

**SOUTH DAKOTA: PROTECTING THE UNBORN  
FROM THE EARLIEST MOMENTS OF LIFE**  
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South Dakota has a history of protecting the unborn from the earliest moments of conception. The legislature has been willing and active in the battle to restrict the availability of abortion-on-demand. Accordingly, if the United States Supreme Court (“USSC”) reverses *Roe v. Wade*,<sup>2</sup> human life will be protected in most cases from conception.

**I. LIFE ISSUES**

In South Dakota, life is valued from the moment of conception. Since 1887, it has been a foundational principle of law that a “child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth.”<sup>3</sup> This principle can be traced through the laws of the state, and potentially sets it up to be a leader in the event the United States Supreme Court (“USSC”) reverses *Roe v. Wade*<sup>4</sup> and sends the issue of abortion back to the states.

**Abortion**

In 1973 in *State v. Munson*,<sup>5</sup> the South Dakota Supreme Court (“Court”), in a short opinion, found that the state’s abortion law was unconstitutional in light of *Roe v. Wade*.<sup>6</sup> Since

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<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> S.D. CODIFIED Laws § 26-1-2 (2007).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> 206 N.W.2d 434 (S.D. 1973).

<sup>6</sup> 410 U.S. 113 (1973).

then, the South Dakota legislature has actively passed legislation that pushes the envelope on limiting abortion.

In 2006, the South Dakota legislature passed the *Women's Health and Human Life Protection Act*<sup>7</sup> and the legal and moral sentiments accompanying its passage place the state in a position to lead the fight to protect life. Specifically, the Act provided that

No person may knowingly administer to, prescribe for, or procure for, or sell 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. No person may knowingly use or employ an instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.<sup>8</sup>

Instead of suing for an injunction to prohibit the law from becoming effective, pro-abortion forces gathered sufficient signatures to place the issue on the ballot, and, on November 7, 2006, South Dakota voters rejected the law.<sup>9</sup>

While the Act<sup>10</sup> was rejected by the voters, South Dakota provides one of the safest havens in the United States for the unborn. The following laws remain on the books:

- During the first twelve weeks, abortion is allowed if the medical judgment of the attending physician deems it appropriate.<sup>11</sup>
- During the second twelve weeks, abortion may be performed by a physician but only in a licensed hospital or licensed medical clinic with an available blood supply.<sup>12</sup>

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<sup>7</sup> H. B. 1215, 2006 Legis. Assemb., 81st Sess. (S.D. 2006). *available at* <http://legis.state.sd.us/sessions/2006/bills/HB1215SST.htm>.

<sup>8</sup> *Id.* Note however, that the bill specifically carved out an exception for contraceptives prior to conception, and provided an exception for physician's who performed an abortion to preserve the life of the mother, after reasonable efforts had been made to save the lives of mother and baby.

<sup>9</sup> *See South Dakota Abortion Ban Rejected*, [http://www.usatoday.com/news/politicselections/vote2006/SD/2006-11-08-abortion-ban\\_x.htm](http://www.usatoday.com/news/politicselections/vote2006/SD/2006-11-08-abortion-ban_x.htm) (last visited June 28, 2007).

<sup>10</sup> H. B. 1215, 2006 Legis. Assemb., 81st Sess. (S.D. 2006).

<sup>11</sup> *See* S.D. CODIFIED LAWS § 34-23A-3 (2007).

<sup>12</sup> *See Id.* at § 34-23A-4 and 6.

- After twenty-four weeks, abortions are allowed only for medical necessity or to preserve the health and life of the mother.<sup>13</sup>

If *Roe* is overturned, abortion will be prohibited. Specifically,

[A]ny person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable judgment that performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.<sup>14</sup>

In addition to the restrictions outlined above, South Dakota has numerous restrictions on the availability of abortions. Even though South Dakota has only one abortion clinic, the courts have upheld the following restrictions:

- Parents or guardians must be given 48 hours notice prior to an abortion, when the mother is a minor or incompetent<sup>15</sup> and
- The mother must give voluntary and informed consent to the abortion.<sup>16</sup>

Additional legislative protections for healthcare providers will be discussed in a later section.

