*Global Constitutionalism* (2024), 13: 3, 640–659
doi:10.1017/S2045381723000412

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

# Which global constitution? The illiberal globalism of the US Supreme Court's *Dobbs* decision

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**Abstract**

Fostering global constitutional discourse has long been anathema to the conservative legal movement within the United States. In *Dobbs v Jackson Women's Health Services*, which overturned *Roe v Wade*'s right to an abortion, the court's conservative justices relied on a globalized analysis. In this article, I identify three potential hypotheses to explain this deviation from conservative orthodoxy. *Dobbs*' conservative globalism could be explained by attitudinal preferences, legitimation concerns or the influence of illiberal legal networks. I compare the proceedings of *Dobbs* against *Carson v Makin* and *Kennedy v Bremerton School District*, the other significant Constitutional cases from the court's 2021–22 term, to deal with religious issues. These two other cases did not feature global citations, despite such citations being able to advance the Justices' policy preferences or blunt legitimation concerns. Lending credence to the illiberal network hypothesis, Alito's *Dobbs* opinion was reliant on a unique amicus briefing by a global network of anti-abortion scholars advocating on behalf of the natural family. Such network campaigns were absent from the proceedings of *Carson* and *Kennedy*.

**Keywords:** amicus briefing; anti-abortion lobby; *Dobbs v Jackson Women's Health Services*; illiberal globalism; *Roe v Wade*; US Supreme Court

## I. The unnoticed argument in *Dobbs*

It is not a stretch to argue that *Dobbs v Jackson Women's Health* is the most important case so-far decided by the US Supreme Court in the twenty-first century. The overturning of *Roe v Wade*'s right to an abortion is the hallmark of a half-century-long mobilization campaign by the religious right. The case has had the immediate effect of scrambling the American political landscape. As with *Roe*, *Dobbs* is expected to fundamentally transform elite and popular political dialogues for decades to come. The opinion has also attracted an unprecedented level of worldwide consternation from leaders of liberal democracies. One aspect of the *Dobbs* decision that has yet to be discussed is its citation of global norms. While traditionally supported by liberal scholars, fostering global constitutional discourse has been anathema to much of the conservative legal movement. However, in overturning *Roe*, the court's conservative coalition relied on global constitutional analysis to argue that

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https://doi.org/10.1017/S2045381723000412 Published online by Cambridge University Press

its ruling was bringing the United States' abortion policy into global congruence. This portion of *Dobbs*, perhaps understandably, has been lost within the broader discussion of the decision's immediate material and political implications.

In this article I analyse *Dobbs* from a unique perspective within the conservative legal movement's debate over the validity of global constitutional discourse. This article proceeds as follows. I begin by chronicling how the religious right became open to global constitutionalism as a means of universalizing its patriarchal vision of the 'natural family'. These interests achieved their zenith of political influence during the Trump administration, which transformed the federal judiciary while promoting an overtly sectarian notion of human rights law. *Dobbs* could be the greatest victory for those who believe they are waging war against the global persecution of the traditional family.

I next propose three preliminary hypotheses, based on the judicial behaviour literature, to explain the conservative embrace of global constitutional discourse within the *Dobbs* decision. The first hypothesis is the 'attitudinal hypothesis'. This model of judicial decision-making argues that the court's conservatives used global norms to advance their *a priori* desire to overturn *Roe.* The second hypothesis is the 'legitimation hypothesis'. Global justification provides judicial cover for the extraordinary act of overturning *Roe* by imbuing the decision with plausible deniability regarding whether the outcome was driven purely by domestic politics. The third hypothesis is the 'illiberal network hypothesis'. *Dobbs*' use of global norms may have been the result of a judicial lobbying campaign by religious legal networks dedicated to the natural family. These hypotheses do not have to be mutually exclusive, and the weight of each variable can be teased out by comparing the proceedings of *Dobbs* against the court's two other significant religion cases decided during the 2021–22 term: *Carson v Makin* and *Kennedy v Bremerton School District.*

I then discuss my empirical findings. Solely examining *Dobbs* provides evidence to support each hypothesis. *Makin* and *Kennedy* provide nuance to test the explanatory power of each hypothesis. The illiberal network hypothesis appears to hold the most explanatory power for conservative justices' foray into global constitutionalism. Challenging the attitudinal hypothesis, global norm citation was absent in both *Makin* and *Carson* despite a rich corpus of academic literature that could have been used to support the preferred outcomes of the six conservative justices. Challenging the legitimation hypothesis, the conservatives did not use global citations in either case to preemptively buttress claims that they were beholden to a sectarian lobbying campaign. What appears to separate *Dobbs* from *Carson* and *Kennedy* is that *Dobbs* was present to a unique amicus campaign by a global cadre of judges, law school deans and academics that viewed abortion as an assault on the natural family. Justice Alito's majority opinion and publicized remarks suggest the influence of these illiberal networks in having the court push back against a secular world order. I conclude by discussing how American, comparative and international legal scholars may further study the influence of illiberal networks on judicial systems.

## II. The long march to *Dobbs*' global citations

For much of American history, legal suits on behalf of religious liberty tended to be brought on an ad hoc basis. This pattern changed when televangelists Jerry Falwell and Pat Robertson leveraged pushback against the 1960s sexual liberalization movement to create a moral majority coalition comprised of evangelical Protestants and ultra-traditional Catholics (Dowland 2009). A central tenet of the religious right is what

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anti-feminist crusader Allan Carlson called the 'natural family', in which the father was head of household (Carlson and Mero 2017). Phyllis Schlafly's successful campaign against the Equal Rights Amendment was an early victory for natural family advocates. A longer-term mission of the religious right was to combat the social liberalism that became constitutionally embedded during the Warren Court (1953–69). *Roe v Wade* was emblematic of how outgrowths from this embedded liberalism challenged the natural family.

