

# ABORTION AND AMERICAN EXCEPTIONALISM

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## Abstract

This Article explores why abortion is being recriminalized in the United States in sharp contrast to the historical evolution of reproductive rights. Its thesis is that abortion exemplifies American exceptionalism in the original sense of the phrase that America is an “exception,” especially within the Western world. Yet exceptionalism should not be misunderstood as historical determinism or cultural essentialism. By the early 1970s, America was converging with peer Western democracies in liberalizing abortion. This process of convergence was ultimately halted by the mounting influence of the U.S. pro-life movement in an age when tolerance or support for reproductive rights increasingly became the norm abroad.

When *Dobbs* overruled *Roe*, it not only exacerbated polarization *within* America, but also the divide *between* America and other Western democracies. This divergence was epitomized by the criticism that *Dobbs* garnered from U.S. allies, which led to remarkable public statements by Justice Samuel Alito defending his decision from condemnation by foreign leaders.

While abortion is often analyzed in isolation, this multidisciplinary Article focuses on its interrelationship with wider features of American exceptionalism. A distinctive religious landscape sheds light on the intensity of opposition to abortion among the substantial minority of Americans who share a traditionalist worldview. The history of Catholicism and evangelicalism in America has notably diverged from fellow Western societies in ways that are largely overlooked. This unique social environment has contributed to the resilience of the U.S. anti-abortion movement, which has an outsized impact due to the exceptional weight of lobbying by special interests over American government. By holding that religious opposition to abortion can legitimately be channeled through secularized laws and policies, the U.S. Supreme Court has further enabled this movement to be highly effective. In contrast, organized opposition to abortion has declined elsewhere in the West concurrently with the decline of organized religion, especially traditionalist conceptions of Christianity. Modern America is now an outlier, refighting and relitigating an endless battle over abortion.

**About the Author**

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**Introduction**

Is abortion a right or a crime? It is both in post-*Dobbs* America, depending on the state. This shift is extremely atypical in the modern Western world, where abortion has been overwhelmingly liberalized. This Article explores why America has sharply diverged from the historical evolution of reproductive rights. It reveals how the United States’ distinctive legal, sociopolitical, and religious landscape has shaped an enduring battle over abortion reflecting wider features of American exceptionalism.

This thesis refers to American exceptionalism in the sense that America is an outlier,<sup>1</sup> especially within the Western world.<sup>2</sup> Today, “American exceptionalism” tends to be equated with a faith in national superiority, namely that America is “exceptional” in the sense of “magnificent” or “superior.”<sup>3</sup> Historically, the primary understanding of the concept has instead been that America is “exceptional” in that it is an “exception.”<sup>4</sup> Multiple comparative studies have explored whether the United States diverges from fellow Western democracies or the wider world due to atypical features of American history, culture, religion, race relations, government institutions, law, and social attitudes.<sup>5</sup>

The recriminalization of abortion in America makes it an outlier. While abortion remains illegal in various regions of the globe, the right to abortion has significantly regressed in only eleven countries over the last three decades.<sup>6</sup> The trend in the West has also been resolutely toward liberalization and decriminalization.<sup>7</sup> Contrary to the growing consensus on reproductive rights, abortion is a source of bitter polarization in modern America, even though a solid majority of U.S. citizens believe it should be lawful.<sup>8</sup> In other

1. See generally MICHAEL KAMMEN, *IN THE PAST LANE: HISTORICAL PERSPECTIVES ON AMERICAN CULTURE* x (1997); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 18, 26 (1996); Anthony Molho & Gordon S. Wood, *Introduction*, in *IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THE PAST* 3, 4 (Molho & Wood eds., 1998); Byron E. Shafer, *Preface*, in *IS AMERICA DIFFERENT? A NEW LOOK AT AMERICAN EXCEPTIONALISM* v, v-ix. (Shafer ed., 1991).
2. The “Western world” has distinct definitions but is generally understood to encompass the United States, Canada, Australia, New Zealand, and European nations, except Russia and states aligned with Russia, such as Belarus. See, e.g., Benjamin Herboth & Gunther Hellmann, *Introduction to USES OF ‘THE WEST’: SECURITY AND THE POLITICS OF ORDER* 1, 1 (Hellmann & Herboth eds., 2017).
3. See, e.g., Jennifer Schuessler, *Will a Pandemic Shatter the Perception of American Exceptionalism?*, *N.Y. TIMES* (Apr. 25, 2020), [<https://perma.cc/F8RF-79PY>] (equating “American exceptionalism” with patriotism or national chauvinism).
4. MUGAMBI JOUET, *EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER* 4 (2017).
5. Mugambi Jouet, *Theorizing American Exceptionalism: An Interdisciplinary Historiography and Intellectual History*, 14 *J. INTERDISC. HIST. IDEAS* 1 (2025). See, e.g., JOUET, *supra* note 4; LIPSET, *supra* note 1; CHARLES LOCKHART, *THE ROOTS OF AMERICAN EXCEPTIONALISM: INSTITUTIONS, CULTURE, AND POLICIES* (2d ed. 2012); *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005); *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* (Kevin R. Reitz ed., 2018); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 *MICH. L. REV.* 391 (2008); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 *U. CHI. L. REV.* 1641 (2014).
6. *Roe Abolition Makes U.S. a Global Outlier*, *FOREIGN POL’Y* (June 24, 2022, 2:07 PM), [<https://perma.cc/3XHZ-AKU4>].
7. *Id.* A comparative study similarly concluded that “[t]he *Dobbs* decision represents an exceptional moment peculiar to US abortion politics” that diverges from the “trend toward global judicial accommodation [of abortion].” Rebecca J. Cook & Bernard M. Dickens, *Abortion*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 3, 4 (Jan M. Smits ET AL. eds., 2023).
8. A poll conducted in April 2024 found that 63 percent of Americans thought that abortion should be legal in all or most cases. PEW RSCH. CTR., *BROAD PUBLIC SUPPORT FOR ABORTION PERSISTS 2 YEARS AFTER DOBBS* 3 (2024).

words, abortion is part of “what divides Americans from the world and from each other,” as I suggested in my book exploring the intersection of American exceptionalism and the polarization of modern America.<sup>9</sup>

*Dobbs* should likewise be understood as a decision exemplifying both the divide *within* American society and the divide *between* American society and other Western democracies. Comments by Justice Samuel Alito, *Dobbs*’s author, reflected these two divides. Speaking about America’s polarization, Alito was surreptitiously recorded when saying: “One side or the other is going to win . . . there can be a way of working, a way of living together peacefully, but it’s difficult, you know, because there are differences on fundamental things that really can’t be compromised.”<sup>10</sup> Alito also approved his interlocutor’s statement about the need to “return our country to a place of godliness.”<sup>11</sup> These brief statements were relatively ambiguous and could have been interpreted as an observation about American society rather than as an expression of his judicial philosophy. While the secret recording of a Supreme Court Justice raised legal and ethical questions,<sup>12</sup> Alito was more outspoken in separate public remarks regarding the United States’ divergence post-*Dobbs*. “I had the honor this term of writing I think the only Supreme Court decision in the history of that institution that has been lambasted by a whole string of foreign leaders who felt perfectly fine commenting on American law,” Alito declared when speaking in Rome at a conference on religious liberty.<sup>13</sup>

The magnitude of protests from U.S. allies had led Alito to vigorously dismiss their criticism.<sup>14</sup> “Women’s rights are threatened. We must defend them resolutely,” German Chancellor Olaf Scholz had deplored.<sup>15</sup> French President Emmanuel Macron concurred: “I wish to express my solidarity with the women whose liberties are being undermined by the Supreme Court of the United States.”<sup>16</sup> Canadian Prime Minister Justin Trudeau called *Dobbs* “horrific.”<sup>17</sup> The reaction of Boris Johnson, then the U.K. Prime Minister and

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9. JOUET, *supra* note 4, at v.

10. Abbie Vansickle, *Alito and Roberts, Secretly Taped, Differ on Role of Religion, Law*, CHI. TRIB., June 12, 2024, at 5.

11. *Id.*

12. Anne Toomey McKenna, *Supreme Court Justices Secretly Recorded – The Legal Issues and What They Mean for the Rest of Us*, THE CONVERSATION (June 13, 2024), [https://perma.cc/XN98-UWNJ].

13. Robert Barnes, *Alito Dismisses Foreign Criticism of Supreme Court’s Abortion Ruling*, WASH. POST (July 28, 2022, 7:32 PM), [https://perma.cc/98Y4-7SJE]. *See also Religious Liberty Summit 2022*, NOTRE DAME L. SCH. RELIGIOUS LIBERTY INITIATIVE, [https://perma.cc/L8GW-G4D3].

14. *See* Martin Farrer, *World Leaders Condemn US Abortion Ruling as ‘Backwards Step’*, GUARDIAN (June 25, 2022), [https://perma.cc/8JLQ-PMFV]; Christina Lu, *Roe Reversal Exposes the ‘Ever-Growing Value Gap’ Between U.S. and Allies*, FOREIGN POL’Y (July 6, 2022, 4:04 PM), [https://perma.cc/6YX7-95RW].

15. David M. Herszenhorn, *European Leaders Decry US Restriction of Abortion Rights*, POLITICO (June 25, 2022, 3:07 PM), [https://perma.cc/H2A2-PDGS].

16. Pamela Druckerman, *Where France Differs on Abortion*, ATLANTIC (June 30, 2022), [https://perma.cc/28CR-JPKM].

17. John Paul Tasker, *Trudeau Calls U.S. Court Decision Overturning Roe v. Wade ‘Horrific’*, CBC (June 24, 2022), [https://perma.cc/J678-RV2T].

leader of the Conservative Party, was perhaps the most revealing of the United States' divergence. After all, the United Kingdom is not merely its closest ally but Johnson is often identified as a right-wing populist close to Donald Trump,<sup>18</sup> who promised that he would appoint “pro-life” judges to reverse *Roe*.<sup>19</sup> Diverging from Trump, Johnson denounced *Dobbs* as “a big step backwards.”<sup>20</sup> “I’ve always believed in a woman’s right to choose and I stick to that view, that’s why the UK has the laws that it does,” he stressed.<sup>21</sup> Johnson’s stance exemplified how numerous conservatives in other Western democracies tend to support or tolerate elective abortion, whereas in the United States it is a source of acute partisan divide.<sup>22</sup> While abortion was a bitterly contested issue when various Western societies legalized it, the vast majority moved on decades ago as abortion came to be widely accepted or tolerated.<sup>23</sup>

Drawing upon a multidisciplinary methodology, the Article will analyze the nexus between modern America’s distinctive social features and its increasingly atypical abortion debate. A searching comparison of American exceptionalism cannot be limited to comparing abortion law, which is only a social construct. To understand the law, we must also dive into history, sociology, political science, anthropology, religious studies, and beyond.

Although the vast literature on American exceptionalism is beyond this Article’s scope,<sup>24</sup> its thesis is consistent with the view that exceptionalism does not mean inherent features of American society, but contingent circumstances that have led it to become an exception or outlier.<sup>25</sup> In particular, America’s polarization on abortion is a relatively recent phenomenon that mostly emerged

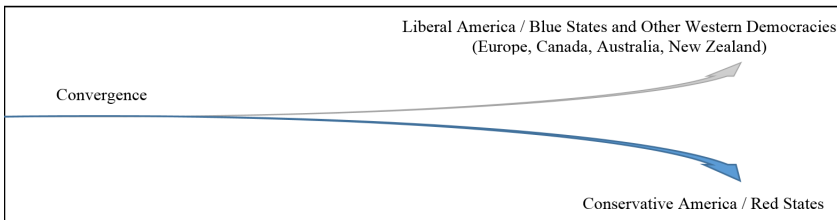
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18. Cas Mudde, *Is Boris Johnson Really Britain’s Trump?*, GUARDIAN (July 24, 2019, 2:00 PM), [https://perma.cc/7Q7J-SEN3].
  19. Peter Sullivan, *Trump Promises to Appoint Anti-Abortion Supreme Court Justices*, HILL (May 11, 2016, 12:26 PM), [https://perma.cc/CXW6-GRNF].
  20. Sophia Sleigh, *Boris Johnson Slams US Abortion Ruling as a ‘Big Step Backwards’*, HUFFPOST (U.K.) (June 24, 2022, 4:28 PM), [https://perma.cc/6WCZ-V9X2].
  21. *Id.*
  22. JOUET, *supra* note 4, at 127–29.
  23. *Id.*
  24. For heterogeneous, if not conflicting, perspectives on the meaning and evolution of American exceptionalism, see generally JACK P. GREENE, THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800 (1993); IAN TYRRELL, AMERICAN EXCEPTIONALISM: A NEW HISTORY OF AN OLD IDEA (2021); JOHN D. WILSEY, AMERICAN EXCEPTIONALISM AND CIVIL RELIGION: REASSESSING THE HISTORY OF AN IDEA (2015); Daniel T. Rodgers, *Exceptionalism*, in IMAGINED HISTORIES: AMERICAN HISTORIANS INTERPRET THE PAST 21 (Anthony Molho & Gordon S. Wood eds., 1998). Additional perspectives can be found in the sources cited above at notes 1 and 5.
  25. See, e.g., AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877 7 (2017) (cautioning against “appeals to presumably innate American qualities” when analyzing the United States’ legal exceptionalism); FRANKLIN E. ZIMRING, WHEN POLICE KILL 87–88 (2017) (“Any empirical analysis of American police violence in international perspective must start by acknowledging American exceptionalism.”); Carol S. Steiker & Jordan M. Steiker, *Global Abolition of Capital Punishment: Contributors, Challenges and Conundrums*, in COMPARATIVE CAPITAL PUNISHMENT 388, 399–404 (Carol S. Steiker & Jordan M. Steiker eds., 2019) (analyzing the retention of the death penalty as a feature of American exceptionalism shaped by contingent circumstances).

in the aftermath of *Roe*.<sup>26</sup> In this period, tolerance of abortion largely became the norm elsewhere in the West, whereas America faced an enduring partisan battle over reproductive rights.<sup>27</sup> In short, American exceptionalism on abortion is not a static phenomenon, as it has depended on the respective evolution of the United States and countries used for comparison.

