and usually it is simply translated “man.” Job 3:3 could be accurately translated, “There is a man conceived.”

The biblical authors identify themselves with the pre-born child. In Psalm 139:13 (*KJV*) David says, “Thou hast covered *me* in my mother’s womb.” Isaiah says, “The Lord hath called *me* from the womb” (49:1), and in Jeremiah 1:5 we read, “before *thou* camest forth out of the womb I sanctified *thee*, and I ordained *thee* a prophet unto the nations.” They don’t say “the fetus that became me”; that person in the womb is “me.”

Job wishes he could have died before he was born: “Wherefore then hast thou brought me forth out of the womb? Oh that I had given up the ghost, and no eye had seen me!” (10:18). How can the pre-born child die if he or she is not alive?

And David says, “Behold, I was shapen in iniquity; and in sin did my mother conceive me.” (Psalm 51:5) There was nothing sinful about the act of David’s conception; this passage establishes that the pre-born child has a sinful nature. How can a non-person have a sinful nature? And while other verses establish the child’s personhood before birth, this passage shows his or her humanity all the way back to conception!

Clearly the Bible, especially in its original languages, treats the pre-born child the same as a child already born. The Bible knows nothing about “potential human beings”; to the authors of Scripture there are only human beings with potential.

Some will argue that because Genesis 2:7 says, “God breathed into his nostrils the breath of life; and man became a living soul,” man doesn’t really become human until he takes that first breath. I believe this is a mistaken interpretation of Scripture. (1) Genesis 2:7 is not normative about how and when human life begins. Adam was never a pre-born child; he was formed out of the dust of the ground as a mature adult human being. No one else was formed out of the dust of the ground; even Eve was formed out of Adam’s rib, and we never read that God breathed the breath of life into her nostrils, or those of anyone else. (2) Even if we were to conclude that without the “breath of life” we are not fully human, the pre-born child takes in oxygen through a placenta. Birth constitutes a dramatic change of environment coupled with the ability to breathe for oneself; other than that birth is simply one more step on the road to maturity.

So the Bible, taken as a whole, teaches that the pre-born child is a living human being. But is the killing of that pre-born child ever justified? We will consider that question as part of the moral argument.

Roe v. Wade is wrong morally.

Let us consider the reasons most commonly advanced to justify abortion.

The Freedom to Choose.

This is an attractive argument, because we Americans do value the freedom to choose. But we also value the right to life, and this right must take precedence because without the right to life, no other rights can be exercised.

Furthermore, the term “pro-choice” is a misnomer. The baby doesn’t get to choose. I saw a billboard on I-35 in neighboring Minnesota that read, “Pro-Choice Is a Lie. Babies Do Not Choose to Die.”

And although the mother may not choose to become pregnant, except in rape cases she does choose to engage in the act by which the child is conceived.

Birth Defects

This is not a valid argument for abortion. Most birth defects cannot be predicted with certainty. Some can be predicted with reasonable certainty, but even in these instances the severity of the defect cannot be known before birth, or, in many instances, not until some time after birth.

Furthermore, we don’t “euthanize” defective children after they are born. How, then, can we justify killing them before they are born, once we accept the fact that the pre-born child is a living human being?

And what right have we to judge whose life is “meaningful” and whose is not? Many persons who are born with defects (Helen Keller, Ludwig von Beethoven, to name only two) make major contributions to society. Ultimately, only God has a right to say whose life is meaningful and whose is not.

Emotional Harm to the Mother

Certainly the mother’s mental health is a genuine concern. That’s why pro-life people operate crisis pregnancy centers to help mothers distraught by pregnancy.

But abortion does not solve the problem. In many instances, abortion complicates the problem and makes it worse. Adoption is a better solution for the mental health of the mother.

And in the final analysis, when we weigh the mental health of the mother against the right of the innocent child to live, the child’s right to life must take priority.

Rape or Incest

Pregnancies resulting from rape or incest are rare and account for, at most, one percent of all abortions. This argument should not be used to justify abortion on demand.

Saying they are rare in no way minimizes the seriousness of the problem when it does occur. Rape and incest are traumatic, especially when a pregnancy results. But is abortion really the solution?

Abortion does not undo the trauma of rape or incest. It complicates the problem by adding the trauma and guilt of abortion. There is no ideal solution to this problem, but childbirth followed by adoption is preferable to abortion.

And although the man who commits rape or incest should be punished as a criminal, the child is innocent. Consider Deuteronomy 24:16: “The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.”

Unwanted and Abused Children

This sounds like a powerful argument: If abortion is prohibited, unwanted children would proliferate and be subject to abuse.

