President's Council on Bioethics

The Council met on February 2 and 3 to receive testimony on, and to discuss, "human dignity," and its implications for (a) the treatment of psychological disorders in children and (b) genetic screening.

Its next meeting is April 20 and 21.

Alternatives to Embryo-Destructive Research

In June 2005, a number of scientists and ethicists, including the author as well as the editors of this journal, released a statement in which they endorsed the possibility of oocyte-assisted reprogramming, or OAR.[1] Essentially, the statement's argument is this: if one can reprogram an oocyte so that it produces embryonic-like stem cells without ever having been, even for a single instant, an embryo, then the procedure would be ethically acceptable.[2]

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[1] "Joint Statement on Oocyte-Assisted Reprogramming: Production of Pluripotent Stem Cells by Oocyte-Assisted Reprogramming" (June 20, 2005) has been widely reprinted. See, for example, the Westchester Institute for Ethics and the Human Person Web site, http://www.westchesterinstitute.net/articulos/articulo.phtml?se=38&ca=22&te=12&id=35. The statement was also published in the Verbatim section of the *Quarterly* 5.3 (Autumn 2005): 579–583.

[2] The statement was careful to note that there is a separate ethical issue regarding how the oocytes are obtained. However, if cells can be reprogrammed to become oocytes (as existing research indicates is possible), it would not be "necessary" to obtain them from a woman, thereby obviating ethical problems.

The statement drew strong criticism from those associated with the journal *Communio*.[3] In return, several signers of the statement, again including the author of this column, published responses to the *Communio* critique.[4]

In February 2006, pro-life Senator James Talent of Missouri withdrew as a supporter of the bill, co-sponsored by Senators Brownback and Landrieu, to ban human cloning. Senator Talent did so because he feared that the bill, if passed, might ban OAR, too. In response, the signers of the original OAR statement wrote to Senator Talent and issued a further statement explaining that OAR is distinct from human cloning and would not be banned by the Brownback-Landrieu bill.[5]

In March 2006, the original signatories met to consider a variation of OAR. They agreed that if the nucleus which was transferred to the denucleated egg could be modified so that when placed into the egg it would cause the egg itself to become an embryonic stem cell, such a procedure would be ethically acceptable. This is a variation on the original OAR procedure, by which an egg is reprogrammed to create embryonic stem cells, but not to be one itself from the beginning.[6]

The Supreme Court

Perhaps the most significant developments came not in Court decisions, but through changes in Court personnel.

Confirmations

On January 31, the Senate confirmed Judge Samuel Alito of the Third Circuit to replace Sandra Day O'Connor on the Supreme Court. The Senate vote came seven days after he was reported favorably, on a straight-party line vote, by the Senate Judiciary Committee.

The judiciary hearings were marked by slanderous charges against Alito, none of which were justified.[7] Senator Ted Kennedy, for example, made much of Alito's

[3] Adrian J. Walker, "A Way around the Cloning Objection against ANT? A Brief Response to the Joint Statement on the Production of Pluripotent Stem Cells by Oocyte Assisted Reprogramming," *Communio* 32.1 (Spring 2005): 188–194, and David L. Schindler, "A Response to the Joint Statement, 'Production of Pluripotent Stem Cells by Oocyte Assisted Reprogramming,'" *Communio* 32.2 (Summer 2005): 369–380.

[4] See, for instance, Stuart W. Swetland and William L. Saunders, "Joint Statement on the OAR Proposal: A Response to Criticisms," and E. Christian Brugger, "ANT-OAR: A Morally Acceptable Means for Deriving Pluripotent Stem Cells—A Reply to Criticisms," *Communio* 32.4 (Winter 2005):744–752 and 755–769, respectively.

[5] "A Joint Statement on Human Cloning and Altered Nuclear Transfer" (February 23, 2006), http://www.westchesterinstitute.net/articulos/articulo.phtml?se=38&ca=22&te=12&id=44.

[6] Addendum (April 26, 2006) to "Joint Statement on Oocyte-Assisted Reprogramming," http://www.westchesterinstitute.net/articulos/articulo.phtml?se=38&ca=22&te=12&id=35.

