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IN CONTEXT: FOREIGN AND INTERNATIONAL LAW IN ABORTION LITIGATION

Martha F. Davis*

In Dobbs v. Jackson Women's Health Org'n, the U.S. Supreme Court, both the majority and dissenting justices, employed comparative law. For some of the justices in the majority, this reflected a change from their prior rejection of comparative law in United States courts. However, a review of the majority's approach to comparative law reveals flaws in their analysis – in particular, a failure to appreciate the broader context surrounding comparative sources. As state courts now take the lead in considering cases relating to abortion, they have the opportunity to develop more nuanced and accurate approaches to comparative law.

* University Distinguished Professor of Law, Northeastern University. I am grateful for the many insights that I gained from other team members during the preparation of the *amicus* brief in Dobbs v. Jackson Women's Health Org. on behalf of International and Comparative Law Scholars. Morgan Metsch provided valuable research assistance. Any mistakes are my own.

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I. INTRODUCTION

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* reversed five decades of judicial precedent that protected the fundamental right to an abortion under the Federal Constitution.[1] The decision also heralded another, less momentous but nevertheless significant, reversal by several of the Justices making up the majority: they employed references to foreign law to support their position that the Mississippi law restricting abortions after fifteen weeks should be upheld.[2]

Only a few years ago, such cites in a constitutional case would have been virtually unthinkable in an opinion issued by a conservative majority. Though Justices of the past, particularly Justice Anthony Kennedy, often found value in looking abroad and did so in a range of cases, that approach was repeatedly attacked by their conservative colleagues.[3] In

1. Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2228 (2022).

2. *Id*. at 2243 n.15 (Alito, J.); *Dobbs*, 142 S.Ct. at 2270, 2312 (Roberts, C.J., concurring); *Dobbs*, 142 S.Ct. at 2340-41 (Breyer, J., *et al*., dissenting). This might be called an evolution rather than a reversal since the Supreme Court's rejection of foreign law was never absolute. For example, conservative Justices also referenced foreign law in Obergefell v. Hodges, though the citations there—mostly to practices of marriage in ancient times—were focused more on history and culture than foreign legal standards and practices. *See* Zachary D. Kaufmand, *From the Aztecs to the Kalahari Bushmen: Conservative Justices' Citation of Foreign Sources: Consistency, Inconsistency, or Evolution?,* 41 YALE J. INT'L L. ONLINE 1, 4 (2015-16). *See also* Steven Calabresi & Stephanie Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 750 n.16 (2005) (noting Justice Thomas's prior citations of foreign law).

3. *See*, *e.g*., Roper v. Simmons, 543 U.S. 551, 575-78 (2005) (Kennedy, J.); *Roper*, 543 U.S. at 622-28 (Scalia, J., dissenting). *See also* Graham v. Florida, 560 U.S. 48, 80-82 (2010) (Kennedy, J.); Graham, 560 U.S. at 114 n.12 (Scalia, J., dissenting); Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of cert.).

the face of these attacks, jurists with a more moderate ideology, including Justice Kennedy, gradually seemed to abandon the practice of "comparative sideglances" in their opinion-writing, even when the Court was presented with briefings on foreign law.[4] The more liberal wing of the Court also seemed increasingly unlikely to include comparative citations—a particularly notable development for Justice Ginsberg, who began her career as a comparative law scholar and, after joining the bench, continued to lecture on the value of comparative perspectives.[5]

However, after years of dwindling instances of foreign law citations, in *Dobbs*, comparative references appear in the opinion of the Court (written by Justice Alito); Chief Justice Roberts' concurrence; and the joint dissent authored by Justices Breyer, Kagan, and Sotomayor.[6] This apparent acknowledgment of the relevance of foreign law does not, however, signal any broader agreement between the majority and dissent over the interpretation of the foreign law in question. In fact, the differing approaches of the majority and dissent to the same basic facts demonstrate significant disagreement over the methodology of comparative law, an issue that is explored below.

This article proceeds in three parts. Following this introduction, Part II examines both the Supreme Court Justices' prior statements about foreign law and the surprising role of foreign law in *Dobbs*. In particular, Part II explores the briefing on foreign law in *Dobbs* and the methodological

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4. Justice Ginsburg frequently used the phrase "comparative sideglances" to describe the practice of looking to foreign law. *See*, *e.g*., Justice Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States,* 57 LA. L. REV. 1019, 1019 (1997). A notable example in which the Justices declined to take up a comparative analysis is Miller v. Alabama, addressing the scope of sentencing of juvenile life without parole. Amnesty International and other amicus filed an extensive comparative and international law brief on the issue, but no Justice cited that material. Brief of Amici Curiae Amnesty International, et al. in Support of Petitioners, Miller v. Alabama, 2012 WL 174238 (U.S.)

5. *See*, *e.g*., Ginsburg, *supra* note 4; *See also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L. REV. 1185, 1196-97 (1992) (in discussing approaches to judging, taking "comparative sideglance" to Irish caselaw). Justice Ginsburg's early work as an academic focused on Sweden. *See, e.g*., Ruth B. Ginsburg, *Proof of Foreign Law in Sweden*, 14 INT'L & COMP. L.Q. 277 (1965); Ruth B. Ginsburg, *Survey of Products Liability Law: Sweden*, 2 INT'L LAW. 153 (1967).

6. *Dobbs*, 142 S.Ct. at 2228.

differences between the majority, concurring, and dissenting opinions. Part III examines how, after *Dobbs*, state courts considering abortion restrictions under their state constitutions might approach the methodological issues raised by references to comparative law. State courts have a strong, independent history of looking abroad in appropriate cases, but have also experienced efforts by some state legislatures to bar use of foreign citations in their opinions. Part IV turns to the related issue of international human rights law, which was briefed by amicus participants but not cited in any of the *Dobbs* opinions, and which may nevertheless play a role in state-level adjudication of abortion restrictions. Part V concludes by summarizing the challenges ahead for state courts seeking to maintain methodological rigor in developing and utilizing both comparative and international law perspectives in this arena.

