

# FAMILY, FAITH, AND NATION: THE ROBERTS COURT AND THE GLOBAL PIVOT AGAINST LEGAL LIBERALISM

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# FAMILY, FAITH, AND NATION: THE ROBERTS COURT AND THE GLOBAL PIVOT AGAINST LEGAL LIBERALISM

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**Abstract:** The Roberts Court has veered sharply in a culturally conservative direction. More specifically, traditional solidarities of faith, family, and nation have been elevated as a constitutional matter above the individual autonomy interests that motivated the liberal Justices who steered the Court in the post-war decades. The Supreme Court's jurisprudence in this register complements, and is reinforced by, changes in public law more generally—for example, in recent executive orders from the Trump Administration that amplify the same values. In legal scholarship, this jurisprudential shift is pervasively framed in terms of domestic electoral politics, particularly as a product of Republican dominance of the presidency and the Senate at key moments.

But open out the analytic lens a few notches, and it quickly becomes clear that the Roberts Court's new emphasis on values of family, faith, and nation is in no way unique to the United States today. It is embedded in, and contributing to, a global phase shift in public law. Across many different countries, basic legal norms are moving sharply in the same culturally conservative direction. While the American Supreme Court is an influential participant in this global turn against legal liberalism, other nations' courts, and legal advocacy organizations, have also adopted their own culturally conservative results. The Roberts Court hence must be understood as just one element of a larger, and even more dramatic worldwide change in public law more generally.

This Article analyzes this international dimension of the Roberts Court's turn to family, faith, and nation. It first situates our local shift in constitutional jurisprudence in the context of a broader jurisprudential pivot toward illiberal ends across diverse geographic and cultural domain—including Europe, Latin America, the Middle East, Africa, and Asia. We then offer an analytic framework for understanding the observed causes and effects of this global shift toward illiberal basic law. We show that this movement has no single, dominant causal pathway, but that there are several different “diffusion” mechanisms, including common causes and self-reinforcing feedback mechanisms. Nations experiencing an illib-

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eral legal shift are subject to common political and socioeconomic pressures. Further, judges and political actors learn from peer institutions, or via transnational networks of political activists. Our analysis yields a more robust causal account of the emergence of a distinctively illiberal shift in constitutional jurisprudence, not just in the United States, but globally—and a sharper account of the Roberts Court’s role in that startling, novel international context. Hardly an outlier, the American Supreme Court reflects a dramatic sea change in global public law, toward illiberalism.

## INTRODUCTION

The Roberts Court is widely viewed as “the most conservative Supreme Court since the *Lochner* era.”<sup>1</sup> A major theme in its docket is the aggressive constitutionalization of traditional forms of authority and hierarchy, which we call the jurisprudence of family, faith, and nation. In these domains, the Court has sometimes acted radically, repudiating many of the tenets of twentieth-century legal liberalism, an ideology that defined itself as a “perennial protest against all forms of absolute authority.”<sup>2</sup> The Court has instead embraced its antithesis—legal illiberalism.<sup>3</sup> For example, in recent years, the Court has: ab-

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<sup>1</sup> Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 131 (2022); see also Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 948 (2008) (calling the Roberts Court “the most conservative Court since the mid-1930s”); Lee Epstein, Barry Friedman & Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299, 1321 (2008) (reporting an empirical finding that “the Roberts Court is significantly more conservative than the average Court sitting since the 1953 Term”); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), <https://www.nytimes.com/2010/07/25/us/25roberts.html> [perma.cc/U272-3GR9]. The term “conservative” here is used in the deontic American sense of meaning, roughly, to the right of the political spectrum. It has historically had a much wider array of uses. See generally EDMUND FAWCETT, CONSERVATISM: THE FIGHT FOR A TRADITION (2020) (documenting that tradition extensively). Not all those who embrace the label “conservative” would embrace the positions taken by the current Court. An alternative label is “postliberalism.” See LAURA K. FIELD, FURIOUS MINDS: THE MAKING OF THE MAGA NEW RIGHT 79–80 (2025).

<sup>2</sup> Alan Ryan, *Liberalism*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 360, 367 (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 2d ed. 2007). This is not the only possible definition of “liberalism.” Galston, for example, distinguishes an “autonomy” and a “diversity” strand in liberal thinking. William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 521 (1995). In an important essay, Duncan Bell argues that the term “liberal” took on its present coloration as a tradition anchored in the thought of John Locke and his successors only in the mid-twentieth century. Duncan Bell, *What Is Liberalism?*, 42 POL. THEORY 682, 692 (2014). And Helena Rosenblatt traces the “invention of liberalism” to the desire of Benjamin Constant and Madame de Staël to “safeguard the achievements of the French Revolution.” HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM: FROM ANCIENT ROME TO THE TWENTY-FIRST CENTURY 51–52 (2018).

<sup>3</sup> See Stephen Holmes, *The Antiliberal Idea* (defining “illiberalism” in a way that turns on the contrast between individual and collective interests), in ROUTLEDGE HANDBOOK OF ILLIBERALISM 3, 3–6 (András Sajó, Renáta Uitz & Stephen Holmes eds., 2021).

roated constitutional rights to reproductive choice;<sup>4</sup> expanded religion-based rights to resist civil-rights mandates;<sup>5</sup> created a right to object to secular education,<sup>6</sup> dismantled the separation of church and state by permitting such actions as state funding for parochial schools, conspicuous prayer by teachers, and prominent state-sponsored displays of Christianity;<sup>7</sup> prohibited the use of affirmative action to diversify universities;<sup>8</sup> enabled the use of racial proxies to dilute the power of Black voters;<sup>9</sup> and narrowed the rights of non-citizens against animus-driven or unfair immigration policies.<sup>10</sup>

These consequential rulings cast oversized shadows because they echo and ramify through public law. The Court's decision on affirmative action, for example, has created a legal and political space for a broader attack on diversity initiatives through a set of executive orders early in the Trump administration.<sup>11</sup> Likewise, Religion Clause decisions are reshaping public policy on education and healthcare, among other areas.<sup>12</sup> The result is a sharp and broad shift in the tenor of the public law embodied in not just constitutional but also legislative and regulatory frameworks for public and private life.

Religion, the traditional family, and the nation-state are back in style; individual liberties that enable a person to define and shape their own trajectory independent of collective authorities less so. We label this pivot an "illiberal" one, but similar philosophies also run under the label of "traditionalism," which entails a defense of some set of what are believed to be "ancient and

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<sup>4</sup> See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022) (overruling *Roe v. Wade*).

<sup>5</sup> See 303 Creative LLC v. Elenis, 600 U.S. 570, 588–89 (2023); see also *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 686–87 (2020) (providing a statutory analog).

<sup>6</sup> See *Mahmoud v. Taylor*, 606 U.S. 522, 569 (2025).

<sup>7</sup> See *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 780–81 (2022); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543–44 (2022); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 48–49 (2019) (plurality opinion).

<sup>8</sup> See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023).

<sup>9</sup> See *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7–8 (2024).

<sup>10</sup> See, e.g., *Dep't of State v. Muñoz*, 602 U.S. 899, 918–99 (2024); *Trump v. Hawaii*, 585 U.S. 667, 711 (2018); Amy Howe, *Supreme Court Pauses District Court Order Preventing Immigrants from Being Deported to Third-Party Countries*, SCOTUSBLOG (June 23, 2025), <https://www.scotusblog.com/2025/06/supreme-court-pauses-district-court-order-preventing-immigrants-from-being-deported-to-third-party-countries> [perma.cc/X77M-T5M7].

<sup>11</sup> See, e.g., Erica L. Green & Hamed Aleaziz, *Federal Workers Ordered to Report on Colleagues Over D.E.I. Crackdown*, N.Y. TIMES, <https://www.nytimes.com/2025/01/22/us/politics/trump-order-discrimination-federal-hiring.html> [perma.cc/2CCR-NT5E] (Jan. 25, 2025) (describing administrative efforts to eliminate so-called diversity programs within the federal government).

<sup>12</sup> See, e.g., Alander Rocha, *Alabama Senate Bill Would Make It Easier to Get Religious Exemptions for School Vaccinations*, ALA. REFLECTOR (Mar. 29, 2024), <https://alabamareflector.com/2024/03/29/alabama-senate-bill-would-make-it-easier-to-get-religious-exemptions-for-school-vaccinations/> [perma.cc/G4YP-YTJ9].

timeless” values.<sup>13</sup> These provide a “basis of sacred order” through “self-realization, religion, and politics.”<sup>14</sup> What we call illiberalism is one strand of the traditionalist project, associated with religion and the nation-state, but aimed at reformulating the legally available terms of self-realization. That term, however, has been used in the legal scholarly context to refer to forms of reasoning that are “a defining characteristic of legal reasoning”<sup>15</sup>—such that the term might mislead here. We hence stick with the term “illiberal,” which has the benefit of being more immediately legible now.

What explains this dramatic pivot in both constitutional law and the larger body of public law? Little by way of consistent interpretive method or historical precedent tying together the Court’s key decisions. The cases we have listed above cannot be characterized as consistently “originalist” or “textualist.”<sup>16</sup> The only obvious common factor binding these decisions together is their elevation of traditional solidarities of family, faith, and nation over the claims of individuals to autonomous life choices. In the crude argot of interest-group politics, these Roberts Court decisions tend to entrench institutional arrangements in state and society that favor (broadly speaking) white, Christian, and patriarchally coded groups or ideologies. Those same groups leverage those decisions to obtain new advantages in legislation and regulation. Unsurprisingly, the dominant explanations in legal and political-science scholarship for these trends in constitutional and public law highlight domestic democratic dynamics. Republican control of the presidency and the Senate, as well as the growth of movement conservatism as a powerful force shaping national politics and legal activism, figure large in these accounts.<sup>17</sup> That is, the Roberts Court is perceived as a purely parochial product of domestic political forces.

This Article breaks new ground by revealing and mapping an international dimension to the illiberal turn of the Roberts Court—one that has been hidden until now. Domestic context, no doubt, has a shaping influence. But we demonstrate here that this is not sufficient to explain or appreciate either the causes or the effects of the illiberal turn in American public law. It demonstrates that the Justices are not alone in making a sudden turn toward family, faith, and nation. Rather, our local sea-change in public-law jurisprudence is unfolding against a backdrop of a wider jurisprudential movement toward illiberal ends in many different geographic and cultural zones. Public-law changes parallel to those catalyzed by the Roberts Court can be tracked across

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<sup>13</sup> MARK SEDGWICK, *TRADITIONALISM: THE RADICAL PROJECT FOR RESTORING SACRED ORDER* 3–4 (2023).

<sup>14</sup> *Id.* at 10–11.

<sup>15</sup> David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1036 (1991).

<sup>16</sup> See Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 227 (2023) (proffering skepticism of the Justices’ consistency in constitutional method).

<sup>17</sup> See *infra* notes 95–117 and accompanying text.

Europe, Latin America, the Middle East, Africa, and Asia over in the last decade. Many national apex courts and national legislatures are shifting away from a liberal account of constitutionalism centered on individual autonomy. They are embracing instead the same vision centered on the traditional institutions of family, faith, and nation.

Such simultaneous pivoting toward an illiberal form of legalism in otherwise heterogeneous political and legal cultures is strong *prima facie* evidence of causal dynamics cutting across national borders. That is, judges and legislators in very different national courts are responding to parallel pressures and reacting in similar ways. This belies an exclusively parochial explanation. It instead suggests a need to broaden the analytic lens used to evaluate the Roberts Court's shift. The U.S. Supreme Court, we hence argue, is part of a global movement. Its shift toward illiberalism has been ongoing since the 1990s, longer than most of the other case studies of juridical illiberalism we discuss below.<sup>18</sup>

American judges do not typically see themselves as embedded in a global context. Famously, the Supreme Court has had vigorous internal debates about whether and when to cite foreign legal materials.<sup>19</sup> Many of the Justices seem reluctant to admit that they might be able to learn from others in approaching legal questions, and this position seems to have solidified with the retirements of Justices Breyer and Kennedy, who both advocated broad reading of foreign caselaw.<sup>20</sup>

Foreign judges, however, are more willing to look abroad, and some have turned to their American peers for guidance. An especially striking illustration of this vanguard role comes from Uganda. In May 2023, President Yoweri Museveni signed an Anti-Homosexuality Act (AHA) into law.<sup>21</sup> This was one of several enacted in African countries in recent years. The AHA institutes an "offence of aggravated homosexuality," defined in terms of as "commit[ting] the

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<sup>18</sup> Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 316.

<sup>19</sup> STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 5–6 (2015) (framing these questions of engagement); cf. *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.").

<sup>20</sup> Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 148–49 (2005) (citing examples).

<sup>21</sup> Anti-Homosexuality Act, 2023 (Act No. 6/2023) (Uganda), <https://www.parliament.go.ug/sites/default/files/The%20Anti-Homosexuality%20Act%2C%202023.pdf> [perma.cc/K4RC-X24V]. This was the second such law to be enacted. See Faith Karimi & Nick Thompson, *Uganda's President Museveni Signs Controversial Anti-gay Bill into Law*, CNN, <http://edition.cnn.com/2014/02/24/world/africa/uganda-anti-gay-bill> [perma.cc/3CMU-TM9S] (Feb. 2, 2014). The 2014 measure had been invalidated on procedural grounds. *Oloka-Onyango v. Att'y Gen.*, Const. Pet. No. 8 of 2014, [2014] UGCC 14 (Const. Ct. Uganda, Aug. 1, 2014), <https://old.ulii.org/ug/judgment/supreme-court-uganda/2014/14> [perma.cc/3JBB-RU7J].

offence of homosexuality in any of [ten listed] circumstances.”<sup>22</sup> These include when a person has sexual relations with a child, a disabled person, or a person aged seventy-five or above; when “the person against whom the offence is committed contracts a terminal illness as a result of the sexual act;” and when “the offender is a serial offender.”<sup>23</sup> The AHA imposes the death penalty on any person “who . . . commits the offence of aggravated homosexuality.”<sup>24</sup> It also criminalizes “promotion” of homosexuality, extending legal sanctions to those who provide financial support to, lease space to, or normalize homosexual activity.<sup>25</sup>

In April 2024, a five-justice panel of the Ugandan Constitutional Court in *Fox Odoi-Oywelowo v. Attorney General* largely upheld the AHA.<sup>26</sup> It reasoned in part that there was no global consensus on the balance between human rights and cultural self-determination on this issue, allowing communal values to trump. Further, the Court took note of “recent developments in human rights jurisprudence”—in particular, the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*.<sup>27</sup> Because the U.S. Supreme Court had “considered the nation’s history and traditions” in over-ruling an individual right to reproductive choice, the Ugandan Constitutional Court perceived itself as licensed to give legal blessing to “the socio-cultural realities of the Ugandan society.”<sup>28</sup> American constitutional jurisprudence hence provided a legitimating ground for the Ugandan judges to allow the coming into force of a “draconian” criminal sanction against gay individuals.<sup>29</sup> Within months, the Ugandan government was making arrests under the AHA’s aegis—with the prospect of the death sentence looming in view, and many gay Ugandans flee-

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<sup>22</sup> Anti-Homosexuality Act § 3(1)–(2).

<sup>23</sup> *Id.* § 3(2)(c)–(d).

<sup>24</sup> *Id.* § 3(1). Uganda is one of seven countries that impose the death penalty for gay sex. *Legal Frameworks | Criminalisation of Consensual Same-Sex Sexual Acts*, ILGA WORLD DATABASE, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> [perma.cc/XR6C-ET8F].

<sup>25</sup> Anti-Homosexuality Act § 11.

<sup>26</sup> *Fox Odoi-Oywelowo v. Att’y Gen.*, Consol. Const. Pets. Nos. 14, 15, 16 & 85 of 2023, [2024] UGCC 10 (Const. Ct. Uganda, Aug. 1, 2014), <https://ulii.org/akn/ug/judgment/ugcc/2024/10/eng@2024-04-03> [perma.cc/EU3H-CSFW]; see also Abdi Latif Dahir, *Ugandan Court Upholds Draconian Anti-Gay Law*, N.Y. TIMES, <https://www.nytimes.com/2024/04/03/world/africa/uganda-anti-gay-law.html> [perma.cc/5G3K-YN9K] (Apr. 10, 2024). There remains the possibility of an appeal to the Ugandan Supreme Court. Eric Wursthorn, *Uganda’s Intermediate Appellate Court Upholds Most of Draconian 2023 Anti-Homosexuality Act*, 2024 LGBT L. NOTES 17, 18.

<sup>27</sup> See *Fox Odoi-Oywelowo*, [2024] UGCC 10, ¶ 266. See generally 597 U.S. 215 (2022).

<sup>28</sup> *Fox Odoi-Oywelowo*, [2024] UGCC 10, ¶¶ 265–267 (arguing that the Ugandan law was “precisely” akin to *Dobbs*’s reasoning).

<sup>29</sup> Neela Ghoshal, *What Does Uganda’s Anti-Homosexuality Bill Mean for Humanitarians, Development Partners and the Private Sector?*, OUTRIGHT INT’L (Mar. 29, 2023), <https://outrightinternational.org/humanitarian-response-to-uganda> [perma.cc/9WE2-9ECH].

ing for their lives.<sup>30</sup> These were the fruit of illiberal policy diffusion through the vector of an American constitutional law judgment.

The Ugandan case is an especially clear example of the transnational character of contemporary judicial illiberalism, and the bleeding-edge role of the U.S. Supreme Court. Yet it is also not an isolated case. There are other instances in which Roberts Court rulings have been cited by judges or activists to advance illiberal ends.<sup>31</sup> In other instances, the common causes and transnationally networked character of illiberally minded judges can be inferred from extrinsic evidence.

We first demonstrate that elected actors and judges in very different political systems are shifting away from the individualist frames of twentieth-century legal liberalism. They are increasingly embracing what might be called the norms of family, faith, and nation widely understood to be traditional. Drawing on examples from different continents, we demonstrate that this triad of traditional forms not only provides an anchor for illiberal legal movements in many different national contexts, but also that legal changes observed overseas have strikingly parallels to American constitutional law. There is a large literature on illiberal political movements globally.<sup>32</sup> But this literature is largely about shifts in political formations and rhetoric, not changes to the primary constitutional and statutory rules governing a society. We show that this question of legal change, which has been sidelined in the political-science literature on illiberalism, merits closer attention. The legal change of interest here is not always “constitutional” in the sense of pertaining to a written, organic document. As in the American context, a judicial turn to faith, family, and nation is often woven into legislative- and executive-branch efforts in the same direc-

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<sup>30</sup> Emma Bubola, *Uganda Arrests Man on Antigay Charge Punishable by Death*, N.Y. TIMES (Aug. 29, 2023), <https://www.nytimes.com/2023/08/29/world/africa/uganda-anti-lgbtq-law-charges.html> [perma.cc/P342-UJAA]. The measure has caused many gay Ugandans to go into hiding or flee. Abdi Latif Dahir, *‘We Will Hunt You’: Ugandans Flee Ahead of Harsh Anti-Gay Law*, N.Y. TIMES (Apr. 20, 2023), <https://www.nytimes.com/2023/04/20/world/africa/uganda-anti-gay-bill-lgbtq.html> [perma.cc/Q7FB-A6H5]; STRATEGIC RESPONSE TEAM, LIVES AT RISK: A REPORT ON DOCUMENTED HUMAN RIGHTS VIOLATIONS AND ABUSES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX AND QUEER PLUS PERSONS (LGBTIQ+) IN UGANDA 44 (2023), [https://www.kuchutimes.com/wp-content/uploads/2023/09/20230927\\_LIVES-AT-RISK.Final-min.pdf](https://www.kuchutimes.com/wp-content/uploads/2023/09/20230927_LIVES-AT-RISK.Final-min.pdf) [perma.cc/2L2F-MCM3]. Given the nation’s high HIV+ rate, it seems likely that the measure will induce a mortality spike as people avoid treatment rather than risking criminal penalties. Apoorva Mandavilli, *With Harsh Anti-L.G.B.T.Q. Law, Uganda Risks a Health Crisis*, N.Y. TIMES (Jan. 22, 2024), <https://www.nytimes.com/2024/01/19/health/uganda-lgbtq-hiv.html> [perma.cc/JC2H-5CKR].

<sup>31</sup> See *infra* notes 366–380 and accompanying text; see also Luke A. Boso, *Exclusionary Expressive Conduct*, 66 B.C. L. REV. 295, 302 (2025) (arguing that the current Supreme Court “has ushered in judicial bias in ways that may raise concerns of ideological favoritism”).

<sup>32</sup> See *infra* notes 391–394 and accompanying text.



tion. But it is pervasively “small-‘c’ constitution[al]” in the sense that it reflects an effort to change the fundamental terms of society and state.<sup>33</sup>

The Article’s central contribution is a new framework for understanding this global pivot toward illiberal basic law. We take a systemic approach that “examines explanatory factors by taking into account that states are located on a political field of other states and networks that cross state boundaries.”<sup>34</sup> Rather than suggesting a single causal pathway, we map a plurality of different “diffusion” mechanisms. These include common causes and mutual feedback mechanisms.<sup>35</sup> Nations experiencing an illiberal legal shift are, on the one hand, subject to a set of common political and socioeconomic pressures. An intolerant populism, despite its nationalist rhetoric, is now a global phenomenon. Once subject to these pressures, legal and policy ideas diffuse from one jurisdiction to another in consequential ways through a set of distinct mechanisms. The *Fox Odoi-Oywelowo* case, for instance, is just one of several instances in which the Roberts Court’s illiberal jurisprudence has been explicitly cited by another nation’s court as justification for an illiberal outcome.<sup>36</sup> Supplementing that vector, transnational interest-group networks act as transnational paths spreading legal and political ideas about the centrality of family, faith, and nation.

The idea that the path of American constitutional law needs to be understood in a comparative and transnational context is not new. Historically, legal scholars have repeatedly demonstrated the role of international dynamics in shaping U.S. constitutional jurisprudence. Studies of the early nineteenth century, the first decades of the twentieth century, and the Cold War all testify to the necessity of a global lens.<sup>37</sup> But today, even though the world has become more interconnected, with ideas migrating quickly from one jurisdiction to another, legal scholars stubbornly insist on viewing the Roberts Court through tightly constrained nationalist blinders. As a result, we simply do not understand the most important global jurisprudential trend of the early twenty-first century. By extending earlier work contextualizing constitutional jurisprudence in relation to international dynamics to the Roberts Court, we aim to deepen understandings of the forces shaping and being shaped by American constitutional law.

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<sup>33</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) (describing “the small-‘c’ constitution [as] the fundamental political institutions of a society, or the constitution in practice”).

<sup>34</sup> David Cook-Martin & David Scott FitzGerald, *How Their Laws Affect Our Laws: Mechanisms of Immigration Policy Diffusion in the Americas, 1790–2010*, 53 LAW & SOC’Y REV. 41, 45 (2019).

<sup>35</sup> See Katerina Linos, *Diffusion Through Democracy*, 55 AM. J. POL. SCI. 678, 679 (2011) (writing on the possibility of policy diffusion across national borders).

<sup>36</sup> See *supra* notes 26–28 and accompanying text.

<sup>37</sup> See *infra* notes 118–144 and accompanying text (documenting scholarship that addresses global influences on earlier periods of constitutional law).

Our finding has implications for the idea of American exceptionalism. Since Alexis De Tocqueville, scholars have noted that American legal culture diverges in many ways from those of other democracies.<sup>38</sup> We are seen as more punitive, legalistic, and adversarial, and the law has become central to many of our cultural and political debates.<sup>39</sup> We do not contest this literature, but note that law, like culture, is not static. During De Tocqueville's time, courts played a uniquely visible role in governance. Today, we live in an era in which judicial power has expanded throughout the globe.<sup>40</sup> As judges and constitutions have assumed a more central role in governance, law becomes an arena in which transnational ideas flow and manifest. These ideas can be liberal, as in an earlier era, but can also be illiberal.

At the same time, we do not claim that all global small-c constitutional change in the past decade has been illiberal. On the contrary, many jurisdictions have been moving in a liberal direction on matters of abortion, reproductive choice, same-sex marriage, and privacy.<sup>41</sup> We are at a moment of profound flux in global legal ordering, with contesting forces generating contrary currents. Some back and forth is to be expected. Our aim here is to isolate and analyze one especially important transnational current that has received inadequate scholarly attention so far.

Our argument proceeds in three steps. Part I reviews briefly the Roberts Court's illiberal turn, its downstream effects, and the standard explanations offered for that pivot in both legal and political science scholarship.<sup>42</sup> We underscore here the dominance of domestic political accounts. In contrast, we demonstrate that there is a rich vein of research analyzing earlier periods of constitutional law in light of international dynamics. Part II then broadens the lens to show that the illiberal turn in constitutional law is international in character.<sup>43</sup> Here, we offer the first close description of a global trend in jurisprudence that to date has been analyzed only in piecemeal, haphazard ways. Part III then knits these two phenomena, parochial and global, together.<sup>44</sup> It charts a series of mechanisms by which the Robert Court participates in, and at times even precipitates or legitimates, the global turn to family, faith, and nation in

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<sup>38</sup> See, e.g., 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 252–68 (1838); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3–4 (2d ed. 2019) (centering “lawyer-dominated” litigation as the core of adversarial legalism).

<sup>39</sup> MUGAMBI JOUET, *EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER* 232–60 (2020); see also Mugambi Jouet, *Abortion and American Exceptionalism*, 9 UCLA CRIM. JUST. L. REV. 1, 2–5 (2025).

<sup>40</sup> See THE GLOBAL EXPANSION OF JUDICIAL POWER 2–3 (C. Neal Tate & Torbjörn Vallinder eds., 1995); Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 119, 119–20 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

<sup>41</sup> See, e.g., *infra* note 432 and accompanying text.

<sup>42</sup> See *infra* Part I.

<sup>43</sup> See *infra* Part II.

<sup>44</sup> See *infra* Part III.

global small-c constitutionalism. This analysis yields a thicker, richer, and more subtle understanding of a phenomenon, legal illiberalism, that looks set to loom over the constitutional landscape, globally as well as at home, for the foreseeable future.

## I. THE ILLIBERAL TURN IN U.S. CONSTITUTIONAL LAW

How is the Roberts Court distinct from its precursors? And why? Section A of this Part begins by contrasting the Roberts Court with the older regime of liberal legalism that it superseded.<sup>45</sup> Section B then canvasses the dominant scholarly explanations for the recent illiberal shift in public law.<sup>46</sup> These leading explanations focus on the mechanics and political environment of judicial appointments in the United States.