The case law of South Dakota also supports the laws as they now stand. In *Planned Parenthood v. Miller*,<sup>17</sup> a 1994 case, a United States district court<sup>18</sup> struck several portions of abortion legislation that it found interfered with women's due process rights.<sup>19</sup> The court examined South Dakota's parental bypass provision, the 48-hour waiting period requirement, the informed consent provisions, and the requirement that doctors provide certain information to a

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<sup>13</sup> See *Id.* at § 34-23A-5.

<sup>14</sup> See S.D. CODIFIED LAWS § 22-17-5.1 (2007). This section is effective "on the date states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy."

<sup>15</sup> See S.D. CODIFIED LAWS § 34-23A-7 (2007).

<sup>16</sup> See *Id.* at § 34-23A-10.1 & 10.2.

<sup>17</sup> 860 F. Supp. 1409 (C.D.D.Ct. 1994).

<sup>18</sup> While this is a U.S. District Court case, it is the only one that addresses the restrictions imposed by the legislature. Parts of this decision remain in effect.

<sup>19</sup> *Miller*, 860 F. Supp. at 1415.

woman to insure she gives informed consent. At the time, the parental notice law did not provide a judicial bypass mechanism, and the district court struck it down for that reason. However, the court found the 48-hour waiting period between receipt by a parent of notice of the abortion<sup>20</sup> and the abortion and the 24-hour waiting period between when a doctor provides information about an abortion to the woman and the actual procedure<sup>21</sup> constitutional. The court also upheld the informed consent provision,<sup>22</sup> finding that it was not an undue burden on a woman's abortion decision.<sup>23</sup> Finally, the court examined the civil and criminal penalties and struck down both because they chilled access to abortions. When the Eighth Circuit Court of Appeals considered *Planned Parenthood v. Miller*<sup>24</sup> on appeal, it upheld the district court's decision in all respects.

In 2002 *Planned Parenthood*<sup>25</sup> again asked the district court to examine whether restrictions on abortion, based on the age of gestation, were unconstitutional burdens on a woman's right to an abortion. The law at issue<sup>26</sup> mandated that abortions performed after the twelfth week of pregnancy must be performed in a hospital and provided for criminal penalties for violations.<sup>27</sup> After a convoluted discussion about whether hospitals were available in the state, the court held the section unconstitutional. The court also found the criminal section unconstitutional, because the underlying law was now unconstitutional and the criminal section lacked a scienter, or awareness of wrongness, requirement. That omission was found to be an undue burden on a woman's right to an abortion and was, therefore, unconstitutional.<sup>28</sup>

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<sup>20</sup> See S.D. CODIFIED LAWS § 34-23A-7 (2007).

<sup>21</sup> See *Id.* at § 34-23A-10.1 (2).

<sup>22</sup> See *Id.* at § 34-23A-10.1 (1)-(4).

<sup>23</sup> *Miller*, 860 F. Supp. at 1419.

<sup>24</sup> 63 F.3d 1452 (8<sup>th</sup> Cir. 1995).

<sup>25</sup> *Planned Parenthood v. Janklow*, 216 F. Supp. 2d 983 (S.D. D. Ct. 2002).

<sup>26</sup> See S.D. CODIFIED LAWS § 34-23A-4 (2007).

<sup>27</sup> *Janklow*, 216 F. Supp. at 985 & 991.

<sup>28</sup> *Id.* at 994.

On appeal, the Eighth Circuit Court of Appeals found several problems with the district court's opinion.<sup>29</sup> First, the court found the district court's determination that hospitals were available was faulty based on the pleadings and evidence. It also found that the district court placed the burden to prove that fact on the wrong party. Therefore, the court of appeals reversed the district court's grant of summary judgment.<sup>30</sup> Before a trial could be held on the merits, the parties settled.<sup>31</sup> The consent decree found that the plaintiff's clinic had a sufficient supply of blood immediately available to perform abortion through fourteen weeks, six days, of pregnancy, without violating the law.<sup>32</sup>