II. FOREIGN LAW IN *DOBBS*: BACKGROUND AND FOREGROUND

A. The Dobbs Majority's Prior Positions on Foreign Citation

In his confirmation hearing for the Supreme Court in 2006, then-Judge Alito was asked directly about his view of the relevance of foreign law to interpreting the U.S. Constitution. His answer was succinct and unequivocal:

> Senator Kyl[:] What is the proper role, in your view, of foreign law in U.S. Supreme Court decisions, and when, if ever, is citation to or reliance on these foreign laws appropriate?
>
> Judge Alito[:] I don't think that foreign law is helpful in interpreting the Constitution.[7]

As hearings continued the following day, Judge Alito elaborated on this position in response to questioning from Senator Colburn, demonstrating an acute awareness of how comparative legal analysis might go wrong. Among other things, Judge Alito testified:

> [S]ometimes it's misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it's located. That can be—if you focus too

7. Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States, 109th Cong. 277 (2006), https://www.congress.gov/109/chrg/shrg25429/CHRG-109shrg25429.htm.

> narrowly on that, you may distort the big picture, so for those reasons, I just don't think that's a useful thing to do.[8]

At least three members of the *Dobbs* majority have made public statements agreeing with Justice Alito's conclusion.[9] In his 2005 confirmation hearing, perhaps the first in history where this line of questioning was put forward, then-Judge Roberts stopped short of condemning judges who cited foreign sources, despite some pressure to do so from conservative Senators.[10] Instead, Roberts suggested that such judges were "getting it wrong," and he concluded that it was not "a good approach."[11] Among the concerns that he raised was one of methodology, because, he averred, "[i]n foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever."[12]

Justice Gorsuch echoed these sentiments at his confirmation hearing in 2017. Under questioning from Senator Sasse about citation of foreign law, then-Judge Gorsuch responded, "Senator, I would say it is improper to look abroad when interpreting the Constitution as a general matter."[13]

Justice Thomas joined the Supreme Court in 1991, long before the consideration of foreign materials became a confirmation flashpoint. But Justice Thomas made his views on the matter known in 1999, in his concurrence in denial of certiorari in the death penalty case of *Knight v. Florida*.[14] In *Knight*, the petitioner argued that excessive delay in administering a death penalty sentence—in that instance,

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8. *Id.*

9. *See infra* notes 11-18 and accompanying text.

10. Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States, 109th Cong. 201, at 293 (2005) (statement of Chief Justice John G. Roberts, Jr.), https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf. Senators Coburn (R-OK) and Kyl (R-AZ) particularly pressed the nominee on this issue. *See* Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States, 109th Cong. 201, at 201 (Sen. Kyl); Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States, 109th Cong. 201, at 292-293 (Sen. Coburn).

11. *Id.* at 293.

12. *Id.* at 201.

13. Confirmation Hearing on the Nomination of Hon Neil M. Gorsuch To Be An Associate Justice of the Supreme Court of the United States, 115th Cong. 208, at 320 (2017), https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf.

14. *Foster*, 537 U.S. at 990. *See also* Knight v. Florida, 528 U.S. 990 (1999).

more than twenty years—constituted "cruel and unusual punishment" in violation of the Eighth Amendment.[15] Justice Breyer would have granted the cert. petition. An enthusiastic proponent of comparative legal dialogues, Justice Breyer cited several foreign authorities in support of his position that excessive delay in carrying out a death penalty sentence could constitute unconstitutionally "cruel" punishment.[16] In voting with the majority to deny the petition, Justice Thomas rejected Justice Breyer's approach, opining that "[w]hile Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's . . . jurisprudence should not impose foreign moods, fads, or fashions on Americans."[17]

The most recent Supreme Court nominees with conservative records have offered somewhat more nuanced views. In his 2018 confirmation hearings, then-Judge Kavanaugh quoted Justice Sotomayor's earlier confirmation statement in 2009 that foreign decisions are not binding, but can be a source of ideas.[18] With that, Judge Kavanaugh left the door open to consideration of foreign law in appropriate cases.[19] Justice Barrett, during her 2020 confirmation process,

15. *Foster*, 537 U.S. at 992 (Breyer, J., dissenting).

16. *Id*. Justice Breyer debated Justice Scalia on the question of foreign law in a series of public forums, with Justice Breyer taking the position that consideration of foreign law was appropriate and helpful. *See also* Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases, A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 528 (2005).

17. *Foster*, 537 U.S. at 990-91.

18. Confirmation Hearing on the Nomination of Hon. Brett Kavanaugh to be an Associate Justice of the United States Before the S. Comm. on the Judiciary, 115th Cong. 545, S. Hrg. 115-545 (2018), at p. 1543, https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf. Justice Kavanaugh specifically cites Justice Sotomayor's 2009 confirmation hearing. *See* Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States, 111th Cong. 503, at 349 (2009), https://www.govinfo.mgov/content/pkg/GPO-CHRG-SOTOMAYOR/pdf/GPO-CHRG-SOTOMAYOR.pdf. Justice Kagan's statements during her confirmation hearings made a similar point. As a nominee, Justice Kagan was questioned extensively about her approach to foreign law. She responded that "I'm in favor of good ideas coming from wherever you can get them," and likened foreign law to law review articles, a source of ideas "that do not have any precedential weight." *See* The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States, 111th Cong. 1044, at pp. 156, 259 (2010), https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf.