This domestic lens, to be sure, has yielded many important insights—and we do not doubt that the politics of judicial appointments have played a central role in respect to the Court’s behavior. To motivate our effort to enlarge the analytic lens so that it includes international and transnational considerations, however, Section C demonstrates that a parochially domestic focus is unnecessary.<sup>47</sup> To the contrary, leading historical treatments of the Founding era, the interwar years of the twentieth century, and the Cold War period all draw attention to the way in which the international environment shapes U.S. constitutional jurisprudence.

### *A. The Old Liberalism and Its Enemies*

In the last two decades, with a marked acceleration after the appointment of three conservative Justices by President Donald Trump, the U.S. Supreme Court has lurched discernably to the right. The Court is now “much more” conservative than the median member of the public.<sup>48</sup> What has ensued is a sharp divide between the mid- to late-twentieth-century Court under Chief Justice Earl Warren, and the early twenty-first century tribunal helmed by Chief Justice John Roberts. It is not much of an exaggeration to say that, in matters of family, faith, and nation in particular, the Roberts Court has defined itself as the antithesis of the liberal Warren Court.

The Warren Court engaged in a “daring and . . . bold” project in the late 1950s and through the 1960s to challenge Jim Crow, “[s]tate-fostered religious practices,” McCarthyism, and the prevalence of “arbitrary and oppressive” gov-

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<sup>45</sup> See *infra* Part I.A.

<sup>46</sup> See *infra* Part I.B.

<sup>47</sup> See *infra* Part I.C.

<sup>48</sup> Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows That the Supreme Court Is Now Much More Conservative Than the Public*, PROCS. NAT’L ACAD. SCI., June 14, 2022, at 1, 5.

ernment in the name of “equality, procedural fairness, freedom of speech, and religious liberty.”<sup>49</sup> In the 1950s, the Court adopted a “participation-oriented, representation-reinforcing approach to judicial review.”<sup>50</sup> It struck blows against racial segregation,<sup>51</sup> religious teaching in schools,<sup>52</sup> and political arrangements that thwarted democratic choice so as to preserve racial exclusions.<sup>53</sup> Subsequent decisions expanded the domain of constitutional solicitude to those experiencing gender-based discrimination<sup>54</sup> and those who eschewed conformity to heteronormative standards.<sup>55</sup> To be sure, some scholars chastised the Warren Court for not moving quicker on issues of gender equality and religious liberty.<sup>56</sup> But there is no real question that its decisions substantially shifted the balance of social power from traditional loci of authority (white-only legislatures and schools, churches, and police) to autonomous, rights-bearing individuals.

These decisions reflect a commitment to what Laura Kalman calls “legal liberalism”: a trust in the courts to bring about specific policy changes that benefited previous marginalized groups, such as women, racial minorities, and non-citizens.<sup>57</sup> This was a liberalism that echoed that doctrine’s late eighteenth-century roots in the ardent defense of “the rule of law and civil equality, constitutional and representative government, and a number of rights” against

<sup>49</sup> Owen M. Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118–19 (1991). In other work in a similar vein, Fiss suggests that judges seek “what is true, right, or just” and give meaning to “public values.” Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9, 11 (1979).

<sup>50</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 4 (2012) (“The animating impulse behind many of the Warren Court’s major decisions was a commitment to civic inclusion and democratic decisionmaking.”).

<sup>51</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954).

<sup>52</sup> *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963), *abrogated by*, *Holt v. Hobbs*, 574 U.S. 352 (2015). For an important pre-Warren Court decision, see *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 18 (1947).

<sup>53</sup> *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964).

<sup>54</sup> There are Warren Court opinions that desist “the medieval notion of woman’s submissiveness to the benevolent coercive powers of a husband.” *United States v. Dege*, 364 U.S. 51, 54–55 (1960); see also Morton J. Horowitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456 (1988) (contending that “many of the most important decisions of the Warren Court can be understood as a rediscovery of the inseparable connection between political culture and political equality,” including its “recognition of the claims of women”).

<sup>55</sup> Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 68–69 (characterizing later opinions favoring gay rights as extensions of the Warren Court).

<sup>56</sup> Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1108 (2012) (contending that “uncritical adoration of the Warren Court has dulled modern liberals to the possibilities held in progressive judicial interpretation”).

<sup>57</sup> LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996); see also Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 195 (2019) (reviewing JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018)) (using the same term “to capture a set of jurisprudential beliefs about courts’ role in mediating the relationship between the individual and the state”).

monarchical and clerical abuse.<sup>58</sup> As such, it had as a necessary correlation the negative conviction that traditional forms of entrenched social and political power—the patriarchal family, the church, and the overweening nation-state—must give way before the individual’s claims and ability to determine their own course.

When it comes to matters of family, faith, and nation, the Roberts Court has inverted the moral registry of the Warren Court. If the latter embodied legal liberalism, then it is fair to characterize the former as an avatar of legal *il-liberalism*: a constitutionalism aimed at vindicating traditional modes of authority against the new-fangled claims of autonomous individuals. This is not to say that the Roberts Court has wholly abandoned the liberal stances of the Warren Court. At least in one jurisprudential domain—freedom of speech—the Court has generally aligned itself with a traditional liberal right in ways that at least echo its mid-twentieth century precursors.<sup>59</sup> Exemplary in this regard is the Court’s 2024 holding to the effect that media platforms engage in First Amendment activity by “presenting a curated compilation of speech originally created by others.”<sup>60</sup> In contrast, beyond the free speech domain, whenever a constitutional dispute pits an individual interest against a traditional mode of social organization (i.e., family, faith, or nation), the Roberts Court unfailingly rules against the individual.

We have already enumerated the fields of constitutional law in which this characterization holds in the Introduction.<sup>61</sup> Instead of marching through familiar material, we briefly catalog the organizing role that ideas of family, faith, and nation played in recent cases.

*First*, a centerpiece of the Roberts Court has been the slow erosion, and then sudden collapse, of the substantive due process right to reproductive choice.<sup>62</sup> The conservative assault on abortion has since the 1970s been carried forth under the banner of “traditional family.” Reva Siegel has recently argued

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<sup>58</sup> ROSENBLATT, *supra* note 2, at 52.

<sup>59</sup> *Id.* (noting the primacy of “freedom of the press” for early liberals). For example the Court has adopted a broad and demanding test for content-based regulation under the speech clause of the First Amendment. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); Nat’l Inst. of Fam. & Life Advoc. v. *Becerra*, 585 U.S. 755, 766 (2018); see also Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 246 (characterizing *Reed* as adopting a “strict test,” and critiquing its inflexibility). This does not mean that the Roberts Court’s approach to the First Amendment tracks that of the Warren Court. See Robert Post, *Public Accommodations and the First Amendment: 303 Creative and “Pure Speech,”* 2023 SUP. CT. REV. 251, 253–54 (providing powerful criticisms of the Roberts Court’s approach to the First Amendment by identifying “corrosive uncertainty [that] does honor neither to this nation’s commitment to equality nor to a principled explication of the First Amendment”).

<sup>60</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707, 727–28 (2024). Its more recent TikTok decision, however, complicates this picture. See *TikTok Inc. v. Garland*, 604 U.S. 56, 67–72 (2025).

<sup>61</sup> See *supra* notes 4–10 and accompanying text.

<sup>62</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022).

that, though it began with the antiabortion cause, “a pro-family movement came to stand for protecting traditional modes of life against the threats of modernity—especially against the threats posed by civil rights for women, Black people, and gay people.”<sup>63</sup> Notably, this did not involve a shift away from rights rhetoric entirely: rather it involved a shift from international and universal sources toward national and religious ideas of rights.<sup>64</sup> As such it links to the second of our triad—religion, especially as espoused by traditionally powerful social actors. The Court more recently has started to limit the scope of gender Equal Protection law in respect to trans persons,<sup>65</sup> a trend that seems likely to persist in the near term.

*Second*, the Roberts Court has issued a string of decisions transforming the First Amendment right to religious liberty from a shield against discriminatory laws into a sword against generally applicable regulation that imposes potentially unjustified burdens on religious exercise.<sup>66</sup> The effect is to assign religious organizations and persons what has come to be called “most favored nation” status such that they must, as a constitutional matter, secure any exception to a generally applicable law claimed by any secular entity.<sup>67</sup> These opinions, however, “have [primarily] benefited religious conservatives, whatever their denomination, and the most high-profile cases have involved resisting antidiscrimination, public accommodation, equal access, and public health laws.”<sup>68</sup> At the same time, the Court has eliminated Establishment Clause bar-

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<sup>63</sup> Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1151 (2023).

<sup>64</sup> Katherine G. Young, *Human Rights in the Constitutional Era of Dobbs*, 56 COLUM. HUM. RTS. L. REV. 912, 918–20 (2025).

<sup>65</sup> *United States v. Skrmetti*, 605 U.S. 495, 509–11 (2025).

<sup>66</sup> This development largely occurred through a series of per curiam decisions issued without oral argument accepting Free Exercise challenges to pandemic-related restrictions. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17–18 (2020); *S. Bay United Pentecostal Church v. Newsom*, 590 U.S. 965, 967 (2020) (Roberts, C.J., concurring) (mem.); *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021) (mem.); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (mem.). On its merits docket, the Court has applied the concept of discrimination in an expansive way to achieve similar results. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 542 (2021) (ruling on exclusion of Catholic charities from state foster system). The Court has also closely scrutinized for calibration of exemptions aimed at accommodating faith, with the effect of expanding them. *See Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 241 (2025) (applying strict scrutiny to Wisconsin’s definition of a “religious” employer for purposes of a tax exemption).

<sup>67</sup> David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court’s Superordination of Whiteness*, 120 MICH. L. REV. 1629, 1636–37 (2022) (explaining that “most favored nation” analysis aims to seek out instances in which “the government has implicitly made an impermissible value judgment that religious reasons for engaging in regulated activity are less valuable and thus less entitled to solicitude”).

<sup>68</sup> Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2335 (2023); *cf. Dunn v. Ray*, 586 U.S. 1138, 1138–39 (2019) (mem.) (denying a stay request by a Muslim inmate on death row that would have given him time to have an imam present to provide him with spiritual advice and comfort during his final moments of life).

riers to the flow of government funds to religious bodies<sup>69</sup> or the official celebration of religious doxa in schools,<sup>70</sup> and has given religious parents an opt-out from secular texts.<sup>71</sup> These lines of cases interact: If there are no Establishment Clause constraints on government funding of religious institutions, the inevitable effect of a “most favored nation” understanding of the Free Exercise Clause is that whenever the government funds any secular private activity (say, education, healthcare, counseling, welfare provision, etc.), it must also fund any religious organization that wants to engage in the same activity.

In a 2022 speech at Notre Dame Law School, Justice Samuel Alito explicitly framed his approach to religious liberty to a repudiation of liberal legalism. On his account, there is “growing hostility to . . . the traditional religious beliefs that are contrary to the new moral code that is ascendant in some sectors.”<sup>72</sup> His resulting “call to arms”<sup>73</sup> framed religious liberty jurisprudence as a riposte to a wave of modernizing social change associated with the Warren Court.<sup>74</sup> It is a decision of the “traditional” against the supernumerary “modern” and individualistic. Alito’s views find echoes in the wider legal culture. Similar themes of majority religiosity are captured in an increasingly influential strand of what is called “common good constitutionalism,” associated with the Harvard legal scholar Adrian Vermeule, and a related critique of liberalism associated with the Notre Dame theologian Patrick Deneen.<sup>75</sup> Both reject any liberal, individualist foundation for modern society. They instead promote a more communitarian vision rooted in traditional, Christian (often Catholic) solidarities that allow little room for the exercise of individual liberty of choice of the sort valued in the Millian liberal tradition.<sup>76</sup> Paradoxically, nation-states

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<sup>69</sup> See *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 781 (2022).

<sup>70</sup> See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543–44 (2022).

<sup>71</sup> See *Mahmoud v. Taylor*, 606 U.S. 522, 659 (2025).

<sup>72</sup> Kyle C. Velte, *The Supreme Court’s Gaslight Docket*, 96 TEMP. L. REV. 391, 410–11 (2024). In contrast, in his opinions, Justice Alito has characterized the aim of “[t]he Religion Clauses of the Constitution . . . [as] foster[ing] a society in which people of all beliefs can live together harmoniously.” *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 38 (2019) (plurality opinion). It is, of course, an open question whether the forms of state-sponsored religious endorsement that Justice Alito would permit are consistent with this aim.

<sup>73</sup> Linda Greenhouse, *Alito’s Call to Arms to Secure Religious Liberty*, N.Y. TIMES (Aug. 11, 2022), <https://www.nytimes.com/2022/08/11/opinion/religion-supreme-court-alito.html> [perma.cc/6AXX-Y64T].

<sup>74</sup> KALMAN, *supra* note 57, at 9.

<sup>75</sup> See generally ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (providing a rehearsal of this critique); PATRICK J. DENEEN, REGIME CHANGE: TOWARD A POSTLIBERAL FUTURE (2023) (same); PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018) (same).

<sup>76</sup> See Mark Lilla, *The Tower and the Sewer*, N.Y. REV. BOOKS (June 20, 2024), <https://www.nybooks.com/articles/2024/06/20/the-tower-and-the-sewer-why-liberalism-failed-deneen/> [perma.cc/6XKX-S9U9] (providing a trenchant overview of these thinkers). Lilla accurately notes that these tests offer “symbolic hieroglyphs for the right” rather than “actual models for orienting action.” *Id.*; see also Brian Leiter, *Politics by Other Means: The Jurisprudence of “Common Good Constitutional-*

in the European heartlands of Christianity take a much less accommodating view of religious liberty, offering far fewer displacing accommodations of the faithful's demands in the workplace and like settings.<sup>77</sup>

Finally, the power of the nation-state is evident in judgments where the Court has narrowed procedural options and remedies for migrants challenging deportation,<sup>78</sup> rejected their substantive constitutional rights claims,<sup>79</sup> and enlarged the power of enforcement authorities to manage migrant flows.<sup>80</sup> The net result of these cases is a general "absence of constitutional constraints over government decisions to admit, detain, and deport noncitizens."<sup>81</sup> Among the most striking of these decisions is one that seemed to pit faith protections against the nation state. In 2018, the Court rejected a constitutional challenge to President Trump's so-called "Muslim ban" on the ground that it was an instance of "national security" policy-making that fell securely within the core of "the President's constitutional responsibilities in the area of foreign affairs."<sup>82</sup> Judges, in contrast, lacked epistemic competence "when it comes to collecting evidence and drawing inferences' on questions of national security."<sup>83</sup>

Instructively, the travel ban case is one of the rare instances in which the Roberts Court has rejected a claim of religious discrimination, albeit also one of the only instances in which national security was tendered on the other side of the scale. But that decision fits the paradigm of illiberal constitutionalism we sketch here once viewed from the right angle. For the very same week that the travel ban decision was handed down, the Court held in favor of a majority-faith plaintiff by inferring "prejudice from far more fragile evidence . . . an ambiguous, off-the-cuff comment by a single official to impugn a decision to which that official's views were not even necessary."<sup>84</sup> The travel ban case is thus best not understood as an instance in which two traditional forms of authority, namely religion and the national-security state, can come into conflict.

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ism," 90 U. CHI. L. REV. 1685, 1686–87 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)) (providing a similar view from a legal scholar).

<sup>77</sup> See generally Myriam Hunter-Henin, *Religious Neutrality at Europe's Highest Courts: Shifting Strategies*, 11 OXFORD J.L. & RELIGION 23 (2022).

<sup>78</sup> See, e.g., *Garland v. Aleman Gonzalez*, 596 U.S. 543, 546 (2022) (rejecting "class-wide injunctive relief" in many immigration challenges).

<sup>79</sup> See, e.g., *Dep't of State v. Muñoz*, 602 U.S. 899, 918–99 (2024) (holding that a citizen spouse had no substantive due process right to be reunited with her spouse). *Muñoz* is the rare case in which the values of family and nation collide. The nation wins, perhaps indicating that some families are more valued than others.

<sup>80</sup> See, e.g., *Dep't Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 139–40 (2020) (holding that certain noncitizens apprehended and detained within the United States enjoy neither a constitutional right to habeas corpus nor a procedural due process right to challenge their detention and removal).

<sup>81</sup> Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1347 (2022).

<sup>82</sup> *Trump v. Hawaii*, 585 U.S. 667, 704 (2018).

<sup>83</sup> *Id.* (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34 (2010)).

<sup>84</sup> Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 81 (2019).



Rather, it was a case in which the Court discerned only one traditional form of authority—the nation state—and ruled in its favor, while discounting spillover effects on a minority faith.

Even decisions that superficially seem to rest on individualist grounds have the effect of reinforcing traditional patterns of authority and social power. For instance, the affirmative action cases lean on a “colorblindness” norm that seems superficially individualist in character.<sup>85</sup> In practical effect, those rulings bind the hands of private and public universities, preventing them from disowning their traditional role as mechanisms for the intergenerational extension of social and economic privilege by accepting a more heterogeneous population of students. Read in the context of existing admissions practices such as legacy preferences and reliance on academic metrics that favor wealthy applicants, these rulings are illiberal in effect. They entrench the interests of a dominant class. They hence prioritize the interests of a traditional “ascriptive group” whose membership is fixed and certain in advance: the affluent.<sup>86</sup>

These cases, of course, do not exhaust the Roberts Court’s conservatism. Yet another strand of cases has placed substantial barriers on the exercise of regulatory power by the administrative state. These include a newly wrought “major questions doctrine,”<sup>87</sup> a 2024 decision eliminating the deferential standard of review enjoyed by federal agencies,<sup>88</sup> and new constitutional limits on agency adjudication.<sup>89</sup> These lines of anti-regulatory cases do not fit within the template of illiberal jurisprudence. They do not elevate family, faith and nation over the individual. As we show in Part II, it is more difficult to find analogues to these cases in other constitutional contexts.<sup>90</sup> Hence, we restrict our focus to matters of family, faith, and nation.

In sum, the Roberts Court has centered three traditional forms of authority in its constitutional vision. These are the family, faith, and the nation-state. When these values are in play, the Court consistently rules in ways antithetical to the liberal legalism of the Warren Court. This hostility to liberalism, however, is not manifest across the board. Contentious as they are, the Court’s recent First Amendment free speech cases emerge from the same template as the War-

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<sup>85</sup> See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 227 (2023). But see Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1609 (2020) (challenging the connection of colorblindness to respect for individuals).

<sup>86</sup> Holmes, *supra* note 3, at 3–6.

<sup>87</sup> See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (holding that “in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there” (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

<sup>88</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 398 (2024) (rejecting *Chevron* deference as inconsistent with the APA).

<sup>89</sup> *SEC v. Jarkesy*, 603 U.S. 109, 120–21 (2024) (holding that the SEC could not enforce anti-fraud rules through agency adjudications rather than Article III courts).

<sup>90</sup> See *infra* notes 324–347 and accompanying text.

ren Court's liberal legalism. Nor does a hostility to liberalism explain administrative law decisions such as the overruling of the 1984 Supreme Court decision in *Chevron v. Natural Resources Defense Council*.<sup>91</sup> Illiberalism is not the universal key to all contemporary jurisprudence: it offers instead a well-fitted explanation when certain traditional forms of social authority are put in play by constitutional litigation, and allows us to distinguish these cases from garden-variety "conservative" decisions.

The effect of these faith, family, and nation decisions are, of course, not limited to the Court. In a flood of executive orders issued in his first months back in office, for example, President Donald Trump aimed to reshape not just the federal government, but the wider corporate and social culture by picking up on opportunities created by the Court's illiberal turn.<sup>92</sup> For example, a number of these orders picked up upon the Supreme Court's disapproval of diversity as an interest in constitutional law to launch a blistering attack on corporate and governmental efforts to mitigate the lingering effects of historical marginalization.<sup>93</sup> Another order attacked the recognition of trans persons' interests, while tangentially making a play for the controversial concept of fetal personhood.<sup>94</sup> Obviously, not all of this broadside against the real and perceived enemies of Trump's political movement can be explained by reference to the illiberal shift of the Roberts Court. But the prominent way in which the Court's ideas are reflected and amplified by his executive orders is a telling example of the way in which changes in constitutional law can quickly disseminate through the broader body of public law.

### *B. Explaining the New Illiberalism*

To understand the shift in Supreme Court jurisprudence that has occurred under the Roberts Court, both legal scholars and political scientists have turned to domestic institutions and the political environment in the United States. The starting premise for such analysis is the appointment process for judges, which the Constitution channels through the White House and the Senate. The Constitution's scheme for judicial appointment left open "a domain of lawful political action through which the elected branches can deploy mechanisms to in-

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<sup>91</sup> 467 U.S. 837, 843 (1984), *overruled by*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>92</sup> See Charlie Savage, *How Trump Is Pushing at Limits of Presidential Power in Early Orders*, N.Y. TIMES (Jan. 22, 2025), <https://www.nytimes.com/2025/01/22/us/politics/trump-executive-orders.html> [perma.cc/DH7J-BFX3] (providing the scope and nature of the orders).

<sup>93</sup> *Id.*

<sup>94</sup> Mary Ziegler, *We Just Got a Big Signal About Trump's Abortion Plans*, SLATE (Jan. 24, 2025), <https://slate.com/news-and-politics/2025/01/donald-trump-abortion-plans-born-alive-bill.html> [perma.cc/G638-N5EH].

fluence judicial behavior and outcomes.”<sup>95</sup> The Constitution’s vesting of judicial appointment powers in the executive, for example, “can shape which policies receive judicial deference by shifting the composition of the court,” and so “offer the executive another tool for influencing judicial deference.”<sup>96</sup> The porousness of the appointment process to partisan interests and incentives, and the resulting interest-group activity around them, is a function of constitutional design. This design gap is a predicate of most causal mechanisms posited as linking popular politics (broadly understood) to constitutional decision-making.

There are three related ways in which the constitutional design allows for political forces to shape jurisprudential outcomes. The first looks broadly at the character and behavior of institutions; the second focuses more on the play of interest groups around the appointment process; and the third considers the ideologies that animate interest-group political investments. Often these explanations are tendered in overlapping account because they are compatible rather than mutually exclusive.

Working mainly in the register of institutional analysis, political scientist Kevin McMahon has focused on domestic institutional dynamics particular to the United States as the cause of the shift. McMahon identifies dramatic shifts in the domestic “politics of choosing and confirming [J]ustices” as an explanation for a Court that sits very far from the median preferences of American voters.<sup>97</sup> On his account, the nation’s “fractured politics” and the “increasingly hollow” role of the Senate explain the Court’s ideological drift.<sup>98</sup> McMahan also makes space for interest groups in his analysis. Shifts in the national political environment, he contends, have created space for “movement conservatives” to shape the appointment process on the Republican side (which has had the lion’s share of chances to make appointments).<sup>99</sup> These interest groups emerged in mid-century in response to a “growth of federal judicial power from the 1930s.”<sup>100</sup> The leading example is the Federalist Society.<sup>101</sup>

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<sup>95</sup> Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055, 1109 (2021); see also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 32 (1981) (explaining that governments create systems of judicial recruitment, training and promotion to advance regime interests).

<sup>96</sup> Peter Bils, Gleason Judd & Bradley C. Smith, *Policy Making and Appointments Under Electoral and Judicial Constraints*, 86 J. POL. 968, 969–70 (2024); accord. Charles M. Cameron, *The Political Economy of the US Presidency*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 241, 248 (Donald A. Wittman & Barry R. Weingast eds., 2008).

<sup>97</sup> KEVIN J. MCMAHON, *A SUPREME COURT UNLIKE ANY OTHER: THE DEEPENING DIVIDE BETWEEN THE JUSTICES AND THE PEOPLE* 2 (2024).

<sup>98</sup> *Id.* at 2–3 (underscoring also the role of “movement conservatives” in pressing for certain kinds of ideologically polarized appointments).

<sup>99</sup> *Id.* at 3–4.

<sup>100</sup> CHARLES M. CAMERON & JONATHAN P. KASTELLEC, *MAKING THE SUPREME COURT: THE POLITICS OF APPOINTMENTS, 1930–2020*, at 8, 107–32 (2023). See generally JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* (2012) (providing a nuanced account of the growth of federal judicial power in the twentieth century).

This second factor, which focuses on the behavior of interest groups, is developed with great cogency in work about specific doctrinal developments. In recent work on the First Amendment's Religion Clauses, Richard Schragger, Micah Schwartzman, and Nelson Tebbe look to the role of religious identity in American political polarization, Americans' rapid disaffiliation from denominations, and shifting interest-group strategies to fund religious schools, to explain doctrinal changes.<sup>102</sup> In effect, they offer a political economy of the Republican Party base that accounts not just for changes of composition, but also the way in which social trends (such as increasingly secularism and disaffiliation from organized religions) shape political incentives. In a similar vein, Eric Posner and Lee Epstein posit that "religiousness has become a screening mechanism for Republicans" thanks to "[E]vangelical" mobilizations.<sup>103</sup>

In isolating the importance of Christian interest groups, these accounts suggest the importance of a third factor—the possibility that ideological development among segments of the American public will shape the Court. One such ideological shift within Christianity is the re-emergence of an old set of beliefs in the "white Christian" form of nationalism.<sup>104</sup> White Christian nationalism is the belief that the United States "has been and should always be distinctively Christian in its identity, values, sacred symbols and policies."<sup>105</sup> According to Philip Gorski and Samuel Perry, it trades on a "deep story" that "America was founded as a Christian nation" and that its providential good fortune persisted only so long as it hewed to this divinely ordained identity.<sup>106</sup> Gorski and Perry argue that this historical diagnosis yields the prescription that "America should be a Christian nation, or, at least, a nation ruled by Christians."<sup>107</sup> If necessary, Christians are entitled to use "righteous violence" in order to ordain once more that divinely sanctioned order.<sup>108</sup> White Christian

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<sup>101</sup> See Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 366–67 (2009). See generally AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

<sup>102</sup> Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 254–72 (2025); see also Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2189–218 (2024) (providing a parallel account focused on the role of abortion).

<sup>103</sup> Epstein & Posner, *supra* note 18, at 337–39.

<sup>104</sup> Daniel K. Williams, *Baptizing Uncle Sam: Tracing the Origins of Christian Nationalism*, 44 REVS. AM. HIST. 391, 398 (2016).

<sup>105</sup> Samuel L. Perry & Andrew L. Whitehead, *Christian Nationalism and White Racial Boundaries: Examining Whites' Opposition to Interracial Marriage*, 38 ETHNIC & RACIAL STUD. 1671, 1672 (2015); see also Williams, *supra* note 104, at 398 (providing the historical roots of this ideology); KATHLEEN BELEW, BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA 10–11, 23–24 (2018) (explaining the ideology's resurgence in the 1970s).

