

Arguments from International Human Rights Law in the Supreme Court's *Dobbs v. Jackson Women's Health Organization* Abortion Case

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INTRODUCTION

The State of Mississippi asked the U.S. Supreme Court to overturn *Roe v. Wade* in *Dobbs v. Jackson Women's Health Center*. Legal experts believe the Supreme Court may side with Mississippi and overturn the 1973 decision that read a right to abortion into the U.S. Constitution, returning the prerogative to legislate on abortion to state legislatures. Oral arguments for the *Dobbs* case will be heard on December 1, 2021. One of the issues that may be raised is whether abortion is an international human right. It is a question of primary importance. If abortion is an international right, then, whether *Roe v. Wade* was correctly decided is arguably irrelevant because the issue will have been entirely removed from the hands of the American People.

The court received six briefs based on arguments from international human rights law. Three briefs argue that there is an international human right to abortion, including a brief submitted by UN human rights experts.¹ Three argue against it, including a brief submitted by the Center for Family and Human Rights (C-Fam), the publisher of the *Definitions* series.² This *Definitions* paper will evaluate the claims that abortion is an

international human right asserted in the international law briefs submitted to the court.

Abortion is not an international human right under UN human rights treaty law

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A brief from UN human rights mandate holders is perhaps the most significant of the international briefs in the *Dobbs* case. It is the first intervention of its kind by UN mandate holders before the U.S. Supreme Court and arguably violates the UN Charter's prohibition on interference in the internal affairs of sovereign nations.³ The brief makes very aggressive claims about abortion being an international right, but fails to engage U.S. constitutional law in a significant way. It relies solely on the non-binding opinions of UN experts instead.

The UN mandate holders claim in their brief that abortion is a right under international human rights law.⁴ They say that prohibitions on abortion access breach the right to equality and non-discrimination; the right to privacy, the right to live, the right to health, and the right to be free from torture and cruel, inhuman, or degrading treatment.⁵ However, they rely entirely upon the views and recommendations of UN treaty bodies and UN special procedure. Essentially, the mandate holders rely upon documents drafted by themselves or others like them. These UN bodies and experts do not have authority to issue binding interpretations of UN treaties. Their views and recommendations are neither binding nor authoritative, and cannot be legitimately cited in a U.S. court as evidence of an international right to abortion.

In reality, no UN treaty establishes a right to abortion or even mentions abortion, as the C-Fam brief demonstrates.

In reality, no UN treaty establishes a right to abortion or even mentions abortion, as the C-Fam brief demonstrates.⁶ The only UN treaty that even comes close to expressly addressing abortion—the Convention on the Rights of Persons with Disabilities—mentions “sexual and reproductive health,” and even that language in the treaty was adopted with the express understanding that there is no international right to abortion and that the treaty would not change that.⁷

The UN mandate holders even claim that human rights agreements expressly or implicitly exclude legal protections for unborn children. The UN mandate holders claim that the Universal Declaration of Human Rights (UDHR) only protects human rights “from the moment of birth” because Article 1 of the UDHR states that all human beings are “born free and equal.”⁸ However, this is a very narrow reading of Article 1 of the UDHR,

and it does not take into account the broader context of the treaty.

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The Preamble of the UDHR opens by recognizing the “inherent dignity” and “equal and inalienable rights of all members of the human family.” The broad formulation “all members of the human family” was deliberately used to not exclude anyone from the protections of human rights law, and no delegation ever suggested that children in the womb were excluded from the protections of the covenant when the declaration was drafted. Moreover, Article 2 of the UDHR plainly states that “everyone is entitled to all the rights and freedoms set forth” in the Declaration “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹

The drafters of the declaration never intended for children in the womb to be excluded from its protections. As the C-Fam brief shows, this is also evidenced by future treaties which implicitly and explicitly recognize that children in the womb should be legally protected. For example, the International Convention on Civil and Political Rights (ICCPR) prohibits the application of the death penalty to pregnant women and the Preamble of the Convention on the Rights of the Child (CRC) expressly declares that children in the womb are legally protected—facts willfully ignored by the UN experts.¹⁰