[7] A complete record of the Alito confirmation hearings is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:25429.wais.

membership in a Princeton group of which the senator disapproved. He demanded to inspect records to which he claimed Chairman Specter had denied him access. After an all-night review of the documents by Kennedy's staff, they were unable to find *a single mention* of Alito's name in those documents.

Despite glowing testimony—from the American Bar Association's review panel, from colleagues on the federal judiciary, and from former law clerks, men and women, liberals and conservatives, Democrats and Republicans—the unfounded and vicious insinuations about Alito and his character continued to be made by committee Democrats; at one point, his wife, sitting behind him, fled the hearing room in tears.

The attacks against Alito were clearly motivated by two factors—his Catholic faith and his conservative judicial philosophy. But underlying it all is, as the newspapers put it, "*Roe v. Wade*."[8] This is a very misleading way of putting it, however, and it perpetrates a misconception under which many Americans suffer. The abortion license in the United States is *not* limited to the first trimester. Yet this is what is implied by references to *Roe*. It would be more honest to refer to "Roe, Doe, Casey & Stenberg." *Doe v. Bolton* (1973)[9] is the case that made the abortion license unlimited. *Doe* permitted abortion if a woman's "emotional" or "psychological" health were at risk (in the opinion of the abortionist).

Planned Parenthood v. Casey (1992)[10] is the case in which, by a 5-to-4 vote, *Roe* was upheld, and the plurality announced the intellectually vacuous standard embodied in the mystery passage (i.e., at the heart of liberty is the right to define the meaning of existence and of the universe). The plurality went on to chide pro-life Americans for failing to acknowledge that the Court's abortion opinions had settled the issue, essentially telling them to shut up and go home. *Stenberg v. Carhart* (2000)[11] is the case in which the Supreme Court refused to outlaw partial-birth abortion, even though the American Medical Association stated that the practice was never medically necessary. It required a "health exception" (like *Doe*), leaving it to the abortionist to decide if the woman's health were, under that standard, at risk. This ruling was too much for Justice Anthony Kennedy, who had joined the plurality in *Casey*, and he dissented. As he noted, if a broad "health exception" were always required, the state's interest in unborn human life, which was recognized in *Casey*, would be nullified.

The key vote in the 5-to-4 decision in *Stenberg* was Justice O'Connor. Thus, pro-abortion groups and their Senate Democratic friends feared that by replacing O'Connor, a vote *for* abortion would be lost. They may be right, but throughout the history of the Senate confirmation process, nominees have never been required to pass a "litmus test." Rather, the test has always been whether the nominee is well qualified. Alito, a graduate of Yale Law School and the most experienced judge ever nominated, surely passed that test. Indeed, Senate Republicans had approved the

[8] *Roe v. Wade*, 410 U.S. 113 (1973).

[9] *Doe v. Bolton*, 410 U.S. 179 (1973).

[10] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[11] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

nomination of Judge Ruth Bader Ginsburg, despite her past as counsel for the ACLU, because they judged her qualified by intellect and experience.

Justice Ginsburg, in fact, played a pivotal role in the hearings of the nominee who preceded Alito—that of John Roberts to replace William Rehnquist as Chief Justice.[12] During his hearings, Roberts was repeatedly asked how he would rule on specific cases, and he repeatedly invoked "the Ginsburg standard": just as she had done during her hearings, he would tell the senators how he would approach a case, what his analytical framework would be, but he would not tell them how he would decide their hypothetical case, for, among other reasons, the role of the judge is to decide *particular* cases, and no particular case (with its unique facts and legal issues) was before him. He agreed with Ginsburg that anything else would be improper; indeed, it would demonstrate that he did not have the requisite judicial temperament.[13]

Unfortunately, Democratic senators on the Judiciary Committee seemed unable or unwilling to accept that, in a democracy, the role of a judge is different from that of the legislator. The legislator makes the laws; the judge interprets them. If the judge makes law, he usurps the legislative role and disenfranchises the people who elected those legislators. Since Alito, like Roberts, was a practitioner of judicial restraint, they were determined to oppose him.

