Abortion and Public Policy: Review of U.S. Catholic Bishops' Teaching and the Future

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ABSTRACT: The U.S. Roman Catholic bishops have been earnest participants in the contemporary public policy debate on abortion. This article reviews the bishops' main policy documents in which the Church's teaching on abortion is applied, first, within the context of the debate on abortion policy that was underway in the states before *Roe v. Wade*, and, second, within the grave and challenging situation thereafter when a right to abortion was made the law of the land. Whether discussing court cases, statutory law, human life bills, or various proposals to amend the Constitution, the bishops raised up a broad vision

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The views expressed in this paper are those of the author and should not be attributed to the persons who generously assisted me, to NCHLA or to the U.S. Conference of Catholic Bishops.

This paper is dedicated to the memory of Gail Patricia Quinn, who passed away on July 24, 2022. I gratefully acknowledge that Gail provided editorial comments on the current presentation. She is the one person who served in the U.S. bishops' Family Life and Pro-Life Offices throughout the years when the main teaching documents reviewed in this paper were issued. Gail began her service to the bishops in 1966, and when she retired in 2006, Gail held the position of Executive Director of the Pro-Life Office. May she rest in peace.

of full protection in law for all human beings, born and unborn, and promoted a comprehensive program of education, pastoral care, public policy, and prayer. Building off this review the article concludes with some initial reflections on the *Dobbs* world in which the Court has returned the abortion issue to the people and their elected representatives.

This paper was presented for publication when *Dobbs v. Jackson Women's Health Organization* was pending before the United States Supreme Court. If the Court's 1973 abortion decisions, *Roe v. Wade* and *Doe v. Bolton*, and the Court's 1992 re-do of the abortion right in *Planned Parenthood v. Casey,* were to be overruled, in whole or in part, the question of the pro-life movement's future public policy goal to secure full protection in law for the unborn and all vulnerable human life would need to be reviewed and updated. The paper postulated that a place to start would be to examine the development of U.S. Catholic bishops' policy on these matters since the 1960s. After such a review the paper concluded with some reflections on a world without *Roe* and *Casey*.

Of course, on June 24, 2022, the Court handed down the *Dobbs* decision in which it held that *Roe* and *Casey* should be overruled and that the abortion issue should be returned to the people and their elected representatives for policy determination. The main part of the paper, I believe, continues to serve its purpose well. In the wake of *Dobbs*, the reflections in the paper's closing section have been adjusted, even if only in a preliminary way; included are updates to public policy developments as of the June 24 date.

The following comments give special attention to a constitutional amendment. Explicit reference to support for an amendment by the U.S. bishops is found from 1973 forward, with their 1981 congressional testimony expressing support for a specific amendment then under consideration.[1]

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[1] The main U.S. Catholic bishops' statements on abortion from 1968 to 1976 can be found in *Documentation on the Right to Life and Abortion* and in *Documentation on Abortion and the Right to Life II*, published by the USCC Publications Office in 1974 and 1976 respectively. Later the bishops submitted additional key testimony on a constitutional amendment in 1981. *The Pastoral Plan for Pro-Life Activities*, first approved by the bishops in 1975, was updated in 1985 and again in 2001. Other pastoral statements on life issues of special note include *Resolution on Abortion* (1989) and *Living the Gospel of Life: A Challenge to American Catholics* (1998), an application to the United States of the landmark encyclical by Pope John Paul II, *The Gospel of Life (Evangelium Vitae)*, issued in 1995. Unless otherwise noted, quotations in this paper to Church teaching will be taken from documentation published by the U.S. Conference of Catholic Bishops.

An analysis and commentary on documents and on the U.S. bishops' pro-life programs in general can be found in Rev. Msgr. James T. McHugh, *The Relationship of Moral Principles to Civil Laws with Special Application to Abortion Legislation in the United States of America 1968-1978* (1981) (S.T.D. Dissertation, Pontifical University of St. Thomas Aquinas), especially Chapter IV: Review and Analysis of American Bishops' Pro-Life Program. From 1965 to 1978 Msgr. McHugh (1932-2000) served as the Assistant Director and then Director of the bishops' Family Life and Pro-Life Offices. He later was ordained Auxiliary

The Church's opposition to abortion and promotion of respect for all human life, from conception to natural death, is deeply rooted in the teachings of sacred Scripture and sacred Tradition.[2] The U. S. bishops' pastoral concern with these teachings, in its contemporary phase, emerged with its own distinct features in the 1960s and from then to the present day has matured in response to significant moral, social, cultural and legal challenges. The U.S. bishops, in their dioceses and as a national conference, increasingly began to take action and speak out, a process that was intensified in 1973 after the Supreme Court asserted a fundamental right to abortion under the United States Constitution.

Some important teachings related to pro-life policy will be briefly reviewed as they come up in documents but will not be considered in depth, for example, the consistent ethic of life,[3] pastoral concerns related to Catholic public officials who support policies

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Bishop of Newark, and thereafter served as the Bishop of Camden and then as the Bishop of Rockville Centre.

A note on terminology: In 1966 the NCWC (National Catholic Welfare Conference) was restructured as the USCC/NCCB (United States Catholic Conference/National Conference of Catholic Bishops). Today that double title has been replaced by the USCCB (United States Conference of Catholic Bishops). The Family Life Bureau, NCWC, became the Family Life Division, USCC. The abortion issue was assigned to the Family Life Office. At the November 1972 General Meeting, the bishops formally established the NCCB Ad Hoc Committee on Population and Pro-Life Activities. In time this committee became the regular standing Committee for Pro-Life Activities, now called the Committee on Pro-Life Activities. Today family life is the responsibility of the USCCB Committee on Laity, Marriage, Family Life, and Youth.

[2] Quoting from an earlier Vatican document, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation (Donum Vitae)* (1987), Pope John Paul II taught in his encyclical letter *The Gospel of Life*:

> Human life is sacred because from its beginning it involves 'the creative action of God' [quote from Pope John XXIII's 1961 encyclical letter *Mater et Magistra*, Par. 194], and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can, in any circumstance, claim for himself the right to destroy directly an innocent human being. (53)

The Holy Father called the statement quoted here "the central content of God's revelation on the sacredness and inviolability of human life." *Id*. He also affirmed the Church's longstanding teaching: "Even scientific and philosophical discussions about the precise moment of the infusion of the spiritual soul have never given rise to any hesitation about the moral condemnation of abortion." *Id*., 61.

An authoritative study of the Church's teaching on abortion is found in John Connery, S.J., *Abortion: The Development of the Roman Catholic Perspective* (1977). Also see *Catechism of the Catholic Church* (CCC), 2258-83.

[3] The consistent ethic of life is reflected throughout the U.S. bishops' teaching statements and is set forth in the introductory section of the *Pastoral Plan for Pro-Life Activities* (initially in 1975, more formally in 1985 and 2001) and in *Living the Gospel of Life* (1998). The latter document stated that protecting the right to life is of unique importance, calling it the foundation for a house in which other issues make up the crossbeams and walls; this double emphasis has been reaffirmed in the more recent statements on political responsibility. See the November 2019 statement *Forming Consciences for Faithful Citizenship: A Call to Political Responsibility from the Catholic Bishops of the United States, with New Introductory Letter*: "The threat of abortion remains our preeminent priority because it directly attacks life itself, because it takes place within the sanctuary of the family, and because of the number of lives destroyed." "Introductory Letter," 6. Statement can be found at: www.usccb.org/issues-and-action/faithful-citizenship/index.cfm (last visited 12/07/21). Since February 12,

promoting abortion,[4] or the important question of citizens properly forming their consciences when voting.[5]

Before *Roe*: 1968 to 1972[6]

The several statements issued by the U. S. bishops during the pre-*Roe* years clearly and concisely articulate the Church's teaching in opposition to abortion and set forth this teaching in the context of support for all human life, born and unborn, with specific reference to assisting women with problem pregnancies. The statements especially reflect a growing concern with the push in the public policy arena to go beyond the modification of state abortion laws to their complete repeal, a fundamental change that started in earnest in the early 1960s with the introduction of the first American Law Institute (ALI) model abortion bill in the California legislature.[7] But only in 1967 did

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1976, the *Political Responsibility* statements have been issued every four years in advance of the elections associated with the selection of the president.

In spring 1972 the U.S. bishops approved an annual program of prayer and study, which was set up as the Respect Life Program. "It was agreed that in addition to abortion, there would be program material on war and peace, the family, the aging, and other appropriate topics." Msgr. McHugh, *Relationship*, 117.

[4] See, *Living the Gospel of Life*, 7, 29, 31-32; *Resolution on Abortion*. Also see the 2004 statement, "Catholics in Public Life," at: usccb.org/issues-and-action/faithful-citizenship/church-teaching/catholics-in-political-life (last visited 12/07/21) and a 2004 memorandum by Cardinal Ratzinger at: ewtn.com/catholicism/library/worthiness-to-receive-holy-communion-general-principles-2153 (last visited 12/07/21). In their statement on the Eucharist approved at their November 2021 General Meeting, the U.S. Bishops affirmed: "It is the special responsibility of the diocesan bishop to work to remedy situations that involve public actions at variance with the visible communion of the Church and the moral law." *The Mystery of the Eucharist in the Life of the Church*, 49; also see, 48, 36, at: usccb.org/resources/mystery-eucharist-life-church (last visited 12/07/21). Also see, Bishop Thomas Paprocki, *Opinions: Eucharistic Coherence*, First Things 7 (August/September 2021).

[5] See, for example, *Forming Consciences for Faithful Citizenship* (2019): "A Catholic cannot vote for a candidate who favors a policy promoting an intrinsically evil act, such as abortion, euthanasia, assisted suicide, deliberately subjecting workers or the poor to subhuman living conditions, redefining marriage in ways that violate its essential meaning, or racist behavior, if the voter's intent is to support that position" (34; also see 35-39). More generally on citizen responsibility to participate in public life, see, CCC 897-913, 1915, 2238-43, 2442, and Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions regarding the Participation of Catholics in Political Life* (November 24, 2002).

[6] The summaries of any of the U.S. bishops' documents do not substitute for one's own careful reading of the statements themselves to grasp the fullness of the teaching being expressed.

When quoted statements in the following text are not footnoted, the reader should presume the quotes are from the document being considered at that point, unless otherwise indicated.

[7] The ALI Model Penal Code Section 230.3 would allow abortion for grave impairment of the physical or mental health of the mother, in the case of grave physical or mental defect of the child, or in the cases of rape, incest or other unlawful intercourse. Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo. L.J. 173 (1960), called the ALI model abortion law "a violent departure from all existing laws." The ALI proposal, which grew out of a 1955 Planned Parenthood meeting on abortion, was first published in draft form in 1959, and, with a few changes, in final form in 1962.

Daniel K. Williams, *Defenders of the Unborn: The Pro-Life Movement before Roe v. Wade* (2016), 1-38, explores how the Church opposed the idea of abortion law relaxation in the early years, especially 1930

the ALI proposal become law in three states (California, Colorado, and North Carolina), with ten more to follow in short order.[8] Four states adopted abortion-on-demand policies as such in 1970 (Alaska, Hawaii, New York, and Washington).[9]

Statements during these years include the "Further Threats to Life" section in the American bishops' Pastoral Letter *Human Life in Our Day* (November 15, 1968), the NCCB Statement on Abortion (April 17, 1969), the NCCB Statement on Abortion (April 22, 1970), and the NCCB Declaration on Abortion (November 18, 1970).[10]

The 1969 statement ended with an expression of confidence that discussion on ethical questions like abortion "will lead to a deeper understanding of the eminent value and inviolability of human life." With the abortion debate intensifying, the bishops pointed to honest dialogue among reasonable people as the way forward.