Perhaps the most puzzling aspect of the brief from UN mandate holders is the attempt to impose an international obligation on the United States based on treaties that the U.S. government has never ratified. To make the claim that abortion is an international right, the UN mandate holders did not just rely on the views and recommendations made by the UN treaty bodies that track the implementation of treaties ratified by the U.S. government; they also relied on the views and recommendations of UN treaty bodies that track the implementation of treaties to which the United States is not even a party, including the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). However, because these treaties are not ratified by the U.S. government, they are irrelevant for the purpose of determining the United States’ international obligation.¹¹

Relying upon the Vienna Convention on the Law of Treaties, which establishes standards for the interpretation of treaties, the UN mandate holders say that even if the U.S. has not ratified these treaties, as *signatories* to CEDAW and CRPD, the U.S. government must refrain from taking actions that “defeat [their]

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object and purpose.”¹² However, even if the U.S. is a signatory, this does not create a legal obligation. Only treaties ratified by the U.S. government become law. Moreover, the U.S. is not party to the Vienna Convention. Therefore, the U.S. is not bound to the CEDAW and CRPD treaties.

Furthermore, to imply that the “object and purpose” of those treaties is to impose an international right to abortion is similarly baseless.

Even if the United States had ratified the treaties relied upon by the UN mandate holders, it still would not be obligated to allow for limitless legal abortion because none of the treaties upon which they rely create a right to an abortion. In fact, there is not a single UN treaty in existence today that creates an obligation for its signatories to legalize abortion.

The mandate holders say that even though abortion is not mentioned in UN treaties, UN treaty bodies have interpreted treaty provisions to include a right to abortion. However, this analysis fundamentally misconstrues the authority of treaty bodies. Any pronouncements by treaty bodies that claim an international right to abortion are *not* binding upon state parties, and exceed the mandates of the treaty bodies.

Only states party to a treaty have the final authority to interpret treaty provisions and to determine their respective obligations under the treaty. The only exception to this fundamental rule of international law is when states delegate that authority to international tribunals or arbitration mechanisms. This was plainly not the case when the treaty bodies were established—far from it. UN member states were careful to craft UN human rights treaty clauses about treaty bodies to avoid any language that would suggest they have any judicial authority. For example, instead of “opinions and orders” the treaty bodies may only issue “views and recommendations.” The fact that treaty bodies frequently refer to their work as “jurisprudence” does not alter this fact.

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Treaty bodies and UN mandate holders simply do not have the authority to expand the commitments of states party to a given treaty. Sadly, the human rights organizations that submitted another international law brief to the Supreme Court: Human Rights Watch, Amnesty International, and the Global Justice Center, also ignore this fact and parrot the non-binding opinions of UN experts as if they could replace the text of painstakingly negotiated UN treaties.

Abortion is not a human right under customary international law

In fact, the ICPD agreement famously rejected an international right to abortion.

In addition to claiming that an international right to abortion is established by a series of UN treaties, the UN mandate holders also claim that abortion is a human right under customary international law. They claim that the 1994 International Conference on Population and Development (ICPD), a conference of national leaders, UN representatives, and members of civil society held in Cairo, Egypt, acknowledged that “‘reproductive embrace certain human rights’ and that ensuring safe abortion access is critical to women’s reproductive health.”¹³ This claim entirely misconstrues the ICPD agreement, and avoids express caveats in the agreement that were crafted to exclude an international right to abortion. In support of their claim, the mandate holders cite four paragraphs of the ICPD agreement (7.3, 8.19, 8.20(a), and 8.25), none of which mention a right to abortion.¹⁴ Paragraph 8.19 only refers to “unsafe abortion” as a potential cause for maternal mortality.¹⁵

