

MONDAY, DECEMBER 13, 2021

GUEST COLUMN

Dobbs could put US out of step with the global community

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On December 1, the U.S. Supreme Court heard oral argument in *Dobbs v. Jackson Women's Health Organization*, a challenge to Mississippi's prohibition on abortions after 15 weeks. The question accepted by the court for review is stark: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Mississippi raised the stakes even further after certiorari was granted, asking the Supreme Court to overrule *Roe v. Wade* and *Planned Parenthood v. Casey* in their entirety.

Since *Roe v. Wade* was decided by the Supreme Court nearly 50 years ago, there has been a recognized right under the U.S. Constitution to a pre-viability abortion (that is, up to approximately 22-23 weeks of pregnancy). And since *Roe*, generations of women have relied on that right. Yet, there now appear to be six justices ready to uphold Mississippi's 15-week ban, despite that it directly violates *Roe* and *Casey*, the 1992 Supreme Court decision reaffirming *Roe's* holding on abortion bans and articulating the "undue burden" standard governing the constitutional inquiry for abortion regulations since.

The main question coming out of argument is whether the current Supreme Court majority will fully overrule *Roe* and *Casey*

now, or instead will provide for some interim regression — such as affirming the constitutionality of Mississippi's 15-week ban without providing guidance on more aggressive bans. Chief Justice John Roberts, for instance, indicated an interest in holding that fetal viability is no longer the appropriate constitutional test for assessing bans. Such an approach would allow Mississippi's approach, overrule the central holdings of *Roe* and *Casey*, and lead many states to ban abortions at 15 weeks or earlier. But such a holding would not go so far — at least not now — as the approach apparently favored by several other justices: overruling *Roe* and *Casey* altogether and holding that the U.S. Constitution offers no protection against state laws forcing women to give birth against their will.

A number of legal and factual misconceptions underpinned key questions asked at oral argument. For example, some justices proceeded from the unfounded notion that overruling precedent to retract constitutional rights is somehow typical practice or consistent with Supreme Court precedent. Yet, in every example of overruling precedent cited — including *Brown v. Board of Education* (overruling "separate but equal" racial segregation) and *Lawrence v. Texas* (overruling allowing states to criminalize same-sex relationships) — the decision to overrule was rights-enhancing, not rights-retracting.

Just as overruling *Roe* and *Casey* would be an extraordinary regression legally speaking, practically speaking, such a decision would place the United States in a retrogressive position worldwide with respect to reproductive rights policy, and would make women less safe by forcing many to seek unsafe abortions. (Together with our colleagues, we filed an amicus brief in *Dobbs* making these points on behalf of the International Federation of Gynecology and Obstetrics.)

At oral argument, Chief Justice Roberts suggested that the settled state of U.S. constitutional law — prohibiting pre-viability abortion bans — relegates the United States to the company of countries such as North Korea. However, the majority of countries worldwide that permit legal access to abortion do so at

least until viability in all or many cases, including Canada (which has no gestational limit), Great Britain (which has a viability line and allows for exceptions after), and most of Europe (which nominally has pre-viability gestational limits but allows for broad socio-economic and health exceptions). Moreover, the global trend in recent decades has been overwhelmingly toward liberalizing abortion laws. Indeed, the few countries that have recently adopted more restrictive abortion laws — such as Poland and Nicaragua — are autocratic regimes that Justices hostile to *Roe* and *Casey* understandably refrained from noting.

Critically, this strong global trend toward increasing legal access to abortion has led to a significant reduction globally in the incidence of unsafe abortion,

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maternal morbidity, and maternal mortality. This tracks the U.S. experience: After *Roe*, deaths and hospitalizations due to complications from unsafe abortions in the United States dropped almost immediately to zero. That is because legal abortion and safe abortion (i.e., abortion performed hygienically and by a skilled provider) are highly correlated: When abortion care is legal, almost all abortions are safe; when it is not, safety is compromised due to limited and inferior options.

Abortions still occur in the face of legal restraints — indeed, global experience consistently demonstrates that legally restric-

ting abortion does not meaningfully reduce the total number of abortions. But the number of abortions that are unsafe multiplies in the face of legal restrictions, with catastrophic results for women's health. Unsafe abortions are among the top four causes of maternal health and disability worldwide, and almost all occur in countries with restrictive abortion laws. Every year, tens of thousands of women worldwide die and millions are hospitalized from unsafe abortions. These harms are disproportionately suffered by poor women and women of color. Thus, the decision to prohibit abortion is not about whether or how many

abortions will be performed, but how those abortions will be performed — safely or unsafely.

A decision by the Supreme Court to overrule or limit *Roe* and *Casey* would buck the global trend toward access to legal abortion care and thus toward safety. Twenty-four states are poised to prohibit abortion entirely if permitted to do so. Women in these states who do not wish to continue their pregnancies and who are unable to travel to another state where abortion is legal will be forced to carry their pregnancies to term and give birth or seek out abortion extralegally. Although some may be able to safely terminate their own

pregnancies using medication, many will turn to unsafe abortion methods, resulting in wholly preventable deaths, disabilities, and attendant harms to women, their families, and communities.

However the Supreme Court ultimately justifies its decision in *Dobbs*, one thing is clear and unrefuted: upending decades of rights-enabling precedent and allowing states to prohibit previability abortion will not meaningfully reduce abortion. Rather, particularly for those without the resources and information to access safe abortion care, the court's decision will lead to more unsafe abortions, jeopardizing women's lives and well-being.