It can be argued that the abortion law "reform" movement peaked in 1970.[11] As Clarke Forsythe observed: "If the courts had not stepped in, the issue would have continued to be debated in the states, with an eventual resolution in which most states, perhaps, retained their criminal prohibitions but some experimented with broad exceptions."[12]

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to 1960, and how the Church responded to the introduction of ALI type bills in various state legislatures from the early 1960s forward, 39-102.

For a scholarly resource on the history of abortion law, see, Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (2006). Williams and Dellapenna serve as introductory historical works.

[8] Arkansas, Delaware, Georgia, Kansas, Maryland, New Mexico, and Oregon in 1968 and 1969, South Carolina and Virginia in 1970, and Florida in 1972 (but only because the State Supreme Court threatened to act if the legislature did not). In 1966 Mississippi added an exception for rape to their life of the mother law. This one change does not reflect the full ALI model.

Even though the California ALI law defined "mental health" in the narrow sense of the term (the pregnant woman "is dangerous to herself or to the person or property of others or is in need of supervision or restraint"), 98.2% of all abortions reported for 1970 were for mental health reasons, that is, more than 60,000 abortion. Clearly these numbers mean that even this tightly written mental health exception was being abused as abortion on demand. Not only in California but presumably in other states the mental health exception amounted to abortion on demand. See, Paul Benjamin Linton, *Overruling Roe v. Wade: the Implications for Women and the Law*, University Faculty for Life (UFFL), 27 Life and Learning Conference 173-75 (2017), available online at: uffl.org/pdfs/vol27/UFL_2017_Linton.pdf (last visited 12/07/21).

[9] The laws in these four states had time limitations. For an historical overview of changes in abortion law from 1967 forward, see, "The Law and the Incidence of Abortion," Testimony of the USCC on Constitutional Amendment (1976), in *Documentation II*, 5-9. Also see Linton, *Overruling Roe v. Wade*, UFFL 27 Life and Learning Conference 171-73 (2017).

[10] See, Msgr. McHugh, *Relationship*, 112-18.

[11] Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013), 76-7, 85-6. Also see Appendix A in Paul Benjamin Linton, *Overruling Roe v. Wade: Lessons from the Death Penalty*, 48 PEPP L.R. 273-74 (2021), on how, beyond those states that had adopted permissive policies before *Roe*, bills in the other states to allow abortion were consistently rejected.

[12] *Abuse of Discretion*, 87. Also see, Williams, *Defenders of the Unborn*, 177-78, on pro-life hopes in 1972 of even rolling back the easy abortion laws (with a citation to a memo the present author sent to right-to-life groups in May, 1972) and going on the offensive with a full pro-life agenda.

The Year of *Roe*: 1973

In its 1973 abortion decisions the Supreme Court altered the constitutional landscape and the rules of public debate. All state laws restricting or regulating abortion were rendered unconstitutional. A matter that had been the primary responsibility of the legislative branch of government in its policy making role now came under the direct control of the Court. Democratic processes could no longer resolve the issue, short of accomplishing very difficult tasks such as amending the Constitution. It is astonishing that the Court in all this was disposing of the fundamental matters of child bearing and family life, allowing, with governmental approval, the direct killing of innocent unborn human life and treating mothers and fathers as individuals isolated from each other, their offspring, and society.

Statement of the NCCB Committee for Pro-Life Affairs (January 24, 1973)

The U.S. bishops issued at least five statements during 1973, the first just two days after the Court's *Roe* and *Doe* decisions. The statements "were direct, forceful and uncompromising."[13]

Msgr. McHugh called the January 24 statement a new step for the American bishops, "urging rejection of the law rather than accommodation or toleration."[14] The Committee made four recommendations:

- "Every legal possibility must be explored to challenge" the Court's opinions.
- All State legislatures were urged to protect the unborn child "to the fullest extent possible" and "to restrict the practice of abortion as much as they can."[15]

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[13] Msgr. McHugh, *Relationship*, 119. The statement by the NCCB Ad Hoc Committee on Pro-Life Activities, *Pastoral Guidelines for the Catholic Hospital and Catholic Health Care Personnel*, April 11, 1973, was not directed to public policy as such.

[14] *Relationship*, 120. The committee's statement "had been cleared with" the NCCB Executive Committee. *Id*. 119.

[15] Confronted with *Roe's* extreme policies, the U.S. bishops consistently supported what has been called incremental or imperfect legislation. The statement in the text is an early example of this position. This teaching was reaffirmed immediately by the February 13, 1973 Pastoral Message of the NCCB Administrative Committee ("Assure the most restrictive interpretation of the Court's opinion at the state legislative level") and became a must-include-element in the 1975 *Pastoral Plan's* legislative program (pass laws and polices "that will restrict the practice of abortion as much as possible"). That must-include-goal was expanded somewhat in the 1985 *Pastoral Plan* (to include the elimination of "government support of abortion") and in the 2001 *Pastoral Plan* was expanded further (to include the elimination of support for "human cloning, and research that destroys human embryos"). Pope John Paul II's Encyclical, *The Gospel of Life* (1995), recognized that lawmakers not infrequently are faced with voting for a more restrictive law, aimed at limiting the number of abortions, in place of a law that is more permissive. In cases "when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects" (emphasis in original) (73). In a section entitled, "Laws

- The Church pledged "all its educational and informational resources" to a program that would present the case for the sanctity of the unborn child's life.
- The bishops expressed confidence that Catholic hospitals "will do all in their power" to be places "where good morals and good medicine will be practiced," and that they and the health care personnel "will be identified by a dedication to the sanctity of life, and by an acceptance of their conscientious responsibility to protect" mother and child.

What the Court has done was "bad morality, bad medicine and bad public policy" and "cannot be harmonized with basic moral principles."[16] The bishops expressed the belief that "millions of our fellow Americans will share our reactions" to the Court's opinions. The Committee concluded: "We have no choice but to urge that the Court's judgment be opposed and rejected."

Pastoral Message of the NCCB Administrative Committee (February 13, 1973)

The NCCB Administrative Committee then held a long discussion on the Court's recent abortion decisions.[17] In their statement the U.S. bishops again emphasized that the unborn child "is an individual human being whose pre-natal development is but the first phase of the long and continuous process of human development that begins at conception and terminates at death." The Court's declaration that the life of the unborn child before viability "is not to be considered of any compelling value" and in the subsequent months is "of only questionable value" means the unborn child "will *no longer* be protected" (emphasis added) under the Constitution. As religious leaders and teachers, the bishops made several pastoral exhortations, including praising the efforts of pro-life groups and other Americans and encouraging them to:

Less Than Perfect," the 2001 *Pastoral Plan* referenced the teaching of *The Gospel of Life*, stating that a person may support such "'imperfect'" legislation "if that is the best that can be achieved at a particular time."

[16] Scholars with diverse views on abortion criticize *Roe* and *Doe* as bad constitutional law. The literature on this is extensive. In his dissent in *Planned Parenthood v. Casey* (1992) Justice Scalia summed things up in this way: "The emptiness of the 'reasoned judgment' that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word 'liberty' *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice" (505 U.S. at 983). Clarke D. Forsythe, *A Draft Opinion Overruling Roe v. Wade*, 16 Geo. J. L. & Pub. Pol'y 470 (2018), stated: "Ever since *Roe*, scholars and academics have been looking for an alternative rationale. Very few, if any, scholars will defend *Roe* as originally decided." Above all, abortion proponents have sought to ground a right to abortion on equality, so far unsuccessfully. See, Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 Harv. J. L. & Pub. Pol'y 890 (2011).

For extensive quotes from legal authorities who are critical of *Roe*, see, Clarke D. Forsythe and Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. L. & Pol. 306-20 (2006). Also see: usccb.org/issues-and-action/human-life-and-dignity/abortion/upload/Reactions-of-Legal-Scholars.pdf (last visited 12/07/21)

[17] Msgr. McHugh, *Relationship*, 120.

a) "Offer positive alternatives to abortion for distressed pregnant women;"
b) Pursue conscience protection for institutions and individuals;
c) "Combat the general permissiveness legislation can engender;"
d) "Assure the most restrictive interpretation of the Court's opinion at the state legislative level;"
e) "Set in motion the machinery needed to assure legal and constitutional conformity to the basic truth that the unborn child is a 'person' in every sense of the term from the time of conception."

Reversing the Court's decision and achieving respect for the unborn "will require unified and persistent efforts." The bishops made an urgent plea: "But we must begin now—in our churches, schools and homes, as well as in the larger civic community—to instill reverence for life at all stages."

With this Administrative Committee statement, strong policy lines were emerging with ever greater clarity. They would only be more firmly defined as the year progressed.

NCCB Administrative Committee (June 20, 1973)

As 1973 unfolded, the U.S. bishops entered ever more fully into a debate about support for a constitutional amendment. Msgr. McHugh noted that at its June 20 meeting, the NCCB Administrative Committee "engaged in a long and detailed discussion" on the matter.[18] After recognizing that amendments can be proposed either by Congress or by a constitutional convention, Msgr. McHugh continued: "Primary emphasis was given by the bishops to urging Congressional adoption of a specific amendment at this time, although from 1976 on, many pro-life groups also worked toward the calling of a Convention."[19] Twenty states issued such a call.[20]

Msgr. McHugh observed that the bishops were under pressure to favor a particular amendment. They faced two questions: (1) how to formulate an amendment that was completely consistent with Catholic teaching, "that is, admitting no exceptions,"[21] and (2) "how to avoid having such an amendment rejected as an attempt to force Catholic morality on the nation and thus become a divisive force among pro-life groups."[22]

At the conclusion of their debate, the Administrative Committee "voted to publicly endorse amending the Constitution without specifically supporting any particular amendment," and to use proposals from the USCC Committee on Law and Public Policy to evaluate amendments submitted to Congress.[23]

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[18] *Id*. 124.

[19] *Id*.

[20] The 20 states: Alabama, Arkansas, Delaware, Georgia, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Utah. The first was passed in 1973 but most were passed 1977-80. See, Michael Stokes Paulsen, A *General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L. J. 677 (1993).

[21] Msgr. McHugh, *Relationship*, 128.

[22] *Id*.

[23] *Id*. For a brief description of the report made by the Committee on Law and Public Policy to the Administrative Committee, see, *id*. 127-28.

Statement of the NCCB Administrative Committee (September 18, 1973)

In a formally approved statement, the Administrative Committee affirmed "its commitment to a constitutional amendment in defense of unborn human life." Abortion involves fundamental questions of morality and transcends the law, yet a constitutional amendment "is now the only viable means to correct the disastrous legal situation created by the Supreme Court's rulings on abortion."

Practical actions were advanced:

- The bishops commended the many members of Congress who had sponsored "numerous pro-life amendments" and urged early hearings in the Senate and House.
- The bishops recognized the need for grassroots organizations on behalf of an amendment. Local action represented an essential service, achieved, for example, through public information programs, contacts with members of Congress, and encouragement to state legislatures to petition Congress on behalf of an amendment. "Men and women of good will, regardless of creed, who support the cause of human life must prepare now to make an effective, united, long-term effort."

The Administrative Committee acknowledged that the U.S. bishops' conference was now studying the complex issues related to an amendment. "At present we do not single out any specific pending amendment. Our detailed views regarding the wording of an amendment will be stated at an early date, in the context of congressional hearings or some other appropriate forum." The immediate concern was that Congress take action on this matter and that pro-life individuals and groups "prepare now" for the action necessary "to win congressional approval and ultimate ratification of an amendment."

The NCCB Resolution on the Pro-Life Constitutional Amendment (November 13, 1973)

The discussion surrounding a constitutional amendment continued into the November 1973 Administrative Committee meeting and the U.S. bishops' fall general

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Msgr. McHugh does not list a statement issued by the Administrative Committee at the June 20, 1973 meeting, *Relationship*, Appendix 1: Statements of the NCCB/USCC Pertaining to Abortion, nor does *Documentation on the Right to Life and Abortion* show a statement being issued. But news sources did report that a resolution supporting a constitutional amendment was introduced and approved. See, *Bishops Supporting Life Amendment*, The Catholic Advocate (Newark), June 28, 1973, at 1, where it is stated the Administrative Committee "unanimously voted to endorse in principle a constitutional amendment to protect unborn human life." Bishop Walter Curtis of Bridgeport, a member of the NCCB Ad Hoc Committee for Pro-Life Activities, had introduced the resolution. He stated that "support for a constitutional amendment to protect the unborn was expressed during the spring meetings of the bishops."

