



Washington Insider



Arina O. Grossu, MA, MS
Founder and Principal
Areté Global Consulting
Fellow
Center on Human Exceptionalism
Discovery Institute

US Supreme Court

Roe No More: The Dobbs Decision

We are living in historic times. On June 24, 2022, we celebrated something that we had only hoped we would see in our lifetimes—the overruling of *Roe v. Wade*. The *Roe* decision plagued our nation for nearly fifty years and snuffed out the lives of approximately sixty-three million babies. The path to this decision came by way of *Dobbs v. Jackson Women’s Health Organization*, a case involving a Mississippi law that protected preborn babies from abortion after fifteen weeks’ gestation. *Dobbs* made its way to the US Supreme Court where not only the issue of gestational limits but also the constitutionality of abortion itself took center stage. On May 2, *Politico* published a leaked draft of the majority opinion in *Dobbs* written by Justice Samuel Alito, which signaled the Supreme Court’s intention to strike down *Roe*. The leak itself was an unprecedented, un-American breach and shook the foundations of our judicial system.

As we saw in the past few months, the Left used a lot of political pressure and intimidation tactics to try to sway the justices’ decision in *Dobbs* and also to harass the pregnancy resource centers whose sole aim is to help women and families in unplanned pregnancies. So much for their concern for women. In the weeks leading up to the decision, illegal (but unfortunately unprosecuted) protests routinely took place outside the homes of Justices Brett Kavanaugh, Amy Coney Barrett, John Roberts, and Alito, culminating in an assassination attempt on Kavanaugh. At the same time, assaults began on pro-life pregnancy resource centers—which offer free resources to pregnant women in need. This illegal (but also unprosecuted) activity ranged from graffiti to firebombing and continue to this date with more than one hundred centers having been the victims of this violence.¹

The work to end abortion at the federal and state levels over the coming years and decades will in many ways reflect our relationship with abortion in a post-*Roe* America. But for now it will suffice to reflect on the *Dobbs* decision itself and the pro-life strategy moving forward.

The specific question taken up by the Supreme Court in the decision in *Dobbs* that finally did away with *Roe* and its companion case, *Doe v. Bolton*, was somewhat convoluted: “Whether all pre-viability prohibitions on elective abortions are

1. Charlotte Allen, “The Vandalism against Crisis Pregnancy Centers Is Only the Beginning,” *Epoch Times*, updated August 29, 2022, https://www.theepochtimes.com/the-vandalism-against-crisis-pregnancy-centers-is-only-the-beginning_4683611.html.

unconstitutional.”² This has recourse, of course, to the revision to *Roe*, that legal labyrinth known infamously as *Casey v. Planned Parenthood*, which gave us the murky viability line to replace the awkward and arbitrary trimester framework.

With the opinion Alito wrote in *Dobbs*, the Supreme Court finally found a clear and constitutional path out of the *Roe* regime. The decision clearly indicated that there is no right to abortion in the Constitution and that there never was. Alito strategically took out all of the major arguments for abortion that have been bandied about in the decades since the *Roe* decision and rebutted them.

This is familiar territory for Alito. He reviewed *Casey* when he sat on the Third Court of Appeals in 1991. It might not be widely known, but he was the lone judge to uphold the spousal notification requirement in that case.³ Thirty-one years later, Alito finally got another crack at *Casey*. And he wasn’t timid—nor should he have been. His majority opinion put *Casey* squarely in his sights. He was finally able to do now what they should have done then: reconsider *Roe* on its merits and strike it down for the flimsy and unprincipled insult to judicial reasoning it truly was.

Alito put *Casey* down in no uncertain terms. He wrote, “*Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*’s analysis, failed to remedy glaring deficiencies in *Roe*’s reasoning, endorsed what it termed *Roe*’s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*’s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.”⁴

There is a strong originalist strain in Alito’s opinion in *Dobbs*, though perhaps not as much as the late legal luminary Justice Antonin Scalia would have liked. As Scalia said in a discussion of the common law, “Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution. . . . Many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong.”⁵ Alito made a similar point that only since the 1970s did judges attribute a so-called right to abortion within the intention of the founders.

Alito made an appeal to the history of abortion law in America in his consideration of the foundation for *Roe* and *Doe*. It is a widely known fact that abortion itself was never mentioned in the Constitution—though abortion advocates would contend that it lurked in the penumbras of its contentions. However, state laws were similarly lacking in any mention of the practice until the late 1800s, when they began

2. *Dobbs v Jackson Women’s Health*, 597 U.S. ____ (2022), slip. op. at 1 (Roberts, C.J., concurring).

3. Jeremy Roebuck, “Thirty Years Ago, the Supreme Court Nearly Struck Down *Roe v. Wade* in a Pennsylvania Case. The Justices Chose Another Way,” *Philadelphia Inquirer*, May 3, 2022, <https://www.inquirer.com/news/planned-parenthood-v-casey-abortion-ruling-pennsylvania-alito-20220503.html>.