But upon closer analysis this argument breaks down. There is no evidence that abortion prevents child abuse. A University of Southern California study of 1,300 battered children found that 91 percent of the battered children were the result of planned pregnancies, 90 percent were legitimate, and 24 percent were named after their parents as compared to only four percent of a control group. The fact that a pregnancy is unplanned does not mean the child will be unwanted or abused later.

Note, also, that since the 1973 *Roe v. Wade* decision legalizing abortion, reports of child abuse have skyrocketed.

And we don't “euthanize” unwanted or abused children after birth. How can we justify doing so before birth?

“You can't legislate morality!”

This threadbare cliché has been used so many times, it is often accepted as a truism. But think about it – does it really make sense?

All legislation has a moral basis. In fact, that is what law is – taking a moral principle and clothing it with official governmental sanction and enforcement.

Nearly everyone would agree that murder is wrong. But I've never heard anyone seriously argue, “If you believe murder is wrong, you should try to persuade people not to commit murder. But you can't force your moral judgment upon another person; that person may regard murder as morally right or at least as an alternate lifestyle. We have to be pro-choice on the question of murder; murder is a decision each person must make for himself, in consultation with his munitions expert.”

No, we don't do that. We enact laws prohibiting murder and we impose those laws even upon those who disagree with them. Moreover, we punish those who refuse to obey this moral law. The same is true of theft, speeding, driving while intoxicated, abusing children, tax evasion, and every kind of legal prohibition we can think of.

Of course you can legislate morality. We do it all the time. The real question is, whose morality is being legislated?

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We conclude, then, that the only possible justification for abortion is to save the life of the mother if her life is jeopardized by the pregnancy. The new statute South Dakotans will vote on in November specifically allows for that exception.

No wonder Orthodox scholar Alexander Webster wrote that abortion “is one of only several moral issues on which not one dissenting opinion has ever been expressed by the Church Fathers.”

Martin Luther stated his position forcefully: “For those who have no regard for pregnant women and who do not spare the tender fruit are murderers and infanticides.” And John Calvin was just as clear: “If it seems more horrible to kill a man in his own house than in a field, because a man’s house is his most secure refuge, it ought surely to be deemed more atrocious to destroy the unborn in the womb before it has come to light.”

Not only is *Roe v. Wade* wrong biblically; it is wrong morally as well.

***Roe v. Wade* is wrong factually.**

Roe v. Wade was based on a lie, and the decision is replete with factual errors.

According to the Supreme Court opinion the woman, known then only as “Jane Roe,” had been raped and did not want to bear the rapist’s child. The Court ruled that Jane Roe had a constitutional right to have an abortion, Texas law to the contrary notwithstanding.

Two decades later, the truth finally came out. Norma McCorvey, the woman known in the lawsuit as “Jane Roe,” became a Christian and knew she must tell the truth. She revealed that she had not been raped; she made up the story because she thought it would make her case stronger. In fact she did not undergo abortion; she chose to give birth to the baby while her legal case was in process. Norma now works full-time in the pro-life cause. In 2005 she tried to persuade the Supreme Court to reopen her case based on the truth, but the Court refused.

The Court majority in *Roe v. Wade* emphasized that they were not deciding the ultimate question of when human life begins. But by ruling that the pre-born child is not a “person” within the meaning of the Fourteenth Amendment and therefore not entitled to the Fourteenth Amendment rights of life, liberty, and property, the Court effectively said that pre-born children are not living human beings. This ignores the basic facts of fetal development.

Luther’s concept of the “two kingdoms,” church and state, is helpful here. Because human nature is what it is, God has established these two kingdoms to govern us. The “kingdom of the right,” the Church, preaches the Gospel which leads us to salvation and moral living. The “kingdom of the left,” the State, preserves order, protects us from criminals, and defends our borders against foreign enemies. God has also given us two tools for understanding truth, revelation and reason. Revelation is God’s revealed Word, the Scriptures. Reason is our power to discover truth from logic and evidence. In Church matters we rely primarily upon revelation; in State matters we rely primarily upon reason.

The abortion issue is a good example of the way these relate. As Christians, we form our own position on abortion by looking to God’s Word, and His Word teaches us that the pre-born child is a living human being and that the taking of innocent life is wrong. But when we enter the civic arena—voting, participating in political conventions, serving in the legislature—we defend our position based upon logic and evidence that would persuade even a secular legislator that abortion is wrong. So let’s look to what modern medicine teaches concerning the pre-born child.