In 1973 the bishops did not hold a single spring meeting but twelve regional meetings in April and May. The agenda for these meetings had been set, but following the Court's January abortion decisions, "the pro-life topic was added." Reports from the regional meetings were to be collected and presented to the Administrative Committee, which would refer action recommendations to the November general meeting. *Bishops' Regional Meeting Agenda Set*, The Catholic Transcript (Hartford), March 30, 1973, at 1. Thus, support for a constitutional amendment was coming from the bishops assembled in meetings around the country and was transmitted through the Administrative Committee to the full body of bishops assembled at the fall meeting.

meeting. "Clearly the majority of the bishops were strongly in favor of stating support for a constitutional amendment, but there was still considerable debate about endorsing any specific amendment."[24]

In their *Resolution on the Pro-Life Constitutional Amendment* the body of bishops recalled that throughout 1973 the bishops' national conference had repeatedly expressed opposition to the Court's abortion rulings. The decisions must be reversed. "The only certain way to repair effectively the damage perpetrated by the Court's opinions is to amend the Constitution to provide clearly and definitively a constitutional base for legal protection of unborn human beings." The bishops continued: "We wish to state once again, as emphatically as possible, our endorsement of and support for a constitutional amendment that will protect the life of the unborn." They reaffirmed the September 18 statement by the Administrative Committee, which urged Congress to hold hearings and pass a pro-life amendment.

The bishops reminded "our people" that passage of the amendment will require "concerted and continued efforts" to convince Congress and the public of the amendment's "absolute necessity." They were forthright on the need for action: "In all of this, well-planned and coordinated political organization by citizens at the national, state and local levels are of highest importance. Our system of government requires citizen participation, and in this case, there is a *moral imperative* for political activity." (Emphasis in original).

The bishops commended and encouraged pro-life groups that had already initiated programs of political action.[25] Without specifying a particular amendment, they urged "continued and unified" efforts toward convincing Congress to hold hearings. The bishops invited the collaboration of other religious leaders in pursuing passage of an amendment.

In conclusion the bishops expressed the wish to make it clear "beyond doubt" that they considered the passage of a pro-life constitutional amendment "a priority of the

[24] Msgr. McHugh, *Relationship*, 129.

[25] For the U.S. bishops the term "political action" should be taken in the broadest sense. They are encouraging the laity to become involved in the public affairs of the country. See, the Vatican II *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)*, Dec. 7, 1965, Ch. IV: The Political Community. Par. 75 is devoted to "Participation by All in Public Life."

The bishops themselves address issues and do not support or oppose candidates for elected office. They also have declined to take positions on court nominees, though this would be legally permissible. In 2005, the bishops approved a parish postcard campaign addressed to the confirmation of judicial nominees in which the message was focused at the level of issue and not in support of or in opposition to a specific nominee. The core message: "As your constituent, I urge you *not* to require support for *Roe v. Wade* as a condition for determining a nominee's fitness for judicial office." After Justice Anthony Kennedy announced his intention to resign, Cardinal Daniel DiNardo, President of the U.S. bishops' conference, sent a letter (July 6, 2018) to the U. S. Senate in which he again affirmed that the bishops do not support or oppose judicial nominees but also expressed "grave concerns" about subjecting nominees "to a litmus test of support for *Roe*, as though nominees who oppose the purposeful taking of innocent human life are somehow unfit for judicial office in the United States." See: usccb.org/issues-and-action/human-life-and-dignity/abortion/upload/usccb-president-letter-to-senate-on-judicial-nominees-070618.pdf (last visited 12/07/21).

highest order," a priority "to which we are committed by our determination to uphold the dignity of the human being and by our conviction that this nation must provide protection for the life, liberty and pursuit of happiness for all human beings, before as well as after birth."

The statement was short, firm, and clear.

By the end of 1973 the U.S. bishops had laid the foundations for all future action and for what would become the *Pastoral Plan for Pro-Life Activities*.

Intense Debate in Congress, and Approval of Long-Term Plan: 1974 to 1983

Testimony of USCC on Constitutional Amendment Protecting Unborn Human Life before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary (March 7, 1974)

This testimony represented the U.S. bishops' most extended statement on abortion up to that time in the ongoing debate. By the submission of their testimony the bishops were participating in the democratic process. As moral teachers they intended to articulate "their reasons and the bases of their reasons for legally protecting the unborn" (Introduction).[26]

The testimony had six sections: the scientific evidence underpinning the human dignity of the unborn child from fertilization, the protection of human rights in law, development of the rights of the unborn in American law, a critique of the Court's opinions in *Roe* and *Doe*, a proposal for a constitutional amendment, and concluding remarks.

In the section on a constitutional amendment the bishops singled out two essential goals: reverse the Court's decisions, and provide a constitutional basis for the legal protection of the unborn. "After much consideration and study, we have come to the conclusion that the only feasible way to reverse the decision of the Court and to provide some constitutional base for the legal protection of the unborn child is by amending the Constitution." Passing an amendment "is a moral imperative of the highest order."

At this point in the developing debate on a constitutional amendment, the bishops described the "so-called 'states' rights' approach" as unacceptable. Simply leaving the recognition of the unborn child's right to life as optional for each state "is repugnant to one's sense of justice." Further, the Court's removal of the unborn child from the protection of the United States Constitution requires that the right to life of the unborn child now be restored and affirmed through an amendment. "Federal constitutional rights, improperly, but substantially denied, must be substantially affirmed."[27]

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[26] For a legal review of constitutional amendment proposals introduced, see, James Bopp, Jr., *An Examination of Proposals for a Human Life Amendment*, in Restoring the Right to Life: The Human Life Amendment 3 (James Bopp, Jr. ed., 1984). Also see, *Human Life Amendment Highlights: United States Congress (1973-2003)* at: humanlifeaction.org/downloads/sites/default/files/HLAhghlts.pdf (last visited 12/07/21). (Human Life Action is a project of NCHLA.)

[27] At the time of the 1974 testimony, at least 37 different constitutional amendment resolutions had been introduced in House or Senate. See *Human Life Amendments: 1973-2003*, at: humanlifeaction.org/

Even so, the bishops commended the Senators for the various amendment proposals they had sponsored. They recognized that the purpose of these hearings was to assist the committee in formulating precise language to be brought before the Senate. At this time, the bishops wanted "to articulate the values that we believe should be encompassed by an amendment," and, they added, "we hope to provide a more detailed legal memorandum at a later date."

The bishops presented four points that "any consideration of a constitutional amendment" should include:

1) "Establish that the unborn child is a person under the law in the terms of the Constitution from conception on."
2) "The Constitution should express a commitment to the preservation of life to the maximum degree possible. The protection resulting therefrom should be universal."
3) "The proposed amendment should give the states the power to enact enabling legislation, and to provide for ancillary matters such as record-keeping, etc."
4) "The right to life is described in the Declaration of Independence as 'unalienable' and as a right with which all men are endowed by their Creator. The amendment should restore the basic constitutional protection for this human right to the unborn child."[28]

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downloads/sites/default/files/HLAlst7303.pdf (last visited 12/07/21). Some would provide a positive basis in the constitution for protection of the unborn, for example, the Hogan Amendment (H.J. Res. 261, introduced January 30, 1973), the Buckley Amendment (S.J. Res. 119, introduced May 31, 1973), or the Burke Amendment (H.J. Res. 769, introduced October 12, 1973). The Whitehurst Amendment (H.J. Res. 427, introduced March 13, 1973), affirmed the right of the states to address abortion as they saw fit, and represented a clear expression of the "states' rights" approach. "Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion." The bishops' testimony was addressing the Whitehurst type proposal.

Over time some 333 amendment resolutions have been introduced in Congress. Of course, specific amendment proposals were introduced separately by different sponsors, re-introduced by lead sponsors with additional co-sponsors, or were introduced again in each new Congress. One source with broad descriptive measures identifies thirteen main types, eight affirming the right to life of the unborn and five overturning *Roe* and returning the abortion issue to the legislative branch for disposition. Within these very broad categories there are significant differences at the level of detail. See: *Human Life Amendments: Major Texts* at: humanlifeaction.org/downloads/sites/default/files/HLAmajortexts.pdf (last visited 12/07/21). In his more theoretical legal review, Bopp, *An Examination of Proposals for a Human Life Amendment*, 18 (1984), categorizes the introduced amendment proposals into six types. He prefers to call all amendment proposals "human life amendments" in that all, in his opinion, could serve in some way to secure protection in law for the unborn. Two types would fall into what generally are called states' rights amendment, but four types "do not leave legal protection of the unborn to the discretion of the legislature but specifically affirm the principle that the unborn's right to life is protected by the Constitution."

[28] See n. 43 below for reflections on how these principles can be understood in the context of various amendment proposals that eventually were developed.

The bishops placed their emphasis on affirming the right to life of the unborn child in foundational United States law. The focus now was on what was needed to begin the process to achieve this. As the debate matured, the prospects for developing and clarifying strategic paths would evolve. "However long the road," the bishops stated in their concluding remarks, "we must begin now with what is the necessary first step, the enactment by Congress of an appropriate constitutional amendment."

Ideally, as the bishops expressed here, passage of an amendment would come at the beginning of the broad historical project to protect unborn and all other vulnerable human life, laying the proper foundation for the necessary follow-up actions, but just as well it could come in the middle of the process, or even at the end as the summation and affirmation of all that has gone before.

The NCCB Pastoral Plan for Pro-Life Activities (November 20, 1975)

In May 1975 Cardinal Terence Cooke, Archbishop of New York, became the new chair of the Ad Hoc Committee for Pro-Life Activities, a position he held until his untimely death October 6, 1983.[29]

In August 1975, the Ad Hoc Committee, under the leadership of the Cardinal, held a series of regional meetings to consult with the U.S. bishops "on anti-abortion strategies and to inform them of the effort to obtain a constitutional amendment."[30] As a result of input from the bishops at these meetings, the Committee decided to propose a plan "that would unify existing efforts, encourage people to continue what would be a long-range effort, and give direction to agencies within the Church."[31] At its September meeting the Administrative Committee approved the development of such a plan and its presentation for adoption at the November 1975 General Meeting. A draft was mailed to the bishops a month in advance for their comments. An extensive discussion of the draft document took place at the November Administrative Committee meeting. After further discussion, the *Pastoral Plan for Pro-Life Activities* was adopted with a unanimous voice vote at the fall General Meeting.[32]

The *Pastoral Plan* was re-issued with updates November 1985, and re-issued with further updates November 2001.

With its primary purpose as programming direction, the 1975 *Pastoral Plan* sought to activate the full pastoral resources of the Church in three areas: education, pastoral care, and public policy. The *Plan* called upon all Church-sponsored or identifiably Cath-

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[29] For years, while carrying out a very demanding schedule, Cardinal Cooke, unbeknownst to the public, suffered from leukemia. He was designated Servant of God in 1992.

[30] Msgr. McHugh, *Relationship*, 137.

[31] *Id*. Also see, *id*. 70, 97-99. As Msgr. McHugh noted, in all the efforts from 1968 forward, the emphasis was on *program* for the long-term ("a determined and coordinated long-range *program*") (emphasis in original). *Id*. 109.

[32] *Id*. 137-38. A brief review of the 1975 *Pastoral Plan* can be found in the introduction to the U.S. bishops March 24, 1976 testimony before Congress on a constitutional amendment to protect the unborn. See, *Documentation on Abortion and the Right to Life II*, 1-3.

olic national, regional, diocesan and parochial organizations and agencies to pursue the three-fold effort. Special emphasis was placed upon dialogue and cooperation, not only within the Church but in various forms of outreach into society—in professional fields, academia, and interfaith relations.