Relying on this case, Planned Parenthood again sued the state in 2005, this time seeking a determination that the informed consent requirements<sup>33</sup> were unconstitutional restraints on doctors' free speech rights.<sup>34</sup> The statute stipulated that consent could be informed only if the patient was told the name of the physician who will perform the abortion, the medical risks associated with the procedure, the probable gestational age of the unborn child, the medical risks associated with carrying her child to term, that medical assistance benefits may be available, that the father is liable to assist in supporting the child, and that she has the right to review printed materials provided by the state of South Dakota and a website. Then the patient had to sign an informed consent certification. There were criminal penalties for failure on the part of a physician to follow the informed consent and disclosure requirements.<sup>35</sup> The plaintiffs' main argument was that the "amended notice law forces abortion providers to articulate the state's abortion ideology and philosophical beliefs about abortion, in violation of their First and

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<sup>29</sup> *Planned Parenthood v. Rounds*, 372 F.3d 969 (8<sup>th</sup> Cir. 2004).

<sup>30</sup> *Id.* at 974.

<sup>31</sup> *Planned Parenthood v. Rounds*, No. 02-4009, 2006 U.S. Dist. LEXIS 47723, (July 7, 2006).

<sup>32</sup> *See Rounds*, 2006 U.S. Dist. LEXIS at 47723, \*3.

<sup>33</sup> *See* S.D. CODIFIED LAWS § 34-23A-10.1 (2007).

<sup>34</sup> *See Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881 (S.D. D. Ct. 2005).

<sup>35</sup> *Id.* at 884.

Fourteenth Amendment rights.”<sup>36</sup> After evaluating whether the plaintiffs’ claims met the preliminary injunction standard, the district court issued a preliminary injunction prohibiting the new notice provisions from taking effect.<sup>37</sup>

In *Doe v. Westby*,<sup>38</sup> the district court comprised of a special three-judge panel, considered whether South Dakota had to provide abortion benefits to women on Medicaid when it would provide prenatal benefits to the same women. The court decided the plaintiff was entitled to Medicaid benefits covering the cost of her abortion.<sup>39</sup> On September 30, 1975, the same panel issued an expanded order in the case,<sup>40</sup> in response to an order from the USSC to reconsider its opinion. The three-judge panel reached the same decision: Women in South Dakota were entitled to receive Medicaid coverage for abortions because the state provided the same coverage for prenatal care.<sup>41</sup> The USSC again vacated and remanded under the new cases: *Beal v. Doe*<sup>42</sup> and *Maher v. Roe*.<sup>43</sup> While this remains on the books, the decisions violate the Hyde Amendment and, thus, would likely be unconstitutional.<sup>44</sup>

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<sup>36</sup> *Id.* at 885.

<sup>37</sup> *Id.* at 889. The court issued an amended preliminary injunction order on October 4, 2006, leaving the injunction in place. See *Planned Parenthood v. Rounds*, 2006 U.S. Dist. LEXIS 72778 (2006).

<sup>38</sup> 383 F. Supp. 1143.

<sup>39</sup> *Id.* at 1147.

<sup>40</sup> *Doe v. Westby*, 402 F. Supp. 140

<sup>41</sup> *Id.* at 144.

<sup>42</sup> 432 U.S. 438 (1977).

<sup>43</sup> 432 U.S. 464 (1977).

<sup>44</sup> See The Hyde Amendment, 111 Stat. 2440, 103 (1997).

## Protection of the Unborn from Criminal Violence

South Dakota joins 34 states that have fetal homicide laws of some sort on their books.<sup>45</sup> Its homicide laws protect unborn children, but it also has a law dealing specifically with fetal homicide.<sup>46</sup> The law makes it a Class B felony to knowingly cause the death of an unborn child.<sup>47</sup> Another law makes it a Class 4 felony to intentionally kill a fetus by injuring the mother.<sup>48</sup> Even the definitions section of the criminal portion of the code purports to recognize the unborn, first, by defining person to include unborn child, and second, by defining unborn child as “an individual organism of the species homo sapiens from fertilization until live birth.”<sup>49</sup>

