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Global Reproductive Governance after *Dobbs*

LYNN M. MORGAN

When the US Supreme Court in a decision handed down in June 2022 stripped away the constitutional right to abortion and gave decision-making power over the matter back to the states, people wondered how other countries might be affected. There is no doubt that the impact of *Dobbs v. Jackson Women's Health Organization* will be felt most acutely by citizens of the 14 states that, at last count, had already taken advantage of the ruling to ban most or all abortions. But as legal chaos and medical uncertainty ensues within the United States, the *Dobbs* decision also sheds light on the workings of global reproductive governance as a growing antiabortion coalition threatens reproductive rights movements elsewhere.

In 1973, the *Roe v. Wade* decision was said to set an example for the world, because it made the United States one of the first countries outside of Western Europe to legalize abortion. Over the past 25 years, more than four dozen countries have liberalized their abortion laws, according to the Center for Reproductive Rights. Abortion is now legal even in some predominantly Catholic countries, like Ireland, that once banned the procedure entirely.

The most dramatic reversals happened quite recently in Latin America. Argentina legalized abortion in 2020, following Uruguay, which had done so in 2012. The Mexican constitutional court decriminalized abortion in September 2021. In February 2022, Colombia's constitutional court legalized abortion through 24 weeks of gestation, giving it the hemisphere's second most liberal abortion laws, after Canada. It is a truism of the abortion rights movement that “victories in one

country inspire other countries,” as Mariana Ardila of Women's Link Worldwide said. But if the United States was a trendsetter when it legalized abortion in 1973, will it also set a global precedent in 2022 by reversing that ruling?

MAPPING THE DEBATE

There is a broad consensus across United Nations human rights agencies that governments should protect gender rights and that the decriminalization of abortion will enhance the equality, dignity, health, and right to life of pregnant people. This consensus began to coalesce decades ago, culminating in the International Conference on Population and Development in Cairo in 1994 and the Fourth World Conference on Women in Beijing in 1995. Since then, and notwithstanding the *Dobbs* decision, many national governments and scores of nongovernmental organizations have continued to promote sexual and reproductive rights, with increasing support from courts and legislatures. Just three months after *Dobbs*, the Supreme Court of India issued a decision allowing pregnancy termination until the twenty-fourth week of gestation, regardless of marital status. Such legal changes are possible only because of a shift in cultural attitudes, led largely by feminist organizers. The Colombian Causa Justa movement, for example, led a campaign to “socially decriminalize” abortion, educating the public about the importance of reproductive integrity and autonomy.

In this global context, the *Dobbs* decision looks like a step backward. Of all the countries that have changed their abortion laws in the twenty-first century, reproductive rights supporters note that the United States is among the very few—including Nicaragua (2006), Honduras and Poland (2021), and Hungary (2022)—to have limited the grounds for voluntary interruption of pregnancy.

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Those countries also happen to be sliding toward authoritarian rule, an observation that led a *Washington Post* columnist to caution that the rollback of reproductive rights is everywhere “consistent with declining democracy.”

The Center for American Progress went further, warning that the *Dobbs* decision places the United States alongside “notorious rights-abusing regimes.” The Guttmacher Institute declared that the ruling makes the United States an “outlier on the global stage.” The dissenting justices—Stephen Breyer, Sonia Sotomayor, and Elena Kagan—agreed, noting, “The global trend . . . has been toward increased provision of legal and safe abortion care.”

From the perspective of a growing coalition of antiabortion groups, however, the *Dobbs* decision looks like a step forward. Members of this coalition include Christian religious and right-wing organizations, many of which are based in the United States with overseas affiliates: ADF International, the American Center for Law and Justice, C-Fam, Family Watch International, Focus on the Family, the Heritage Foundation, Human Life International, the Political Network for Values, and the international wing of Concerned Women for America, among others. Their movement depends on forging alliances between antiabortion and profamily NGOs, religious fundamentalists, and right-wing politicians, both nationally and transnationally.

Members of the coalition have united around the claim that UN treaty-monitoring bodies have fabricated new rights that do not exist in international law and forced them on other countries against their will. One of their slogans is: “There is no international right to abortion.” They agree that the United States is an outlier, but of a different sort. They claim that the US government coerces other countries to legalize abortion, and that the *Roe* decision was out of step with international trends by not limiting pregnancy terminations after 14 weeks of gestation, as many European countries do. Elyssa Koren of the conservative Christian legal advocacy organization ADF International argues that the justices were right to resist outside pressure, and she hopes that *Dobbs* will inspire the global prolife movement.

