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The March for Life and a Supreme Court Resignation

January was an eventful month. On January 21, the forty-eighth March for Life was held in Washington, DC. Then, on January 27, a Supreme Court Justice submitted his resignation. The March for Life had a different feel this year. Unlike the previous four years when there was a pro-life president, Donald Trump, this march was held with an aggressively anti-life president in the White House. This alone might have cast a pall on the march, but that was not the whole story. In fact, the turnout was very good, and the mood was robust. The march began in January 1974 as a protest against the Supreme Court decisions, exactly one year earlier, in the companion cases of *Roe v. Wade* and *Doe v. Bolton*, which together legalized abortion at any time for any reason, marking America with one of the most pro-abortion legal regimes in the world.

However, this year the marchers were well aware that there is a case pending at the Supreme Court that will almost certainly overrule those decisions. That case is *Dobbs v. Jackson Women's Health*. While overturning *Roe* and *Doe* would not make America pro-life, it would remove the greatest existing obstacle in the path of creating such an America—in effect, a veto of all pro-life state laws, wielded by the Supreme Court, invalidating every one of them.

Of course, pro-lifers were not the only ones aware of this. The anti-life forces projected pro-abortion slogans on the outside walls of the Basilica of the National

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At the time of writing, *Dobbs v. Jackson Women's Health* has not been decided, but a draft opinion that overturns *Roe v. Wade* was leaked to the public. I will consider that and related issues, along with the outcome in *Dobbs*, in my next column.

Shrine of the Immaculate Conception, where an annual Mass is held the night before the march, and in which out-of-town pro-life youth groups sometimes get some sleep.[1] The anger and the attacks can only be expected to increase if *Roe-Doe* are overturned. The US Conference of Catholic Bishops has smartly started a tracker to keep a record of these (and other) attacks on churches in an increasingly hostile culture.[2]

Americans' attitudes on abortion, speaking generally, are inconsistent. In November 2021, the American Enterprise Institute (AEI) published *Attitudes about Abortion: A Comprehensive Review of Polls from the 1970's to Today*. It concluded, "Opinion about abortion is complex. Americans appear to be simultaneously pro-life and pro-choice. Significant numbers of people say abortion is an act of murder. They also say that the decision to have an abortion should be a personal choice." Thus, it is not surprising to read what is the most ominous conclusion: "Most Americans do not want the Supreme Court to overturn *Roe v. Wade*."[3] Yet this is what will happen, I am confident, at the end of the Supreme Court term in June. This poses a direct challenge to pro-life Americans because most Americans will not be happy with that decision, and anti-life political forces will try to manipulate that unhappiness to pass anti-life laws in every state and at the national level. There is little doubt that President Joe Biden and national Democratic leaders will support an amendment to the Constitution to ensure a right to abortion. Similar efforts will be made in every state.

As the AEI report notes, American attitudes are solidly pro-life when it comes to "notification of partners, parental consent for a teenager seeking an abortion, and 24-hour waiting periods."[4] Laws reflecting those views have been regularly passed in America since *Roe-Doe*, yet the Supreme Court has just as regularly overturned them. Arguably, however, as Americans realize that even these "commonsense" restrictions are not permitted, attitudes have moved toward the pro-life side. With the overturning of *Roe-Doe* (assuming the decision will go the way I expect), it will be possible not only to put in place those commonsense restrictions but to go much further and effectively eliminate abortion in many states. Nonetheless, given that the majority of Americans do not support overturning *Roe-Doe*, they will be less favorably disposed (and perhaps even hostile) to the pro-life perspective, which they will see, rightly, as working for limits on abortion that go far beyond the commonsense ones they support. Ironically, the overall cultural challenge is likely to be more difficult after the overturning of *Roe-Doe*. Pro-life Americans must rise to the challenge.