The *Plan* stated upfront that the most effective, and thus most important, structures for implementation are in the diocese and the parish.

The broad outline of the three program areas can be described as follows. The educational effort was to be directed both to the general public and to the Catholic community. Pastoral care encompassed three facets: moral guidance and motivation, service and care for women and unborn children, and reconciliation. In its turn, the public policy program had four must-include elements:

- "Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible."
- "Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible."
- "Continual research into and refinement and precise interpretation of *Roe* and *Doe* and subsequent court decisions."
- "Support for legislation that provides alternatives to abortion."

The first element affirms the commitment of the U.S. bishops to passage of a human life amendment protecting the life of the unborn child. As Msgr. McHugh stated: "These priorities, unified and formalized in the *Pastoral Plan*, had been enunciated separately in earlier statements."[33]

Pursuing these public policy goals would require well-planned and coordinated action by all citizens at the national, state, and local levels. As religious leaders the bishops "see a moral imperative for such political activity."

In a final part of the *Pastoral Plan*, the bishops addressed the Means of Implementation. With accompanying descriptions, they urged the establishment of the State Coordinating Committee, the Diocesan Pro-Life Committee, and the Parish Pro-Life Committee; and they addressed the pro-life effort in the congressional district. In all this the bishops' Pro-Life Office and the National Committee for a Human Life Amendment[34] are resources for and partners with the local church, with specific reference to the Diocesan Pro-Life Committee. These structures and relationships are reaffirmed in the two subsequent updates of the *Pastoral Plan*.

The focus of the effort in the congressional district was to be the passage of a constitutional amendment. If members of Congress are to be persuaded to vote in favor of an amendment, "it is absolutely necessary to encourage the development in each congressional district of an identifiable, tightly-knit and well-organized pro-life unit." Such a unit "can be described as a public interest group or a citizens' lobby." Its task is

[33] Msgr. McHugh, *Relationship*, 141, n. 26.

[34] In January 1974, under the direction of the U.S. bishops, NCHLA was established with the mandate to work to overturn *Roe* and *Doe*, counter the decisions' impact on law and society, and help secure full legal protection for the unborn child's right to life.

to organize people to persuade their elected representatives; its activity is focused on passing a constitutional amendment. The congressional district unit "is an agency of the citizens, operated, controlled and financed by these same citizens." The bishops emphasized that it is "*not an agency of the Church, nor is it operated, controlled, or financed by the Church*" (emphasis in original).[35]

The *Pastoral Plan* took care to define with some detail 12 program objectives of the congressional district group, for example, "To conduct a continuing public information effort to persuade all elected officials and potential candidates that abortion must be legally restricted," or "To persuade all residents [in the congressional district] that a constitutional amendment is necessary as a first step toward legally restricting abortion," or "To enlist sympathetic supporters who will collaborate in persuading others," or "To work for qualified candidates who will vote for a constitutional amendment, and other pro-life issues." These activities can be generated and coordinated "by a small, dedicated and politically alert group." Some financial support will be needed but the "greatest need is the commitment of other groups" who realize the importance and potential of these activities and the absolute necessity of working together.

By specifying the objectives of the citizen group in such detail the bishops were indicating that the challenges arising from a permissive abortion policy were enormous but can and should be met. The process of restoring respect for human life at every stage "may be demanding and prolonged," but it is an effort "which both requires and merits courage, patience, and determination." The U.S. bishops expressed an awareness of the importance of this moment in history. "In every age the Church has faced unique challenges calling forth faith and courage."

Testimony of USCC on Constitutional Amendments Protecting Unborn Human Life before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary (March 24, 1976)

The 1976 testimony builds on the earlier 1974 testimony, which was again submitted for the record. In five main sections the U.S. Catholic bishops explored ways the Court's permissive abortion rulings were producing serious harm to the country. The bishops discussed the law and the incidence of abortion, the social implications of permissive abortion, threats to the lives of children, the impact of *Roe* and *Doe* on American life and law, the issue of religious freedom, and a concluding section on the need for a constitutional amendment. The bishops presented these reflections "as evidence of the breakdown of commitment to human rights, particularly the right to life, and as reasons in favor of an amendment to the Constitution that will protect human life at every state of existence . . ." (Introduction).

Support for an amendment was seen as growing. An analysis of public opinion polls showed that opposition to abortion on request has continued despite *Roe*. A De

[35] This language was added by the Administrative Committee during their November 1975 meeting at the recommendation of the bishops' General Counsel. Msgr. McHugh, *Relationship*, 138.

Vries & Associates poll published February 1975 affirmed that the majority of Americans were opposed to the abortion policy established by the Court.[36] Also, legal scholars, including some who favored a permissive abortion policy, increasingly opposed "the substance and the legal methodology" of *Roe* and *Doe* (Introduction).

In their concluding section the bishops acknowledged that before the Judiciary Committee were a large number of amendment proposals that express "fundamentally different approaches to protecting unborn life." One category provided full constitutional protection for all human rights of the unborn and a second category essentially restored to the states the power to prohibit, restrict or regulate abortion. "However, this so-called 'states rights' approach does not require any state to enact a law, it does not create a model, and it is unlikely to achieve uniformity in the various states."

The bishops then observed that a new formulation had been proposed "that explicitly affirms that the state shall have the power to protect all human life, including that of the unborn." Unlike the states' rights approach, this amendment "positively affirms the value of unborn human life, thereby creating a predisposition in favor of protecting such life."

The bishops did not cite or name this new amendment formulation. The assumption is they were referring to the proposal drafted by John Noonan.[37]

The bishops noted that they have repeatedly urged "the passage of a human life amendment," adding, "and we restate that policy today." They continued to decline to endorse any specific amendment. They recalled their 1974 testimony in which "we suggested four principles that we believe should guide the legislative process in formulating an amendment" to protect unborn human life. They restated "these four points" verbatim. The bishops were aware "that considerable controversy has raged" on the acceptability of the various amendment proposals. In the interest of protecting the fundamental right to life of all, the bishops strongly urged the Subcommittee to "approve and recommend" an amendment that embodies the values expressed by the four principles.

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[36] The De Vries poll was the most thorough public opinion poll on abortion up to that time, interviewing 4,067 persons in their homes for approximately 45 minutes in late 1974. The interview schedule included 111 items. The interviews were conducted by Cambridge Survey Research. The poll was sponsored by the National Committee for a Human Life Amendment. For a summary reference to early 1970s public opinion polling on abortion, see the bishops' March 24, 1976 testimony, *Documentation on Abortion and the Right to Life II*, 4. n.1.

[37] On October 1, 1975, Rep. Leonor Sullivan (D-MO) introduced H.J. Res. 681: "The Congress within Federal jurisdiction and the several States within their jurisdictions shall have power to protect life including the unborn at every stage of biological development irrespective of age, health, or condition of physical dependency." Rep. Sullivan acknowledged John Noonan's role in writing the amendment as does Noonan himself in February 5, 1976 testimony on a constitutional amendment. The wording was considered an improved version of the Burdick Amendment that was reported to have received a tied vote during a September 17, 1975 Senate subcommittee closed session markup that followed 16 days of hearings in 1974 and 1975. It is reported that in the markup eight votes occurred on amendment proposals; none were approved. John Noonan also acknowledged authoring the Burdick Amendment.

By appearing before the subcommittee the bishops "take responsibility for being part of the legislative process," something they viewed as a dialogue, a dialogue that is "based on fundamental principles of morality and law," "that must take into account the destruction of the lives of almost one million unborn children each year," "that carefully defines any possible conflict of fundamental human rights," and "that admits and states the reasons for the limits of law in protecting fundamental human rights."

The bishops said that the dialogue was not well served by the Senate Subcommittee's failure in its September 17, 1975 closed markup votes to support any of the amendments it had under consideration. Also the subcommittee chairman's explanation of what occurred "was deficient." It failed to address the "substantive strengths and weaknesses of the various proposals," or to give "reasons for refusing to recommend any of those proposals to the attention of the full Committee."

The bishops reiterated that they testified because "we respect the democratic process." They have submitted principles that agree with moral values and the Constitution, "and remain unconvinced by the arguments against protecting unborn human life." They urged the subcommittee to approve "a constitutional amendment that restores the protections of the Constitution to the unborn, and provides for a legal structure that will specifically protect human life at every stage of its existence."

NCCB Testimony before the United States Senate Judiciary Subcommittee on the Constitution (November 5, 1981)

In this testimony the U.S. bishops, when presented by the Congress with the text of a proposed constitutional amendment, formally responded with an expression of support.

Speaking on behalf of the NCCB, Archbishop John Roach and Cardinal Terence Cooke presented testimony with four parts: the human dignity of the unborn child, western traditions on human rights and the unborn child, the legal and social effects of *Roe v. Wade*, and the issue of law and morality.[38]

In their introduction the bishops reviewed in summary the testimony submitted in 1974 and 1976. The developments over the past five years "strengthen the case on behalf of an amendment." They noted that on March 24, 1981 the NCCB Administrative Committee reaffirmed the earlier testimony that the passage of a constitutional amendment is the only feasible way to reverse the Court and to provide a constitutional base for legal protection of the unborn child.

In their conclusion, the bishops directly addressed the question of a constitutional amendment. After re-stating the four elements of the pro-life legislative program set forth in the 1975 *Pastoral Plan*, they affirmed that their "highest legislative priority is the passage of a constitutional amendment that will reverse the Supreme Court's abortion decisions and restore legal protection to the unborn." They again re-stated verbatim the four guidelines for an amendment first put forward in 1974.

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[38] The bishops' testimony can be found in *Const. Amends. relating to abortion: Hearings before Subcomm. on Const. of the S. Comm. on the Judiciary*, 97th Cong., vol. 1, 413-79 (1981).

They acknowledged their 1976 testimony on the point that some amendment proposals granting legislative authority to Congress and the states to protect unborn human life (a reference to the Noonan amendment) "were a significant improvement on the 'states' rights' approach."

Recently the bishops' Administrative Committee had expressed "great interest" in a new amendment proposal:

> Similarly, on September 22 of this year [1981] we expressed great interest in the new 'human life federalism amendment' recently proposed by Senator Hatch of Utah, which expressly overturns the right to abortion created by the Supreme Court in 1973 and gives concurrent power to Congress and the states to restrict and prohibit abortion.[39]

On September 21, 1981 Senator Orrin Hatch (R-UT) had introduced his Human Life Federalism Amendment (HLFA) (S.J. Res. 110).[40]

In their November 5, 1981, testimony, the bishops again claimed "no special competence at legislative draftsmanship," offering their guidelines as "contributions to a dialogue." Members of Congress are considered "the appropriate agents for the actual drafting of an amendment to be presented to the state legislatures."

That being said, the bishops commented: "We take note of the fact that some recent testimony before this subcommittee indicates a possibility that the establishment of constitutional 'personhood' may not be necessary at the present time for restoring effective legal protection to unborn children, and indeed that it could fail through judicial interpretation to provide effective protection."[41] The bishops added: "We expect that

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[39] See, *Bishops Support Plan by Hatch to Curb Abortions*, N.Y. Times, Nov. 19, 1981, at A19.

[40] The text: "A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern." Sen. Hatch's HLFA was designed to overturn *Roe* and restore to the state legislatures and Congress the authority to legislate on abortion. Following introduction, nine days of hearings were held in 1981. On December 16, 1981, the Senate Judiciary Subcommittee on the Constitution favorably reported a slightly amended version of S.J. Res. 110; the wording of the proviso section was clarified. On March 10, 1982, the full Judiciary Committee voted favorably to report the amended wording. Efforts in 1982 to bring the amended Hatch HLFA to the Senate floor were substantial but not successful. On September 15, 1982 Sen. Hatch withdrew the amended HLFA from the Senate floor, with the understanding that the measure would receive full floor consideration in 1983.