In *Wheeldon v. Madison*,<sup>50</sup> a 1985 state Supreme Court case, the Court addressed informed consent in a wrongful death suit. The Wheeldons’ full-term baby died when an amniocentesis screening went horribly wrong. The Wheeldons sued, alleging in part that they had not been properly informed of all the risks and complications possible as a result of the test. The court focused on whether the family had given informed consent and whether the doctor followed standard procedures in giving that information to the family. Because “the right to know – to be informed – is a fundamental right personal to the patient and should not be subject to restriction by medical practices that may be at odds with the patient's informational needs,” the court adopted “the *Canterbury v. Spence* rule that the standard measuring the performance of

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<sup>45</sup> See *State Homicide Laws That Recognize Unborn*,

([http://www.nrlc.org/Unborn\\_Victims/Statehomicidelaws092302.html](http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html)) (last visited June 28, 2007).

<sup>46</sup> S.D. CODIFIED LAWS § 22-16-1.1 (2007) provides “Homicide is fetal homicide if the person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant and caused the death of the unborn child without lawful justification and if the person: (1) Intended to cause the death of or do serious bodily injury to the pregnant woman or the unborn child; or (2) Knew that the acts taken would cause death or serious bodily injury to the pregnant woman or her unborn child; or (3) If perpetrated without any design to effect death by a person engaged in the commission of any felony...”  
CODIFIED

<sup>47</sup> See S.D. CODIFIED LAWS § 22-16-1.1 (2007).

<sup>48</sup> *Id.* at § 22-17-6 (2007).

<sup>49</sup> S.D. *Id.* at § 22-1-2(31) & (50A) (2007).

<sup>50</sup> 374 N.W.2d 367 (S.D. 1985).

the physician's duty to disclose is conduct which is reasonable under the circumstances.”<sup>51</sup> However, Justice Henderson, in his dissent, focused on the fact that a baby that was scheduled to be born during a caesarian section two days after the test had died, as a result of the doctor’s actions.<sup>52</sup> He argued that the court should have maintained the current state of the law, which stated that “a doctor has the duty to make a reasonable disclosure to his patient of any alternative treatment or procedures.”<sup>53</sup>

In *Wiersma v. Maple Leaf Farms*,<sup>54</sup> the Court considered a certified question from the U.S. district court regarding whether a mother who was 7.3-weeks pregnant had a cause of action for the alleged wrongful death of her unborn and nonviable child.<sup>55</sup> After examining the definition of “unborn child” contained in Title 21,<sup>56</sup> the court determined that the term encompassed nonviable children.<sup>57</sup> The Court then held that because the statute’s language was clear, unborn children were covered by South Dakota’s wrongful death statute and that the statute preserved the interests of parents and provided a legal remedy when a third party caused the death of their child.<sup>58</sup> However the dissent, argued that because of how controversial the definition of "unborn child" is, the “court should consider at what point of gestation an unborn child becomes a "person," relying on related chapters of South Dakota Codified Laws, South Dakota case law, and precedent from other jurisdictions.”<sup>59</sup> Accordingly, to the dissent, the court

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<sup>51</sup> *Id.* at 374

<sup>52</sup> *Id.* at 379.

<sup>53</sup> *Id.* at 381.

<sup>54</sup> 543 N.W.2d 787 (S.D. 1996).

<sup>55</sup> *Id.*

<sup>56</sup> S.D. CODIFIED LAWS § 21-5-1 (2007).

<sup>57</sup> *Wiersma*, 543 N.W.2d at 790.

<sup>58</sup> *Id.* at 792. Judge Konenkamp authored this opinion, and Judges Miller and Sabers concurred, Judge Amundson dissented in the opinion, and Judge Gilbertson wasn’t yet on the panel.

<sup>59</sup> *Id.*

should have followed the majority of states and not allowed wrongful death suits until a baby was viable.<sup>60</sup>

### **Assisted Suicide**

South Dakota actively protects people from others encouraging or assisting in their suicide. Suicide is defined as the active taking of one's own life.<sup>61</sup> It is a Class 6 felony in South Dakota to intentionally advise, encourage, abet, or assist another in trying to take his or her own life.<sup>62</sup> There is also a mechanism to obtain an injunction against the person who is encouraging or assisting in obtaining the suicide.<sup>63</sup> As of April 2007, there are no published opinions in South Dakota that have addressed this law.