Thus, the hearing of Samuel Alito (and, earlier, of John Roberts) revealed a chasm between advocates of judicial activism and those advocating judicial restraint. Given that it was through judicial usurpation that the Court in *Roe v. Wade* made social policy for the entire national on a highly disputed issue, it is no surprise that advocates of judicial activism on the Senate Judiciary Committee voted against Alito. What is more surprising—and sadder—is that nearly every Democrat in the Senate voted against him on the Senate floor. (He was approved by a 58-to-42 margin.) Fortunately, most Americans did not feel that Alito's judicial conservatism—or his previously stated views that *Roe* was wrongly decided (an opinion he shared with liberals such as Harvard professor Laurence Tribe)—disqualified him.[14]

Decisions

The Supreme Court, under the leadership of Chief Justice John Roberts, decided several important cases.

- *Scheidler v. NOW* (Feb. 27)[15]—The Court ruled unanimously that abortion protestors could not be sued under RICO (the Racketeer Influenced and Corrupt Organizations Act) or the Hobbs Act. This result should have been obvious, since those statutes apply only if there has been robbery or extor-

[12] A complete record of the Roberts confirmation hearings is available at http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html.

[13] Roberts was approved by the full Senate on September 29, 2005.

[14] "Poll: Alito Should Sit on High Court," *CNN.com*, January 23, 2006, http://www.cnn.com/2006/POLITICS/01/23/alito/index.html.

[15] *Scheidler v. NOW*, U.S. Supreme Court docket no. 04-1244, decided February 28, 2006.

tion, and neither was involved here. Unfortunately, it took years of litigation and three trips to the Supreme Court before justice was served.

- *Ayotte v. Planned Parenthood on Northern New England* (January 18)[16] — The case concerned whether a parental notification statute in New Hampshire was invalid on its face if it did not provide for a waiver of such notice in "a medical emergency." The Court ruled that, so long as the state asked the Court for a limited ruling (i.e., to invalidate only those portions of the statute that violated the Constitution), such a case could be remanded to the trial court to determine if, in fact, there were any constitutionally defective portions of the statute, which could then (alone) be enjoined. The decision was a blow to Planned Parenthood, whose litigation strategy is always to challenge a statue "on its face" (i.e., before it is applied in a particular case), arguing that if there is any Constitutional defect, the entire statute should be enjoined.
- *Gonzalez v. Oregon* (January 17)[17] —The Court ruled that the federal Controlled Substances Act did not give the U.S. Attorney General the power to prevent such substances from being used to assist suicide in Oregon. (Chief Justice Roberts and Justices Scalia and Thomas dissented. Alito did not participate in the decision.) Although touted in the media as endorsing Oregon's law on assisted suicide, the decision did no such thing; rather, it considered the meaning of terms (written language) in a federal law. If Congress chooses, it can remedy the problem by amending the statute to make it clear that federally controlled substances may not be used to assist suicide.

The Supreme Court also announced that it will hear the case of *Gonzales v. Carhart*,[18] in which abortionists are challenging the validity of the federal ban on partial-birth abortion. It is hoped that Justice Kennedy, who rejected the majority's argument in *Stenberg* that a broad health exception was always required, will join a majority to uphold the federal law.

Political Developments

The March for Life

The thirty-third annual March for Life, under the redoubtable leadership of Nelly Gray, was held in Washington, D.C., on January 23. Once again, thousands upon thousands of people refused to heed the hectoring of the Supreme Court plurality in *Casey*; instead, they marched, urging the Supreme Court to overturn the abortion license in America. On the day of the march, young people packed the Verizon Center, the sports arena in downtown D.C., for a Mass.

Although President Bush did not appear at the rally, he made a live call, which was broadcast to the participants. He told them "to take warmth and comfort from

[16] *Ayotte v. Planned Parenthood of Northern New England*, U.S. Supreme Court docket no. 04-1144, decided November 30, 2005.

[17] *Gonzales v. Oregon*, U.S. Supreme Court docket no. 04-623, decided January 17, 2006.