19. Confirmation Hearing on the Nomination of Hon. Brett Kavanaugh, *supra* note 18.

likewise avoided completely rejecting foreign citation, stating that "[constitutional] interpretation should not be *controlled* by the laws passed by other countries."[20]

Given this history, the majority opinion and Chief Justice Roberts' concurring opinion in the *Dobbs* case reflect a surprising openness to citation of foreign law, an about-face from the earlier rejection of the practice by conservative Justices on the Court. But at the same time, the opinions lay bare the potential pitfalls of comparative law. While citing foreign law in the course of overturning *Roe v. Wade*, the majority and concurrence failed to appreciate, or even address, the very methodological issues pointed out by Justice Alito and Chief Justice Roberts in their confirmation hearings.

B. Comparative Law in the Dobbs Case

Dobbs is one of the most significant and shocking cases ever decided by the U.S. Supreme Court, given its cavalier treatment of precedent, and it attracted more than 140 amicus briefs, representing thousands of interested organizations and individuals.[21] A handful of these amicus briefs dealt with comparative law, and they clearly attracted the attention of several of the Justices.[22]

20. Nomination of Amy Coney Barrett to the U.S. Supreme Court, Questions for the Record, Submitted Oct. 16, 2020, at p. 5, https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf (response to Senator Coons, D-DE; emphasis added). In 2022, Supreme Court nominee Ketanji Brown Jackson elaborated on her view that appropriate uses of foreign law are circumscribed, writing in response to Senator Cotton (R-AR) that "foreign law should not be used as binding precedent or legal authority to interpret the United States Constitution. But foreign law can be consulted in limited circumstances, just as law review articles or treatises can be consulted." Questions for the Record, Judge Ketanji Brown Jackson, Nominee, Associate Justice of the Supreme Court of the United States, at p. 214 (2022), https://www.judiciary.senate.gov/imo/media/doc/Judge%20Ketanji%20Brown%20Jackson%20Written%20Responses%20to%20Questions%20for%20the%20Record.pdf.

21. Ellena Erskine, *We Read all the Amicus Briefs in Dobbs so You Don't Have to*, SCOTUSBLOG (Nov. 21, 2021), https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/.

22. *See Dobbs*, 142 S.Ct. at 2340-41 (Breyer, J., et al., dissenting) (Justice Bryer cites two of these amicus briefs in his dissenting opinion). *See, e.g.*, *Dobbs*, 142 S.Ct. at 2243 n.15 (Alito, J.) (Material presented in these amicus briefs, though not the briefs themselves, was also cited in Justice Alito's majority opinion) (*citing* source appearing in Brief of 141 International Legal Scholars as Amici Curiae in Support of Petitioners, Dobbs v. Jackson Women's Health Org., U.S. No. 19-1392, p. 22).

As an initial matter, it is worth noting that the Mississippi law addressed in *Dobbs* invited a comparative perspective. In its preamble, the law asserted that new federal restrictions on abortion were justified because the United States was purportedly an international outlier in allowing abortions up to twenty-four weeks under the *Roe v. Wade* framework.[23] During the *Dobbs* litigation, amicus briefs from both foreign and domestic legal experts sought to either bolster or undercut this claim.[24] For four briefs, this comparative law issue was a significant focus.[25]

Submitted in support of Mississippi, the Brief of 141 International Legal Scholars as Amici Curiae (hereinafter "141 Scholars Brief"), included several paragraphs addressing foreign law.[26] Drawing from a United Nations tally of abortion time limits and other criteria, these amici offered a birds-eye view of abortion that gave equal weight to the laws of every nation, arguing that "only thirty-four percent of countries permit abortion solely based on a woman's request."[27] Further, characterizing the pertinent black letter law, these scholars asserted that "[t]he majority of States . . . heavily restrict access to abortion by way of narrow grounds, gestational limits, and other requirements."[28] These "narrow" grounds, the scholars explained without elaboration, included "saving the mother's life, preserving her health, or in cases of rape, incest, or fetal impairment."[29]

On the other side of the issue, the brief from International and Comparative Law Scholars in support of respondents (hereinafter "ICLS Brief"), provided the context that was

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23. The Gestational Age Act, Miss. H.B. 1510 (2018).

24. *See, e.g.*, Brief of International and Comparative Legal Scholars as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392).

25. *See* discussion *infra* at notes 26-42 and accompanying text. Several additional briefs, discussed *infra* at notes 76-80 and accompanying text (focused on international law, including the European Convention on Human Rightsand the International Covenant on Civil and Political Rights).

26. Brief of 141 International Legal Scholars as *Amici Curiae* in Support of Petitioners at pp. 22-25, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392).

27. *Id.* at 22.

28. *Id.* at 23.

29. *Id.*

missing from the analysis in the 141 Scholars Brief.[30] Drawing on respected comparative law scholarship, the ICLS Brief noted that "[i]n conducting comparative law analysis, American courts afford particular weight to the laws of liberal, democratic states."[31] Further, the ICLS Brief asserted that reliance on a bare, undifferentiated tally—as was done by the Mississippi legislature—was a misleading indicator of foreign nations' policies and a poor guide to the practices of comparable countries.[32] Looking closely at the legal realities in liberal, democratic states, the international and comparative law scholars asserted that "comparable liberal states provide broad legal access to abortion up to or around viability."[33] According to the ICLS brief, "other jurisdictions with earlier time limits actually extend abortion access later into pregnancy through broad legal exceptions that apply in a range of circumstances," and "the broad global trend is towards liberalizing access to abortion."[34] An examination of on-the-ground practices is a critical component of a valid comparative exercise, the brief asserted, because "'how these rules are enacted every day,' beyond the formal laws themselves, shape the substantive content of abortion law."[35] Applying this contextualized approach, the brief provided in-depth analysis of abortion laws in Canada, New Zealand, the Netherlands, New South Wales in Australia, and several other countries that share a common legal history with the United States.[36]

The amicus brief filed in support of the clinic by Human Rights Watch, the Global Justice Center, and Amnesty International (hereinafter "HRW Brief"), offered relevant comparisons between the Mississippi law and the laws of thirty-six economically developed or highly economically developed countries—the nations most comparable to the United States.[37] As the brief explained, "[o]f these 36

30. Brief of International and Comparative Legal Scholars as Amici Curiae in Support of Respondents, *supra* note 24.

31. *Id.* at 9.