### **Healthcare Rights of Conscience**

Under South Dakota law,

- Hospitals are not required to provide abortions.<sup>64</sup>
- Medical facilities may not discriminate against employees who refuse to participate in abortions.<sup>65</sup>
- Doctors are also not liable for refusing to perform an abortion.<sup>66</sup>
- Pharmacists have the right to refuse to dispense medication if there is a reasonable belief it could cause an abortion, destroy an unborn child, or aid in suicide, euthanasia, or mercy killing.<sup>67</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> S.D. CODIFIED LAWS § 22-16-36 (2007).

<sup>62</sup> *Id.* at § 22-16-37.

<sup>63</sup> S.D. CODIFIED LAWS § 34-12D-24 (2007).

<sup>64</sup> *See Id.* at § 34-23A-14. (“No hospital licensed pursuant to the provisions of chapter 34-12 is required to admit any patient for the purpose of terminating a pregnancy pursuant to the provisions of this chapter. No hospital is liable for its failure or refusal to participate in such termination if the hospital has adopted a policy not to admit patients for the purpose of terminating pregnancies as provided in this chapter.”).

<sup>65</sup> *See Id.* at § 34-23A-13. (“No physician, nurse, or other person who performs or refuses to perform or assist in the performance of an abortion shall, because of that performance or refusal, be dismissed, suspended, demoted, or otherwise prejudiced or damaged by a hospital or other medical facility with which he is affiliated or by which he is employed.”).

<sup>66</sup> *See Id.* at § 34-23A-12. (“No physician, nurse, or other person who refuses to perform or assist in the performance of an abortion shall be liable to any person for damages arising from that refusal.”).

As of April 2007, there are no published opinions that address these laws.

### **Cloning and Destructive Embryo Research**

Not surprisingly, South Dakota has taken a strong stand against human cloning. The law<sup>68</sup> prohibits reproductive or therapeutic cloning and makes it a Class 6 Felony to engage in human cloning.<sup>69</sup> The law also strictly prohibits research on all embryos, regardless of their source, so even cloned and aborted embryos may not be used in research.<sup>70</sup> It further prohibits the sale of embryos. However, South Dakota currently has no law regulating gamete and embryo destruction.<sup>71</sup> As of April 2007, there are no published opinions in South Dakota that have addressed these issues.

Unlike other states, the South Dakota legislature has acted aggressively to protect the lives of the unborn and elderly. It has also provided safeguards for those in medical fields that could be forced to participate in abortion or other practices that would violate their consciences. To date, the Court has allowed the great majority of those safeguards and regulations to stand. As a result, if the USSC overturned *Roe*, South Dakota would be a state where abortion is exceedingly rare and the unborn are protected.

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<sup>67</sup> See S.D. CODIFIED LAWS § 36-11-70 (2007).

<sup>68</sup> See S.D. CODIFIED LAWS § 34-14-2 (2007).

<sup>69</sup> *Id.* at § 34-14-27 provides "No person or entity, public or private, may:(1)Perform or attempt to perform human cloning; (2)Participate in an attempt to perform human cloning; (3)Transfer or receive the product of human cloning; or (4)Transfer or receive, in whole or in part, any oocyte, embryo, fetus, or human somatic cell, for the purpose of human cloning. Any person that knowingly or recklessly violates this section is guilty of a Class 6 felony. Any person or entity that violates this section and derives a pecuniary gain from such violation is subject to a civil penalty of two thousand dollars or twice the amount of gross gain, or any intermediate amount at the discretion of the court." See also *State Human Cloning Laws*, <http://www.ncsl.org/programs/health/Genetics/rt-shcl.htm> (last visited June 28, 2007).

<sup>70</sup> See *State Embryonic and Fetal Research Laws*, <http://ncsl.org/programs/health/genetics/embfet.htm> (last visited June 6, 2007).

