

Roe in the Balance

The progress and setbacks of the pro-life movement after 33 years of legal abortion

By Michael S. Rose

EACH YEAR on the Jan. 22 anniversary of *Roe v. Wade*, pro-lifers turn out in the nation's capital by the hundreds of thousands. At this year's March for Life, a decidedly hopeful mood prevailed despite grim weather. For the past 33 years, since the 1973 ruling in which the Supreme Court claimed that the state and federal governments lack the authority to ban abortions, the pro-abortion crowd has had the upper hand, with both the mainstream media and the courts on their side. That's changing.

High-profile abortion pushers who thrive in apoplexy mode now routinely gnash their teeth in public statements. Agitated by President Bush's new Supreme Court appointments and the wave of recent state legislative restrictions on abortion, Nancy Keenan, president of NARAL Pro-Choice America, believes it all spells doomsday for her movement. She has been sounding the alarm: *Roe v. Wade* will soon be dismantled. Yet even the apocalyptic auguring falls flat. Despite NARAL's aggressive opposition to the latest Bush nominee—the only nominee since Robert Bork on record stating he believes the Supreme Court erred in its decision on *Roe*—Keenan's troops were unable to harass Samuel Alito significantly, let alone scuttle his confirmation.

Judicial and legislative developments since the Alito hearings are enough to give NARAL heartburn for years to come. Their terror alert began on the day of Alito's debut when the high court agreed to reconsider the legality of partial-birth abortion. After being mired in

litigation for years, the law that prohibits doctors from performing the barbaric late-term procedure is expected to be upheld by the Roberts Court.

On Feb. 27, the Supreme Court ended a 20-year-old legal battle over protests outside abortion clinics. Justices ruled 8-0—Alito did not participate—that federal racketeering laws cannot be used to outlaw the presence of pro-life demonstrators near clinic entrances.

But the major political asteroid hit the next day when South Dakota became the first state in 14 years to pose a direct challenge to *Roe v. Wade*. The Senate voted 23 to 12 to prohibit virtually all abortions in the state. Even the typical exceptions for rape or incest, favored by President Bush—who said through a spokesman he does not support the ban—were rejected by South Dakota lawmakers, and doctors who perform abortions would be charged with a Class 5 felony, punishable by up to five years in prison. Before Gov. Mike Rounds even signed the bill into law on March 6, Planned Parenthood had already threatened a lawsuit challenging the constitutionality of the ban. Prepared for that eventuality, pro-life activists say they have already raised over \$1 million to fund a protracted legal battle.

Similar bans are being proposed in six other states—Mississippi, Missouri, Ohio, Georgia, Indiana, Kentucky—and the Tennessee Senate recently passed a proposal to amend its state constitution to not include a right to abortion. Further, all 50 states now have abortion-restricting legislation either on the books

or in the works in some form. Proposals in 21 states would require doctors to inform women seeking abortions that their babies will likely feel pain during the procedure. Fetal pain bills have already passed in Arkansas, Georgia, Minnesota, and Wisconsin. Other state legislatures are focusing on preventive measures such as requiring waiting periods, pre-abortion counseling, and ultrasound images before an abortion.

Understandably, pro-abortion forces fear a continued legal avalanche that will eventually give the Supreme Court the opportunity to reverse *Roe v. Wade*. Although neither Bush appointee said he would vote to overturn *Roe*, abortion proponents fear that both Roberts and Alito would add to the pro-life voices of Scalia and Thomas. That leaves a five-vote majority to uphold the precedent of *Roe v. Wade* in the unlikely event that a case comes before the Supreme Court before the retirement of Justice John Paul Stevens, who turns 86 in April, or Ruth Bader Ginsburg, 73 and rumored to be in ill health.

Ironically, Pierre's most notable critics are not the ho-hum hystericals of the pro-choice movement. The South Dakota ban has unleashed a flock of pro-life Chicken Littles decrying the Black Hills "hardliners" who, they fear, might undermine their strategy of passing less sweeping laws that restrict access. Neocon oracles like the editors at *National Review* have doomed the ban to be overthrown, the result of which would reinforce *Roe* as a "super-duper precedent." It appears that South

Dakotans and other Midwestern abortion foes are being dismissed as chaw-bacon do-gooders with little understanding of the judicial process back East.