This early iteration of the religious right was highly nationalistic in its outlook, generally believing that any 'globalist' organizations such as the United Nations were inherently at odds with the natural family (Conway 2007). President Reagan's initiation of the Mexico City Policy that blocked federal funding for NGOs providing abortion-related services signalled a nascent interest of the religious right in extranational affairs (Lalisan 2020). The Vatican's campaign against the 1994 Cairo Conference on Population and Development catalyzed once nationally oriented religious organizations such as Focus on the Family, the Catholic Family and Human Rights Institute, and the Howard Center to become globally involved in defence of the natural family (Buss and Herman 2003). This religious network fought the 1995 Beijing World Conference on Women. The religious right's concern was that the conference's focus on 'women's human rights' rather than 'rights for women' would destabilize its patriarchal vision of the natural family (Buss 1998). Not all members of the religious right supported the movement's increasingly global focus. Organizations such as Concerned Women for America and the Eagle Forum still believe international institutions are antithetical to the natural family.

Legal scholars in the religious right began exploring avenues of jurisprudential influence as the bulk of the movement came on board with international advocacy at the turn of the twenty-first century. In 2002, World Family Policy Center director Richard Wilkins published a seminal document on how international and comparative law could be leveraged to support domestically and globally 'long established and natural institutions of marriage, family, motherhood, fatherhood and childhood' (Wilkins 2002: 1). Fostering global constitutional discourse became urgent to the religious right the following year when Justice Kennedy's majority opinion in *Lawrence v Texas* (2003) cited the European Court of Human Rights' *Dudegon v United Kingdom* (1981) as partial justifications for invalidating Texas's criminal prohibition on same-sex sodomy. Religious right organizations publicly called for the impeachment of Justice Kennedy over his global citation, but privately began fostering a global network to advance the natural family (Thomas 2019).

The American Center for Law and Justice (ACLJ) provided the primary vehicle for organizing an international sectarian network. Pat Robertson founded the ACLJ in 1990 as a foil to the American Civil Liberties Union, the secular legal advocacy of which was seen as undermining the natural family. Chief counsel for the ACLJ is Jay Sekulow, who sought to advance the religious right's priorities before the federal judiciary through appointment consultation and litigation. The Alliance Defending Freedom, the Becket Fund, American United for Life, the International Center for Law and Religion Studies of Brigham Young University and the Family Research Council quickly joined Sekulow's global efforts (McCrudden 2015). Sekulow also began coordinating with traditionally religious law schools such as Liberty University, Ave Maria College and the University of Notre Dame to train the next generation of lawyers that would globally advocate on behalf of the natural family (Hollis-Brusky and Wilson 2021).

The ACLJ's global advocacy faced resistance in the conservative legal movement. The movement houses a broad tent of business, libertarians and neoconservatives alongside

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the religious right. These different constituencies can often be at odds with one another, but they are glued together by the interpretive method of originalism, which argues the constitution should be interpreted based on the original meaning of the text at the time of the document's ratification (Teles 2008). Citation of international norms has been anathema to originalism. Sekulow offered defensive and offensive justifications for conservatives' use of global constitutional discourse. Defensively, creating globally comparative scholarship in defence of the natural family could neutralize legal claims advancing a liberal conception of human rights. Offensively, if the federal judiciary was going to cite evolving global trends, moving these global trends towards supporting the natural family could create conditions conducive to fighting the liberal legal community at home (Kalb 2017). Sekulow's arguments proved effective in persuading the religious right, but much of the broader conservative legal movement still vociferously writes against global constitutional discourse (Ku and Yoo 2012).

Justice Antonin Scalia, a seminal founder of the originalist school, displayed the tension within the conservative legal movement on global constitutional discourse in his *Roper v Simmons* (2005) dissenting opinion. Justice Kennedy's majority opinion invalidating the juvenile death penalty under the Eight Amendment incorporated an extensive discussion of global trends. Scalia castigated his colleague for using global discourse to subvert American notions of morality, but also outlined how conservatives could craft a more sectarian global constitutionalism:

> Most other countries – including those committed to religious neutrality – do not insist on the degree of separation between church and state that this Court requires … And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability.

Despite Scalia's signalling, efforts of the religious right were highly constrained during the Obama years (2009–17). Obama's administration vigorously argued on behalf of abortion rights and became more supportive of the LGBTQ+ community as time progressed. Kennedy, as swing justice, ruled favourably to the liberal position on both issues.

As documented by McCrudden (2015), a plethora of American organizations under the tutelage of the ACLJ worked to globally expand legal doctrines supporting the natural family while their domestic efforts stalled. In Europe they supported a 2005 case in which pastor Ake Green was charged with giving a homophobic sermon, a 2007 challenge to a Slovakian law allowing abortion up to twelve weeks, and in 2007 defended Romania's anti-sodomy law. Similar litigation networks were essential to a 2013 case before the Indian Supreme Court upholding the country's anti-sodomy law. These organizations also supported Russia's 2013 law prohibiting 'gay propaganda'. Kaoma (2012) has chronicled the extensive role of the ACLJ's efforts to foster anti-gay laws throughout much of Africa. The most infamous example is a series of anti-gay legislation in Uganda that continue to pass as of this writing.

The ACLJ's network only gained global prominence when the sympathetic Bush 41 administration was being replaced by a hostile Obama administration. Donald Trump's election in 2016 marked the first time this ACLJ global network had allies in the White House and on a majority of the Supreme Court. Trump gave social conservatives unprecedented levels of influence, engaging in many symbolic actions to signal his commitment (Saldin and Teles 2020). Indiana Governor Mike Pence was selected as Vice-President to assuage evangelicals' concerns over Trump's personal debauchery and history of supporting socially liberal causes (Wead 2017). Trump was also the first

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President to physically attend the 'March for Life', an annual anti-abortion rally that takes place in Washington, DC on the anniversary of *Roe v Wade*. Symbolism was accompanied by four years of policy victories. Upon Trump taking office, action was quickly taken to defund abortion providers both domestic and international. Conditions were relaxed under which churches could participate in electioneering. Transgender individuals were barred from military service. A variety of Judeo-Christian hardliners cheered his highly deferential policy towards Israel (Margolis 2019). Most importantly, Trump promised to only appoint 'pro-life' Supreme Court Justices vetted by The Federalist Society (Alberta 2019). Trump's three Supreme Court appointments – Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett – alongside over one hundred lower court judges are expected to dramatically alter jurisprudence in a more socially conservative direction for decades (Greenhouse 2021).