4. *Dobbs*, 597 U.S. at 56.

5. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, new ed. (Princeton, NJ: Princeton University Press, 2018), 13.

to develop criminal liability for it—often with serious penalties.⁶ However, as Alito continued, by the time the Fourteenth Amendment was passed, three-fourths of the states had made abortion a crime. Alito took an originalist stance in moving the issue back to the states: “Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.”⁷

Though Alito’s often originalist posture might have caused him to resort to prior precedent in some cases, he made clear that this is not one of them. He wrote, “*Stare decisis* plays an important role in our case law. . . . It protects the interests of those who have taken action in reliance on a past decision. . . . And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. . . . [But] *stare decisis* is not an inexorable command.” Alito unambiguously asserted that “the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.” The opinion gives a lengthy discussion on *stare decisis*, focused on five points: the court’s error, its reasoning, a precedent’s workability, its effects on other areas of the law, and reliance interests. Going to great lengths to show that the *Roe* decision stood on inexcusably weak grounds, Alito concluded that “*Roe* and *Casey* must be overruled.”⁸

Post-Roe Strategy

Now that *Roe* is overturned, it is important that we do not sit on our laurels. The pro-life work is now only beginning, and the illusion of a permanent pro-life victory must be quickly dispelled. It would be naïve to think that this victory can carry us through the future, given the many ways that the Left is already pushing to codify *Roe*. Here are my top ten recommendations for a winning post-*Roe* pro-life strategy:

1. *Work to get pro-life candidates elected at the local, state, and national level, especially in the upcoming midterm elections.* Elections matter. Abortion policy primarily will be determined at the state and local levels. Pro-lifers must commit to finding, supporting, campaigning for, and voting for pro-life leaders in their state and community.
2. *Pass federal and state pro-life legislation.* We can begin to make progress toward eliminating abortion altogether by focusing on passing pro-life legislation both nationally and at the state level. In the federal and states sections below, there are examples of the types of bills that can be introduced. In addition to those recommendations, one way to federally protect preborn children is to pass legislation outlawing abortion from the moment a heartbeat is detected, with the ultimate goal of federal protection from the moment of fertilization. In the meantime, a federal heartbeat bill would likely eliminate more than half of abortions, as evidenced by the 60 percent drop in abortion in Texas when that state enacted such a law.

6. Students for Life, “History of Abortion,” accessed September 1, 2022, <https://studentsforlife.org/learn/history-of-abortion/>.

7. *Dobbs*, 597 U.S. at 31.

8. *Dobbs*, 597 U.S. at 5, 39, internal quotation marks omitted.

We also must pass laws that protect women from dangerous chemical abortions which have been on the rise over the past few years as the abortion industry's primary means of selling abortion. The abortion industry is pushing these dangerous drugs more than ever, as a means to circumvent surgical abortion limits in the states, especially since the *Dobbs* decision. Chemical abortions make up the majority of abortions in America, claiming 54 percent of all abortions as of 2020,⁹ a number that has only increased in the last two years. Thankfully, pro-life states have not been oblivious to this threat, with many passing commonsense laws to protect the health and safety of women. For example, twenty-nine states require that chemical abortions be administered by a licensed physician, nineteen states restrict the administration of chemical abortion via telemedicine and require that the abortion provider be physically present when the chemical abortion is administered, and two states prohibit the use of chemical abortion after a specific gestational age.¹⁰ These commonsense regulations provide an obvious starting point for states to protect vulnerable women from these dangerous drugs.

Finally, we can establish sanctuary cities for the unborn. There are now over forty sanctuary cities for the unborn. The group Sanctuary Cities for the Unborn now provides step-by-step guidance on how to outlaw abortion in your town, thereby eliminating abortion across America, one city at a time.¹¹

3. *Increase pregnancy-resource funding and fund pro-life medical centers.* Through legislation, we need to increase funding both nationally and at the state level for alternatives to abortion programs. This is an area that should garner bipartisan support from those who say they care about women and children. Texas has succeeded in providing a whopping \$100 million in grants in 2022 through its Alternatives to Abortion program. The funds are funneled to pregnancy centers as well as other social services that offer “counseling, mentoring, educational information and classes on pregnancy, parenting, adoption, life skills and employment readiness; material assistance, such as car seats, clothing, diapers and formula; care coordination through referrals to government assistance programs and other social services programs; ... [and] housing and support services through maternity homes.”¹²

9. Rachel K. Jones et al., “Medication Abortion Now Accounts for More Than Half of All US Abortions,” Guttmacher Institute, updated March 2, 2022, <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>.

10. Guttmacher Institute, Public Policy Office, “Medication Abortion,” updated August 1, 2022, <https://www.guttmacher.org/state-policy/explore/medication-abortion>.