National Right to Life and many of its local affiliates already torpedoed attempts to ban abortion in Louisiana two years ago and have now set their sights on scuttling proposed bans in Missouri and Mississippi. Those anti-ban plans and their accompanying philosophy of compromise do not sit well with other pro-life groups like the Pro-Life Action League, Human Life International, and the Thomas More Law Center. This rift is nothing new but only highlights the longstanding division in the ranks of the pro-life moment. As Notre Dame law professor Charles Rice has noted, the pro-life movement has sadly degenerated into a debate not over the question as to whether babies should be killed, but how and when we should kill them. "After all," says American Life League's Judie Brown, "every abortion is an act of murder, and the only way to honestly

choice camp do not support unrestricted access to abortion. According to a 2003 Gallup poll, two-thirds of Americans think abortion should be legal only in the first three months of pregnancy.

This shift is partly due to advances in technology. 4-D ultrasound monitors now allow a mother to see clearly that there's a human baby in her womb. Unborn babies also routinely receive blood transfusions, undergo surgical operations, and are treated medically in a variety of ways like the human beings they are. Pro-life efforts have also been buoyed by a much greater awareness of the risks abortion poses to mothers: studies in recent years have linked abortion to breast cancer and depression among other emotional and physical problems. The South Dakota bill reflected the findings of a task force report released last December: "We do not know the cost to our society" caused by "the pain and anger resulting from abortion, but we fear it is far worse than what we are able to comprehend."

abortion as directly related to sexual freedom or feminism and I no longer see it strictly as a matter of personal privacy, either. It entails questions about life ..."

Of late, many abortion-advocacy groups have turned their attention to the campaign to promote abortion-inducing drugs such as RU-486 and Plan B. They have thus far waged a successful semantics campaign by getting the media to erroneously refer to these drugs as "emergency contraception" despite the medical fact that the result of their use is often the abortion of an embryo in its earliest days of life. No reliable statistics are yet available on just how common so-called "chemical abortions" have become, but the Centers for Disease Control and Prevention estimated that by 2002, 10 percent of women between the ages of 18 and 24 had used morning-after pills. The same pro-life groups that oppose laws to ban abortion outright—most notably National Right to Life—refuse to condemn or campaign against chemical abortions, which would now appear to outnumber surgical abortions. Pro-life gains have not yet been as calculable on this new terrain. According to a Zogby poll, only 55 percent of Americans believe that human life begins at conception.

This is not the only life issue in which the human embryo is, in effect, the new battlefield. The major source of stem cells for experimental research purposes is embryos, which are destroyed in the process of extracting stem cells. Thus, biomedical researchers routinely manipulate and dispose of human life at their discretion, justifying their work as having laudable goals. Scientists continue to claim that embryonic stem-cell research holds promise for helping those who suffer from diseases such as Alzheimer's and Parkinson's. Yet after eight years of cannibalizing human embryos, no one has achieved any success in using this procedure for thera-

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challenge the misconceived idea in *Roe v. Wade* that the child is not a person is to confront them with the precise question of who a person is." That's exactly what the South Dakota ban can do.

Tactics aside, it is important to note that the battle against abortion is being won not primarily by legislation and politics, but by public opinion, which is changing swiftly and dramatically. A September 1995 Gallup poll found that 56 percent of Americans described themselves as pro-choice compared to just 33 percent who identified themselves as pro-life. By August 1997, the 23-point gap had shrunk to just a 3-point difference and has remained in the single digits since. Moreover, many Americans who identify with the pro-

This continuing public shift in attitudes is so obvious that key Democrats like John Kerry and Hillary Clinton have embarked on a strategy to make the Left more appealing to religious voters concerned with the immorality of abortion. Liberal commentators have been reading the tea leaves, too. Not only are they advising abortion advocates to back away from *Roe* because it is ultimately indefensible, they're actually admitting abortion is an important moral issue. *Slate* correspondent William Saletan wrote in an op-ed for the *New York Times*: "It's bad to kill a fetus. You can't eliminate the moral question by ignoring it." Richard Cohen, writing in the *Washington Post*, built upon Saletan's admission by confessing, "I no longer see

peutic treatments. The only “break-throughs” have turned out to be frauds, such as when South Korean human cloning superstar Woo-Suk Hwang faked the results of his embryonic experimentation. Other false starts were announced in 1999 and 2001 by American researchers. Nevertheless, opponents of embryonic stem-cell research are still routinely dismissed as misguided religious fanatics.