[41] Not all "human life amendments" referred to personhood in specific terms. The Hogan Amendment (H.J. Res. 261, introduced January 30, 1973) and Paramount Human Life Amendment (H.J. Res. 294, introduced April 5, 1979) used the term "human being." The Roncallo Amendment (H.J. Res. 1041, introduced May 30, 1974) referred to "human life." The bishops here are presumably making a generic reference to amendment proposals that affirmed the right to life of the unborn.

Whether the courts were to be trusted or not was a significant factor in the way the various amendments affirming the right to life were drafted. Some amendments set forth general principles which then were to be applied by the courts and legislatures in accord with normal processes of law. Sponsors here were concerned that specific exceptions placed in constitutional law would open the door to other exceptions. These views were expressed by Rep. Larry Hogan, (R-MD), *Abortion—Part 1: Hearings before Subcomm. on Const. Amends. of S. Comm. on Judiciary*, 93d Cong., 512, 515-16 (1974); by Rep. Angelo Roncallo (R-NY), 120 Cong. Rec. 17092-94 (1974); and by Sen. Jesse Helms (R-NC), 121 Cong. Rec.

the members of the subcommittee will take expert testimony of this sort into account, and also that they will consider the political possibilities for ratification of the various proposals which confront them." The bishops' fundamental commitment as stated in the 1975 *Pastoral Plan* "is to an amendment which will actually provide the maximum degree of protection for unborn human life that is possible."

In their dialogue with the Senators at the 1981 hearing both Archbishop Roach and Cardinal Cooke indicated their support for the HLFA, without disparaging other approaches. As Archbishop Roach stated:

> It is our belief at this moment, with deep respect for both the initiators and supporters of other amendments, that the amendment we are discussing at this point [the HLFA] is the amendment which we really ought to support.
>
> We are not troubled by other amendments. We feel this is the amendment we want to support at this moment.[42]

When a Senator asked whether it was correct the U.S. bishops "would ultimately like to have a constitutional amendment declaring a fetus a person from the moment of conception," Archbishop Roach answered: "Yes; that would be an ultimate hope, correct."[43]

S725-26 (1975) and 127 Cong. Rec. S859 (1981). Other amendments, their sponsors not trusting the courts and the legislatures to act properly in implementing the general principles, specified the limited conditions under which an abortion could be allowed or performed, typically, some expression of allowance for abortions to save the mother's life. Especially the Burke, NRLC, and NRLC Unity Amendments reflected this approach. For a concise review of how the various amendment proposals developed, with reference to reaching private action and specifying exceptions, see testimony of Joseph Witherspoon, *Proposed Const. Amendments on Abortion: Hearings before the Subcomm. on Civil and Const. Rts. of H. Comm. on Judiciary*, vol. 1, 27-30 (1976).

Two key examples of amendments affirming the right to life would be the Paramount Human Life Amendment and the NRLC Amendment. The Paramount HLA is a single sentence: "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency." The NRLC proposal has three sections:

> Section 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and in the fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.

Rep. Romano Mazzoli (D-KY) first introduced the Paramount HLA on April 5, 1979 as H.J. Res. 294. Sen. Jake Garn (R-UT) first introduced the NRLC Amendment on January 24, 1977 as S.J. Res. 15.

[42] *Const. Amends. relating to Abortion: Hearings before Subcomm. on Constitution of S. Comm. on Judiciary*, 97th Cong., vol. 1, 421 (1981).

[43] *Id*. 423. And as Cardinal Cooke stated in a dialogue with Sen. Hatch on the prospect of the HLFA failing to achieve the hoped for protection of the unborn at the state level: "We will continue our struggle

The bishops concluded by urging Congress to restore "to our legal system the power to protect human life at every stage of existence."

In their testimony the bishops referred to *effective* legal protection. By this time in the debate arguments were being made by John Noonan and others that properly worded "states' rights" amendments—they would call their proposals life affirming amendments—could in time lead to de facto full protection for the unborn.[44] These arguments involved their own prudential judgments about what was thought possible. The driving motive was to get Congress at that time to pass some kind of constitutional amendment that would overturn *Roe* and allow the states and Congress to begin the process of passing laws that de facto protected the unborn.

The concept emerged of pursuing full protection in law for the unborn in stages: first, undo *Roe* and allow the legislatures the option again to act; second, pass a constitutional amendment explicitly affirming the right to life of the unborn and all other vulnerable human life.

Also in the mix was the role of passing human life bills. As an institution sworn to uphold the Constitution, Congress could pass laws that asserted the right to life of the unborn under existing provisions of the Constitution, especially the 14th Amendment.[45]

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for the principles articulated. Yes; very much so." *Id*. 420. And again: "Senator, so that we understand each other, we will continue our struggle for the maximum protection for the unborn." *Id*. 421.

In terms of the bishops' four principles underlying a constitutional amendment, the first principle ("Establish that the unborn child is a person under the law in the terms of the Constitution from conception on") expresses the core of the affirmative human life amendment, without addressing in specific terms the Constitutional foundations; it is linked to the fourth principle, which, citing the Declaration of Independence's affirmation of the right to life, then states: "The amendment should restore the basic constitutional protection for this human right to the unborn child." The second principle ("The Constitution should express a commitment to the preservation of life to the maximum degree possible," with the addendum that such protection "should be universal") could be understood to reference such questions as whether the protection would reach to state action or also to private action, or whether it should specify an exception only for the life of the mother; and that all human beings, born and unborn, should be protected equally without regard to age, function, condition of dependency, and the like. In principle, it also can be seen as opening the door for a Sullivan Amendment or the subsequent Hatch-Eagleton Amendment, without prejudicing the option to secure at a later date the affirmative protection in law envisioned by principles one and four. In 1975 the statement in the *Pastoral Plan* ("Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible") is a summary statement consistent with the statement of the four principles found verbatim in the 1974, 1976, and 1981 testimonies.

[44] See the amendment introduced by Rep. Sullivan cited in n. 37 above.

[45] Human life bills in the full sense of the term were introduced in Congress in 1981, starting on January 21 with S. 158 by Sen. Jesse Helms (R-NC) and H.R. 900 by Rep. Henry Hyde (R-IL). The Congressional Pro-Life Caucus produced a revised bill, H.R. 3225, introduced on April 10 by Rep. Romano Mazzoli (D-KY). Eight days of hearings were held in the Senate before the Judiciary Subcommittee on the Separation of Powers. In May 21, 1981 testimony before the subcommittee Rep. Charles Dougherty (R-PA) stated that H.R. 3225, as well as S. 158 and H.R. 900, have as their essential purpose "to declare that the word person, as used in the 14th Amendment, includes the unborn and thus, that they are entitled to the same 14th Amendment protections as all other persons enjoy." *Human Life Bill: Hearings on S. 158 before Subcomm. on Separation of Powers of S. Comm. on Judiciary*, 97th Congress, vol. 1, 167-68 (1981). The bills also typically restricted the jurisdiction of the lower federal courts.

The Court, of course, could strike down such laws as unconstitutional, or it could reconsider its abortion doctrine and uphold such laws.[46] Once *Roe* is overturned by constitutional amendment or overruled by the Court, then human life bills also could serve as a second step in the process of protecting the unborn, with a full human life amendment to follow as a third and final step in terms of constitutional law.

In the 1981 testimony Archbishop Roach referred to the prospect of passing a national abortion law following the ratification of an amendment. "When a constitutional amendment is ratified and hearings are held on a national abortion law, we shall again request permission to testify in order to urge Congress to enact laws to protect the unborn child to the maximum degree possible."[47]

Needless to say, in all this, the strategy of stages to achieve full protection for the unborn, however such might play out, refers to an historical process that could take many years.

As the debate in the early 1980s unfolded the Hatch HLFA would be reduced down to just the first sentence: "A right to abortion is not secured by this Constitution." It would be called the Hatch-Eagleton Amendment. In additional hearings in early 1983 Sen. Tom Eagleton (D-MO) testified that he thought that single sentence plainly reversing *Roe* had the greatest support in the Senate. That single sentence was favorably reported by subcommittee and later, though on a tied voted, was sent by the

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On July 9, 1981, the Senate Judiciary Subcommittee reported a substitute S. 158 to the full committee, but no further action was taken on that bill. *The Human Life Bill—S. 158: Report* [GPO 1981—the Report itself lacks both a report number and year].

On March 1, 1982 Sen. Jesse Helms introduced S. 2148, an expanded and modified version of the human life bill. Language explicitly restricting the jurisdiction of the lower federal courts was absent but there was a provision expediting appeals to the Supreme Court (Sec. 9). Later in 1982 the new Helms proposal was offered in an again modified form as an amendment to a debt limit resolution (H.J. Res. 520). The Helms amendment to the debt limit resolution moved two sections of the earlier S. 2148 explicitly applying the 14th amendment to the unborn (Sections 7 and 8) to two new subsection under the introductory section on findings (Sec. 201 (k) and (l)). Retained was the prohibition on U.S. government agencies performing abortions except to save the mother's life (Sec. 202) and a slightly expanded version of the section on expedited appeals was retained (Sec. 207). Otherwise the focus was on restricting government funding of abortion (Secs. 203-205) and conscience protection (Sec. 206). The Helms amendment was filibustered. On September 15 a motion to table the Helms amendment passed by one vote, 47-46.

On January 26, 1983, Sen. Helms introduced the earlier substitute S. 158 as S. 26.

[46] In 1981 testimony before the Senate Subcommittee Joseph Witherspoon agreed that the whole purpose of a human life statute was "to move the Supreme Court to reexamine the correctness of its decision in *Roe v. Wade* and to reverse that decision." *Human Life Bill: Hearings on S. 158 before Subcomm. on Separation of Powers of S. Comm. on Judiciary*, 97th Congress, vol. 1, 643 (1981). Between 1862 and 1865 Congress passed 11 statutes "which rejected the Supreme Court's interpretation of the due process clause of the fifth amendment in the *Dred Scott* case. Indeed . . . Congress enacted statutes in about the very words . . . that were used in submitting the resolution for the ratification of the 13th amendment." *Id*. 631-32; also see 649-53, 656. Perhaps, it was hoped, something of this kind could happen in present times on the matter of abortion.

[47] *Const. Amends. relating to Abortion: Hearings before Subcomm. on Const. of the S. Comm. on the Judiciary*, 97th Cong., vol. 1, 415 (1981).

full committee to the Senate floor, where on June 28, 1983, the Senate failed to approve the measure, 49-yes, 50-no, 1-present (2/3rds being required).

The pro-life movement was united in its commitment to provide protection in law for the right to life of the unborn. But the movement was deeply divided on the character of the legislative proposal best suited to achieve this goal. Some were opposed to human life bills as either unconstitutional or, in the face of a predictably negative Court, impractical and a waste of time. Others were adamantly opposed to states' rights amendments in any form, and, granting the difficulty at that point of passing a constitutional amendment affirming the right to life of the unborn, thought that human life bills were the best option, at least in the short term.[48] The pro-life movement was strong, but unity was needed to press forward any proposal to protect the unborn. At the conclusion of the 1982 Senate debate on the Hatch HLFA Fr. Edward Bryce, the Director of the U.S. bishops Pro-Life Office, was quoted as stating: "With the support of a united prolife movement, the Hatch Amendment has solid prospects; without such support, its chances are doubtful."[49]

In the short-term, efforts focused on other strategies, such as appointing new Justices to the Supreme Court, who hopefully would be favorable to overruling *Roe,* or passing incremental legislation that would promote life values as much as possible and would be the basis for continuing challenges to the Court's abortion holdings.

