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Retrenchment of the Federal Right to Abortion: How Dobbs Threatens National Security

by [Heather Zimmerman](#) and [Justin Cole](#)

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On June 24, 2022, the Supreme Court in *Dobbs v. Jackson Women’s Health Organization* overruled nearly fifty years of precedent and ended federal protection of the right to abortion. Opposition quickly emerged from many quarters: reproductive, civil, and human [rights groups](#) and [major medical organizations](#) condemned the ruling for threatening liberty, curtailing access to critical health care, and inflicting disproportionate harm on marginalized groups. [Legal scholars](#) warned that the lawlessness of the *Dobbs* opinion will hasten the [erosion of freedom](#) and other substantive due process rights. Melissa Murray, a law professor at New York University School of Law, noted that Justice Clarence Thomas’ concurring opinion points to future legal battles over fundamental rights as his aberrant legal theories “[flourish](#) in the lower courts, widening the Overton window of mainstream opinion and shifting the terms of our [political] debates.”

In addition to threatening individual liberty and fundamental rights, the *Dobbs* decision poses a significant challenge to national security. Defense analysts have already [described](#) *Dobbs* as a “nightmare for women in the military” and expressed concern that it will hinder [military readiness](#) or generate a “[cultural backlash](#)” against women in the military more generally. But other aspects of the threat to national security posed by the *Dobbs* decision remain underexplored. The Court’s decision has invigorated anti-abortion groups and legislators, who have sprung into action to pass some of the most radical abortion bans in the world to expand the criminalization of abortion. The risk of political violence has increased as *Dobbs* has exacerbated political division and weakened the legitimacy of the Supreme Court. Perhaps most notably, the decision damages the United States’ standing in the world, as [foreign leaders](#) and [international organizations](#) have accused the United States of failing to safeguard its professed fundamental values.

The consequences which flow from the elimination of the federal right to abortion raise important considerations for national security and legal efforts going forward.

Criminalization and National Security

The weeks following *Dobbs* have been characterized by a [flurry](#) of legal activity and chaos. In Louisiana, a state law banning all abortions from conception, with no exceptions for rape or incest, was triggered by *Dobbs*' overruling of *Roe v. Wade*. A New Orleans judge quickly [blocked](#) the law, but it was subsequently [allowed](#) to take effect after a different court ruled that the New Orleans judge lacked the proper authority. It was [blocked](#) again on July 12, and enforcement of the state abortion ban is currently [halted](#) by a preliminary injunction until the case concludes. Although specifics vary, approximately [two dozen states](#) have already banned most abortions or will do so in the near future.

Most of these states intend to [enforce](#) their abortion bans through the criminal justice system. Many states are stiffening the [criminal penalties](#) for abortion providers who violate new or existing laws, instituting large fines, prison sentences, or both. Notably, exceptions for abortions necessary to save the life of a pregnant person are [limited](#) or [ambiguously worded](#), leaving pregnant patients and physicians uncertain as to which medical procedures are legally permitted and producing “a [chilling effect](#)” that further bars pregnant people from accessing reproductive health services and life-saving care. Worse, in anticipation of *Dobbs*, states including [Texas](#), [Idaho](#), and [Oklahoma](#) have attempted to circumvent [prosecutorial discretion](#) in the enforcement of these bans by incentivizing private enforcement, rewarding citizens with cash bounties if they successfully sue someone found to have helped a pregnant person get an illegal abortion (eerily [resembling](#) the Fugitive Slave Law of 1850 under which people who captured and returned enslaved people who escaped could receive monetary rewards from the federal government). Model legislation [drafted](#) by the National Right to Life Coalition seeks to go further by imposing state penalties for abortion beyond their borders, possibly through travel restrictions.

While these new restrictions represent a dramatic expansion of the criminalization of reproductive rights, they are far from the first such efforts. Throughout the *Roe* era, states [prosecuted](#) thousands of pregnant women — disproportionately Black and poor —

for engaging in behavior which is considered risky during pregnancy. The National Advocates for Pregnant Women has [identified](#) more than 1,700 cases from 1973 to 2020 in which individuals were investigated, arrested, detained, or compelled to undergo medical treatment for engaging in actions that the state deemed harmful to their pregnancies. In the aftermath of *Dobbs*, the criminalization of abortion naturally [proceeds](#) from the criminalization of reproductive rights more broadly.

Despite these longstanding restrictions on abortion rights, most abortion-related criminal laws pre-*Dobbs* targeted providers, rather than pregnant persons. But that appears to be changing. For example, in April of this year, a woman was [arrested](#) and indicted in Texas for “intentionally and knowingly caus[ing] the death of an individual” after she allegedly self-induced an abortion. Because medication abortions can be difficult to police, with abortion pills crossing state borders in the mail, legislators and prosecutors may increasingly investigate any pregnancy that ends in miscarriage and [extend criminal prosecution](#) to any person taking these medications (which can also be used to [treat](#) a variety of conditions) for any reason. As Jia Tolentino [argues](#) in a podcast for the *New Yorker*, if the “[interjurisdictional abortion wars](#)” targeting providers across state lines are unsuccessful for states with abortion bans, “the only people to target to stop abortions will really be the people who are getting them.” States are also aggressively reducing the time and circumstances in which a person can get an abortion. For example, in [Alabama](#), a law passed in 2019 and implemented following *Dobbs* bans nearly all abortions except in medical emergencies. All of this raises the [horrifying prospect](#) that “a woman’s body could become a common site of state investigations: analyzed coldly, mined like a crime scene, exposed to authorities, and, fundamentally, not her own.”