<sup>106</sup> PHILIP S. GORSKI & SAMUEL L. PERRY, THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY 3–4 (2022).

<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 7.

nationalism is just one of a range of “religious nationalisms,” which are ideologies found in many parts of the world that “rel[y] on religious identities and myths to define the nation and its goals.”<sup>109</sup> This belief system is not identical to the illiberalism manifested by the Roberts Court.<sup>110</sup> But there are many points of contact.

Survey evidence finds a majority of Republican voters evincing sympathy with this world view,<sup>111</sup> even if this affinity has cooled lately.<sup>112</sup> Given the prevalence of such beliefs among Republicans, and the interest-group dynamics described by Schragger, Schwartzman, and Tebbe, it is at least plausible to posit that beliefs shape judicial appointments by Republican presidents. At a minimum, the latter likely search for candidates acceptable to the majority in their party who hold such views. There is a further reason to suspect this causal mechanism is at work. White Christian nationalism offers an explanation for not just the resurgence of faith but also of the family and nation strands of illiberal doctrine.<sup>113</sup> Hence, one line of white Christian nationalist thinking underscores a fear of “replacement” by non-white, non-Christian peoples.<sup>114</sup> This belief has a direct link to views about immigration.<sup>115</sup> It also dovetails into a pro-natalist opposition to abortion, which is also perceived as a threat to white

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<sup>109</sup> Anna Grzymala-Busse, *Religious Nationalism and Religious Influence*, OXFORD RSCH. ENCYCLOPEDIAS (Mar. 26, 2019), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-813> [perma.cc/B2FY-GGUN].

<sup>110</sup> See Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 852 (2020) (linking Christian nationalism to Establishment Clause decisions that allow “a caste system based on religion”).

<sup>111</sup> *A Christian Nation? Understanding the Threat of Christian Nationalism to American Democracy and Culture*, PRRI (Feb. 8, 2023), <https://www.prri.org/research/a-christian-nation-understanding-the-threat-of-christian-nationalism-to-american-democracy-and-culture/> [perma.cc/R4P-8ZUU] (finding that 54% of Republicans in a nationally representative survey sympathize with Christian nationalism ideas).

<sup>112</sup> Russell Contreras, *Poll: Most Americans Cool to Christian Nationalism as Its Influence Grows*, AXIOS (Feb. 28, 2024), <https://www.axios.com/2024/02/28/poll-christian-nationalism-americans-reject> [perma.cc/3Z84-RJBT] (finding that seven out of ten Americans were skeptical of these beliefs; 55% of Republicans, however, viewed Christian nationalism favorably, with higher concentrations of support among Evangelicals).

<sup>113</sup> Not surprisingly, there is also evidence that white Christian nationalism is associated with a racialized account of political citizenship, and thus legitimate political agency. See ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* 105–06, 163–64 (2020).

<sup>114</sup> See WEEKEND EDITION SUNDAY: *What Is White Replacement Theory? Explaining the White Supremacist Rhetoric*, NPR (Sep. 26, 2021), <https://www.npr.org/2021/09/26/1040756471/what-is-white-replacement-theory-explaining-the-white-supremacist-rhetoric> [perma.cc/EG7P-TMA9] (noting “that many incarnations of this theory involve a supposed cabal of Jewish elites”).

<sup>115</sup> See, e.g., Adam Serwer, *Conservatives Are Defending a Sanitized Version of ‘The Great Replacement’*, THE ATLANTIC (May 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/buffalo-shooting-republican-great-replacement/629903/> [perma.cc/27GS-F2HW] (discussing the increasing prevalence of this belief among members of the Republican party, and its link to anti-immigration politics).

demographic dominance.<sup>116</sup> Abortion bans are thus seen as “calculated ideological attempts to promote natalism and preserve the male-female binary as a way of defending against a perceived liberal and LGBTQ attack on conservative and Christian values.”<sup>117</sup> White Christian nationalism thus offers a comprehensive belief system that knits a preference for one majority faith, an orientation toward a specific notion of the heteronormative and fertile family, and a hostility to immigrants. While it seems unlikely that any Justice would explicitly cite its tenets to justify a decision, there is a clear congruence between this constellation of beliefs, held by elements of the Republican base, and the illiberal jurisprudential priorities of the Roberts Court.

### C. *The International Lacuna*

The institutional and socio-political dynamics identified by political scientists and legal scholars shed compelling insights into the political economy of judicial appointments, and hence into the priorities of those most likely to be selected as Justices. Nevertheless, we want to draw attention here to an important gap in the scholarly literature trying to understand the Roberts Court: influential historical accounts of constitutional law have repeatedly called attention to the significant role played by transnational dynamics—the tug and pull of geopolitical considerations, the influence (positive or negative) or other nations’ behavior, and the diffusion of ideas across national borders. These dynamics have been persuasively flagged with regard to the early Republic, the first half of the twentieth century, and the Cold War period. Yet they are entirely absent from accounts of the Roberts Court. The lacuna is puzzling and calls out to be addressed.

Scholars have called attention to the influence of geopolitical dynamics at various points of American constitutional development. Three periods of American history bear scrutiny: the early Republic, the first half of the twentieth century, and the Cold War era.

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<sup>116</sup> See GORSKI & PERRY, *supra* note 106, at 68–69; Cynthia Miller-Idriss, Opinion, *How the Loss of Roe Directly Serves White Supremacists’ Horrifying Plot*, MS NOW (Aug. 14, 2022), <https://www.ms.now/opinion/msnbc-opinion/how-anti-abortion-rights-white-supremacist-extremism-overlap-n1297896> [perma.cc/53A3-THEY]. The same connection has been documented in Australia. See Erica Millar, ‘Too Many’ Anxious White Nationalism and the Biopolitics of Abortion, 30 AUSTRAL. FEMINIST STUD. 82, 82–83 (2015) (“The figure of the aborting woman thus stands alongside other bodies perceived as threats to white sociocultural hegemony in Australia and one of its key institutions—the white, hetero-family.”). See generally Emma Green, *The Rebirth of America’s Pro-Natalist Movement*, THE ATLANTIC (Dec. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/12/pro-natalism/547493/> [perma.cc/37TR-UHTX] (outlining the idea of “natalis[m],” which is a positive attitude as to the desirability of reproduction, and the need to foster it).

<sup>117</sup> Noa Ben-Asher & Margot J. Pollans, *Gender Regrets: Banning Abortion and Gender-Affirming Care*, 2024 UTAH L. REV. 763, 793–94.

First, it is widely recognized among scholars that the initial judicial development of American constitutional norms was “profoundly shaped by the new nation’s relationship to the broader community of ‘civilized nations,’” to say nothing of the new nation’s fraught relations with indigenous tribal nations.<sup>118</sup> The Constitution itself was crafted, as Madison explained, as a “bulwark against foreign danger” and “the conservator of peace among ourselves.”<sup>119</sup> The result was “a fundamentally international document.”<sup>120</sup> Early Administrations “sought to delegate decision-making *responsibility* on an important foreign affairs matter to the courts entirely,” for example in respect to disputes over captured foreign vessels.<sup>121</sup> In the process, presidents encountered resistance as “federal judges sought to articulate their own vision of a judicial role in managing foreign nations.”<sup>122</sup>

Early Supreme Court decisions reflected judicial awareness of international stakes. The Marshall Court faced hundreds of cases raising foreign affairs questions.<sup>123</sup> These were particularly politically salient during the Neutrality Crisis of 1793 and the Jay Treaty controversy of 1795–96. In the 1796 case of *Ware v. Hylton*, for example, the Court rejected an argument that treaties required domesticating legislation to be enforced in federal courts.<sup>124</sup> Several Justices took the case as an opportunity to pronounce on the importance of international law. Justice Wilson thus explained that the new, independent nation had been “bound to receive the law of nations, in its modern state of purity and refinement.”<sup>125</sup> And Justice Iredell avowed “reverence [for] the obligation

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<sup>118</sup> Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 LAW & HIST. REV. 245, 249 (2012). See generally Gregory Ablavsky, “With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025 (2018) (providing the context of relations with the tribes in the era of constitution-making).

<sup>119</sup> THE FEDERALIST No. 14, 99 (James Madison) (Clinton Rossiter ed., 1961); see also DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 7 (2003) (emphasizing the international orientation of the Constitution’s design).

<sup>120</sup> David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 934 (2010).

<sup>121</sup> Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1, 5.

<sup>122</sup> *Id.* at 6; see also MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 14–19 (2019) (developing a similar claim about judicial involvement in foreign affairs). For example, the Justices famously declined to respond to Washington’s cabinet’s request for guidance on how to handle French privateers. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 626 n.68 (1971).

<sup>123</sup> Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 YALE L.J. 855, 861 (2005) (identifying “323 such cases from a total caseload of more than 1300”).

<sup>124</sup> 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.).

<sup>125</sup> *Id.* at 281 (opinion of Wilson, J.).

of treaties,” upon which rests “[t]he peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations.”<sup>126</sup>

Second, historians have long been aware that the concern for minorities’ civil rights starting in the 1940s stemmed from liberals’ anxieties about Hitler’s and Stalin’s policies.<sup>127</sup> Legal scholars have extended this point by showing how anti-totalitarianism shaped the courts. Both before and after World War II, Richard Primus argued, the Supreme Court “continually reformulated constitutional doctrine in ways designed to prevent a totalitarian regime, communist or otherwise, from arising in the United States.”<sup>128</sup> At times, this connection was explicit. Writing in 1943, for example, Justice Robert Jackson voted to invalidate a compulsory flag-salute mandate as excessively reminiscent of “the fast failing efforts of our present totalitarian enemies.”<sup>129</sup> Offering a quintessential slippery slope argument, he agonized about the risk that “[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters.”<sup>130</sup> Seven years later, Jackson worried about how the First Amendment could accommodate “the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties.”<sup>131</sup> Primus further identifies concern with the perils of totalitarianism in decisions related to free expression, equal protection, police procedures, and personal privacy.<sup>132</sup> Of course, anti-totalitarianism did not always carry the day. But when it faltered, the Justices’ critics were quick to pounce. When the Court upheld the Japanese-American exclusions and detentions, for example, commentators quickly flagged parallels between that policy and the Nazis’ treatment of the Jewish populations under their baleful control.<sup>133</sup>

Finally, in the wake of World War II, a different kind of geopolitical conflict would shape constitutional law. In an influential 1980 law review article, Derrick Bell argued that the school desegregation decisions of the Supreme

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<sup>126</sup> *Id.* at 270 (opinion of Iredell, J., Circuit Justice, published in whole on appeal); see also *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (suggesting that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

<sup>127</sup> Gary Gerstle, *The Protean Character of American Liberalism*, 99 AM. HIST. REV. 1043, 1071–73 (1994).

<sup>128</sup> Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996).

<sup>129</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943).

<sup>130</sup> *Id.*; see also Primus, *supra* note 128, at 438 (arguing that *Barnette* was “largely driven by the Court’s desire to distinguish America from wartime Germany”).

<sup>131</sup> *Dennis v. United States*, 341 U.S. 494, 567 (1951) (Jackson, J., concurring).

<sup>132</sup> Primus, *supra* note 128, at 423–24; see also Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1196 (1998) (explaining how World War II judges invoked the specter of totalitarianism in developing criminal procedure doctrine).

<sup>133</sup> See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 506 (1945).



Court, and their repudiation of longstanding precedent authorizing “separate but equal” facilities, rested upon a momentary convergence of majority and minority interests, rather than any legal or moral principle.<sup>134</sup> On this account, successive Administrations supported desegregation so as to secure “immediate credibility to America’s struggle with Communist countries” by desegregating Southern schools.<sup>135</sup> There was, in addition, a wish to modernize the agrarian Southern economy.<sup>136</sup> In an article and a book that built on Bell’s work, Mary Dudziak substantiated his hypothesis through archival research.<sup>137</sup> At the time of the *Brown* litigation, she demonstrated, the State Department had been urging the Justice Department to support the campaign to reverse segregation for the very reasons Bell posited.<sup>138</sup> “Domestic civil rights crises would quickly become international crises. As presidents and secretaries of state from 1946 to the mid-1960s worried about the impact of race discrimination on U.S. prestige abroad, civil rights reform came to be seen as crucial to U.S. foreign relations.”<sup>139</sup> Without identifying specific evidence that the Justices considered these geopolitical considerations, Dudziak argued that they likely were “well aware of this issue.”<sup>140</sup>

Cold War imperatives shaped not only the emergence but the decline of judicial efforts at desegregation. Bell accurately predicted that judicial and executive-branch support for desegregation would wane as geopolitical priorities shifted.<sup>141</sup> Consistent with that hypothesis, Dudziak demonstrated that the Vietnam War shifted international attention from questions of race within the United States to overseas military actions.<sup>142</sup> By 1966, she notes, “[a]wareness of and disapproval of treatment of the Negro seem to have comparatively little

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<sup>134</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523, 524–25 (1980).

<sup>135</sup> *Id.* at 524.

<sup>136</sup> *Id.* at 525.

<sup>137</sup> See generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) [hereinafter DUDZIAK, COLD WAR CIVIL RIGHTS]; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

<sup>138</sup> Dudziak, *supra* note 137, at 13–15, 118–19.

<sup>139</sup> DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 137, at 6.

<sup>140</sup> *Id.* at 104–06; see also Mary L. Dudziak, *Brown as a Cold War Case*, 91 J. AM. HIST. 32, 34 (2004) (arguing that Cold War concerns motivated not only presidents but also “the courts . . . to act on civil rights” in the 1950s). See generally H. Timothy Lovelace, Jr., *Civil Rights as Human Rights*, 71 DUKE L.J. 1849, 1861–66 (2022) (providing similar points about the influence of the Cold War on government incentives respecting segregation); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003) (same).

<sup>141</sup> Bell, *supra* note 134, at 525.

<sup>142</sup> DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 137, at 240.

effect on general opinion of the U.S.”<sup>143</sup> As white elite and Black interests respecting school segregation came apart, the desegregation project faded.

In short, from the beginning of the Republic, the development of constitutional jurisprudence has been molded in different ways by international dynamics. The nature of these dynamics has shifted as the United States’ position in the international system has evolved. In the early eighteenth-century context, the Court recognized the force of international law and the concerns of other sovereigns. In the early twentieth-century, the Court looked at developments in other jurisdictions, particularly Germany and Russia, with abhorrence: transnational examples were a negative exemplar, showing what to disavow. And in the Cold War period, anti-Communist imperatives buffeted litigation over school desegregation and the Establishment Clause, changing the pace at which constitutional change occurred. There is no one way, in short, in which international dynamics shape the Court: the pathways are numerous.

It is hard to believe that the far more globalized world of the early twenty-first century would lead to a more autochthonous constitutional jurisprudence than the one observed in earlier periods of American history. The United States today, at a minimum, is no less buffeted by external forces than in 1800. This yields a puzzle: if it is likely that transnational forces shape, in one way or another, that jurisprudence, where are they, and how do they operate?

## II. THE GLOBAL ILLIBERAL SHIFT

The Roberts Court’s illiberal shift is not distinctive. There has been an illiberal shift in domestic constitutional and foundational statutory law broadly across the globe in the same period. Across many different national and geopolitical contexts, courts, legislators and constitution makers have elevated the traditional solidarities of family, faith, and nation over individual autonomy claims. The illiberal shift in public law is global.

This Part documents that claim by systematically documenting parallels between the family, faith, and nation jurisprudence of the Roberts Court discussed in Part I.A, and legal shifts in other parts of the world. This largely descriptive enterprise covers three areas in which the Roberts Court jurisprudence has parallels around the world: (i) a revival of the traditional family, with attacks upon lesbian, gay, trans, queer, intersex, and asexual (LGBTQIA+) rights and also rights to control of reproductive freedom (e.g., abortion and contraception);<sup>144</sup> (ii) measures that prioritize by law the role of dominant religions in state and

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<sup>143</sup> *Id.* (quoting OFFICE OF RESEARCH, UNITED STATES INFORMATION AGENCY, RACIAL ISSUES IN THE U.S.: SOME POLICY AND PROGRAM INDICATIONS OF RESEARCH, Special “S” Reports, 1964-82, S-3-66 (Mar. 14, 1966)).

<sup>144</sup> *Cf.* *United States v. Skrmetti*, 605 U.S. 495, 522 (2025) (upholding Tennessee statute that prohibits gender care for minors).

society; (iii) the promotion of exclusivist and often racially constrained visions of the nation, often through restrictions upon lawful immigration or access to citizenship. These three strands track the three prongs of American constitutional law described above.

The final section of this Part discusses one area in which the Roberts Court's jurisprudence tellingly lacks direct parallels in other countries—but where other, indirect resonances can be traced. A central plank of the Roberts Court's project has been a deregulatory attack on the administrative state.<sup>145</sup> The United States is somewhat distinctive from other jurisdictions in the way in which the administrative state has been cobbled together piecemeal over time against the backdrop of a two-century-old constitution drafted in an era that could not imagine modern bureaucracy.<sup>146</sup> The Roberts Court is also distinctive insofar as it has unleashed a counter-attack against the New-Deal-era administrative state. We find in other illiberal jurisdictions no other generalized assault on regulation. Indeed, in Europe at least, a distinctive amalgam of populism and bureaucracy and populism is emerging that is quite unlike the deregulatory policies in the United States exemplified by the so-called Department of Governmental Efficiency (DOGE). Despite this difference, we identify a more limited kind of backlash against bureaucracy in illiberal regimes beyond the United States. This entails attacks on institutions that resist their efforts to create a new cultural hegemony. Universities and liberal judiciaries, in particular, have come under fire as bastions of a disfavored liberal ethos. But their degradation is collateral damage in a wider culture war. This dynamic does not have a parallel in the Roberts Court's illiberal turn—although it may portend where its jurisprudence will go next.

Two caveats are warranted up front. First, we identify both legislative and constitutional vectors of change, which overlap and reinforce each other, resonating with the Roberts Court's illiberalism. While the precise configuration and balance between legislative and constitutional change varies greatly with local context, the overall pattern of activity is sufficiently clear to be characterized as illiberal and small-c constitutional. That is, it makes sense to speak of constitutional trends to describe a series of global efforts to change the fundamental terms of the social contract.

Second, our aim here is to offer a series of suggestive examples, rather than to offer an exhaustive catalog of a global trend. Where possible, we adduce case studies from a variety of different national contexts. In their range and similarity, these examples showcase the global character of the illiberal turn.

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<sup>145</sup> See generally Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1 (2020) (providing an overview).

<sup>146</sup> Martin Shapiro, *A Comparison of US and European Independent Agencies*, in COMPARATIVE ADMINISTRATIVE LAW 293, 296 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

### A. Reviving Visions of the “Traditional” Family

The rapid social change in practices related to gender identity and sexuality over the last fifty years have been accompanied by a backlash in many countries beyond the United States. This has taken the form of bottom-up social movements, sometimes transnational in nature, but also top-down efforts by the Vatican to defend traditional marriage, oppose gay rights, and combat transgender care.<sup>147</sup> As Mary Anne Case has shown, the Vatican under the former Pope Joseph Ratzinger developed a series of arguments targeting what it calls “gender ideology,” initially as a response to a series of United Nations Conferences on Women in the 1990s.<sup>148</sup> These arguments built on the Church’s earlier efforts to develop a doctrine of “complementarity” to signify the existence of essential and immutable differences between men and women.<sup>149</sup>

This Catholic discourse of gender ideology has in turn diffused and become a central policy plank for many political movements that are seeking illiberal statutory and constitutional change to shore up patriarchal and heteronormative ideals. In Latin America, where local churches quickly picked up Ratzinger’s ideas, the term has been used to justify changes to policies of sex education or violence against women.<sup>150</sup> Surprisingly, the idea of gender ideology has “detached itself from its Catholic origins and become a signifier for those politicians who confront the influence of feminist and LGBTQI movements” more generally.<sup>151</sup> For example, the term “complementarity” has filtered into constitutional debates in the Muslim world in the aftermath of the Arab Spring. In August 2012, a draft of a proposed Tunisian constitution was published. Backed by the religious party Ennahda, it included an article notionally concerning gender equality, that stated that “women . . . hav[e] a role complementary [(“yetekaamul”)] [to men] within the family.”<sup>152</sup> Women’s groups saw this as a step back from equality because it was “situated within an

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<sup>147</sup> Mary Anne Case, *Trans Formations in the Vatican’s War on “Gender Ideology,”* 44 SIGNS: J. WOMEN CULTURE & SOC’Y 639, 641 (2019); see also Juan Marco Vaggione, *The Conservative Uses of Law: The Catholic Mobilization Against Gender Ideology*, 67 SOC. COMPASS 252, 253 (2020) (noting “the growing use of the term ‘gender ideology’ by the Catholic hierarchy in order to understand and counter the influence of the feminist and LGBTQI movements”). This is, of course, an issue the Roberts Court took up and resolved favorably to the Vatican position in 2025. See *Skrmetti*, 605 U.S. at 510–11 (rejecting the use of intermediate scrutiny for limits on gender medicine for minors).

<sup>148</sup> Case, *supra* note 147, at 642.

<sup>149</sup> Mary Anne Case, *The Role of the Popes in the Invention of Complementarity and the Vatican’s Anathematization of Gender*, 6 RELIGION & GENDER 155, 156 (2016); Mary Anne Case, *After Gender the Destruction of Man? The Vatican’s Nightmare Vision of the “Gender Agenda” for Law*, 31 PACE L. REV. 802, 813–14 (2011).

<sup>150</sup> Vaggione, *supra* note 147, at 262.

<sup>151</sup> *Id.*

<sup>152</sup> Mounira M. Charrad & Amina Zarrugh, “Women Are Complete, Not Complements” Terminology in the Writing of the New Constitution of Tunisia (emphasis omitted), in WOMEN RISING: IN AND BEYOND THE ARAB SPRING 85, 87–88 (Rita Stephan & Mounira M. Charrad eds., 2020).

Islamist ethics of collectivism.”<sup>153</sup> Major public protests ensued until the proposed article was withdrawn.<sup>154</sup>

This “anti-gender ideology” movement coincides with a growing trend of adding explicit text of national constitutions defining marriage as between a man and a woman. Figure 1 reports data on that trend from 1990 to the present. It is at least suggestive of a counter-liberal backlash manifesting widely in law.

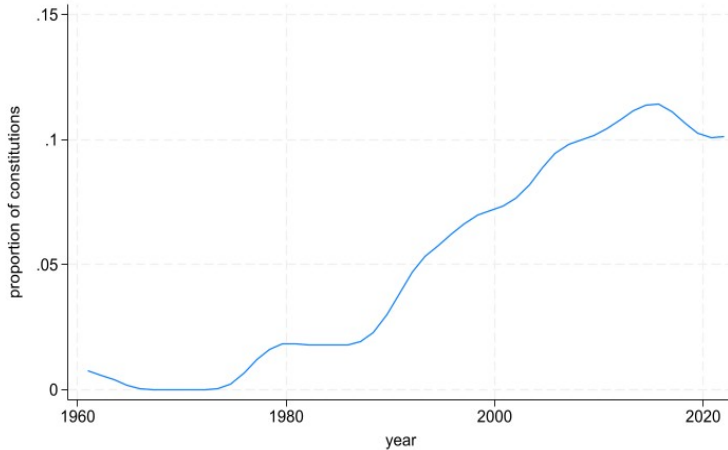


Figure 1. Proportion of national constitutions in force defining marriage as between a man and woman. Data: Constitute Database (accessed July 2025).

The general social movement around the traditional family has three distinct policy goals. One is a pro-natalist policy that encourages current citizens to reproduce, reflecting demographic anxieties in much of the rich world.<sup>155</sup> While of course these could be partially redressed through expanded immigration, such an approach risks undermining national solidarity. As a result, encouraging births among the “true” members of the nation is the preferred solution. Second, and related to natalist ideas, is the policy of restricting access to abortion by law in the fashion of the *Dobbs v. Jackson Women’s Health Organization* decision. Anti-abortion policy has become increasingly linked, as a rhetorical matter, with a demographic worry, about the “replacement” of a traditionally dominant ethnic group.<sup>156</sup> Finally, there is a parallel attack on LGBTQIA+ rights in many parts of the world, which is justified by reference to ideas of a patriarchal and heteronormative family deemed to be traditional.

<sup>153</sup> *Id.* at 89.

<sup>154</sup> *Id.*

<sup>155</sup> See Green, *supra* note 116 (discussing “natalis[m]”).

<sup>156</sup> See Aziz Huq, *Illiberalism and Islam* (charting diffusion of “great replacement” discourse), in *THE ROUTLEDGE HANDBOOK OF ILLIBERALISM*, *supra* note 3, at 331–33.

In this section, we illustrate these developments with four different national case studies: Kenya, Russia, Poland, and Italy.

## 1. Kenya

An early iteration of the constitutional politics of family, faith, and nation was apparent during the tumultuous, multi-year process by which the Constitution of Kenya of 2010 was adopted. The draft emerged after years of false starts, consultations, political negotiation and expert input. In some quarters, it was expected to open upon a new era of good governance and human rights after political turmoil and authoritarianism. During the campaign for adoption by public referendum, however, a late wave of opposition arose from Kenyan churches—including Anglican, Catholic and Evangelical institutions—in respect to a single clause thought to relate to abortion.<sup>157</sup> The opposition linked local religious groups to transnational networks—anticipating many of the themes and dynamics to emerge later in the decade in the Roberts Court. As such, the controversy is worth flagging as a harbinger of global culture wars to come.

Perhaps surprisingly, the controversial provision of the draft Constitution did not in fact legalize abortion at all. Instead, Article 26 stated that life begins at conception, and that abortion was prohibited unless a medical professional thought there was a risk to the life or health of the mother, “or if permitted by any other written law.”<sup>158</sup> Yash Pal Ghai, a well-known Kenyan law professor and constitutional drafter, described the draft as “about as hard on abortion as you can get.”<sup>159</sup> But the churches were upset about the element of the clause allowing medical professionals to grant abortion on the basis of the mother’s “health,” a term they believed to be too broad and permissive. They also fretted that leaving the matter to “other written law” would allow parliament to completely legalize abortion at a later date. And they argued that this constituted an expansion in abortion rights, which had previously been limited to circumstances in which the mother’s life was in danger.<sup>160</sup>

While the government and the Committee of Experts were coordinating a vast civic education campaign to inform the public of the contents of the proposed draft, the churches organized a counter-campaign of their own. They brought graphic videos showing aborted fetuses to poor, rural areas. Misinfor-

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<sup>157</sup> Grace Maingi, *The Kenyan Constitutional Reform Process: A Case Study on the Work of FIDA Kenya in Securing Women’s Rights*, 15 FEMINIST AFR. 63, 73 (2015).