1. Shannon Mullen, "Activist Group Projects Pro-Abortion Messages on National Shrine during March for Life Prayer Vigil," *National Catholic Register*, January 21, 2022, https://www.ncregister.com/cna/activist-group-projects-pro-abortion-messages-on-national-shrine-during-march-for-life-prayer-vigil.
2. US Conference of Catholic Bishops, "Arson, Vandalism, and Other Destruction at Catholic Churches in the United States," accessed June 9, 2022, https://www.usccb.org/committees/religious-liberty/Backgrounder-Attacks-on-Catholic-Churches-in-US.
3. Karlyn Bowman and Samantha Goldstein, *Attitudes about Abortion: A Comprehensive Review of Polls from the 1970s to Today* (Washington, DC: American Enterprise Institute, 2021), 2.
4. Bowman and Goldstein, *Attitudes about Abortion*, 2.

One of the Justices who will decide whether to overturn *Roe-Doe* is Stephen Breyer, who has been a member of the Court since 1994. Perhaps ironically, he was chosen to replace Harry Blackmun, the author of *Roe-Doe*. Speaking broadly, Breyer is a member of the so-called liberal wing of the Court. For instance, he authored the *Whole Woman's Health v. Hellerstedt* (2016) decision that interpreted *Planned Parenthood v. Casey* (1992) so as to strike down a Texas abortion law.[5] Most commentators felt the law should have been upheld under "judicial deference to legislative findings," which the Court had emphasized in *Gonzales v. Carhart* (2007) a few years earlier.[6]

Nevertheless, Breyer is widely considered a reasonable jurist and a pragmatist. He engaged in a friendly sparring match with Justice Antonin Scalia for many years in books and in public conversations. Scalia emphasized the judicial philosophy of originalism, which seeks to go no further than the text of the law in question, while Breyer favored a moderate version of the judicial activist approach, often basing his decisions on a balancing test (as he did in *Hellerstedt*).

Breyer, who is eighty-three years old, had been under pressure from the Left for months to retire so that Biden could nominate a younger liberal to replace him. Breyer finally gave in and submitted his resignation letter on January 27. Biden moved quickly to replace Breyer. During his campaign for president, he had promised to appoint a black woman, and he did. On February 25, he nominated Court of Appeals Judge Ketanji Brown Jackson. She is fifty-one years old. She was a District Court judge from 2013 until 2021, when she was elevated to the Court of Appeals. She had once clerked for Breyer at the Supreme Court.

While some argued that this simply amounted to swapping a younger liberal jurist for an older one, others fiercely disagreed. They saw her as an ideological radical, whose activist judicial philosophy was much more dangerous to the country than was the pragmatic liberalism of Justice Breyer. Pro-life groups strongly opposed her.[7] Nonetheless, the political realities in Washington, DC, where the Democrats and so-called moderate Republicans control the Senate, meant Jackson was going to be confirmed—there simply were not enough votes to defeat her. This proved to be the case in April, when she was confirmed by a fifty-three-to-forty-seven vote, with Republicans Lisa Murkowski, Susan Collins, and Mitt Romney joining the Democrats.[8]

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5. The Texas law required abortionists to have admitting privileges in a local hospital in case of medical complications to the woman undergoing the abortion. *Hellerstedt* was a five-to-three decision that occurred before the vacancy created by the death of Justice Antonin Scalia had been filled.
6. This had always been the case in other areas of the law, and the *Gonzalez* Court affirmed that the principle applies even to abortion laws.
7. Daniel R. Suhr, "More Than Just Trading One Liberal for Another," *World*, February 28, 2022, https://wng.org/opinions/more-than-just-trading-one-liberal-for-another-1646053191; and Kaelan Deese, "Anti-Abortion Groups Slam Biden's Supreme Court Pick," *Washington Examiner*, February 25, 2022, https://www.washingtonexaminer.com/policy/courts/anti-abortion-groups-slam-bidens-supreme-court-pick.
8 Mike DeBonis and Seung Min Kim, "Senate Confirms Jackson as First Black Woman on Supreme Court," *Washington Post*, updated April 7, 2022, https://www.washingtonpost.com/politics/2022/04/07/jackson-confirmation-vote-senate/.