Yet it is mainly red states and not America as a whole that are an exception on abortion in the modern Western world.<sup>28</sup> In allowing abortion, blue states are generally closer to Europe, Canada, Australia, and New Zealand than to red states intent on criminalizing abortion.<sup>29</sup> Figure 1 represents these converging and diverging paths. This is consistent with my prior research documenting the distinctive evolution of American conservatism in the modern Western world.<sup>30</sup> On a wide range of issues, such as abortion, guns or health care, the worldview of the average American liberal is closer to the worldview of other Westerners—whether liberal or conservative in their own countries—than to the worldview of the average American conservative.<sup>31</sup>

FIGURE 1

**Historical Convergence and Divergence on Abortion**



At the time of writing, full abortion bans were in place in a dozen American states, predominantly conservative, but more were moving toward recriminalization or had sharply restricted the time frame for an abortion to six weeks.<sup>32</sup> In contrast, the right to elective abortion funded by universal

26. ALAN I. ABRAMOWITZ, *THE POLARIZED PUBLIC? WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL* 68–69 (2013).

27. JOUET, *supra* note 4, at 127–29.

28. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, [https://perma.cc/76U7-HZJR] (last updated Apr. 28, 2025).

29. See FOREIGN POL’Y, *supra* note 6.

30. JOUET, *supra* note 4, at 34–39 (discussing how the conception of conservatism in other modern Western democracies is more moderate than in the United States).

31. *Id.* Relatedly, international polls indicate overwhelming support among Europeans and the wider international community for Democratic presidential candidates over Republican ones in past U.S. elections. *Id.* at 38.

32. McCann & Walker, *supra* note 28 (defining a “full ban” as barring abortion in all or “almost all” circumstances). States with full bans were Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. *Id.* Florida, Georgia, Iowa, and South Carolina had also instituted bans after approximately six weeks of pregnancy. *Id.* Opponents of six-week bans argue that they are akin to full bans since many women would not realize they are pregnant in time to abort. See Michelle Rodrigues, *The Absurd Pregnancy*

health care is generally protected throughout Europe.<sup>33</sup> Portugal, Spain, and Ireland were among the last European nations to bar elective abortion, which they respectively authorized in 2007, 2010, and 2018.<sup>34</sup> Poland is the main exception with severe restrictions on abortion that have divided the country.<sup>35</sup> Elsewhere in the Western world, namely Canada, Australia, and New Zealand, reproductive rights have also evolved to encompass elective abortion covered by public health insurance.<sup>36</sup> Surely, abortion restrictions exist in various Western societies, such as prohibitions on terminating a pregnancy past a certain number of weeks.<sup>37</sup> Nevertheless, the right to abortion is increasingly understood broadly as a discretionary right.

The United States' public debate in the aftermath of *Dobbs* instead appears to increasingly focus on the right to abortion in narrow circumstances

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*Math Behind the 'Six-Week' Abortion Ban*, SCI. AM. (Sept. 4, 2021), [https://perma.cc/4EMS-JW7Q].

33. See Brief of European Law Professors as Amici Curiae in Support of Respondents at 16, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19–1392), 2021 WL 4340178 (“[A]bortion is broadly available, and in many cases government-funded, through viability in most [Council of Europe] Member States, whether ‘on request’ or based on broad health or well-being of the pregnant woman or socioeconomic criteria.”).
34. Tiago Villanueva, *Portugal Is Ready to Decriminalise Abortion*, 334 BRIT. MED. J. 332 (2007) (discussing Portugal referendum backing elective abortion by 59 percent); Irish Times Reporters, *Abortion Referendum: Yes Secures Landslide Victory*, IRISH TIMES (May 26, 2018), [https://perma.cc/TX7M-N8JY] (Irish voters repealed the constitutional ban on abortion by 66.4 percent in referendum); David Román & Olivia Crellin, *Spain Scraps Plan to Tighten Abortion Law*, WALL ST. J. (Sept. 23, 2014, 4:41 PM), [https://perma.cc/E695-86YA].
35. See generally Isabella Kwai, Monika Pronczuk & Anatol Magdziarz, *Near-Total Abortion Ban Takes Effect in Poland, and Thousands Protest*, N.Y. TIMES (Jan. 27, 2021), [https://perma.cc/R8CH-SKBM]. At the time of writing, Poland was debating liberalizing its abortion laws after the election of Donald Tusk as Prime Minister in late 2023. Sonya Ciesnik, *PM Donald Tusk Faces Uphill Battle on Reforming Polish Abortion Rights*, FRANCE 24 (Apr. 12, 2024), [https://perma.cc/J6A5-RPRK]. Overall, “[o]nly six European countries retain highly restrictive abortion laws and do not permit abortion on request or on broad social grounds,” namely Andorra, Liechtenstein, Malta, Monaco, Poland, and the Faroe Islands, a self-governing Danish territory. CTR. REPROD. RTS., EUROPEAN LAWS: A COMPARATIVE OVERVIEW 4 (2022), [https://perma.cc/G2C7-2PXY].
36. See Brief of International and Comparative Legal Scholars as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19–1392), 2021 WL 4341890. Regarding ongoing financial and geographic obstacles to abortion in various Western democracies, see also *infra* notes 127, 128, 129, and 130.
37. A study in Western Europe found that gestational age limits can bar abortion even in countries whose abortion laws are otherwise liberal. This constrains women to travel to the Netherlands or United Kingdom—countries with longer gestational limits—assuming they have the means to do so. Silvia De Zordo, Giulia Zanini, Joanna Mishtal, Camille Garnsey, Ann-Katherin Ziegler & Caitlin Gerdt, *Gestational Age Limits for Abortion and Cross-Border Reproductive Care in Europe: A Mixed-Methods Study*, 128 BEST PRACT. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 838 (2020).

like rape, incest, fetal abnormality or danger to the life of the mother.<sup>38</sup> For instance, the case of a 10-year-old rape victim who had to travel from Ohio to Indiana for an abortion made headlines.<sup>39</sup> While these exceptions generally concern the most tragic situations where one may seek an abortion, they would not be genuinely construed as the right to abortion elsewhere in the West in the twenty-first century. In modern Western democracies, this right usually evokes elective or discretionary abortion, namely the choice to terminate a pregnancy for personal reasons or on demand—not only under the direst situations. The United States once recognized this fundamental right under *Roe* and its progeny. The growing social debate over whether post-*Roe* America should allow abortion in tragic circumstances is a benchmark of the intensity of its anti-abortion movement, including its capacity to frame the terms of the social, political, and legal debate.

This Article will analyze how the abortion debate is intertwined with longstanding debates over the appropriate role of faith in American society, including whether religious objections can be a basis for government bans on abortion. This is partly traceable to the captivating history of Catholicism and evangelicalism in America, which has diverged from peer Western societies. Building on this history, we will explore how laws and policies that ban abortion and protect fetal personhood primarily reflect religious beliefs that are secularized to pass constitutional muster.

The United States' distinctive religious landscape is key to understanding its distinctive evolution on abortion. America notably tends to be the most religious Western society and it is the only one with a substantial proportion of Christian fundamentalists.<sup>40</sup> The term “fundamentalist” is not derogatory but stems from booklets titled *The Fundamentals*, which were published in the 1910s to defend Christian traditionalism against the forces of modernity, from the theory of evolution to the liberalization of social mores.<sup>41</sup> Belief in creationism and the literal truth of scripture, for instance, has mostly disappeared

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38. See, e.g., Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion Foes Push to Narrow ‘Life of Mother’ Exceptions*, WASH. POST (May 13, 2022, 7:08 PM), [https://perma.cc/GX7D-UBWT]; Elizabeth Chuck, *Post-Roe, Exceptions to State Abortion Bans Won’t Be Easy to Acquire*, NBC (June 24, 2022, 1:24 PM), [https://perma.cc/T5JD-F3BL]; Jan Hoffman, *The New Abortion Bans: Almost No Exceptions for Rape, Incest or Health*, N.Y. TIMES (June 9, 2022), [https://perma.cc/8ZER-YT8W]; Maggie Koerth & Amelia Thomson-DeVeaux, *Even Exceptions to Abortion Bans Pit a Mother’s Life Against Doctors’ Fears*, FIFTYEIGHT (June 30, 2022, 6:00 AM), [https://perma.cc/EUY4-NLSZ]; Jennifer Rubin, *It’s the Cruelty That Will Undo the Forced Birth Crusade*, WASH. POST (July 5, 2022, 7:45 AM), [https://perma.cc/MMD5-VGTP] (“[T]he number of states contemplating abortion bans with no exception for rape or incest might shock you.”).
39. Timothy Bella, *Doctor in 10-Year-Old’s Abortion Case Takes Legal Step Against Indiana AG*, WASH. POST (July 19, 2022, 6:26 PM), [https://perma.cc/HTW2-CBY8].
40. See generally JOUET, *supra* note 4, ch. 3–4; PEW RSCH. CTR., BEING CHRISTIAN IN WESTERN EUROPE 47–48, 95–96, 98, 107, 122 (2018) [hereinafter PEW, BEING CHRISTIAN IN WESTERN EUROPE].
41. MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 381 (1992).

elsewhere in the West but remains commonplace in the United States.<sup>42</sup> Even though growing numbers of Americans are secular-minded,<sup>43</sup> the intensity of religious belief helps explain why abortion has remained a salient issue and source of division in the United States, where the clash between modernity and traditionalism has been comparatively acute and persistent.

Religion has received comparatively less attention than other factors in recent scholarship on abortion, which has especially focused on the intersection of gender, race, health care, constitutionalism, legal history, and the ongoing sociopolitical debate over these matters.<sup>44</sup> This research has offered insight on *Dobbs*, its roots, and ramifications,<sup>45</sup> which this Article does not aim

42. See *infra* note 243 and accompanying paragraphs.

43. PEW RSCH. CTR., ABOUT THREE-IN-TEN U.S. ADULTS ARE NOW RELIGIOUSLY UNAFFILIATED (2021) [hereinafter PEW, THE RELIGIOUSLY UNAFFILIATED].

44. See, e.g., ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Lee Bollinger & Geoffrey Stone eds., 2024); FELICIA KORNBLOH, A WOMAN'S LIFE IS A HUMAN LIFE (2023); MARY ZIEGLER, ROE: THE HISTORY OF A NATIONAL OBSESSION (2023); Aziza Ahmed, *Feminist Legal Theory and Praxis After Dobbs: Science, Politics, and Expertise*, 34 YALE J.L. & FEMINISM 48 (2023); Meghan Boone, *Reversing the Criminalization of Reproductive Health Care Access*, 48 AM. J.L. & MED. 200 (2022); Khiara M. Bridges, *Deploying Death*, 68 UCLA L. REV. 1510 (2022); Naomi R. Cahn & June Carbone, *Supporting Families in a Post-Dobbs World: Politics and the Winner-Take-All Economy*, 101 N.C. L. REV. 1549 (2023); Glenn Cohen, Melissa Murray & Lawrence O. Gostin, *The End of Roe v Wade and New Legal Frontiers on the Constitutional Right to Abortion*, 328 JAMA 325 (2022); Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 L. & ETHICS HUM. RTS. 189 (2017); Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 SUP. CT. REV. 111 (2022); Felicia Kornbluh, *Before "the Supreme Court Bail[ed] Us Out": Feminist Claims for Abortion Rights and the Constitutional History of Roe v. Wade*, 2 J. AM. CONST. HIST. 275 (2024); Serena Mayeri, *The Critical Role of History After Dobbs*, 2 J. AM. CONST. HIST. 171 (2024); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305 (2023); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 34 HARV. L. REV. 2025 (2021); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024); Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091 (2023); Nelson Tebbe, *Does Dobbs Reinforce Democracy?*, 108 IOWA L. REV. 2363 (2023); Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149 (2024); Alexander Tsesis, *Aspirational Reliance of the Declaration of Independence: Labor and Women's Suffrage*, in CAMBRIDGE COMPANION TO THE DECLARATION OF INDEPENDENCE (Mark Graber & Michael Zuckert eds., forthcoming 2025).

