The First March for Life after the *Dobbs* Decision

The theme of this year's march, held on January 20, was "Next Steps—Marching into a Post-*Roe* America." This, of course, reflected the reality that, given the Supreme Court's overturning of *Roe v. Wade* (1973) in *Dobbs v. Jackson Women's Health* (June 2022), there is no longer a putative national Constitutional "abortion right." That opens the possibility of creating the culture of life that Pope St. John Paul II described in *Evangelium vitae* (1995). Of course, doing so faces many hurdles and hence calls for creative responses by the pro-life community. Pro-life Americans now have the opportunity to persuade their neighbors. They should recall that when interracial marriage was found by the Supreme Court to be a Constitutional right in 1967,[1] only 40 percent of Americans agreed.

Some feared the size of the crowd might be diminished this year. Perhaps the marchers would no longer see "the need" for a march since *Roe* had been overturned. Perhaps marchers would stay away due to fear of violence from pro-abortion groups. In the event, the crowds appeared to be as boisterous and happy as one would expect; after all, few mass movements in history have accomplished what the March for Life did.

What was accomplished—the overthrow of *Roe*—was due to many forces and events. One of those was electoral politics—pro-life Americans gained sufficient political power to demand that the President only nominate originalists to the Supreme Court. As explained in my prior column, a true originalist could not support *Roe* since (a) there is no mention of *abortion* in the Constitution and (b) there is no evidence that the Fourteenth Amendment when it speaks of "liberty" intends

1. Loving v. Virginia, 388 US 1 (1967).

to include abortion.[2] In fact, and very interestingly, some pro-life Constitutional scholars, such as Robert George of Princeton and John Finnis of Oxford, argue that, if one looks to the context in which the Fourteenth Amendment was ratified, one finds that the Fourteenth Amendment actually precludes abortion when properly understood. Briefly, their argument is this: at the time the Fourteenth Amendment was adopted, pro-life protections were being strengthened in every state (as the facts of embryology became known); many of the same legislators who passed those state laws served in the Congress; since the Fourteenth Amendment says no state may deprive any "person" of the equal protection of the law, the unborn would have been understood to be "persons"; finally, since the Fourteenth Amendment empowers Congress to enforce this "equal protection,"[3] Congress can/should/must displace any pro-abortion laws. The issue whether the Constitution provides pro-life protections—and, hence, this possible interpretation of the Fourteenth Amendment—was not before the Supreme Court in *Dobbs* but is almost certainly to be raised in future cases. It is possible a majority of the Court will agree with these scholars. If so, pro-abortion laws will be voided. This would be a welcome result that would go far beyond the generally accepted understanding of *Dobbs* as returning the issue to the states, leaving it to state legislatures and courts to decide.

Post-*Dobbs* Developments

It should be noted that the "mid-term" elections in November resulted in deadlock on most pro-life legislation in the Congress, with the Senate being controlled by the abortion-friendly Democrats and the House by the pro-life Republicans.

Meanwhile, President Biden continues to provide as much federal support for "abortion rights" as possible. After issuing an executive order in July to federal agencies to increase the availability of abortion,[4] he issued what can only be described as a full-throated exhortation for abortion, "A Proclamation on 50th Anniversary of the *Roe v. Wade* Decision."[5] Therein he claimed, "The Court got *Roe* right 50 years ago." Then he called upon Americans to fight for the legalization of abortion. "NOW, THEREFORE, I, JOSEPH R. BIDEN, JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 22, 2023, as the 50th Anniversary of the *Roe v. Wade* decision. I call upon Americans to honor generations of advocates who have fought for reproductive freedom, to recognize the countless women whose lives and futures have been saved and shaped by the *Roe v. Wade* decision, and to march forward with purpose as we work together to restore the right to choose."