<sup>158</sup> CONSTITUTION art. 26 (2010) (Kenya).

<sup>159</sup> Jeffrey Gettleman, *Kenyan Constitution Opens New Front in Culture Wars*, N.Y. TIMES (May 13, 2010), <http://www.nytimes.com/2010/05/14/world/africa/14kenya.html> [perma.cc/RL7N-CA3Q].

<sup>160</sup> Penal Code, Laws of Kenya, Cap. 63, § 204 (2012) (“A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation . . . upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable . . .”).

mation was common, with many rural women being told that they would be *forced* to have abortions under the new constitution. Such intense lobbying over abortion turned what was a moderately contentious social issue into a major threat to Kenya's political reconstruction. Abortion had never attracted the kind of attention that it did in the debates over the Constitution. In the end, the constitution nevertheless passed with the support of around 70% of the population in a referendum in August 2010 and ultimately provided a basis for expanded access to reproductive care.<sup>161</sup>

Opposition to this perceived liberalization of abortion access emerged from a matrix of local and international organizations—foreshadowing some of the trends of global illiberalism of the last decade. For example, a group called the American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) lobbied Congress and the Obama administration to oppose the draft. The Vatican also criticized the constitution and mobilized Catholics to oppose the Kenyan Constitution.<sup>162</sup> The American Center for Law and Justice—a U.S.-based Christian lobbying group founded by Pat Robertson that has filed more than three hundred amicus briefs in the U.S. Supreme Court—opened up a branch in Kenya (the East African Center for Law and Justice) and lobbied against the draft.<sup>163</sup> And a pro-choice U.S. Congressman from New Jersey, Chris Smith, assailed the draft and Obama administration support for the process.

It is worth noting that LGBTQIA+ rights were also discussed during the constitutional drafting process, but did not incite the same level of public controversy. The Committee of Experts decided not to include sexual orientation as a specifically protected category in the equality clause, out of concern that gay rights would have doomed the Constitution in the highly conservative Kenyan society.<sup>164</sup> Subsequent efforts to strike down Kenya's anti-sodomy laws have also failed, despite doctrinally plausible arguments for their uncon-

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<sup>161</sup> Eric Kramon & Daniel N. Posner, *Kenya's New Constitution*, 22 J. DEMOCRACY 89, 89 (2011). In 2022, the High Court held that the Penal Code had to be amended to facilitate abortions consistent with the Constitution. *PAK v. Att'y Gen.* (2022) 262 K.L.R. 1 (H.C.K.) (Kenya).

<sup>162</sup> Steven Ertelt, *Kenya Government Starts Campaign for Pro-Abortion Constitution, Attacks Church*, LIFE NEWS.COM (Apr. 20, 2010), <https://www.lifenews.com/2010/04/20/int-1515/> [perma.cc/LTS6-T6JT]. *Kenya: Abortion Harms Women's Health, U.S. Physicians Say*, ALLAFRICA (Mar. 31, 2010), <https://allafrica.com/stories/201003310624.html> [perma.cc/Z822-K3L6].

<sup>163</sup> They also opened offices in Zimbabwe. See KAPYA JOHN KAOMA, POL. RSCH. ASSOCS., *COLONIZING AFRICAN VALUES: HOW THE U.S. CHRISTIAN RIGHT IS TRANSFORMING SEXUAL POLITICS IN AFRICA*, at vii (2012).

<sup>164</sup> Mathias Ringe, *Law Review Experts Rule Out Rights for Homosexuals*, DAILY NATION (July 3, 2020), <https://nation.africa/kenya/news/law-review-experts-rule-out-rights-for-homosexuals-611718> [perma.cc/7WZ5-RD96].

stitutionality.<sup>165</sup> The Constitution, for example, protects both a right to privacy and a right to equality, broadly understood. Such liberal rights have formed the basis for international legal protection for LGBTQIA+ rights.<sup>166</sup> Kenyan courts, however, have not taken up this opportunity.

## 2. Poland

Poland's populist Law and Justice (PiS) Party held national office between 2015 and 2023, and made family and faith central planks of its platform. Its approach reflects all three programs identified above: a pro-natalist policy to reward large families; a strong anti-abortion focus; and explicit attacks on sexual minorities.

First, celebration of the reproductive, heterosexual family has been an explicit focus of the PiS Party since the 1990s. After it won election in 2015, one of the Party's "flagship" initiatives was the Family 500+ program, which was launched in April 2016.<sup>167</sup> Under this program, Polish families with more than one child would earn a monthly allowance of 500 zloty (about \$125) for each child after the first.<sup>168</sup> This program was highly popular, and explains some of the Party's electoral success. Urged on by a Catholic legal organization *Ordo Iuris*, the PiS government tried to withdraw from the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence as a measure containing "elements of an ideological nature, which we consider harmful."<sup>169</sup>

Second, and concomitantly, politicians and judges associated with PiS have worked together to narrow reproductive choice in Poland. During the Soviet era, Poland had some of the most liberal abortion laws in Europe.<sup>170</sup> In

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<sup>165</sup> See Courtney E. Finerty, *Being Gay in Kenya: The Implications of Kenya's New Constitution for Its Anti-Sodomy Laws*, 45 CORN. INT'L L.J. 431, 450–56 (2012) (providing an effective documentation of those arguments).

<sup>166</sup> U.N. High Comm'r for Hum. Rts., *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity* ¶¶ 15–19, 41, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

<sup>167</sup> *Poland to Ramp Up Child Benefit Payments from 2024*, REUTERS (May 14, 2023), <https://www.reuters.com/world/europe/poland-up-monthly-child-benefit-800-zlotys-ruling-party-leader-2023-05-14/> [perma.cc/9RKU-SZAN]; see also "Family 500+" Program, MINISTRY OF FAM., LAB. & SOC. POL'Y REPUBLIC OF POL. (Sep. 14, 2017), <https://www.gov.pl/web/family/family-500-programme> [perma.cc/7BC8-QJGA].

<sup>168</sup> *Id.*

<sup>169</sup> Eline Schaart, *Poland to Withdraw from Treaty on Violence Against Women*, POLITICO (July 25, 2020), <https://www.politico.eu/article/poland-to-withdraw-from-istanbul-convention-treaty-on-violence-against-women/> [perma.cc/ZZ38-RDCR]. The effort ultimately failed. *Tusk Withdraws Former Government's Challenge to European Convention on Domestic Violence*, NOTES FROM POL. (Jan. 30, 2024), <https://notesfrompoland.com/2024/01/30/tusk-withdraws-former-governments-challenge-to-european-convention-on-domestic-violence/> [perma.cc/WG48-EXC7].

<sup>170</sup> Marta Bucholc, *Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon*, 14 HAGUE J. ON RULE L. 73, 80 (2022).



1993, a pre-PiS government limited abortion to certain classes of cases (e.g., cases of danger to the mother's health or life, rape or incest, or severe fetal abnormalities).<sup>171</sup> In 2019, a group of right-wing deputies in the Sejm filed a petition in the Constitutional Tribunal seeking to have abortion access further narrowed.<sup>172</sup> By this time, PiS efforts to stack the court with loyalists meant that it was already "an enabler of governmental politics and was effectively eliminated as an instance exercising control over the system of the separation of powers."<sup>173</sup> In October 2020, the PiS-dominated Tribunal ruled that abortion even in cases of severe and irreversible fetal defects was unconstitutional as inconsistent with human rights.<sup>174</sup> The judges expressly invoked an understanding of constitutional law anchored in tradition. The ruling hence characterized the Polish Constitution as a "cultural creation, embedded in the historical experience of the community and construed based on the system of values common to a given circle of subjects."<sup>175</sup> Despite the COVID-19 pandemic, the opinion sparked considerable public protests.<sup>176</sup>

Third, the PiS and its allies have leveraged a provision in the 1997 Constitution defining marriage as the "union of a man and a woman" as a legal basis for discrimination on the basis of sexual orientation.<sup>177</sup> In the last decade, the same Catholic organization that pushed for patriarchal family-law norms, *Ordo Iuris*, promoted the creation of "LGBT-free zones."<sup>178</sup> More than eighty localities in the religiously conservative south-east of Poland declared themselves to be unwelcoming of LGBTQIA+-supportive marches and activities at

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<sup>171</sup> *Id.*

<sup>172</sup> Anna Rakowska-Trela, *A Dubious Judgment by a Dubious Court*, VERFASSUNGSBLOG (Oct. 24, 2020), <https://verfassungsblog.de/a-dubious-judgment-by-a-dubious-court/> [perma.cc/A9DF-7BS4].

<sup>173</sup> Bucholc, *supra* note 170, at 85. See generally WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019) (offering a broad account of the breakdown of legality in Poland).

<sup>174</sup> *Poland: A Year on, Abortion Ruling Harms Women*, HUM. RTS. WATCH (Oct. 19, 2021), <https://www.hrw.org/news/2021/10/19/poland-year-abortion-ruling-harms-women> [perma.cc/ZAV4-9ZEY]; see also Tom Ginsburg, *American Exceptionalism and the Comparative Constitutional Law of Abortion*, in *ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION* 259, 269 (Lee C. Bollinger & Geoffrey Stone eds., 2024).

<sup>175</sup> Ginsburg, *supra* note 174, at 88.

<sup>176</sup> Marta Makowska, Rafał Boguszewski & Katarzyna Sacharczuk, *A Study of Opinions About the Polish Constitutional Tribunal's Judgement Strengthening Polish Abortion Laws*, 27 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 39, 39 (2022) (reporting survey evidence to the effect that only 15% of Poles agreed with the court's judgment).

<sup>177</sup> See Trybunał Konstytucyjny [Constitutional Tribunal] May 11, 2005, 86 Dziennik Ustaw 5757, 5757–59 (Pol.) (holding that Article 18's marriage definition does not conflict with the Treaty Establishing the European Community's prohibition on discrimination based on sexual orientation, because the sweeping language in Article 32 forbidding discrimination for "any reason" supersedes).

<sup>178</sup> Lucy Ash, *Inside Poland's 'LGBT-free Zones'*, BBC NEWS (Sep. 20, 2020), <https://www.bbc.com/news/stories-54191344> [perma.cc/L7V9-M5QK].

the behest of PiS legislators.<sup>179</sup> The LGBT free zones were, in general, symbolic and did not have any legal impact. Proponents described them as a reaction to encroachment by LGBT “ideology,” which they described as “aggressive[ly] . . . promoting homosexuality,”<sup>180</sup> and “‘even more destructive’ than communism.”<sup>181</sup> One regional governor went as far as to publicly award medals to local officials for their resistance to “LGBT ideology.”<sup>182</sup> At the peak of the movement, over a third of the country was avowedly “LGBT-free.”<sup>183</sup> This led to an adverse response from the Council of Europe Commissioner for Human Rights, and eventually a European Union decision to avoid funding activities in these municipalities.<sup>184</sup>

Domestic challenges to these measures in the Constitutional Tribunal proved ineffective given the 1997’s Constitution endorsement of marriage as a heterosexual institution and the PiS’s successful capture of the court. Yet, in 2022 the Supreme Administrative Court, which was not yet controlled by PiS appointees, decided in favor of challengers to the LGBTQIA+-free declarations on both points. The court first held that the declarations, rather than being “non-authoritative ideological declaration[s],” which would have been permissible, were “authoritative act[s]” subject to nondiscrimination provisions of law because they evinced an intent to exclude individuals from certain public positions.<sup>185</sup> Particularly with regard to schools, the declarations constituted “direct instruction[s]” to school officials about whom to employ and what content to include in curricula.<sup>186</sup> Having established that the declarations were not a matter of protected government speech, the court then turned to the question of whether sexual minorities were protected from discrimination under the relevant law. It cited the Polish constitution’s language that “no one . . . may be discriminated against for any reason,” in holding that the resolutions were a

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<sup>179</sup> Adam Ploszka, *From Human Rights to Human Wrongs. How Local Government Can Negatively Influence the Situation of an Individual. The Case of Polish LGBT Ideology-Free Zones*, 27 INT’L J. HUM. RTS. 359, 365 (2023).

<sup>180</sup> Ash, *supra* note 178.

<sup>181</sup> *Id.* (quoting Polish President Andrzej Duda).

<sup>182</sup> Anton Ambroziak, *Sąd Unieważnia Uchwały anty-LGBT, za Które Czarnek Rozdawał Medale. Sukces RPO* [The Court Annuls Anti-LGBT Resolutions for Which Czarnek Awarded Medals], OKO.PRESS (May 11, 2022), <https://oko.press/sad-uniewaznia-uchwaly-anty-lgbt> [perma.cc/TR9H-4ZX9].

<sup>183</sup> Ploszka, *supra* note 179, at 67–69.

<sup>184</sup> Commissioner for Human Rights, Council of Eur., Memorandum on the Stigmatisation of LGBTI People in Poland (Dec. 3, 2020), <https://rm.coe.int/memorandum-on-the-stigmatisation-of-lgbti-people-in-poland/1680a08b8e> [perma.cc/E38F-X4QX]; Monika Pronczuk, *Europe Tightens Purse Strings to Try to Pressure Poland and Hungary*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/09/24/world/europe/hungary-poland-eu.html> [perma.cc/623L-CYAB].

<sup>185</sup> Naczelny Sąd Administracyjny [Supreme Administrative Court] June 28, 2022, III OSK 3746/21 (Pol.). This finding was supported by specific passages of the declaration at issue in the case and statements from those involved.

<sup>186</sup> *Id.*

“violation of the dignity, honour, good name and private life of a specific group of inhabitants of the municipality.”<sup>187</sup> “In the context of sexual orientation,” the court wrote, honor and dignity “means the right of the individual to live freely and openly in accordance with his or her own orientation and identity, on an equal footing with [heterosexual] individuals.”<sup>188</sup> In so doing, the court both recognized and rejected the illiberal core of the PiS policy agenda.

In short, the PiS government sought to advance the traditional family. It was more successful in its pro-natalist and abortion policies. The former has been retained by its successor government, while the latter has yet to be reversed. In the anti-LGBTQIA+ context, however, its efforts sparked both domestic and international pushback, leaving sexual minorities vulnerable albeit not subjects of formal, legal persecution.

### 3. Russia

A similar mix of pro-natalist, anti-abortion, and anti-LGBTQIA+ policies can be traced in Russia, although the patterning of success and failure has been different. Take first pro-natalism. Since the fracturing of the Soviet Union, the population of what is now Russia has been dwindling.<sup>189</sup> By 2000, the fertility rate had fallen to 1.25 births per woman.<sup>190</sup> By 2022, the same number of Russians were being born as had been during the Nazi occupation of World War Two.<sup>191</sup> This trend has catalyzed a wave of pro-natalist rhetoric and policy. The Russian government under President Vladimir Putin instituted policy changes such as the “Maternity Capital” program, which provides substantial subsidies to families for housing, education, and pension contributions when they have two or more children.<sup>192</sup> Between 2009 and 2018, the program dispensed more than 2.3 billion rubles.<sup>193</sup>

At the same time, the Russian government has moved under intense pressure from religious conservatives to constrain by law access to reproductive care such as abortion and contraception. Under current Russian law, abortions

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Russia's Population Nightmare Is Going to Get Even Worse*, THE ECONOMIST (Mar. 4. 2023), <https://www.economist.com/europe/2023/03/04/russias-population-nightmare-is-going-to-get-even-worse> [perma.cc/X7LP-RXQX].

<sup>190</sup> D. Clark, *Total Fertility Rate in Russia from 1840 to 2020*, STATISTA (Nov. 28, 2025), <https://www.statista.com/statistics/1033851/fertility-rate-russia-1840-2020/> [perma.cc/R3CM-AJZE].

<sup>191</sup> *Russia's Population Nightmare Is Going to Get Even Worse*, *supra* note 189.

<sup>192</sup> Kazuhiro Kumo, *Explaining Fertility Trends in Russia*, CTR. FOR ECON. POL'Y RSCH. (June 2, 2010), <https://cepr.org/voxeu/columns/explaining-fertility-trends-russia> [perma.cc/2LUF-NH4K]; *Maternity (Family) Capital*, SOC. FUND OF RUSS., <https://sfr.gov.ru/en/matcap/> [perma.cc/U3WY-6ZMG].

<sup>193</sup> Ludmila Kormishkina & Lyudmila Koroleva, *Maternity Capital as a Tool for Reducing Child Poverty in Russia*, in COMPETITIVENESS AND THE DEVELOPMENT OF SOCIO-ECONOMIC SYSTEMS 561, 561–62 (Evgeny Popov, Viktor Barkhatov, Van Duc Pham & Dmitri Pletnev eds., 2021).

are permitted upon request up to twelve weeks of pregnancy and up to twenty-two weeks in cases of rape or other exceptional circumstances.<sup>194</sup> The Russian Orthodox Church, however, has long opposed abortions, and attempted in 2011 to persuade legislators to dramatically restrict its availability.<sup>195</sup> Under continuing pressure from the church,<sup>196</sup> the Putin government has since 2011 invoked “traditional Christian values” as a justification for imposing numerous obstacles to access to reproductive care, including mandatory counseling designed to discourage abortions, waiting periods, and resistance from medical professionals, sometimes on religious grounds.<sup>197</sup> In 2023, a series of legislative acts were adopted restricting access to abortion pills and intimidating those who provide information on abortions.<sup>198</sup> These measures are also justified by the pro-natalist concern about “losing the nation to those who may outbreed the Russians.”<sup>199</sup> Indeed, measures such as a proposed ban on abortion procedures in private clinics in some parts of the country, has been explicitly tied to the goal of expanding the population.<sup>200</sup>

Finally, LGBTQIA+ rights in Russia have been increasingly encumbered by law in recent years, culminating in severe legal measures targeting members of that community. In 2015, President Putin’s United Russia political party unfurled a heterosexual pride flag to mark an “annual Day of Family, Love and Fidelity.”<sup>201</sup> Since then, the government has aggressive “political homophobia” that has become central to a state project of promoting “traditional values” at home and abroad, while projecting its disfavor of “nontraditional” (i.e., non-heterosexual and nonheteronormative) identities.<sup>202</sup>

As part of this campaign, the Russian government has promulgated and enforced laws that broadly criminalize LGBTQIA+ expression and activism in the

<sup>194</sup> Pål Kolstø, *The Russian Orthodox Church and Its Fight Against Abortion: Taking on the State and Losing*, 51 RELIGION, STATE & SOC. 153, 156 (2023).

<sup>195</sup> *Id.* at 158–59.

<sup>196</sup> *See id.* at 159–60 (documenting efforts after 2011).

<sup>197</sup> Leyla Latypova, *Russia Edges Closer to Abortion Ban in Quest to Preserve ‘Traditional Values’*, MOSCOW TIMES (July 27, 2023), <https://www.themoscowtimes.com/2023/07/27/russia-edges-closer-to-abortion-ban-in-quest-to-preserve-traditional-values-a81977> [perma.cc/4M3T-L59E].

<sup>198</sup> Katie Marie Davies, *Russia Limits Women’s Access to Abortion, Citing Demographic Changes*, AL JAZEERA (Nov. 28, 2023), <https://www.aljazeera.com/features/2023/11/28/russia-limits-womens-access-to-abortion-citing-demographic-changes> [perma.cc/R7QQ-BR8T].

<sup>199</sup> Carol Mason, *Opposing Abortion to Protect Women: Transnational Strategy Since the 1990s*, 44 SIGNS: J. WOMEN CULTURE & SOC’Y 665, 679 (2019); *see also* Caroline Hill, *Framing of Abortion and Church-State Relations in Russian Orthodox Online Portals*, RELIGIONS, Dec. 2021, at 1, 1–2.

<sup>200</sup> Darko Janjevic, *Russia: What’s Behind the Anti-Abortion Push?*, DEUTSCHE WELLE (Nov. 22, 2023), <https://www.dw.com/en/russia-whats-behind-the-anti-abortion-push/a-67512380> [perma.cc/B3GL-RFR9].

<sup>201</sup> Jennifer Suchland, *The LGBT Specter in Russia: Refusing Queerness, Claiming ‘Whiteness,’* 25 GENDER, PLACE & CULTURE 1073, 1074 (2018).

<sup>202</sup> Emil Edenborg, *‘Traditional Values’ and the Narrative of Gay Rights as Modernity: Sexual Politics Beyond Polarization*, 26 SEXUALITIES 37, 39, 42 (2023).

name of protecting “traditional values” against the West. In 2022, for example, the Putin government banned by statute any “propaganda” related to same sex relations, a prohibition that extended to any public dissemination of information or activities that support LGBTQIA+ rights or display non-heterosexual orientations, including art, scientific studies, and education.<sup>203</sup> In 2023 it banned gender transition and gender affirming care.<sup>204</sup> In 2024, a decision of the Russian Supreme Court labeled an undefined international LGBTQIA+ movement as “extremist,” and so a threat to public order.<sup>205</sup> Of course, there is no such organized international conspiracy. But two managers of a gay bar were arrested in the first criminal “extremist” case against members of the LGBTQIA+ community and may face up to ten years in prison if found guilty of organizing extremist activities.<sup>206</sup> A minor girl was recently arrested for using an “extremist symbol” when she displayed a pride flag.<sup>207</sup> At the same time, the Putin government has simultaneously cracked down on human rights organizations, like Memorial, which might defend those persecuted under the “extremist” banner.<sup>208</sup> These developments reflect a wider international deployment of the loose term “extremist” by authoritarian governments in domestic and international law.<sup>209</sup>

#### 4. Italy

Perhaps no European politician has been as explicit in promoting “God, country and family” as Italy’s sitting prime minister Giorgia Meloni.<sup>210</sup> Beyond taking “God, country and family” as her central electioneering slogan,

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<sup>203</sup> *Russia: Expanded ‘Gay Propaganda’ Ban Progresses Toward Law*, HUM. RTS. WATCH (Nov. 25, 2022), <https://www.hrw.org/news/2022/11/25/russia-expanded-gay-propaganda-ban-progresses-toward-law> [perma.cc/QZ6S-XZ4P].

<sup>204</sup> Lucy Papachristou, *Russian Duma Completes Passage of Bill Banning Gender Change*, REUTERS (July 14, 2023), <https://www.reuters.com/world/europe/russian-duma-completes-passage-bill-banning-gender-change-2023-07-14/> [perma.cc/9NU8-33YV].

<sup>205</sup> *Russia Adds ‘LGBT Movement’ to List of Extremist and Terrorist Organisations*, REUTERS (Mar. 22, 2024), <https://www.reuters.com/world/europe/russia-adds-lgbt-movement-list-extremist-terrorist-organisations-2024-03-22/> [perma.cc/3Z62-UCTA].

<sup>206</sup> *Russia Adds ‘LGBT Movement’ to ‘Terrorists and Extremists’ List*, MOSCOW TIMES (Mar. 22, 2024), <https://www.themoscowtimes.com/2024/03/22/russia-adds-lgbt-movement-to-terrorists-and-extremists-list-a84574> [perma.cc/6FUC-WUYR].

<sup>207</sup> *In First, Russian Stands Trial for Displaying ‘Extremist’ Rainbow Flag*, MOSCOW TIMES (Jan. 30, 2024), <https://www.themoscowtimes.com/2024/01/30/in-first-russian-stands-trial-for-displaying-extremist-rainbow-flag-a83915> [perma.cc/9DND-D2S6].

<sup>208</sup> RFE/RL’s Russian Service, *Russia’s Top Court Upholds Decision to Shut Down Memorial Rights Group*, RADIO FREE EUR. RADIO LIBERTY (Feb. 28, 2022), <https://www.rferl.org/a/russia-memorial-shutdown-confirmed/31728086.html> [perma.cc/E346-M5DB].

<sup>209</sup> TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 222 (2021).

<sup>210</sup> Luisa Rizzitelli, *Giorgia Meloni Treasures Italy’s Families—Unless They Include Same-Sex Parents*, Opinion, THE GUARDIAN (Oct. 28, 2023), <https://www.theguardian.com/commentisfree/2023/oct/28/giorgia-meloni-italy-families-same-sex-parents-rights#:~:text=Giorgia%20Meloni’s%20words%20are%20always,a%20man%20and%20a%20woman%E2%80%9D> [perma.cc/PCF5-BH94].

Meloni has campaigned against “the LGBT lobby” as “a woman, a mother, a Christian” who vehemently opposes same-sex marriage.<sup>211</sup> The Prime Minister, despite herself being an unmarried mother, has used the coded language that “a child needs a mum and a dad.”<sup>212</sup> Her political rise was enabled in 2019 when a parody-remix video of her speech attacking the LGBTQIA+ movement went viral, helping Meloni anoint herself as “the last guardian of the ‘traditional’ Italian family.”<sup>213</sup> Since taking office as Prime Minister in October 2022 at the head of a right-wing coalition around the Brothers of Italy party, Meloni has cultivated those traditional values via law as well as rhetoric.

In office, Meloni has successfully pursued pro-natalist policies, started to chip away at abortion access, and has begun to constrain LGBTQIA+ rights. Taking advantage of persisting public concerns about declining birthrates, her party pushed a law aimed at “promoting the birth rate, supporting parenthood and promoting employment, especially for women” even before her coalition came to power.<sup>214</sup> On abortion, Meloni has stated her personal opposition, but her government has not been able to revise Italy’s laws legalizing the procedure thus far.<sup>215</sup> At the same time, it has reinforced and expanded application of Italy’s existing laws allowing healthcare workers to claim conscientious objection to refuse performing abortions. This has sparked concerns about access being restricted in some hinterlands of Italy.<sup>216</sup> Her coalition has also pressed for a new law giving anti-abortion groups access to any woman considering an abortion, so as to try to counsel them out of the procedure.<sup>217</sup>

Finally, the Meloni government has seized a series of piecemeal opportunities to elevate heteronormative values in law. Her government has sought to promote the traditional family and counteract “gender ideologies,”<sup>218</sup> a term

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Maria Elena Indelicato & Máira Magalhães Lopes, *Understanding Populist Far-Right Anti-Immigration and Anti-Gender Stances Beyond the Paradigm of Gender as ‘a Symbolic Glue’: Giorgia Meloni’s Modern Motherhood, Neo-Catholicism, and Reproductive Racism*, 31 EUR. J. WOMEN’S STUD. 6, 6–7 (2024).