Continued Implementation of Long-Term Plan: 1984 to Present

Pastoral Plan for Pro-Life Activities: A Reaffirmation (November 14, 1985)

The re-issued *Pastoral Plan* reaffirmed the basic program originally set forth, with updates that reflected new challenges and responses over the intervening ten years. The *Plan* continued to delineate three general program areas: Public Information and Education, Pastoral Care, and Public Policy.

Under public policy, the 1985 *Pastoral Plan,* like its predecessor, included four elements, but with some refinements in expression, including referring to them as "long- and short-term goals."

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[48] In separately submitted views to the Senate Judiciary Subcommittee's report on S. 158, Sen. Hatch expressed serious doubts about the constitutionality of S. 158 and had "little reason to believe that the Supreme Court as presently comprised would be likely to uphold the exercise of Congressional authority in this measure." No legislation not sustained by the Court would "contribute anything toward saving unborn lives." *The Human Life Bill—S. 158: Report*, 33 (GPO 1981).

Sen. Helms was adamantly opposed to a states' rights amendment in any form. To give the states the option to destroy human life would be "the proabortion position." 127 Cong. Rec. S855 (1981).

During 1982 the Hatch HLFA and the various Helms human life bills were in contention for time on the Senate floor. In the process the pressures of practical politics also were bearing down. Sen. Helms reshaped and refocused his human life bills and Sen. Hatch compressed the language of his HLFA into the Hatch-Eagleton Amendment.

[49] 128 Cong. Rec. S23588 (1982).

That each goal has a short-term and a long-term aspect reflects historical fact. The pursuit of a constitutional amendment, by design quite difficult, itself is a goal in which either the short-term or the long-term aspects can predominate, depending on circumstances. The 1985 *Pastoral Plan* made more explicit what the bishops had always realized, that the passage of a human life amendment and the garnering of the needed public support would involve a long-term process.

Granting the failed 1983 Senate vote on the Hatch-Eagleton Amendment that exposed some deep divisions in the pro-life movement, the revised *Pastoral Plan* reflected the fact that other goals would become more prominent on the way toward the goal of passing some kind of a constitutional amendment.

For example, the goal of laws and administrative policies was not only to "restrict the practice of abortion as much as possible" but also to "eliminate government support of abortion." The *Plan* was reflecting the bruising but effective battle starting in 1976 to pass the all-important Hyde Amendment that set the standard for the government not using tax dollars to pay for abortions. The goal of researching and limiting interpretations of the Court's abortion decisions was expanded with a reference to the "ultimate reversal of decisions by the Supreme Court and other courts denying the right to life," here reflecting the new hopes of the Court's overruling of *Roe* and *Doe* and also perhaps a reference to undoing state supreme court decisions interpreting state constitutions to include a right to abortion.[50] The goal of supporting legislation providing alternatives to abortion was expanded by adding the nuance of supporting legislation "that provides morally acceptable alternatives to abortion," reflecting concern for specific proposals that had come forward such as massive increases in government contraceptive programs supposedly to reduce "the need for abortion."

Also, in the section on implementation the goals of the Pro-Life Effort in the Congressional District are expanded to include passage not only of a constitutional amendment but also "other pro-life legislation."

Resolution on Abortion (November 1989)

This *Resolution on Abortion*, adopted by the U.S. bishops at their annual November meeting, was issued in the wake of the Supreme Court's *Webster v. Reproductive Health Services* (1989) decision.

The bishops reaffirmed their teaching opposing abortion and upholding the sacredness of all human life, expressing a special plea: "At this particular time, abortion has become the fundamental human rights issue for all men and women of good will." They also reaffirmed the 1985 updated *Pastoral Plan*, including the *Plan*'s long and short range public policy goals, the first of which was the "constitutional protection for the right to life of unborn children to the maximum degree possible." Public officials, especially Catholics, should advance these goals. The bishops stated the general principle:

[50] By 1985 four state supreme courts had issues rulings of concern: Vermont (1972), California (1981), Massachusetts (1981), and New Jersey (1982). See n. 65 below.

"No Catholic can responsibly take a 'pro-choice' stand when the 'choice' in question involves the taking of innocent human life."

Living the Gospel of Life: A Challenge to American Catholics (1998)

In 1995 Pope John Paul II issued his encyclical *The Gospel of Life*. In 1998 the U.S. Catholic bishops followed up with *Living the Gospel of Life: A Challenge to American Catholics*. In this document the bishops addressed the life issues in broad historical and cultural contexts. Of particular note, they more carefully considered the theoretical framework for the consistent ethic of life and they discussed their responsibility to call all to conversion, including political leaders.

The Gospel of life, as a complement to American political principles, is not "a private piety" but something to be lived "*vigorously and publicly*" (emphasis in original) or "or we will not live it at all" (20). But bringing this message to practical politics "can be a daunting task" (21). Good people will disagree on some specifics. But there is a basic principle for all: "*We must begin with a commitment never to intentionally kill, or collude in the killing, of any innocent human life, no matter how broken, unformed, disabled or desperate that life may seem*" (emphasis in original) (*Id.*). No direct abortion. No euthanasia or assisted suicide. No direct attacks on innocent civilians in time of war. Today capital punishment "is unnecessary to protect people's safety and the public order, so that cases where it may be justified are 'very rare, if not practically non-existent'" (*Id.*).[51]

The Church upholds a consistent ethic of life, seeking to protect human life from beginning to end. The full range of issues that Catholics should engage and public officials must address include poverty, violence, injustice, war, capital punishment, racism, hunger, employment, education, housing, and health care. "Opposition to abortion and euthanasia does not excuse indifference" to these concerns. "*But being 'right' in such matters can never excuse a wrong choice regarding direct attacks on innocent human life*" (emphasis in original) (23). The bishops explained the relationship in this way:

> If we understand the human person as the "temple of the Holy Spirit"—the living house of God—then these latter issues fall logically into place as the crossbeams and walls of that house. *All direct attacks on innocent human life, such as abortion and euthanasia, strike at the house's foundation*" (emphasis in original) (*Id.*).

Pope John Paul II referred to the command never to kill as a minimum. A "'yes'" said repeatedly "'will gradually embrace the *entire horizon of the good*'" (emphasis in original) (*Id.*).[52]

The consistent ethic of life requires all Catholic believers to engage our culture of democratic pluralism with the fullness of the faith. It is a serious mistake to restrict reli-

[51] The interior quote is from the *Gospel of Life*, 56. Update: On August 2, 2018 Pope Francis revised the *Catechism of the Catholic Church*, Par. 2267, on the question of the death penalty: "Consequently, the Church teaches, in the light of the Gospel, that 'the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person' [citation to a 10/11/2017 papal address], and she works with determination for its abolition worldwide." See: press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html (last visited 12/07/21).

[52] The interior quote is from the *Gospel of Life,* 75.

gious beliefs to the personal realm, as when politicians say "they personally oppose evils like abortion" but "cannot force their religious views onto the wider society" (24). When life begins "is not a religious belief but a scientific fact," and the sanctity of life is "part of humanity's global ethical heritage and our nation's founding principle" (*Id.*). A true pluralism in democracy "*depends on people of conviction struggling vigorously to advance their beliefs by every ethical and legal means at their disposal*" (emphasis in original) (*Id.*).

The bishops have a responsibility to call everyone to conversion. Earlier in the document this call was characterized as one in which persons recover "their identity as followers of Jesus Christ" (7). In particular the bishops' call is directed to political leaders "who contradict the Gospel of life through their actions and policies" (29). In these cases the first step should be a "private call to conversion" (*Id.*). Some may refuse to open their minds to the truth. The bishops must "continue to challenge those officials on the issue in question and persistently call them to a change of heart" (*Id.*; also see 32). St. Thomas More was lifted up as an example for all public leaders to follow. Commendation is extended to those "who, with courage and determination, use their positions of leadership to promote respect for all human life" (31).

Various groups are exhorted to live out the Gospel of life, with special encouragement for everyone to exercise their citizenship. The bishops concluded: "We urge all persons of good will to work earnestly to bring about the cultural transformation we need, a true renewal in our public life and institutions based on the sanctity of all human life (39)."

Pastoral Plan for Pro-Life Activities: A Campaign in Support of Life (November 2001)

For the second time the U.S. Catholic bishops re-issued the *Pastoral Plan*, again reflecting the latest developments in the public debate and incorporating the most recent Church teaching documents, principally *The Gospel of Life*, *Living the Gospel of Life,* and the *Catechism of the Catholic Church*.

In the Introduction the bishops set the context for the reissued *Plan* by reviewing and updating some pressing issues of the day. They began with a full discussion of the consistent ethic of life, followed by a brief analysis of the continuing impact of *Roe* and *Doe*, in which they focused on the Court's most recent important decisions in *Planned Parenthood v. Casey* (1992) and *Stenberg v. Carhart* (2000) (partial-birth abortion) as well as on the emergence of research that involves the destruction of human embryos. The bishops also discussed opposition to violence as a means to achieve pro-life goals, the relationship of abortion and contraception, and the latest Church teaching in opposition to the death penalty.

The three program parts of the 1975 and 1985 documents were expanded formally to include a fourth: Prayer and Worship.[53]

[53] The 1975 *Pastoral Plan* made explicit reference to prayer under the Pastoral Care section, where the bishops stated: "Underlying every part of our program is the need for prayer and sacrifice. In building the house of respect for life, we labor in vain without God's merciful help." In the 1985 *Pastoral Plan* a separate sub-section under Pastoral Care was designated "Prayer and Worship," which, in the 2001 *Plan*,

The Public Information and Education section reflected in part the major public education campaign launched by the U.S. bishops with the support of the Knights of Columbus in the early 1990s.

The Pastoral Care program has subsections on pregnancy services and on post-abortion healing and reconciliation, but it also has two new subsections, one on care for those who are chronically ill, disabled, or dying and another on care for prisoners, those on death row, and victims of violent crime.

The Public Policy Program section began with an expanded introduction, drawing from teachings in the latest Church documents, including comments on the responsibility of public officials to promote respect for all human life. The bishops concluded: "It is imperative to restore legal protection to the lives of unborn children and to ensure that the lives of others, especially those who are disabled, elderly, or dying, are not further jeopardized."

The comprehensive public policy program still included the "long- and short-term goals." As in 1975 and 1985 these included "a constitutional amendment that will protect unborn children's right to life to the maximum degree possible," here explicitly adding "and pursuit of appropriate strategies to attain this goal." The wording carefully and clearly affirmed the established policy of the U.S. bishops. The goal "federal and state laws and administrative policies that restrict the practice of abortion as much as possible" and that "prohibit government support of abortion" are now also aimed against government support of "human cloning, and research that destroys human embryos."

But the goals were no longer specific solely to the unborn but referenced a broader range of concerns. Three new goals were cited:

- "support for federal and state legislation that promotes effective palliative care for those who are chronically ill or dying"
- "support for efforts to prevent legalization of euthanasia and assisted suicide by legislation or referendum"
- "support for efforts to end the death penalty"

The first and second of these new goals reflected the increasing effort to promote euthanasia and assisted suicide by legislation and especially by referendum with Oregon approving the first physician-assisted suicide law by referendum in 1994. The third goal reflected the teaching in the *Catechism*.

The public policy section ended with a new subsection on "Laws Less Than Perfect," re-stating the teaching on this matter found in Pope John Paul II's *The Gospel of Life*.

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became its own separate program part. At the level of programming, prayer on behalf of life was being incorporated more systematically into the Church's liturgical prayer (for example, prayers of the faithful at Mass) and was being expressed in special events, such as the annual National Prayer Vigil for Life at the National Shrine in Washington, DC in conjunction with the January 22 March for Life. The bishops concluded the 2001 "Prayer and Worship" section: "Only with prayer—prayer that storms the heavens for justice and mercy, prayer that cleanses our hearts and our souls—will the culture of death that surrounds us today be replaced with a culture of life."