Despite Biden's claim in the proclamation that "Americans across the country … have made clear at the ballot box that they believe the right to choose is

2. U.S. Const. amend. XIV, §1, states in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."
3. U.S. Const. amend. XIV, §5: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."
4. Exec. Order No. 14076, 87 Fed. Reg. 42053 (July 13, 2022); Exec. Order No. 14079, 87 Fed. Reg. 49505 (August 11, 2022).
5. Proclamation No. 10515, 88 Fed. Reg. 4719 (January 25, 2023).

fundamental and should be preserved," the most recent opinion polls demonstrate the opposite. American's attitudes on legalized abortion remain essentially the same as they were before the *Dobbs* decision.[6] Most Americans oppose most abortions. On some issues—opposition to sex-specific or eugenic abortion, opposition to foreign aid for abortions or government subsidy of abortion costs, as well as support for pregnancy resource centers—the agreement is overwhelming and crosses party lines. In these areas, there is hope for bipartisan pro-life measures, at least at the state level.

As noted previously, federal agencies are providing "abortion travel" benefits, and federal laws are being newly interpreted in a pro-abortion manner. The Department of Health & Human Services (HHS) has proposed rules limiting conscience protection in health care. The Veterans Administration has taken steps to include abortion among the "health services" it provides.

Perhaps the most notorious action taken by the Biden administration concerns the Emergency Medical Treatment and Labor Act (EMTALA).[7] In July, the secretary of HHS publicly stated that, due to *Dobbs*, HHS would be enforcing the EMTALA to require a physician to perform *an abortion* despite the laws of the state. That interpretation ignores the EMTALA's express concern for the unborn child—both mother and child are protected. However, through this interpretation, the unborn child is effectively erased from the statute. The EMTALA was not intended to provide *abortion* within emergency care.

HHS's new interpretation of EMTALA was officially adopted and was immediately challenged in court. Litigation is continuing.

One area of contention involves abortion-causing pills or "chemical abortion" (the two-drug regime of mifepristone and misoprostol). On December 23, the Department of Justice's legal counsel published a new opinion on the application of federal law to the mailing of prescription abortion drugs that claimed this was legally justified under existing law, specifically the Comstock Act (despite that Act's plain language in stating that "every article or thing designed, adapted, or intended for producing abortion," as well as "every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion," is to be "nonmailable matter").[8] The Food and Drug Administration (FDA) accordingly authorized such distribution *regardless of the laws of the state*. Needless to say, the DOJ opinion as

6. Caroline Downey, "Roe Reversal Barely Impacted Attitudes on Abortion, Poll finds," *National Review*, January 18, 2023, https://www.nationalreview.com/news/roe-reversal-barely-impacted-attitudes-on-abortion-poll-finds/.
7. See, generally, Joshua McCaig, "Biden Administration Silently Erases 'Unborn Child' In Legal Argument Pushing Abortion on Religious Medical Workers," *The Federalist*, September 20, 2022, https://catholichealthalliance.org/biden-admin-silently-erases-unborn-child-in-legal-argument-pushing-abortion-on-religious-medical-workers/.
8. Christopher H. Shroeder, "Application of the Comstock Act to the Mailing of Prescription Drugs that Can Be Used for Abortions," memorandum opinion for the general counsel US Postal Service, US Department of Justice Office of Legal Counsel, 46 Op. O. L. C. ____ (December 23, 2022) (slip op.), https://www.justice.gov/olc/opinion

well as FDA's authorization for such distribution are being contested in on-going lawsuits that are certain to reach the Supreme Court.

FDA authority arguably preempts state laws against abortion pills. This has led to much political controversy. Two national American pharmaceutical stores, CVS and Walgreens, had announced they would provide such pills even in pro-life states. This sparked protests and boycotts by concerned citizens. Further, pro-life state attorneys general threatened legal action. In March, Walgreens announced it would not distribute the pill.[9]

The controversy over the distribution of chemical abortion can be traced to the refusal of pro-abortion forces to acknowledge that a pregnancy occurs upon fertilization. They claim it occurs upon implantation; hence, nothing that prevents implantation can be abortifacient, but is, rather, "contraceptive."

Finally, some states are seeking to make it illegal to distribute the "abortion reversal" pill. Mifepristone, the pill that is used first, blocks the progesterone receptors in the uterus. The reversal pill simply adds doses of progesterone to reverse the abortion effect of mifepristone for a woman who decides she does not want to have an abortion after all. Since there is nothing dangerous about doing this (a woman's body naturally produces progesterone), such banning seems unlikely to survive legal scrutiny.