Jackson will not participate in the consideration of *Dobbs*, as Breyer's resignation is effective following the last day of the current term. However, if *Roe-Doe* are overturned, there will certainly be efforts to expand the number of Justices on the Court in order to add additional members who are perceived, like Jackson, to favor abortion rights.

Dobbs v. Jackson Women's Health

As noted, the case that will almost surely overturn *Roe-Doe* is *Dobbs*. No one knows when the decision in the case will be issued, but it will almost certainly be when the Supreme Court's term ends at the very end of June. This has been the invariable practice of the Court with controversial cases.[9] *Dobbs* itself concerns a Mississippi ban on abortion (with a few exceptions) after fifteen weeks. While the Court *could* decide the case without overturning *Roe-Doe*—perhaps by only overturning *Casey*, which kept *Roe-Doe* in force but substituted a viability standard for the previous trimester standard—it is not expected to do so. In large part, this is because the Court expressly permitted briefing on the question of overturning *Roe-Doe*.

Perhaps the chief reason it is expected that *Roe-Doe* will be overturned is based on the composition of the Court. One might think that the utter lack of constitutional basis for *Roe-Doe* would have persuaded the Court to overturn those decisions before now.[10] However, the Court has found amazing (and constitutionally creative) ways, such as *Casey*, to uphold those decisions. What is different in 2022 is that there are—*for the first time since 1973*—at least five originalist Justices: Samuel Alito, Neil Gorsuch, Clarence Thomas, Amy Coney Barrett, and Brett Kavanaugh.[11] That should prove fatal to *Roe-Doe*, since five votes constitutes a majority. There is a sixth justice—Chief Justice John Roberts—who has been thought to be at least somewhat pro-life.[12] However, he is an incrementalist, who prefers to change the law in small steps. Many feel that overturning *Roe-Doe* would be too far for him to go.

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9. One example is *Obergefell v. Hodges*, the decision holding that recognition of same-sex marriage is constitutionally required.
10. Briefly, *Roe-Doe* was essentially based on an implied right to privacy. This is such a weak basis that the plurality in *Casey* switched to the word *liberty* in the Fourteenth Amendment: "No state shall … deprive any person of life, liberty, or property without due process of law." This is called substantive due process because it invests words (like *liberty*) with vast meaning. This meaning, one must note, is the creation of the judge who "finds" it, since the words (such as *abortion*) are not present in the text.
11. In 1994, when *Casey* was decided, there were four votes against upholding *Roe-Doe*; however, three supposedly pro-life judicial conservatives (Anthony Kennedy, Sandra Day O'Connor, and David Souter) joined two staunch supporters of *Roe-Doe* as originally decided (John Paul Stevens and Harry Blackmun) to uphold those decisions. By the way, this is why *Casey* was understood to be weaker than *Roe-Doe*: the opinion of those three did not constitute a majority opinion of the Court, unlike in *Roe-Doe* that had majorities of seven. Nonetheless, their plurality opinion set the standard until today, though in some cases, such as *Gonzales*, its continuing validity was *assumed* but not *decided* by the Court.
12. To illustrate, consider Roberts's opinions in *Hellerstedt* and in *June Medical Services v. Russo*. In the former, he dissented from Breyer's majority opinion striking down Texas's

Regardless, oral argument by the lawyers before the Supreme Court was held on December 6, 2021. Though the results of oral argument are never a guarantee of the final outcome, most listeners—including me—felt the questioning by the Justices clearly revealed that there were, indeed, the expected five votes to overturn *Roe-Doe*. Questions from those five focused upon the utter absence of a sound basis for those opinions. Roberts, meanwhile, seemed to be searching for a middle ground (e.g., an overturning of *Casey* but not *Roe-Doe*), but the lawyers arguing against the Mississippi law refused to concede that such an outcome was possible. Some feared that Kavanaugh might be persuaded by Roberts to join him in an incrementalist concurrence. This would rob the decision of the fifth vote needed for a majority that would make it *precedence* binding on the lower federal courts. However, Kavanaugh's questioning in oral argument was very strong, indicating he was prepared to go all the way and overrule *Roe-Doe*.