The Trump administration began efforts to coordinate the religious right's cadre of globalized networks. In 2019, the State Department announced the creation of the Commission on Unalienable Rights, which would advise Secretary of State Mike Pompeo on human rights issues. The Commission was explicit in its goal of reorienting human rights promotion in line with what its members viewed as the nation's Judeo-Christian finding. Membership consisted of evangelical leaders who previously had coordinated global efforts in support of the natural family (Mills and Payne 2019). The Commission's proceedings made clear that contentious social issues such as same-sex marriage or abortion would not be part of the deliberation, signalling a potential death knell for the legally protected status of these issue (Kaufman 2019).

Although the final document contains extensive discussions of the Constitution's guarantees of religious liberty, the report contains no mention of the Constitution's prohibitions on establishing religion (US Department of State 2020). A Ministerial hosted by Pompeo in 2019 to promote the Commission was billed as 'the largest religious freedom event of its kind in the world. With more than 1,000 civil society and religious leaders, and more than 100 foreign delegations invited' (US Department of State 2019). This was one of several the State Department hosted in the United States and Catholic-identifying countries. In 2020, Pompeo organized the international Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family to declare that abortion is not a human right; countries have an interest in limiting abortion access to 'reaffirm that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State' (Geneva Consensus Declaration 2021). The Geneva Consensus was signed by 34 countries, many of which had been influenced by the ACLJ's global lobbying campaign.

In 2017, the federal Western District Court of Texas heard the case *Planned Parenthood v Smith*, which dealt with Texas's total ban on the dilation and evacuation abortion procedure. Notre Dame law professor Carter Snead submitted an expert affidavit in the case, arguing that bans on such procedures are not global outliers. Snead's affidavit was cited on appeal by Fifth Circuit Judge James Ho, a Trump appointee, in support of Texas's prohibition:

> According to Carter Snead, one of the nation's leading scholars on public bioethics and an expert witness in this case, '132 countries out of 194 that I looked at ban abortion outright, at all gestational stages, with certain exceptions defined by law,' while 178 countries generally ban abortion after a gestational age of 12 weeks. So '92 percent of all countries presumptively ban abortions at 12 weeks or less.' Texas does not ban abortion until 22 weeks. So, Texas law is not only valid under the

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> Constitution and Supreme Court precedent – it's also more permissive than the overwhelming majority of laws around the world. (University of Notre Dame Law School 2021: 65).

Ho's use of global norms as a justification for upholding abortion limitations were a prelude to the role of global constitutional discourse in the *Dobbs* decision.

## III. Methodology

*Dobbs*' incorporation of global norms by a conservative majority is a deviant case needing to be explored in the realm of global constitutionalism. The judicial behaviour literature contains three potential hypotheses to explain this significant deviance from conservative orthodoxy. First, the attitudinal model of judicial decision making argues that judges begin with their conclusions, then reason their way backwards to justify their preferred policy outcome (Segal and Spaeth 2002). That citations of global norms were used by conservative justices to provide legal justification to a foregone outcome is the 'attitudinal hypothesis'. Second, the strategic institutional model of judicial decision-making argues that while judges have policy preferences, they must tailor or constrain their decisions to maintain political legitimacy (Epstein and Knight 1997). That justices believed overturning *Roe* required international legitimation is the 'legitimation hypothesis'. Third, an emerging literature examines the role of legal networks in substantively shaping the direction of the court's jurisprudence (Hollis-Brusky 2015). That conservative citations of global norms resulted from the religious right's sectarian lobbying campaign is the 'illiberal network hypothesis'. These hypotheses are not mutually exclusive since attitudes, institutional concerns and networks influence judicial decision-making to some degree.

Comparative case work is required to begin teasing out the relative importance of each hypothesis as applied to *Dobbs* (Bennett and Elman 2007). Further case selection has been limited to the Supreme Court's 2021–22 term. This is the first full term under which President Trump's three appointments have served. During this term, *Dobbs* was the only opinion to contain global constitutional discourse. Companion cases thus cannot be based on the shared dependent variable of global citations by conservative justices. Cases must then be selected based on being most similar to *Dobbs* in terms of independent variables. The most appropriate foils are *Carson v Makin* and *Kennedy v Bremerton School District. Carson* ruled that a provision of Maine's voucher program mandating that funds be used at 'nonsectarian' schools amounted to unconstitutional discrimination against religion. *Kennedy* ruled that a high school football coach's personal religious observance was protected religious speech, even if such observance was conducted in public. All three cases involved constitutional disputes over religious issues; the subject matter at the heart of each case contained an extensive global literature to advance conservative causes; and each case involved the court's six conservative justices advancing the religious right's legal goals over the dissent of the three liberals.

For each case I consult sources traditionally used within judicial process tracing: lower court proceedings, briefs, oral argument, opinions and justices' public remarks (Keck 2017). Keeping with the best practices of process tracing, all pertinent evidence is discussed, whether it supports or challenges any of the three proposed hypotheses (Collier 2011). When *Dobbs* is examined in the context of other cases, the attitudinal and legitimation hypotheses appear to least contribute to the conservative justices'

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citation of global developments. Plenty of globally oriented scholarship existed for each of the three cases, but references to such scholarship only appeared in *Dobbs*. Conservative justices could have incorporated global discourse in *Carson* and *Kennedy* to either advance their pre-existing policy preferences (attitudinal) or to provide international contextualization (legitimation). The illiberal network hypothesis seems to offer the most explanatory power for the conservatives' citation of global norms in *Dobbs*, as the justices were presented with a unique amicus campaign by religious right scholars aimed at promoting the natural family. The run-up to *Carson* suggests the importance of religious conceptions of gender roles, rather than religion *per se*, in *Dobbs*' global citations. A globally oriented amicus brief for *Carson* was submitted to the court; however, this brief did not discuss global constitutionalism in relation to the natural family and was not cited by the justices.

## IV. A tale of three victories: The Supreme Court's 2021–22 term

### *Dobbs v Jackson Women's Health Organization*

In 2018, the state of Mississippi passed what was at the time the nation's most stringent abortion law. H.B. 1510, The Gestational Age Act (GAA) prohibited the procedure after fifteen weeks of gestation, except for the life of the mother. None of the typical exceptions for rape or incest were included. The GAA was a key tenant of Governor Phil Bryant's (2014) promise 'to end abortion in Mississippi'. While the timeframe was stringent by American standards, the Mississippi legislature framed the law as bringing abortion policy into congruence with global patterns. The beginning of the legislation notes that only six other countries 'permit nontherapeutic or elective abortion-on-demand after the twentieth week of gestation' (Alito 2022). Regardless of global trends, the act appeared to clearly violate existing Constitutional standards that states cannot place an 'undue burden' in the face of women seeking an abortion.