<sup>71</sup> See *State Laws on Frozen Embryos*, <http://www.ncsl.org/programs/health/embryodisposition.htm> (last visited June 28, 2007).

## II. JUDICIAL RESTRAINT

Characterizing a court as “restrained” or “activist” always involves some degree of subjectivity – but by nearly any measure, this Court is very restrained, and very reluctant to interfere with legislative judgments. To some degree, the South Dakota constitution itself uniquely demands that heightened level of legislative deference – because it,

unlike the Constitution of the United States, does not constitute a grant of *legislative power*. Instead, our constitution is but a limitation upon the legislative power and the legislature may exercise that power in any manner not expressly or inferentially proscribed by the federal or state constitutions. Thus, except as limited by the state and federal constitutions, the *legislative power* of the *state legislature is unlimited*. The legislature may do anything that has not been forbidden by the organic law. Consequently, in determining whether an act is unconstitutional, we search the state and federal constitutions for provisions which prohibit its enactment rather than for grants of such power.<sup>72</sup>

That principle alone would require the Court to be particularly restrained in reviewing legislative matters – presumably including life-issues legislation.<sup>73</sup>

In addition to the general structural limits on judicial review of legislation, the Court has also chosen to limit *itself* even further in reviewing legislation. Nearly every one of its constitutional decisions begins its analysis by reciting a long list of hurdles a challenger must clear – including proof beyond a reasonable doubt:

Challenges to the constitutionality of a statute face a significant and heavy burden. There is a strong presumption that a statute is constitutional. In order to

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<sup>72</sup> See *E.g., Doe v. Nelson*, 680 N.W.2d 302, 312 (S.D. 2004) (quoting *Breck v. Janklow*, 623 N.W.2d 449, 454 (S.D. 2001)).

<sup>73</sup> That constitutionally-imposed deference does not render the State constitution toothless, however. The Court recognizes that “state law may recognize more extensive liberty interests than the federal constitution,” *Steinkruger v. Miller*, 612 N.W.2d 591, 598 n. 5 — and as discussed *infra*, its substantive due process analysis imposes a more stringent standard than the federal Constitution.

prevail, a successful challenge must refute this presumption beyond a reasonable doubt.<sup>74</sup>

In other words, “the conflict between the statute and the constitution must be plain and manifest, before it may be justifiably declared unconstitutional and void.”<sup>75</sup>

The Court rarely goes into much detail in discussing its analytical framework for constitutional questions, but when it does, it reveals a rather restrained interpretive “toolkit.” The overarching principles are textualism and original intent:

Where a constitutional provision is quite plain in its language, we construe it according to its natural import. If the provision is ambiguous, we look to secondary sources for guidance. . . . The historical context of a constitutional provision is a guide to its interpretation.<sup>76</sup>

Rarely does the Court’s analysis look to any secondary sources beyond the history of the enactment in question, however.<sup>77</sup> Fundamentally, the Court will “assume the drafters said what they meant and meant what they said.”<sup>78</sup>

However, the Court will sometimes deviate from its highly deferential standard of review: On substantive due process issues, the Court “historically has applied a more stringent

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<sup>74</sup> *Benson v. State*, 710 N.W.2d 131, 145 (internal citations and quotes omitted).

<sup>75</sup> *Dakota Systems, Inc. v. Viken*, 694 N.W.2d 23, 29 (S.D. 2005) (quoting *Simpson v. Tobin*, 367 N.W.2d 757, 767 (S.D. 1985)).

<sup>76</sup> *Brendtro v. Nelson*, 720 N.W.2d 670, 675 (internal citations and quotes omitted); see also *Benson*, *supra*, 710 N.W.2d at 146-47 (“Examination of this constitutional issue cannot be conducted in a historical vacuum.”).