A transcendently important outcome of the overturn of *Roe-Doe* is the re-enfranchisement of the American people regarding abortion. *For the first time since 1973, the vote of Americans will matter*. What the citizens decide to do regarding abortion will be the law, at least in their own states. Until the overturning of *Roe-Doe*, American democracy was placed in suspended animation while the Court decided *every* issue regarding abortion. The Court *never* deferred to the American people; it *never* gave a standard by which legislatures—elected, of course, by the people—could decide how to pass laws that the Court would not overturn; it *never* gave the American people the right—one that they have with every other issue—to decide how to deal with this terribly important matter.

After *Roe-Doe* will come the important times when Americans, competing within the political system, will try to convince one another what to do about abortion. Some states with solid pro-life majorities will end abortion, and it is to be hoped that they will provide empirical evidence for their fellow Americans of the good things that flow therefrom. But pro-life Americans will have to demonstrate—despite the calumnies of the anti-life forces and their widespread media allies—that they are truly pro-life. They will have to find ways to respond to desperate women who wrongly think abortion is a solution. They will have to find ways to end whatever social circumstances lead to the abandonment of women by the fathers of their children. They will have to make great sacrifices to show they love all those involved. In short, they will need to read and heed the magnificent vision of a truly pro-life culture, in all its multitudinous aspects, articulated by Pope St. John Paul II in his great encyclical, *Evangelium vitae*.

Assisted Suicide

One little-appreciated aspect of *Dobbs* is the effect it could have on the legality of assisted suicide. Efforts to make assisted suicide a national right—similar to the national right to abortion—were also pursued in the federal courts. However, those efforts were decisively checked in 1997 when the Supreme Courts issued its opinion in *Washington v. Glucksberg*.

admitting-privileges law. In the latter, he joined Breyer to strike down a substantially identical Louisiana law.

Glucksberg concerned a challenge to a state ban on assisted suicide. Plaintiffs claimed that such a ban was unconstitutional because assisted suicide is a right protected by the liberty interest of the Fourteenth Amendment (see note 10). They based their claim upon the fact that the plurality in *Casey* had said that abortion was a right protected by this liberty interest (see note 11). Yet the formulation used in *Casey* was sweeping and unlimited: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[13] This invited ridicule, often from Scalia, who referred to it as the "sweet mystery of life" passage.[14] But it also invited what we might call "litigation imitation," for if what the Fourteenth Amendment means as *liberty* is so capacious, no personal decision is excluded from constitutional protection.

The plaintiffs claimed such a liberty interest must include the decision to end—and to be assisted in ending—one's life. However, the Supreme Court unanimously rejected their claim. The majority said that in order to find a new constitutionally protected right, that is, one not mentioned in the text of the Constitution, it must be demonstrated that such claimed right is "deeply rooted in this Nation's history and tradition."[15] Assisted suicide, at the time banned in every state, clearly failed that test.

There matters rested until the Court decided *Obergefell v. Hodges* (2015), which relied upon the logic and language of *Casey* to find a right to same-sex marriage under the liberty interest of the Fourteenth Amendment. In doing so, in a passage little noted at the time but full of significance for the future, the majority paused to address *Glucksberg* and its holding regarding assisted suicide, which was clearly at odds with the freewheeling approach to liberty rights in *Casey*. It said that "while that approach [in *Glucksberg*] may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights."[16] I think this clearly signals a willingness (bordering on intention) to revisit the outcome in *Glucksberg* in the future in order to bring it in line with these other precedents. Truly, if capaciously defined and constitutionally protected *liberty* in the Fourteenth Amendment includes abortion and same-sex marriage, can there be any doubt it includes assisted suicide?