Jackson Women's Health Organization, the last remaining abortion provider in the state, immediately sued State Health Commissioner Mary Currier in the Southern District Court of Mississippi. Judge Carlton Reeves ruled that the GAA violated women's due process rights. Global norms did not arise during proceedings and the opinion was solely based on domestic precedent. The State of Mississippi then appealed to Fifth Circuit Court. As with the district proceedings, deliberation was held along domestic lines of Constitutional argumentation. The Fifth Circuit ruled that the GAA posed an undue burden. Global normative standards were not incorporated into Judge Higginbotham's opinion. The lack of global argumentation about a law that was framed around comparative norms suggests that judges are hesitant to incorporate global standards into their opinions unless such standards are brought to the court's attention by an outside source.

In the summer of 2021, the Supreme Court announced that it would be hearing an appeal over the GAA's constitutionality. Given that only the court can overturn constitutional precedent, justices decided to also discuss whether *Roe* in its entirety should be overturned. The stakes were high considering President Trump's three staunchly conservative court appointments. In the run-up to oral argument, a flurry of 137 amicus briefs were submitted by interested third parties. Amici included a cross-ideological array of legal scholars, historians, medical professionals, activist organizations, politicians and celebrities. Of the 137 amicus briefs, ten were submitted by foreign or international organizations, dealing expressly with the issue of global abortion standards. Seven were in support of Jackson Women's Health (respondent), two were in support of Mississippi

https://doi.org/10.1017/S2045381723000412 Published online by Cambridge University Press

(petitioner). One brief was neutral, attempting to provide an unbiased survey of European abortion law.

Respondent amici sought to either challenge the framing of the Mississippi legislature as bringing the world into congruence with global standards or provide data as to the adverse effects of countries choosing to limit abortion. A brief by European law professors showed that '39 of the 47 COE Member States make abortion broadly available for periods ranging from 10 weeks through viability. Abortion is permitted through at least 22 weeks of pregnancy in 37 States, and through 18–21 weeks in a further three' (McAllister, Steel and Wilson 2021). A group of international and comparative legal scholars also argued that Mississippi distorts the quality of regimes restricting abortion alongside a larger global trend towards enhancing access:

> In presenting a cursory tally of foreign abortion law time limits, Petitioners present a grossly misleading narrative that the scope of abortion rights in the United States is at odds with most other nations. This analysis wholly ignores the reality of abortion laws worldwide: comparable liberal states pro-vide broad legal access to abortion up to or around viability, that other jurisdictions with earlier time limits actually extend abortion access later into pregnancy through broad legal exceptions that apply in a range of circumstances, and that the broad glob-al trend is towards liberalizing access to abortion. (Davis et al. 2021)

Global human rights groups, including Amnesty International, took the lead in demonstrating the health devastation likely to arise in Mississippi. Their brief noted that in countries like 'Romania, South Africa, El Salvador, and Ecuador, there is a statistical relationship between the imposition of restrictive abortion legislation and increases in maternal mortality and morbidity … If an abortion ban like H.B. 1510 is upheld, more women in Mississippi are likely to die' (Sorensen et al. 2021).

No global health organizations came to the defence of Mississippi. Two briefs were submitted by foreign and international law scholars to argue that the GAA was not outside the global norm of abortion restriction. Perhaps the most important brief from the entire *Dobbs* proceedings was the 'Brief of 141 International Legal Scholars'. This brief was organized by Ligia Castaldi and Brian Scarnecchia of Ave Maria Law School, which has been a lynchpin for globally coordinating religious legal networks (Hollis-Brusky and Wilson 2021). Several foreign judges who had issued anti-abortion decisions signed on to the brief. Most notable among this cohort is Zbigniew Cieslak, a former Justice of Poland's Constitutional Tribunal with a history of donating to anti-abortion causes (Cronin 2022). Deans from fourteen law schools associated with evangelical Protestantism or traditional Catholicism joined as well. The rest of the signatories were law professors from Africa, Asia, Europe, Latin America and Oceania. Each had contributed to a comparative law scholarship in a manner that was conducive to elevating foetal rights at the expense of female autonomy (Cornell 2022). Much of the brief's substantive argument was derived from the scholarship of Paolo Carozza, a Notre Dame law professor who was also a member of President Trump's Commission on Unalienable Rights. The brief also relied on the Geneva Consensus Declaration, which was one of the Trump administration's international efforts in support of the natural family that argued abortion is not a human right.

The 141 International Scholars Brief deserves to be reprinted at length due to its impact on *Dobbs*' outcome:

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> With ample support in international law to protect the lives of the unborn, most States exercise their prerogative to regulate abortion more strictly than in the United States. Indeed, through the lens of comparative national law, Mississippi's abortion regime is more permissive than in most countries. A comparative view of national abortion laws demonstrates that the United States is out of step with most countries, currently ranking among the most permissive in the world. A recent United Nations study found that only thirty-four percent of countries permit abortion solely based on a woman's request. Further, only eight States allow abortion without restriction as to reason after twenty weeks' gestation: the United States, Canada, China, Iceland, the Netherlands, North Korea, Singapore, and Vietnam (emphasis added). Most of these States permit abortion on demand at any gestational age. The majority of States exercise their prerogative under international law to heavily restrict access to abortion by way of narrow grounds, gestational limits, and other requirements. According to the Center for Reproductive Rights (CRR) – a global advocacy group seeking to make abortion an international human right-117 countries either prohibit abortion entirely or permit the practice only on narrow grounds. In this category, 24 countries prohibit abortion altogether, with some allowing for limited exceptions to save the life of the mother under the criminal-law principle of necessity. The other 93 countries permit abortion only on the grounds of saving the mother's life, preserving her health, or in cases of rape, incest, or fetal impairment. These statistics clearly demonstrate that abortion is not an international right and that most countries regulate abortion more heavily than in Mississippi. (Castaldi et al. 2021).