32. *Id.* at 10.

33. *Id.*

34. *Id*.

35. *Id.* at 11.

36. Brief of International and Comparative Legal Scholars as Amici Curiae in Support of Respondents, *supra* note 24, at 13-22.

37. Brief of *Amici Curiae* Human Rights Watch, Global Justice Center, and Amnesty International in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (U.S. No. 19-1392).

countries, 34 allowed for abortion on request or made abortion available on broad economic and social grounds. Only two of the countries included in the [UN] report—Malta and Poland—have more restrictive laws."[38]

Another comparative law brief supporting the abortion clinic, from European Law Professors (hereinafter "ELP Brief"), also argued for the importance of context.[39] The ELP Brief addressed the regional international law of Europe under the European Convention on Human Rights while also providing additional specifics regarding the legal regimes of European countries within the Council of Europe. According to the law professors:

> Full appreciation of the availability of abortion in the [Council of Europe countries] cannot be gleaned by simply counting how many States permit abortion "on request" or for how many weeks they do so. Based on that crude metric, the United Kingdom, for example, could be mischaracterized as a restrictive State. But in fact abortion is available (and government-funded) through 24 weeks with no meaningful impediment in the United Kingdom . . . [40]

Because of our shared legal and political history, the United Kingdom is usually one of the first countries a U.S. court looks to in a comparative exercise, so a misleading and essentially inaccurate understanding of its abortion law is particularly concerning.[41] Yet the inaccurate characterization that the ELP Brief warned of is exactly what was embedded in the generalizations offered in the 141 Scholars Brief supporting Mississippi and ultimately adopted by the *Dobbs* majority. A detailed chart annexed to the ELP Brief—showing not just the number of weeks attached to abortion access in European jurisdictions, but also the full range of broad exceptions—drives home the point: the isolated data points offered by the 141 Scholars Brief and adopted by the *Dobbs* majority do not accurately describe the true access to legal abortion in these peer countries.[42]

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38. *Id.* at 13.
39. Brief of European Law Professors as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392).
40. *Id.* at 16 (citation omitted).
41. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 608 (2008).
42. Brief of European Law Professors, *supra* note 39, at app.

In short, despite the detailed comparative law briefs submitted to the Court, the majority in *Dobbs* fell into the very trap that Justice Alito and Chief Justice Roberts had warned about in their confirmation hearings. Rather than apply a sound, contextualized comparative law methodology to assess true similarities and differences between laws in the United States and those of other liberal democracies, they "look[ed] out over a crowd and pick[ed] out… friends"—in this instance, nations with abortion laws that were, at least superficially, more restrictive than the United States.[43] It was only by ignoring context that Justice Alito could opine that other countries eschewed viability as a meaningful line, and that Chief Justice Roberts could assert in his concurrence that "[o]nly a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12–week line."[44] Tellingly, both Justices supported their propositions with citations to a chart produced by the Center for Reproductive Rights that explicitly maps only "black letter law," not the more contextualized legal analysis offered by the ICLS, HRW, and ELP Briefs that is appropriate to a comparative law inquiry in a judicial context.[45]

In contrast, the dissenting Justices in *Dobbs* credited more nuanced accounts of abortion laws that reflect actual practice of countries that are appropriate comparators. As the dissenters noted:

> [t]he global trend . . . has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as Roe and Casey set. Canada has decriminalized abortion at any point in a pregnancy. Most Western European countries impose restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental

43. *Dobbs*, 142 S.Ct. at 2243 n.15, 2270 (Alito, J.); *Dobbs*, 142 S.Ct. at 2312 (Roberts, C.J., concurring). *See* Stanley Halpin, *Looking over a Crowd and Picking out Your Friends: Civil Rights and the Debate over the Influence of Foreign and International Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT'L & COMP. L. REV. 1 (2006).

44. *Dobbs*, 142 S.Ct. at 2312 (Roberts, C.J., concurring).

45. *See* Center for Reproductive Rights, *The World's Abortion Laws*, https://reprodctiverights.org/maps/worlds-abortion-laws/ (last visited Apr. 6, 2023).

> health. They also typically make access to early abortion easier, for example, by helping cover its cost. Perhaps most notable, more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.[46]

The dissent's approach takes account of the criticisms once levied by conservative opponents of citation to foreign authority. Rather than relying on an undifferentiated single-metric tally, the dissenters focus on the abortion laws in liberal democracies and nations that share legal histories with the United States. And rather than cite static statistics to justify eliminating a fundamental right, the dissenting Justices examine broad, worldwide trends that reflect the gradual expansion of abortion rights worldwide.

The *Dobbs* decision jettisoned the longstanding federal fundamental right to abortion under the Fourteenth Amendment and sent the matter to the states to establish their own legal frameworks and regulations. State courts and state constitutions, rather than federal courts and the Federal Constitution, now provide the backstop to ensure that individuals' rights are protected by any new state-level legislative enactments in the abortion arena.[47] And state courts, rather than federal courts, may now be called on to take "comparative sideglances" as they construe the meaning of their own constitutional provisions.[48]

III. STATE COURTS, STATE CONSTITUTIONS, AND FOREIGN LAW

State high courts have a longstanding practice of citing foreign law in a range of cases—a practice that was also once well-accepted among federal courts.[49] Indeed, the rationale supporting such citations is particularly strong in the state

46. *Dobbs*, 142 S.Ct. at 2340-41 (Breyer, J., et al., dissenting).