The antiabortion movement is currently working to expand its global reach. Tensions are

perhaps highest on the floor of the UN, where many progressive global reproductive rights policies originate. Although the United States is a major UN funder and claims to champion universal human rights, historically it has refused to sign or endorse many UN human rights treaties. This makes the US role decisive for both sides, because Washington may choose to support or obstruct UN initiatives. The United States is one of the few countries that have not ratified the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which protects women’s sexual and reproductive health rights.

Inconstancy by the United States at the UN is mirrored by partisan polarization at home. When Republicans are in power, they enforce the Mexico City Policy (also known as the Global Gag Rule), which prevents US foreign assistance from funding organizations that provide abortions or advocate for abortion rights. The Trump administration was particularly receptive to the antiabortion lobby, appointing numerous antiabortion activists to top

government posts and allowing them to represent the United States in UN forums. When the Democrats are in power, they rescind the Global Gag Rule and return to supporting sexual and reproductive health and

rights in foreign policy and at the UN.

The global antiabortion movement is ideologically anti-globalist. Its members regularly assail “international pressure” on countries to legalize abortion, even as they assemble and empower a global coalition to do the opposite. In the *Dobbs* decision, only the dissenting justices mention the global trend toward expanding safe and legal abortion care. The majority stubbornly ignores the legal logic developed by constitutional courts in other countries.

The *Dobbs* ruling rests on two key arguments: (1) the US Constitution does not confer any right to obtain an abortion; and (2) any constitutional right to abortion requires evidence that the procedure is, as Justice Samuel Alito wrote, “deeply rooted in this Nation’s history and tradition.” Not once in its 80-page opinion does the majority discuss how the global reproductive landscape has changed since *Roe*, or how global trends might affect the US conversation. The words “United Nations” and “human rights” do not

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appear in their text. With these omissions, the majority reveals its partisan inclinations and disavows the importance of global developments. Foreign observers may care about what the justices say, but the justices apparently do not reciprocate.

BRUTAL CONSEQUENCES

Abortion rights supporters argue that by allowing states to ban abortion outright, the *Dobbs* decision discriminates against those who are already disadvantaged in American society: poor people, young people, immigrants, incarcerated people, indigenous people, and people of color. Abortion bans will expose them to greater economic hardship, surveillance, prosecution, and criminalization.

By forcing people to carry pregnancies they do not want and bear children they cannot support, the *Dobbs* decision calls up dystopian memories of Romania. Between 1966 and 1989, the Romanian dictator Nicolae Ceaușescu prohibited birth control and abortion. The resulting boom in unwanted pregnancies led to back-alley abortions and forced childbearing that left thousands of women dead and children abandoned in dismal state-run orphanages. This legacy still lingers, amid reports that abortion is again becoming harder to access in Romania.

There are many other examples of how abortion bans lead to tragedy. Ireland's infamous Magdalene Laundries were operated by Catholic nuns to house unwed pregnant women whose infants were often stolen and given away in illegal adoptions. Ireland saw more heartbreak in 2012, when a 31-year-old dentist, Savita Halappanavar, died in Galway of sepsis during a miscarriage. Doctors blamed the country's abortion laws for preventing them from performing an emergency pregnancy termination, even as Halappanavar's condition worsened and it became clear that the fetus could not survive.

The brutal consequences of abortion bans are also evident in El Salvador, which banned all abortions in 1998. Zealous enforcement of the law led to several poor women being convicted of aggravated homicide after suffering obstetrical emergencies. Some were later released from prison, but only after a 2021 ruling by the Inter-American Court of Human Rights. Although the United States has never been a paragon of reproductive justice, these stories are a reminder that the *Dobbs* decision could make things much worse.

AN ENERGIZED MOVEMENT

The global antiabortion coalition views the *Dobbs* decision differently—as a step toward a world that values life from conception to natural death. An amicus brief filed in the *Dobbs* case bore the signatures of 141 antiabortion lawyers and politicians from several countries, anticipating a day when “states [will] have the sovereign right under international law to protect the lives of the unborn.” The *Dobbs* decision energized this movement.

As Human Life International stated, “If the largest, most powerful democracy in the world can turn its back on legalized abortion, then maybe pro-lifers in nations worldwide can bring about the same outcome.” Similarly, the Political Network for Values, a self-described global platform to promote family, life, and freedom, anticipates that a global “domino effect” in the wake of *Dobbs* could halt the momentum to establish abortion as an international human right.