Amnesty International's brief specifically responded to these claims, arguing that these scholars distorted reality because 'a strong majority of women of reproductive age – approximately 60%– live in countries where abortion is available upon request or otherwise broadly available on a variety of social, economic, and health grounds. By contrast, just a handful of countries, representing 5% of women of reproductive age, ban abortion without exception' (Sorensen et al. 2021).

During oral argument in December 2021, the issue of global norms was finally raised by Chief Justice John Roberts, who had been a long-standing opponent of judicial globalization, most prolifically speaking out against the practice during his confirmation hearings (Biskupic 2019). Displaying discomfort but newfound openness with citing global norms, Roberts (2021) said:

> I'd like to focus on the 15-week ban because that's not a dramatic departure from viability. It is the standard that the vast majority of other countries have. When you get to the viability standard, we share that standard with the People's Republic of China and North Korea. And I don't think you have to be in favor of looking to international law to set our constitutional standards to be concerned if those are your – share that particular time period.

Reporting has since revealed that from the outset Roberts had tried to pursue this line of internationally minded argumentation as a compromise to uphold the Mississippi law while maintaining *Roe* (Biskupic 2022). Such reporting is consistent with his long-standing efforts to maintain the political legitimacy of the court (Biskupic 2019). These efforts at compromise required looking for analogous frameworks abroad, and they add weight to the legitimation hypothesis.

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In May 2022, a draft opinion of Justice Alito's majority opinion was leaked by *Politico*. Little changed between the draft and published opinion. Nothing changed regarding the citation of global norms. Alito's opinion began by adopting Mississippi's frame of bringing the United States into congruence with global standards on abortion: 'To support this Act, the 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"' (Alito 2022: 6–7). Based on data provided in the 141 International Scholars Brief, Alito supplemented Mississippi by noting that the 'other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam … A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive' (Alito 2022: 7). After a discussion of federalism, the proper scope of judicial power and applicability of precedent, Alito officially overturned *Roe* and *Casey*. This monumental change in precedent was interwoven with another discussion of global norms:

> The viability line, which *Casey* termed *Roe*'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line. The Court thus asserted raw judicial power to impose, as a matter of constitutional law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy. (Alito 2022: 53).

Again, data from the 141 International Scholars Brief was used as the basis of Alito's argumentation. The conclusion of the passage abolishing the viability framework is accompanied by the observation that 'only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request' (Alito 2022: 61).

The text of Alito's opinion is potentially supportive of each hypothesis. In support of the attitudinal hypothesis, Alito and his four colleagues have previously been critical of some aspect of *Roe*. Global norms may have simply provided the justices with additional evidence in support of their long-standing policy preferences. In support of the legitimation hypothesis, Alito explicitly framed his opinion as bringing the United States into congruence with fellow democracies. Situating globalized decisions against or alongside certain regime types has been understood as a tool of political legitimation (Renberg and Tolley 2021) In support of the illiberal network hypothesis, Alito's citation of global norms was directly lifted from the 141 International Scholars Brief. Furthermore, this brief was put together by religiously inclined law school networks, being based upon the academic writings of a member of the Commission on Unalienable Rights and relying on the Geneva Consensus's promotion of the natural family for political support.

Justice Kavanaugh issued a concurrence to suggest that the holding of *Dobbs* should be limited. Justice Thomas issued a concurrence to suggest the holding of *Dobbs* should be expanded. Both agreed that *Roe* needed to be overturned, and did not criticize Alito's reliance on global standards. Chief Justice Roberts was a lonely voice, arguing that upholding the GAA did not require overturning *Roe*. His logic was identical to the position he had initially advanced at oral argument:

> Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12-week line … The Court rightly rejects the arbitrary viability rule today … None of this, however,

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> requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*. (Roberts 2021: 141)

Two dynamics of this passage are favourable evidence to the political legitimation hypothesis. First, Roberts' desire to maintain institutional integrity appears to have superseded his philosophical opposition to fostering a global constitutional dialogue. Second, the chief justice selectively chose to situate the United States' current framework alongside the authoritarian nations of China and North Korea instead of fellow liberal democracies such as Canada and Iceland. Like Alito, this editorial choice allowed Roberts to paint his decision as bringing the United States into global congruence.

Breyer, Sotomayor and Kagan issued a joint dissent that was written by Kagan. The opinion filtered the global trends noted by the respondent briefs. Comparing Mississippi's no-exception law to other abortion statutes was illegitimate:

> Most 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. See id., at 24–27; Brief for European Law Professors as Amici Curiae 16–17, Appendix. They also typically make access to early abortion easier, for example, by helping cover its cost. (Kagan 2022: 189–90)

Aside from the qualitative difference in Mississippi's laws from the rest of the world, the dissent also argued that efforts to restrict abortion fly in the face of global trends in favour of liberalizing access. Bringing the United States into global congruence, according to the dissent, required maintaining *Roe*:

> Perhaps most notable, more than 50 countries around the world – in Asia, Latin America, Africa, and Europe – have expanded access to abortion in the past 25 years. See Brief for International and Comparative Legal Scholars as Amici Curiae 28–29. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today. (Kagan 2022: 190)

Overturning *Roe* was simply a raw exercise of power because 'the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of *Roe* and *Casey*' (Kagan 2022: 190)

Liberal justices have long been sympathetic to globalized legal argumentation, so the dissents' use of global norms is not a deviant case. However, since every action has an equal and opposite reaction, the dissent is still helpful for contextualizing the three hypotheses regarding the conservative justices' use of global norms. First, in support of the attitudinal hypothesis, each argument cherry-picked certain data points to support diametrically opposed conclusions. Second, in support of the legitimation hypothesis, the dissent attacked Alito's potential legitimation argument by painting the overturning of *Roe* as sliding away from liberal democratic norms. Third, the dissent relied on liberal legal networks that expressly attacked the framing of the 141 International Scholars Brief cited by Alito.