47. The *Dobbs* decision returned abortion decision-making to "the people and their representatives." *Dobbs*, 142 S. Ct. at 2279. To date, activity has centered on state legislatures and state courts. *See generally* David Cohen, Greer Conley & Rebecca Rebouche, *The New Abortion Battleground*, 123 COLUM. L.REV. 1 (2023); Mark Strasser, *Abortion and State Constitutional Guarantees: The Next Battleground*, 51 HOFSTRA L. REV. 231 (2022).

48. *See supra* text accompanying note 4.

49. *See* Sarah Cleveland, *Our International Constitution*, 31 YALE INT'L L.J. 1, 2 (2006).

system. State courts are inherently comparativist in their orientation, often looking to sister states for persuasive ideas.[50] State court judges also operate in the common law tradition.[51] Common law approaches invite judges to reason by analogy, necessarily accessing wisdom from a range of sources.[52]

Yet like federal courts, state courts were also the targets of a significant campaign to bar foreign law citation. The effort reached its height in 2013, when thirty-two state legislatures considered bills that would have banned state courts from citing foreign law in at least some circumstances.[53] Significant legislative attacks on foreign law continued in the states at least through 2021.[54]

These legislative proposals to limit state courts' citations raised a host of practical and theoretical challenges. Still, despite all of the attention that they received, few were ultimately enacted.[55] The broadest prohibition, proposed in Wyoming, would have barred all foreign citation, but it was defeated.[56] The proposals that were enacted into law in a handful of states are quite narrow, mostly barring state court decisions "based on" foreign law—statutory language which

50. *See*, *e.g*., State v. McCleese, 333 Conn. 378, 215 A.3d 1154 (2019). For examples of citing of sister states, *see* Iowa v. Baldon, 829 N.W.2d 785, 821 (Appel, J., specially concurring, quoting Justice Hans Linde's opinion in State v. Kennedy, 295 Or. 260 (1983)) and Planned Parenthood South Atlantic vs. South Carolina, 438 S.C. 188, 206-09 (2023).

51. *See, e.g*., Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6 (1995).

52. *See* Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1264 (2005) ("Analogy is perhaps the defining feature of common law legal reasoning.").

53. Faiza Patel *et al.*, REPORT: FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS, Brennan Center for Justice (May 16, 2013), https://www.brennancenter.org/our-work/research-reports/foreign-law-bans-legal-uncertainties-and-practical-problems.

54. PATRICK BERRY *et al*., LEGISLATIVE ASSAULTS ON STATE COURTS – MAY 2021 UPDATE, Brennan Center for Justice (May 19, 2021), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-may-2021-update (citing legislation introduced in Iowa, New Jersey, South Carolina, and Florida).

55. PATRICK BERRY *et al*., LEGISLATIVE ASSAULTS ON STATE COURTS – DECEMBER 2022 UPDATE, Brennan Center for Justice (Dec. 12, 2022), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2022-update (citing legislators in at least 25 states considered at least 74 bills targeting state courts, 5 of which have become law in 3 states).

56. Patel, *supra* note 53, at 20.

would seem to exclude cases that cite foreign law simply as a non-binding basis of comparison.[57] Many of the state laws also limited their ban to bar only those citations to foreign legal systems that do not grant the same "fundamental liberties" as the U.S. federal and state constitutions.[58] Interestingly, this limitation seems designed to respond to the concerns previously expressed by Justice Alito and Chief Justice Roberts in their confirmation hearings, that foreign citation might lead U.S. courts to be unduly influenced by legal systems that diverge significantly from those in the United States., such as—in Chief Justice Roberts' words—Japan, Somalia, or Indonesia.[59]

While these state-level legislative enactments likely chill judges in some states from looking at comparative laws and practices as they construe their state constitutions, there appear to be no states barring the types of foreign law citations that appeared in the *Dobbs* majority, concurring, and dissenting opinions.

In fact, such "comparative sideglances" would be entirely consistent with past practices of state supreme court justices as they examine issues arising under state constitutions.[60] Over the years, several state supreme court justices have been outspoken about the value that they find in this approach,[61] and foreign citations continue to appear regularly in state court opinions.[62]

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57. *Id.* app. at 41-42.

58. *See, e.g.*, *id.* app. at 41 (describing Oklahoma law).

59. Japan's legal system is primarily a civil law system, as is Indonesia's. *See Japanese Law*, ENCYC. BRITANNICA, https://www.britannica.com/topic/civil-law-Romano-Germanic/Japanese-law (last visited Apr. 7, 2023); *See also* Alamo D. Laimon et al., *Update: The Indonesian Legal System and Legal Research*, N.Y.U., (Dec. 2019), https://www.nyulawglobal.org/globalex/Indonesia1.html. Somalia currently has no national legal system and disputes are generally resolved by "shadow" courts using Sharia or customary law. Kay Rollins, *No Justice, No Peace: Al-Shabaab's Court System*, HARV. INT'L REV. (Mar. 27, 2023, 9:00AM), https://hir.harvard.edu/no-justice-no-peace-al-shabaabs-court-system/.

60. Ginsburg, *An Overview*, s*upra* footnote 5.

61. Margaret Marshall, *'Wise Parents do not Hesitate to Learn from their Children': Interpretating State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U.L. REV. 1633 (2004); s*ee also* Shirley Abrahamson & Michael Fisher, *All the World's a Courtroom, Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997).

62. *See, e.g.*, In re Hawai'i Elec. Light Co., 526 P.3d 329, 336 n.15 (Wilson, J., concurring).