The human embryo is no less the subject of experimentation in the ever burgeoning artificial procreation industry. During the in vitro fertilization process, unused embryos stored in cryogenic banks are often abandoned and left to disintegrate slowly, or may be given away for experimental purposes. As with embryonic stem-cell research and morning-after drugs, the fertility industry is mistakenly perceived by the American public as a positive good with worthy goals.

The fact that the same used to be said about surgical abortion goes to show how far the pro-life movement has advanced its goals in just the past decade. With abortion activists now perpetually enraged, liberal commentators admitting that abortion is indefensible, and left-wing politicians devising strategies to appeal to moral-minded voters, it's difficult not to conclude that the pro-life movement has reached a new pinnacle of success, despite its internecine squabbles. The tables have turned. The political fortunes of the pro-abortion lot are clearly in decline—at least when it comes to the traditional abortion debate. The next few years, however, present new challenges as the human-life debate steadily shifts its focus onto the less understood issues of biotechnology that the Left thus far seems to be winning, almost by default. ■

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Eminent Complaint

Developers begin to feel *Kelo* backlash.

By Steven Greenhut

BIG DEVELOPERS, retail stores and auto dealerships, bond merchants and city officials got exactly what they wanted last summer from the U.S. Supreme Court. In *Kelo v. City of New London*, the court ruled that local governments have the right to use eminent domain to take property from small-business owners and homeowners and give it to developers who promise tax and other benefits to cities that do their dirty work for them.

You could almost hear the sighs of relief emanating from the National League of Cities and the American Planning Association as Justice John Paul Stevens, writing for the majority, declared that the Connecticut city's plan to bulldoze a settled neighborhood of waterfront historic homes so that a developer could build condos, offices, a hotel, and upscale shopping “qualifies as a ‘public use’ within the meaning of the Takings Clause.”

But while the “redevelopment community” certainly got what it wanted, it also got something it never expected: a strong public and legislative backlash against the abuse of property rights, increased understanding of what eminent domain and government-driven redevelopment means for communities, and the creation of a new nationwide property-rights movement that spans the political spectrum. As an *Arizona Republic* editorial put it, “Be careful what you wish for? They had no idea.”

While not much of substance has happened so far, in terms of tough new anti-eminent-domain legislation, a sea change has taken place in public opinion. A

quiet little game has gone from the shadows, where lucrative deals are cut in closed city council session without controversy or debate, to the evening news, where the Little People openly question plans to bulldoze their neighborhoods to make way for subsidized new condos or auto malls.

Now, there's a backlash against the backlash.

“Developers Can't Imagine a World Without Eminent Domain,” the *New York Times* proclaimed in a Jan. 18 headline. The *Times* article quotes developers who are reacting angrily to critics of *Kelo*. “Bank of America agreed to join the developer Douglas Durst in 2003 in building a 54-story tower in the heart of Midtown Manhattan, giving a psychological and economic lift to a city that was still reeling from the destruction of the World Trade Center,” explained the news story. “Mr. Durst said he would not have been able to negotiate with Bank of America or other prospective tenants had the state not authorized him to use eminent domain.”

You see, some property owners held out or kept raising the price. “Once we had that ability [to use eminent domain],” he told the *Times*, “we were able to quickly come to a resolution on the two properties and meet Bank of America's schedule.”

No one doubts that eminent domain helps one party in particular transactions. The question, answered incorrectly by the nation's highest court, is whether in this supposedly free and constitutional society, it's acceptable for