States approach matters of reproductive governance from different starting points. Liberal democratic governments tend to expand reproductive and sexual rights—often (but not always) including the right to abortion—in the name of enhancing gender equality, bodily autonomy, dignity, nondiscrimination, and economic opportunity. Conservative, authoritarian, and populist governments, on the other hand, often oppose reproductive and sexual rights. They create common cause with fundamentalist religious factions, like-minded nations, and right-wing NGOs, often scapegoating women and sexual minorities for a rash of social ills. They blame the allegedly radical abortion agendas and gender ideologies of their opponents for stoking social anxieties and economic precarity, while wrapping themselves in nationalism and claiming to represent the traditional values of life, faith, and family.

This is the dark side of global reproductive governance, where right-wing governments and organizations are trying to wrest sexual, reproductive, and family matters from the realm of international human rights. Their short-term strategy is consistent with the *Dobbs* ruling: they want to return the authority for regulating abortion “to the people and their elected representatives.” Their long-term goal is to outlaw abortion and compel states to protect prenatal life, in ways that are not inconsistent with Catholic doctrine.

The *Dobbs* decision is a perfect example of how this strategy operates. It offers a model for how to

invoke local culture, history, and traditions in the service of sovereignty and states' rights, while disregarding popular opinion or international trends. It is consistent with the global coalition's playbook, which holds that sovereign nation-states should be allowed to set their own laws related to life and family matters, based on their unique history and traditions, without international interference from multilateral bodies. But historians charge that such claims about history and traditions, like those in the *Dobbs* decision, are often selective and inaccurate.

IGNORING INTERNATIONAL HUMAN RIGHTS

One glaring omission in the *Dobbs* decision is any consideration of international human rights. This is not too surprising. Conservative US Supreme Court justices typically reject the relevance of international law. The late Justice Antonin Scalia said that while foreign law may be instructive, it is irrelevant to interpreting the US Constitution. But why would antiabortion conservatives be so obsessed with denying an international right to abortion, if they consider it irrelevant? C-Fam explained it this way: "The strategy of abortion-rights groups is to capture UN agencies and the UN human rights machinery, get them to recommend the legalization of abortion internationally, and thereby allow abortion lobbyists to claim in national courts that a customary, international human right to abortion has emerged."

If this happens, antiabortion legal scholar William Saunders predicts dire consequences for the United States. It is imperative, he says, to prevent abortion from being "viewed as an international norm," because that might allow a future Supreme Court to decide that abortion is permissible despite the overturning of *Roe*. Antiabortion activists further worry that if this happens, any entity that opposes abortion could be labeled a human rights violator.

By refusing to acknowledge international norms and treaty law, the US Supreme Court insists that the international community respect its sovereignty. Sovereignty is a key word within the global antiabortion movement. Trump administration statements used it frequently, as when the US State Department submitted a memorandum to the UN Human Rights Council stating, "The United States believes in the sovereign right of nations to make their own laws to protect the unborn, and rejects any interpretation of international human rights to require any State to provide access to abortion."

This allowed antiabortion activists to step up attacks against the Organization of American States (OAS), which oversees the regional human rights framework. Rulings by the Inter-American Court undercut their ability to rely, as they once did, on a prolife reading of the American Convention on Human Rights. It was at their behest that then-Secretary of State Mike Pompeo cut funding to the OAS in 2019, after Republican senators charged the Inter-American Court and its sister organization with promoting abortion across the hemisphere. Animosity toward the OAS prompted a contingent of US antiabortion groups to hold up OAS Secretary General Luis Almagro's reelection bid in 2020, until he relented to their demand to support a "fundamental" right to life. The anti-abortion coalition pressures the OAS to support some rights over others in the name of sovereignty.

Although the *Dobbs* decision has no direct bearing on the realm of international human rights, it is consistent with an approach that favors national constitutions over international law. It gives fodder to those who wish to shield states from the purview of international human rights accords, agencies, and courts when it comes to setting abortion policy. It shows that a constitutional court can prioritize radical sovereignty, putting the nation's purported history and traditions ahead of international treaty obligations. And it allows religious activists to cite *Dobbs*, as ADF International did, in affirming "that states have an important interest in limiting abortion and protecting 'vulnerable and innocent life' from the moment of conception." The court's emphasis on states' rights is instructive, and the global antiabortion coalition is heedful.

CONSTITUTIONS AND VALUES

Abortion activists on either side of the issue always want national constitutions to reflect their values, which explains why so many constitutional reforms center on abortion. Ireland's abortion policy was driven by such reforms, first in 1983, when a constitutional amendment prohibited abortion, then again in 2018, when that amendment was repealed. Chileans had fairly easy access to therapeutic abortion (permissible in cases of rape, incest, and so-called birth defects, or to save a pregnant woman's life) from 1931 until 1989, when the military dictatorship rewrote the constitution and left the incoming democratic government with a total ban that human rights activists have tried, so far unsuccessfully, to reform. The High Court of

Kenya affirmed a constitutional right to abortion in March 2022 and instructed the parliament to implement corresponding reforms.