The Implementing the Program section still contained subsections on the State Coordinating Committee, the Diocesan Pro-Life Committee, and the Parish Pro-Life Committee, but the earlier subsection on the congressional district was renamed the Public Policy Effort at the Local Level. As in the 1985 *Plan*, the goal was twofold, securing "federal pro-life legislation" or passing "a constitutional amendment." The importance of organizing "on a congressional district basis" was affirmed but it was acknowledged that this objective can be reached in various ways, including through "effective parish efforts." Specific mention was made of "building effective mechanisms" to lobby public officials. "These mechanisms might be telephone trees, postcard campaigns, fax and e-mail systems, letter-writing programs in the parish, etc. Collaborative work with other churches is highly encouraged." Here the 2001 *Pastoral Plan* reflected "mechanisms" that were being developed and implemented at the Catholic parish level throughout the 1990s, which at times were adopted by congregations of other faith communities as well.

The *Pastoral Plan* was responding to the experience accumulated over the years, showing that decennial redistricting would often require regular re-structuring of the citizen-based "congressional district action committees." This reality had undercut the usefulness of this structure for achieving long-term objectives. In most cases, organizational structure based on congressional districts is suited to the pursuit of specific short-term goals within any given ten-year redistricting cycle. As in the 1970s and early 1980s, a pending vote on a constitutional amendment could again be the occasion to re-activate this kind of focused "congressional district action committee" organization. But in general the organization of all policy efforts on a congressional district basis is critical for effective communication to the members of Congress who represent each of the 435 congressional district as well as to the two senators who represent the entire state.

In the Conclusion, the bishops identified a number of areas where progress has been made in the "more than a quarter-century since the *Pastoral Plan for Pro-Life Activities* was first issued," yet the Supreme Court's abortion decisions "make impossible any meaningful protection" for the lives of unborn children. The Court's decisions "must be reversed." The common good requires "'acknowledging and defending the right to life, upon which all the other inalienable rights of individuals are founded and from which they develop'" (interior quote from *The Gospel of Life*, 101).

To Summarize—and to Project into the Future

The process of hammering out the wording of a specific human life amendment has been effectively suspended since the mid-1980s. This is an unfinished task that awaits completion.

Amending the Constitution was not a task undertaken lightly. *Roe* and *Doe* were not foregone conclusions. Once the Court tore the constitutional fabric of the nation through its abortion decisions, the U.S. bishops understood the gravity of the situation and moved immediately to voice support for a constitutional amendment to correct what the Court had done and establish full protection for the right to life in law.

From the beginning of this process, the bishops, as citizens, have supported a human life amendment while respecting the primary role of the elected representatives of the people in crafting and proposing specific wording. They have set forth general principles that should undergird any proposed amendment and have proved earnest participants in the public dialogue.

The bishops favored a constitutional amendment that would recognize the unborn child from conception as a person under the law; that would restore to the unborn child the right to life enunciated in the country's founding documents; that would express a commitment to preserve life "to the maximum degree possible" and would result in protection with a universal character. They pressed Congress to hold hearings and to produce an amendment for public consideration. When the Hatch Human Life Federalism Amendment was proposed in the early 1980s, the bishops, true to their word, assessed the measure, determining it to be the best that could be achieved at that time, and, on balance, expressed their support.

The pursuit of public policy goals does not stand alone. As the bishops affirmed in the *Pastoral Plan*, education, pastoral care, public policy, and prayer provide essential support to one another as the Church moves forward, step by step, in carrying out its pastoral ministry to uphold the right to life of every human being, born and unborn.

The prospect of *Roe* and *Casey* being overruled, in whole or in part, was moved to center stage when the United States Supreme Court on May 17, 2021 granted certiorari in *Dobbs v. Jackson Women's Health Organization*, a case concerning a Mississippi law (the Gestational Age Act) that allowed abortions after 15 weeks only for a medical emergency or in the case of severe fetal abnormality. The Court limited its review to the question, "Whether all pre-viability prohibitions on elective abortions are unconstitutional," a question that reached to the substance of the Court's abortion right. By granting certiorari the Court had decided to revisit the abortion question.

As expected, the Court handed down its ruling in *Dobbs* late in the term (June 24, 2022), and, after the unprecedented leak of Justice Alito's draft opinion in early May, the breadth and nature of the historic decision was not a surprise.[54]

In its opinion the Court takes great care, with detailed historical research and thoughtful analysis, to refute the arguments of *Roe* and *Casey* and to establish that the Constitution does not confer a right to abortion (Pts. II, III, and IV). The Court responds

[54] In *Dobbs* the vote was 6-3 to uphold the constitutionality of the Mississippi law, but 5-1-3 to overrule *Roe* and *Casey*. Justice Alito delivered the opinion of the Court, in which Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined. Justices Thomas and Kavanaugh filed concurring opinions. Chief Justice Roberts filed an opinion in which he concurred with the judgment to uphold the Mississippi law but he did not agree with the overruling. Justices Breyer, Sotomayor, and Kagan filed a dissent. For a detailed analysis of the *Dobbs* decision in its several parts, see Carolyn McDonnell, "*Dobbs v. Jackson Women's Health Organization*: The Overturn of *Roe v. Wade*," at: aul.org/wp-content/uploads/2022/07/Dobbs-v.-Jackson-Womens-Health-Organization-The-Overturn-of-Roe-v.-Wade.pdf (last accessed 8/13/22). The Court's slip opinion in the *Dobbs* case (Docket No. 19-1392) can be found at: supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf. With case documentation at: supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html.

to the arguments made in the dissent and in Chief Justice Roberts' concurrence (Pt. V), and concludes with an important statement on the proper standard for constitutional review (Pt. VI). The Court summarizes:

> Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.[55]

The Court has left the field open for the people and their representatives to determine abortion policy. Not only does the Court rule that the Constitution does not confer a right to abortion, the Court also states that "our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests . . . ."[56] More pointedly, when discussing *Roe*'s and *Casey*'s balancing of the interest of the woman and the interest of "what they [*Roe* and *Casey*] termed 'potential life,'" the Court in *Dobbs* affirms that "the people of the various States may evaluate those interests differently."[57] Voters in some States "may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized." In other States voters "may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being.'"[58] The historical understanding of ordered liberty "does not prevent the people's elected representatives from deciding how abortion should be regulated."[59]

When presented, as it was in *Dobbs*, with conflicting arguments about "the effects of the abortion right on the lives of women" and about "the status of the fetus," the Court held that it "has neither the authority nor the expertise to adjudicate those disputes. . . ."[60]

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[55] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, slip op. at 78-79 (U.S. June 24, 2022). Also see: *Id.*, slip op. at 6 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives"); *Id.*, slip op. at 69 ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives"). For other references to the limits of the Court's constitutional authority, see: *Id.*, slip op. at 5-6 ("*Stare decisis* . . . does not compel unending adherence to *Roe*'s abuse of judicial authority"); *Id.*, slip op. at 35 (the supporters of *Roe* and *Casey* have failed to show "that this Court has the authority to weigh" the policy arguments each side makes, and "we thus return the power to weigh those arguments to the people and their elected representatives"); *Id.*, slip op. at 67 (". . . we cannot exceed the scope of our authority under the Constitution . . .").

[56] A parenthetical observation in *Id.*, slip op. at 29. Also: "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Id.*, slip op. at 38.

[57] *Id.*, slip op. at 31.

[58] *Id.* The interior quote is from the Mississippi law; a fuller quote of that law can be found at *Id.*, slip op. at 6.

[59] *Id.*, slip op. at 31. Also see the factual acknowledgment that in recent years some state legislatures have passed laws "allowing abortion, with few restrictions, at all stages of pregnancy," while other legislatures "have tightly restricted abortion beginning well before viability." *Id.*, slip op. at 4.

[60] *Id.*, slip op. at 65.

In the event "state abortion regulations" are constitutionally challenged, the Court sets forth the principle: "Under our precedents, rational-basis review is the appropriate standard for such challenges." A law would have a presumption of validity and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[61]

The term "legitimate state interests" is a key concept. The Court specifies the term as including

> . . . respect for and preservation of prenatal life at all stages of development [cite to *Gonzalez*]; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability [with cites to *Gonzalez*, *Roe*, and *Glucksberg*].[62]

Scholars will discuss the ramifications of the *Dobbs*' decision. But the implications are enormous for all citizens.

The Court abjures the policy making role that is proper to the States, and in returning the abortion issue to the people, refers consistently to the role of the States and the state legislatures in setting policy. "For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens."[63] The contest in the states will be intense and the results real, either to protect life as much as possible, or to establish a right to abortion. What happens will make a difference. Not only legislation but also amendments to state constitutions or rulings by state supreme courts interpreting those constitutions will be in play.

At the time the decision was handed down, the stage could be set, so to speak, as follows: sixteen states where laws prohibiting abortion would go into effect,[64] thirteen

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[61] *Id*., slip op. at 77.

[62] *Id*., slip op. at 78.

[63] *Id*., slip op. at 1.

[64] These sixteen states are a combination of six states with unrepealed pre-*Roe* prohibitions, all with life of the mother exceptions only (Arizona, Michigan, Oklahoma, Texas, West Virginia, and Wisconsin), and eleven states with enforceable "trigger" law prohibitions (these states with date of the law's passage: South Dakota in 2005; Louisiana in 2006; North Dakota in 2007; Arkansas, Kentucky, Tennessee, and Missouri in 2019; Idaho and Utah in 2020; Texas in 2021; Wyoming in 2022). Note that Texas has both a pre-*Roe* law and a "trigger" law.

The Michigan pre-*Roe* prohibition was in the process of being challenged, but at the time *Dobbs* was handed down the law arguably was enforceable.

In general, "trigger" laws are measures that would prohibit abortion in most circumstances and are drafted to go into effect if *Roe* and *Casey* have been either overruled by the Court or overturned by amendment; some states have a process for certifying the event. This update is based on a personal communication from Paul Linton. Over the last several years Paul Linton has documented how many state laws prohibiting abortion would go into effect if *Roe* and *Casey* are overruled. For recent reviews, see, *Overruling Roe v. Wade: The Implications for the Law*, 32 Issues in Law & Medicine 341 (2017); *Overruling Roe v. Wade: Lessons from the Death Penalty*, 48 PEPP L.R. 278-79 (2021).

Mississippi passed a "trigger" law ban in 2007 but in 1998 the State Supreme Court had recognized a state constitutional right to abortion (*Pro-Choice Mississippi v. Fordice*) (and thus the state's "trigger" law

states where the state constitutions have been interpreted by state supreme courts to contain a right to abortion,[65] and the remaining twenty-one states where existing laws, ranging from protecting life to allowing abortion with virtually no limits, would remain in effect.

In the wake of *Dobbs*, the situation is very dynamic. The status of the law in each of the states needs to be continually monitored and assessed.[66]

In the states with unfavorable supreme court rulings the situation would be like it was under *Roe* but now state constitutional law would set the norm for the kinds of "incremental" legislation that might be possible. Paul Linton notes that there is a place for regulatory laws, "especially in those States where there would be no consensus in support of enacting a prohibition."[67] Some constitutional regulatory options in a post-*Roe* world would include:

> . . . requiring parental consent or notice without a judicial bypass mechanism; requiring spousal consent or notice; mandating longer waiting periods (as is the case in some European countries); banning specific abortion procedures (e.g., dismemberment abortions); or mandating counseling by third party entities that have no

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was not listed above as enforceable). On July 5, 2022 Mississippi Chancery Court Judge Debbra Halford refused to grant a temporary restraining order blocking enforcement of the "trigger" law, which then went into effect on July 7, 2022. In her ruling Judge Halford is quoted as saying that "it is more than doubtful" the state Supreme Court will continue to uphold the 1998 ruling.