Modern medicine and modern science confirm Scriptures’ teaching concerning the beginning of human life. Consider the following established medical facts:

- From the point of conception, the child’s DNA or genetic make-up is fixed and remains constant throughout the child’s life. This DNA determines, to a large extent, the child’s eventual bone structure, skin, eye and hair color, and many other characteristics.
- Two weeks after conception, the child already has her own blood supply and blood type. Her blood and the mother’s blood come into contact through a membrane but do not mingle.
- Three weeks after conception, the heart is beating and a body rhythm is established that will remain constant throughout the child’s life.
- Four weeks after conception, the brain, arms, legs, kidneys, liver, and digestive tract have begun to take shape. The heartbeat can be detected on an electrocardiogram.
- By the end of the second month, the child is less than one thumb’s length in size, but everything—hands, feet, head, organs, brain—are already in place. The child even has fingerprints!
- During the third month, the palms of the hands become sensitive, as do the soles of the feet. The child will grasp an object placed in his hand and can make a fist. He swallows, his lips part, his brow furrows, and he is capable of moving to avoid light or pressure. His eyelids even squint.
- By the end of the third month, the child sucks his thumb and can feel pain. From this point on, development consists mainly of growth.

And yet, the Court majority in *Roe v. Wade* ignored all of this evidence and concluded that the pre-born child is not a “person” within the meaning of the Fourteenth Amendment. *Roe v. Wade* is wrong factually.

***Roe v. Wade* is wrong legally and constitutionally.**

Writing for the Court majority in *Roe v. Wade*, Justice Blackmun declared that the abortion law of Texas and those of nearly all other states are unconstitutional because they violate the right to an abortion. But the plain fact is, the Constitution does not mention abortion. Justice Blackmun acknowledges this, but he says the right to abortion is part of a broader right of privacy. The problem is, the Constitution does not mention a right to privacy either.

To set forth this right of privacy, Justice Blackmun quoted from a 1965 decision known as *Griswold v. Connecticut*, in which the Supreme Court recognized a narrow right of privacy that protected the right of a married couple to practice birth control in their own home. One might readily agree that a decision concerning birth control is within the jurisdiction of the family rather than the state. But it is problematic whether a Court of unelected Justices serving life terms should have the authority to invalidate laws passed by an elected legislature, based upon a so-called right of “privacy” that is not mentioned in the Constitution.

Justice Douglas, writing for the majority in *Griswold*, found a right to privacy in the “emanations” or “penumbras” of the Bill of Rights.

The problem is, when Justices start basing their decisions upon “penumbras” and “emanations” instead of the plain words of the Constitution as understood by those who framed and ratified it, justice becomes entirely subjective, and the Constitution becomes a “silly putty” document that can be molded into anything a judge wants it to be.

And even if we accept the notion that a right to privacy does exist somewhere in the emanations or penumbras of the Bill of Rights, it is quite a stretch to say that right of privacy includes abortion. In fact, when oral arguments on *Griswold* took place before the Supreme Court

in 1965, Professor Thomas Emerson argued for the right to privacy in birth control for married couples. Justice Hugo Black asked Professor Emerson:

“Would your argument concerning these things you’ve been talking about relating to privacy, invalidate all laws that punish people for bringing about abortions?”

Prof. Emerson replied: “No, I think it would not cover the abortion laws... [T]hat conduct does not occur in the privacy of the home.”

And yet, just seven years later, in *Eisenstadt v. Baird* (1972), a Massachusetts law prohibiting birth control for all except married people was declared unconstitutional. This narrow right of privacy that at first applied only to the family, now becomes an individual right.

And just one year later, in the 1973 *Roe v. Wade* decision, this so-called privacy right is stretched by judicial fiat to include abortion – something the Court and the nation were assured in 1965 would not happen.

I believe *Roe v. Wade* is wrong constitutionally for several reasons. First, the decision takes the right to privacy, which is itself not expressly set forth in the Constitution, and stretched that right to mean something far different from anything the Framers ever envisioned.

Second, Justice Blackmun declares that the right to abortion is a “fundamental” or “preferred” right, and therefore the state may infringe upon that right only when the state has a compelling interest that cannot be achieved by less restrictive means. The State of Texas contended that it had a “compelling interest” in the lives of its pre-born children. But Justice Blackmun said that right becomes “compelling” only when the pre-born child reaches the point of “viability,” that is, when the child is capable of surviving outside the womb. The point of viability, Justice Blackmun said, comes at the beginning of the third trimester, or that is, at the beginning of the seventh month of pregnancy. This is erroneous because (1) Blackmun gives no reason to equate the state’s compelling interest with viability; and (2) his assertion that the child cannot survive outside the womb before the beginning of the seventh month was questionable in 1973 and definitely untrue today. Children today can survive outside the womb before the beginning of the sixth month, and sometimes even earlier than that.