11. “Sanctuary Cities for the Unborn,” accessed September 1, 2022, <https://sanctuarycitiesfortheunborn.com/>.

12. Micaiah Bilger, “Texas Spends \$100 Million to Help Pregnant Moms While It Protects Babies from Abortion,” LifeNews, September 1, 2021, <https://www.lifenews.com/2021/09/01/texas-spends-100-million-to-help-pregnant-moms-while-it-protects-babies-from-abortion/>; and Texas Health and Human Services, “Alternatives to Abortion,” accessed September 1, 2022, <https://www.hhs.texas.gov/services/health/women-children/alternatives-abortion>.

In addition, the pro-life movement must get behind a plan to fund and create more pro-life medical clinics that offer comprehensive women's health care services. As a starting point, the pro-life movement could match willing pregnancy resource centers with pro-life physicians who are willing to "adopt" the centers and make them into their own medical practices providing comprehensive women's health care such as well-woman and gynecologic care, including breast exams and testing and treatment for sexually transmitted diseases; maternity care, including prenatal care and post-partum care; pregnancy testing; miscarriage support; abortion pill reversal; hormone management services; fertility education; and infertility screening.

4. *Make college campuses more family and child friendly.* Students for Life is already doing a good bit of work in this area through their Standing with You program to support pregnant students on campus.¹³ This program empowers pro-life students to advocate for campus policy changes that will support pregnant students, increase visibility of local pregnancy resource centers at the school, and educate young women on their rights as pregnant students. If we want to help young college women choose life, we must make it easier for them to do so by showing them that they need not decide between their education and their child.
5. *Defund Planned Parenthood.* We must cut off federal and state funding of Planned Parenthood and call it out for the sham organization it is. For years Planned Parenthood has claimed that abortion is only 3 percent of the services it provides. This statistic was demonstrably false from the beginning, as was made abundantly clear when the national organization began shuttering facilities immediately following the *Dobbs* decision. It is hardly a women's health clinic and does not even provide basic mammograms or prenatal care for women who choose to carry their pregnancy to term. Some of the services it provides could hardly be described as health care. For example, in addition to being the number one killer of preborn babies under the guise of medicine, the abortion behemoth has, in recent years, expanded into gender-transition interventions. In plain language, it prescribes drugs to young people that will stop their bodies from developing normally, even chemically castrating them, placing these vulnerable young adults on the path to transition interventions that will leave them permanently mutilated.
6. *Increase parish involvement in pro-life accompaniment.* A post-Roe America also requires that priests, pastors, and lay church members step up their game. Every church in America should have a pregnancy support program—and there is no reason why it cannot. However, priests and pastors cannot do this work this alone. Lay people are a vital part of the creation of such programs through their willingness to volunteer their time and to accompany and mentor moms and families in unplanned pregnancies. Our dioceses have done a good job of establishing pro-life offices, but do the pregnant women in the pews know that they have their parish's support? A Care Net survey found that more

13. "Standing with You," accessed September 1, 2022, <https://www.standingwithyou.org/>.

than four in ten women who have had an abortion were churchgoers when they got the abortion.¹⁴ One poll found that seven in ten women who have had an abortion identified as a Christian, including 27 percent Catholic, 26 percent Protestant, 15 percent nondenominational, and 2 percent Orthodox.¹⁵ Nearly 60 percent of women who had an abortion received or expected to receive a judgmental or condemning reaction at their local church.¹⁶ Our churches should be the first place that women facing unplanned pregnancies think of going to for assistance. Human Coalition has a church kit that should serve as a general template for “informing, equipping, and activating” churches for the culture of life.¹⁷

7. *Promote adoption and foster care reform.* Another area that should receive bipartisan support is making adoption more affordable to the average-income American family, for example, by providing tax credits and other benefits to counter the costs of adoption. Although adopting from foster care costs little to nothing, and the state offers subsidies, many families still opt for a domestic adoption through a private agency, which typically ranges from \$20,000 to \$50,000 but can cost up to \$70,000.¹⁸ This starkly demonstrates the failures of the current adoption system. Pro-lifers should push for major reforms of both foster care and adoption systems. Such a scenario could only result in both expectant mothers’ and the public’s having a more favorable view of adoption as an alternative to abortion.
8. *Encourage family-friendly employment.* While some companies are offering to pay travel costs for abortions, pro-life companies should take the example of Buffer Insurance in Texas, which has offered to pay employees who have babies, grant paid maternity and paternity leave, and pay for medical costs associated with adoption.¹⁹ They are making their ready-to-use policies available to other companies that also want to provide these benefits to their employees.

14. Lisa Cannon Green, “New Survey: Women Go Silently from Church to Abortion Clinic,” Care Net, November 23, 2015, <https://www.care-net.org/churches-blog/new-survey-women-go-silently-from-church-to-abortion-clinic>.