In fact, the ICPD agreement famously rejected an international right to abortion. The agreement expressly states that abortion should never be used as a methods of family planning, that governments should do everything possible to reduce recourse to abortion, and that measures to change abortion laws should only occur through national legislative processes.¹⁶

The UN mandate holders also cited the Fourth Conference on Women held in Beijing in 1995 which recognized the right of women to “make decisions concerning reproduction free of discrimination, coercion and violence.”¹⁷ However, the document resulting from the Beijing Conference repeats the *same caveats* included in the ICPD document.¹⁸ Neither conference created an international right to abortion, nor did they cast abortion in a favorable light.

Permissive abortion regimes are the exception, not the norm

Abortion advocates not only claim that there is an international right to abortion, but also that most of the world has legalized abortion and the countries that have not yet made it legal are trending in that direction.

Pro-abortion comparative law scholars who filed an amicus brief in the *Dobbs* case claim that the fetal viability standard established in *Roe* and *Planned Parenthood v. Casey*, the 1992 case that upheld and refined *Roe*, is consistent with comparable

jurisdictions' abortion laws, which provide for abortion access up to or around viability.¹⁹ They claim that a “methodologically rigorous comparative law analysis looks beyond a single component of law”²⁰ and that “comparable countries, which on their face, set shorter time limits on abortion access than the United States, often provide greater flexibility in obtaining abortions after those limits pass, which exceptions for a broad range of circumstances.”²¹

The comparative scholars claim that “in the past 25 years, a number of countries have explicitly” liberalized their abortion regimes “in recognition that reproductive rights are protected under international human rights law.”²² However, they provide no evidence to support their claim that countries are liberalizing their abortion regimes in recognition of a so-called international right to abortion and not from pressure exerted by UN treaty bodies or merely as an exercise of their sovereign right to create their own national laws.²³ Even if such a trend were due to pressure from UN treaty bodies and mandate holders, the treaty bodies still cannot modify the obligations under a treaty unless it were universally recognized.

According to a recent Pew Research Study, roughly 50 countries only allow abortion to save the life of the mother without exception.

The brief does not seriously consider the fact that most countries in the world, with few exceptions, prohibit abortion in their criminal codes, even if broad (or broadly interpreted) exceptions exist.²⁴ These countries report that they would enforce their criminal laws against abortion in circumstances not excepted by law, according to a recent UN survey.²⁵ According to a recent Pew Research Study, roughly 50 countries only allow abortion to save the life of the mother without exception and in the recent past some countries, including Poland and El Salvador, as well as subnational legislatures within Mexico, the U.S., and others have tightened restrictions on abortion access – not removed them.²⁶ Even in countries where abortion is available on demand, early gestational limits are common, though exceptions where the health of the mother is in danger or where the pregnancy is the result of rape or incest, are also common. In fact, according to the UN Global Abortion Policies Project, which surveys the world's countries, eighty-four percent of countries report a gestational limit of less than twelve weeks in such situations.²⁷

However, the analysis of the pro-abortion comparative law scholars focuses on only three countries and one subnational state: Canada, the United Kingdom, New Zealand, and New South Wales in Australia. Their brief ignores liberal democracies with common law traditions that protect unborn children before viability, such as Ireland, Cyprus, Trinidad & Tobago, Jamaica, India, Hong Kong, and Uganda. Unlike the U.S., which permits

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abortion on demand without restrictions up to the moment of birth unless states pass limiting legislation not constituting an “undue burden,” other liberal democracies with common law traditions maintain anti-abortion laws in their criminal codes and prohibit abortion at or around viability.²⁸ For example, Israel allows abortion on demand until twenty-four (24) weeks of pregnancy, but any woman seeking an abortion after this point must petition a committee in person to request an exemption.²⁹

The scholars compare the U.S. abortion regime to that of Australia, asserting that the United States should model itself after this country. However, in Australia, abortion is regulated at the sub-national level and every state has authority over its own jurisdiction. For example, New South Wales permits abortion up to twenty-four (24) weeks, whereas in Tasmania, termination is only legal up to sixteen (16) weeks, and up to only fourteen (14) weeks in the Northern Territory. If the U.S. were to model itself after Australia, then *Roe* and *Casey* should be reversed to allow for states to regulate abortion rather than the federal government.

