FOREIGN LAW IN *DOBBS*: THE NEED FOR A PRINCIPLED FRAMEWORK

By Sital Kalantry[*]

In a decision that sent shockwaves across the country, the United States Supreme Court overturned *Roe v. Wade*, a nearly 50-year-old precedent that had enshrined the right to abortion in the U.S. Constitution.[1] For comparative and international scholars, one striking feature about *Dobbs v. Jackson Women's Health Organization* is that foreign law was used by the conservative justices in their majority opinion.[2] In the past, justices appointed by Republican administrations had opposed references to international and foreign law in U.S. Supreme Court cases. Indeed, Justice Thomas, who joined the majority opinion in *Dobbs* and also referred to foreign policies and laws in another recent abortion case,[3] had a decade ago vociferously argued against the use of foreign law in a series of rights-expanding cases, namely, *Atkins v. Virginia*,[4] *Roper v. Simmons*,[5] and *Lawrence v. Texas*.[6]

Although many scholars celebrated the use of international and foreign sources in cases with rights-expanding outcomes, other liberals raised caution flags. If international and foreign law can be used to expand rights, it can also be used to retrench them. This is exactly what the Court did in *Dobbs*. *Dobbs* underscores that judges and lawyers need to develop a principled framework for when and how to use foreign and international law sources.

---

[*] Associate Dean for International and Graduate Programs and Associate Professor of Law, Seattle School of Law.

1. 410 U.S. 113 (1973).
2. Dobbs v. Jackson Women's Health Organization, 597 U.S. ___, 142 S.Ct. 2228 (2022).
3. Box v. Planned Parenthood of Ind. & Ky., Inc., 587 U.S. ___, 139 S.Ct. 1780, 1790-91 (2019) (Thomas, J. concurring).
4. 536 U.S. 304 (2002).
5. 543 U.S. 551 (2005).
6. 539 U.S. 558 (2003).

In this essay, I describe a moment in the Supreme Court's history a decade ago when the use of foreign and international law piqued and the responses to this trend at that time. I explain why the surface-level analysis conducted by the Supreme Court of foreign law sources in *Dobbs* and *Box v. Indiana* is problematic. I give an example of abortion law in India to illustrate the need for judges who cite foreign statutes and case law to utilize a more robust contextual and in-depth analysis of the laws in question. I then conclude with some preliminary observations about a framework for foreign and international sources in U.S. court decisions.

I. FOREIGN LAW IN PRIOR U.S. SUPREME COURT CASES

About a decade ago, the Court issued three decisions in which it cited international and foreign law sources. First, the Court referred to an amicus brief for the European Union in finding that executing people with intellectual disabilities violated the Eighth Amendment in *Atkins v. Virginia*.[7] Second, in *Roper v. Simmons,* the Court cited the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the Criminal Justice Act from the United Kingdom in holding that it is unconstitutional to impose capital punishment for crimes committed by someone at the time they were younger than eighteen years old.[8] Third, in *Lawrence v. Texas*, a decision striking down a Texas law making intimate gay relationships a crime, the Court cited three decisions of the European Court of Human Rights.[9]

The Court's use of foreign and international law sources in these three cases drew wide criticism from the justices who dissented from those opinions as well as conservative scholars. Justice Scalia (joined by Justice Thomas), dissenting in *Roper v. Simmons*, stated that "the basic premise of the court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."[10] In *Atkins v. Virginia*, Chief Justice William Rehnquist (joined by Justice Thomas) declared: "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."[11] Justice Scalia (joined by Thomas) argued in dissent that the majority's "discussion of these foreign

7. *Atkins*, 536 U.S. at 316-17 n.21.
8. *Simmons*, 543 U.S. at 576-78.
9. Lawrence v. Texas, 539 U.S. 558 (2003).
10. *Simmons*, 543 U.S. at 624 (Scalia, J., dissenting).
11. *Atkins,* 536 U.S. at 324–35 (Rehnquist, C.J., dissenting).

views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta."[12]

At that time liberals strongly embraced the use of foreign precedent by judges.[13] Conservative scholars, on the other hand, opposed it. John Yoo, for example, argued that using foreign precedents to determine outcomes transfers federal authority to bodies outside of the United States and is against the limited role of judicial review.[14]