15. Aaron Earls, “7 in 10 Women Who Have Had an Abortion Identify as a Christian,” Lifeway Research, December 3, 2021, <https://research.lifeway.com/2021/12/03/7-in-10-women-who-have-had-an-abortion-identify-as-a-christian/>.

16. Lisa Cannon Green, “Women Distrust Church on Abortion,” LifeWay Research, November 23, 2015, <https://research.lifeway.com/2015/11/23/women-distrust-church-on-abortion/>.

17. Human Coalition, “The Church Toolkit,” accessed September 1, 2022, <https://www.humancoalition.org/church-outreach/>.

18. US Department of Health and Human Services, Children’s Bureau, *Planning for Adoption: Knowing the Costs and Resources* (Washington, DC: HHS, 2022), 5; and American Adoptions, “The Average Cost of Adoption—What to Expect,” accessed September 1, 2022, <https://www.americanadoptions.com/adopt/average-adoption-cost>.

19. Abigail Adcox, “Texas-Based Insurance Provider Offers to Pay for Employees’ Birth Costs,” *Washington Examiner*, July 1, 2022, <https://www.washingtonexaminer.com/restoring-america/community-family/texas-insurance-buffer-pay-employees-birth-costs>.

9. *Support families through tax credits.* Tax credits for children are one way that many states already support families; however, Georgia has gone one step further in recognizing the humanity of the unborn by providing tax credits for children still in utero. Pro-life states should seek to follow Georgia's example and ramp up their support for families with increased child tax credits that apply to all children no matter how young.²⁰
10. *Rebuild marriage, family, and sexual ethics.* Marriage as an institution in the United States started to crumble in the 1960s and 1970s in no small part because of the legal stamp of approval of so-called consequence-free contraceptive intramarital sex (*Griswold v. Connecticut* in 1965), contraceptive extramarital sex (*Eisenstadt v. Baird* in 1972), and abortion when contraception failed (*Roe v. Wade* and *Doe v. Bolton* in 1973). While there is no political appetite today for prohibiting contraception, it must be noted that Catholics are called to live out sexual ethics according to their state in life and practice family planning in marriage in accordance with Catholic teaching.²¹ The destruction of marriage was also aided by no-fault divorce, which was adopted in 1969 in California and rapidly adopted by the other states. It gave spouses an easy way out of a marriage. It is high time we take a hard look at all of these significant cultural shifts and their contribution to the dissolution of marriage and the culture of death that has ensued. As a Church, we should boldly proclaim Catholic teaching on marriage, family, and sexuality in our schools, parishes, pre-Cana classes, and marriage support ministries.

Regulatory and Executive Branch

Weaponizing the Emergency Medical Treatment and Active Labor Act to Force Abortions

On July 8, President Joe Biden signed an executive order directing the US Department of Health and Human Services (HHS) to find ways to make abortion accessible in light of the *Dobbs* ruling. On July 11, HHS published a memorandum and sent a letter to health care entities encouraging them to use the Emergency Medical Treatment and Active Labor Act of 1986 in the context of abortion.²² EMTALA was originally created to protect people in medical emergencies to receive necessary

-
20. Georgia Department of Revenue, "Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act," news release, August 1, 2022, <https://dor.georgia.gov/press-releases/2022-08-01/guidance-related-house-bill-481-living-infants-and-fairness-equality-life>.
 21. US Conference of Catholic Bishops (USCCB), "Love and Sexuality," accessed September 1, 2022, <https://www.usccb.org/topics/natural-family-planning/love-and-sexuality>; and USCCB, "Contraception, Sterilization, & Abortion," accessed September 1, 2022, <https://www.usccb.org/issues-and-action/marriage-and-family/natural-family-planning/catholic-teaching/upload/Contraception-2.pdf>.
 22. Centers for Medicare and Medicaid Services, "Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss," memo no. QSO-22-22-Hospitals, updated August 25, 2022.

care. The law requires medical professionals to stabilize a patient in an emergency and either treat or transfer the patient.

EMTALA's language itself outright states that there are two patients, mother and unborn child, who must be taken into account in an emergency situation involving a pregnant woman. "Emergency Medical Condition" in EMTALA is defined as "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy." In addition, "with respect to a pregnant woman who is having contractions," emergency medical conditions include situations when "there is inadequate time to effect a safe transfer to another hospital before delivery, or that transfer may pose a threat to the health or safety of the woman or the unborn child."²³ The HHS guidance conveniently leaves out mention of the unborn child and directs that abortions must be made available to women who present in an emergency room with life-threatening situations, regardless of the state's laws on the matter. In his letter to health care entities, HHS Secretary Xavier Becerra defines *stabilizing treatment* to include "medical and/or surgical interventions (e.g., abortion, removal of one or both fallopian tubes, anti-hypertensive therapy, methotrexate therapy etc.), irrespective of any state laws or mandates that apply to specific procedures."²⁴

Pregnancy itself is not an emergency, and abortion is not a treatment but the taking of a human life. Legitimate emergency situations that may involve a pregnancy, such as an unresolved ectopic pregnancy, can be resolved ethically without an abortion, which is never medically necessary to save the life of the mother.