The sensitivity with which most state courts have considered foreign law suggests that they have incorporated a sound understanding of comparative methodology that can guide them in the area of abortion law, just as it has in other contexts. State courts' experience with foreign law is extensive. State courts are frequently called upon to determine whether a foreign court's ruling on matters such as child custody, inheritance, divorce, or similar issues is comparable to their own jurisprudence, and is therefore recognized by the state court.[63] For example, a Massachusetts appellate court considering a child custody case explained that the rulings of a Lebanese Sunnite court were not binding because they were sufficiently different from Massachusetts state law.[64] In contrast, when the Indiana Court of Appeals in *Coulibahy v. Stevance* evaluated the child custody decision of a court in Mali, it credited the Malian court's decision after determining that the foreign court's analysis was "not at all unlike the one applied by Indiana courts."[65] A Westlaw search reveals hundreds of such cases in which state courts have assessed the applicability of foreign law.[66]

State court judges may also turn to foreign law when presented with novel legal issues. One such case arose in the New Jersey Tax Court, where a plaintiff challenged the court's fees.[67] There, the court discussed a Canadian court decision at length, noting that its treatment of the same issue provided valuable guidance.[68] Similarly, Justice Johnson of the Vermont Supreme Court, concurring in part and dissenting in part in *Baker v. State*, cited Canadian case law for the proposition that the court should take the step of enjoining the

63. *See generally* Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. JUR. COMP. L. 213, 223-25 (2014) (discussing state procedures for dealing with foreign judgments).

64. Chaar v. Chehab, 941 N.E.2d 75, 82-83 (Mass. App. Ct. 2010).

65. Coulibaly v. Stevance, 85 N.E.3d 911, 919 (Ind. Ct. App. 2017).

66. On July 29, 2023, a Westlaw search of the State Court case database using the search terms "choice of law" and "foreign" and "Canada" identified 462 cases. Substituting "France" for "Canada" yielded 156 cases. Substituting "England" yielded 378 cases. While this is no doubt somewhat overinclusive of the cases involving foreign judgments or contracts, it does give some indication of the numbers of such cases being considered by state courts.

67. Fields v. Trustees of Princeton Univ., 28 N.J. Tax 574 (N.J. Tax Ct. 2016).

68. *Id.* at 293.

denial of same sex marriage in the state, rather than return the issue to the state legislature.[69]

Foreign law will certainly be relevant to abortion litigation in those states where the underlying legislation parallels that in Mississippi, and erroneously asserts that providing access to abortion to protect a pregnant person's physical and mental health through a significant portion of the pregnancy is an outlier position internationally.[70] In those states, like Mississippi, the legislation itself invokes foreign law.

Foreign law may also be helpful as states grapple with the interpretations of their own state constitutional provisions regarding substantive due process, including the meanings of "liberty" and "life." Due process language appears in the text of most state constitutions, and these concepts are common across nations like Canada, the United Kingdom, New Zealand, Australia, and others around the world that directly or indirectly trace their notions of fundamental rights back to the Magna Carta.[71]

Concepts of gender equality developed and applied in foreign law may also provide helpful intellectual fodder for state court judges, who may be called on to examine abortion restrictions through the lens of state Equal Rights Amendments (ERAs).[72] Unlike state Due Process Clauses, state ERAs have no federal analogue to which state courts can turn for guidance.[73] Likewise, in the handful of states whose constitutions include "dignity" clauses—a concept that is

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69. Baker v. State of Vermont, 744 A2d 864, 904 (Vt. 1991).

70. S. 1164, 55th Leg., Reg. Sess. (Ariz. 2022). *See supra* notes 22-23 and accompanying text.

71. *See* James Gardner, *State Constitutional Rights as Resistance to National Power: Towards a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1029 n.123 (2003) (providing cites to thirty-two state constitutional due process clauses). *See also* Maya Hertig Randall, *Magna Carta and Comparative Bills of Rights in Europe,* MAGNA CARTA TRUST (Nov. 24, 2015), https://magnacarta800th.com/articles/magna-carta-and-comparative-bills-of-rights-in-europe/ (describing appearance of due process concepts in European constitutions).

72. *See State-Level Equal Rights Amendments*, Brennan Center (Dec. 6, 2022), https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments (In another equality context, some state courts looked to Canada in considering same-sex marriage under their state constitutional equality provisions.); *see, e.g.*, Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 969 (2003) (citing Canadian Charter of Rights and Freedoms).

73**.** On looking to international law when there is no federal analogue. *See generally* Martha F. Davis, *The Spirit of Our Times: State Constitutions and Human Rights*, 30 N.Y.U.L. Rev. 359 (2006).

absent from the Federal Constitution's text, but that is frequently found in constitutions globally[74]—foreign law may provide ideas about how such state constitutional provisions should be construed and applied in the context of abortion.[75]

Comparative legal analysis is not simple. But state courts' extensive experience with comparative methodology should inform their use of foreign law in abortion cases—an application of foreign law that the U.S. Supreme Court has apparently endorsed in *Dobbs*.

IV. STATE CONSTITUTIONS AND INTERNATIONAL LAW

Abortion rights are also addressed in international human rights law, as distinct from foreign law. International human rights arguments were extensively briefed by amicus participants on both sides of the *Dobbs* case. However, unlike the material on foreign law, no Supreme Court Justice in *Dobbs* cited the international human rights law submissions offered by amici.[76]

Most of the international law briefs supporting the state of Mississippi argued simply that international law was silent on abortion, and thus did not preclude the state's law. For example, the 141 Scholars Brief argued that abortion was not encompassed within any formal treaties or other binding international law documents.[77] The amicus brief from the New York-based Center for Family and Human Rights, known as C-Fam, likewise argued that treaties such as the International Covenant on Civil and Political Rights did not preclude states from protecting "life in the womb."[78]

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74. Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. JUR. COMP. L. 461 (2014).

75. An overview of dignity in national constitutions. *See* ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2020).

76. In contrast to the law of foreign jurisdictions, international law is law developed by international institutions—that is, collections of national governments—like the United Nations' legal system. Sources of international law include treaties, customs, general principles, judgments, and teachings. *See, e.g.*, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 June 26, 1945, 59 Stat. 1055.