Litigation

It should also be noted that pro-abortion groups have not given up trying to find a basis to claim a "right to abortion" exists even after *Dobbs* (and despite the majority's statement, as recounted in my last column, that no provision of the Constitution provides such a right). These groups claim such a right can be found in the religion clauses of the First amendment.[10]

Some claims are made under the first part of the clause—"no establishment." The argument is that no state may adopt one religion's view of the matter, that the pro-life view is based on Christian teaching, and that other religions—for example, Reform Judaism or liberal Protestantism—believe abortion is permissible. The weakness of this argument is that, unless a state legislature says it is basing its pro-life legislation on Christian teaching, the pro-life perspective is based on scientific facts about the beginning of life.

Other claims are based on the second part of the clause— "free exercise." The argument is that people must have the freedom to "exercise" their religiously-based pro-abortion views. Pro-abortion organizations are already suing for exemptions from state pro-life laws in Indiana, Florida and Wyoming. The weakness of this argument is that conduct physically harmful to another has always been prohibited

/application-comstock-act-mailing-prescription-drugs-can-be-used-abortions; 18 U.S.C. §1461.

9. Samantha Kamman, "Major Pharmacy Chain Won't Dispense Abortion Pill in Some States amid Pro-Life Backlash," *Christian Post*, March 16, 2023, https://www.christianpost.com/news/major-pharmacy-chain-wont-dispense-abortion-pill-in-some-states.html.
10. US Const. amend. I, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court has held that these provisions are "incorporated" against the states by the Fourteenth amendment.

by the law pursuant to the state's traditional police power, whether that conduct is claimed to be religiously based or not.

Likewise, in eleven states—Georgia, Idaho, Indiana, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, Utah, and Wyoming—pro-abortion litigants are seeking to gut pro-life protection and to create a state constitutional right to abortion. Often the claim is that the *state constitution* provides a "right to abortion" pursuant to language that does not explicitly mention abortion. This the state-level version of the same argument *Roe* made on the national level.[11] At the state level, as in the lower federal courts, the struggle between those who wish to apply the law as written (the originalists) and those who want to "interpret" the law as they believe is just continues.[12]

However, pro-life forces are fighting back. Pro-life marches, similar to the March for Life, were held in several states after *Dobbs*, all of which attracted far more support than did pro-abortion countermarches. Though it was expected that there would be an anti-life backlash after the monumental change brought by *Dobbs*, particularly given biased reporting to the effect that *Dobbs* meant women would be denied "abortions" when their lives were in danger, it is still unfortunate that pro-life ballot initiatives failed (as in, e.g., Kansas and Kentucky), while pro-abortion initiatives won (as in Michigan). Still, national attitudes on abortion remain as they were pre-*Dobbs*, as noted above.

Dobbs Fallout

On the federal level, the *Dobbs* decision resulted in perhaps 150 attacks by pro-abortion forces on pro-life pregnancy resource centers. Such attacks violate the Freedom of Access to Clinic Entrances Act. Yet the FBI has been slow to investigate and prosecute, with only a single indictment as of the end of January.[13] Again, the highly politicized response of the Biden administration is demonstrated by the effort to portray attacks as occurring as frequently against abortion clinics, while the facts show such attacks to have been very rare.[14]

11. Carrie Campbell Severino, "On Mixed Results in State Abortion Cases," *National Review*, January 13, 2023, https://www.nationalreview.com/bench-memos/on-the-mixed-results-in-state-abortion-cases/.
12. See my prior column for an extensive discussion of this issue, William L. Saunders, "Two Momentous Supreme Court Decisions and the Road Ahead," Washington Insider, *National Catholic Bioethics Quarterly* 22.3 (Autumn 2022): 427–434, doi: 10.5840/ncbq202222339.
13. See, generally, Ryan Foley, "Grand Jury Indicts Abortion Activists for Vandalizing Pro-life Pregnancy Centers," *Christian Post*, January 26, 2023, https://www.christianpost.com/news/grand-jury-indicts-activists-for-defacing-pro-life-clinics.html.
14. See "FBI Statement Downplays Attacks on Pro-life Groups," Catholic Vote, January 19, 2023, https://catholicvote.org/fbi-statement-downplays-attacks-on-pro-life-groups/; and FBI National Press Office, "FBI Offering $25,000 Rewards for Information in Series of Attacks against Reproductive Health Services Facilities," press release, January 19, 2023, https://www.fbi.gov/contact-us/field-offices/portland/news/fbi-portland-division-offering-25000-reward-for-information-in-several-arson-investigations.