The Biden administration's twisting of EMTALA shows the lengths it is willing to go to push the abortion agenda and force hospitals and medical professionals to embrace it. Texas Attorney General Ken Paxton sued the administration over its guidance, and on August 23, Judge James W. Hendrix ruled in favor of Texas, blocking the EMTALA abortion requirement and the implementation of the Biden administration's guidance in that state, saying that "the Guidance extends beyond EMTALA's authorizing text."²⁵ The next day, in Idaho, Judge B. Lynn Winmill went in the opposite direction, arguing that health care professionals who offer abortions under EMTALA would not be prosecuted under that state's laws that prohibit abortions.²⁶ The abuse of EMTALA in order to force health care professionals to perform abortions is a threat to medical conscience. Other states should follow Texas's lead in pushing back on the guidance as going beyond EMTALA's authorizing text.

Battle at the Pharmacy

On July 13, HHS also issued guidance to the sixty thousand US retail pharmacies, mandating them to provide contraceptives or abortifacients or be considered discriminatory under civil rights laws, reinterpreting sex discrimination to include

23. 42 U.S. Code §1395dd.

24. Xavier Becerra to Health Care Providers about Emergency Medical Care, July 11, 2022.

25. *Texas v. Becerra*, no. 5:22-CV-185-H, 2 (N.D. Tex. 2022).

26. *United States v. Idaho*, no. 1:22-cv-00329-BLW (D. Idaho 2022).

“pregnancy discrimination,” including “discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth” and even reinterpreting disability discrimination to include refusals to provide contraceptives or abortifacients for nonreproductive indications (e.g., to treat stomach ulcers or for immunotherapy).²⁷ According to the guidance, pharmacies that receive federal funding, per the Affordable Care Act and the Rehabilitation Act of 1973, cannot make their own judgments about the appropriateness of a certain drug on the basis of their own beliefs or medical conclusions. The directive especially centered on the issuance of misoprostol and methotrexate, both of which can be used in the context of abortions.²⁸

While a pro-abortion association of pharmacists towed the line and publicly asserted that it supports the guidance, it also said that it is worried about how this guidance might affect the patient–pharmacist relationship and sought clarification how this guidance may interact with state laws on abortion. In a letter addressed to Biden, Paul Abramowitz, the CEO of the American Society of Health-System Pharmacists, wrote, “We request HHS clarify that the guidance is in no way intended to abrogate or obstruct the pharmacist-patient relationship or limit the clinical decision-making obligations and authorities of pharmacists by nature of their professional license and professional oath. Further, we urge HHS to provide additional detail regarding the interaction of federal discrimination laws and state laws regarding reproductive health.”²⁹

While the guidance mentions the Church Amendments, federal conscience laws enacted by Congress in the 1970s, right after listing examples of sex or disability discrimination for not providing contraceptives and abortifacients, it leaves it up to HHS to decide on a case-by-case basis how the Church Amendments would be applied, thus undercutting their very existence.

Proposed Rule on Section 1557

On July 25, HHS announced changes via a proposed regulation under Section 1557 of the Affordable Care Act to redefine sex discrimination in health programs and activities funded by HHS to include sexual orientation, gender identity, and “pregnancy or related conditions,” including elective abortion.³⁰ The proposed rule was

27. HHS, “HHS Issues Guidance to the Nation’s Retail Pharmacies Clarifying Their Obligations to Ensure Access to Comprehensive Reproductive Health Care Services,” news release, July 13, 2022, <https://www.hhs.gov/about/news/2022/07/13/hhs-issues-guidance-nations-retail-pharmacies-clarifying-their-obligations-ensure-access-comprehensive-reproductive-health-care-services.html>.

28. HHS, Office of Civil Rights, “Guidance to Nation’s Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services,” July 14, 2022, <https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html>.

29. Paul W. Abramowitz to Xavier Becerra, July 14, 2022, <https://www.ashp.org/-/media/assets/advocacy-issues/docs/ashp-seeks-clarification-on-reproductive-health-guidance>.