[65] Paul Linton lists twelve state supreme courts that have recognized or clearly implied a right to abortion under their state constitutions: Alaska (2001, 2001, 1997), California (1981), Florida (1989), Iowa (2018), Kansas (2019), Massachusetts (1981), Minnesota (1995), Mississippi (1998), Montana (1999), New Jersey (1982), New York (1994), and Tennessee (2000). Decisions in two other states are not as clear but just as problematic. A New Mexico decision (1998) "strongly suggest(s)" the court would recognize a state right to abortion. The grounds for a Vermont decision (1972) "are not entirely clear, but could have been based on the state constitution." Tennessee's court opinion, it is good to note, was overturned by referendum in 2014, leaving thirteen states with adverse court rulings in place. Paul Benjamin Linton, *The Pro-Life Movement at (Almost) Fifty: Where Do We Go From Here?* 18 Ave Maria L.R. 30 (2020).

On June 17, 2022, the Iowa Supreme Court overruled its 2018 decision but left standing a related 2015 ruling; efforts to have the Court undo that ruling are underway. It remains to be seen whether in ongoing litigation the Mississippi Supreme Court, in light of *Dobbs*, will overrule its 1998 decision.

On August 2, 2022 Kansas failed to approve a referendum to reverse its 2019 court decision.

Proposals to recognize a state right to abortion are on the November 2022 ballots in California, Vermont, and Michigan. Several states have provisions in their constitutions supporting life in some way. Approval of any of the three referenced ballot measures recognizing an abortion right would be a first. See, Paul Benjamin Linton, *The Pro-Life Movement at (Almost) Fifty*, 31-33.

[66] Various resources on state pro-life legislation exists. See, for example, Americans United for Life (AUL) at aul.org; the National Right to Life Committee (NRLC) at nrlc.org; the Charlotte Lozier Institute at lozierinstitute.org. For an analysis of abortion law in each state from the perspective of constitutional law, see, Paul Benjamin Linton, *Abortion under State Constitutions:A State-by-State Analysis* (3d ed. 2020). AUL also issues quarterly "Life Litigation Reports" on major cases in federal and state courts. See: aul.org/topics/life-litigation-reports (last visited 8/13/22).

[67] *Overruling Roe v. Wade*, UFFL 27 Life and Learning Conference 182 (2017).

> financial or other association with abortion clinics (as is the case in Germany). Many other regulatory options could be considered . . . .[68]

In *Dobbs*, the emphasis is placed on the prerogative of the states to set their own abortion policies. But insofar as members of Congress, the president, and the governors are elected, they all would be included, at least in principle, in "the people and their elected representatives."[69] The assumption exists that Congress will exercise a policy making role, certainly in regard to all matters of specific concern to the federal government, but also in regard to passing national abortion laws, either abortion on demand legislation (such as the radical pro-abortion Women's Health Protection Act) or legislative proposals prohibiting or regulating abortion (perhaps even some kind of human life bill).[70]

Since *Dobbs* was handed down I only note that President Biden on the national level and several Governors on the State level have issued executive orders promoting abortion.

Of course, federal constitutional amendment proposals could still be passed.[71]

Before the Supreme Court's 1973 abortion decisions the law was progressing at its own deliberate pace toward an ever greater recognition of the rights of the unborn. That process continued forward under *Roe* whenever such rights did not interfere with the Court's right to abortion.[72]

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[68] *Id*.

[69] In his concurrence in *Dobbs* Justice Kavanaugh, in articulating the view that the Constitution "is neutral" on the abortion issue (slip op. at 2, 3, 5, 12), refers to the people and their elected representatives resolving the matter democratically "in the States *or Congress*. . ." (emphasis added) (slip op. at 2-3). Also see the Justice's concurrence, slip op. at 4-5, cited in n. 78 below.

[70] The *2020 Democratic Party Platform* (p. 32) advocated repeal of the Hyde Amendment and codification of "the right to reproductive freedom." The Women's Health Protection Act (WHPA) has been introduced in Congress since 2013, a measure promoted as a national law codifying *Roe*, but in fact goes well beyond *Roe*. In response to the Court not staying enforcement of the Texas Heartbeat law, the WHPA (H.R. 3755) was brought to the House floor, where on September 23, 2021 the measure was approved, 218-211. That measure was then placed on the Senate calendar. On March 28, 2022, cloture on the motion to proceed failed, 46-46. Efforts to pass the WHPA have continued. See H.R. 8296 and S. 4132.

The National Abortion Act (S. 3746), the first such bill to authorize abortion, was introduced by Sen. Robert Packwood (R-OR) on April 23, 1970 (116 Cong. Rec. 12672-3, 12703), and, with the start of the next Congress, was re-introduced (S. 1750) on May 3, 1971 (117 Cong. Rec. 13155-61). When the Court's *Webster v. Reproductive Health Services* (1989) decision was seen to threaten *Roe*'s abortion right, Sen. Alan Cranston (D-CA) and Rep. Don Edwards (D-CA) later in the same year introduced the Freedom of Choice Act (FOCA) (S. 1912, H.R. 3700), a measure that was claimed to enshrine the Court's abortion doctrine as it existed from before 1988. There were hearings and markups, but bills were never brought to the floor. After the Partial Birth Abortion Ban Act was signed into law in late 2003, a substantially revised version of FOCA was introduced by Rep. Jerrold Nadler (D-NY) and Sen. Barbara Boxer (D-CA) (H.R. 3719, S. 2020) in early 2004, the predecessor to the WHPA.

[71] Efforts to pass the ERA as part of the federal constitution have been renewed. On March 17, 2021 the U.S. House of Representatives passed H.J. Res. 17, 218-204, a measure that would remove any deadline for the States to ratify the 1972 ERA. On March 23, 2021 H.J. Res. 17 was placed on the Senate calendar.

[72] See, for example, the 2004 the federal Unborn Victims of Violence Act law (PL 108-212) at: humanlifeaction.org/issues/unborn-victims-of-violence-act (last visited 12/07/21). For a list of 38 states that

Within the pro-life movement persons have held different views on whether the right to life of the unborn was to be found in the Constitution as properly interpreted or whether that right must be explicitly secured in law.[73] Before *Roe* it was a common expectation that the Court should affirm the rights of the unborn. Germain Grisez argued that a case should be brought before the Court to obtain just such a result.[74] Other legal authorities in a similar vein: "Courts should therefore protect the unborn's constitutional rights in any decision they render."[75] In the event of a Hatch-Eagleton Amendment being ratified and *Roe* undone, Dennis Horan in March 7, 1983 testimony on the matter stated: "Finally, I agree wholeheartedly with Professor Wardle's observation that ratification of the amendment would not prohibit the Supreme Court from interpreting the Fourteenth Amendment, at some future date, to protect the right to life of all human beings, including the unborn."[76]

Dobbs, however, as noted just above, takes a different approach. In his concurrence Justice Kavanaugh acknowledges that some legal questions raised by *Dobbs* "are not especially difficult as a constitutional matter." But there are other legal questions (he cites, for example, evaluation of "the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy") that will not be decided by the Court.

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as of 2018 have passed fetal homicide laws, see: nrlc.org/federal/unbornvictims/statehomicidelaws092302 (last visited 12/07/21). Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 Univ. of St. Thomas Journal of L. & Pub. Pol'y 141-55 (2011), places state laws that confer rights on the unborn in five categories: criminal, tort, health care, property, and guardianship law. That the states may not extend protection in the single context of abortion is an anomaly "that is entirely of the Supreme Court's making and one which, at some point, the Court will need to confront and resolve" (155). At: ir.stthomas.edu/cgi/viewcontent.cgi?article=1093&context=ustjlpp (last visited 12/07/21).

[73] Two recent examples. John Finnis presented arguments why the Court should affirm that the unborn "are persons entitled to the protection of its [the Fourteenth Amendment's] due process and equal protection clauses . . . ." *Abortion is Unconstitutional*, First Things 38 (April 2021.

Taking a constitutionally more cautious approach Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio State Law Journal 13 (2013) concluded that the evidence distinctly leans in favor of the plausibility of personhood for the unborn under the Constitution but is not entirely conclusive. In his opinion the resolution of matters of this kind should be left to representative bodies. Under the Fifth and Fourteenth Amendments the state legislatures and Congress have the right to pass legislation regulating abortion and to determine that personhood includes the unborn. "The Supreme Court would not be justified in creating a full-blown right-to-life quasi-statute, in opposition to democratic choices, any more than it would be justified in creating a full-blown right-to-abortion quasi-statute, in opposition to democratic choices (as it wrongfully did in *Roe*)." *Id.*, 72. From within Paulsen's perspective, perhaps the Court could affirm that a democratically passed law acknowledging the personhood of the unborn would fall within the acceptable range of meanings embraced by the Constitution.

[74] *Abortion: the Myths, the Realities, and the Arguments*, 422-23, 442, 459 (1970).

[75] Dennis Horan, Jerome Frazel, Jr., Thomas Crisham, Dolores Horan, John Gorby, John Noonan, Jr., and David Louisell, *The Legal Case for the Unborn Child*, in Abortion and Social Justice, 133 (Thomas Hilgers and Dennis Horan, eds., 1972).

[76] *Legal Ramifications of the Human Life Amendment: Hearings on S.J. Res. 3 before the Subcomm. on Const. of S. Comm. on Judiciary*, 98th Cong. 113 (1983). In the same place Horan also expresses the view that, after the reversal of *Roe*, federal powers to regulate abortion would be "almost certainly secondary" to the authority of the States.

They "will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government."[77]

It is an understatement to say that the public policy challenges before the pro-life movement extend across a broad field. The projections for action includes passage of state and federal laws protecting life and the passage of amendments securing the right to life for the unborn and all other vulnerable human life in both state and federal constitutions.[78]

In the wake of *Dobbs*, with all basic policy determinations to be made by the people and their elected representatives, and not by the Court, the pro-life movement should re-commit itself all the more to the goal of passing a federal constitutional amendment that recognizes the right to life of the unborn and all other vulnerable human life. A Hatch-Eagleton type amendment as a first step amendment would enshrine *Dobbs*' overruling of *Roe* and *Casey* and would close the door to the Court ever finding a right to abortion in the Constitution. Supreme Court decisions can be reversed, laws can be repealed, but a constitutional amendment can be undone only by another constitutional amendment. Unborn human life deserves the secure protection of law that we strive to offer to born human life. The historic process of granting to the unborn the increasing protection of the law must be pressed forward to its completion.

It goes without saying that this is a long-term intergenerational project and will require a significant effort to educate and form the culture with a proper respect for all human life. The project was understood to be a major undertaking in 1973, and would remain so today. In the *Dobbs* world it can be conceived as going forward in stages or phases, involving protective or regulatory legislation, human life bills, and constitutional amendments, with developments taking place at both the state and federal levels. As the bishops stated in their 1974 testimony on a constitutional amendment: "Only the law, in conjunction with a broadly conceived program of education, can effectively extend the horizons of democracy and civil rights to include explicit and full protection for the rights of the unborn child."

The U.S. bishops' *Pastoral Plan for Pro-Life Activities* is needed more than ever now that *Roe* and *Casey* are overruled. The difficult tasks before us require a *determined* and *organized* effort. The process of promoting pro-life legislation and policies at the state and federal levels has been carried out since 1973 with the guiding idea of resisting and overturning the Court's abortion decisions and in securing full protection in law for the right to life of the unborn and all other vulnerable persons. Going forward the focus would be on the latter goal of securing the full protection in law, a goal that has integral links to other key life issues, above all, to assisting women with difficult pregnancies.

The challenge, as great as it is, cannot be laid aside. Archbishop John Roach,

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[77] Justice Kavanaugh's concurrence, slip op. at 10-11.

[78] "But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments." *Id.*, slip op. at 4-5.

speaking for the American bishops in November 5, 1981 congressional testimony, stated: "We are committed to full legal recognition of the right to life of the unborn child, and will not rest in our efforts until society respects the inherent worth and dignity of every member of the human race."[79]

[79] *Const. Amends. relating to Abortion: Hearings before Subcomm. on Const. of the S. Comm. on the Judiciary*, 97th Cong., vol. 1, 415 (1981).