77. Brief of 141 International Legal Scholars, *supra* note 26, at 5-14.

78. Brief of Amicus Curiae Center for Family and Human Rights in Support of Petitioners pp. 4-18, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392). The amicus brief filed by the European Centre for Law &

A brief on behalf of neither party was filed by European Legal Scholars (distinct from the European Law Professors brief discussed above). These scholars argued that the European Convention on Human Rights and the decisions of the European Court of Human Rights do not bar European states from adopting laws that criminalize abortion by protecting "human life before birth."[79]

In contrast, the amicus briefs filed to support the clinic argued that international human rights law creates affirmative rights protecting abortion access. A group of United Nations (hereinafter "UN") Mandate Holders—UN-appointed experts responsible for interpreting and applying human rights norms—filed an extensive brief arguing that international human rights law protects abortion rights based on the rights to equality, non-discrimination, privacy, life, and health, as well as freedom from torture and cruel, inhuman, and degrading treatment.[80] The HRW Brief submitted by three prominent human rights organizations—Human Rights Watch, the Global Justice Center, and Amnesty International—also argued that the right to abortion is affirmatively protected under international law.[81]

To some extent, the failure of Justices on either side of the abortion issue to acknowledge these arguments is surprising. Unlike foreign law, international law has a formal status within the U.S. domestic legal system through the Constitution's Supremacy Clause which states that treaties shall be the "supreme law of the land."[82]

Further, Supreme Court Justices do sometimes cite relevant international law. For example, in *Roper v. Simmons*,

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Justice went further, asserting that there is an "international duty to prevent abortion." Amicus Brief of the European Centre for Law & Justice pp. 12-14, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392).

79. Brief of European Legal Scholars As Amici Curiae In Support of Neither Party at p. 6, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392).

80. Brief of United Nations Mandate Holders as Amici Curiae In Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (No. 19-1392).

81. Brief of Amici Curiae Human Rights Watch, Global Justice Center, And Amnesty International, *supra* note 37, at 18-29. The European Law Professors brief, *supra* note 39, likewise argued that European human rights law does not establish the fetus as a "rights-bearer," and that the margin of appreciation allowing deviation in European abortion laws is limited. *Id*. at 10-13.

82. U.S. CONST. art. VI, cl. 2.

concerning the juvenile death penalty, the majority opinion cited both foreign and international law.[83] In her concurrence in *Grutter v. Bollinger*, Justice Ginsberg cited the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.[84] In *Lawrence v. Texas*, the majority cited rulings of the European Court of Human Rights, a regional human rights body.[85] In *Knight v. Florida*, Justice Breyer, who was later a member of the three-justice dissent in *Dobbs*, cited the Universal Declaration of Human Rights in his opinion dissenting from the denial of certiorari.[86] So, it is curious that in *Dobbs* none of the justices drew on the international law submissions.

However, international human rights law remains relevant post-*Dobbs* as state courts grapple with abortion restrictions. While international human rights law is directed to national governments, subnational governments are also expected to comply with international human rights norms.[87] Notably, local responsibility for implementation of international law has been repeatedly recognized by the U.S. government as a matter of the federalist structure.[88]

Looking to international human rights law, state courts have much to draw on. Most clearly, abortion is addressed

83. Roper v. Simmons, 543 U.S. 551, 575-78 (2005).

84. Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

85. Lawrence v. Texas, 539 U.S. 558, 576-77 (2003).

86. Knight v. Florida, 129 S.Ct. 459, 463 (1999). The Universal Declaration has also been cited in concurring or dissenting opinions authored by Justice Douglas (Int'l Ass'n of Machinists v. S. B. Street, 367 U.S. 740, 776-77 (1959)), Justice Frankfurter (AFL v. American Sash & Door, 335 U.S. 538, 548-49 n.5 (1949)), and Justice Marshall (Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970)), among others.

87. The international law rule is that a state may not excuse or justify its failure to carry out its international treaty obligations on the basis that its internal (domestic) law is inadequate or prevents it from complying. *See* Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331.

88. For example, a typical "federalism understanding" was set out by the United States when it ratified an Optional Protocol under the Convention on the Rights of the Child: "The United States understands that the Protocol shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that State and local governments exercise jurisdiction over such matters, the Federal Government shall as necessary, take appropriate measures to ensure the fulfillment of the Protocol." Optional Protocol to The Convention on the Rights of The Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227, Declarations and Reservations (United States), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&clang=_en.

directly in General Comment No. 36 issued by the UN Human Rights Committee on the meaning of the term "life" under the International Covenant on Civil and Political Rights (ICCPR).[89] The Human Rights Committee is the UN treaty body responsible for overseeing the interpretation and implementation of the ICCPR, a human rights treaty that was ratified by the United States in 1992.[90] The Human Rights Committee periodically issues General Comments to aid in the implementation of the treaty's terms by State Parties to the Covenant.[91] These General Comments are not binding, but they are considered authoritative guides to ICCPR's meaning.[92] General Comment No. 36 illuminates the provisions of Article 6 of the ICCPR, which provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[93]

The drafting process for this General Comment began in 2015, and spanned several discussions, drafts, and comment periods that allowed for participation by interested stakeholders, including States Parties to the ICCPR, civil society, academia, and national human rights institutions.[94] The United States was among the nations actively participating in this process, though its assertions that the ICCPR does not encompass abortion did not carry the day.[95]

89. *See* U.N. Human Rights Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶ 65, Oct. 30, 2018, U.N. Doc. CCPR/C/GC/36 [hereinafter General Comment 36].

90. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW.J. INT'L H.R. 1 (2005) (laying out ratification process).

91. Office of the High Commissioner for Human Rights, *Treaty Bodies: General Comments*, https://www.ohchr.org/en/treaty-bodies/general-comments (last visited Apr. 7, 2023).