30. HHS, “HHS Announces Proposed Rule to Strengthen Nondiscrimination in Health Care,” news release, July 25, 2022, <https://www.hhs.gov/about/news/2022/07/25/hhs-announces-proposed-rule-to-strengthen-nondiscrimination-in-health-care.html>.

published in the Federal Register on August 4. If finalized, it would threaten the rights of conscience of hospitals, doctors, clinics, and health care professionals and force them to provide deadly interventions such as abortion and mutilating transgender surgeries against their best ethical and medical judgment or be considered discriminatory for refusing to do so. It would also force insurance companies to pay for or cover these interventions. It will give HHS the discretion to determine if any entities are exempt from this requirement, thus creating a gray area where some federal conscience laws may not be enforced. Individuals and organizations have an opportunity to voice their objections by submitting public comments until October 3 at the Federal Register. The Ethics and Public Policy Center has provided a helpful instruction guide on the public comment process.³¹

Proposed Rule on Title IX and Its Effect on Health Care

Title IX of the Civil Rights Act of 1972 is a law that prohibits sex discrimination in federally funded educational programs and activities. It was meant to level the playing field for women in sports. On June 23, the fiftieth Anniversary of Title IX, the US Department of Education announced a proposed rule on Title IX.³² On July 12, the proposed rule was published in the Federal Register. Why should Title IX concern health care professionals? It goes hand in hand with Section 1557, as they both are being used to redefine sex discrimination to include gender identity and termination of pregnancy, including elective abortions. Whatever Title IX regulations say about sex discrimination in the education context will have a direct effect on how sex discrimination will be defined, interpreted, and enforced in the health care context.³³ Individuals and organizations have an opportunity to voice their objections to the Biden Administration's Title IX proposed rule by submitting public comments until September 12 at the Federal Register.

-
31. Ethics and Public Policy Center, "Public Comments on Agency Rulemaking," accessed September 1, 2022, <https://eppc.org/wp-content/uploads/2022/03/Public-Comments-on-Agency-Rulemaking-Explainer.pdf>. If your medical conscience rights have already been violated (or you know of someone whose rights have been violated), you may file a federal conscience complaint with HHS and the Equal Employment Opportunity Commission. Ethics and Public Policy Center, "How to File a Conscience Complaint," accessed September 1, 2022, <https://eppc.org/wp-content/uploads/2022/02/How-to-File-a-Federal-Conscience-Complaint.pdf>.
 32. US Department of Education, "The U.S. Department of Education Released Proposed Changes to Title XI Regulations, Invites Public Comment: Department Commemorates 50 Years of Protecting and Advancing the Rights of All Students," news release, June 23, 2022, <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>.
 33. Rachel N. Morrison, "Why the Medical Community Should Care about Biden's Proposed Title IX Regulations," *National Review*, August 30, 2022, <https://www.nationalreview.com/bench-memos/why-the-medical-community-should-care-about-bidens-proposed-title-ix-regulations/>.

Federal Legislation

Opportunities

As of August 8, the House of Representatives of the 117th Congress is made up of 223 Democrats (including four delegates), 213 Republicans (including one delegate and the resident commissioner of Puerto Rico), and five vacant seats. The Senate of this Congress is made up of fifty Republicans, forty-eight Democrats, and two Independents, who both caucus with the Democrats.³⁴ The upcoming midterm elections this November have the potential to return the House of Representatives and Senate to Republican control. Additionally, there are elections being held across the country for governors, state attorneys general, and state legislative seats. Every local and state election is crucial at this ideological crossroads in our nation.

Some of the key federal bills that are pro-life priorities are the following:

- The No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act would codify the Hyde Amendment and ensure that no federal funds are used for abortions or health coverage that includes abortions.
- The Born-Alive Abortion Survivors Protection Act would criminalize infanticide and require that health care professionals provide the proper degree of care for babies born alive after a failed abortion. House Republicans, led by Minority Whip Steve Scalise of Louisiana, have indicated that they will introduce BAIPA on the first day of the session should there be a Republican majority in Congress following the election in November.³⁵
- The Pain-Capable Unborn Child Protection Act establishes a criminal offense for performing or attempting to perform an abortion if the probable post-fertilization age of the preborn child is twenty weeks or more. A twenty-week ban on abortion was passed by the House of Representatives in 2015 and 2017, and it remains possible that Republicans could take it up again. However, after *Dobbs* that line could be moved even closer to fertilization. *Dobbs* upheld protections for preborn babies at fifteen weeks, so lawmakers may be interested in attempting to protect preborn babies nationally from that stage. Such legislation could certainly pass the House if Republicans regain it in November.³⁶ However, it is unlikely that it would clear the Senate, because of the sixty-vote threshold

34. Congressional Research Service, *Membership of the 117th Congress: A Profile* (Washington, DC: CRS, 2022).

35. Mychael Schnell, “Scalise Says Republicans Will Take Up Born Alive Act on ‘Day One’ if GOP Wins House Majority,” *The Hill*, May 11, 2022, <https://thehill.com/homenews/house/3484558-scalise-says-republicans-will-take-up-born-alive-act-on-day-one-if-gop-wins-house-majority/>.

36. Melanie Zanona and Manu Raju, “House Republicans Eye 15-Week Abortion Ban after *Roe* Ruling,” CNN, updated June 24, 2022, <https://www.cnn.com/2022/06/24/politics/republican-reaction-abortion-congress/index.html>.

needed to overcome the filibuster, and Biden would not sign such a measure. However, its passage would set a legislative precedent that could be helpful politically in the coming months and years.