There are at least two ways in which this increased criminalization of abortion will harm the national security interests of the United States. First, criminalization [consistently and predictably impacts](#) low-income people, people of color, and marginalized communities the most intensely. This is plainly true of the criminalization of abortion; already, women of color have been disproportionately [targeted](#) by laws criminalizing reproductive health. Abortion bans, then, further entrench the systemic racism which already pervades the United States and hinders the [economy](#), [political institutions](#), the [military](#) and [national security](#) writ large. Second, the criminalization of abortion will

accelerate the use of surveillance by law enforcement. Advocates note that law enforcement already [gathers](#) women's personal data to acquire evidence in cases of suspected illegal abortion, since it is very [difficult to distinguish](#) between a miscarriage and a self-managed abortion. Again, pregnant people of color are [more likely](#) to be threatened by this intensifying digital surveillance. However, an expanded surveillance society should be of great concern to all Americans; the erosion of privacy necessary to enforce these restrictions place all Americans' most private and intimate information at risk of seizure by law enforcement investigating an abortion-related case — and the sheer [volume of data](#) potentially available to law enforcement seeking to make arrests has never been greater. If [privacy](#) “sits at the heart of democracy,” then everyone should be concerned about abortion restrictions which contribute to the deterioration of privacy.

Political Violence

In a memo published by the Department of Homeland Security (DHS) just days before *Dobbs* was handed down, agency officials [warned](#) of a wave of violence from both the far right and far left. Specifically, they [indicated](#) that churches, judges, and abortion providers could face a heightened risk of violence in the weeks following the ruling. Attacks against anti-abortion groups did [increase](#) after the *Dobbs* draft opinion leaked in May, and in early June, a California man was [arrested](#) after he traveled to Justice Brett Kavanaugh's home with a gun and a plan to kill him in response to the leaked opinion. Meanwhile, disinformation researchers have determined that far-right channels have [appropriated](#) the DHS memo to urge extremists to arm pregnancy centers and churches. As one post on a far-right Telegram channel put it, “American Patriots” should “defend the faith” with arms: “Guard and protect your local church. Guard and protect your local pregnancy centers. Call them in advance. Bring rifles and men with you.”

The threat of violence following the *Dobbs* decision constitutes a broadening of previous [abortion-related violence](#) historically committed by anti-abortion extremists. Between 1993 and 2016, 11 abortion providers were killed, an additional 26 people survived murder attempts, and over 40 bombings and nearly 200 arson attacks have been launched against clinics or the homes of abortion providers. The new threat of violence follows the political fault lines of American society: According to [Axios](#), “[s]ome racially or ethnically motivated violent extremists’ embrace of pro-life narratives may be linked

to the perception of wanting to ‘save white children’ and ‘fight white genocide.’” Although *Dobbs* cannot be blamed for the deep divisions in the United States, it has contributed to them in ways that go beyond the abortion debate. Barbara Walter [observed](#) that *Dobbs* has increased the risk of political violence in two ways: (1) weakening democracy by imposing the will of the minority on the majority; and (2) deepening the “urban/rural, red state/blue state, [and] secular/religious divide.” In the context of the ongoing [January 6](#) Select Committee investigation, it is all too clear how dangerous domestic political violence can be to the national security of the country.

In addition to fueling political division, *Dobbs* contributes to the Supreme Court’s worsening crisis of legitimacy. At its core, democratic governance relies on citizens’ trust in legal institutions. The Court’s decision in *Dobbs*, however, reflects lawmaking through sheer judicial force. Commentators have [noted](#) that the Court’s majority decision relied on [weak legal reasoning](#) and gave scant consideration to the harmful implications for individuals, the country, and rule of law. The dissenting justices [recognized](#) how the Court’s decision imperiled the institution and American democracy, lamenting that the Court had “betray[ed] its guiding principles” and left much of the American public to conclude that “its constitutional protections hung by a thread.” With a conservative majority poised to further dilute fundamental rights, the Court’s weakened standing among the public is likely to worsen, an ominous prospect for a system of government which relies on an independent judiciary to use careful reasoning as opposed to raw power.

Global Leadership of the United States

The Court’s decision to *eliminate* a fundamental right also contributes to the eroding global leadership of the United States. With *Dobbs*, the Court cemented the [latest era of retrenchment](#) for civil rights in the country and moved federal law in a direction that threatens to ignore the American ideals of freedom, equality, and liberty.