92. *Id*.

93. International Covenant on Civil and Political Rights art. 6, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (emphasis added).

94. Livio Zilli, *The UN Human Rights Committee's General Comment 36 on the Right to Life and the Right to Abortion*, OPINIO JURIS, (June 3, 2019) http://opiniojuris.org/2019/03/06/the-un-human-rights-committees-general-comment-36-on-the-right-to-life-and-the-right-to-abortion/ (describing the drafting process of General Comment 36).

95. The United States' position is set out in a document submitted to the drafting committee. *See*
U.S. DEP'T OF STATE, OBSERVATIONS OF THE UNITED STATES OF AMERICA ON THE HUMAN RIGHTS COMMITTEE'S DRAFT GENERAL COMMENT NO. 36 ON ARTICLE 6 - RIGHT TO LIFE (Oct. 6, 2017), https://www.state.gov/wp-content/uploads/2019/

General Comment No. 36 took three years to complete, and it was issued in 2018.[96]

The General Comment addresses the content of "life" as a general matter, stressing the affirmative nature of the right, but also noting that under the human rights regime, the state cannot simply deny the right to life through its omissions.[97] After years of sidestepping the abortion issue, the Human Rights Committee was praised for finally addressing the "fulcrum of women's rights head-on" by specifically addressing state obligations around pregnancy and abortion along with broader issues of security.[98]

According to the General Comment, under the ICCPR, the right to life means that "restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering, . . . discriminate against them or arbitrarily interfere with their privacy."[99] The General Comment further provides that States Parties must provide safe, legal, and effective access to abortion, notably when the pregnancy is the result of rape or incest, or when the pregnancy is not viable.[100] Additionally, States Parties to the ICCPR may not regulate pregnancy or abortion in a manner that compels women and girls to resort to unsafe abortions, including criminalizing women seeking abortions or medical service providers who assist them.[101]

The General Comment is not binding, even on States Parties to the ICCPR.[102] But as litigation goes forward in states that have adopted extreme abortion restrictions, the international guidance for interpreting "life," focused on protecting the lives of pregnant people, can be considered by

05/U.S.-observations-on-Draft-General-Comment-No.-36-on-Article-6-Right-to-Life-.pdf.

96. Zilli, *supra* note 94.

97. General Comment 36, *supra* note 89, at ¶ 6.

98. Fionnuala Ní Aoláin, *Gendered Security and the Right to Life: Analysis of UN Human Rights Committee's General Comment,* JUST SECURITY (Feb. 8, 2019) www.justsecurity.org/62475/fionnuala-ni-aolain-gender-comment-36-post/.

99. General Comment 36, *supra* note 89, at ¶ 8.

100. *Id.*

101. *Id.*

102. Sandy Gandhi, *Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case*, 11 HUM. RTS. L. REV. 527, 535 (2011) (noting that General Comments of the Human Rights Committee are not binding).

state courts.[103] In fact, with the demise of a federal abortion right, U.S. compliance with international law on abortion becomes an important responsibility of the states, making international law an appropriate consideration in state court adjudication of abortion rights.[104]

Reference to General Comment No. 36 may be particularly helpful as state courts construe the meaning of "life" in their own state constitutions.[105] Cases raising this issue are already reaching state supreme courts. In March 2023, the Supreme Court of North Dakota construed the term "life" in its state constitution to support a preliminary injunction enjoining the operation of a so-called "trigger law" that would have broadly prohibited abortions even when necessary to women's life and health.[106] Also in March 2023, the Oklahoma Supreme Court was called on to determine the scope of the term "life" in the state constitution's Due Process Clause in the context of restrictive abortion legislation.[107]

The North Dakota and Oklahoma courts did not cite international law, the ICCPR, or General Comment No. 36 to support their conclusions. Rather, both courts relied on their states' own constitutional text, history, and precedents. But while international law did not play an explicit role in these state court cases, General Comment No. 36 demonstrates that a more affirmative approach to protecting the life and health

103. For examples of state courts considering international law, *see* INDIA THUSI & MARTHA F. DAVIS. HUMAN RIGHTS IN STATE COURTS (2016), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1277&context=facbooks. *See also* State v. McCleese, 333 Conn. 378, 434 n.3 (2019) (Ecker, J., dissenting).

104. *See* OHCHR, *supra* note 91. The United States entered the following understanding when it ratified the ICCPR in 1992: "That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992).

105. *See* Gardner, *supra* note 71, at 1006-1007 (most state constitutional due process clauses are identical to the Federal Due Process Clause).

106. Wrigley v. Romanick, 988 N.W.2d 231, 234 (N.D. 2023).

107. Oklahoma Call for Reproductive Justice v. Drummond, 526 P.3d 1123, 1125 (Ok. 2023).

of pregnant people has substantial and respected support worldwide.

V. CONCLUSION

The *Dobbs* opinions opens the door to citation of foreign law, but the majority of the Court failed to appreciate the methodological issues raised by its citations of undifferentiated, uncontextualized data. Now that abortion regulation is the primary province of the states, state courts have the opportunity to use methodologically sound approaches to draw on relevant comparative law. State courts have considerable experience dealing with foreign law in a wide range of circumstances, including state constitutional litigation, and there are many examples of responsible uses of foreign law that can serve as exemplars.[108]

International human rights law can also be a source of persuasive authority for state courts considering abortion regulations. The United States has ratified the ICCPR, and General Comment No. 36 to the ICCPR addresses abortion directly.[109] As states assume their responsibilities for bringing the United States into compliance with its human rights obligations after the Supreme Court's *Dobbs* decision, these international human rights law sources are an important resource for state courts.

108. *See supra* notes 58-67 and accompanying text.
109. International Covenant on Civil and Political Rights, *supra* note 93.; *See also* General Comment 36, *supra* note 89.

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