45. Illustratively, Reva Siegel has published a series of instructive articles on *Dobbs*, its genesis, and wider societal questions. See Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 23 (2022) (observing that the Supreme Court has scarcely engaged with the history of women's rights despite *Dobbs*'s avowed historical rationale); Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1196 (2023) [hereinafter Siegel, *Memory Games*] (arguing that "*Dobbs* is antidemocratic because it locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies"); Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights In and After Dobbs*, in ROE V. DOBBS 22, *supra* note 44, at 36–43 (comparing the criminalization of abortion in the second half of the nineteenth century

to call into question. Rather, its thesis suggests that the multifaceted circumstances that have led to the recriminalization of abortion in the United States are intertwined.

While America's distinctive religious landscape alone cannot explain the evolution of its abortion debate, it is a key explanatory factor because religious beliefs are foundational in shaping one's worldview. For example, they help explain the intensity of belief and resilience of the U.S. anti-abortion movement even as such movements abated elsewhere in the West with the decline of Christian traditionalism or ultra-traditionalism. Despite representing a minority of the American public, the anti-abortion movement is a mobilized force that exerts outsized influence in the political arena, partly due to other dimensions of American exceptionalism, such as the extraordinary weight of money and lobbying by special interests in U.S. politics.<sup>46</sup>

Drawing upon original research in the archives of the Southern Baptist Convention, my findings offer another perspective on the evangelical movement's position on abortion. Prior scholarship has argued that the modern evangelical movement did not focus on abortion until several years after *Roe* was decided in 1973; and that the movement mobilized itself as a political force not in reaction to abortion but in opposition to racial integration.<sup>47</sup> My findings nuance this account by demonstrating that the Southern Baptist Convention already had moral reservations about abortion when *Roe* was decided, even though it indeed was not until later that the Convention mobilized itself to overturn *Roe*. The Article offers context to understand this debate by discussing the split of American Protestantism between a modernist current and a traditionalist current over past centuries. Evangelicalism has largely gravitated toward traditionalism or ultra-traditionalism, which has resisted the liberalization of social mores, including on gender, sexuality, and reproductive rights. By contrast, mainline Protestants have gravitated toward a modernist conception of religion that is tolerant or supportive of abortion rights. The Catholic Church initially spearheaded religious opposition to abortion in the late nineteenth century and continues to play a role, but evangelicals have become the leading force in the modern U.S. anti-abortion movement for reasons that deserve closer attention.<sup>48</sup>

Another contribution of this Article is its use of a comparative framework to identify neglected root causes of abortion's recriminalization in America. "Those who know only one country know no country," as Seymour Martin Lipset wrote, because "it is impossible to understand a country without seeing how it varies from others."<sup>49</sup> Various scholars have called for greater comparatism in American law.<sup>50</sup> While a literature on comparative abortion previously

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and in post-*Dobbs* America).

46. See *infra* Section VI.

47. RANDALL BALMER, *BAD FAITH: RACE AND THE RISE OF THE RELIGIOUS RIGHT* (2021). Balmer's book is primarily discussed in the passage accompanying note 257.

48. See *infra* Section IV.

49. LIPSET, *supra* note 1, at 1.

50. See generally John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546-47 (1995); Richard L. Marcus, *Putting*

explored the United States' evolution,<sup>51</sup> few scholars have analyzed *Dobbs* comparatively and in the context of American exceptionalism. In particular, Tom Ginsburg has observed that “[o]ne area in which our country is exceptional is the particular role of abortion politics in our current ailment. While many countries struggle with the question of how abortion should be treated within the constitutional order, the United States is distinct in the degree to which the abortion question has warped our politics more generally.”<sup>52</sup> This Article delves further into that topical issue by analyzing the enduring polarization of American society over abortion as a feature of American exceptionalism.

Many extraordinary events since *Dobbs* reaffirmed the remarkable intensity of opposition to abortion in parts of America. Even as abortions slightly increased nationwide after *Dobbs* for various reasons, such as improved access to medication enabling one to terminate a pregnancy without surgery,<sup>53</sup> a punitive regime has come to target the crime of abortion.<sup>54</sup> Surveillance and fear of prosecution have created a climate of suspicion in red states. As these criminal laws can be vague, they dissuade doctors from treating patients with non-viable pregnancies or medical complications, for fear of being charged with abortion.<sup>55</sup> In Idaho, for instance, many doctors specializing in obstetrics and gynecology have left the state as a result.<sup>56</sup> This has caused significant hardships for patients who now lack access to medical care or who are forced to travel great distances to receive it.<sup>57</sup> Similarly, in the run-up to *Dobbs*, a Texas woman who miscarried had to carry her dead fetus inside the womb for two weeks until finding a provider willing to remove it, as doctors feared being accused of committing an abortion.<sup>58</sup> Meanwhile, a U.S. Senator blocked hundreds of military promotions

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*American Procedural Exceptionalism into A Globalized Context*, 53 AM. J. COMP. L. 709, 710 (2005); Jenny S. Martinez, *Who's Afraid of International and Foreign Law?*, 104 CAL. L. REV. 1579, 1584 (2016).

51. See generally RESEARCH HANDBOOK ON INTERNATIONAL ABORTION LAW (Mary Ziegler ed., 2023); ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE (Marianne Githens & Dorothy McBride Stetson eds., 1997).
52. Tom Ginsburg, *American Exceptionalism and the Comparative Constitutional Law of Abortion*, in ROE V. DOBBS 159, *supra* note 44, at 159 (emphasis in original).
53. Ivette Gomez ET AL., *10 Things to Know About Abortion Access Since the Dobbs Decision*, KFF (June 20, 2024), [https://perma.cc/7GPU-B46H].
54. See generally GRACE E. HOWARD: THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD (2024); Mary Ziegler, *The Anti-Abortion Movement and the Punishment Prerogative*, in ROE V. DOBBS 227, *supra* note 44, at 227–28, 236–40 [hereinafter Ziegler, *The Punishment Prerogative*].
55. Caroline Kitchener & Dan Diamond, *Faced With Abortion Bans, Doctors Beg Hospitals for Help With Key Decisions*, WASH. POST (Nov. 1, 2023, 4:44 PM), [https://perma.cc/2EQV-JBYJ]. See also Milan Markovic, *Charging Abortion*, 92 FORDHAM L. REV. 1519 (2024) (analyzing prosecutorial discretion in the abortion context).
56. Kyle Pfannenstiel, *Idaho is losing OB-GYNs after strict abortion ban. But health exceptions unlikely this year.*, IDAHO CAP. SUN (Apr. 5, 2024, 4:30 AM), [https://perma.cc/2P55-TWPU].
57. *This American Life: The Bear at the End of the Tunnel* (Act 2), CHI. PUB. RADIO (Oct. 20, 2023), [https://perma.cc/3R5H-5A2B] (investigative report on Idaho's situation following *Dobbs*).
58. Timothy Bella, *Woman Says She Carried Dead Fetus for 2 Weeks After Texas Abortion Ban*, WASH. POST (July 20, 2022, 4:16 PM), [https://perma.cc/Y7DM-7NAG].

for nearly a year to protest the Pentagon's coverage of abortion-related costs for service members.<sup>59</sup> Such events are not only extremely peculiar in the modern Western world, they also divide Americans, thereby calling for a deeper analysis of the United States' singular evolution.

This Article explores American exceptionalism and abortion in several steps. First, it discusses how opposite conceptions of tolerance have shaped divergent approaches to abortion in the modern Western world. Second, it situates the U.S. abortion debate in the wider "culture wars" that have polarized American society in past decades. Third, the Article focuses on America's distinctive religious landscape, which is indispensable to understanding its abortion debate. Fourth, we delve closer into Catholicism, evangelicalism, and the beliefs that have shaped the U.S. pro-life movement. Fifth, the Article turns to constitutional debates over the role of religion in government, which have favored the pro-life movement by enabling religious objections to abortion to be secularized to pass constitutional muster. Sixth, the considerable role of lobbying by special interests in American government helps explain the outsized impact of the U.S. pro-life movement. The final section connects the dots between abortion and wider dimensions of polarization in modern America. All in all, a closer examination of the United States' exceptional social environment will shed light on its persistent battle over abortion.

## I. To Tolerate or Criminalize

Tolerance may be understood as the capacity to accept something that one finds wrong. Criminal law, by contrast, is perhaps the most punitive means that a democratic society may choose to signal that it does not tolerate certain behavior. These considerations are key to understanding the United States' distinctive historical evolution.

The U.S. pro-life movement won its decades-long campaign to eviscerate *Roe* in part because it successfully resisted attempts by various Republican leaders and strategists to promote tolerance of abortion. When Senator Bob Dole, the 1996 Republican presidential candidate, called for a "declaration of tolerance" on abortion and even mulled choosing a pro-choice running mate,<sup>60</sup> he seemed to point to the path taken by mainstream conservative parties in the rest of the West. In practice, this could have meant that the Republican Party would tolerate elective abortion—an unacceptable outcome for a pro-life movement that has often opposed abortion categorically without exceptions.<sup>61</sup>

Dole was not alone, as in the last decades of the twentieth century various Republican leaders and strategists considered building the party as a "big tent" welcoming pro-life and pro-choice conservatives.<sup>62</sup> After all, several prominent

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59. Leo Shane III, *Tuberville Drops Holds on More than 430 Military Promotions*, MIL. TIMES (Dec. 5, 2023), [<https://perma.cc/K7BW-A7G8>].

60. MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 106 (2022) [hereinafter ZIEGLER, DOLLARS FOR LIFE].

61. See generally MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 189–90 (2015) [hereinafter ZIEGLER, AFTER ROE].

62. ZIEGLER, DOLLARS FOR LIFE, *supra* note 60, at 77, 87–88.

Republicans showed relative support for abortion rights earlier in their careers before becoming staunch allies of the anti-abortion movement, from Ronald Reagan to Mitch McConnell.<sup>63</sup> Yet such a big tent appeared elusive by the 2000s.<sup>64</sup> Republican leaders and strategists eventually concluded that the movement was more than an asset—it could become an unflinching part of its base if the party resolutely embraced its agenda, which always entailed a criminal ban.<sup>65</sup>

Elsewhere in the West criminal law instead increasingly became an inappropriate or illegitimate response in the eyes of people with objections to abortion. In a 1994 book, Mark MacGuigan notably offered reasons why Canada has mostly come to terms with abortion, which echoed a wider evolution in modern Western democracies.<sup>66</sup> A former Minister of Justice, Attorney General, and law professor, MacGuigan grew up in conservative Prince Edward Island before becoming a member of the Liberal Party and legislator representing Windsor, Ontario.<sup>67</sup> His essay took a position that would be less acceptable in American society, namely that moral opposition to abortion should *not* translate into criminalization:

I am a practising Catholic. Unlike some fellow Catholics, *I accept the Vatican teaching that directly induced abortion is always morally wrong*, and that people should be guided by this view in their daily lives. To this extent, *my position is entirely orthodox*.

However, for me the popular assumption that, if abortion is morally wrong, it ought to be prohibited by the criminal law, is a complete *non sequitur*, one based on a total confusion of the respective domains of morality and law, of sin and crime, in a democracy. . . . in a democracy law is not simply morality writ large, backed by the compulsion of the criminal law, [as] the two spheres are distinct and separate, each having its own purpose, structure and methods. Although criminal law is admittedly dependent on morality for its legitimacy and acceptance, it nevertheless does not simply incorporate morality—nor morality, law.<sup>68</sup>

MacGuigan's position hardly represents all Canadians, few of whom are practicing Catholics nowadays.<sup>69</sup> But it captures reasons why moral or religious concerns about abortion in other modern Western democracies do not translate into legal attempts to criminalize the medical procedure to the same degree as in America. Three decades after their publication, his observations still ring true in explaining why many Canadian elected officials are either opposed to the anti-abortion movement or wary that embracing its cause would become a political liability: "I believe that every politician of national experience instinctively knows that it would be wrong in a democracy such as ours

63. *Id.* at 6, 8, 18–19, 74; ALEC MACGILLIS, *THE CYNIC: THE POLITICAL EDUCATION OF MITCH MCCONNELL* 21–22 (2014).