<sup>214</sup> Art. 1, Legge [Law], n. 46, 1 Apr. 2021 (It.) (establishing General Family Allowance); see Gianpiero Dalla-Zuanna & Peter F. McDonald, *A Change of Direction for Family Policy in Italy: Some Reflections on the General Family Allowance (GFA)*, 79 GENUS, May 22, 2023, at 1, 1.

<sup>215</sup> See Erica L. Green & Emma Bubola, *A Tense Debate Erupts at the G7, This Time Over Abortion Rights*, N.Y. TIMES (June 14, 2024), <https://www.nytimes.com/2024/06/14/world/europe/g7-abortion.html> [perma.cc/8J73-NK6V].

<sup>216</sup> See generally Nausica Palazzo, *Meloni’s Mark: The Revival of the Traditional Family in Italian Law and Politics*, J. ILLIBERALISM STUD. (Oct. 6, 2025), <https://www.illiberalism.org/melonis-mark-the-revival-of-the-traditional-family-in-italian-law-and-politics/> [perma.cc/RBP3-9EXY].

<sup>217</sup> Nicole Winfield, *Abortion Returns to the Spotlight in Italy, 46 Years After It Was Legalized*, ASSOCIATED PRESS (Apr. 23, 2024), <https://apnews.com/article/italy-abortion-meloni-de7f4d2af81cf94ecf1d8cde5802fcec> [perma.cc/Y62K-RD4Q].

<sup>218</sup> Palazzo, *supra* note 216.

that was, as noted, invented by the Vatican.<sup>219</sup> Meloni's government is also seeking to revise laws around LGBTQIA+ parental rights, potentially restricting same-sex couples from adopting children.<sup>220</sup> She has further voiced opposition to allowing LGBTQIA+ people to carry children through surrogacy arrangements, which are currently illegal in Italy.<sup>221</sup> Meloni's goal, writes one journalist, "is to cement the traditional, Catholic notion of the family by means of a war on 'different' families."<sup>222</sup>

## 5. Summary: The Rise of the "Traditional" Family (in Law)

In short, the combination of a demographic anxiety among the populations of rich countries along with socially conservative politics has produced different bundles of pro-natalist, anti-abortion, and pro-heteronormative laws or policies that seek to uphold the traditional family against a perceived time of modernizing liberalization. Echoing in part the Roberts Court's decisions on substantive due process (or, more precisely, its limits), the ensuing legal measures include politics emphasizing larger families and restrictions on hard-fought access to abortion rights. They have also been accompanied by anti-LGBTQIA+ laws and policies, which are justified in the same nationalist, demographic terms.

Many of these changes have been accomplished by legislation, rather than constitutional change. Indeed, outside of Poland, the role of courts in this process has largely been to affirm pro-family legislation, allowing in some cases for new restrictions on individual liberties that had been expanding. The transvaluation of "family" hence has different armatures in different nations. Nevertheless, given the profound and potentially durable nature of the resulting changes, it makes sense to think about these legal changes as efforts to alter the small-c constitution of state and society in ways that align with the moral project of the Roberts Court.

### *B. Reinforcing Dominant Faith Traditions*

A second domain wherein legal and constitutional backlash can be traced concerns the role and the status of historically dominant religions. As we have documented in this Section, religious organizations such as the Catholic Church and the Polish organization called *Ordo Iuris* play a major role in pushing for the constitutional centrality of traditional conceptions of the family.

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<sup>219</sup> See *supra* notes 147–151 and accompanying text.

<sup>220</sup> Palazzo, *supra* note 216.

<sup>221</sup> Emma Bubola, *Italy Criminalizes Surrogacy from Abroad, A Blow to Gay and Infertile Couples*, N.Y. TIMES (Oct. 16, 2024), <https://www.nytimes.com/2024/10/16/world/europe/italy-surrogacy-law.html> [perma.cc/DHF8-3SJJ].

<sup>222</sup> Rizzitelli, *supra* note 210.

Supplementing that description, we turn here to a second way in which religiosity has come to the fore again: as an explicit constitutional end in itself.

The re-emergence of dominant religions' claim to exceptional status comes at a moment of demographic and conceptual tumult. Although there is talk of a global religious revival, its exact character is disputed. On the one hand, former editors of the liberal *Economist* newsmagazine have discerned the re-emergence of faith as a "force" even in heartland of Enlightenment secularism.<sup>223</sup> On the other hand, quantitative evidence suggests that religiosity has been declining in North American and European countries (including the United States), while population growth has been highest in the highly religious societies of Africa and the Middle East.<sup>224</sup> In countries where religiosity has been declining, moreover, it is less moderate and more culturally exclusionary faith traditions that remain strong (while more moderate sects seem to shrivel under the strains of secular modernity).<sup>225</sup> Within the latter polities, a new theory of explicitly political and muscular strain of Christianity is now congealing. In Christian conservative thinking in the United States, for example, liberalism is perceived as "both hegemonic and fragile,"<sup>226</sup> in the sense that it demands conformity, but is unable to secure enduring legitimacy and loyalty. Hence, the moment is ripe for illiberal movements centered on a dominant faith to make a mark.

Perhaps the most explicit version of this dynamic can be glimpsed in Hungary of Viktor Orbán. After winning 68% of parliamentary seats in 2010 with 53% of the popular vote, Orbán made extensive statutory and constitutional changes that entrenched his party from political defeat "with exquisite legal precision."<sup>227</sup> Orbán explicitly describes his regime as an effort to construct an illiberal democracy.<sup>228</sup> But at other moments, Orbán uses the term "Christian democracy" to describe the regime he is trying to build.<sup>229</sup> This

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<sup>223</sup> JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* 14 (2009).

<sup>224</sup> *Key Findings from the Global Religious Futures Project*, PEW RSCH. CTR. (Dec. 21, 2022), <https://www.pewresearch.org/religion/2022/12/21/key-findings-from-the-global-religious-futures-project/> [perma.cc/3Q52-APQZ]. Recent data suggest that this decline is bottoming out.

<sup>225</sup> See generally DAVID A. HOLLINGER, *CHRISTIANITY'S AMERICAN FATE: HOW RELIGION BECAME MORE CONSERVATIVE AND SOCIETY MORE SECULAR* (2022) (providing an excellent historical account of this process).

<sup>226</sup> Gladden Pappin, *Contemporary Christian Criticism of Liberalism*, in *THE ROUTLEDGE HANDBOOK OF ILLIBERALISM*, *supra* note 3, at 44.

<sup>227</sup> Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549–50 (2018).

<sup>228</sup> Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 129–30 (2018); see also János Kis, *The Puzzle of "Illiberal Democracy,"* in *RETHINKING OPEN SOCIETY: NEW ADVERSARIES AND NEW OPPORTUNITIES* 179, 179 (Michael Ignatieff & Stefan Roch eds., 2018); Marc F. Plattner, *Illiberal Democracy and the Struggle on the Right*, 30 J. DEMOCRACY 5, 9–11 (2019).

<sup>229</sup> András Máté-Tóth & Zsófia Rakovics, *The Discourse of Christianity in Viktor Orbán's Rhetoric*, 14 RELIGIONS, Aug. 12, 2023, at 1, 11–12.



view starts with the proposition that Christian ideas of equality underpin democracy, and so the former is prior to the latter and must inform concepts of democracy.<sup>230</sup> Christianity serves as a “‘nodal point’ . . . a knot of meanings fixing exclusionary identities” so as “to secure a cultural and political hegemony of populist parties and leaders.”<sup>231</sup>

We focus here, though, on the specific legal manifestations of these trends, in terms of expansions in the constitutional or statutory rights of dominant faith organizations and their members, such as developments that roughly parallel what has happened in First Amendment religious liberty and establishment jurisprudence during the Roberts Court.<sup>232</sup> As in the United States, the trendline in legal change in many countries is not animated by a traditional liberal concern with minority faiths vulnerable to majoritarian abuse. It is instead directed at bolstering traditionally dominant faiths perceived as being threatened by secular modernity.

The resulting measures infuse the general constitutional order with elements drawn from that faith and constrain individual autonomy rights. Dominant religious revival is thus in deep tension with liberalism. Again, we offer a series of examples drawn from a larger global sample to show how this style of politics cashes out into law. We begin with Russia, in part to show how the constitutional theme of “family” documented in Section A of this Part intertwines with legal ideas about “faith.” We then move on to a series of new jurisdictions by way of case studies from India, Israel, and Southeast Asia to show the geographic breadth and ideological diversity of the trend. While an Evangelical strain of Christianity dominates in the Roberts Court, we demonstrate that the Orthodox Church, Judaism, and Buddhism play analogous roles elsewhere.

## 1. Russia

After the fall of the Soviet Union in 1991, a long-repressed tide religious sentiment began to seep back into public life. The Russian Orthodox Church, closely associated with nationalism and the state before the Russian Revolution, was the greatest beneficiary. In 1991, the Pew Research Center found that only 31% of Russians identified as Orthodox.<sup>233</sup> By 2022, this number had in-

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<sup>230</sup> *Id.* at 21.

<sup>231</sup> Christian Lamour, *Orbán Urbi et Orbi: Christianity as a Nodal Point of Radical-Right Populism*, 15 *POLS. & RELIGION* 317, 318 (2022).

<sup>232</sup> See *supra* notes 48–94 and accompanying text.

<sup>233</sup> *Russians Return to Religion, but Not to Church*, PEW RSCH. CTR. (Feb. 10, 2014), [https://www.pewresearch.org/religion/2014/02/10/russians-return-to-religion-but-not-to-church/#:~:text=During%20the%20same%20period%2C%20the,1990s%20and%20then%20leveled%20off\[perma.cc/V4BU-2MFC\]](https://www.pewresearch.org/religion/2014/02/10/russians-return-to-religion-but-not-to-church/#:~:text=During%20the%20same%20period%2C%20the,1990s%20and%20then%20leveled%20off[perma.cc/V4BU-2MFC]).

creased to around 68%.<sup>234</sup> In part, this revival may reflect President Vladimir Putin's redeployment of Tsar Nicholas I's idea of "Orthodoxy, Autocracy, and Nationality" into his rhetorical slogan of "Patriotism, Power, and Statism."<sup>235</sup> By increasing the influence of the Orthodox Church and incorporating it into the country's identity, Putin has tried to promote social stability and legitimate his own regime. This blending of religion and nationalism was already apparent early in his tenure, when Putin adopted the National Security Strategy in 2000, which called for the "protection of Russian cultural, moral, and spiritual traditions."<sup>236</sup> In 2017, Putin addressed an Orthodox Bishops Council to call for closer state-church collaboration "in such important areas as education and healthcare, the preservation of cultural and historical heritage, support for the family and the education of young people, and the fight against social ills."<sup>237</sup>

While Russia has formally been a secular state since the end of the Cold War,<sup>238</sup> in practice the Orthodox Church enjoys a legally, as well as politically, privileged status. A 1997 Law on Freedom of Conscience and Religious Associations sets apart a privileged class of "religious organizations" from other "religious groups," so as to "effectively introduce[] a hierarchy of religions in Russia with the Russian Orthodox Church as the most important religion and traditional religions of the Russian peoples in the second place."<sup>239</sup>

While the Orthodox church's legal status has been elevated, that of minority faiths has been pushed down. The main instruments to this end have been

<sup>234</sup> *Almost 70% of Russians Identify as Orthodox Christians, 19% of Them Observe Lent—Poll*, INTERFAX (Mar. 9, 2022), <https://interfax.com/newsroom/top-stories/76018/> [perma.cc/WT22-9KXM].

<sup>235</sup> Sean Cannady & Paul Kubicek, *Nationalism and Legitimation for Authoritarianism: A Comparison of Nicholas I and Vladimir Putin*, 5 J. EURASIAN STUD. 1, 3–5 (2014). One way in which this idea has been espoused by many Russian thinkers and leaders is in terms of styling Moscow as the "Third Rome." *Id.* at 7. This concept boils down to three ideas. First, the Eastern Orthodox Church is true and must be (and will be) unified. Second, the East Slavic territories, which are historically Orthodox and hold Slavic customs must be unified. Third, the Moscow Prince (in this case, Putin) must act as the supreme ruler and not just defend the state of Russia, but the Russian Orthodox Church. See generally Anna N. Klimenko & Vladimir I. Yurtaev, *The "Moscow as the Third Rome" Concept: Its Nature and Interpretations Since the 19th to Early 21st Centuries*, 9 GEOPOLÍTICA 231 (2018). Putin was able to benefit from the church's support when he annexed Crimea and invaded Ukraine thanks to church's leaders' expansive view of their remit. See Ksenia Luchenko, *Why the Russian Orthodox Church Supports the War in Ukraine*, CARNEGIE POLITIKA (Jan. 31, 2023), <https://carnegieendowment.org/russia-eurasia/politika/2023/01/why-the-russian-orthodox-church-supports-the-war-in-ukraine?lang=en> [perma.cc/BM6C-TBGS].

<sup>236</sup> Carlo J.V. Caro, *Vladimir Putin's "Orthodoxy, Autocracy, and Nationality,"* CTR. FOR ETHICS & THE RULE OF L. (Aug. 31, 2022), <https://www.pennscr.org/the-rule-of-law-post/vladimir-putins-orthodoxy-autocracy-and-nationality/> [perma.cc/F7U8-97V3].

<sup>237</sup> Kolstø, *supra* note 194, at 163.

<sup>238</sup> Marcin Składanowski & Cezary Smuniewski, *The Secularism of Putin's Russia and Patriarch Kirill's Church: The Russian Model of State-Church Relations and Its Social Reception*, RELIGIONS, Jan. 14, 2023, at 1, 5.

<sup>239</sup> Kristina Stoeckl, *Three Models of Church-State Relations in Contemporary Russia*, in CONSTITUTIONS AND RELIGION 237, 243–44 (Susanna Mancini ed., 2020).

criminal laws targeting “extremists.” In 2016, the Duma, or parliament, enacted a package of anti-terrorism measures known as the Yarovaya Laws that prohibited proselytizing by Protestants and many other minority religious groups.<sup>240</sup> In some cases, those laws have been used to criminalize the teaching of yoga and the discussion of religion in private homes.<sup>241</sup> In 2017, the apex Russian court designated the Jehovah’s Witnesses as “extremist” leading to the group being subject to “hundreds of raids and arrests by Russian security forces and, in some places, alleged torture.”<sup>242</sup> As of January 2020, more than three hundred members of that religious order faced criminal charges, or were “suspects” in criminal cases as a result of their religious practice.<sup>243</sup>

It might seem that Russian state policy under Putin has been an unalloyed blessing for the Orthodox church. In something of a warning to those who hope for greater integration of church and state in the United States, however, these legal changes have not necessarily increased the Orthodox Church’s freedom of action. According to leading analysts, the church “has not become an autonomous participant in Russian social life,” and instead remains subordinate to the Kremlin.<sup>244</sup> Indeed, actual church attendance remains low. Only about one in every ten self-identifying Russian Orthodox Christians regularly attends weekly service.<sup>245</sup> It is thus unclear how deep popular commitment to the Orthodox faith is today, independent of the Russian state’s support and promotion.<sup>246</sup> Institutionalization of a traditionally dominant faith, therefore, may be legally feasible and yet not in that faith community’s interest.

## 2. India

Established in 1947, India’s historically pluralist and secular constitutional order has come under profound pressure with the rise of the Hindu national-

<sup>240</sup> *Id.*

<sup>241</sup> Daniel Ortner, *Extremism: Russia’s Crackdown on Free Speech and Religious Freedom in the Name of National Security*, in COUNTER-TERRORISM LAWS AND FREEDOM OF EXPRESSION: GLOBAL PERSPECTIVES 273, 273 (Téwodros Workneh & Paul Haridakis eds., 2021).

<sup>242</sup> Patrick Reeve, *Russia’s Mysterious Campaign Against Jehovah’s Witnesses*, ABC NEWS (July 18, 2021), <https://abcnews.go.com/International/russias-mysterious-campaign-jehovahs-witnesses/story?id=78629389> [perma.cc/6ZU5-5H63].

<sup>243</sup> *Russia: Escalating Persecution of Jehovah’s Witnesses*, HUM. RTS. WATCH (Jan. 9, 2020), <https://www.hrw.org/news/2020/01/09/russia-escalating-persecution-jehovahs-witnesses> [perma.cc/YL62-S3LM].

<sup>244</sup> Skladanowski & Smuniewski, *supra* note 238, at 9.

<sup>245</sup> PEW RSCH. CTR., *supra* note 233. In the U.S., the comparable figure is around 26% of self-identifying Orthodox Christians. Jeffrey M. Jones, *Church Attendance Has Declined in Most U.S. Religious Groups*, GALLUP (Mar. 25, 2024), <https://news.gallup.com/poll/642548/church-attendance-declined-religious-groups.aspx#> [perma.cc/LFD7-6GVJ].

<sup>246</sup> For example, Russian citizens successfully protested to prevent construction of a new church in the midst of a community park. Alexander Baunov, *Russians Are Getting Sick of Church*, FOREIGN POL’Y (June 12, 2019), <https://foreignpolicy.com/2019/06/12/russians-are-getting-sick-of-church-orthodox-putin/> [perma.cc/BJ9A-2GTH].

ist Bharatiya Janiya Party (BJP).<sup>247</sup> The BJP is a successor of an earlier party, the Bharatiya Jana Sangh, founded in 1951, and is entangled in pre-independence Hindu nationalist networks such as the (more hard-line) social movement called the Rashtriya Swayamsevak Sangh (RSS).<sup>248</sup> The BJP has long explicitly positioned itself as a champion for a greater role for the majority faith, Hinduism, in Indian politics.<sup>249</sup> It has centered “Hindutva” as the core of India’s national ideology. “Loosely translated as Hindu-ness or Hindu nationalism,” the concept of Hindutva initially emerged as a sort of pan-Indian identity that swept in many faiths, including Islam.<sup>250</sup> As early as 1937, however, some Hindutva theorists asserted that Hindus and Muslims were “two antagonistic nations living side by side.”<sup>251</sup> By the start of the twenty-first century, Hindutva came to be widely understood as excluding Islam as a “foreign” religion<sup>252</sup> (albeit one subscribed to by some 14% of the Indian population).<sup>253</sup> In this vein, Hindu nationalist thinker Vinayak Damodar Savarkar has defined a Hindu as one “who regards this land . . . from the Indus to the Seas as his fatherland as well as his Holyland,” in effect fusing territory with faith.<sup>254</sup>

While the BJP had first formed a government that lasted from 1998 to 2004, it was unable to implement its agenda. With the rise of Narendra Modi, who gained prominence as the Chief Minister of Gujarat during riots that led to the deaths of over a thousand Muslims in 2002, the party took a more explicitly religious nationalist turn.<sup>255</sup> It also received significant support from a billionaire class who disapproved of the Gujarat pogrom, but embraced Modi’s deregulatory policies.<sup>256</sup> In 2014, the BJP took 274 out of 545 seats in the Lok Sabha, ris-

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<sup>247</sup> The 1947 Constitution “does not formally establish any religion but respects them all,” for example, by the application of Islamic personal law. Cécile Laborde, *Minimal Secularism: Lessons for, and from, India*, 115 AM. POL. SCI. REV. 1, 2 (2021).

<sup>248</sup> See generally CHRISTOPHE JAFFRELOT, MODI’S INDIA: HINDU NATIONALISM AND THE RISE OF ETHNIC DEMOCRACY (2021) (documenting the rise of Modi within the BJP). See also VINAY SITAPATI, INDIA BEFORE MODI: HOW THE BJP CAME TO POWER 73 (2021) (discussing the merger of the RSS and the BJP in 1971).

<sup>249</sup> Manoj Mate, *Constitutional Erosion and the Challenge to Secular Democracy in India*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 377, 377–78 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

<sup>250</sup> Deepa S. Reddy, *Hindutva: Formative Assertions*, 5 RELIGION COMPASS 439, 439–40 (2011).

<sup>251</sup> Zaheer Baber, *Religious Nationalism, Violence and the Hindutva Movement in India*, 25 DIALECTICAL ANTHROPOLOGY 61, 68 (2000).

<sup>252</sup> MANISHA BASU, THE RHETORIC OF HINDU INDIA 7–9 (2017).

<sup>253</sup> Laborde, *supra* note 247, at 2.

<sup>254</sup> Farrah Ahmed, *Constitutional Parasitism, Camouflage, and Pretense: Shaping Citizenship Through Subterfuge*, 21 INT’L J. CONST. L. 285, 292 (2023).

<sup>255</sup> For a fascinating history of Modi’s mixture of neo-liberal market politics and violent Hindu nationalism as chief minister of Gujarat, see Nikita Sud, *The Actual Gujarat Model: Authoritarianism, Capitalism, Hindu Nationalism and Populism in the Time of Modi*, 52 J. CONTEMP. ASIA 102, 106–10 (2022).

<sup>256</sup> Radhika Desai, *Peak Hindutva?*, 147 NEW LEFT REV. 89, 97 (2024).

ing to 303 in 2019. With coalition parties, this gave it a substantial supermajority in parliament, even though it had only obtained 37.76% of the vote.<sup>257</sup>

Modi has consistently portrayed the opposition Congress Party as agents of foreign powers, alluding to the Mughal rulers of previous centuries as evidence of this point.<sup>258</sup> During the 2024 election campaign, Modi gave a speech describing Muslims as “infiltrators [who] have more children,” and warned that the opposition Indian National Congress Party, if elected, would redistribute property to Muslims by “calculate[ing] the gold with [Hindu] mothers and sisters” have and transferring it away.<sup>259</sup> His party has drawn on the rhetoric of decolonization to justify its program of exclusionary nationalism.<sup>260</sup> It has also used personnel choices to fuse religion and nationalism. It has, for example, appointed a Hindu monk, Yogi Adityanath, as Chief Minister of Uttar Pradesh, only to see him censured for anti-Muslim remarks.<sup>261</sup> The party’s president, Amit Shah, has also called undocumented Muslim migrants as “termites,” properly disposed of by being thrown to sea.<sup>262</sup>

These sentiments have found expression in a variety of legally mandated policies pursued by the BJP government under Modi. We focus here on a cluster that elevate, in form or in effect, Hindu interests as such over those of Muslim co-citizens. We bracket for now consideration of questions about the boundaries of the polity, and the question of who can be a citizen—taking those questions up in the subsequent section on “nation” related policies later in this Part.

First, the Modi government has changed the basic structure of Indian federalism to eliminate opportunities for Muslim majority self-rule in subnational units. Most importantly, in August 2019, it peremptorily and violently terminated the autonomous self-governing status of Kashmir, a Muslim-majority province, by sending in the Indian military and detaining thousands of civilians.<sup>263</sup> The central government shut down local governance institutions and

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<sup>257</sup> Mate, *supra* note 249, at 379; Eswaran Sridharan, *India’s Watershed Vote: Behind Modi’s Victory*, 25 J. DEMOCRACY 20, 22 (2014).

<sup>258</sup> Mate, *supra* note 249, at 392.

<sup>259</sup> Sushant Singh, *Modi’s Campaign Rhetoric Is Dangerous*, FOREIGN POL’Y (May 28, 2024), <https://foreignpolicy.com/2024/05/28/modi-india-election-campaign-rhetoric-anti-muslim/> [perma.cc/ZGW8-Y25Y].

<sup>260</sup> Pranay Somayajula, *Decolonization and Its Discontents*, 77 MONTHLY REV., May 2025, at 27, 27.

<sup>261</sup> Devjyot Ghoshal, *Yogi Adityanath Temporarily Banned from Election Campaign After Anti-Muslim Comment*, REUTERS (Apr. 16, 2019), <https://www.reuters.com/article/world/india/yogi-adityanath-temporarily-banned-from-election-campaign-after-anti-muslim-comm-idUSKCN1RR17T/>.

<sup>262</sup> *Id.*

<sup>263</sup> Devjyot Ghoshal & Alasdair Pal, *Thousands Detained in Indian Kashmir Crackdown, Official Data Reveals*, REUTERS (Sep. 12, 2019), <https://www.reuters.com/article/us-india-kashmir-detentions/thousands-detained-in-indian-kashmir-crackdown-official-data-reveals-idUSKCN1VX142>.

assumed “complete” control of the province.<sup>264</sup> At least four thousand people, including many elected local leaders, were arrested and detained without trial.<sup>265</sup> The province remained under direct rule from New Delhi through the 2024 elections; indeed, the BJP declined even to put up candidates for most of the region that year—in effect thumbing its nose at the very possibility of sub-national elections that could challenge its hold on power.<sup>266</sup>

Second, the BJP has pressed for the erasure of India’s Muslim history in favor of a version aligned with its Hindu nationalist preferences. In November 2019, for example, India’s Supreme Court held unanimously that a Hindu temple could be built in the spot where riots by Hindu extremists in 1992 destroyed a sixteenth century mosque, the Babri Masjid in Ayodhya.<sup>267</sup> Having successfully used the Babri Masjid as a pivot for Hindu nationalist mobilization, the BJP turned to other historic mosque sites at Varanasi and Mathura with the same goal in mind.<sup>268</sup>

Third, BJP politicians have pursued policies that criminalize the quotidian decisions of Muslims about what to eat and who to marry, while enshrining Hindu doxa on related matters.<sup>269</sup>

This is not simply a question of tolerating, and even eliciting, high levels of parastatal violence against Muslims.<sup>270</sup> BJP-led states have enacted laws restricting sales of cattle and beef possession in deference to the sacred role of

<sup>264</sup> Anchal Vohra, *Modi Took Complete Control of Kashmir Two Years Ago—And Got Away with It*, FOREIGN POL’Y (Aug. 3, 2021), <https://foreignpolicy.com/2021/08/03/modi-took-control-of-kashmir-2-years-ago-and-got-away-with-it/> [perma.cc/PX5R-3R9T].

<sup>265</sup> Yashraj Sharma, *Detained in Kashmir*, FOREIGN POL’Y (Sep. 9, 2019), <https://foreignpolicy.com/2019/09/09/detained-in-kashmir/> [perma.cc/9PB4-HM3E]; Niha Masih & Joanna Slater, *Locked Up and Shut Down: How India Has Silenced Opposition to Its Crackdown in Kashmir*, WASH. POST (Aug. 12, 2019), [https://www.washingtonpost.com/world/asia\\_pacific/india-kashmir-detentions-of-local-politicians-deepen-crackdown/2019/08/12/6d83995a-bd09-11e9-a8b0-7ed8a0d5dc5d\\_story.html](https://www.washingtonpost.com/world/asia_pacific/india-kashmir-detentions-of-local-politicians-deepen-crackdown/2019/08/12/6d83995a-bd09-11e9-a8b0-7ed8a0d5dc5d_story.html) [perma.cc/9JBB-UZM6].