However, if the Court overrules *Roe-Doe*, it is likely to do so on the basis that rights cannot be found so freely as was done in those cases; I expect it will say any new rights must be deeply rooted in the nation's history and traditions, following *Glucksberg* and, importantly, saving the holding in *Glucksberg* from being eviscerated by a finding that it is out of line with the Court's approach to other fundamental rights. In sum, the Court, in its *Dobbs* decision, is likely not only to put to rest notions of a constitutional right to abortion but also to do the same regarding assisted suicide.

13. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
14. See, for example, Lawrence v. Texas 539 U.S. 558 (2003), slip op. at 588 (Scalia, J., dissenting).
15. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).
16. Obergefell v. Hodges, 576 U.S. 644, 661 (2015).

Other Matters

In his State of the Union address on March 1, Biden, after praising both Breyer and Jackson, spoke of the need to keep abortion legal. Equating a right to abortion to "the rights of women," Biden said, "The constitutional right affirmed in Roe v. Wade—standing precedent for half a century—is under attack as never before. If we want to move forward—not backward—we must protect access to health care [i.e., abortion]. Preserve a woman's right to choose [i.e., abortion]."[17] The Biden administration has been relentless in repealing pro-life policies of the prior administration and in promoting abortion at home and abroad. Many of these initiatives are still working through the administrative process and will be discussed in subsequent editions of this column.

In anticipation of the overturn of *Roe-Doe*, congressional Democrats have tried—and so far failed—to pass the Women's Health Protection Act. That bill would extend abortion rights by, inter alia, (1) eliminating all parental-involvement laws, (2) eliminating any bans on sex-selective or disability-based abortions, (3) eliminating informed-consent laws, and (4) denying public funds to any hospital that does not provide abortion.

In two opinions on January 13, the Court addressed the federal COVID vaccine mandates, upholding one and striking down another. This makes it hard to reconcile the cases, though both outcomes supposedly turn on the intent of Congress in enacting the underlying statute. *National Federation of Independent Businesses v. Occupational Safety and Health Administration* was a six-to-three opinion that stayed (paused indefinitely) the implementation of OSHA's vaccination mandate. Issued in November, the regulation instructed all businesses with one hundred or more employees to require them either to be vaccinated or to wear a mask and undergo weekly COVID tests. The majority said that OSHA is tasked with ensuring safety in *working conditions*, rather than in meeting general public health standards.

In *Biden v. Missouri*, the Court, by a five-to-four vote, allowed the US Department of Health and Human Services to mandate that workers at federally funded health care facilities be vaccinated. The majority concluded this was congressional intent, while the four dissenters concluded that HHS had failed to show that it was. Beyond the practical outcome in each case, the two might better be understood in light of (though not explicitly based upon) the difference between congressional power pursuant to the Commerce Clause of the Constitution, which the Court has held is limited, and congressional power pursuant to the Spending Clause (i.e., conditioning the receipt of federal funds upon compliance with federal rules), which the Court has held is very broad.[18] Regarding the fear that Roberts might convince Kavanaugh to join him in a concurrence in *Dobbs*, it is interesting to note that in this case Roberts and Kavanaugh split from the four conservatives and voted with the liberals.

17. Joe Biden, State of the Union Address as prepared for delivery, March 1, 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/.
18. See U.S. Const. art. I, §8.

In *Ramirez v. Collier*, decided on March 24, the Supreme Court ruled on a matter affecting capital punishment. The plaintiff had been sentenced to death for murder. However, he claimed the circumstances surrounding his execution would violate his rights under federal law, specifically, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Though Texas would allow his pastor to be in the chamber at the moment of execution, it would not permit his pastor to "lay hands" upon him or to pray audibly. RLUIPA requires that the government may not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution … unless the government demonstrates that imposition of the burden … is the least restrictive means of furthering [a] compelling government interest."[19] The Court found Texas did not meet its burden of showing it was pursuing its interests in the least restrictive way.

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19. 42 U.S.C. §2000cc-1(a).