[18] *Gonzales v. Carhart*, U.S. Supreme Court docket no. 05-0380.

our history, which tells us that a movement that appeals to the noblest and most generous instincts of our fellow Americans and that is based on a sacred promise enshrined in our founding document … will not fail."[19] A few days later, in his State of the Union address, the President remarked,

> A hopeful society has institutions of science and medicine that do not cut ethical corners, and that recognize the matchless value of every life. Tonight I ask you to pass legislation to prohibit the most egregious abuses of medical research: human cloning in all its forms, creating or implanting embryos for experiments, creating human-animal hybrids, and buying, selling, or patenting human embryos. Human life is a gift from our Creator, and that gift should never be discarded, devalued or put up for sale.[20]

In the months ahead, we shall see if Congress responds to this challenge.

Note: One of the great, though largely unsung, heroes of the pro-life cause, Gail Quinn, executive director of the U.S. Catholic Bishops' Secretariat for Pro-Life Activities, has announced that she is retiring.

Democrats Release Statement of Principles

Fifty-five Catholic Democrats in the House of Representatives released a statement of principles on February 28.[21] The statement ignored the primacy that the Church gives to the life issue, what John Paul II called the "first right." It also misrepresented the Church's teaching on conscience, which must always be informed by the teachings of the magisterium.[22] It is to be recalled that a similar statement of principles was released by largely the same group during the campaign of John Kerry for the presidency, following the statement by the Congregation on the Doctrine of the Faith that communion must sometimes be denied to pro-abortion Catholic politicians.[23]

Note: Speaking at the third National Catholic Prayer Breakfast on April 7, Bishop Robert Morlino, the chairman of the board of directors of the National Catholic Bioethics Center, likened such efforts by Catholic politicians to redefining conscience "as a line item veto with regard to elements of the Ten Commandments and the teachings of the Church."[24] An apt analogy, indeed.

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[19] "President Bush Calls 'March for Life' Participants" (January 24, 2006) transcript, White House Office of the Press Secretary, http://www.whitehouse.gov/news/releases/2005/01/20050124-7.html.

[20] George W. Bush, "State of the Union Address" (January 31, 2006), The White House, http://www.whitehouse.gov/stateoftheunion/2006/index.html.

[21] "House Democrats Release Historic Catholic Statement of Principles" (February 28, 2006), Congresswoman Rosa L. DeLaura press release, http://www.house.gov/delauro/press/2006/February/catholic_statement_2_28_06.html.

[22] Second Vatican Council, *Gaudium et spes*, n. 16.

[23] Philip F. Lawler, "Puzzling Exchange: Are the U.S. Bishops 'In Complete Harmony' with Vatican Instructions on Receiving the Eucharist?" *Catholic World Report*, August–September 2004, 28–31.

[24] Bishop Robert C. Morlino, "The Dictatorship of Relativism," keynote address at the third annual National Catholic Prayer Breakfast, April 7, 2006, Washington, D.C., www.catholicprayerbreakfast.com.

International Developments

United Kingdom

British law prohibits the implantation of embryos from IVF clinics without the consent of both genetic parents. However, a British woman, Natallie Evans, sued under the European Convention on Human Rights, arguing that its provisions—especially the right to a family life in article eight—trumped those of the United Kingdom, because the United Kingdom was a signatory to the convention. However, the European Court of Human Rights ruled against her (and went so far as to claim that the convention did not protect the unborn).[25]

United Nations

A report from the Population Division of the United Nations disproved the claims of abortion advocates that legalization decreases maternal mortality. *The World Mortality Report 2005* showed that countries where abortion is legal (such as Russia) often have significantly higher rates of maternal mortality than do nations (such as Ireland) where it is illegal.[26]

USAID

The U.S. Agency for International Development (USAID) imposed sanctions on two groups in Peru. Contrary to U.S. legal requirements, these two groups used U.S. funds to promote legalization of the "morning-after pill."[27]

Columbia

All nations in Latin America prohibit abortion or provide for very limited access to it.[28] Three lawsuits pending in the nation of Columbia allege that international law requires Columbia to make abortion available.