<sup>266</sup> Singh, *supra* note 259.

<sup>267</sup> Helen Regan, Swati Gupta & Manveena Suri, *Hindus Allowed to Build on Disputed Holy Site, India’s Supreme Court Rules*, CNN (Nov. 9, 2019), <https://www.cnn.com/2019/11/08/asia/ayodhya-dispute-india-ruling-intl-hnk/index.html> [perma.cc/E44N-7F7A].

<sup>268</sup> Amulya Ganguly, *Opinion, BJP Preparing for Babri 2.0 by Targeting Varanasi Mosque and Keep the Communal Cauldron Boiling*, NAT’L HERALD IND. (Apr. 12, 2021), <https://www.nationalheraldindia.com/opinion/bjp-preparing-for-babri-20-by-targeting-varanasi-mosque-and-keep-the-communal-cauldron-boiling> [perma.cc/QED8-DXRF].

<sup>269</sup> Law enforcement more generally is often conducted in systematically anti-Muslim ways. *See, e.g.,* Sarita Santoshini, *Indian Police Use Facial Recognition to Persecute Muslims and Other Marginalized Communities*, CODA (Oct. 11, 2022), <https://www.codastory.com/authoritarian-tech/india-police-facial-recognition/> [perma.cc/F8R9-SPH7].

<sup>270</sup> *See* Muhammad Waqas Sajjad, *Examining the State of Muslim Minority Under Modi’s BJP Since 2014*, 38 STRATEGIC STUD. 19, 20 (2018) (“[V]iolence against minorities has reached to such an acceptable stage and has become so normalised that the BJP officials have often publicly sided with and supported mobs and Hindu extremists for their actions, including the cases of lynching the Muslims . . .”).

the cow in Hindu belief.<sup>271</sup> In addition, almost a dozen Indian states have proposed or enacted “forced conversion” bills that are used to prosecute Muslim men on the theory that their marriages to Hindu women are coerced.<sup>272</sup> These anti-“love jihad” measures reflect the same (groundless) demographic fears underwriting the pro-natalist policies described in Section A of this Part.<sup>273</sup> They hence embody the symbiotic relationship between legal efforts to shore up the heteronormative and patriarchal family on the one hand, and to defend the ethnically homogenous nation on the other.

### 3. Israel

Under the leadership of Likud Prime Minister Benjamin Netanyahu, Israel has taken an illiberal path in the domestic sphere in “reaction[.]” to the country’s “constitutional liberalization” during the 1990s and 2000s.<sup>274</sup> Israel’s 1948 Declaration of Independence defined the country as both a Jewish state and one that ensured “complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.”<sup>275</sup> The resulting tensions have shaped political and constitutional debate thereafter.<sup>276</sup> For instance, Israel’s governments have long used a variety of “economic, political, and social” incentives to “boost[.] Ashkenazi Jewish birthrates while simultaneously limiting population growth among Arab Palestinians and even occasionally among non-European Jews.”<sup>277</sup> Pro-natalism, in other words, has a much longer history in Israel than in other countries, and is not tied to a distinctively illiberal agenda.

In recent years, however, the Government of Israel has taken a turn toward the illiberal embrace of family, faith, and nation. As in the Indian case,

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<sup>271</sup> See Supriya Nair, *The Meaning of India’s ‘Beef Lynchings,’* THE ATLANTIC (July 24, 2017), <https://www.theatlantic.com/international/archive/2017/07/india-modi-beef-lynching-muslim-partition/533739> [perma.cc/5EN8-8FDT] (detailing the BJP’s indifference to violence against Muslim’s who trade or consume beef).

<sup>272</sup> OFF. OF INT’L RELIGIOUS FREEDOM, U.S. DEP’T OF STATE, INDIA 2021 INTERNATIONAL RELIGIOUS FREEDOM REPORT 14–15 (2021), <https://www.state.gov/wp-content/uploads/2022/03/INDIA-2021-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> [perma.cc/WJN8-LKD9].

<sup>273</sup> Mohan Rao, *Love Jihad and Demographic Fears*, 18 IND. J. GENDER STUD. 425, 425–30 (2011).

<sup>274</sup> Alon Harel, *Basic Law: Israel as the Nation State of the Jewish People*, 49 NAT’YS PAPERS 262, 262 (2021). We focus here on domestic politics and bracket the complex and contentious questions raised by the West Bank and the Gaza Strip for the sake of offering an analysis that parallels our other examples.

<sup>275</sup> *Declaration of Israel’s Independence 1948*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., [https://avalon.law.yale.edu/20th\\_century/israel.asp](https://avalon.law.yale.edu/20th_century/israel.asp) [perma.cc/8V8Y-CPRK].

<sup>276</sup> Ruth Gavison, *A Constitutional Revolution?*, in TOWARDS A NEW EUROPEAN IUS COMMUNE 517, 517–31 (A. Gambaro & A.M. Rabello eds., 1999).

<sup>277</sup> Devyn Rigsby, “Be Fruitful and Multiply”: *The Role of Israeli Pronatalist Policy in the Pursuit of Jewish Demographic Dominance in the Holy Land*, YALE REV. INT’L AFF. (Apr. 30, 2018), <https://yris.yira.org/essays/be-fruitful-and-multiply-the-role-of-israeli-pronatalist-policy-in-the-pursuit-of-jewish-demographic-dominance-in-the-holy-land/> [perma.cc/SQG2-Y65J].

this arises from a rightward shift in the elected governing elite. Prime Minister Netanyahu's recent coalition partners have included "messianic" nationalists, who look to the Bible to justify their policies both in Israel and in the Occupied Territories.<sup>278</sup> Zionism, which originated as a national movement of secular Jews in the nineteenth century, has become an instrument of radical religious restoration.<sup>279</sup> We focus here on policies that aim to establish a dominant religious faith, here Judaism, to the exclusion of other faith communities.

In July 2018, the Israeli parliament, or Knesset, passed a quasi-constitutional "Nation-State law" that establishes that only the Jewish people have the right to exercise national self-determination in the country.<sup>280</sup> This downgraded the status of the country's Arab minority, which constitutes about one-fifth of the population. Section Seven of the Law establishes "Jewish settlement" as a national value.<sup>281</sup> According to the leading Israeli constitutional scholar Alon Harel, this was a response to a famous liberal Supreme Court case declaring that "the practice of excluding non-Jews from a 'Jewish' settlement because they were not Jewish was illegal."<sup>282</sup> It also arguably bestows constitutional status to the settlement project in the Occupied West Bank, recently ruled to be in violation of international law.<sup>283</sup> Similarly, Section Four of the law contains an "expressive demotion of the status of Arabic," again pushing back on an earlier liberal Supreme Court opinion mandating the use of Arabic as well as Hebrew.<sup>284</sup> The law's overall effect, Harel concludes, is "authoritarian" and "anti-liberal."<sup>285</sup> As two other Israeli commentators conclude, the measure "sends an unequivocal message to Israel's Palestinian-Arab citizens—the state is not yours."<sup>286</sup>

The Nation-State Law builds on earlier measures that distinguished formally between Jewish and Arab identities to prioritize the former over the latter. A 2011 measure, for example, allows the government to penalize organizations that mark independence day as a moment of loss for Palestinians, rather

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<sup>278</sup> Barak Mendelsohn, *Israel and Its Messianic Right: Path Dependency and State Authority in International Conflict*, 60 INT'L STUD. Q. 47, 51–55 (2016).

<sup>279</sup> Gayil Talshir, "We Are a Traditional People": The Zionist (Counter-)Revolution of National Conservative Populism, in ROUTLEDGE HANDBOOK ON ZIONISM 538, 539 (Colin Schindler ed., 2024).

<sup>280</sup> Harel, *supra* note 274, at 265.

<sup>281</sup> *Id.* at 267.

<sup>282</sup> *Id.*

<sup>283</sup> Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 2024 I.C.J. ¶¶ 155–156 (July 24).

<sup>284</sup> Harel, *supra* note 274, at 266.

<sup>285</sup> *Id.* at 266.

<sup>286</sup> Dov Waxman & Ilan Peleg, *The Nation-State Law and the Weakening of Israeli Democracy*, 25 ISR. STUD. 185, 187 (2020).



than a celebration.<sup>287</sup> Two Israeli commentators gloss the measure as an effort to “eras[e]” non-Jewish accounts of history.<sup>288</sup> Five years later, the culture minister suggested “loyalty” tests for those applying for arts funding.<sup>289</sup> Many of these measures, including the Nation-State Law itself, have been upheld as constitutional by the country’s Supreme Court.<sup>290</sup> Like the Roberts Court’s decisions advancing majority faiths’ interests, these decisions signal the priority of traditionally dominant over minority religions.

#### 4. Southeast Asia

In recent years, nationalistic and militaristic strains of Buddhism have arisen in South and Southeast Asia.<sup>291</sup> Monk-led groups such as 969 (later Ma Ba Tha) in Myanmar and Bodu Bala Sena (BBS) in Sri Lanka have advanced an ultra-right-wing, majoritarian politics that stigmatized non-Buddhists, particularly Muslims, and often led to violence.<sup>292</sup> This has unfolded in “the service of nationalism, and in support of governments embracing a global trend toward majoritarianism and autocracy.”<sup>293</sup> These monastic groups and conservative ideologies have contributed significantly to the success of ethnocentric populism at the polls in the region, with social media playing an important role in amplifying their messages. Myanmar’s military government, in particular, has close ties with radical monks who have expressed anti-Muslim sentiments.<sup>294</sup> In Sri Lanka, firebrand monk, Galagoda Aththe Gnanasara Theero, the General Secretary of the BBS, went from being convicted of incitement

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<sup>287</sup> Mordechai Kremnitzer & Shiri Krebs, *From Illiberal Legislation to Intolerant Democracy*, 26 ISR. STUD. REV. 4, 6 (2011).

<sup>288</sup> *Id.*

<sup>289</sup> Marissa Newman, *Culture Minister Pushes Bill to Condition Funding on ‘Loyalty,’* TIMES ISR. (Jan. 26, 2016), <http://www.timesofisrael.com/culture-minister-to-push-bill-to-hinge-funding-on-loyalty/> [perma.cc/GFR5-Q5EG].

<sup>290</sup> Ben Sales, *Israel’s Supreme Court Upholds Law Declaring Israel Nation-State of the Jewish People*, JEWISH TELEGRAPHIC AGENCY (July 9, 2021), <https://www.jta.org/quick-reads/israels-supreme-court-upholds-law-declaring-israel-nation-state-of-the-jewish-people> [perma.cc/8HT8-6BQM].

<sup>291</sup> See generally JOHN CLIFFORD HOLT, *BUDDHIST EXTREMISTS AND MUSLIM MINORITIES: RELIGIOUS CONFLICT IN CONTEMPORARY SRI LANKA* 1–6 (2016) (mapping this development).

<sup>292</sup> Michael Jerryson, *Introduction*, in *BUDDHIST WARFARE* 3, 3–15 (Michael K. Jerryson & Mark Juergensmeyer eds., 2010).

<sup>293</sup> SONIA FALEIRO, *THE ROBE AND THE SWORD: HOW BUDDHIST EXTREMISM IS SHAPING MODERN ASIA* 17 (2025).

<sup>294</sup> See generally JULIANE SCHOBBER, *MODERN BUDDHIST CONJUNCTURES IN MYANMAR: CULTURAL NARRATIVES, COLONIAL LEGACIES, AND CIVIL SOCIETY* (2011) (providing excellent surveys of these relationships); BENJAMIN SCHONTHAL, *BUDDHISM, POLITICS AND THE LIMITS OF LAW: THE PYRRHIC CONSTITUTIONALISM OF SRI LANKA* (2016) (same); Benjamin Schonthal, *Making the Muslim Other in Myanmar and Sri Lanka* (same), in *ISLAM AND THE STATE IN MYANMAR: MUSLIM-BUDDHIST RELATIONS AND THE POLITICS OF BELONGING* 234 (Melissa Crouch ed., 2016).

to being made head of a presidential task force on legal reform under the second government of Mahinda Rajapaksa.<sup>295</sup>

Constitutional law has reflected this shift in subtle ways. One sign of the increasing prominence of majoritarian religions has been the increasing constitutional prominence of Buddhism in southeast Asia. Today, the constitutions of six of the seven Buddhist-majority countries in Asia grant that faith a special status.<sup>296</sup> In some cases, this has involved a shift from previously secular modes of legitimation. The 1993 Constitution of Cambodia, for example, makes Buddhism the “religion of the state.”<sup>297</sup> Laos, a socialist country, revised its Constitution in 2003 to provide that “the State respects and protects all lawful activities of Buddhists and of followers of other religions, [and] mobilises and encourages Buddhist monks and novices as well as the priests of other religions to participate in activities that are beneficial to the country and people.”<sup>298</sup>

The 2017 Thai Constitution makes extensive use of Buddhist idiom. It says that the state should support and protect Buddhism as “the religion observed by the majority of Thai people for a long period of time.”<sup>299</sup> Analysts have argued that this shift toward majoritarianism has gone hand in hand with increasing authoritarianism.<sup>300</sup> Buddhist ideas have undergirded and empowered an elite set of guardian institutions whose role has been to circumscribe space for democracy, while also inhibiting religious pluralism and promoting absolutist conceptions of monarchy.<sup>301</sup> Thailand’s Constitutional Court has played an important role here, in serving as a vehicle for limiting democratic space. At the same time, the regime has engaged in acts of repression in the majority Muslim southern part of the country, exacerbating political tensions.<sup>302</sup>

<sup>295</sup> Meera Srinivasan, *Hardline Monk to Head Legal Reforms Panel in Sri Lanka*, THE HINDU (Oct. 27, 2021), <https://www.thehindu.com/news/international/sri-lankan-president-appoints-task-forced-by-controversial-buddhist-monk-for-one-country-one-law/article37189262.ece> [perma.cc/7FUK-PYRM].

<sup>296</sup> Tom Ginsburg & Benjamin Schonthal, *Introduction: Mapping the Buddhist-Constitutional Complex in Asia*, in *BUDDHISM AND COMPARATIVE CONSTITUTIONAL LAW* 1, 5 (Tom Ginsburg & Benjamin Schonthal eds., 2022).

<sup>297</sup> CONST. OF THE KINGDOM OF CAMBODIA, Sep. 21, 1993, art. 43 (Cambodia).

<sup>298</sup> CONST. OF THE LAO PEOPLE’S DEMOCRATIC REPUBLIC, May 28, 2003, art. 9 (Laos).

<sup>299</sup> CONST. OF THE KINGDOM OF THAILAND, Apr. 6, 2017, sec. 67 (Thai.).

<sup>300</sup> Khemthong Tonsakulrungruang, *Thailand’s Constitution Capitulates to Buddhist Domineering*, E. ASIA F. (Jan. 24, 2018), <https://eastasiaforum.org/2018/01/24/thailands-constitution-capitulates-to-buddhist-domineering/> [perma.cc/YP6J-2WCA]. See generally KATEWADEE KULABKAEW, *THE POLITICS OF THAI BUDDHISM UNDER THE NCPO JUNTA* (2019) (providing background on the relation of Thai Buddhism to its military regimes).

<sup>301</sup> Khemthong Tonsakulrungruang, *Thai Constitutions as a Battle Ground for Political Authority: Barami Versus Vox Populi*, in *BUDDHISM AND COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 296, at 162.

<sup>302</sup> See generally IN SEARCH OF JUSTICE IN THAILAND’S DEEP SOUTH: MALAY MUSLIM AND THAI BUDDHIST WOMEN’S NARRATIVES (John Clifford Holt ed., Soroya Jamjuree compiler, Hara Shintaro trans., 2022) (documenting violence against Muslim women in Thailand in the course of these campaigns); Michael Jerryson, *Militarizing Buddhism: Violence in Southern Thailand* (describ-

### C. Curating the (Ethnically Pure) Nation

The third vector of illiberalism has been the resurgence of nationalist sentiment in recent decades deployed to justify narrow or exclusionary approaches to immigration that are aimed (explicitly or not) at maintaining the demographic advantage of a dominant ethnic or religious group. Immigration law of an illiberal cast is hardly a new phenomenon. The first federal immigration measure, enacted in the second half of the nineteenth century, aimed to exclude Asian migrants from the United States<sup>303</sup> Not until 1965 were barriers to lawful Asian and Latin American migration lowered.<sup>304</sup> Today, however, many countries around the world are introducing, or reverting to, restrictive immigration policies designed to preserve a status quo ante of racial, religious, or ethnic homogeneity.<sup>305</sup> Like the Muslim ban upheld by the Roberts Court, these policies advance a specific demographic goal. This is a population that is less—rather than more—heterogenous, and that freezes in amber the traditional dominant numerosity of a particular group. And as in the Roberts Court, such demographic homogeneity is commonly achieved by a narrowing of procedural rights and a shift in the legal prerequisites of membership in what Benedict Anderson famously called the “imagined community” of the nation.<sup>306</sup> The effect, as in the United States, is to install into law a form of what Maya Tudor and Dan Slater call “exclusive nationalism” rather than “inclusive nationalism.”<sup>307</sup> To demonstrate this point, we draw on particularly crisp examples from Italy and India.

#### 1. Italy

Italy offers an example of a gradual hardening of immigration law, one that has accelerated under Giorgia Meloni. Its first “comprehensive” immigration law, enacted in 1998, was praised as broadly compatible with human rights principles.<sup>308</sup> In 2002, it enacted the Bossi-Fini law, which limited family reunification, expanded detention powers, and accelerated deportations.<sup>309</sup>

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ing the role of monasteries in the militarization process), in *BUDDHIST WARFARE* 179, 181 (Michael K. Jerryson & Mark Juergensmeyer eds., 2010).

<sup>303</sup> DAVID A. GERBER, *AMERICAN IMMIGRATION: A VERY SHORT INTRODUCTION* 23–41 (2021).

<sup>304</sup> MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 8, 227–64 (2004) (discussing the effects of the 1965 legislation).

<sup>305</sup> Zsolt Kapelner, *Anti-Immigrant Backlash: The Democratic Dilemma for Immigration Policy*, 12 *COMPAR. MIGRATION STUD.*, Mar. 1, 2024, at 1, 1–2.

<sup>306</sup> BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 4 (1983) (defining nationhood in terms of a shared imaginary).

<sup>307</sup> Maya Tudor & Dan Slater, *Nationalism, Authoritarianism, and Democracy: Historical Lessons from South and Southeast Asia*, 19 *PERSPS. ON POL.* 706, 707–08 (2020).

<sup>308</sup> Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359, 399, [https://chicagounbound.uchicago.edu/uclf/vol2007/iss1/12/\[perma.cc/XU4D-GZ9Z\]](https://chicagounbound.uchicago.edu/uclf/vol2007/iss1/12/[perma.cc/XU4D-GZ9Z]) (describing the 1998 Turco-Napolitano Law).

<sup>309</sup> *Id.* at 402.

Piling on, the Meloni government has enacted a slate of measures such as “tougher punishments for smugglers, stricter procedures to grant humanitarian protection, and more detention centers and longer detention periods for rejected asylum-seekers awaiting deportation.”<sup>310</sup> Lest there be doubt about the targets of these onerous measures, Meloni has invoked a fear of “ethnic substitution” of European citizens, an evident variant on the openly racist “Great Replacement theory.”<sup>311</sup>

Because Italy is embedded in a supranational union in which a measure of free movement is legally mandated, it cannot advance this exclusionary vision of citizenship and residency on its own. Meloni has hence looked to the European Union as a tool “to stem migration and reverse the demographic tides with a few billion euros in development aid” to Africa—a plan likely as doomed from its inception as President Trump’s famous wall.<sup>312</sup> Politically, though, the approach is starting to yield dividends. In April 2024, the EU adopted a new “common migration pact” aimed to reduce the volume of asylum applications, trim asylum procedures, and consolidate processing in a smaller number of sites.<sup>313</sup> The proposal was supported not just by right-of-center politicians, but also by center-left groupings hoping to outflank a populist surge in summer European parliament elections.<sup>314</sup> It remains to be seen whether this effort diminishes support for populist, anti-immigrant groups, or increases antipathy to migrants in ways that make those previously fringe groups even more mainstream.

## 2. India

Under Narendra Modi, the BJP government has moved to resculpt the Indian polity to align it with their vision of an exclusively Hindu nation. This has entailed both purging the extant citizenship of Muslims and limiting the flow of Muslims into the nation. These internal and externally focused measures must be understood as two wings of the same Hindu nation-building project.

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<sup>310</sup> Michele Barbero, *Giorgia Meloni Gets a Reality Check on Immigration*, FOREIGN POL’Y (Oct. 24, 2023), <https://foreignpolicy.com/2023/10/24/italy-immigration-right-wing-meloni-migrant-crisis/> [perma.cc/6UXJ-4HAJ].

<sup>311</sup> Anchal Vohra, *Italy Now Has Conspiracy Theory as National Policy*, FOREIGN POL’Y (May 8, 2023), <https://foreignpolicy.com/2023/05/08/italy-meloni-great-replacement-conspiracy-theory-immigration/> [perma.cc/9HC8-WF8L].

<sup>312</sup> David Broder, *Giorgia Meloni’s Europe*, 71 DISSENT, Spring 2024, at 18, 25–26.

<sup>313</sup> Michelle Pace, *Attempts by European Centre Parties to Outflank the Right on Migration Could Be Misguided*, CHATHAM HOUSE (May 21, 2024), <https://www.chathamhouse.org/2024/05/attempts-european-centre-parties-outflank-right-migration-could-be-misguided> [perma.cc/MC9A-AFF9].

<sup>314</sup> *Id.*

First, in 2019, the BJP government implemented a National Register of Citizens, designed to identify and deport out-of-status immigrants.<sup>315</sup> When implemented in the northeastern state of Assam, the Registry had a disparately large disenfranchising effect on Muslims: 70% to 80% of those deemed “foreigners” were Muslims, even though they comprised only 40% of Assam’s population.<sup>316</sup> Appeals from non-citizen designation are “long and exhaustive,” requiring fiscal resources many lack.<sup>317</sup> Because many Indians, regardless of faith, lack citizenship documentation, the Registry’s disparate operation had the effect of selectively exposing Indian Muslims to potential deportation similarly situated co-citizens do not face.<sup>318</sup>

Second, the party has pushed for changes to admissibility rules under immigration law that disfavor Muslims, while enabling members of other faiths to migrate to India.<sup>319</sup> In 2015, the government declared that Hindus, Sikhs, Jains, Buddhists, Parsis (Zoroastrians), and Christians—but not Muslims—who came to India from Pakistan, Bangladesh, or Afghanistan before 2015 would be exempted from laws prohibiting citizenship for illegal immigrants. This differential migratory scheme was enacted into law in December 2019 in the Citizenship Amendment Act.<sup>320</sup> India’s immigration statutes have precluded illegal migrants from becoming citizens since 1955.<sup>321</sup> The practical effect of the 1995 measure was to extend this categorical exclusion to persecuted Muslim minorities from neighboring countries, such as the Ahmadiyya in Pakistan or the Hazara in Afghanistan, while sparing other persecuted minorities.

As in the United States, the Indian judiciary has declined to push back against these measures, even though they are in obvious tension with the equality demands of the Indian constitution. In its 2021 judgment in *Salimullah v. Un-*

<sup>315</sup> Amit Shah: NRC to Apply Nationwide, No Person of Any Religion Should Worry, IND. TODAY (Nov. 20, 2019), <https://www.indiatoday.in/india/story/amit-shah-nrc-raja-sabha-1620810-2019-11-20> [perma.cc/Y4J4-K9VU].

<sup>316</sup> ANGANA P. CHATTERJI, MIHIR DESAI, HARSH MANDER & ABDUL KALAM AZAD, BREAKING WORLDS: RELIGION, LAW AND CITIZENSHIP IN MAJORITARIAN INDIA; THE STORY OF ASSAM 4–5 (2021).

<sup>317</sup> Assam NRC: What Next for 1.9 Million ‘Stateless’ Indians?, BBC NEWS (Aug. 31, 2019), <https://www.bbc.com/news/world-asia-india-49520593> [perma.cc/4A9F-DG7M] (explaining the appeals process).

<sup>318</sup> Puja Changoiwala, *India’s Muslims Are Terrified of Being Deported*, FOREIGN POL’Y (Feb. 21, 2020), <https://foreignpolicy.com/2020/02/21/india-muslims-deported-terrified-citizenship-amendment-act-caa> [perma.cc/A5TL-CMUQ].

<sup>319</sup> K. ALAN KRONSTADT, CONG. RSCH. SERV., IF11395, CHANGES TO INDIA’S CITIZENSHIP LAWS (2022), [https://www.everycrsreport.com/files/2024-04-18\\_IF11395\\_d98ea7364cf8fc321eca7533bc3ea2ca87971d4e.pdf](https://www.everycrsreport.com/files/2024-04-18_IF11395_d98ea7364cf8fc321eca7533bc3ea2ca87971d4e.pdf) [perma.cc/E24M-WR9V].

<sup>320</sup> Helen Regan, Swati Gupta & Omar Khan, *India Passes Controversial Citizenship Bill That Excludes Muslims*, CNN (Dec. 17, 2019), <https://www.cnn.com/2019/12/11/asia/india-citizenship-amendment-bill-intl-hnk/index.html> [perma.cc/N7EV-A28K].

<sup>321</sup> Talia Lewis, *India’s Citizenship Amendment Act Violates International Human Rights*, 28 U. MIA. INT’L & COMPAR. L. REV. 463, 472 (2021).

*ion of India*, the Supreme Court of India refused to stay a deportation order against Rohingya who had been held in the northern Indian region of Jammu.<sup>322</sup> It cited “serious concerns about the threat to the internal security of the country,” and ignored the grave humanitarian concerns raised by Myanmar’s military government’s policies of ethnic cleansing and violent appropriation.<sup>323</sup> Ethnic nationhood hence trumped individuals’ well-founded fear of persecution.

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The Roberts Court’s permissive attitude to discriminatory and cruel migration regimes designed to preserve the racial, religious, and ethnic homogeneity of the nation is thus of a piece with a global trend. Italy and India offer unusually crisp examples of that trend. But the anti-migrant turn has been global in scope and often colored by exclusionary conceptions of the nation.