<sup>77</sup> In fact, the Court generally discourages resort to any further secondary sources. For example, In re Certification of Questions of Law (Knowles), 544 N.W.2d 183 unanimously concluded that a statute was unconstitutional — but the majority strongly criticized Judge Sabers’ concurrence for reweighing the legislative fact findings behind the statute against more-recent statistics, and “repudiate[d] this as judicial encroachment”: Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. *Knowles v. United States*, 544 N.W.2d 183, 197 (quoting *Radice v. New York*, 264 U.S. 292, 294 (1924)).

<sup>78</sup> *Brendtro v. Nelson*, 720 N.W.2d 670, 682

standard than the United States Supreme Court’s substantive due process analysis.”<sup>79</sup> The South Dakota standard goes beyond the federal rational basis standard, requiring that the statute “bear a real and substantial relation” to the legislative objectives.<sup>80</sup>

But even under that heightened standard, the Court still strictly limits the secondary sources it is willing to examine. In *Knowles, supra*, the Court unanimously concluded that a statutory cap on *all* medical malpractice damages (not just non-economic damage) was unconstitutional. However, there were three separate opinions in reaching that result, with two opinions joining in only the *result* of the lead opinion,<sup>81</sup> believing that its analysis was insufficiently restrained.

The majority overturned the across-the-board cap imposed by the 1986 version of the statute, as violative of substantive due process, not because of any due process-based “fundamental right to an unlimited monetary remedy” for tort plaintiffs, but on the absence of any legislative findings whatsoever to support the drastic step taken by the 1986 amendment.<sup>82</sup> In contrast, it held the original 1976 cap (covering only non-economic damages) bore a real and substantial relation to the legislature’s extensive findings that skyrocketing malpractice insurance premiums were driving doctors out of the state.<sup>83</sup> In that regard, the majority strongly criticized

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<sup>79</sup> *Knowles*, at 199 n.20.

<sup>80</sup> *Id.* at 189 (internal quotes omitted).

<sup>81</sup> Justice Sabers’s opinion was the lead opinion, and technically the “majority” opinion, since there were four questions before the Court, and his opinion expressed the majority’s rationale on two of the four questions, in addition to reaching the same *result* on the due-process question. However, Justice Gilbertson’s concurrence expressed the majority *analysis* on the due-process issue — and since only that issue is relevant here, this paper will refer to the two opinions as the “lead” and “majority” opinions, respectively. Justice Amundson’s special concurrence joined in the majority’s criticisms of the lead opinion, with the further criticism that having found the cap unconstitutional under due process, the lead should not have “kill[ed] the bird more than once” by finding it to violate additional constitutional provisions.

<sup>82</sup> *Id.* at 199-201 n.25.

<sup>83</sup> *Id.* at 195-96. The *Knowles* majority acknowledged the possibility that any such crisis had passed, but declared, “[W]e are not legislative overlords empowered to eliminate laws whenever we surmise they are no longer relevant or necessary.” *Id.* at 197.

the lead opinion for looking to more recent insurance industry statistics to reweigh the original legislative findings, and “repudiate[d] this as judicial encroachment”:

Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.<sup>84</sup>

Accordingly, with rare and isolated exceptions, the Court is highly restrained, both in its willingness to override the legislature and in the narrow scope of materials it is willing to review in matters of constitutional interpretation.

### III. THE COURT

The South Dakota Supreme Court is the highest court in the state, with limited original jurisdiction and appellate jurisdiction, as set by the legislature.<sup>85</sup> Five justices serve on the Court, though it could constitutionally be expanded to seven, if the Court requests and the legislature approves.<sup>86</sup> The five justices select the Chief Justice from among themselves by majority vote for a four-year term.<sup>87</sup> The Chief Justice acts as administrative head of the Unified Judicial System.<sup>88</sup>

The governor appoints justices, one from each of five geographic districts.<sup>89</sup> The appointment is made from a field of at least two candidates, slated by the Judicial Qualifications

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<sup>84</sup> *Id.* at 197 (quoting *Radice v. New York*, 264 U.S. 292, 294 (1924)).

<sup>85</sup> S.D. CONST. art. V, § 5.

<sup>86</sup> *Id.* at § 2.

<sup>87</sup> *Id.* at § 8; S.D. CODIFIED LAWS § 16-1-2.1 (2007).