- The Conscience Protection Act would amend the Public Health Service Act to prohibit governmental discrimination against health care entities and professionals that do not participate in abortion. The greater the threats to medical conscience become, the more necessary such protections will be.

Threats: The So-Called Women’s Health Protection Act

In the weeks following the overturning of *Roe*, Democratic lawmakers again introduced the Women’s Health Protection Act (H.R. 3755), also known as the Abortion on Demand until Birth Act. It passed the House but failed to reach the sixty votes necessary in the Senate. This extreme abortion bill would codify *Roe*, legislate a federal right to abortion on demand, and invalidate all federal and state laws that protect life, which have been put in place over the past five decades as a way of chipping away at abortion under *Roe*. These laws include provisions that require ultrasounds before abortions, parental consent or notification, waiting periods, telemedicine, or health and safety within abortion facilities.³⁷ It also would have nullified the Religious Freedom Restoration Act, which provides a way for doctors, nurses, and other health care professionals to bring a cause of action against the government for infringing on their right to practice medicine according to their conscience and religious freedom rights, including their right not to be forced to participate in abortion. Further, it would have endangered the conscience rights of health care professionals by threatening long-standing bipartisan federal conscience laws. It is unclear whether Democratic lawmakers will attempt to pass this legislation again before the November election.

The States

Post-Roe Pro-Life States

Over the past months since the decision came down in *Dobbs*, there are sixteen states that offer significant pro-life protections for the preborn or will very soon, with three additional states where the pro-life laws have been temporarily blocked but should be watched closely. The twelve states with current near-total protections for the preborn are Arkansas, Alabama, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin. Georgia and Ohio have six-week heartbeat laws in effect. In addition, Florida currently has a fifteen-week ban, and Indiana’s new abortion ban, passed in the weeks following the *Dobbs* decision, is set to go into effect in September.

A few more states with pro-life laws that were set to go into effect have faced some temporary setbacks. The three states whose pro-life conditional laws have

37. USCCB, Secretariat of Pro-Life Activities, Opposition Letter and Fact Sheet, The Women’s Health Protection Act, revised September 2021, <https://www.usccb.org/resources/WHPA%20opposition%20letter%20Senate%20and%20fact%20sheet%20-2022.pdf>.

been temporarily blocked by local courts are North Dakota, Wyoming, and Utah. Additionally, a federal judge in Idaho temporarily blocked some of the state's pro-life protections by asserting the Biden administration's EMTALA guidance as it relates to abortions in emergency situations.

As of August 31, the South Carolina House of Representatives passed legislation that would protect preborn children at all stages. The state Senate will take up the bill in early September.

Pro-Life Bills Introduced and Passed

Even pre-*Dobbs*, states have continued the trend of introducing and passing massive amounts of pro-life legislation or provisions. As we outlined at the Charlotte Lozier Institute, as of June 30, forty-three states have introduced a total of 441 pro-life bills (or bills containing at least one pro-life provision) in 2022 or the current legislative session. This includes 297 bills introduced in 2022 and 144 bills introduced in 2020–2021 for the current legislative session. These bills include a total of approximately 654 pro-life provisions. The most common included gestational limits; informed-consent and counseling bills; regulations on abortion centers, abortion reporting, and chemical abortion; prohibitions on abortion funding and non-physician abortions; protections for born-alive abortion survivors; funding for pregnancy resource centers; and requirements for ultrasounds.³⁸

Not in Kansas Anymore

Pro-life states could become exemplars to abortion-lenient ones and perhaps influence their future legislative moves. A classic example, Kansas, is quite a pro-life state in terms of the views of its populace. It was one of the first places to bring into effect the groundbreaking Dismemberment Abortion Ban in 2015 that shed a bright light on abortion procedures performed later in pregnancy, which, as then Justice Anthony Kennedy had once remarked, were “laden with the power to devalue human life.”³⁹ However, in a tragic turn in 2019, an activist state Supreme Court was able to undercut all those efforts with a judicial decision. In one of the more tragic tales in abortion jurisprudence in recent years, a very pro-life state became, legally speaking, very pro-choice—in a heartbeat.⁴⁰

The Kansas legislature recently considered an amendment to the state Constitution to effectively reverse those moves. The Value Them Both Amendment would have affirmed that the Kansas Constitution does not provide a right to abortion and enabled state lawmakers to regulate abortion directly.⁴¹ The Amendment would have also required parental notification for minor girls seeking abortion,

38. Arina O. Grossu and Genevieve Plaster, “Overview of U.S. Pro-Life Bills & Provisions Advanced in the States from January to April 2022: Preparing for the Impact of the Supreme Court’s Decision on Abortion Laws,” *On Point* 80 (April 2022): 1–9.

39. *Gonzales v. Carhart*, 550 U.S. 124, 151 (2007).

