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After Dobbs: What's Next?

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By James G. Hanink | September 2022

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Opinions abound about the U.S. Supreme Court's *Dobbs v. Jackson Women's Health Organization* ruling (June 24). Here in California, highly publicized protests have featured women carrying signs calling for "Abortion on Demand, without Apology." In Los Angeles, four activists chained themselves to City Hall. Thereupon, according to their press release, they dispensed a "river of fake blood" while wearing bloody pants "to represent the women who will die" because of *Dobbs*. (On the flipside, a columnist for the *Los Angeles Times* dismissed memorials to preborn victims of abortion as political ploys.) Since the May 2 leak of the *Dobbs* draft, more than 30 Catholic churches have been vandalized. The furious are in full throttle.
We pro-lifers, in contrast, have welcomed the chance to celebrate a long overdue decision. Gloating has been minimal. We have long said that both women and their preborn children deserve better than abortion and that we should love them both. Here and now, we have a duty to step forward, perhaps even more than in the past.

But count on the controversy to continue and increase. Expect the tumult to persist. Even so, forewarned, we need to look ahead. How should we assess *Dobbs*, a six-to-three ruling, in terms of its internal structure and logic? Let's start, though, with a preliminary question. How many people have read the ruling? Probably very few. The document, with appendices, runs to 213 pages. But its introductory "Syllabus" is just eight pages — easy enough homework.

In my view, *Dobbs* is a decent first step. But its own reasoning doesn't allow for the next step. It's a step that justice requires: ending the abortion industry's destruction of innocent children.

Straightway, of course, *Dobbs* rejects both *Roe v. Wade* (1973) and *Planned Parenthood of Southeast Pennsylvania v. Casey* (1992). There is no constitutional basis, it argues, for a federal "right" to abortion. But neither is there a constitutional basis for rejecting abortion. Fundamental abortion decisions, it says, are best left to the states. State legislatures can measure the will of the people far better than can the Supreme Court, which has no mandate to usurp legislators. Justices who rightly interpret the U.S. Constitution will understand that the document itself says as much.

Of course, the Constitution allows for amendments, and some pro-lifers have proposed a Personhood or Human Life Amendment that would guarantee a preborn child's right to life. The process, however, is daunting. Proposing an amendment requires either a two-thirds vote of both Houses of Congress or a request for an amendment by two-thirds of the states. The amendment itself must then be ratified by three-fourths of the states. The great difficulty in doing so encourages judicial activism. Perhaps it's time to consider how to make that process less arduous.

In reading *Dobbs*, we see that both sides — the majority in favor of overturning *Roe* and *Casey*, and the minority against it — argue about the character of settled law based on *stare decisis,* that is, standing by things as decided. Their arguments, taken together, also provide an instructive legal history; it is one that illustrates the differing lenses of historians. As expected, both sides argue at length about whether overturning *Roe* and *Casey* would violate the 14th Amendment's demand for due process. In both these disputes, I support the majority. Two points are decisive. First, precedent is not a straitjacket and, second, due process applies to well-grounded rights. Whether abortion is such a right is the very question at hand.

Both sides also argue at length about whether reversing *Roe* and *Casey* would wrongly unsettle the expectations that the longstanding abortion industry has brought about. Just what expectation is at issue? Is it that we can rely on a federal license to destroy unborn children? But that expectation parallels the reliance slave-owners had on a national license to own human beings as pivotal to their agricultural economy, an expectation that could hardly override the humanity of the slaves.

Nonetheless, both sides agree that they should argue on the basis of moral neutrality. Ironically, neither side will admit that neutrality is impossible. Both sides

limit themselves to a policy of pure *procedural* justice. That is, whatever the Constitution prescribes is proper policy, and justice is its deliverance.

And so, as directed, we are to return to the states. Of course, the Constitution of California is far less fixed than that of the United States, as are those of the other states. Let's consider what's in play in the Golden State.

With our legislature's urging, we Californians will be voting this November to "enshrine" a right to abortion in our Constitution. Proposition 1 amends Article I of the California Constitution by adding the following language:

The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.

Bishop Jaime Soto of Sacramento had just the right response. "The state's political leadership," he said, "continues to stubbornly cling to the practice of abortion and the throwaway culture. It is reprehensible to enshrine in the State Constitution the practice of abortion even until moments before delivery. The language of [the proposition] is overly vague, reckless and could further endanger children, especially among the poor and marginalized in our state."

The bishop's warning notwithstanding, the proposition is expected to pass, and easily. But no majority, in California or any other state, no matter how compelling its might, is enough to make an abortion license right. As St. Thomas Aquinas teaches, law is an ordinance of reason to advance the common good, put forward by the authority who has care of the community. But it is always and everywhere against justice to kill the innocent. Any judicial license to kill the innocent betrays the common good. Any such license is a "failed" law. To borrow from Pope Francis, there can be no foundation in justice, and hence none in law, to "hire an assassin" to kill an innocent preborn child.

History, of course, is replete with failed attempts at law. Each is an attack on justice. We need to call such abuses by name. Our shared vocation is to join Christians, from the time of the first-century *Didache*, in showing our neighbors that destroying

preborn babies cannot be an act of justice, much less of love. Nor, to be sure, can hating those whom we do not convince.

John Carroll, the first bishop of the United States, optimistically wrote that Christians are no longer routinely brought before tribunals for the exercise of their faith. But, he added, “There are still remaining many occasions of honoring it, less splendid but perhaps not much less difficult and meritorious than those of the primitive martyrs.” In this regard, *Dobbs* changes nothing. We must still step into the breach and proclaim Christian truth, come what may. And the time for us to engage in the Church’s “mission of proclaiming the Gospel of life in all the world and to every creature,” as Pope St. John Paul II put it, is nigh.