In addition, the scholars claim that exemptions to laws that limit abortion are liberally applied and less restrictive than pro-life amici claim.³⁰ However, in Australian states, exemptions are difficult to obtain, with some states requiring two doctors out of a six-doctor panel to determine that abortion is necessary due to a “severe medical condition.”³¹ In many states, doctors who conscientiously object to performing abortions are not required to make referrals to abortion providers.³² Proof of residency is also required to access abortion in certain territories.³³ The scholars claim that, unlike the U.S., other liberal democracies with a common-law tradition, have government-funded healthcare, which cover the costs relating to contraception and abortion. However, in Australia, except for South Australia and the Northern Territories, abortions are not provided to women free of charge under the public health system, and they are costly.³⁴

CONCLUSION

Although international actors, UN experts, and UN treaty bodies may steadfastly and collectively assert that abortion access is a human right, to date no international right to abortion has been established by treaty or by custom. In fact, the ICCPR and CRC both allow for the protection of unborn children. In addition, treaty bodies have no authority to interpret treaties or expand the commitment of state parties. Therefore, sovereign states retain the right to outlaw and regulate abortion access.

Therefore, the U.S. Supreme Court should reject the baseless claims of the international abortion advocates and protect all U.S. citizens from conception until death.

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DEFINITIONS is published monthly by the Center for Family & Human Rights (C-Fam).

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Although some countries have liberalized their abortion regimes to increase abortion access, there is no proof that these changes are in response to an international consensus that abortion is a human right. The ICPD agreement reflects the current consensus on abortion and it not only discourages abortion, but also reasserts the authority of sovereign states to regulate abortion.

Abortion proponents claim that permitting laws like the Mississippi Gestational Age Act would make the U.S. an outlier among liberal democracies. However, many similarly situated countries, including liberal democracies with common law traditions, protect life in the womb. Moreover, under the ICCPR, which does not exclude children from the right to life, the United States may protect the lives of unborn children. Therefore, the U.S. Supreme Court should reject the baseless claims of the international abortion advocates and protect all U.S. citizens from conception until natural death.

Endnotes

- 1 Brief of United Nations Mandate Holders as Amici Curiae in Support of Respondents, *Thomas E. Dobbs, et al. v. Jackson Women's Health Organization, et al.* (2021) (No. 19-1392) ("Brief for UN Mandate Holders"); Brief of Human Rights Watch, Global Justice Center, and Amnesty International as Amici Curiae in Support of Respondents, *Thomas E. Dobbs, et al. v. Jackson Women's Health Organization, et al.* (2021) (No. 19-1392) ("Brief for Human Rights Watch"); and Brief for International and Comparative Legal Scholars as Amici Curiae Supporting Respondents, *Thomas E. Dobbs, et al. v. Jackson Women's Health Organization, et al.* (2021) (No. 19-1392) ("Brief for International Comparative Legal Scholars").
- 2 *Id.*
- 3 See UN Charter, Art. 2.4
- 4 Brief of UN Mandate Holders, *supra*, p. 2 ("Authorization for the positions and views expressed herein, in accordance with the independence of the amici's positions and respective mandates, was neither sought nor given by the United Nations, including the Human Rights Council, the OHCHR, or any of the officials associated with those bodies").
- 5 Brief of UN Mandate Holders, *supra*, p. i.
- 6 Brief of The Center for Family and Human Rights as Amici Curiae in Support of Petitioners, *Thomas E. Dobbs, et al. v. Jackson Women's Health Organization, et al.* (2021) (No. 19-1392) ("Brief of C-Fam").
- 7 *Id.* at 17-20.
- 8 Brief of UN Mandate Holders, *supra*, p. 8.
- 9 Universal Declaration of Human Rights, Art. 2.
- 10 Brief of C-Fam, *supra*, p. 4-15.
- 11 Pursuant to Article 2, Section 2 of the U.S. Constitution, the President has the sole power to negotiate treaty agreements and the Senate has the sole power to approve them. Once the ratification process is complete, the treaty provisions are enforceable, but not before.