40. Frank Morris, “Kansas Is a National Abortion Battleground Again, with the Prospect of an Outright Ban,” *KCUR*, July 18, 2022, <https://www.kcur.org/news/2022-07-18/kansas-is-a-national-abortion-battleground-again-with-the-prospect-of-an-outright-ban>.

41. Value them both, “The Amendment,” accessed September 1, 2022, <https://valuethemboth.com/the-amendment/>.

required abortion facility health and safety standards, and prohibited state funding of abortion. Kansans for Life reported that since the 2019 court ruling, Kansans saw the largest increase in the number of abortions in over twenty-five years, with the majority performed on out-of-state residents, making Kansas an abortion destination state in the Midwest.⁴²

While the amendment had the support of many state and national pro-life groups and leaders, unfortunately it failed in a state-wide vote on August 2—thanks in large part to a considerable amount of pro-abortion funding and negative media. A total of \$11 million was spent to influence the outcome of the vote, and the abortion activists outspent pro-lifers by at least one million dollars. A large percentage of pro-abortion funds came from Planned Parenthood as well as Democratic dark-money influencers such as the Sixteen Thirty Fund.⁴³ These funds were primarily spent on distortions and outright lies meant to confuse the voters as to the actual effects of the amendment, were it to pass. The pro-abortion propaganda campaign inundated voters with the idea that this amendment would not only lead to the immediate abolition of abortion in the state but even threaten necessary, life-saving, ethical medical treatment for ectopic pregnancies and miscarriages—procedures that are in no way targeted by any pro-life legislation.

Unfortunately, this deception was successful. Kansans for Life released the following statement following the amendment's failure: "Over the last six months, Kansans endured an onslaught of misinformation from radical left organizations that spent millions of out-of-state dollars to spread lies about the Value Them Both Amendment. Sadly, the mainstream media propelled the left's false narrative, contributing to the confusion that misled Kansans about the amendment. While the outcome is not what we hoped, our movement and campaign have proven our resolve and commitment. We will not abandon women and babies."⁴⁴

The pro-life defeat in Kansas was significant because it was the first major vote on abortion since the overturning of *Roe*. The pro-abortion lobby attempted to

42. Kansans for Life, "Value Them Both Amendment," accessed September 1, 2022, <https://kfl.org/legislation/constitutional-amendment/>.

43. Miranda Moore, "Follow the Money: Who Is Funding Kansas Abortion Amendment Ads?," *Flatland*, August 1, 2022, <https://flatlandkc.org/news-issues/follow-the-money-who-is-funding-kansas-abortion-amendment-ads/>; Emma Green, "The Massive Progressive Dark-Money Group You've Never Heard Of," *The Atlantic*, November 2, 2021, <https://www.theatlantic.com/politics/archive/2021/11/arabella-advisors-money-democrats/620553/>; and Amelila Thomson-DeVeaux and Nathaniel Rakich, "The Abortion Vote in Kansas Looks Like It's Going to Be Close," *FiveThirtyEight*, July 20, 2022, <https://fivethirtyeight.com/features/the-abortion-vote-in-kansas-looks-like-its-going-to-be-close/>. For an analysis of some of the political and social factors in the defeat of the Amendment, see Michael J. New, "Pro-Lifers Need Not Despair over Kansas Abortion Setback and Here's Why," *The Federalist* August 3, 2022, <https://thefederalist.com/2022/08/03/pro-lifers-need-not-despair-over-kansas-abortion-setback-and-heres-why/>.

44. Kansans for Life, "Value Them Both Coalition Releases Statement on Election Results," news release, August 3, 2022, <https://kfl.org/value-them-both-coalition-releases-statement-on-election-results/>.

portray the Kansas vote as a significant shift on public sentiment on abortion—as if the country had shifted significantly in just six weeks—away from the decades of political and legal changes that brought about the end of the *Roe* regime this year.

It may seem strange that the abortion fight had become so tense in a state such as Kansas, which is almost synonymous with the American heartland and the family values that it embodies. That all-American image could be part of the abortion industry's motivation in attempting to keep it from enacting pro-life laws. They may conjecture that as Kansas goes so goes America. Additionally, since many of the surrounding states already protect preborn babies, had Kansas also protected preborn babies, it would have rendered an entire section of the Midwest as abortion free.

The failure of the Kansas Value Them Both Amendment should underscore the importance for pro-lifers to keep up the fight for the passage of pro-life laws, including ensuring adequate funding for advertising and an even greater education campaign to combat the misinformation that is put out by the pro-abortion lobby. Kansans for Life ended their statement by saying, “This outcome is a temporary setback, and our dedicated fight to value women and babies is far from over. As our state becomes an abortion destination, it will be even more important for Kansans to support our pregnancy resource centers, post-abortive ministries, and other organizations that provide supportive care to women facing unexpected pregnancies. We will be back.”⁴⁵

ARINA O. GROSSU

45. Kansans for Life, “Statement on Election Results.”