64. *See, e.g.*, ZIEGLER, *DOLLARS FOR LIFE*, *supra* note 60, at 77, 88–89, 106.

65. *Id.* at 47–48.

66. MARK R. MACGUIGAN, *ABORTION, CONSCIENCE AND DEMOCRACY* 2–3 (1994).

67. *The Honourable Justice Mark R. MacGuigan Memorial Scholarship*, U. PRINCE EDWARD ISLAND, [<https://perma.cc/V3TJ-3MTY>] (last visited Nov. 7, 2022).

68. MACGUIGAN, *supra* note 66, at 1 (emphasis added).

69. *See generally* Louis Cornelissen, *Religiosity in Canada and Its Evolution from 1985 to 2019*, STAT. CAN.: INSIGHTS ON CAN. SOC'Y, Oct. 2021, at 11.

for Catholics and fundamentalists, even if they did constitute a majority in the society, to make all abortions illegal.<sup>70</sup> Strikingly, Stephen Harper, a conservative evangelical who was Canada's Prime Minister for nearly a decade (2006–15), declined to reopen the abortion debate following its decriminalization in 1988.<sup>71</sup>

The same historical trend toward decriminalization can be found in fellow Western democracies, even when considering nuances in abortion law and policy in various countries. In Germany, for example, abortion remains in the Criminal Code but exceptions readily allow it in the first trimester.<sup>72</sup> Moreover, in 2020, New Zealand reformed its legislation to decriminalize abortion. While abortion had been allowed before then, the legal scheme faced criticism for impeding access. The reform contained diverse measures to improve abortion services, including no longer mandating a doctor referral, expanding the range of health practitioners who can provide abortions, and ending the requirement that abortions be performed in licensed premises, thereby providing the option for services in primary care or via telehealth.<sup>73</sup> An analogous process has occurred in Australia since the liberalization of abortion in the 1970s, as its jurisdictions have incrementally decriminalized abortion and regulated it under health legislation.<sup>74</sup> In 2023, Western Australia became the last state to decriminalize abortion, making it lawful throughout the country.<sup>75</sup>

Although each Western country's path to the present may differ, the upshot is a historical convergence toward the liberalization of elective abortion. The recriminalization of abortion in post-*Dobbs* America sharply diverges from this trend, thereby reflecting American exceptionalism. To an extent, growing tolerance in other Western democracies may reflect realism by conservatives who recognized that strict abortion bans were now impossible.

70. MACGUIGAN, *supra* note 66, at 2.

71. Andrew Mayeda & Althia Raj, *Harper Vows Not to Reopen Abortion Debate as Prime Minister*, NAT'L POST (Can.) (Apr. 21, 2011), [<https://perma.cc/XV4Q-LRFR>]; Gloria Galloway, *Harper Denounces 'Unfortunate' Bid to Reopen Abortion Debate*, GLOBE & MAIL, Apr. 27, 2012, at A8. On the decriminalization of abortion in Canada, see also *infra* note 142 and accompanying text.

72. See Strafgesetzbuch [StGB] (Penal Code), § 218 ("Abortion"), § 218a ("Exemption from Punishment for Abortion"), [<https://perma.cc/8HK5-DQ9E>]; see also JAMAL GREENE, HOW RIGHTS WENT WRONG: HOW OUR OBSESSION WITH RIGHTS IS TEARING US APART 114–39 (2021) (comparing the evolution of the abortion debate in America and Germany); CTR. REPROD. RTS., *supra* note 35, at 7 ("Some countries in Europe that have legalized abortion on request or broad social grounds nonetheless maintain specific criminal sanctions for abortions performed outside of the scope of applicable legal provisions").

73. See *Abortion Legislation*, N.Z. MINISTRY OF HEALTH, [<https://perma.cc/CU5C-6F68>] (last updated Sept. 7, 2023).

74. See Barbara Baird, *Abortion is now legal across Australia – but it's still hard to access. Doctors are both the problem and the solution.*, THE CONVERSATION (Dec. 5, 2023), [<https://perma.cc/QW4P-BTXR>].

75. *Id.* See also Anna Walsh & Tiana Legge, *Abortion Decriminalisation in New South Wales: An Analysis of the "Abortion Law Reform Act 2019" (NSW)*, 27 J.L. & MED. 325 (2019) (discussing how, in 2019, New South Wales became the seventh Australian jurisdiction to decriminalize abortion and regulate it under health legislation).

But a paradigm shift has also occurred as abortion has been normalized and accepted under relatively wide circumstances.

Nuances still exist regarding abortion law in countries that have liberalized it. When referring to “decriminalization” this Article primarily focuses on the early- to mid-stages of pregnancy, as in various countries the criminal law can cover abortion in latter stages.<sup>76</sup> But nuances should not overshadow broader patterns of convergence. This would miss the forest for the trees. Modern Western democracies have overwhelmingly moved toward liberalization and decriminalization. Post-*Dobbs* America is an outlier in recriminalizing abortion in over a dozen states.<sup>77</sup>

Exploring the international landscape, Tom Ginsburg showed that the United States is on the fringe in having a social debate where abortion plays “a central, defining role in political identity.”<sup>78</sup> His research describes American activists in both the “pro-choice” and “pro-life” movements as more intransigent than is generally the norm in many other countries, where abortion law and policy reflect more compromise.<sup>79</sup> In 1975, for example, West Germany’s Constitutional Court recognized that the principle of human dignity attached to a fetus, thereby rejecting *Roe*’s holding that a fetus had no constitutional interests in the first trimester.<sup>80</sup> The West German court consequently “gave room to the legislature to craft a compromise” since “prevention of abortion was to be preferred over punishment,” Ginsburg notes.<sup>81</sup> This led to a framework allowing abortion in the first twelve weeks of pregnancy, if accompanied by counseling and a waiting period, whereas later abortions were limited to situations involving risk to physical or mental health.<sup>82</sup> Ginsburg observes that “[t]his remains the basic framework in Germany today, and it is not particularly controversial.”<sup>83</sup>

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76. A comparative study on Europe notably emphasized that “[a]bortion remains punishable, unless certain circumstances pertain, such as when requirements of gestational age, waiting periods, or specific grounds are met . . . . Abortion is lawful only within the provisions of the law and any action outside of them is a criminal offense.” Lucia Berro Pizzarossa, Tamara Hervey & Anniek de Ruijter, *Abortion Law in Europe: The Promise and Pitfalls of Human Rights and Transnational Trade Law in the Face of Criminalization with Exceptions*, in RESEARCH HANDBOOK ON INTERNATIONAL ABORTION LAW 374, *supra* note 51, at 377.

77. McCann & Walker, *supra* note 28. See also Ziegler, *The Punishment Prerogative*, *supra* note 54, at 227–28, 230, 236–40 (explaining that the U.S. pro-life movement has long focused on criminalization as the means to condemn and prevent abortion, although equating it with murder also bolstered constitutional claims about fetal personhood).

78. Ginsburg, *supra* note 52, at 267.

79. *Id.* at 259–60.

80. *Id.* at 262. See 39 BVerfGE 1, Feb. 25, 1975 (Ger.) (decision by West German Constitutional Court); *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (setting out the trimester framework).

81. Ginsburg, *supra* note 52, at 262.

82. *Id.*

83. *Id.*

While critics charge that the abortion regulations found in European societies “undermine women’s agency,”<sup>84</sup> Ginsburg, Jamal Greene, and Mark Tushnet describe them as a functional compromise that could serve as a model for the United States.<sup>85</sup> But these three scholars have acknowledged that atypical features of American society currently impede this evolution.

Ginsburg suggests that the conditions surrounding abortion in Germany would be a nonstarter to U.S. pro-choice activists demanding an absolute right to abortion, whereas elective abortion in the first trimester would be anathema to the U.S. pro-life movement as well.<sup>86</sup> Ginsburg underscores Germany’s greater ability to find “common ground,” such as in minimizing the number of abortions by promoting contraception.<sup>87</sup>

To Greene, American society has gravitated toward a peculiar conception of rights that tends to be absolutist, excessively adversarial, and hostile to compromise, as exemplified by abortion.<sup>88</sup> He posits that *Roe* fueled acrimony over abortion in America, as “the opinion’s insistence that a fetus was not a constitutional person pushed the [anti-abortion] movement in a more radical, disruptive posture.”<sup>89</sup> In contrast, the 1975 decision by the West German Constitutional Court “forced political compromise over abortion,” helping resolve conflicts over abortion by mediating competing rights claims.<sup>90</sup> By the 1990s compromise was increasingly the norm, even as the various groups in Germany’s multiparty system held a range of positions, from the Green Party backing abortion on request to the Christian Democrats’ call for a narrower model restricting social grounds for abortion.<sup>91</sup> “Still, very few Germans supported complete repeal of abortion restrictions, and there was likewise a general consensus that counseling and financial assistance to pregnant women and families protected fetal life far better than a prohibition on abortion,” Greene underlines.<sup>92</sup> In his view this approach has served the greater good, as “abortion today is a far less politically polarizing issue in Germany than it is in the United States.”<sup>93</sup>

Moreover, Tushnet has envisioned a future paradigm shift in America where “an entrepreneurial politician, probably a Democrat but perhaps a Republican, might someday find it advantageous to develop a comprehensive political platform” resembling the relative consensus achieved by European Social Democrats and Christian Democrats.<sup>94</sup> In addition to ideological divides in modern America, Tushnet finds an obstacle in its greater inclination

84. Pizzarossa, Hervey & de Ruijter, *supra* note 76, at 380.

85. GREENE, *supra* note 72; Ginsburg, *supra* note 52, at 259; Mark Tushnet, *Abortion Policy Aimed at Promoting Life as Much as Possible*, in *ROE V. DOBBS* 243, *supra* note 44, at 258.

86. Ginsburg, *supra* note 52, at 260–61.

87. *Id.* at 262.

88. *See generally* GREENE, *supra* note 72.

89. *Id.* at 120.

90. *Id.* at 129.

91. *Id.* at 129–30.

92. *Id.* at 130.

93. *Id.* at 131.

94. Tushnet, *supra* note 85, at 244.

to rely on the U.S. Supreme Court to settle divisive issues with constitutional rulings, as opposed to legislation.<sup>95</sup> Tushnet observes that the Court scarcely manages to do so given that its decisions tend to have a winner-take-all quality while aiming for a “rational consistency” inhospitable to the “messy compromises” that have mended divides over abortion in Europe.<sup>96</sup> The development of social democracy in Europe, Tushnet adds, has converged with Catholic teachings on solidarity and equality, favoring the notion that a strong social safety net should be among the responses to abortion.<sup>97</sup> In the United States, the Catholic Church’s position on abortion has been more reduced to punitiveness and moral condemnation, partly because the Republican Party, within which it has more influence on the abortion issue, has adamantly rejected social-democratic policies.<sup>98</sup>

Ginsburg, Greene, and Tushnet offer different insights but converge in depicting a U.S. abortion debate where issues are framed in a way that impedes common ground. This feature recalls the zero-sum relationship between victims and prisoners’ rights that has also grown influential in modern America.<sup>99</sup> By suggesting that any concern for prisoners devalues or disrespects victims, that framing has contributed to the exceptional harshness and dysfunctionality of the contemporary U.S. penal system.<sup>100</sup> This zero-sum approach is less influential in fellow Western democracies, which have all abolished the death penalty and lack U.S.-style mass incarceration, partly due to a greater focus on universal human rights protecting both victims and prisoners.<sup>101</sup> However, an inability to find common ground on a host of fundamental questions has been a recurrent feature of American government.<sup>102</sup> Gridlock has not been limited to abortion or criminal justice, as distinct worldviews tend to sharply split U.S. conservatives and liberals on many issues that are a matter of consensus or less controversial elsewhere in the West, such as health care, financial regulation, political spending, guns or climate change.<sup>103</sup>

A distinctive social environment also sets the U.S. abortion debate apart. For decades, America has had a far more politically powerful and uncompromising anti-abortion movement than virtually all other Western democracies. This movement aspires to eliminate abortion per se, especially elective abortion, meaning abortion for personal reasons. As this is the movement’s *raison d’être*, it cannot genuinely compromise on this front—even if it might compromise on abortion in narrow circumstances like rape, incest or danger to the mother’s life.<sup>104</sup> Following *Roe*, the U.S. pro-life movement sought to

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95. *Id.* at 250–51.