For such an obligation to exist, Columbia would have to be bound by international law to provide for access to abortion. Such a legal obligation could arise under either a treaty or customary international law, but there is no treaty that requires abortion to be legalized.

(It must be noted, however, that the U.N. Human Rights Committee recently ordered Peru to provide reparations to a girl who had been denied an abortion.[29] As

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[25] "Woman Loses Frozen Embryos Fight," *BBC News*, March 7, 2006, http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/4779876.stm.

[26] Bradford Short, "U.N. Data Show Banning Abortion Doesn't Increase Maternal Mortality," *Friday Fax* 9.9 (February 17, 2006), Catholic Family and Human Rights Institute, http://www.c-fam.org/FAX/Volume_9/faxv9n9.html. The full U.N. report may be found at http://www.un.org/esa/population/publications/worldmortality/WMR2005.pdf.

[27] Joseph A. D'Agostino, "USAID Cracks Down on Abortion Promoters," *Human Events Online*, December 19, 2005, http://www.humaneventsonline.com/article.php?id=10978.

[28] Yuri Mantilla and William L. Saunders, Jr. "The Latin American Consensus: Human Life Must Be Protected," *Insight* (May 9, 2002), Family Research Council, http://www.frc.org/get.cfm?i=IS02E2.

[29] Juan Forero, "Push to Loosen Abortion Laws In Latin America," *New York Times*, December 3, 2005, A6.

in Columbia, abortion is not legal in Peru. The Human Rights Committee claimed that a treaty, called the Covenant for Civil and Political Rights, required legalization of abortion. This is an absurdity—the treaty in question provides that every human being has the inalienable right to life, which must be protected in law.[30] Peru should either ignore the committee or denounce the treaty.)

Further, there is no right under customary international law to abortion. In fact, the very existence of laws making abortion illegal in Latin America rebuts any such allegation, for they make it impossible for abortion proponents to satisfy the central requirement of proving customary international law—that is, a consensus among nations on the point in question.

On April 2, hundreds of thousands of Columbians marched in favor of keeping abortion illegal.[31] Still, it is possible that the Columbian Constitutional Court will ignore the people's will and rule that Columbia must legalize abortion. As in the United States, pro-abortion lawyers seek to achieve in the courts what they cannot achieve at the ballot box. In Columbia as in the United States, the judicial usurpation of politics is the greatest threat democracy faces.[32]

Scandal in Korea

In February and March 2004, a South Korean researcher, Hwang Woo Suk, made an announcement that, in Mohammed Ali's words, "shocked the world." In an article in *Science*,[33] Hwang announced he had successfully cloned human embryos, and that he had extracted embryonic stem cells from them. This was stunning news, as it would have been the first successful attempt to do so.[34]

In the months that followed, Hwang became a national and international celebrity. Students in South Korea even wore T-shirts with his name and photograph on them. He became a symbol of national scientific achievement. Building on his success and fame, Hwang announced in October 2005 an international consortium for embryonic stem cell research.[35]

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[30] The Covenant on Civil and Political Rights, part III, 6 (1), states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

[31] "El Divino Niño fue sacado de su Iglesia en el 20 de Julio para protestar contra el aborto," *Il Tiempo*, April 3, 2006, http://eltiempo.terra.com.co/bogo/2006-04-03/ARTICULO-WEB-_NOTA_INTERIOR-2823502.html.

[32] Robert P. George, *Judicial Activism and the Threat to the Constitution* (Washington, D.C.: Family Research Council, 2005).

[33] Woo Suk Hwang et al., "Evidence of a Pluripotent Human Embryonic Stem Cell Line Derived from a Cloned Blastocyst," *Science* 303.5664 (March 12, 2004): 1667–1674, published online February 12, 2004.

[34] An account of the whole affair, from boom to bust, can be found in Anthony Faiola and Rick Weiss "South Korean Panel Debunks Scientist's Stem Cells Claims," *Washington Post*, January 10, 2006, A09.

[35] "International Stem Cell Bank Open," *BBC News*, October 19, 2005, http://news.bbc.co.uk/1/hi/health/4355722.stm.