#### *D. How the Roberts Courts Diverges from Kindred Judiciaries*

We have identified in this section a range of ways in which the courts beyond the United States increasingly advance the same triad of family, faith, and nation as the Roberts Court. The same foreign jurisdictions, however, are not moving in lockstep with American jurisprudence in other ways. In particular, there is no clear parallel to the anti-regulatory agenda advanced by the Roberts Court—although a variant form of institutional backlash fitted to national circumstances can be observed.

### 1. Judicial Hostility to the American Administrative State

In several lines of constitutional and statutory cases, the Roberts Court has thrown up barriers to the promulgation of administrative regulation aimed at preventing spillovers to consumers, residents, and firms. The October 2024 Term alone showcases how several different doctrinal tools can be simultaneously deployed to this end. The Court eliminated the deference agencies’ statutory interpretations received since 1984.<sup>324</sup> Mere days after that momentous decision, the Court held that the statute of limitations for a regulatory challenge started to run when a party was injured, rather than when the regulation was published.<sup>325</sup> As Justice Jackson explained in dissent, this ruling meant there was “effectively no longer any limitations period for lawsuits that chal-

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<sup>322</sup> See *Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789.

<sup>323</sup> *Id.*; see also Shriansh Jaiswal & Ananya Kumar, *India’s Response to Rohingyas: A Gross Misuse of Defense of National Security and Turning Away from Its International and Constitutional Obligations*, JURISTNEWS (July 2, 2021), <https://www.jurist.org/commentary/2021/07/https-www-jurist-org-commentary-2021-07-jaiswal-kumar-rohingya-muslims-national-security-india/> [perma.cc/2M2H-KHJK].

<sup>324</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 398 (2024).

<sup>325</sup> *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 804–05 (2024).

lenge agency regulations on their face.”<sup>326</sup> In the same term, the Court deployed arbitrary and capriciousness review to invalidate an EPA program meant to manage cross-state flows of air pollution,<sup>327</sup> and struck down the SEC’s use of administrative law judges to adjudicate fraud claims.<sup>328</sup>

The net effect of these rulings was to dramatically curtail agencies’ practical regulatory authority: both of the main tools for regulations—rulemaking and adjudication—are elevated in cost, and less likely to succeed. Often, agencies simply will not have the necessary staff to generate significant rules, or the lawyers to file federal lawsuits to address violations. When rules are promulgated, fewer in expectation will survive judicial review. And when a rule is promulgated and survived, it will be closely scrutinized by the courts for procedural regularity. Not all governmental actors, however, are constrained: Both the presidency, particularly through its exercise of security and war-related powers, and also the federal bench maintain substantive discretion. The effect is to “centralize power in government positions that have minimal responsibility for ongoing, pluralistic public contestation over specific policy issues.”<sup>329</sup>

## 2. Populist Administration Beyond the United States

Our research reveals no analog to this fierce backlash against the domestic regulatory state in other jurisdictions. To begin with, the extent of independent regulatory authority vested in the executive varies widely between different jurisdictions.<sup>330</sup> There is not a monolithic regulatory leviathan in all countries against which national courts might rebel. Moreover, there is far more accommodation between political movements organized around family, faith, and nation, on the one hand, and technocratic bureaucracies on the other.

The European context provides a useful arena for considering these questions. In Europe, both populist parties and non-parties have criticized the “technocra[ti]c” European Union (EU) system as being out of touch with the public’s preferences.<sup>331</sup> But “populists appear less concerned with abolishing the EU and more concerned with transforming it to serve their ends.”<sup>332</sup> At a municipal and national level, moreover, there is evidence that the political

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<sup>326</sup> *Id.* at 843 (Jackson, J., dissenting).

<sup>327</sup> *Ohio v. EPA*, 603 U.S. 279, 293–94 (2024).

<sup>328</sup> *SEC v. Jarkesy*, 603 U.S. 109, 140–41 (2024).

<sup>329</sup> Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1807 (2023).

<sup>330</sup> Cf. José Antonio Cheibub, *Making Presidential and Semi-Presidential Constitutions Work*, 87 TEX. L. REV. 1375, 1386 (2009) (noting that the scope of presidential decree power “varies widely” across national contexts); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2487 (2006) (underscoring “the changing nature of executive power”).

<sup>331</sup> John Erik Fossum, *In What Sense Does Right-Wing Populism Pose a Democratic Challenge for the European Union?*, 32 SOC. & LEGAL STUD. 930, 930 (2023).

<sup>332</sup> *Id.* at 947.

movements that might be expected to assail the administrative state have instead reached an accommodation with it. Where populist candidates have come to office in major European cities, such as Rome and Prague, they have embraced technocratic modes of government.<sup>333</sup> Further, it is not clear that members of the political movements associated with family, faith, and nation see administrative power, or technocratic rule as malign. Survey evidence from Spain suggests that “those who espouse populist principles also tend to demand the involvement of experts.”<sup>334</sup> Indeed, drawing on examples from Spain and Italy, Chris Bickerton and Carlo Accetti have urged the use of a new term “techno-populism” to capture this new form of political formation.<sup>335</sup>

The Roberts Court, in short, may be distinctive in its judicial welding of economic and cultural conservatism. Cross-national survey evidence, indeed, suggests that these views often come apart. Globally, at least, cultural conservatism is more likely to be found mingled with left-of-center economic views.<sup>336</sup> Political parties, including the Republican party in the United States, are grappling with this combination. The Roberts Court is not—instead serving as a vehicle for promoting family, faith and nation, while undermining the capacity for redistributive economic policy.

### 3. Institutional Backlashes Beyond the United States

Where the global illiberal turn has induced institutional effects, they have been more subtle and targeted than those observed in the United States. Rather than targeting administrative agencies at large, illiberal policy movement has induced the dismantling of what we call counterhegemonic institutions, namely, institutions that are tasked with protecting individual liberal rights to autonomous choice, and to resisting the knowledge or obedience claims of traditional solidarities. We highlight here attacks on universities and a suite of “fourth-branch” guarantor institutions that have been developed in recently promulgated constitutions as pro-democracy checks on incumbent power.<sup>337</sup>

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<sup>333</sup> Eliška Drápalová & Kai Wegrich, *Technocratic Populism and Subnational Governance*, 56 GOV'T & OPPOSITION 640, 641 (2021) (finding, based on several case studies, that “local populist politicians frequently combine technocratic discourse with their populist stance”).

<sup>334</sup> Pablo Fernández-Vázquez, Sebastián Lavezzolo & Luis Ramiro, *The Technocratic Side of Populist Attitudes: Evidence from the Spanish Case*, 46 W. EUR. POL. 73, 76 (2023).

<sup>335</sup> Christopher J. Bickerton & Carlo Invernizzi Accetti, ‘Techno-Populism’ as a New Party Family: The Case of the Five Star Movement and Podemos, 10 CONTEMP. ITALIAN POL. 132, 133 (2018) (defining “techno-populism”).

<sup>336</sup> Ariel Malka, Yphtach Lelkes & Christopher J. Soto, *Are Cultural and Economic Conservatism Positively Correlated? A Large-Scale Cross-National Test*, 49 BRIT. J. POL. SCI. 1045, 1045–46 (2017).

<sup>337</sup> See MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY 4–6 (2021) (introducing the concept of such institutions); Michael Pal, *Electoral Management Bodies as a Fourth Branch of Government*, 21 REV. CONST. STUD. 85, 85–86 (2016) (offering electoral bodies as an example thereof).



A first institutional spillover from illiberal policies of family, faith, and nation relates to secular institutions committed to epistemic norms inconsistent with those traditionalist commitments. In some places, this has been universities; in others, it has been (generally liberal) courts, which have been an object rather than an instrument of illiberal backlash.

For instance, universities have come under sustained assault for serving as islands of integrity as part of illiberal cultural shifts. A high-profile example involves the 2019 expulsion of the Central European University from Hungary.<sup>338</sup> A more recent and extensive case comes from India, where the Modi government has been able to pursue a “previously unimaginable . . . deregulation of capital, labour, farming and the environment” through its parliamentary majority—without the need to assault any extant administrative apparatus.<sup>339</sup> Instead of regulatory agencies, the institutions that have come under BJP attack are liberal universities that resist its claims on behalf of family, faith, and nation.<sup>340</sup> Academics have been physically attacked and threatened, with reports suggesting their assailants are associated with the RSS.<sup>341</sup> Prominent scholars Amartya Sen and Pratap Bhanu Mehta have resigned positions as Vice-Chancellors of major universities because of pressure from trustees and others. Other professors have been detained under vague anti-terrorism laws.<sup>342</sup> In one prominent case, a Maoist professor named G.N. Saibaba was charged with links to revolutionary organizations after criticizing state violence; his subsequent acquittal was later overturned by the Supreme Court.<sup>343</sup> The result has been a cowed academic world, unable to debate, let alone challenge, discourses of family, faith and nation.

In Israel, by contrast, Prime Minister Benjamin Netanyahu’s ethnonationalist coalition used a November 2022 electoral victory to challenge the Supreme Court of Israel. Under Chief Justices like Aharon Barak, the Court had long been a major liberal force in Israeli political life, resisting a rightward

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<sup>338</sup> WOJCIECH SADURSKI, A PANDEMIC OF POPULISTS 2 (2022).

<sup>339</sup> Desai, *supra* note 256, at 101.

<sup>340</sup> Mukul Kesavan, *The Attacks on Two Delhi Universities Reveal Modi’s Targets: Muslims and Their Allies*, THE GUARDIAN (Jan. 13, 2020), <https://www.theguardian.com/commentisfree/2020/jan/13/attacks-delhi-universities-modi-muslims-allies> [perma.cc/TQ9B-A2Z5].

<sup>341</sup> ACAD. FREEDOM MONITORING PROJECT, SCHOLARS AT RISK, FREE TO THINK 25–26 (2020), <https://www.scholarsatrisk.org/wp-content/uploads/2020/11/Scholars-at-Risk-Free-to-Think-2020.pdf> [perma.cc/7M7P-ZKGW].

<sup>342</sup> Abhishek Hari, *Academic Freedom Is Under Attack Globally—Including in India: Report*, THE WIRE (Dec. 9, 2021), <https://thewire.in/rights/academic-freedom-is-under-attack-globally-including-in-india-report> [perma.cc/JLK9-NEJG].

<sup>343</sup> He was subsequently re-acquitted. *India: Re-Acquittal of Human Rights Defender G.N. Saibaba Is a Triumph of Justice Over Continued Repression*, AMNESTY INT’L (Mar. 5, 2024), <https://www.amnesty.org/en/latest/news/2024/03/india-re-acquittal-of-human-rights-defender-g-n-saibaba-is-a-triumph-of-justice-over-continued-repression/> [perma.cc/5V4L-G4CN].

shift in Israel politics.<sup>344</sup> To this end, Minister of Justice Yariv Levin, unveiled “reforms” designed to weaken the Court’s liberal wing. These included adjusting the composition of the commission that selects the higher judiciary to include more representatives from parliament; creating an over-ride by simple Knesset majority of judicial decisions interpreting Basic Laws; allowing ministers to reject the opinions of their own law advisors; and ending judicial review on the basis of “reasonableness,” which has played a role in the judicial disqualifications of candidates from public office.<sup>345</sup> The proposals led to massive public demonstrations in the streets, which petered out only with the terrorist attacks of October 7, 2023.<sup>346</sup>

To summarize, these examples suggest that it is indeed sensible to distinguish the illiberal components of the Roberts Court’s agenda from its anti-administrative strands. In the United States, these elements are braided together thanks to the distinctive coalitional politics of the Republican party.<sup>347</sup> In other jurisdictions, however, they can come apart. Where counter-hegemonic institutions such as universities and courts are attacked, it is because they are perceived as obstacles to an illiberal agenda. What does seem to be common across all these jurisdictions, however, is the constitutional and legal elevation of the trinity of family, faith and nation.

### III. THE PATHWAYS OF ILLIBERAL CONSTITUTIONALISM’S TRANSNATIONAL DIFFUSION

The roughly lock-step emergence of illiberal constitutional doctrines elevating family, faith, and nation above the autonomous individual across many and diverse jurisdictions around the globe suggests the existence of powerful transnational vectors of influence in constitutional law. Specifically, how do such different national judiciaries, ranging across continents and the civil law and common law divide, reach the same results? In earlier eras of American constitutional law, these vectors were closer to the surface. Judges explicitly recognized ways in which their approach to a problem was shaped by what other jurisdictions were doing. When, in the early 2000s, judges critiqued the citation of foreign law in constitutional decision-making,<sup>348</sup> for example, a lively debate could ensue precisely because judges were candid about their

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<sup>344</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 173–78 (2004).

<sup>345</sup> Yaniv Roznai, Rosalind Dixon & David E. Landau, *Judicial Reform or Abusive Constitutionalism in Israel*, 56 *ISR. L. REV.* 292, 295–96 (2023).

<sup>346</sup> Noam Gidron, *Why Israeli Democracy Is in Crisis*, 34 *J. DEMOCRACY* 33, 33–34 (2023).

<sup>347</sup> Posner & Epstein, *supra* note 18, at 337–38.

<sup>348</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (providing an example of the Justices’ citations of foreign law); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (same); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (same).

reliance on foreign jurisdiction's decisions.<sup>349</sup> Just over a decade later, however, the wellsprings of transnational influence have become subterranean.

This Part offers an analytic framework that binds together several diffusion mechanisms into a “systemic” whole.<sup>350</sup> Diffusion is a process by which the “prior adoption of a trait or practice in a population alters the probability of adoption for remaining non-adopters.”<sup>351</sup> It typically operates through mechanisms of “competition, coercion, learning, and acculturation.”<sup>352</sup> These processes are not top-down. Judges and politicians in recipient jurisdictions “actively select or invoke foreign models to suit their domestic political goals.”<sup>353</sup>

The diffusion mechanisms we identify are heterogenous. To begin with, we map a common set of political and socio-economic pressures. Generally, these result in a form of politics described as “populist.” Once nations take an illiberal turn, however, a further set of cross-border feedback mechanisms kick in: The discursive shift from individualism to traditionalism in one jurisdiction leaks over into others—which can then in their turn shape other nations’ laws—creating an echo chamber in which ideas can reverberate and amplify. The Ugandan *Fox Odoi-Oywelowo* case is thus just one of several times the Roberts Court’s illiberal jurisprudence has rebounded globally. Supplementing this direct effect, transnational networks of faith-based and so-called “national conservative” networks operate as global channels for ideas about family, faith, and nation. The net result of this analysis is a more robust understanding of the emergence of a distinctively illiberal shift in constitutional jurisprudence not just in the United States, but globally.

In this Part, we posit and offer evidence for four diffusion pathways. Section A first explores the constitutional transvaluation of family, faith, and nation arising from a common political matrix of so-called populist movements.<sup>354</sup> Section B discusses a learning mechanism.<sup>355</sup> As the *Fox Odoi-Oywelowo* case suggests, the global prominence of the Roberts Court means that it acts as a beacon

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<sup>349</sup> Compare Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132 (2005) (outlining a theory that would allow such citation), with Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 167 (2005) (raising carefully calibrated concerns).

<sup>350</sup> Cook-Martin & Fitzgerald, *supra* note 34, at 45.

<sup>351</sup> David Strang, *Adding Social Structure to Diffusion Models: An Event History Framework*, 19 SOCIO. METHODS & RSCH. 324, 325 (1991).

<sup>352</sup> RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 272 (2014); accord. Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1, 2 (2014) (citing the same four mechanisms); Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 39 (2005) (offering a slightly different but overlapping taxonomy).

<sup>353</sup> Matthew J. Nelson, Ashl Bâli, David Mednicoff & Hanna Lerner, *From Foreign Text to Local Meaning: The Politics of Religious Exclusion in Transnational Constitutional Borrowing*, 45 LAW & SOC. INQUIRY 935, 936 (2020).

<sup>354</sup> See *infra* Part III.A.

<sup>355</sup> See *infra* Part III.B.

for illiberal ideas, but it itself denies that it learns from others. Section C maps a series of transnational networks that share ideas about family, faith, and nation.<sup>356</sup> In particular, the Catholic Church and Evangelical movements have played a significant role in diffusing illiberal ideas. These are in close touch with one another and share the same moral priorities and worldviews. The result is a powerful acculturation effect. Section D notes that international bodies are typically understood as vectors of liberal ideas, but in the past decade, international law has taken an increasingly “authoritarian” bent.<sup>357</sup> This both reflects and enacts the declining hegemony of a Cold War-era liberalism associated previously with the United States. A more fragmented and multipolar geopolitical context also cracks open new pathways for illiberal ideas.

### *A. The Common Populist Wellspring*

A “new family of political systems often branded as ‘populist’” has diffused across the world in the past decade.<sup>358</sup> Populism has been usefully defined as a style of politics that pits “the ‘people’ in a moral battle against ‘elites.’”<sup>359</sup> While populism can emerge on the political left or right, it is the latter manifestations that have stressed values of family, faith, and nation. Mexico, for example, has experienced populist rule and a measure of democratic erosion under a leftist government, but there has been no corresponding constitutional manifestation of cultural illiberalism.<sup>360</sup> Turkey under Recep Tayyip Erdoğan has emphasized pro-natalist policies, and has also developed a “civilizational populism” that emphasizes the Turkish national role as a defender of Sunni Islam, fusing religion and nation.<sup>361</sup> It has actively sought to diffuse this framing to other Muslim countries.

The rise of cultural populists in many countries in the twenty-first century has been an object of much academic study, which has yielded more disagree-

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<sup>356</sup> See *infra* notes Part III.B–C.

<sup>357</sup> Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221, 222–24 (2020).

<sup>358</sup> SADURSKI, *supra* note 338, at 4. See generally JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016) (offering a brief synopsis of populism’s diffusion).

<sup>359</sup> Jane Mansbridge & Stephen Macedo, *Populism and Democratic Theory*, 15 ANN. REV. L. & SOC. SCI. 59, 59 (2019); see also JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 19–20 (2016) (characterizing populism as a “moralistic imagination of politics” entailing a Manichean confrontation between a morally purified “people” and a corrupt and irremediable “elite[.]”).

<sup>360</sup> Mariano Sánchez-Talanquer & Kenneth F. Greene, *Is Mexico Falling into the Authoritarian Trap?*, 32 J. DEMOCRACY 56, 58–60 (2021).

<sup>361</sup> See *Minimum of Three: Erdoğan’s Battle to Boost Turkey’s Birth Rate*, POPULATION MATTERS (Jan. 30, 2025), <https://populationmatters.org/news/2025/01/minimum-of-three-erdogans-battle-to-boost-turkeys-birth-rate/> [perma.cc/US66-GWCY] (detailing Erdoğan’s pro-natalism); Ihsan Yilmaz & Mustafa Demir, *Manufacturing the Ummah: Turkey’s Transnational Populism and Construction of the People Globally*, 44 THIRD WORLD Q. 320, 323–26 (2023) (outlining transnational efforts to project Erdoğan’s vision).

ment than consensus on its causes. A recent summary of the literature, for example, identified a gamut of factors to explain the electoral success of cultural populists. These include “broad[] sociocultural anxieties,” and “the frequent appeal to voters almost everywhere of change for change’s sake.”<sup>362</sup> One insightful study further suggests that such anxieties become particularly salient in moments of economic crisis or cultural strain.<sup>363</sup> In truth, we suspect that there are complex feedback mechanisms linking cultural and economic anxieties, and that any attempt to peel them apart introduces misleading distinctions into the taxonomy of ambient political beliefs that in practice bleed together.<sup>364</sup>

It is not surprising that the first two decades of the new century would yield a pivot to legal illiberalism. The 2008–09 financial crisis, for example, revealed the fragility of macroeconomic stability and the willingness of national governments to sacrifice their social welfare provision to maintain the wellbeing of private financial firms.<sup>365</sup> At the same time, increased migration flows placed what was perceived as new pressures on cultural and social norms, particularly in Europe. The COVID-19 pandemic crystallized new anxieties about the movement of bodies and viruses across space, while revealing to many the profoundly limited competence of their government. These factors (and many others) provide a common causal basis for the emergence of cultural populism and hence legal illiberalism across the world.

### *B. Learning by Example: The Roberts Court as Illiberal Bellwether*

A classic mechanism of policy diffusion is learning by the exemplary behavior of others. The Ugandan court’s citation to *Dobbs v. Jackson Women’s Health Organization* reflects this mechanism at work. We searched the available databases of translations of foreign jurisdictions’ decisions over the past ten years for evidence of the Roberts Court’s influence in shaping global illiberal norms. Our search homed in upon recent decisions, such as *Dobbs*, that evince a normative orientation toward family, faith, and nation.<sup>366</sup> This search, to be clear, is not comprehensive: it does not include decisions that have not been translated into English or that are not deposited in an electronic database available transnationally. We hence make no claim to have canvassed the whole universe of instances in which the Roberts Court has exercised influence. Ra-

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<sup>362</sup> Thomas Carothers & Brendan Hartnett, *Misunderstanding Democratic Backsliding*, 35 J. DEMOCRACY 24, 32–34 (2024).

<sup>363</sup> Matthew Rhodes-Purdy, Rachel Navarre & Stephen K. Utych, *Populist Psychology: Economics, Culture, and Emotions*, 83 J. POL. 1559, 1769–70 (2021).

<sup>364</sup> See Yotam Margalit, *Economic Insecurity and the Causes of Populism, Reconsidered*, 33 J. ECON. PERSPS. 152, 152–53 (2019) (arguing that cultural anxieties trigger economic ones).

<sup>365</sup> See LAWRENCE JACOBS & DESMOND KING, *FED POWER: HOW FINANCE WINS* 1–10 (2d ed. 2021) (summarizing this critique in reference to the Federal Reserve).

<sup>366</sup> See *supra* notes 48–94 and accompanying text.

ther, we offer proof of a concept: The Roberts Court does act as an illiberal vanguard even if the full extent of its reach has yet to be properly mapped.

As a threshold matter, it is important to observe that many citations to the illiberal Roberts Court's decisions have nothing to do with substance. *Dobbs*, for example, can be cited for its posture toward precedent as much as its teachings on who controls the pregnant body. In other instances, however, Roberts Court rulings are cited for their illiberal substantive conclusions. The number of such cases remains small, but this may in part be a function of how recent the key American decisions have been.

The leading example beyond *Dobbs* to date is the 2018 *Masterpiece Cakeshop v. Colorado Civil Rights Commission* ruling, in which the Court issued a seemingly narrow decision prioritizing concerns about religious discrimination in the enforcement of state antidiscrimination laws over concerns about discrimination based on sexual orientation.<sup>367</sup> Several foreign courts have cited *Masterpiece Cakeshop* for the merits of the decision. In Bermuda, the privy council cited it for the idea that litigants' religious beliefs must be accepted at face value without further inquiry.<sup>368</sup> In Costa Rica, the American decision has been cited for the idea that judges have the capacity to evaluate claims of religious competence.<sup>369</sup> The English high court cited *Masterpiece Cakeshop* for the proposition that sexual orientation discrimination does not occur if a defendant baker would refuse all requests for a gay-themed product, regardless of who asked for it.<sup>370</sup> Given the realities of who asks for such products, the latter decision effectively licenses anti-gay discrimination so long as those engaged in the discrimination are savvy enough.

Foreign courts do not simply cite illiberal majority opinions. A Justice of the Peruvian Constitutional Tribunal, for instance, cited Chief Justice Roberts' dissent in *Obergefell v. Hodges*,<sup>371</sup> in denying a constitutional argument for same-sex marriage. Rejecting a lower court ruling that had relied on the Inter-American Court of Human Rights' broad definition of the family,<sup>372</sup> the Peruvian Court quoted Roberts for the proposition that the "universal definition of marriage [is] as the union of a man and woman."<sup>373</sup>

<sup>367</sup> 584 U.S. 617, 640 (2018) (hinging ruling on a factual finding of official hostility).

<sup>368</sup> Att'y Gen. for Berm. v. Roderick Ferguson & Others [2022] UKPC 5, [18/04/2022] TLR 1 (PC) (appeal taken from Berm.), <https://justis.vlex.com/vid/898992550> [perma.cc/9WP4-Q9RK].

<sup>369</sup> Sentencia No. 2021-017098 de Sala Constitucional [Constitutional Chamber], July 1, 2021 (Costa Rica), translated in <https://justis.vlex.com/vid/901714772> [perma.cc/8XGC-4954].

<sup>370</sup> Lee v. Ashers Baking Co. Ltd & Others [2018] UKSC 49, [2020] AC 413 (appeal taken from N. Ir.)

<sup>371</sup> 576 U.S. 644, 686–713 (2015) (Roberts, C.J., dissenting).

<sup>372</sup> See Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion, OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 178 (Sep. 24, 2017) (providing the definition).

<sup>373</sup> Tribunal Constitucional [Constitutional Court], Apr. 19, 2022 (Peru), translated in <https://justis.vlex.com/vid/923770705> [perma.cc/4XS5-6K4R] (separate opinion of Magistrate Costa).

The Ugandan court is one foreign court we have been able to identify that has cited the 2022 decision in *Dobbs*. That decision occurred against the backdrop of a “worldwide trend toward judicial decisions liberalizing abortion bans and legislative measures decriminalizing abortion.”<sup>374</sup> While little time has elapsed since that decision, there is some reason to anticipate that it will have an impact beyond Uganda. In Asian countries such as Nepal, judges leaned upon the U.S. Supreme Court’s ruling in *Roe v. Wade*<sup>375</sup> to justify constitutional rulings to expand abortion access.<sup>376</sup> Those who oppose abortion, “particularly those supported and inspired by U.S.-based conservatives, will be further encouraged in their attempts to erode abortion rights” by *Dobbs*.<sup>377</sup> Transnational anti-abortion activists such as Human Life International indeed responded to the decision by stating that “If the largest, most powerful democracy in the world can turn its back on legalized abortion, then maybe pro-lifers in nations worldwide can bring about the same outcome,” while the Political Network for Values, a “self-described global platform to promote family, life, and freedom,” predicted “a global ‘domino effect’” after *Dobbs*.<sup>378</sup> Indeed, in February 2024, the member of Argentinian premier Javier Milei’s party presented a bill to Congress seeking to recriminalize abortion, which had been legalized by the courts only a few years earlier.<sup>379</sup> While the bill was not advanced, anti-abortion rhetoric has “prompted growing numbers of doctors in Argentina to refuse to carry out terminations” for fear that it will be criminalized.<sup>380</sup> While the debate in Argentina has not hinged around *Dobbs*, it hints at the possibility of a new wave of illiberal restrictions on reproductive choice.