96. *Id.* at 251.

97. *Id.* at 249–50.

98. *Id.* at 255.

99. Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 722–23 (2019).

100. *Id.*

101. *Id.* at 729–33.

102. JOUET, *supra* note 4 (exploring the distinctive sources and forces of polarization in modern America).

103. *Id.* at 36–38.

104. See ZIEGLER, *AFTER ROE*, *supra* note 61, at 189–90.

incrementally regulate abortion out of existence or render access practically impossible through various means.<sup>105</sup> This included successfully blocking all public funding for abortion at the federal level under the Hyde Amendment and at the state level for jurisdictions with equivalent policies,<sup>106</sup> whereas abortion is generally publicly funded and covered by universal health care in other Western democracies.<sup>107</sup> Additional efforts have included using regulatory regimes to force many abortion clinics to close in American states where the anti-abortion movement is politically powerful.<sup>108</sup>

Conversely, restrictions like mandatory waiting periods or counseling in other Western democracies are not designed as means toward banning abortion per se.<sup>109</sup> These distinct circumstances have plausibly encouraged the U.S. pro-choice movement to take less compromising stances and use more absolutist rhetoric in defending the right to abortion than some pro-choice movements abroad.<sup>110</sup> In modern America, any limitation of this right risks being perceived as a Trojan horse, as “the U.S. pro-life movement makes no secret of its goal to use [any] restrictions as stepping stones toward eliminating all elective abortions.”<sup>111</sup>

These circumstances have further impeded the kind of compromise generally found in other Western democracies, which has five basic dimensions: 1) liberalize abortion in the early- to mid-stages of pregnancy, 2) albeit with certain regulations or constraints; 3) while seeking to limit the occurrence of abortion by 4) publicly funding and promoting contraception alongside comprehensive sexual education; and by 5) publicly funding social services to support people who wish to have children but would otherwise lack the means to do so.<sup>112</sup>

This policy model stands in tension with the convictions of the U.S. pro-life movement. Besides opposing elective abortion per se, it has resisted public funding for contraception and has promoted abstinence-only sexual education for religious reasons, which are again very atypical policies in the modern Western

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105. See GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA’S ORIGINS TO THE TWENTY-FIRST CENTURY* 408–09, 434–40 (2017).

106. *Harris v. McRae*, 448 U.S. 297, 302–03 (1980) (upholding Hyde Amendment). See also generally *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (plurality opinion) (stressing that “the State need not commit any resources to facilitating abortions”).

107. See *supra* notes 33, 36. See, e.g., Kelly Gordon & Paul Saurette, *The Future of Pro-Choice Discourse in Canada*, in *ABORTION: HISTORY, POLITICS, AND REPRODUCTIVE JUSTICE AFTER MORGENTHAUER* 265, 279 (Shannon Stettner, Kristin Burnett & Travis Hay eds., 2017) (noting that Canada has no equivalent to the U.S. Hyde Amendment barring federal funding for abortion).

108. See generally *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 612 (2016) (striking Texas legislation that had forced numerous abortion facilities to close by requiring providers to obtain admitting privileges at a nearby hospital, among other restrictions).

109. JOUET, *supra* note 4, at 129.

110. *Id.*

111. *Id.*

112. See generally Tushnet, *supra* note 85.

world.<sup>113</sup> Some evangelical leaders have nonetheless encouraged contraception by seeking to conciliate their faith with practical realities in an effort to serve the greater good, such as Reverend Joel Hunter: “Unmarried sex with contraception is not God’s plan, but unmarried sex without contraception is not a plan at all. If holy living is not the choice of some in the near term, contraception can at least reduce some potentially devastating results (including abortion) for all in the long term.”<sup>114</sup> Reverend Richard Cizik, who led the National Association of Evangelicals until being forced out for approving same-sex civil unions, likewise advocates contraception—abandoning his past support for abstinence-only policies and pointing to data on the toll of unplanned pregnancies.<sup>115</sup> In practice, virtually all Americans use contraception at *some* point of their lives, including members of traditionalist communities.<sup>116</sup>

Even so, moral concern among traditionalists has shaped public policies that dissuade contraception and effectively hinder access to it for teenagers and socioeconomically underprivileged persons.<sup>117</sup> Despite some progress, the teenage birth rate in America remains high among developed countries, such as over twice above Canada and France’s rates in 2021.<sup>118</sup> We will later explore how the U.S. pro-life movement is grounded in a religious worldview that tends to diverge from modern approaches to public health and family-planning prevalent in liberal America and other Western democracies.<sup>119</sup>

More features of American exceptionalism stand in the way of such a model. The United States is the sole industrialized country without universal health care, as well as the one with the sharpest degree of wealth inequality.<sup>120</sup> This is a source of polarization, as Americans have been sharply divided on the appropriate role of the government in the economy, especially since the Reagan Revolution upended the more egalitarian economic model shaped

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113. JOUET, *supra* note 4, at 129–34.

114. *Is Contraception Acceptable for Evangelicals to Use?*, NAT’L ASS’N EVANGELICALS (Mar. 20, 2012), [https://perma.cc/7W4C-DDG3].

115. Richard Cizik, *If Hobby Lobby Wins, Pro-life Christians Lose*, HUFFPOST (June 27, 2014, 9:25 PM), [https://perma.cc/657P-QQAF]; Jesse Ellison, *Can Safe Sex Save the Earth?*, NEWSWEEK (Dec. 17, 2012, 12:00 AM), [https://perma.cc/PWV5-Y3Y9]. As Geoffrey Stone emphasized in his book *Sex and the Constitution*, published in 2017, “[f]or those who want to reduce the number of abortions, easy access to effective contraception and guidance in the use of contraception is critical. Indeed, if all people used contraception consistently and correctly, the number of abortions per year in the United States would drop from one million to approximately 75,000.” STONE, *supra* note 105, at 400, at 430.

116. “Across religious affiliations, 99.7% of women with no religious affiliation, 99.3% of Protestant women, 98.8% of Catholic women, and 97.6% of women affiliated with other religions had *ever* used a contraceptive method.” Kimberly Daniels & Joyce C. Abma, *Contraceptive Methods Women Have Ever Used: United States, 2015–2019*, 195 NAT’L HEALTH STAT. REP. 1, 6 (2023) (emphasis added).

117. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 37–44, 89, 106–16 (2010).

118. *Teen Births in the United States: Overview and Recent Trends*, CONG. RSCH. SERV. (last updated Apr. 17, 2025), [https://perma.cc/DZY2-8VG4].

119. *See infra* Sections II, III.

120. JOUET, *supra* note 4, ch. 5.

by Franklin Delano Roosevelt's New Deal.<sup>121</sup> A related feature is that modern America stands out in having a significant segment of the electorate vote against its economic interest for diverse reasons beyond the scope of this Article, including a peculiar receptiveness to disinformation about the "tyranny of socialized medicine" and other policies that would reduce wealth inequality.<sup>122</sup>

In particular, the U.S. voters most opposed to abortion are also among those most opposed to instituting universal health care or expanding public services for destitute families, which are the likeliest to face unplanned pregnancies.<sup>123</sup> In *Roe*'s aftermath, anti-abortion forces opposed congressional bills providing federal funding for "health care and other social services to teenage mothers and to expand insurance coverage for pregnant women."<sup>124</sup> The absence of universal health care in America may compound moral objections to the public funding of contraception. Worry that the government is licensing sexuality or immorality may diminish in societies where it is the norm for the government to ensure health care writ large—provided that sexual education, contraception, and abortion are framed as health-care issues.<sup>125</sup>

All of these elements presently impede America's evolution toward the kind of compromise on abortion found in other Western democracies. Social policy in these nations not only aims to liberalize abortion for people who do not want children or more children, but also support childrearing for those who do. Should the United States develop a greater consensus on socioeconomic policy, it may converge toward the forms of European social democracy that Tushnet describes, including "strong systems of social support for childbearing, childbirth, and childrearing," which can "reduce the demand for abortions."<sup>126</sup>

None of this means that debates about reproductive rights no longer exist in fellow Western democracies. Experts and advocates deplore inadequate services and access to abortion in Europe,<sup>127</sup> Canada,<sup>128</sup> Australia,<sup>129</sup> and

121. *Id.* at 143–49.

122. *Id.*, ch. 6.

123. *See generally* Tushnet, *supra* note 85, at 255, 257.

124. GREENE, *supra* note 72, at 121.

125. *See also* Tushnet, *supra* note 85, at 246 (observing that "most features of [universal health care] systems are not abortion- or pregnancy- specific; they are applications of more general social support programs").

126. *Id.* at 243.

127. *See generally* Pizzarossa, Hervey & de Ruijter, *supra* note 76, at 375 (arguing that European laws "have not been brought in line with the most recent developments of scientific knowledge or practice," including abortion medication and telehealth services); Payal K. Shah and Jihan Jacob, *Beyond Abortion Decriminalization: Human Rights Perspectives on the Role of Law in Creating Enabling Environments for Abortion Access*, in RESEARCH HANDBOOK ON INTERNATIONAL ABORTION LAW 343, *supra* note 51, at 345 (advancing that, beyond decriminalization, "states must also take positive measures to address inequities and structural barriers to abortion"); *see also supra* note 37 (describing obstacles that gestational limits can pose to abortion in Europe).

128. *See generally* RACHAEL JOHNSTONE, *AFTER MORGENTHAU: THE POLITICS OF ABORTION IN CANADA* 86–88, 98, 102–11, 115–16 (2017) (discussing obstacles to abortion in modern Canada).

129. In Australia, "[t]he 1970s saw significant social change and the implementation of

New Zealand.<sup>130</sup> Some have called for the full decriminalization of abortion in Europe and beyond, including at any stage of pregnancy.<sup>131</sup> The main rationale is that abortion should not fit within the sphere of criminal liability in any circumstance because this violates women's rights.<sup>132</sup> Another argument is that penalization does not prevent abortion except for underprivileged women who lack the resources to seek late-term abortions in jurisdictions that allow them.<sup>133</sup> Divergences over full decriminalization are not the focus of this Article, however, as it instead addresses the decriminalization of abortion in the early- to mid-stages of pregnancy, which concern the vast majority of abortions in modern Western democracies.<sup>134</sup>

The key trend in other Western democracies has not merely been convergence toward greater *tolerance* of abortion, including among people with moral reservations, but also toward significant *support* for reproductive rights. Recall that *Dobbs* was roundly criticized by U.S. allies, from liberal figures to conservative ones like Boris Johnson, then the British Prime Minister.<sup>135</sup> In many Western democracies, the right to elective abortion has indeed been celebrated as a major progress in women's rights. For example, Simone Veil, the figure most

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safe, hygienic abortion procedures through the provision of universal health insurance [under federal Medicare]. However, the supply of public health clinics does not meet demand for elective abortions, which is met by private clinics charging fees well above that of the universal insurance rebate." Ronli Sifris & Suzanne Belton, *Australia: Abortion and Human Rights*, 19 HEALTH & HUM. RTS. 209, 2012–13 (2017). See also Ronli Sifris, *Abortion in Australia: Law, Policy, and the Advancement of Reproductive Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ABORTION LAW 124, *supra* note 51, at 124 (noting that the past twenty years "have led to a significant advancement" though "there is still a long way to go before Australian women achieve full reproductive justice").