Countries whose constitutions enshrine rights to “equality, autonomy, dignity, and bodily integrity” are more likely to expand sexual and reproductive rights, according to political scientist Druscilla Scribner. But constitutional courts are entitled to seek guidance from a variety of sources, including those that originate outside their own countries.

The *Dobbs* majority opted for a narrowly nationalist, originalist interpretation of the US Constitution. As Justice Brett Kavanaugh wrote, “The issue before this Court is what the Constitution says about abortion.” By this, Kavanaugh meant that the Constitution is silent on abortion. This narrow constitutionalist reading allowed him to ignore arguments that have surfaced elsewhere, such as in other countries’ constitutions, treaties, or international law. The majority did not even rely on the court’s own legal precedents supporting the right to abortion; rather, it found (and stated 16 times) that “the right to abortion is not deeply rooted in the Nation’s history and tradition.” It did not mention that abortion opponents have failed since 1973 to win ratification of a Human Life Amendment.

Through a series of omissions, the court also deliberately opted to overlook the international norms and standards influencing high courts in other countries that have recognized access to abortion as a constitutional guarantee. It ignored a landmark 2012 Inter-American Court ruling that the right to life is not absolute, that embryos are not juridical persons, that women’s rights must be considered above fetal rights, and that protection of life before birth must be gradual and incremental. It ignored decisions made by other constitutional courts—such as Brazil’s—that consider “women’s rights to health and well-being to be protected in the constitutional architecture,” as scholars Marta Rodriguez de Assis Machado and Rebecca J. Cook have noted.

Although the US justices ignored foreign constitutional jurisprudence in drafting the *Dobbs* decision, foreign jurists were nonetheless paying close attention to the US legal reasoning. Will other countries follow the US Supreme Court’s lead by

prioritizing national constitutions? Or will they rely on international human rights norms?

The *Dobbs* decision was closely read in the Latin American countries that recently legalized abortion. A report from Mexico said President Andrés Manuel López Obrador convened his advisers to ask whether they could use *Dobbs*-like arguments to dismantle the constitutional right to abortion there. Antiabortion law professors at the Catholic University of Argentina parsed the implications of *Dobbs* for their country. They had plenty of critiques, including that the right to life is absolute and should never be subject to regulation by secular law. They called for national constitutional courts to seize the opportunity to interpret the constitution in accordance with natural law. They hope that Argentina’s high court will find in its constitution an affirmative right to life—something *Dobbs* did not do—which would bode well for the pending lawsuits that seek to have the 2020 legalization of abortion declared unconstitutional.

Outside the United States, many constitutional courts seek guidance not from natural law, but from international human rights norms established through their treaty obligations. Macarena Sáez of Human Rights Watch points out that most democratic countries now use the language and logic of human rights to prevent their citizens from being forced into pregnancy and compulsory childbearing. In the Americas, most countries have ratified the American Convention on Human Rights and accept the jurisdiction of the inter-American human rights system. The Inter-American Court has actively expanded reproductive and sexual rights in recent decades. The rulings that legalized abortion in Argentina, Mexico, and Colombia were heavily influenced by those decisions.

But the *Dobbs* decision ignored all that, just as it dismissed public opinion as an “extraneous concern.” The six justices of the majority focused instead on a much-maligned interpretation of “deeply rooted” history, which many read as code for Christian values. The approach is similar to the cultural relativism argument used by antiabortion groups at the United Nations. As the Association for Women’s Rights in Development (AWID) explains, anti-rights actors often appeal to unique “cultural specificities,” sometimes by adopting the language

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of secular human rights, as a way to dilute human rights protections at the UN Human Rights Council.

Twenty years ago, US Catholic legal scholars Mary Ann Glendon and Paolo G. Carozza mounted a low-key, erudite prolife campaign, arguing that Latin America has a distinct history and tradition of human rights. This unique history, they argued, justifies giving Latin American judiciaries a degree of latitude to tailor human rights in ways that fit the tenets of social Catholicism: respect for family and parental rights, fetal rights, and natural rights. They illustrated their arguments with carefully chosen historical examples, ignoring the violent history of colonialism as well as contemporary human rights movements (including liberation theology, women's rights, land rights, and Indigenous rights). In this way, they tried to set the stage for a regional reinterpretation of human rights that would be consistent with Pope John Paul II's 1995 *Evangelium Vitae* encyclical about the inviolability of human life.