II. FOREIGN LAW IN RECENT U.S. SUPREME COURT ABORTION CASES

Though conservative judges are typically reluctant to use foreign sources, when it comes to restricting abortion rights, the Supreme Court has embraced foreign law and practices. Justice Thomas referred to the trend in Denmark where few children with certain genetic anomalies are born in his concurrence in *Box v. Indiana*.[15] He raised trends in foreign countries to suggest that the same outcomes would result in the United States if states did not restrict abortion. His use of comparative sources, however, presented a very superficial understanding of foreign contexts. An in-depth look at the examples he cited suggests that the same results would not occur in the United States. Unlike the United States, where one-third of women refuse to obtain fetal genetic tests, nearly all pregnant people in Demark do obtain such tests because the government makes tests for fetal disabilities widely available. As a result, as I have argued elsewhere, we would not observe the same consequences of permitting disability-selection abortion in the United States as are seen in Denmark.[16]

In the *Dobbs* decision as well, the Court (mis)used foreign law. Justice Alito writing for the majority referenced the laws of Canada, China, Netherlands, North Korea, Singapore, and Vietnam to argue that those were the only countries in the world that allow abortion on request

12. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

13. Harold Hongju Koh pointed out that the submission of amicus briefs by the European Union and former U.S. diplomats was a strategy used by law professors and death penalty abolitionists to introduce international materials into U.S. death penalty jurisprudence, which expanded protections for criminal defendants. *See* Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1109-29 (2002).

14. John Yoo, *Peeking Abroad: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385, 387–400 (2004).

15. *Box*, 139 S.Ct at 1790 (Thomas, J. concurring).

16. Sital Kalantry, *Do Reason-based Bans Prevent Eugenics*, 107 CORNELL L. REV. ONLINE (Oct. 13, 2021), https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2021/10/Kalantry-107.1-reformatted.pdf.

up until twenty weeks.[17] Justice Alito's goal in referring to foreign law sources was to suggest that the United States' liberal abortion policy was out-of-sync with other nations in the world. What is lacking in the references to foreign law in *Dobbs* is a contextual analysis of the laws and policies.

In an amicus brief in *Dobbs* signed by numerous comparative and international law scholars (including myself), we pointed out that using a comparative law analysis requires more than just counting numbers, as courts must also look at the context of the laws.[18] A surface-level examination of foreign sources conducted in *Dobbs* has long been rejected by modern comparative law scholars. The majority in *Dobbs* should have examined how foreign countries that might appear to have more restrictive abortion laws actually support reproductive decision-making in other ways such as through universal healthcare, access to abortion services, and access to contraception. Had it conducted an in-depth review of global abortion laws, it would have also found that there are ample exceptions to time limits for when abortion is allowed in the laws of many countries.

Indeed, the dissent in *Dobbs* points out that "[m]ost Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health."[19] The dissent further argues that "[t]he global trend . . . has been toward increased provision of legal and safe abortion care."[20] According to the Center for Reproductive Rights, the United States is only one of four countries that have adopted restrictive abortion laws in the last twenty-five years along with Poland and Nicaragua.[21] A total of fifty countries have liberalized their abortion laws in the last twenty-five years. Since 2020 alone, Argentina, Thailand, Mexico, South Korea, Colombia, and New Zealand eased their abortion restrictions.[22] International human rights bodies and norms also recognize that women should have the right to determine when

17. *Dobbs*, 142 S.Ct. at 2243 ("To support this Act, the [Mississippi] legislature made a series of factual findings. It began by noting that, at the time of enactment, only six countries besides the United States 'permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation.'"

18. Brief of International and Comparative Legal Scholars as Amicus Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. (2022) (No. 19-1392).

19. *Dobbs*, 142 S.Ct. at 2340 (Breyer, Sotomayor, and Kagan, J.J., dissenting) (citing Brief for European Law Professors as Amici Curiae 16–17, Appendix).

20. *Id*.

21. Center for Reproductive Rights, *Global Trends: Abortion Rights*, (August 24, 2022), https://reproductiverights.org/global-trends-abortion-rights-infographic/.

22. Council on Foreign Relations, *Abortion Law: Global Comparisons*, (June 24, 2022), https://www.cfr.org/article/abortion-law-global-comparisons.

they will have children.[23] Thus, a contextual and more detailed analysis demonstrates the problem with how the majority in *Dobbs* utilized foreign law.

By way of example, reference to the law in India on abortion further demonstrates the need for deeper contextual analysis. In 1971, the Indian Parliament adopted the Medical Termination of Pregnancy Act ("MTP"). Pregnancies can be terminated if one or two medical professionals determines that "(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped."[24] If a foreign judge were to just read the text of the statute, she might not be aware whether the exception for mental health is a great barrier to abortion access or not and might categorize India as a state where abortion is severely restricted.