130. A major reform to New Zealand's abortion law occurred in 2020 in order to improve access. See *supra* note 73 and accompanying text. The latest official report on abortion services indicated "positive signs that the accessibility and equity of abortion services are increasing . . . . The abortion workforce has doubled in size since the 2021 Annual Report. This is due to an increase in the number of facilities providing abortion services; the endorsement of midwifery abortion services; and telehealth services for early medical abortion. In particular, the availability of Māori and Pacific health practitioners has increased." *Access to Abortion Services Improving, Annual Report Shows*, N.Z. MINISTRY HEALTH (Nov. 1, 2023), [https://perma.cc/5CTW-WFR4].
131. Pizzarossa, Hervey & de Ruijter, *supra* note 76, at 374, 376–78, 391.
132. See *id.*; Shah and Jacob, *supra* note 127, at 343–51.
133. Pizzarossa, Hervey & de Ruijter, *supra* note 76, at 381–82.
134. A study of twenty-four developed countries found that in the majority "over 90% of all abortions were completed before 13 weeks, and more than two-thirds of abortions occurred before the first 9 weeks of gestation." Anna Popinchalk & Gilda Sedgh, *Trends in the Method and Gestational Age of Abortion in High-Income Countries*, 45 BMJ SEXUAL & REPROD. HEALTH 95, 101 (2019). Data for the United States alone show convergence in this area: "Nearly all abortions in 2021 took place early in gestation: 93.5% of abortions were performed at ≤13 weeks' gestation; a smaller number of abortions (5.7%) were performed at 14–20 weeks' gestation, and even fewer (0.9%) were performed at ≥21 weeks' gestation." *Abortion Surveillance Findings and Reports*, CTR. DISEASE CONTROL (May 15, 2024), [https://perma.cc/6KM9-RYQ8].
135. See *supra* note 20 and accompanying text.

associated with the liberalization of abortion in France in the 1970s,<sup>136</sup> received a state funeral after passing away in 2018.<sup>137</sup> Veil was buried in the Panthéon, an honor bestowed on France's most revered figures and national heroes.<sup>138</sup> In 2022, the French author Annie Ernaux received the Nobel Prize in Literature for her life's work, which included *L'Événement (Happening)*, a 2000 memoir about the distressing illegal abortion she obtained in France in 1964.<sup>139</sup> The award came after *Dobbs*, seeming to rebuke the U.S. Supreme Court. The Swedish Academy praised Ernaux for her writings on abortion and women's rights.<sup>140</sup> By the same token, abortion doctor Henry Morgentaler was awarded the prestigious Order of Canada in 2008,<sup>141</sup> after being the main criminal defendant in the series of cases leading to the decriminalization of abortion in 1988.<sup>142</sup> The views of the abortion rights movement have become largely normalized throughout the West, where opponents of abortion declined in numbers and mostly moved on.

Multiple American states have now instead reintroduced criminal legislation on abortion, which signal no tolerance and defend another worldview. To understand this extraordinary shift, the next sections will delve deeper into American exceptionalism, from the United States' peculiar "culture wars" to its distinctive religious landscape and sociopolitical environment.

## II. A Key Battle in Enduring "Culture Wars"

Abortion is a crucial battle in wider "culture wars" dividing American society. Over the past five decades, the United States has experienced chronic tensions over questions of faith, gender, sexuality, and family planning. While fellow Western democracies have also faced such issues, divides within American society have tended to be more intense and persistent. For instance, a 1977 Canadian commission on abortion observed tensions due to "shifting ideas about the relations between men and women, the bonds between children and parents, and of the role of the family in Canadian society."<sup>143</sup> Alongside the growing number of women in the workforce and rising education levels, the report discussed "modified ideas about social and religious morals" among the causes of these tensions.<sup>144</sup> Yet Canada eventually gravitated toward modern liberal attitudes on these issues, just as the rest of the Western world. The

136. JEAN-YVES LE NAOUR & CATHERINE VALENTI, *HISTOIRE DE L'AVORTEMENT: XIXE – XXE SIÈCLE* ch. 7 (2003).

137. Druckerman, *supra* note 16.

138. *Id.*

139. ANNIE ERNAUX, *HAPPENING* (Tanya Leslie trans., Seven Stories Press 1st ed. 2001).

140. *Speaker's Manuscript – Literature Prize 2022: Annie Ernaux* (Oct. 2022), [<https://perma.cc/TT67-PZH8>].

141. *Morgentaler Receives Order of Canada in Quebec City*, CBC (Oct. 10, 2008, 9:27 AM), [<https://perma.cc/4QQY-87LW>].

142. *See R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.); *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 (Can.). On Dr. Morgentaler's historic significance, see Mugambi Jouet, *A History of Post-Roe America and Canada: From Intertwined Abortion Battles to Dobbs*, 23 *Nw. J. Hum. Rts.* 187 (2025).

143. REPORT OF THE COMMITTEE ON THE OPERATION OF THE ABORTION LAW 43 (1977) (Can.). This is known as the "Badgley Report," named after its chairman Robin Badgley.

144. *Id.* at 43–44.

main exception has been the United States, where a profound social divide between modernist and traditionalist outlooks has persisted.<sup>145</sup>

What kind of crime is abortion to the traditionalist worldview? One answer from American states that are recriminalizing abortion is that it is a form of homicide.<sup>146</sup> But abortion also falls in the category of morals legislation that have been enforced through the criminal law in diverse epochs and jurisdictions, such as bans on drugs, alcohol, adultery, pre-marital sex, or homosexuality. It goes without saying that these matters have overwhelmingly moved outside the sphere of criminal liability in modern Western democracies. The main exception is drugs, which remain matters of criminal law notwithstanding the legalization of recreational marijuana in various Western countries and American states.<sup>147</sup> That does not mean that the decline of morals legislation was a self-evident evolution in the modern Western world, as it could be an arduous battle reflecting ambivalence about social change.<sup>148</sup> What is most revealing is the direction of social change away from criminalization and toward acceptance or at least tolerance.

The legitimacy of morals legislation enforced through criminal conviction and punishment has been a recurrent theme in modern U.S. Supreme Court jurisprudence. The trend long pointed toward a diminishing sphere of criminal liability in this area. In *Lawrence v. Texas*, a 2003 decision barring the criminalization of homosexual intercourse, Justice Antonin Scalia's dissent expressed concern about "the end of all morals legislation."<sup>149</sup> By enabling the recriminalization of abortion, *Dobbs* would lead America on a different path, albeit a familiar one given its relentless "culture wars."

In addition to abortion, America has experienced unusual divides over sexual education, contraception, and gay rights in recent decades.

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145. CAHN & CARBONE, *supra* note 117, *passim*; JOUET, *supra* note 4, at 113–42.

146. The conceptual link to homicide is found in the use of terms such as "unborn child" in statutes penalizing abortion. For instance, among other criminal and civil provisions, Texas law holds that "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child." TEX. HEALTH & SAFETY CODE ANN. § 171.204. Similarly, on November 15, 2019, Alabama's legislature stressed that state law "defines a person for homicide purposes to include an unborn child in utero at any stage of development," although it "ha[d] remained unenforceable as a result of [*Roe*] and its progeny." ALA. CODE § 26–23H-2. However, the classification of abortion within criminal law is not identical across states, just as it has shifted over time. "It is because abortion law regulated family roles that abortion was commonly codified in the nineteenth century as a crime against the family or a sex crime—not as homicide." Franklin & Siegel, *supra* note 45, at 25 (emphasis in original). Efforts to classify abortion as a homicide in post-*Dobbs* America reflect the pro-life movement's increasingly punitive approach since the 1980s. *Id.* at 29–30.

147. See generally LEGALIZING CANNABIS: EXPERIENCES, LESSONS AND SCENARIOS (Tom Decorte, Simon Lenton, & Chris Wilkins eds., 2020) (exploring the gradual decriminalization of marijuana across nations).

148. See, e.g., Robert Leckey, 'Repugnant': *Homosexuality and Criminal Family Law*, 70 U. TORONTO L.J. 225 (2020) (discussing homophobic rhetoric and beliefs in the legislative debate leading to Canada's partial decriminalization of homosexuality in 1969).

149. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

Comprehensive sexual education and publicly-funded contraception tend to be uncontroversial and accepted by both liberals and conservatives in other Western democracies. America stands out in having an influential movement promoting abstinence-only sexual education and opposing public funding for the birth-control pill.<sup>150</sup> Similarly, divides over gay rights have often proved sharper in American society. Until the end of the controversial “Don’t Ask, Don’t Tell” policy in 2011, the United States lagged behind fellow Western democracies in refusing to allow openly gay persons into its armed forces.<sup>151</sup> More fundamentally, America lagged behind in decriminalizing homosexuality. In 1981, the European Court of Human Rights barred the criminalization of homosexual sodomy in *Dudgeon v. United Kingdom*.<sup>152</sup> The U.S. Supreme Court instead upheld such legislation five years later in *Bowers v. Hardwick*.<sup>153</sup> It did not change course until *Lawrence* in 2003,<sup>154</sup> belatedly converging with the European Court of Human Rights. *Lawrence* had three dissenting votes.<sup>155</sup> While the advent of same-sex marriage would later divide Western societies, the recognition of same sex-relationships stirred stauncher opposition in America, as demonstrated by the wave of state laws that banned both same-sex marriage and civil unions in the 2000s.<sup>156</sup> Even though the Supreme Court’s *Obergefell* decision struck these laws, it garnered four dissenting opinions.<sup>157</sup>

Conflicting understandings of religion and secularism largely shape America’s “culture wars.” Chief Justice John Roberts captured this question in his *Obergefell* dissent: “Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.”<sup>158</sup> Justice Sonia Sotomayor would again raise this issue during the *Dobbs* oral arguments, when she asked the attorney for Mississippi: “How is your interest anything but a religious view?”<sup>159</sup> However, *Dobbs*’s joint dissenting opinion by Justices Sotomayor, Stephen Breyer, and Elena Kagan did not explicitly address religion. Nor did the *Dobbs* majority or concurring opinions. Yet religious traditionalism has long been at the heart of the anti-abortion movement.

Besides the conviction that human beings exist from the time of conception, religion is intertwined with diverse rationales for opposing abortion, including traditionalist conceptions of sexuality, motherhood, and the family. “[A]bortion bears on the structure of marriage and the family, the role and duties of parents, the limitations of the paternal part in procreation, and

150. CAHN & CARBONE, *supra* note 117, at 37–44, 77–91, 106–16; JOUET, *supra* note 4, at 115–16, 129–34; ZIEGLER, AFTER ROE, *supra* note 61, at 35, 172, 200. See also *supra* note 113 and accompanying text.

151. JOUET, *supra* note 4, at 136–37.

152. *Dudgeon v. United Kingdom*, 7525/76, 45 Eur. Ct. H.R. 20 (1981).

153. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

154. *Lawrence v. Texas*, 539 U.S. 558 (2003).

155. The dissenters in *Lawrence* were Justices Rehnquist, Scalia, and Thomas. *Id.*

156. JOUET, *supra* note 4, at 136.

157. *Obergefell v. Hodges*, 576 U.S. 644 (2015). The dissenters in *Obergefell* were Justices Alito, Roberts, Scalia, and Thomas. *Id.*

158. *Id.* at 712 (Roberts, C.J., dissenting).

159. Oral Argument at 26:35, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (No. 19–1392), [https://perma.cc/54KK-ND4G].

the virtues that characterize a mother,” John Noonan wrote.<sup>160</sup> “The values cherished—human life, childbearing, maternal fidelity—are values with religious origins, sustained by religious commitment,” he added.<sup>161</sup> Regardless of whether Noonan was right in tracing the historical roots of these norms to religion, his book offered an instructive perspective on the traditionalist social model from a distinguished legal scholar whom Ronald Reagan later appointed to the U.S. Court of Appeals for the Ninth Circuit.<sup>162</sup>

Traditionalists tend to believe that responsibility means carrying through with a pregnancy and embracing a maternal role.<sup>163</sup> This conviction is intertwined with the notion that premarital or non-procreative intercourse is sinful; and that elective abortion promotes irresponsibility by enabling people to avoid the consequences of their actions.<sup>164</sup> The traditionalist model was palpable at the oral argument in *Roe* when Jay Floyd argued on behalf of Texas that having sex means that one should accept a child created as a result: “Now I think [a woman] makes her choice prior to the time she becomes pregnant. . . . and I think pregnancy may terminate that choice.”<sup>165</sup> This conception of moral responsibility can reinforce the view that abortion is a matter of criminal responsibility.

By contrast, the modernist approach to family planning considers that responsibility can entail ending a pregnancy through abortion, especially if one is unwilling or unable to provide for the child after birth.<sup>166</sup> Echoing a perspective that has become common throughout the West, Dr. Henry Morgentaler—the most influential figure in Canadian abortion history—argued that having a child should not become a punishment for an allegedly irresponsible woman.<sup>167</sup>

The prior quotation from the counsel for Texas in *Roe* was framed secularly but resembled a theme found in religious traditionalism. Tanya Luhrmann, a leading anthropologist of religion, has described how the socio-political attitudes of devout persons can express religious aspirations for themselves and for society. “When evangelicals vote, they think about what kind of people they are trying to *become*,” Luhrmann wrote when explaining how liberal and secular-minded observers can misapprehend the role of faith in politics.<sup>168</sup> “From this perspective, the problem with government is that it steps in when people fall short, preventing them from being the people God wants

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160. JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES I* (1979).

161. *Id.* at 175.

162. See Sam Roberts, *John Noonan, Federal Judge Who Served for Three Decades, Dies at 90*, N.Y. TIMES (Apr. 21, 2017), [https://perma.cc/B9GB-9DKD].