The leak of the *Dobbs* draft in May 2022 unleashed protests outside the homes of Supreme Court justices who were perceived to be pro-life. Such protests continue, as does the violent rhetoric.[15]

The leak, unprecedented in Supreme Court annals, prompted an internal investigation by the Court, in an effort to determine the source of the leak. [16] However, the investigation, despite taking many months and being focused on the very few employees, justices and clerks (about a hundred individuals) at the Court, was unable to identify the culprit. The Chief Justice, John Roberts, directed a comprehensive review of the Court's document security protocols to prevent future leaks.[17]

Religious Freedom

In December, Congress passed, and Biden signed, the Respect for Marriage Act (RFMA).[18] RFMA (1) repeals section 2 of the Defense of Marriage Act, which permitted states to deny recognition of same-sex marriages created in other states, (2) forbids those acting under color of law to withhold recognition of marriages created in other states, and (3) requires the federal government to recognize marriages validly created in any state, thereby changing the federal definition of *marriage* and *spouse*.

Supporters of RFMA claim that the *Dobbs* opinion raised the possibility that in the future the Supreme Court would overturn *Obergefell v. Hodges*, the case which had established a Constitutional right to same-sex marriage; hence, the protections in federal law provided by RFMA were necessary. Opponents claim that RFMA threatens the religious liberty of those who believe marriage is between one man and one woman. The bill divided religious liberty proponents, with the Church of Jesus Christ of Latter-Day Saints and the National Association of Evangelicals supporting RFMA, while the US Conference of Catholic Bishops and the Heritage Foundation opposed it.[19]

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15. See Mary Margaret Olohan, "'Cut His Time Short': Far-Left Activists Continue Demonstrations at Kavanaugh's Home," Daily Signal, January 22, 2023, https://www.dailysignal.com/2023/01/22/far-left-activists-continue-demonstrations-at-justice-kavanaugh-home/.
16. See Office of the Marshal, Supreme Court of the United States, "Marshall's Report of Findings & Recommendations," January 19, 2023, https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf. The Chief Justice noted, "In May 2022, this Court suffered one of the worst breaches of trust in its history: the leak of a draft opinion. The leak was no mere misguided attempt at protest. It was a grave assault on the judicial process. … It is no exaggeration to say that the integrity of judicial proceedings depends on the inviolability of internal deliberations."
17. See Brooke Singman, "House Judiciary Committee to Investigate Leak of Supreme Court Opinion after SCOTUS Whiffs," Fox News, Fox Corporation, January 19, 2023, https://www.foxnews.com/politics/house-judiciary-committee-investigate-leak-supreme-court-opinion-scotus-whiffs.
18. Respect for Marriage Act of 2022, Pub. L. No. 177-228, 136 Stat.2305 (December 13, 2022).
19. A fair summary of the arguments for and against RFMA can be found in the following article supportive of RFMA: Stanley Carlson-Thies, "The Senate's Respect for Marriage Act Protects Churches and Faith-Based Service Organizations," Center for Public Justice, November 22, 2022, https://cpjustice.org/the-senates-respect-for-marriage-act-protects-churches-and-faith-based-service-organizations/.

Former US ambassador for international religious freedom, Sam Brownback, along with Katrina Lantos-Swett, president of the Lantos Foundation for Human Rights & Justice, convened the third International Religious Freedom Summit in Washington, DC, in January. The bipartisan event was co-chaired by two US senators, Jacky Rosen, a Democrat from Nevada, and Roger Wicker, a Republican from Missouri. The event was attended by religious freedom advocates from around the world.