Moreover, the Indian Parliament recently amended the MTP to allow for one medical professional to approve a termination of pregnancy within 12 to 20 weeks, whereas under the original statute, two medical professionals had to approve.[25] The amendment also liberalized the reasons for which a pregnancy may be terminated from week 20 to 24 whereas previously it was only allowed to save the pregnant woman's life.[26] Although the text of the MTP (as amended) did not explicitly allow for the termination of pregnancy of an unmarried woman from week 20 to 24, a recent decision by the Indian Supreme Court interpreted the statute to include unmarried women.[27] Thus, any references of foreign statutes by U.S. courts will not be adequate without understanding how lawyers

23. International human rights bodies and norms also recognize that women should have the right to determine when they will have children. Article 6 of the International Covenant on Civil and Political Rights recognizes and protects the inherent right to life of all human beings. G.A. Res 2200A (XXI), art. 6 (Dec. 16, 1966). Article 12 of the Convention on the Elimination of Discrimination Against Women requires the State Parties to take appropriate measures to eliminate discrimination against women in health care services in connection with family planning, pregnancy, confinement, and post-natal period. G.A. Res. 34/180, art. 12 (Dec. 18, 1979). Similarly, Article 16 urges State Parties to eliminate all forms of discrimination against women and to ensure that they have the same right to decide freely and responsibly on the number and spacing of children and access the relevant information to effectively exercise these rights. *Id.,* art. 16 (Dec. 18, 1979).

24. Medical Termination of Pregnancy Act 1971, INDIA CODE § 3(2)(b)(i)-(ii).

25. Medical Termination of Pregnancy Act 2021, INDIA CODE § 3(2)(a) (Amendment).

26. *Id.* § 3(2)(b)(i)-(ii).

27. Ananthakrishnan G, *Even Single, Unmarried Women have the Right to Safe and Legal Abortion, Rules SC*, INDIAN EXPRESS, Sept. 30, 2022, https://indianexpress.com/article/india/all-women-entitled-to-safe-and-legal-abortion-supreme-court-8179879/.

and the courts in the foreign country interpret the statute.[28] Without such deep analysis, any comparison would be misleading. Yet, in both *Dobbs* and *Box v. Indiana*, no such analysis was conducted of the countries that were cited in the opinion.

III. THE NEED FOR BETTER STANDARDS

It is useful to revisit the debate between judges and scholars who opposed the use of international and foreign law in the series of cases in the mid-2000s, and judges and scholars who supported its use in those decisions. People who supported the expansion of human rights supported the outcome of the cases as well as the use of foreign and international sources. Those who opposed the expansion of human rights objected to the use of foreign and international law. One legal scholar, Michael Ramsey, wisely pointed out that using foreign precedent can cut both ways—it can be used to justify expanding rights as well as limiting rights. For this and other reasons, he argues that there is a need for principled guidance for American courts on which foreign and international courts they should draw from, under what circumstances, and to what ends.[29]

There are several open questions in regard to foreign and international sources in U.S. Supreme Court and other court decisions. Under what circumstances should they be used? Only in cases where there is no clear domestic authority or in other situations as well? What countries should we refer to? Should we refer only to "western" countries that many consider to be the only peer countries that matter such as some European countries? While this is typically what is done by many comparative scholars, this approach leaves out numerous democratic regimes across the world, including India, that have developed robust abortion laws. Should courts conduct broad empirical studies of global laws or simply "cherry-pick" those laws that support their pre-determined conclusion? What purpose do these foreign authorities serve? Are they persuasive authority or do they just rubber-stamp decisions that have already been made by courts? Should there be a hierarchy among non-

28. *See also* Dipika Jain & Payal K. Shah, *Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality From The Supreme Court of India*, 39 COLUM. J. GENDER & LAW 1, 3-5 (2020).

29. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 71 (2004); *see also* Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) (outlining potential misuses of international and foreign materials); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (identifying weakness in scholarly justifications for the use of foreign law).

binding international and foreign law? Should courts treat foreign statutes and case law differently? These are all questions that are yet to be answered let alone agreed upon.

IV. CONCLUSION

In 1973, the United States was one of the first countries in the world to liberalize abortion laws. Now, the United States defies the trend toward liberalization. With the *Dobbs* decision, the United States has lost its place as a global leader in women's human rights. The majority in *Dobbs* and the concurrence in *Box v. Indiana* referred to foreign law sources. However, as demonstrated above, the opinions only conducted a surface-level analysis that failed to understand the impact of the laws in the context of the society. This use of comparative law deviates from modern comparative law methods as illustrated by the analysis of abortion law in India. Judges need to adopt principled methodologies and approaches for the use of international and foreign sources in U.S. court decisions.