163. See JOUET, *supra* note 4, at 125–27.

164. See *id.* at 127; CAHN & CARBONE *supra* note 117, at 92–93, 128, 170.

165. Oral Argument (Dec. 13, 1971) at 41:54, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70–18), [https://perma.cc/CF2K-HC4H].

166. See CAHN & CARBONE *supra* note 117, at 92, 128, 170; JOUET, *supra* note 4, at 127.

167. Interview with Henry Morgentaler, in AVORTEMENT. OUI ET NON. 9, 40–41 (Michel Buruiana ed., 1988). Regarding Morgentaler, see also *supra* note 142 and accompanying text.

168. T. M. Luhrmann, *Blinded by the Right? How Hippie Christians Begat Evangelical Conservatives*, HARPERS (Apr. 2013), [https://perma.cc/24A3-75S8] (emphasis in original).

them to be,” Luhrmann underlines.<sup>169</sup> In other words, religious traditionalists can operate on a separate plane. In their worldview, the crux of the issue is not fundamentally the pros and cons of abortion as a public policy, health-care matter or medical procedure. Similarly, the documented ineffectiveness of abstinence-only sexual education is less relevant than its virtue.<sup>170</sup> This approach may be analogized to legal theories of expressivism, which describe how a primary consideration for legislation can be defending or denouncing social behavior.<sup>171</sup>

The recriminalization of abortion might thus be understood as a message or symbol, irrespective of the actual number of prosecutions. Criminalization might not substantially decrease abortions, given the relatively high abortion rates in periods of U.S. history when the procedure was unlawful or in contemporary countries with punitive laws.<sup>172</sup> In modern America, criminal bans might also prove hard to enforce for other reasons, such as the fact that medication-based abortions might be accessible even in states that forbid them.<sup>173</sup> We saw earlier that the number of abortions nationwide in fact rose following *Dobbs*.<sup>174</sup> While punitiveness might have a limited impact on the incidence of abortion, it risks especially affecting underprivileged minorities targeted for surveillance and incarceration.<sup>175</sup> Criminalization has already had a wider effect on society by subjecting pregnancy to surveillance and creating a climate of suspicion.<sup>176</sup> This has dissuaded medical care by doctors who fear prosecution, even for treating non-viable pregnancies in cases that the public does not usually think of as “abortions.”<sup>177</sup> But the laws that have led to this situation should not be assessed by conventional standards of public health, as they operate on a separate plane in focusing on achieving religious virtue.

The clash between modernist and traditionalist worldviews has been a recurrent feature of the U.S. political debate in the last half century. The partisan divide on these matters was less pronounced in the 1970s that saw the election of Jimmy Carter, a liberal evangelical ambivalent about abortion rights.<sup>178</sup> Over time “Democrats came largely to support feminist positions, while the Republicans increasingly opposed women’s rights, on issues such as [the Equal Rights Amendment], abortion, child care funding, and more,” the political scientists Marc Hetherington and Jonathan Weiler describe.<sup>179</sup> In

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169. *Id.*

170. MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* 135–36 (2006).

171. *See generally* RICHARD McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015).

172. *See generally* Ziegler, *The Punishment Prerogative*, *supra* note 54, at 239–40.

173. *Id.* at 240; Michelle Oberman, *What Will and Won’t Happen When Abortion Is Banned*, 9 *J. L. & BIOSCIENCES* 1, 6–7 (2022).

174. *See supra* note 53 and accompanying text.

175. *See generally* Ziegler, *The Punishment Prerogative*, *supra* note 54, at 239–40.

176. *See supra* note 54 and accompanying paragraph.

177. *Id.*

178. ZIEGLER, *DOLLARS FOR LIFE*, *supra* note 60, at 35.

179. MARC J. HETHERINGTON & JONATHAN D. WEILER, *AUTHORITARIANISM & POLARIZATION IN AMERICAN POLITICS* 79 (2009).

particular, the Moral Majority, which was a crucial part of President Reagan's base, was relatively ecumenical in welcoming conservative evangelicals, Catholics, and fellow believers sharing similar concerns.<sup>180</sup> Stephen Prothero, a scholar of religious history, analyzes this evolution as follows:

[T]he Religious Right politicized Judeo-Christianity, using it to attack not just godless Communists (as Eisenhower had done) but liberal Democrats too. And so the Judeo-Christian tradition morphed into the “Judeo-Christian ethic,” which was eventually conflated with “family values.” This new ideology helped religious conservatives gain political power, but this power came at a price since, under the gentleman's agreement struck by the Moral Majority with culturally conservative Catholics and Jews, anything specifically Protestant, Catholic or Jewish had to be checked at the door.<sup>181</sup>

These circumstances help explain why the anti-abortion movement has a profoundly religious dimension, albeit one often framed in generic terms that can be accepted by traditionalists of diverse faiths or denominations. This is a longstanding facet of the U.S. anti-abortion movement, which has sought to institutionalize its religious objections in secular legislation.<sup>182</sup> If these dynamics are absent or less significant in other Western democracies nowadays, it is because organized religion in general and Christian traditionalism in particular have greatly declined there with the advent of modernity.<sup>183</sup>

### III. A Distinctive Religious Landscape

This section explores how the United States' distinctive religious landscape has shaped its equally distinctive abortion debate. Religious traditionalism or ultra-traditionalism plays a significant role in pro-life movements throughout the world, not only in the United States.<sup>184</sup> What sets modern America apart, however, is that these social features remain far more influential there than in contemporary Western democracies, where the liberalization of abortion has gone hand-in-hand with the decline of organized religion. This is no coincidence, as religions play a central role in shaping people's world-views, moral values, and social attitudes.<sup>185</sup>

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180. STEPHEN PROTHERO, *RELIGIOUS LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW—AND DOESN'T* 52, 144 (2007) [hereinafter PROTHERO, *RELIGIOUS LITERACY*].

181. *Id.* at 144.

182. *See infra* Section V.

183. *See generally* Cornelissen, *supra* note 69; PEW, *BEING CHRISTIAN IN WESTERN EUROPE*, *supra* note 40.

184. “Throughout the world, pro-life activists have sought to advance a sexually conservative, traditional, holistic understanding of mutual human obligations that challenges the individualistic assumptions of modern liberalism and the emphasis on equality that pervades progressive or socialistic ideologies, even while drawing on a liberal human rights tradition to protect the unborn.” Daniel K. Williams, *The International Pro-Life Movement*, in *RESEARCH HANDBOOK ON INTERNATIONAL ABORTION LAW* 243, *supra* note 51, at 243.

185. JOUET, *supra* note 4, at 109.

The United States consistently stands out as one of the most religious societies in the modern Western world, if not the most religious.<sup>186</sup> While religiosity has experienced a relative decline in American society in recent decades, it remains remarkably high by comparative standards.<sup>187</sup> The United States is also the only modern Western democracy where a substantial segment of the population gravitates toward Christian fundamentalism, namely an ultra-traditionalist faith rooted in a literal interpretation of the Bible.<sup>188</sup>

TABLE 1

Percentage of adults with religious beliefs based on 2017 poll in United States and fifteen Western European countries.<sup>189</sup>

| Question   | United States | Western European Median |
|--|---------------|-------------------------|
| Believe in God as described in the Bible         | 56            | 27                      |
| Believe in other higher power or spiritual force | 33            | 38                      |
| Do not believe in any higher power               | 10            | 26                      |
| Believe God or higher power is all-knowing       | 71            | 32                      |
| Believe God or higher power is all-powerful      | 61            | 25                      |

Table 1 indicates that Americans are far likelier than Europeans to believe in both the Bible and a personal God. “Half of Americans (53%) say religion is ‘very important’ in their lives, compared with a median of just 11% of adults across Western Europe,” according to another study.<sup>190</sup> “Among Christians, the gap is even bigger—two-thirds of U.S. Christians (68%) say religion is very important to them, compared with a median of 14% of Christians in the 15 countries surveyed across Western Europe,” the report found.<sup>191</sup> “In fact, by some of these standard measures of religious commitment, [Americans without an official religious affiliation] are as religious as—or even more religious than—*Christians* in several European countries, including France, Germany and the UK.”<sup>192</sup>

Church-attending Europeans are not only a diminishing minority, they have gravitated toward moderate or liberal social attitudes.<sup>193</sup> European median data indicate that a majority of church-attending Christians, 75 percent, believe

186. See generally Jerome Karabel & Daniel Laurison, *An Exceptional Nation? American Political Values in Comparative Perspective* 16–21 (Inst. Rsch. Lab. & Emp., Working Paper No. 136–12, 2012); PEW RSCH. CTR., *THE GLOBAL GOD DIVIDE* 13, 15, 29–38 (2020); Steve Crabtree, *Religiosity Highest in World’s Poorest Nations*, GALLUP (Aug. 31, 2010), [<https://perma.cc/U6PB-QFZP>]; PEW RSCH. CTR., *AMONG WEALTHY NATIONS U.S. STANDS ALONE IN ITS EMBRACE OF RELIGION* (2002).

187. PEW, *BEING CHRISTIAN IN WESTERN EUROPE*, *supra* note 40, at 47–48, 95–96, 98, 107, 122.

188. See generally NOLL, *supra* note 41, at 381–86.

189. PEW RSCH. CTR., *U.S. ADULTS ARE MORE RELIGIOUS THAN WESTERN EUROPEANS* (2018).

190. PEW, *BEING CHRISTIAN IN WESTERN EUROPE*, *supra* note 40, at 47.

191. *Id.*

192. *Id.* (emphasis in original).

193. *Id.* at 6, 9, 28–29, 47, 54. The comprehensive survey defined the church-attending as those going at least once a month. They constituted 22 percent of the median in a study of fifteen European countries. *Id.* at 7.

that abortion should be legal in most or all cases.<sup>194</sup> Moreover, 85 percent of non-practicing Christians and 87 percent of the religiously unaffiliated do, too.<sup>195</sup> Even in Italy, which has among the highest rates of church attendance and religiosity in Western Europe, 47 percent of church-attending Christians, 79 percent of non-practicing Christians, and 85 percent of the unaffiliated support legal abortion.<sup>196</sup> Overall, median support for the right to abortion in Western Europe is 81 percent, compared to 57 percent in America.<sup>197</sup>

TABLE 2

“God plays an important role in my life.” Survey conducted in 2019 in diverse Western countries. Percentage of response.<sup>198</sup>

| Country        | Completely Agree | Mostly agree | Mostly disagree | Completely disagree |
|----------------|------------------|--------------|-----------------|---------------------|
| United States  | 51               | 21           | 9               | 17                  |
| Canada         | 27               | 25           | 16              | 31                  |
| France         | 14               | 17           | 15              | 51                  |
| Germany        | 26               | 25           | 15              | 33                  |
| Italy          | 20               | 40           | 17              | 20                  |
| Netherlands    | 19               | 14           | 18              | 48                  |
| Spain          | 27               | 18           | 16              | 37                  |
| Sweden         | 10               | 11           | 12              | 66                  |
| United Kingdom | 22               | 18           | 15              | 44                  |
| Australia      | 19               | 19           | 22              | 39                  |

America is not merely an outlier in comparison to Europe but also next to the rest of the West, namely Canada, Australia, and New Zealand. In neighboring Canada, for example, organized religion and religious observance have markedly declined in modern times.<sup>199</sup> A survey found that “Canadian respondents are less than half as likely as their U.S. counterparts to pray daily (25% vs. 57%).”<sup>200</sup> Rates of weekly worship attendance were 36 percent in America compared to 20 percent in Canada, 17 percent in Australia, 15 percent in Spain, 12 percent in France, 10 percent in Sweden, and 8 percent in the United Kingdom.<sup>201</sup> The decline of Christian traditionalism in Canada began decades ago and appears to have accelerated since the 1990s following the hard-fought battle to decriminalize abortion. In 2001, social scientists already observed that

194. *Id.* at 29.

195. *Id.*

196. *Id.* at 7, 29.

197. *Id.* at 154.

198. PEW, THE GLOBAL GOD DIVIDE, *supra* note 186, at 32.

199. Paul Bramadat & David Seljak, *Charting the New Terrain, in* CHRISTIANITY AND ETHNICITY IN CANADA 3, 12–18 (Bramadat & Seljak eds., 2008); Cornelissen, *supra* note 69, 1, 5–8; *The Canadian Census: A Rich Portrait of the Country’s Religious and Ethnocultural Diversity*, STATS. CAN. (Oct. 26, 2022), [<https://perma.cc/3VWL-GZ37>].

200. PEW RSCH. CTR., THE AGE GAP IN RELIGION AROUND THE WORLD 65–66 (2018).

201. *Id.* at 65–68.