- 12 Brief of UN Mandate Holders, *supra*, at 4; Brief of Human Rights Watch, *supra*, p. 16.
- 13 Brief of UN Mandate Holders, *supra*, p 10.
- 14 See Rep. of the Int'l Conf. on Pop. and Dev., Cairo, September 5-13, 1994, U.N. Document No. A/CONF.171/13/Rev.I (1994).
- 15 *Id.*
- 16 *Id.*; Brief of C-Fam, *supra*, p 17-20.
- 17 Brief of UN Mandate Holders, *supra*, p 10.
- 18 See Rep. of the Fourth World Conf. on Women, Beijing, September 4–15, 1995, U.N. Doc. No. A/CONF.177/ 20/Rev.1, at paragraph 106(k) (1995); Brief of C-Fam, *supra*, p 19.
- 19 Brief for International Comparative Legal Scholars, *supra*, p 6
- 20 *Id.*
- 21 *Id.*
- 22 *Id.* at 7.
- 23 See Rebecca Oas, *Jamaica Under Pressure: A Caribbean nation faces mounting demands by international actors to change its abortion laws*, <https://c-fam.org/definitions/jamaica-under-pressure-a-caribbean-nation-faces-mounting-demands-by-international-actors-to-change-its-abortion-laws/> (Last visited October 27, 2021).
- 24 Brief of C-Fam, *supra*, p 11.
- 25 *Id.*
- 26 See Angelina E. Theodorou and Aleksandra Sandstrom, How abortion is regulated around the world, <https://www.pewresearch.org/fact-tank/2015/10/06/how-abortion-is-regulated-around-the-world/> (Last visited October 24, 2021).
- 27 United Nations Department of Economic and Social Affairs, World Population Policies 2017: Abortion laws and policies – a global assessment, https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesapd_2020_world_population_policies_highlights.pdf (Last visited October 24, 2021).
- 28 See Center for Reproductive Rights, The World's Abortion Laws, <https://maps.reproductiverights.org/worldabortionlaws> (last visited July 15, 2021).
- 29 See Jewish Virtual Library, Israel Health & Medicine: Legal Terms of Abortion, Rabbi Yitzchok Breitowitz, <https://www.jewishvirtuallibrary.org/legal-terms-of-abortion-in-israel> (Last visited October 15, 2021).
- 30 Brief of International Comparative Scholars, *supra*, p. 10.
- 31 See Western Australia Act 1911- Section 334 (7a).
- 32 See Medical Practitioners Amendment Bill 2002.
- 33 See John Williams, David Plater, Anita Brunacci, Sarah Kapadia and Melissa Oxlad, *Abortion: A Review of South Australian Law and Practice* (South Australian Law Reform Institute, Adelaide, 2019), <https://law.adelaide.edu.au/system/files/media/documents/2019-12/Abortion%20Report%20281119.pdf> (Last visited October 15, 2021).
- 34 See Mridula Shankar, Kirsten I. Black, Philip Goldstone, Safeera Husainy, Danielle Mazza, Keerry Petersen, Jayne Lucke, and Angela Taft, *Access, equity and costs of induced abortion services in Australia: a cross-sectional study*, Australian and New Zealand Journal of Public Health Vol. 41, Issue 3, p. 309-314, <https://onlinelibrary.wiley.com/doi/full/10.1111/1753-6405.12641> (Last visited October 15, 2021).