At this juncture, given that the justices' papers will not be made public for decades, public remarks are the best indicator of motivations behind judicial decision-making. In the run-up to the decision, Justice Gorsuch made an unprecedented move of giving The

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Federalist Society keynote speech behind closed doors to avoid potential protest. During an interview at the Ronald Reagan Presidential Library a month before the opinion leak, Barrett pleaded for the American public to read the legal logic of the court's upcoming controversial opinions rather than listen to political commentary on the matter. Roberts and Kavanaugh have been quiet on summer recess following *Dobbs*. Shortly after *Dobbs*, Justices Sotomayor and Thomas both gave public interviews saying that the justices were still congenial. Kagan publicly warned that 'over time the Court loses all connection with the public and with public sentiment, that's a dangerous thing for a democracy'. Although she qualified the statement by saying, 'I'm not talking about any particular decision', it is difficult to divorce the remarks from the post-*Dobbs* environment (2022). In his first post-retirement speech, Breyer (2022) noted that he is 'still an optimist' about the American system, even 'with its drawbacks and its going-the-wrong way from time to time'.

The only justice to have been outspoken on the overturning of *Roe* has been Alito as keynote speaker at the 2022 Religious Liberty Summit. The conference is hosted by Notre Dame, and the 2022 edition was a follow-up to a previous iteration focused on the Commission of Unalienable Rights. *Dobbs*' author gave an unprecedented speech tearing into his critics, both foreign and domestic. However, the speech opened with praise for American promotion of multilateral human rights accords:

> As this summit makes clear, religious liberty is an international problem. But I do think that we Americans can take special pride in our country's contribution to the development of a global consensus, at least on the level of international agreements, in support of this fundamental right here … The adoption of the Universal Declaration without dissent was an impressive political achievement, and Americans can take pride for the role we played in bringing that about the chair of the commission, responsible for drafting the Universal Declaration was former First Lady Eleanor Roosevelt. So the declaration was important. It is important it paved the way for other multilateral treaties that protect religious Freedom, including what became the European Convention on Human Rights and the European Union's Charter of Fundamental Rights. So those who respect international law can point to the charter and other international agreements. (Alito 2022)

The court would need to continue its vigilance in promotion of religious values because 'religious persecution is alive and well in the world. And in many places, it is a violent life and death thing' (Alito 2022).

Any attempt to be globally conciliatory faded with an abrupt segue to the admission that 'I am not a diplomat'. He revelled in the fact that:

> Over the last few weeks since I had the honor this term of writing, I think, the only Supreme Court decision in the history of that institution that has been lambasted by a whole string of foreign leaders who felt perfectly fine commenting on American law. (Alito 2022)

Speaking a week after the ousting of British Prime Minister Boris Johnson follow a series of scandals, Alito joked that 'one of these [critics] was former Prime Minister Boris Johnson, but he paid the price' (Alito 2022). Johnson was not the only global figure to be attacked:

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> Others are still in office. President Macron and Prime Minister Trudeau I believe are two. But what really wounded me what really wounded me was when the Duke of Sussex [Prince Harry] addressed the United Nations and seemed to compare the decision of whose name may not be spoken with the Russian attack on Ukraine. (Alito 2022)

Unlike his colleagues, who could with plausible deniability say they were not focused on *Dobbs* in their public commentary, the Prince Harry reference quashed any doubt that Alito was attacking critics of this decision.

He then attacked the secular foundation of the liberal world order, questioning political orders that pursue religious neutrality rather than actively promote religion:

> A liberal society they say should be value neutral, and therefore it should treat religion, just like any other passionate personal attachment, say rooting for a favorite sports team, pursuing a hobby or following a popular artist or group. Now, I think we would all agree that in a free society, people should be free to pursue those avocations. But do they really merit the same protection as the exercise of religion? Does the support for a sports team, for example, really merit the same protection as religious devotion? (Alito 2022)

Alito's public remarks are strong evidence in favour of the illiberal network hypothesis. He does not question the validity of the liberal world order itself. However, his desire to embed a more sectarian society within the form of the liberal world order is a continuation of efforts spearheaded by the religious right in support of the natural family during the 1990s. This commentary marks the justices' last public foray into abortion politics before the start of the 2022–23 term.

The proceedings of *Dobbs* contain evidence in support of each hypothesis explaining why conservative justices would depart from methodological orthodoxy by citing global norms. First, that both sides cited global norms to arrive at diametrically opposed conclusions is supportive of the attitudinal hypothesis. Second, Roberts' use of global norms to forge judicial compromise during oral argument, as well as in his concurring opinion, suggests a legitimation dynamic. Alito situating his opinion alongside fellow liberal democracies is also in line with legitimation arguments from the judicial politics literature. Third, Alito's reliance on the 141 International Scholars Brief suggests that illiberal networks were an essential component in introducing this dynamic for the justices' consideration. Furthermore, this brief was shaped by pre-existing global religious networks that gained tremendous sway in the Trump administration. Alito's public commentary further confirms conservatives' increasing cosiness with these networks. Comparing the proceedings of *Dobbs* against *Carson v Makin* and *Kennedy v Bremerton School District* can help to clarify the extent to which these three hypotheses have explanatory power.

## *Carson v Makin*

In 1980, the state of Maine made private religious schools ineligible to receive taxpayer-funded voucher assistance. Following the Supreme Court's 2017 decision *Trinity Lutheran Church of Columbia, Inc. v Comer*, which forbade states from denying grant eligibility to private religious schools, religiously inclined parents sued Maine over the

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1980 voucher exclusions. Parents argued that the sectarian exclusion violated the First Amendment's Free Exercise Clause. Maine argued that sectarian funding would violate the First Amendment's Establishment Clause. In the District Court of Maine, Judge Brock Hornby upheld the voucher exclusion. Hornby's opinion was confined to whether *Trinity* overturned First Circuit precedent against sectarian funding. In June 2020, the Supreme Court's five conservative justices ruled in *Espinoza v Montana Department of Revenue* that *Trinity*'s core holding applied to Montana's voucher programme. Hornby's ruling was appealed considering *Espinoza* and was upheld by the First Circuit in October 2020.

The Supreme Court granted certiorari for the 2021–22 term. *Carson* provided an opportunity for the religious right to advance sectarian globalism. Scalia's *Roper v Simmons* (2005) dissent had identified the United States as a global outlier in limiting government aid to religious education:

> countries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that 'the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding' … Even in France, which is considered 'America's only rival in strictness of church-state separation,' '[t]he practice of contracting for educational services provided by Catholic schools is very widespread.'

