Why the Right-to-Life Movement Faces a Difficult Future
The Supreme Court's decision in the Nebraska case was an even bigger legal defeat for anti-abortion activists than most people realize
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This week's five to four Supreme Court ruling striking down a Nebraska law aimed at outlawing what opponents call "partial birth" abortions was an even bigger legal defeat for anti-abortion forces than the press-and activists-have so far realized.

The Court's majority opinion identified two fatal defects in the Nebraska law. First, the Court found that Nebraska's definition of the procedure was so broadly worded that it violated the "undue burden" test that the Court had laid down for anti-abortion measures in the landmark 1992 case, Planned Parenthood v. Casey, another five to four ruling that reaffirmed Roe v. Wade (1973). Most, although not all, of the 30 other states laws outlawing "partial-birth" abortions have similar or identical flaws and are now also unconstitutional.

Anti-abortion activists and lawyers have realized for several years that these statutes were at risk, and were at work at crafting more precisely worded prohibitions even before the Supreme Court ruled. Ohio, for example, adopted a new statute outlawing what it called "partial-birth feticide" this past March, and the new law was scheduled to take effect late this summer.

But the Supreme Court's majority opinion in the Nebraska case, Stenberg v. Carhart, also identified a second and more serious shortcoming in Nebraska's ban. The statute included an exception allowing a doctor to perform such a procedure if it was necessary to save a woman's life, but it failed to extend such an exception to instances in which a doctor believed the procedure was necessary to protect a woman's health.

Both in Casey in 1992, and in Doe v. Bolton, a companion case to Roe v. Wade in 1973, the Supreme Court had explicitly declared that all anti-abortion regulations, even those targeted against post-viability abortions, had to include exceptions for a woman's life and health in order to pass constitutional muster. Indeed, the Court had mandated an extremely broad and inclusive definition of a woman's health-her "psychological as well as physical well-being"-in an important but now little-remembered 1971 abortion case, United States v. Vuitch, two years before it legalized pre-viability abortions nationwide in Roe v. Wade.

This long-standing and utterly-inclusive Supreme Court definition of "health" is the impassable roadblock that anti-abortion legislators are now staring straight in the face. Abortion opponents argue, quite correctly, that if every anti-abortion law, including ones that are narrowly and clearly worded so as to prohibit only the "intact" abortion method of "dilation and extraction" (D&X) that opponents term "partial-birth," has to include an exception for instances where the procedure might help preserve any aspect of a woman's health, such as her future fertility, a "partial birth" ban would actually be no ban at all. Any doctor, either by invoking the physical safety of her reproductive organs, and/or by invoking her mental and emotional health, would be

able to include every possible "partial-birth" abortion within the statutory protection of a "health" exception.

Justice Sandra Day O'Connor, one of the five justices who voted to void the Nebraska statute, explicitly volunteered that "a ban on partial-birth abortion that only proscribed the D&X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional." One anti-abortion group, Americans United for Life, denounced that concession as an "illusion" and a "hoax."

Anti-abortion activists who have championed "partial-birth" bans now face a decisive choice. They can either continue their crusade, while acknowledging that the necessary inclusion of health exceptions will make any such laws nothing more than symbolic statements that will have no effect whatsoever on abortion doctors' methods, or they can choose a new legislative agenda focused on issues other than outlawing specific procedures. The chances that the U. S. Supreme Court would be open to adopting a newly narrowed and highly exclusive definition of "health" simply in order to accommodate anti-abortion activists seems too fanciful to be worth anyone's time or energy.

Nor is it is reasonable for the activists to count on the weight of public opinion to force a change in attitude on the Court. Second-trimester abortions-those performed from the thirteenth week of pregnancy up until fetal viability occurs at approximately twenty-four weeks-are far more unpopular than first-trimester abortions with many Americans. But the Supreme Court's insistent commitment to maintaining constitutional protection for all pre-viability abortions is at least as big a roadblock as the Court's definition of "health."

One legislative option that could pan out for anti-abortion forces is the "Child Custody Protection Act." This proposed federal law would make it a crime for anyone other than a parent to assist a pregnant minor in obtaining an out-of-state abortion if her home state has a law requiring parental notice. Parental-involvement requirements are highly popular, and generally pass judicial muster.

But let's not be surprised if abortion opponents to a significant extent put their legal and legislative options aside and instead focus almost exclusively on attempting to elect a president whom they hope might be able to significantly alter the composition of the Supreme Court. However, that path, too, is strewn with obstacles: George W. Bush clearly does not want American voters to perceive him as an anti-abortion crusader, and there are no signs that any of the Supreme Court's pro-choice Justices-even 80 year-old John Paul Stevens, who is in excellent health-are contemplating retirement. What's more, even if a pro-choice Justice leaves the Court sometime during the next four years, how certain is it that a majority of United States Senators would vote to confirm a Bush nominee who is clearly committed to reversing Roe and Casey? The right-to-life movement faces a difficult future, one that the Supreme Court has made significantly harder than it was just a week ago.

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