The struggle for reproductive rights and freedom has always been central to the project of developing the United States’ legal identity and constitutional democracy. Justice Samuel Alito’s majority opinion rests on an inaccurate, ahistorical account of the role that abortion and the right to control one’s own reproductive health and decisions have played in developing and defending the country’s conception of liberty. While [abortion](#)

was [legal](#) and [widely practiced](#) in the United States for white, upper- and middle-class women through the mid-nineteenth century, legal scholars have [explained](#) how slave owners' control over enslaved people's reproduction — including through forced pregnancy — was constitutive of the American institution of slavery. Furthermore, abortion and the right to reproductive control was central to the American struggle to abolish chattel slavery. Enslaved men and women used [abstinence and abortifacents](#) to prevent pregnancy or induce an abortion as a way to reclaim control over their bodies and families. Control over reproductive capacities became an important marker of freedom sought by enslaved people. After the Civil War, drafters of the Reconstruction Amendments sought to create a radical break from the violence and wrongs of antebellum slavery and according to Peggy Cooper Davis, these amendments “[placed](#) reproductive and family autonomy squarely within constitutional protection.” As other legal scholars have [argued](#), the Thirteenth Amendment prohibition of slavery and involuntary servitude was intended to reach all of the wrongs created by slavery and protect people from being forced to carry pregnancies to term or go through labor and delivery. A robust and historically grounded reading of the Thirteenth and Fourteenth Amendments' grant of liberty demonstrates that laws prohibiting abortion violate the Constitution and American models of freedom.

The Court's action to unmoor federal law from American values and history has international implications and undermines the position of the United States in the global order. Moreover, overturning *Roe v. Wade* and *Planned Parenthood v. Casey* enables states to enact laws [violating](#) the country's international law obligations. International organizations, including the World Health Organization and the United Nations (U.N.), and human rights groups [criticized](#) the legal setback. The U.N. Office of the High Commissioner for Human Rights (OHCHR) [called](#) the Dobbs decision “a monumental setback for the rule of law and for gender equality” and condemned the Court for “completely disregard[ing] the United States' binding legal obligations under international law.” The OHCHR also pointed to the United States' isolated position compared to the positive global trend in which many countries have liberalized their laws to increase access to abortion. Globally, the United States is one of only [three countries](#) to increase restrictions on abortion rights since 2000, while thirty-one countries have expanded legal access to abortion. In the Americas, Mexico, Argentina, and Colombia have moved to [legalize abortions](#) after successful, long-term organizing by

feminist movements. After the *Dobbs* decision, Mexican feminist activists started planning ways to provide abortion support and care to people stripped of their rights in the United States.

Rights retrenchment severely harms the United States' international image and leadership. Foreign heads of state were quick to [condemn](#) the Court's ruling, claiming that the loss of the federal right to abortion moved the United States backwards and attacked the freedoms of Americans. Canadian Prime Minister Justin Trudeau [tweeted](#) that the decision was "horrific," while French President Emmanuel Macron [expressed](#) "solidarity with the women whose liberties are being undermined by the Supreme Court of the United States." At the G-7 summit, a few days after the Court released *Dobbs*, world leaders continued expressing their shock and criticism of the United States' retraction of the right to abortion. This international criticism shows how eliminating the federal right to abortion will hinder the Biden administration's goal of restoring American global leadership. Because gender equality was an issue of focus at the G-7 summit, Biden found his position compromised in some discussions with other leaders: when Biden mentioned his concern about human rights violations in India, Prime Minister Narendra Modi [responded](#) with his concern about abortion restrictions in the United States, among other human rights violations.

Beyond the harm done to the United States' reputation abroad, there is concern that the United States' legal position will jeopardize the global momentum to increase abortion access. Reproductive rights advocates around the world [worry](#) that the *Dobbs* decision will [embolden](#) anti-abortion groups and lawmakers in other countries, potentially leading to an increase in funding and legislative efforts to restrict abortion rights in other jurisdictions.

Conclusion

The Supreme Court's decision to eliminate federal protection of the right to abortion poses significant challenges to national security. The expansion of criminalization of the most intimate aspects of Americans' lives will exacerbate systemic racism and weaken the right to privacy, while also deepening divisions in American society and increasing the risks of political violence. Moreover, the Court's decision isolates the United States and undermines the Biden administration's efforts to restore American leadership

around the world. The national security implications of the right to abortion highlight additional considerations that the White House and Congress must consider in charting the path forward. The right to an abortion is fundamental to ensuring the well-being of Americans, the longevity of national institutions, and the ability of the United States to contribute to international law and justice.

Image: WASHINGTON, DC – JUNE 25: Red paint splattered by abortion rights activists is seen on the sidewalk in front of the U.S. Supreme Court on June 25, 2022 in Washington, DC. The Supreme Court's decision in Dobbs v Jackson Women's Health overturned the landmark 50-year-old Roe v Wade case and erased a federal right to an abortion. (Photo by Anna MoneyMaker/Getty Images)

About the Author(s)

Heather Zimmerman

Heather Zimmerman is a Student Staff Editor at Just Security and a JD student at Yale Law School.

Justin Cole

Justin Cole (@justin_cole005) is a Student Staff Editor at Just Security and a JD student at Yale Law School.