### C. Transnational Networks of National Illiberalism

Organizations such as Human Life International and the Political Network for Values are not outliers. In the fall of 2009, a group of U.S. Evangelicals

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<sup>374</sup> Anna Śledzińska-Simon, *Constitutional Framings of the Right to Abortion: A Global View*, 21 INT’L J. CONST. L. 399, 402 (2023) (footnote omitted); accord Ginsburg, *supra* note 174, at 264–67.

<sup>375</sup> See 410 U.S. 113, 164 (1973), *overruled by*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

<sup>376</sup> Risa Kaufman et al., *Global Impacts of Dobbs v. Jackson Women’s Health Organization and Abortion Regression in the United States*, 30 SEXUAL & REPROD. HEALTH MATTERS 22, 26 (2022).

<sup>377</sup> *Id.* at 26–27 (predicting that this effect will be felt in both Asia and Africa).

<sup>378</sup> Lynn M. Morgan, *Global Reproductive Governance After Dobbs*, 122 CURRENT HIST. 22, 24 (2023). On the other hand, the European Union responded to *Dobbs* by calling for greater legal protection for abortion. Resolution on Global Threats to Abortion Rights: The Possible Overturning of Abortion Rights in the US by the Supreme Court, EUR. PARL. DOC. P9\_TA(2022)0243, § 24 (2022).

<sup>379</sup> Mar Centenera, *El Partido de Milei Presenta en el Congreso Un Proyecto Para Penalizar el Aborto en Argentina*, EL PAÍS (Feb. 8, 2024), <https://elpais.com/argentina/2024-02-08/milei-presenta-en-el-congreso-un-proyecto-para-derogar-el-aborto-legal-en-argentina.html> [perma.cc/QK3S-SE85].

<sup>380</sup> Harriet Barber, *‘The Stigma Has Returned’: Abortion Access in Turmoil in Javier Milei’s Argentina*, THE GUARDIAN (Mar. 18, 2024), <https://www.theguardian.com/global-development/2024/mar/18/argentina-abortion-javier-milei> [perma.cc/5J4D-5QNV].

sought to promote conversion from homosexuality to heterosexuality through prayer and faith.<sup>381</sup> Inspired by their visit, Ugandan Minister of Parliament David Bahati introduced the Anti-Homosexuality Bill of 2009—a measure that ultimately led to the 2019 legislation upheld on the basis of *Dobbs*.<sup>382</sup> Global (and more specifically American) forces thus lie both at the inception and the apogee of Ugandan efforts to criminalize same-sex relationships.

These religiously inspired organizations are one of the two observable kinds of transnational networks along which the moral ideas and legal possibilities of illiberalism are disseminated. In addition to religious networks, there is a cluster of secular organizations that can be usefully ranked as “national conservatives” (after the name of the leading global conference). We address each of these in turn, although we stress that these networks are not in practice wholly distinct from each other.

To begin with, as the Uganda case demonstrates, there is a longstanding cluster of religious organizations focused on the advocacy of faith and family in law around the world. These networks are decades old. The Vatican, as we have explained, has fought a “decades-long, worldwide, multifront war on . . . ‘gender ideology,’” finding common cause in the last decade with Evangelical groups in the United States.<sup>383</sup> Under Ratzinger, the Vatican developed theological arguments against what it deemed “dangerous claims for trans and for women’s rights.”<sup>384</sup> As we explored in Part II, these ideas have been particularly influential in Latin America, where they spurred calls for illiberal legal change (most recently Argentinian president Milei’s call for new abortion restrictions).<sup>385</sup> In Poland, as we have noted, Catholic organizations have played a major role in pressing for illiberal legal change, including the creation of “LGBT-free zones.”<sup>386</sup> In France, legislators of the Union for a Popular Movement borrowed the Vatican’s terminology to resist successfully laws in favor of alternative reproductive procedures and adoption for LGBTQIA+ couples.<sup>387</sup> And, as also noted, the Vatican played a role in Kenyan debates about a new constitution and abortion rights.<sup>388</sup>

Catholic organizations have found important allies in Evangelical and Orthodox communities. Of central importance, the World Congress of Families (WCF) was created in 1996 by an American and a Russian scholar, for exam-

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<sup>381</sup> See Zoe Alsop, *Uganda’s Anti-Gay Bill: Inspired by the U.S.*, TIME (Dec. 10, 2009), <https://time.com/archive/6948854/ugandas-anti-gay-bill-inspired-by-the-u-s/> [perma.cc/Z5KS-99FV].

<sup>382</sup> *Id.*

<sup>383</sup> Case, *supra* note 147, at 639–40; Vaggione, *supra* note 147, at 253.

<sup>384</sup> Case, *supra* note 147, at 646.

<sup>385</sup> See *supra* notes 149–151 and accompanying text.

<sup>386</sup> See *supra* note 178 and accompanying text.

<sup>387</sup> Elizabeth S. Corredor, *Unpacking “Gender Ideology” and the Global Right’s Antigender Countermovement*, 44 SIGNS: J. WOMEN CULTURE & SOC’Y 613, 613 (2019).

<sup>388</sup> See *supra* notes 157–161 and accompanying text.



ple, to forge a movement across religions to uphold their view of family morality.<sup>389</sup> In time, the WCF moved closer to the Russian Orthodox church, and advocated for “interfaith cooperation” among “conservative Christians . . . against common foes (liberalism, secularism, feminism etc.).”<sup>390</sup> A 2019 WCF conference in Verona, Italy, for example, drew in Catholic, Syrian Orthodox, Mormon, and far-right populists such as the Lega Nord leader Matteo Salvi, to campaign for “heteronormative social structures and traditional family values.”<sup>391</sup> Similar religious groups have been very active in Uganda and other African nations.<sup>392</sup> That is, the WCF is one of several nodes linking *both* religious and secular organizations in pursuit of family, faith, and nation. Indeed, there is some evidence that illiberal religious and secular mobilizations draw on the same motivational wellspring of discontent with the democratic systems.<sup>393</sup>

Transnational organizations such as the WCF create physical and virtual spaces for the diffusion of ideas.<sup>394</sup> It seems likely that they also nurture enduring personal relationships that allow for cooperation at a distance long after an event ends. Like the Vatican and affiliated Catholic organizations, they also actively support transnational activism to change laws in an illiberal direction. The WCF, for example, has been a vehicle to support anti-LGBTQIA+ legislation across the world.<sup>395</sup> They have been aided in this effort by aligned religious organizations, such as the “powerful Christian lawyers’ group” Advocates International, based in Fairfax, Virginia, that sends its U.S.-trained attor-

<sup>389</sup> Kristina Stoeckl, *The Rise of the Russian Christian Right: The Case of the World Congress of Families*, 48 RELIGION, STATE & SOC’Y 223, 223–24 (2020).

<sup>390</sup> *Id.* at 228–30.

<sup>391</sup> Giulia Evolvi, *The World Congress of Families: Anti-Gender Christianity and Digital Far-Right Populism*, 17 INT’L J. COMM’N 2805, 2805–06 (2023).

<sup>392</sup> See, e.g., David McKenzie & Sarah Dean, *Activists Link US Nonprofit to Anti-LGBTQ Laws in Africa. The Group Says It’s Only Promoting ‘Family Values,’* CNN (Dec. 18, 2023), <https://edition.cnn.com/2023/12/18/africa/anti-lgbtq-laws-uganda-kenya-ghana/index.html> [perma.cc/4BEK-KZVT]; Lydia Namubiru & Soita Khatondi Wepukhulu, *US Christian Right Pours More Than \$50m into Africa*, OPENDEMOCRACY (Oct. 29, 2020), <https://www.opendemocracy.net/en/5050/africa-us-christian-right-50m/> [perma.cc/GC74-26CS]; Ayesha Habib, *How White Evangelicals Incite Homophobia in Uganda*, BROADVIEW (June 24, 2025), <https://broadview.org/white-evangelicals-incite-homophobia-uganda/> [perma.cc/BE45-KBEQ] (describing the Christian right’s pivot to funding anti-LGBT movements in Africa: having sensed a loss of “traction [politically] on American soil, evangelical groups began looking internationally, playing the long game”); Marcia Oliver, *Transnational Sex Politics, Conservative Christianity, and Antigay Activism in Uganda*, 7 STUD. SOC. JUST. 83, 93 (2013) (accounting for the role of the Christian right fostering through international civil society a “[t]ransnational [s]ex [p]olitics”).

<sup>393</sup> Marta Rawłuszko, *And if the Opponents of Gender Ideology Are Right? Gender Politics, Europeanization, and the Democratic Deficit*, 17 POL. & GENDER 301, 301–02 (2021).

<sup>394</sup> See JOHN FEFFER, RIGHT ACROSS THE WORLD: THE GLOBAL NETWORKING OF THE FAR-RIGHT AND THE LEFT RESPONSE 58 (2021) (explaining that WCF convenings have increasingly been a site for cross-fertilization across political and religious movements, mostly within Christianity but also other faith traditions).

<sup>395</sup> Sara Kalm & Anna Meeuwisse, *For Love and for Life: Emotional Dynamics at the World Congress of Families*, in THE POLITICS OF NEGATIVE EMOTIONS 135, 135 (Dan Degerman ed., 2023).

neys around the world to aid other civil society groups with legal advice and judicial trainings.<sup>396</sup> In the United Kingdom, the Alliance Defending Freedom “is guiding” the leadership of the hard-right Reform Party “even further to the right, on a conservative Christian agenda similar to the one that is sweeping through the United States.”<sup>397</sup> Another organization, the Abiding Truth Ministries, has pushed globally for laws criminalizing homosexuality, such as the Ugandan legislation discussed above.<sup>398</sup> Since the 1990s, Christian groups have also cooperated with Muslim groups in a “traditional families” alliance to challenge women’s rights, abortion, and gay rights groups.<sup>399</sup> These collaborations have found a forum in international organizations.<sup>400</sup>

Meanwhile, on the secular side are several transnational networks that have emerged over the last decade between illiberal parties and organizations across different companies. There is a rich cluster of both political party and also civil society groupings forging transnational linkages on the right.<sup>401</sup> These illiberal networks ebb and flow, with the scale of transnational mobilization on the far-right generally increasing over time.<sup>402</sup> Efforts by former Trump advisor Stephen Bannon to fashion a global movement in the wake of the 2016 presidential election, for example, seem to have faltered.<sup>403</sup> In contrast, the Fidesz government in Hungary has built up a “vast array of publicly financed think-tanks and foundations . . . to help the elaboration of illiberal narratives.”<sup>404</sup> These generate “wide range of journals, media-outlets, and educational institutions.”<sup>405</sup> Through these investments, the capture of one state’s resources by a single illiberal movement creates fresh pressure on liberal norms in other states.

We focus here on a more recent network—the National Conservative movement launched in 2023—as an illustration, rather than an exhaustive ac-

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<sup>396</sup> CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* 73 (2012).

<sup>397</sup> Jane Bradley & Elizabeth Dias, *They Helped Topple Roe v. Wade. Now Their Sights Are Set on Britain.*, N.Y. TIMES (Oct. 13, 2025), <https://www.nytimes.com/2025/10/13/world/europe/uk-abortion-farage.html> [perma.cc/5FDM-VHCR].

<sup>398</sup> Jeffrey Gettleman, *Americans’ Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES (Jan. 3, 2010), <https://www.nytimes.com/2010/01/04/world/africa/04uganda.html> [perma.cc/VFX2-JCF8]; accord KAOMA, *supra* note 163, at vii.

<sup>399</sup> BOB, *supra* note 396, at 37–38.

<sup>400</sup> Cole Parke, *Seventeen Years of Tracking the World Congress of Families*, POL. RSCH. ASSOCS. (Aug 3, 2023), <https://politicalresearch.org/2017/05/22/seventeen-years-tracking-world-congress-families> [perma.cc/C3RG-6D8Z].

<sup>401</sup> FEFER, *supra* note 394, at 44–65 (mapping linkages).

<sup>402</sup> Manuela Caiani, *Radical Right Cross-National Links and International Cooperation* (reporting “an increase in the transnationalization of the radical right over time”), in *THE OXFORD HANDBOOK OF THE RADICAL RIGHT* 394, 401 (Jens Rydgren ed., 2018).

<sup>403</sup> OWEN WORTH, *MORBID SYMPTOMS: THE GLOBAL RISE OF THE FAR-RIGHT* 167–76 (2019) (discussing Bannon’s efforts).

<sup>404</sup> Zsolt Enyedi, *Illiberal Conservatism, Civilisationalist Ethnocentrism, and Paternalist Populism in Orbán’s Hungary*, 30 CONTEMP. POL. 494, 498–99 (2024).

<sup>405</sup> *Id.*

count, of the transnational illiberal movement. We do so because the movement is recent and especially salient in the pronation of ideas about family, faith, and nation. The National Conservative movement was founded by the Israeli academic Yoram Hazony, a thinker who takes Netanyahu's Israel as "a light unto the nations—an illiberal model for the international nationalist brigade."<sup>406</sup> According to Hazony, "the Bible prescribes the nation-state as the optimal form of political community."<sup>407</sup> His national conservatism stresses "the primacy of the family as the core political unit, the immutability of biological facts, the preservation of borders and boundaries (between countries, between genders), [and] the goodness of national histories."<sup>408</sup> It blames "liberalism" for the perceived decline of the traditional family.<sup>409</sup>

National Conservative conferences have attracted populist luminaries such as Hungarian premier Viktor Orbán, American presidential hopeful Ron DeSantis, and TV personality Tucker Carlson.<sup>410</sup> A recent history of the National Conservative movement argues that it must be understood as a reaction to serial crises of globalization, from the 9/11 terrorist attacks, to the 2008–09 financial crisis, and to the hegemony-shaking rise of China.<sup>411</sup> In response to these shocks, it offers a "reinforced emphasis on traditional social and conservative hierarchies along national, ethnic, religious or racial lines."<sup>412</sup> It unites anti-abortion politics with a "radical identity politics of ethnicity and race."<sup>413</sup> More practically, the National Conservatism conferences held in London, Brussels, and Budapest enable participants to "make connections between different economic and social discontents" and to "feel themselves as engaged in similar struggles."<sup>414</sup> Hence, these conferences allow "unfailingly nationalist" actors to mobilize and exploit global connections and resources.<sup>415</sup>

#### D. Authoritarian International Law

Recent years have seen the emergence of a specifically authoritarian style of international law.<sup>416</sup> This involves cooperation across borders, albeit not for

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<sup>406</sup> Suzanne Schneider, *Light Among the Nations*, JEWISHCURRENTS (Sep. 28, 2023), <https://jewishcurrents.org/light-among-the-nations> [perma.cc/9BZS-XDQU].

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> Yoram Hazony, *Conservative Democracy: Liberal Principles Have Brought Us to a Dead End*, 289 FIRST THINGS 19, 19 (2019).

<sup>410</sup> Schneider, *supra* note 406.

<sup>411</sup> Gorkem Altinors & Angelos Chrysogelos, *Beyond Populism and into the State: The Political Economy of National-Conservatism*, 26 BRIT. J. POL. & INT'L RELS. 995, 996 (2024).

<sup>412</sup> *Id.* at 1006.

<sup>413</sup> *Id.* at 1007.

<sup>414</sup> Rita Abrahamsen & Michael C. Williams, *Transnational Nationalists: Building a Global Radical Right*, 14 POL. INSIGHT, Sep. 2023, at 28, 30.

<sup>415</sup> *Id.* at 29.

<sup>416</sup> See Ginsburg, *supra* note 357, at 221–22.

liberal purposes. Liberal international cooperation had long been idealized as a mechanism of reducing barriers among states and advancing liberal values, and some scholars had speculated that the future of international law was European style integration for all.<sup>417</sup> That has not occurred. Instead, the rising number of authoritarian regimes in the world, and particularly the authoritarian superpowers of China and Russia, have organized new groupings for illiberal purposes. In doing so, they have repurposed norms for their own ends.

Instead of deep integration, authoritarians cooperate with each other to advance national projects and to reinforce state sovereignty. For example, while democratic nations cooperate to form deep security alliances, authoritarians are more interested in cooperating on internal security, extraditing each other's dissidents and shoring up the security apparatus.<sup>418</sup> This form of international law strengthens the nation. Doctrines of non-interference in the internal affairs of other states are often invoked defensively, even as authoritarian powers show little respect for them in practice.

In attacking liberal international law, authoritarians have found common cause with populists in wealthy democracies. These voices have attacked international legal institutions as being out of touch and infected with a liberal bias. The United Nations has thus become a site of efforts to develop a pro-family bloc, in which predominately Muslim countries make common cause with transnational conservative movements. Groups like United Families International, Catholic Family & Human Rights Institute, and the WCF are forming partnerships with Muslim nations like Egypt and Pakistan based on shared opposition to LGBTQIA+ rights and abortion.<sup>419</sup> They seek to create a "permanent UN pro-family bloc" of an unholy "alliance" between Catholic and Muslim countries to promote their values at the United Nations.<sup>420</sup>

One strategy of the groups involves the repurposing or "misappropriation" of rights language for less progressive ends.<sup>421</sup> The Universal Declaration of Human Rights, for example, has been deployed by transnational actors and the Russian Orthodox Church in service of a conservative and exclusionary agenda.<sup>422</sup> The WCF, for example, organizes around article 16(3) of the Universal Declaration, which defines the family as the natural group unit of socie-

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<sup>417</sup> See Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 328–40 (2006).

<sup>418</sup> Ginsburg, *supra* note 357, at 247.

<sup>419</sup> Jennifer Butler, *For Faith and Family: Christian Right Advocacy at the United Nations*, POL. RSCH. ASSOCS. (Apr. 8, 2024), <https://politicalresearch.org/2000/09/01/faith-and-family> [perma.cc/A4TU-XHLD].

<sup>420</sup> *Id.*; see BOB, *supra* note 396, at 109–46 (describing the United Nations as a platform for cultural conflict between such networks).

<sup>421</sup> Gráinne de Búrca & Katharine G. Young, *The (Mis)appropriation of Human Rights by the New Global Right: An Introduction to the Symposium*, 21 INT'L J. CONST. L. 205, 205 (2023).

<sup>422</sup> KRISTINA STOECKL, *THE RUSSIAN ORTHODOX CHURCH AND HUMAN RIGHTS* 61–70 (2014).

ty.<sup>423</sup> According to studies of the movement, this has enabled its exportation of American styles of organized religious activism to other jurisdictions.<sup>424</sup>

According to critics, the religious right capitalizes on some liberals' "sensitivity . . . to charges of colonialism" to make inroads in developing nations.<sup>425</sup> They frame their efforts as protecting national sovereignty and traditional cultures from allegedly Western values like LGBTQIA+ equality and abortion rights. Some left-leaning human rights organizations are hesitant to fight back due to the history of colonialism in Africa, leaving the right-wing groups an open field to infiltrate and influence without much pushback from other groups from the outside.<sup>426</sup> In Ghana, for example, a group called the National Coalition for Proper Sexual Relations and Family Values has pushed an anti-LGBT bill as well as constitutional reform to enshrine its position.<sup>427</sup> By enlisting state power through laws and constitutional amendments, illiberals aim to erect legal bulwarks to impede permissive cultural change respecting gender and sexuality.

The attacks on LGBTQIA+ rights have been extensive in Africa. Several African countries, including Niger, Ghana, and Namibia, have recently made legislative changes that further restrict gay rights.<sup>428</sup> But the continuing evolution of transnational norms and standards have, thus far, liberalized national-level abortion laws in recent years.<sup>429</sup> For example, in 2003, the Maputo Protocol significantly mandated that:

States Parties shall take all appropriate measures to . . . [p]rotect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued preg-

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<sup>423</sup> Kristina Stoeckl, *Traditional Values, Family, Homeschooling: The Role of Russia and the Russian Orthodox Church in Transnational Moral Conservative Networks and Their Efforts at Reshaping Human Rights*, 21 INT'L J. CONST. L. 224, 229–30 (2023).

<sup>424</sup> *Id.*

<sup>425</sup> Kapya Kaoma, *The U.S. Christian Right and the Attack on Gays in Africa*, POL. RSCH. ASSOCS. (Aug. 4, 2023), <https://politicalresearch.org/2009/12/01/us-christian-right-and-attack-gays-africa> [perma.cc/7QE8-NGHW].

<sup>426</sup> *Id.*; see Clifford Bob, *The United Nations: Gay Versus Anti-Gay Players In Transnational Contention* (outlining the existence of conflict between different networks in civil society), in BREAKING DOWN THE STATE: PROTESTORS ENGAGED 205, 214 (Jan Willem Duyvendak & James M. Jasper eds., 2015).

<sup>427</sup> David McKenzie & Nimi Princewill, *How A US Group with Links to the Far-Right May Have Influenced A Crackdown On Ghana's LGBTQ Community*, CNN (Oct. 8, 2021), <https://edition.cnn.com/2021/10/08/africa/ghana-lgbtq-crackdown-intl-cmd> [perma.cc/3MDW-P4FK].

<sup>428</sup> Chelsea Cohen & Ottilia Anna Maunganidze, *Anti-Gay Laws: Africa's Human Rights Regression*, INST. FOR SEC. STUD. (Sep. 27, 2023), <https://issafrica.org/iss-today/anti-gay-laws-africas-human-rights-regression> [perma.cc/MUT5-KBCY].

<sup>429</sup> Johanna B. Fine, Katherine Mayall & Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, 19 HEALTH & HUM. RTS. J. 69, 69 (2017).

nancy endangers the mental and physical health of the mother or the life of the mother or the foetus.<sup>430</sup>

In 2014, General Comment No. 2 to the Maputo Protocol, adopted by the African Commission on Human and Peoples' Rights, clarified this obligation. It provided that states are obliged to create a legal and political environment facilitative of exercising reproductive rights, ensure information regarding safe abortion is accessible, guarantee access to comprehensive and safe abortion services, and remove obstacles to safe abortion, among other responsibilities.<sup>431</sup> As of June 2023, while only four of the forty-four states had been bound to the Maputo Protocol through ratification, only four states could be categorized as non-compliant (not allowing abortion in any instance).<sup>432</sup> The Maputo Protocol is unique amongst human rights instruments in its "prescriptive language" on the criteria for abortion.<sup>433</sup> As this illustrates, the transnational networks that advance illiberalism also confront counter-networks that advance a competing set of values in effective ways.

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The global illiberal turn in constitutional law, embracing traditional solidarities of family, faith, and nation, rests upon a complex set of interconnected causal forces. On one side of the ledger, several nations have experienced a sequence of economic and social shocks over the past decade. Across these nations, the sense of new uncertainty has cleaved open political space for new populist parties, often (albeit not always) on the culturally conservative right.

On the other side of the ledger, the emergence of illiberal policies at the national level often has cross-border spillover effects. Judges in foreign jurisdictions emulate the Roberts Court's turn to illiberal norms, while American conservatives find inspiration in the illiberal programs of Viktor Orbán and Benjamin Netanyahu. New political formations collaborate with extant religious organizations and thinkers to develop transnational linkages that enable the dissemination of ideologies, proposals, and political strategies in favor of family and faith in particular.

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<sup>430</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 14(2)(c), *adopted* July 1, 2003, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa> [perma.cc/Z4VE-MTQ7].

<sup>431</sup> AFR. COMM'N ON HUM. & PEOPLES' RTS., GENERAL COMMENT NO. 2 ON ARTICLE 14.1 (A), (B), (C) AND (F) AND ARTICLE 14.2 (A) AND (C) OF THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (2014), <https://achpr.au.int/sites/default/files/2021-05/achprinstrgeneralcomment2rightsofwomeninafricaengpdf.pdf> [perma.cc/YY6V-GSU6].

<sup>432</sup> CTR. FOR REPROD. RTS., MAPUTO PROTOCOL AT 20: PROGRESS ON ABORTION RIGHTS IN AFRICA (2023), [https://reproductiverights.org/wp-content/uploads/2023/06/CRR\\_Maputo-Protocol\\_4pg\\_web.pdf](https://reproductiverights.org/wp-content/uploads/2023/06/CRR_Maputo-Protocol_4pg_web.pdf) [perma.cc/7ZDB-2R8M].

<sup>433</sup> AKINRINOLA BANKOLE ET AL., FROM UNSAFE TO SAFE ABORTION IN SUB-SAHARAN AFRICA: SLOW BUT STEADY PROGRESS 4 (2020).

## CONCLUSION

Family, faith, and nation operate as touchstones not only for the Roberts Court. They are also the ideological touchstones for judges and politicians pressing a culturally conservative agenda around the world today. The illiberal turn in the Roberts Court needs to be understood in light of this global context: It is shaped by the same tectonic socioeconomic pressures as are felt in Warsaw and São Paulo. Its decisions are read and admired in Kampala, Jerusalem, and Budapest, even as the ideas it channels originate in broader global trends.

Our analysis has several important descriptive and prescriptive implications. First, echoing previous generations of scholars, we have argued that American constitutional jurisprudence is not hermetically sealed off from transnational forces. Earlier generations have been forced to confront the fact that seemingly domestic jurisprudence echoes and shapes the United States' position abroad; they have hence trimmed their sails or tacked toward new constitutional courses. Today, by contrast, the Court is integrated into transnational dynamics in somewhat different ways: it is shaped, profoundly yet often invisibly, by socioeconomic and political trends that do not explicitly register in the Justices' formal opinions. These same forces are sculpting a new, culturally conservative species of politics around the world.

Further, there is a transnational web of organizations, politicians, and lawyers working to disseminate the ideas and policies that are to be found on the pages of the U.S. Reports. Increasingly important among those mechanisms are the Court's own opinions, which are looked to around the world as lodestars for other judges and activists. While the threads tying together these domestic and international dynamics will not always be apparent in the individual case, in the aggregate, the transnational context of the Roberts Court cannot be ignored when seeking to understand the path of our constitutional jurisprudence.

As a predictive and forward-looking matter, we conclude that the global illiberal turn mapped in this article is just the beginning of a new phase of legal and political contestation—one that is likely to deepen and accelerate in future years even as it faces a countervailing defense of liberal autonomy claims. We have demonstrated that the institutional and ideological architecture of this movement has consolidated in recent years. The Roberts Court has done its part by contributing a garland of culturally conservative triumphs in the readily emulated form of constitutional doctrine. These opinions, we predict, will increasingly be picked up, and weaponized, to advance illiberal policy changes around the world. As mobilization yields judicial and legislative successes, those outcomes in turn will rebound back to shape American policies.

In short, the global illiberal turn mapped here is playing its opening hand. How its long game unfolds remains to be seen. Our hope in this Article is to

cast light on its ideas, institutional resources, and ambitions so as to enable a better understanding of what might come to be the defining force of twenty-first-century constitutionalism.