Third, Justice Blackmun dismisses the right of the pre-born child to live. The Fourteenth Amendment states in part that “no state shall deprive any person of life, liberty or property without due process of law.” If the term “liberty” includes the right of a woman to an abortion, doesn’t the word “life” include the right of the pre-born child to live? But without providing any support for his position at all, Justice Blackmun dogmatically states that the term “person” as used on the due process clause includes only people who are already born. Not only does Justice Blackmun provide no support for this position (because there is none), he ignores the fact that at the time the 14th Amendment was adopted (1868), medical science was in the process of discovering the amazing secrets of fetal development, and at this very time statutes prohibiting abortion (or “foeticide” as the practice was sometimes called) were being adopted in states all across the country.

By this flawed reasoning, seven men who had never been elected to public office overturned the statutes enacted by elected state legislators in almost every state. It is appropriate for Supreme Court Justices to strike down statutes that violate the clear language of the Constitution. But the Constitution doesn’t mention abortion; it doesn’t even mention privacy. Activist Justices have substituted their own notions of what the laws ought to say, in place of the plain wording of the Constitution. That is not judging. That is legislating. Our Constitution does not give judges any authority to legislate. That is the role of legislators, the elected representatives of the people.

The Time Has Come to Overrule *Roe v. Wade!*

Roe v. Wade was controversial from the beginning. It was a 7-2 decision; Justices Rehnquist and White dissented vigorously. Then in 1983, Justice Sandra Day O'Connor joined the dissenters in *City of Akron v. Akron Center for Reproductive Health*, and the pro-abortion majority shrunk to 6-3. Then in 1986, Chief Justice Burger joined the dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, and the pro-abortion majority shrunk to 5-4. Burger's support for *Roe v. Wade* was always tenuous. And in *Thornburgh* he broke from Justice Blackmun and the pro-abortion majority to declare that in 1973 he did not foresee that legalizing abortion would lead to 1½ million abortions each year, and concluded, "It is now time to rethink *Roe v. Wade*."

Then, in *Webster v. Reproductive Services* (1989) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), four Justices were ready to overrule *Roe v. Wade*. But Justice O'Connor, was not willing to go that far. Still, although the Court did not overrule *Roe v. Wade*, the majority upheld restrictions on abortion that would have been struck down as unconstitutional a decade earlier.

It's time for a challenge, because we have a different Court today. None of the nine Justices who decided *Roe v. Wade* are still serving on the Court. Recently Chief Justice Roberts and Justice Alito have joined the Court; both are thought to be strongly pro-life. They join two solidly pro-life Justices, Scalia and Thomas, and conservative-leaning Justice Kennedy could provide the fifth vote to overrule *Roe v. Wade*. And it is entirely possible that by the time a challenge to South Dakota's law reaches the Supreme Court, more new Justices will have joined the Court. I cannot say with certainty that the Court will overrule *Roe v. Wade* and uphold the South Dakota statute, but I can say it is a strong possibility.

A challenge to *Roe v. Wade* is long overdue. The decision is biblically wrong, morally wrong, factually wrong, and constitutionally wrong. But it will remain the law of the land until a state like South Dakota has the courage and fortitude to challenge it. *Plessy v. Ferguson*, the 1896 decision that upheld segregation, was wrong; but it remained the law of the land until citizens challenged it and persuaded the Court to overturn it in *Brown v. Board of Education* (1954). It is time to do the same with *Roe v. Wade*.

Like many of yours, my ancestors were pioneers in the great State of South Dakota. South Dakotans today have the opportunity to be pioneers in eliminating the evil of abortion that has plagued our land and protecting the right to life of our weakest and most helpless citizens, by ratifying a statute that prohibits abortion and lays the groundwork for a challenge to *Roe v. Wade*.

My grandparents had no guarantee that they would succeed in South Dakota, and I can give no guarantee that we will succeed in this challenge to overturn *Roe v. Wade*. But I believe our chances are good.

Living and working in Alabama, I will not be able to vote in the South Dakota referendum. But as a son of South Dakota I will be watching and praying that South Dakotans will do the right thing November 7, and vote "Yes" to preserve this law that will provide a challenge to *Roe v. Wade*.

Only then will unborn children, created by the hand of God, have the right to life that all of God's children deserve.

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