From Scalia's dissent sprang a rich comparative law scholarship by social conservatives and libertarians advancing aid to religious education as part of a broader school choice agenda (DeAngelis and McCluskey 2020). Justice Breyer (2016) even acknowledged in his academic writings and public commentary that foreign legal developments pose challenges to his belief that publicly funding religious education would inevitably intertwine government and religion.

Despite the conservative intellectual groundwork on vouchers, global discourse was scant throughout the *Carson* proceedings. Of the 59 amicus briefs submitted before the court, only one contained an extensive discussion of global practices. Ashley Roberts Berner, an education professor at Johns Hopkin University and contributing expert at the conservative Manhattan Institute stated that

> the United States has become an outlier among democratic nations in its commitment to a uniform school system. Elsewhere, including in the United Kingdom, Germany, France, the Netherlands, Sweden, Denmark, and most provinces in Canada, the state either operates a wide array of secular and religious schools, or funds all schools but operates only a portion of them. These systems are not designed to be uniform; they are intentionally pluralistic. (Berner 2017: 29; see also McAllister, Draye and Eye 2022)

Berner's amicus brief was cited in petitioners reply brief to argue that 'if Maine were truly concerned with diversity, it would adopt a pluralistic approach to education like that which 'prevailed in the beginning of our nation's history and succeeds today in other modern democracies" (Shackleford and Whitehead 2022). Michael Bindas, arguing on behalf of petitioners, did not purse any globalized line of argumentation during oral argument. Justice Breyer made one passive reference to France during a back-and-forth

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with Bindas, but aside from this small exchange the Justices did not press on the foreign law dynamics.

On 21 June, the court ruled 6–3 that Maine's sectarian voucher exclusion was unconstitutional. All three opinions were bereft of references to global norms. Chief Justice Roberts issued an opinion for the six conservative justices. He ruled that the voucher's exclusions were discriminatory against religion, violating the Free Exercise Clause. Since the voucher funds went to parents as an intermediary before being spent on religious education, reinstating sectarian funding would not violate the Establishment Clause. Breyer's dissent argued the converse. Maine had anti-establishment interests in preventing taxpayer money to support private religious education. Sotomayor issued a standalone dissent to emphasize that this decision was part of a concentrated campaign 'to dismantle the wall of separation between church and state that the Framers fought to build'.

It cannot be argued that the conservatives avoiding foreign law was out of principled opposition to the practice, since they would do so a week later in *Dobbs*. The lack of citations to foreign law in *Carson* weakens the attitudinal and legitimation hypotheses. Mixed evidence exists regarding the illiberal network hypothesis. First, casting doubt on the attitudinal hypothesis, Roberts' opinion did not cite foreign subsidy to religious education despite an extensive corpus of academic literature that could have been used to justify pre-existing policy preferences. Second, to the extent that the legitimate perception of the court was challenged in this ruling, Sotomayor's solo dissent tried to paint the court as giving in to a concerted campaign against legal secularization. The majority could have rebuffed Sotomayor by framing their opinion as simply bringing the United States into the norm of fellow liberal democracies, but chose not to do so. Third, the illiberal network hypothesis may best explain the discrepancy between *Dobbs* and *Carson* in conservative citation of global norms, but challenges remain. No global religious networks submitted an amicus brief focusing on global norms regarding religious aid to education. Ashley Binder's brief did provide foreign law data on religious education, but her work is representative of the conservative legal movement's libertarian wing that shies away from the religious right's promotion of the natural family. It may not be appropriate to label an individual's libertarian scholarship as an illiberal network. Considering *Dobbs* and *Carson* in relation to *Kennedy* can help to further refine the scope of these hypotheses.

### *Kennedy v Bremerton School District*

Joseph Kennedy was a high school football coach who prayed on the 50-yard line following each game. He was fired by the Bremerton School District out of concern that such prayers violated the Establishment Clause. Kennedy sued his employer in the Western District Court of Washington, arguing that his rights of free speech and free exercise were violated. Judge Leighton ruled that Kennedy had violated the Supreme Court's 1973 precedent of *Lemon v Kurtzman*, which created a three-pronged test to determine whether government actions are an unconstitutional endorsement of religion. Kennedy lost on appeal to the Ninth Circuit. Then appealing to the Supreme Court in 2019, Kennedy was denied *certiorari*. Yet Alito, joined by Thomas, Gorsuch and Kavanaugh, expressed concern that language of the Ninth Circuit 'can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith.' After further fact-finding, the Western District Court

https://doi.org/10.1017/S2045381723000412 Published online by Cambridge University Press

again ruled in favour of Bremerton. A divided Ninth Circuit panel affirmed this ruling. Kennedy's petition for an *en banc* hearing was denied, setting the stage for a showdown at the Supreme Court. These lower court proceedings did not include any comparative analysis of foreign laws regarding religious establishment in education.

The Supreme Court granted certiorari for the 2021–22 term to settle this dispute between speech and establishment concerns. Petitioner and respondent's brief both focused on whether Bremerton School District violated Kennedy's speech rights by trying to prevent a violation of the *Lemon* endorsement test. 66 amicus briefs were filed, mostly providing additional evidence for each side's interpretation of *Lemon.* A few amici went further than petitioner, questioning the merits of the endorsement test. The religious right has long been opposed to *Lemon* because its doctrine legally interfered with state promotion of the natural family (Benshoof 1987). One brief was submitted by a cadre of globally oriented religious organizations that sought to promote the natural family such as the Billy Graham Evangelical Association. This brief was confined to Constitutional precedent, arguing that the endorsement test was incompatible with religious liberty (Fitschen and Davids 2021). Trump's Education Secretary Betsy DeVos also submitted a brief, arguing that some form of a 'history and tradition' test could be used by the court to create outcomes more conducive to claims of religious speech. Since the 1980s, the DeVos family has been extensively involved in funding political and legal networks in support of the natural family (Stanton 2017). Global discourse was then absent from oral argument.