Then the fabric of his success began to unravel. First, concerns were raised that he had exploited women in obtaining the egg cells (or oocytes) that he used during cloning. Hwang answered this charge by asserting that the eggs had been *donated* by students in his laboratory. Concerns then mounted that Hwang had used his power over these students to coerce those donations.[36]

Next, reports surfaced that Hwang had misrepresented the number of embryonic stem cell lines he had produced. Other researchers noticed, in photographs of the cell lines, that some were exactly the same (i.e., the photos showed duplicates of the same cell line).[37] Hwang then admitted that he had misrepresented the number of lines, but minimized the misrepresentation by claiming he still had a significant number of new lines.

Then questions began to arise about the validity of the underlying research itself. Hwang denied those charges, but *Science* eventually withdrew the published articles.[38] Other scientists whose names were listed as co-authors with Hwang withdrew their names.[39] Finally, after Hwang admitted that he had fabricated the lines, his license to conduct such research was revoked by the South Korean government.[40]

The fallout from these events has been significant. For instance, an ethics panel at the University of Pittsburgh recommended disciplining Hwang's co-author, Gerald Schatten, on a later paper.[41] Schatten used Hwang's fabrications to apply for (and receive) a $16.1 million federal grant for stem cell research.

Some researchers and scientific entrepreneurs worry that the fallout will discredit all embryonic stem cell research.[42] That is precisely the wrong reaction to the scandal. Hwang rushed into this research for notoriety and financial reward. These are the factors that have always driven human cloning and embryonic stem cell

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[36] Constance Holden, "Korean Cloner Admits Lying about Oocyte Donations," *Science* 310.5753 (December 2, 2005): 1402–1403.

[37] Gretchen Vogel, "Landmark Paper Has an Image Problem," *Science* 310.5754 (December 9, 2005): 1595.

[38] David Kennedy, "Editorial Retraction," *Science* 311.5759 (January 20, 2006): 335, published online January 12, 2006.

[39] Nicholas Wade, "American Co-Author Wants His Name Off Stem Cell Paper," *New York Times*, December 14, 2005, http://www.nytimes.com/2005/12/14/science/14CELL.html.

[40] Jae-Soon Chang, "Stem Cell Researcher's License Revoked," *Associated Press*, March 16, 2006.

[41] Woo Suk Hwang et al., "Patient-Specific Embryonic Stem Cells Derived from Human SCNT Blastocysts," *Science* 308.5729 (June 17, 2005): 1777–1783, on which Schatten served as senior author. The panel's report can be found at University of Pittsburgh, "Summary Investigative Report on Allegations of Possible Scientific Misconduct on the Part of Gerald P. Schatten, Ph.D." (February 8, 2006), http://newsbureau.upmc.com/PDF/Final%20Public%20Report%202.08.pdf.

[42] "Stem Cell Scandal a Tragedy, Scientists Say," *Reuters*, January 12, 2006.

research. As pointed out repeatedly by the authors of this column, the editors of this journal, and many others, the excitement over embryonic stem cell research is media-driven hype.[43] To date, there have been no successful human treatments using embryonic stem cells, while the number of such successes with nonembryonic stem cells keeps climbing.[44] If embryonic stem cell research were as promising as many claim, the venture-capital markets would rush to fund it. But they do not.

State Developments

California

The classic example of scientific entrepreneurs using taxpayers' dollars to fund what the venture-capital markets will not is, of course, California. There, following Proposition 71, lawsuits alleging conflicts of interest for the body that awards the grants, the California Institute for Regenerative Medicine (i.e., that some of the same people who serve with that body are applying for grants from it) have prevented taxpayers' funds from going to the grantees. The suits also allege that the institute is violating state requirements for open meetings as well as for state oversight. Arguments concluded in these trials on March 2.[45]

Missouri

Sadly, many states are rushing to imitate California's ill-conceived efforts and establish their own state mandates to conduct (with state funds) human embryonic stem cell research. One such state is Missouri. As is too often the case, the pending ballot initiative is misleading, claiming to ban cloning while actually permitting it for research purposes. A lawsuit has been filed challenging the wording of the ballot initiative.[46]

South Dakota

The South Dakota legislature passed, and the governor signed, a law banning all abortions.[47] (Similar bills were introduced in Mississippi[48] and Alabama,[49] following passage of the South Dakota bill.) The law was challenged by pro-abortion

[43] Kevin Shapiro, "Lessons of the Cloning Scandal," *Commentary* 121.4 (April 2006).