Their argument leads straight to *Dobbs*, insofar as *Dobbs* argues that abortion is antithetical to “deeply rooted” history and traditions in the United States. It is a profoundly sectarian, revisionist view of history. Like the reasoning in *Dobbs*, it is consistent with the principle of subsidiarity. The goal of these scholars is to take these matters out of the international realm and return them to states, which they depict as the best way to ensure respect for cultural traditions.

GLOBAL REVERBERATIONS

Dobbs demonstrated to Americans what others—in Poland, Ireland, and Chile—already know, which is that history does not march steadily toward greater reproductive freedom. The Supreme Court decision that overturned *Roe* will be felt most keenly by the estimated 80 million US citizens who, according to the Center for Reproductive Rights, have already lost access to abortion services. But it was widely condemned by world leaders, the European Parliament, and several UN agencies and human rights experts.

In response to *Dobbs*, CEDAW issued a statement calling on the United States to ensure women's access to safe and legal abortion. The UN Committee on the Elimination of Racial Discrimination (which monitors implementation of a treaty that the United States has ratified) urged it to ensure abortion access and culturally respectful maternal health care.

It is impossible to separate the *Dobbs* decision from the rise of authoritarian rule. Recent investigations by the European Parliamentary Forum, AWID, and openDemocracy document the spread of antiabortion and “profamily” activities across Europe, Africa, and Latin America. The *Dobbs* decision is resonating around the world as a disturbing reminder that rights are not sacrosanct with authoritarianism on the rise.

The antidote to the US Supreme Court's insularity is international collaboration that places human rights at the center of reproductive health and justice movements. Feminist organizers from Argentina, Colombia, Ireland, and Mexico are leading the way. Working with feminist attorneys, they analyzed the 1973 *Roe* decision and crafted a human rights-based legal strategy that is smarter, more sophisticated, and more coherent than the reasoning in *Roe*.

They are now sharing their strategies, in hopes that their momentum and commitment to social mobilization, in the so-called green wave, will rub off on their US allies. Akila Radhakrishnan, president of the Global Justice Center, an NGO working for international gender equality, says that human rights “should be the framework that all US advocates utilize going forward.” This is in contrast to the privacy argument used in *Roe* or the narrow originalism deployed in *Dobbs*.

International human rights attorney Mary Hansel goes even further, suggesting that the US government should file a complaint against the *Dobbs* decision with the Inter-American Commission on Human Rights. It would likely be a futile gesture, as Hansel admits, because the United States does not acknowledge the jurisdiction of inter-American human rights bodies. But it would underscore the legitimacy of a human rights approach for the United States as well as for the rest of the Western hemisphere.

The effects of *Dobbs* on global reproductive governance will reverberate for years. Meanwhile, the ruling should be interpreted as one element of an ambitious, multifaceted global antiabortion movement that is hiding in plain sight. *Dobbs* shows how that movement operates and what its next steps will be. Specifically, the movement works to gain control over national legislatures with the aim of rewriting or amending constitutions to protect fetal rights. It also works to control the selection of judges—on domestic as well as international human rights commissions and courts—aiming to install those who will offer antiabortion

interpretations of constitutions, conventions, and treaties.

The antiabortion movement ignores or disregards any international covenants or conversations with which its members disagree. Working as a bloc, the movement aims to thwart reproductive and sexual rights initiatives at the UN and the OAS by citing national sovereignty and local history and traditions. Generating controversy over abortion in multilateral forums allows it to turn around and argue that abortion is too controversial to be adjudicated at the UN. The global antiabortion coalition insists that each state should have the sovereign right to set its own policies with respect to life, family, and population. Each of these elements is visible in the *Dobbs* decision.

Dobbs highlights the contrast between an insular, nationalist, anti-globalist, and pro-sovereignty approach and a universalist human

rights strategy for achieving reproductive rights, health, and justice. The framework of human rights is not without its intellectual problems—including its androcentrism, reliance on utopian moral universalism, and lack of attention to intersectional forms of oppression. But the concept has nevertheless proven to be a powerful motivator and political tool for feminist movements in countries as diverse as Colombia, Iran, Nepal, and Nigeria, to name just a few. The global antiabortion coalition is a formidable adversary that deserves careful monitoring, though so far it has not matched the momentum achieved by the global abortion rights revolution. In spite of the *Dobbs* decision, global reproductive governance seems to be on a trajectory to secure human rights to dignity, gender equality, health, bodily autonomy, and freedom from violence and coercion. ■