A week after *Dobbs*, the court issued its *Kennedy* opinion. Justice Gorsuch, while not directly citing their efforts, fulfilled the stated goal of evangelical amici by directing lower courts to abandon the endorsement test. Instead of endorsement concerns, Gorsuch adopted the preferred test of Betsy DeVos's organization by insisting that lower courts should consult 'historical practices and understandings' when settling disputes between establishment and speech or religious exercise concerns. Kennedy's prayers were protected under this new test because, 'The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.' Alito issued a concurrence, arguing that the opinion did not go far enough in delineating the speech rights of public employees versus private citizens. Thomas concurred, echoing one of his out-of-the-mainstream views that the Establishment Clause should not be applied against state governments. As she had done in *Carson*, Sotomayor issued a dissent painting her conservative colleagues as giving in to a concentrated campaign to erode 'our Nation's longstanding commitment to the separation of church and state'.

Like *Carson*, *Kennedy* weakens the attitudinal and legitimation hypotheses. First, the court's conservatives were again not willing to cite the literature on foreign intersections of religion and education, despite such literature suiting their agenda. Second, the act of overturning *Lemon*'s operative precedent did not make the conservatives feel as though global contextualization was necessary. Nor did Gorsuch seek to globally contextualize his opinion in response to Sotomayor's criticism that the majority was subordinating Constitutional doctrine to extra-judicial religious networks. Considering *Kennedy*, the illiberal network hypothesis most plausibly explains *Dobbs*' conservative global forays. The overturning of the *Lemon* endorsement test was a sought-after goal of globally oriented evangelical organizations and Trump administration officials acting as amici, demonstrating their staying power in a transformed Supreme Court. However, Gorsuch did not cite these amici so his opinion may have been incidentally congruent with these organizations' preferences.

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## V. Moving beyond abortion and American shores

*Dobbs*' citation of global norms to advance the religious right's agenda could be explained by attitudinal decision-making, concerns over institutional legitimacy or the influence of illiberal networks. These variables are not mutually exclusive; however, analyzing *Dobbs* in the context of *Carson* and *Kennedy* reveals the relative importance of each variable. Attitudinal and institutional concerns seem to offer the least utility. Challenging attitudinal explanations, global norms were not cited in these other two cases despite extensive literature on comparative establishment law in support of conservative positions. Casting some doubt on the legitimation argument, this foreign law literature was not used to fight claims of judicial capture, or to support overturning the *Lemon* test. Albeit, overturning the *Lemon* test does not have the same immediate societal implications as overturning *Roe*, so the legitimation argument should not be completely abandoned. The argument behind Roberts' *Dobbs* compromise concurrence (fifteen-week bans are acceptable, but outright bans are not) appears to have required global perspective. Given Roberts' concern for maintaining judicial integrity, the legitimation argument finds the most support within his concurrence.

Roberts' concern for legitimation does not necessarily extend to Alito's opinion for the *Dobbs* majority. The illiberal network hypothesis appears to best explain Alito's attempt at promoting a sectarian global constitutionalism. His reliance on global religious networks and public commentary following the decision suggest that the post-Trump Supreme Court is but one actor within the religious right's global efforts to promote religious liberty's paramount status, as exemplified by the Trump administration's efforts to promulgate its Commission on Unalienable Rights. The illiberal network hypothesis is not airtight, though. Lack of citation to global norms in *Carson*, despite being directly briefed on the matter by a renowned education policy expert in support of religious instruction, suggests that network citations are not automatic. The *Carson* proceedings suggest that the *Dobbs* majority did not respond to global argumentation in support of religious liberty *per se*, but acted in response to global argumentation in support of the natural family. It could still be that the extreme act of overturning *Roe* necessitated some network reliance. Although *Kennedy* did not cite global norms, the case did fulfil the request of evangelical amici to overturn *Lemon*'s entanglement test. One other possibility is that attempts at foster a form of sectarian globalism became a characteristic of Alito's opinions, given his personal association with various religious networks.

Future court terms will need to be closely scrutinized to examine the staying power of illiberal networks in conservative judicial discourse. The closing of the court's 2022–23 term has already provided new fodder for scholars interested in illiberal networks. Religious right supporters of the natural family achieved a significant victory in *303 Creative LLC v Elenis*. By a now familiar 6–3 split, the conservative majority ruled that Colorado's anti-discrimination law cannot be used to compel a website designer to contradict her religious beliefs by catering to same-sex weddings. Arguments that natural family advocacy has influenced the Supreme Court are based on a long-standing literature positing that the religious right formed in reaction to the sexual revolution of the 1960s. A counter-narrative exists, arguing that the religious right formed in response to school integration efforts during the 1950s (Martin 2005). This competing origin story has been receiving more scholarly attention, given the religious right's newfound interest in combatting critical race theory in education (Balmer 2021). The court's struggles with interpreting racial equality treaties in the run-up to the civil rights movement is well documented, but scholars have not addressed the intersection of

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the religious right's global network and contemporary racial strife before the court (Kersch 2004). The court's recent decision in *Students for Fair Admissions v Harvard University*, which held that race-based affirmative action policies in higher education violate the 14th Amendment's Equal Protection Clause and Title VI of the 1964 Civil Rights Act, could be another watershed event in the impact of globalized illiberal networks on a post-Trump court.

The scholars examining the religious right's global impact have yet to concretely map out the network akin to Hollis-Brusky's (2015) analysis of the Federalist Society. Hollis-Brusky and Wilson (2021) have begun mapping out this network within the United States, but stop at the water's edge. The global governance literature on epistemic communities, on which Hollis-Brusky's Federalist Society analysis was based, could serve as a useful starting point for network analysis. The epistemic community framework has yet to be applied to the religious right despite hermeneutic networks having been designated as epistemic communities (Sandal 2011). Although mapping out the religious right's global network is a massive undertaking, the endeavour is necessary given the contemporary effects it is having on judicial systems around the world.

**Acknowledgments.** would like to thank my research assistant, Blake Carlson of Framingham State University, for reviewing the Supreme Court cases from the 2022-2023 term to check for global citations to confirm that Dobbs was the only such case to feature such commentary.

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**Cite this article:** Espino G. 2024. Which global constitution? The illiberal globalism of the US Supreme Court's *Dobbs* decision. *Global Constitutionalism* 13: 640–659, doi:10.1017/S2045381723000412

https://doi.org/10.1017/S2045381723000412 Published online by Cambridge University Press