[44] Bradley R. Hughes, Jr. "Real-World Successes of Adult Stem Cell Treatments," *Insight* (October 6, 2004), Family Research Council, http://www.frc.org/get.cfm?i=IS04J01.

[45] The cases are *People's Advocate v. Independent Citizens' Oversight Committee*, Superior Court of California for Alameda County, HG05-206766, and *California Family Bioethics Council v. California Institute for Regenerative Medicine*, HG05-235177.

[46] Rob Roberts, "Lawsuit: Stem Cell Ballot Language Is Misleading," *Kansas City Business Journ*al, November 29, 2005, http://kansascity.bizjournals.com/kansascity/stories/2005/11/28/daily15.html.

[47] There is dispute as to whether the law provides an exception where the life of the mother is concerned.

[48] "Mississippi Abortion Bill Dies This Session," *Associated Press*, March 27, 2006.

[49] Bob Johnson, "Alabama Legislators Consider Bills to Ban Abortions," *Associated Press*, March 25, 2006.

groups, which, under an unusual state procedure, can mount a referendum drive to place the issue directly before the citizens of the state. It is not certain whether the issue will eventually go to the voters, but that seems likely.

Many pro-life Americans are divided over the advisability of the strategy South Dakota is pursuing. Some fear it invites speedy invalidation in the federal courts, and could even lead to a Supreme Court decision affirming *Roe v. Wade* and other abortion decisions. (Even with the addition of Alito and Roberts to the Court, there are not currently a majority of justices on the Supreme Court who have questioned the central holding of the Court's abortion jurisprudence—specifically, that there is a federal constitutional right to abortion.)

Other pro-life Americans believe legislators are morally obligated to act for the common good and in accordance with the truth, and should, therefore, pass laws that invalidate or restrict abortion, leaving it to the courts to do their job and uphold such laws.

One thing is certain: the South Dakota legislature deserves to be applauded for refusing to submit to judicial usurpation. As noted above, the usurpation of the legislative role by the judiciary is the single greatest threat we face. The South Dakota legislature has refused to submit to the "act of raw judicial power" (in the words of Justice Byron White, dissenting in *Roe v. Wade*) by which the Supreme Court imposed abortion on this country. They refused—as did those who participated in the March for Life, as well as President Bush—to accept the Court's order in *Casey* to surrender their rights as American citizens to call for change in unjust laws.

Conscience Protection

Under pressure from abortion advocates, Wal-Mart decided its pharmacies would make the "morning-after pill" available. However, Wal-Mart permitted its individual pharmacists to refrain from doing so.[50]

Marriage Protection

The editors of this journal asked me to cover the topic of marriage protection, on which, though not involving bioethics, they felt their readers would want to be informed.

Congress

A vote on the Marriage Protection Amendment is scheduled for June in the Senate. It is expected to receive more than fifty votes, but fewer than the sixty-seven needed to approve a constitutional amendment. (A vote will take place in the House of Representatives in July, where it should receive the necessary two-thirds majority.)

Massachusetts

The Massachusetts Supreme Judicial Court, which has legalized homosexual marriage, ruled that out-of-state couples from states where homosexual marriage is

[50] "Wal-Mart Standoff on 'Morning After' Pill," *UPI*, March 24, 2006.

illegal could not, under an older state law, be married in Massachusetts.[51] This does not, of course, prevent married homosexual couples who are resident in Massachusetts from moving to another state and claiming benefits due to married couples under that state's law. Thus, the real possibility remains that the U.S. Supreme Court will have to decide whether, under the full-faith-and-credit clause of the U.S. Constitution, another state would be required to recognize as a valid marriage a homosexual marriage from Massachusetts.

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