<sup>88</sup> S.D. CONST. art. V, § 11.

<sup>89</sup> *Id.* at § 2.

Commission.<sup>90</sup> After their initial appointment, justices face a retention vote at the general election three years after their appointment and every eight years thereafter.

Justices may also be removed or involuntarily retired by the Judicial Qualifications Commission,<sup>91</sup> – or like most other government officers, they may be impeached by a majority of the House of Representatives, *see*<sup>92</sup>, and convicted by two-thirds of the Senate<sup>93</sup> *see* for “for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office.”<sup>94</sup> No current justice has been impeached.

Finally, retirement is mandatory and automatic in January following the first legislative election after a justice’s 70th birthday.<sup>95</sup>

<b>Member</b>	<b>Appointed by/ Year</b>	<b>Term Expires</b>	<b>Miscellaneous</b>
David E. Gilbertson, Chief Justice	Janklow/ 1995.	2014	- Biographical information: J.D. University of South Dakota 1975; B.S. South Dakota State University 1972; Served as a judge in the S.D. 5th Cir. 1986-1995. - Professional affiliations: President, Conference of Chief Justices; South Dakota Judges Association, 1993-1994; Tribal-State Judges Forum, 1992; South Dakota Bar Association, Civil Pattern Jury Instruction Committee, 1986-1999. - Other: Fellow Court members elected him Chief Justice in 2001.
Richard W. Sabers	Janklow/ 1986.	Jan. 2009 (mandatory)	- Biographical information: J.D. University of South Dakota 1966; B.A. St. John’s

<sup>90</sup> *Id.* at § 7.

<sup>91</sup> *Id.* at § 9.

<sup>92</sup> S.D. CONST. art. XVI, § 1.

<sup>93</sup> *Id.* at § 2.

<sup>94</sup> *Id.* at § 3.

<sup>95</sup> *See* S.D. CODIFIED LAWS § 16-1-4.1 (2007).

		retirement)	University, Collegeville, MN 1960; First and Second Lieutenant, U.S. Army Corps of Engineers. - Professional/Social affiliations: North Dakota representative for March of Dimes; Received Jaycee Award for Outstanding Young Religious Leader (Layman) in 1971.
John K. Konenkamp	Miller/ 1994.	2014; Jan. 2015 (mandatory retirement)	- Biographical information: J.D. University of South Dakota 1974; Served in the U.S. Navy; Served as Deputy State's Attorney, 1974-77; Private practice 1977-84; Circuit Judge 1984-1994. - Professional affiliations: Serves on Board of Directors, American Judicature Society. - Other: Former foster parent (with wife Geri) for Department of Social Services.
Steven L. Zinter	Janklow/ 2002.	2014	- Biographical information: J.D. 1975, B.S. 1972 University of South Dakota; Assistant Attorney General, 1975-78; Private practice 1979-86; Circuit Judge 1987-97; Presiding Judge, 1997-2002. - Professional/Social affiliations: A member of the American Bar Association, the State Bar Association, the Harry S. Truman Foundation, and the South Dakota Corrections Commission; Also a Trustee of the South Dakota Retirement System and former president of the South Dakota Judges Association.
Judith K. Meierhenry	Janklow/ 2002.	2014	- Biographical information: J.D. 1977, M.A. 1968, B.S. 1966 University of South Dakota; Teacher, 1966-74; private practice 1977-78; S.D. State Economic Opportunity Office, 1979; S.D. Secretary of Labor, 1980-84; S.D. Secretary of Education and Cultural Affairs, 1983-84; Senior Manager and Assistant General Counsel, Citibank S.D., 1985-88; Circuit Judge 1988-97; Presiding Judge 1997-2002. - Other: Second woman appointed Circuit Judge; First appointed to the Court.

## **CONCLUSION**

South Dakota's legal and cultural climate will likely make it a frontrunner to change its abortion laws if *Roe* is overturned. It has historically protected the unborn; its constitution allows the legislature much wider authority than under most state constitutions; and its highest court is highly restrained, reluctant to overturn legislative enactments. It will certainly merit close attention in a post-*Roe* legal landscape.