However, Brownback confronted a serious problem concerning advocacy of religious liberty *within* the US. Another organization he founded, the National Committee for Religious Freedom (NCRF), had its bank account canceled by JPMorgan Chase. The NCRF includes Christians, Hindus, Jews, Mormons, and Muslims. Yet its account was canceled by the bank without an explanation. JPMorgan Chase's CEO, Jamie Dimon, at a recent Congressional hearing had spoken of religious freedom as "foundational" to American democracy. Yet Brownback later learned the decision to cancel the NCRF account came from corporate headquarters. Later, when NCRF tried to find another bank, it experienced substantial difficulty. Does this mask widespread hostility to organizations supporting traditional religious views? Brownback, who previously served in the US Senate, says he would hold a hearing to investigate if he were still in the Senate.[20]

Finally, it must be noted that the Vatican renewed its ill-conceived agreement with the Chinese communist government concerning the selection of bishops.[21] This comes despite the arrest and subsequent trial of Cardinal Zen and of Jimmy Lai and despite the fact that the Chinese government has selected and installed at least one bishop without Vatican knowledge or approval.

International Pro-Life Developments

Pro-abortion forces work ceaselessly in the international arena to advance "abortion rights." They do so chiefly in two ways—(1) trying to get (often through the courts) recognition of such rights domestically, and (2) asserting endlessly that abortion is an "international human right," though this is demonstrably false.[22] To be an international "right," abortion would have to be guaranteed in a treaty, which it is not, or have become a right through custom, that is, by (all or nearly all) the nations of the

20. Sam Brownback, "Are Big Banks Chasing Away Religious Organizations?," opinion, *Washington Examiner*, October 6, 2022, https://www.washingtonexaminer.com/restoring-america/faith-freedom-self-reliance/are-big-banks-chasing-away-religious-organizations.

21. See Ignatius Dean, "Cardinals Tagle and Parolin Defend Renewal of Sino-Vatican pact," *Catholic Herald*, October 24, 2022, https://catholicherald.co.uk/cardinals-tagle-and-parolin-defend-renewal-of-sino-vatican-pact/.

22. For a thorough discussion of these issues, see two of my articles: William Saunders, "Neither by Treaty, Nor by Custom: Through the Doha Declaration the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, Affirming Traditional Understanding of Human Rights," opinion, *Georgetown Journal of Law and Public Policy,* 9.1 (Winter 2011): 67–102; and William Saunders, "The San Jose Articles and an International Right to Abortion," *Ave Maria International Law Journal* 4 (Spring 2015): 1–28.

world providing it. The latter has not happened. Nonetheless, pro-abortion lawyers endlessly assert that "soft law norms" have coalesced into a right by custom. Soft law norms are claimed to be embodied in international pronouncements of many types (statements from international meetings, observations of UN special rapporteurs, comments of UN treaty bodies, etc.). *However*, the secret they never admit is that even these (arguable) sources of "soft norms" almost always use ambiguous language, i.e., they do not use the word "abortion"; rather they use terms such as "reproductive health services" that have been treated at international meetings and in international statements as *not* referring to a right to abortion.

It is all rather dizzying, this pro-abortion multi-step dance of deception, but I assure the reader it is very dangerous. If pro-abortion advocates can convince a domestic (i.e., national) court that international law guarantees abortion, that court will then impose it on that nation's citizens (much as the US Supreme Court did in *Roe*). With this in mind, let us look at recent developments in Columbia.

Columbia used to be a pro-life country. However, over many years, beginning in 2004, the constitutional court has made a series of rulings—based partly on pro-abortion claims of "soft norms"—creating a right to elective abortion in the first twenty-four weeks. However, the government remained pro-life. Thus, in May 2022, Columbia joined the Geneva Consensus. What is the Geneva Consensus? It is a "consensus declaration" of a coalition of pro-life nations, affirming that there is no international "human right" to abortion. It was first issued in 2020.

However, the government in Columbia changed. A pro-abortion president came to power. He immediately withdrew Columbia from the Geneva Consensus. While this is sad for Columbia, it does not change the immensely important fact that the Geneva Consensus continues to exist (even as some nations leave it and some join). Thus, since finding a right to abortion under international law requires unanimity (or nearly so) among nations, the fact that there are proudly pro-life nations means the conditions for an international right by custom do not exist.

In the United States, sixty-nine Democratic members of Congress asked the State Department to confirm that the United States is bound by an international right to abortion (though it is not). Meanwhile, on November 17, resolutions were introduced in the Senate and in the House supporting the Geneva Consensus and urging the United States to rejoin it (Biden withdrew the United States, which had originally joined under President Donald Trump).

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