“culture war” issues “are much weaker in Canada than in the United States,” a lower level of intensity partly due to “differences in the Canadian religious environment.”<sup>202</sup> This is the overarching trend throughout the modern Western world, from Scandinavia<sup>203</sup> to New Zealand.<sup>204</sup> Tables 2 and 3 capture how America is an outlier.

TABLE 3

“How important is religion in your life?” Survey conducted in 2019 in diverse Western countries. Percentage of response.<sup>205</sup>

| Country        | Very important | Somewhat important | Not too important | Not at all important |
|----------------|----------------|--------------------|-------------------|----------------------|
| United States  | 47             | 23                 | 13                | 16                   |
| Canada         | 24             | 24                 | 22                | 30                   |
| France         | 11             | 22                 | 22                | 44                   |
| Germany        | 24             | 31                 | 15                | 29                   |
| Italy          | 24             | 37                 | 22                | 15                   |
| Netherlands    | 19             | 20                 | 20                | 40                   |
| Spain          | 24             | 26                 | 21                | 29                   |
| Sweden         | 7              | 15                 | 30                | 48                   |
| United Kingdom | 20             | 19                 | 21                | 39                   |
| Australia      | 18             | 19                 | 25                | 37                   |

Assessing the degree of religiosity in a society is an intricate endeavor. Some poll respondents may exaggerate their church attendance, for instance.<sup>206</sup> Self-identification with a religion is another benchmark that can distort reality by including people who do not actively practice that religion. Indeed, many Westerners nowadays identify with a religious group due to a sense of shared culture, community, and history without believing in the religion’s supernatural or metaphysical beliefs.<sup>207</sup> Poll data can also eclipse intensity or salience of a belief in a given society. Assessing religiosity should therefore conciliate both quantitative and qualitative evidence, such as the role of religion in historical, social, political, and legal events.

Tables 1 through 5 still capture the far greater degree of religiosity in America next to contemporary Western democracies. Such data shed light on the distinctive religious landscape that has continued to provide a fertile ground

202. James L. Guth & Cleveland R. Fraser, *Religion and Partisanship in Canada*, J. SCI. STUD. REL. 51, 63 (2001).

203. See PHIL ZUCKERMAN, SOCIETY WITHOUT GOD: WHAT THE LEAST RELIGIOUS NATIONS CAN TELL US ABOUT CONTENTMENT (2010) (comparing religion in America and Scandinavia).

204. *Losing Our Religion*, STATS NZ (Oct. 3, 2019, 10:45 AM), [https://perma.cc/6BPL-LTU8] (discussing “an increasing trend in the number of people reporting no religion in the last few censuses” of New Zealand).

205. PEW, THE GLOBAL GOD DIVIDE, *supra* note 186, at 32–35.

206. Philip S. Brenner, *Some Exceptional Behavior or Exceptional Identity: Overreporting of Church Attendance in the U.S.*, 75 PUB. OP. Q. 19 (2011).

207. Cornelissen, *supra* note 69, at 3; Paul Bramadat & David Seljak, *supra* note 199, at 15; PEW, BEING CHRISTIAN IN WESTERN EUROPE, *supra* note 40, at 6–14.

for the U.S. anti-abortion movement. Contrariwise, anti-abortion movements have declined or collapsed in Western societies that have grown more secular, irreligious or moderately religious.

#### IV. From Catholicism to Evangelicalism

The influential roles of Catholicism and evangelicalism in the United States' distinctive religious landscape require greater comparative analysis. These faiths have buoyed the nation's pro-life movement but their paths have not been identical, despite their relative convergence in modern times. This section therefore discusses various chapters of history, from the Vatican's theology in the nineteenth century to the part that race played in mobilizing the modern conservative evangelical movement before it gravitated toward abortion.

To begin, the Catholic Church has played an important role in fomenting opposition to abortion since at least 1869.<sup>208</sup> Pope Pius IX then proclaimed that human beings exist from the time of conception, abandoning the theological distinction between “inanimate” and “animate” embryo, which respectively could and could not be aborted.<sup>209</sup> This religious rule permitting early abortion was analogous to the one allowing abortion until quickening, which America had inherited from Britain.<sup>210</sup>

Abortion pre-quickening—the moment when a pregnant woman first detected movement in the womb—was lawful in America until the campaign to eradicate abortion in the second half of the nineteenth century.<sup>211</sup> According to Glanville Williams, an eminent British scholar, the distinction between abortion pre- and post-quickening had a distant theological origin traceable to debates in Antiquity and medieval times.<sup>212</sup> While understandings differed, an influential view was that the movement of the fetus signaled its ensoulment and therefore barred abortion.<sup>213</sup> In this view, the fetus previously was inanimate or not alive, permitting abortion until what became known as quickening.<sup>214</sup>

In 1869, Pope Pius IX's edict effectively sought to resolve this theological debate by adopting the doctrine that an abortion is a homicide or, if it occurs

208. See THOMAS J. CARR, *THE CONSTITUTION “APOSTOLICÆ SEDIS MODERATIONI” EXPLAINED – FIRST PART* 11 (1870).

209. *Id.*; JOHN CHRISTOPOULOS, *ABORTION IN EARLY MODERN ITALY* 256 (2021); JOHN R. CONNERY, *ABORTION, THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* 307 (1977); GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 197 (1957). See also SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* 19–20 (2011); KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 13, 59 (1984).

210. LUKER, *supra* note 209, at 13–14.

211. See *id.*, ch. 2.

212. WILLIAMS, *supra* note 209, at 148–52, 193–200.

213. *Id.*

214. *Id.* Historians have similarly described how “medieval writers saw [the] moment of ‘animation,’ ‘ensoulment,’ or ‘quickening’ as a key stage in the development of pregnancy.” Sara McDougall, Mireille Pardon & Karl Shoemaker, “*Abortion Was a Crime*”? *Three Medievalists Respond to “English Cases Dating All the Way Back to the 13th Century Corroborate the Treatises’ Statements That Abortion Was a Crime.”*, *L. & HIST. REV.* (June 14, 2022), [<https://perma.cc/V5LL-Q2ST>].

before ensoulment, an anticipated homicide.<sup>215</sup> From then on, the Catholic Church firmly condemned abortion at all stages of pregnancy, generally taking more intransigent stances than Protestant churches on questions like therapeutic abortions to protect a mother's life.<sup>216</sup>

How can one explain why Catholic teachings on abortion now carry far more weight in America than in European countries with longstanding Catholic traditions, such as Italy, France, and Germany? A plausible reason is that as organized religion markedly declined in Europe in the second half of the twentieth century, the Catholic Church's influence became comparatively stronger in the United States. A traditionalist approach to Catholicism thus found a receptive audience in American society when pressing against the liberalization of abortion.

TABLE 4

“Would you describe yourself as a ‘born-again’ or evangelical Christian?”  
Percentage of response.<sup>217</sup>

| Year | Yes | No  | No opinion |
|------|-----|-----|------------|
| 2022 | 32  | 66  | 2          |
| 2021 | 36  | 62  | 2          |
| 2020 | 34  | 64  | 2          |
| 2019 | 37  | 60  | 2          |
| 2018 | 36  | 59  | 5          |
| 2017 | 42  | 54  | 4          |
| 2016 | 41  | 53  | 6          |
| 2015 | 38  | 56  | 6          |
| 2014 | 44  | 50  | 6          |
| 2013 | 41  | 53  | 6          |
| 2012 | 41  | 54  | 5          |
| 2011 | 42  | 53  | 5          |
| 2010 | 42  | 53  | 4          |
| 2009 | n/a | n/a | n/a        |
| 2008 | 40  | 55  | 6          |
| 2007 | 41  | 54  | 5          |
| 2006 | 43  | 52  | 5          |
| 2005 | 41  | 53  | 6          |
| 2004 | 41  | 54  | 5          |
| 2003 | 42  | 54  | 4          |
| 2002 | 46  | 49  | 5          |
| 2001 | 44  | 49  | 7          |
| 2000 | 45  | 49  | 6          |

215. WILLIAMS, *supra* note 209, at 197.

216. *Id.* at 192–206.

217. *Religion*, GALLUP [<https://perma.cc/f4jy-3nen>] (last visited May 12, 2024).

| Year | Yes | No | No opinion |
|------|-----|----|------------|
| 1999 | 46  | 47 | 7          |
| 1998 | 47  | 46 | 7          |
| 1997 | 44  | 49 | 7          |
| 1996 | 39  | 54 | 7          |
| 1995 | 41  | 53 | 6          |
| 1994 | 36  | 59 | 5          |
| 1993 | 42  | 54 | 4          |
| 1992 | 36  | 59 | 5          |

American evangelicalism has gravitated toward the same theological position as Catholicism in holding that human beings exist from the time of conception. If scholars find that the Catholic Church spearheaded the anti-abortion movement in twentieth-century America,<sup>218</sup> the modern movement became predominantly evangelical. Illustratively, the Southern Baptist Convention was jubilant after *Roe* was overturned, vowing to press on toward a nationwide abortion ban.<sup>219</sup>

Nowadays, white evangelicals are “far more likely than U.S. adults who identify with other religious groups to say that life begins at conception and that the fetus is thus a person with rights,” as a survey concluded.<sup>220</sup> A full 72 percent of white evangelicals felt that this idea reflected their convictions “extremely well” or “very well,” compared to 44 percent of Catholics and 32 percent of white non-evangelical Protestants.<sup>221</sup> In addition, 73 percent of white evangelicals said that religion is “extremely” or “very” important in shaping their views on abortion, compared to 41 percent of Catholics and 32 percent of white non-evangelical Protestants.<sup>222</sup> But the religious or personal conviction that a human being exists from conception is not dispositive. A third of U.S. adults say that “both the statement ‘the decision about whether to have an abortion should belong solely to the pregnant woman’ and the statement ‘human life begins at conception, so the fetus is a person with rights’ reflect their own views at least somewhat well.”<sup>223</sup> Such findings echo this Article’s thesis, namely that a key question is *intensity* of belief. Ambivalence or reservations toward abortion are not exceptional to America. Rather, the United States stands out among modern Western democracies in having a substantial proportion of citizens with traditionalist or ultra-traditionalist convictions. Even though these citizens constitute a minority of the population,

218. See generally DUBOW, *supra* note 209, at 19–20; LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 153, 200, 207–09, 216 (1992); ZIEGLER, *AFTER ROE*, *supra* note 61, at 34, 177.

219. Brandon Porter, *SBC Leaders React to Historic Decision Overturning Roe v. Wade*, BAPTIST PRESS (June 24, 2022), [https://perma.cc/95S9-T6XM].

220. PEW RSCH. CTR., *AMERICA’S ABORTION QUANDARY* 22 (2022) (poll conducted before *Dobbs*).

221. *Id.* at 60.

222. *Id.* at 68.

223. *Id.* at 61 (emphasis in original).

we will see that they have outsized influence over U.S. government due to other dimensions of American exceptionalism.<sup>224</sup>

While evangelicalism encompasses a host of denominations lacking the Catholic hierarchy or central organization, opposition to abortion became a defining feature of the U.S. evangelical movement in the aftermath of *Roe*.<sup>225</sup> This was a consequential development given that evangelicals have been a sizable demographic group for generations. A third of modern-day Americans identify as evangelical or born-again Christians, as Table 4 indicates. To be sure, the definition of evangelicalism is an area of scholarly debate, just like demographic estimates, as some born-again are not evangelicals.<sup>226</sup> Regardless, America is undoubtedly an outlier in this area. Evangelicalism is either practically absent or far less influential in contemporary Western societies.

In Canada, evangelicals constitute approximately 10–12 percent of the population.<sup>227</sup> Many scholars have concluded that evangelicalism has been less prevalent and more moderate in Canada than in America from the late eighteenth century to modernity. “Although American religious culture strongly felt the impress of evangelicalism in the years between 1780 and 1840, which spawned a welter of new Protestant sects and religious movements, its effect on Canadian Protestantism was more temperate and diffuse.”<sup>228</sup> For instance, “Methodism continued to grow vigorously in Upper Canada [i.e., future Ontario] through the middle of the nineteenth century, but after 1815 it . . . failed to supplant the churches centered in elite leadership the way it had in the United States.”<sup>229</sup> Nowadays, evangelicalism is considerably more powerful in American society:

Evangelical Protestants in Canada do not make up nearly as large a proportion of the population as in the United States, are not as concentrated in one geographical region (as, for example, evangelicals [are] in the American South), and therefore do not have the potential for exercising the same degree of influence. In addition, a much larger proportion of American evangelicals is both socially conservative as well as fiscally conservative.<sup>230</sup>

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224. See *infra* Sections VI, VII.

225. See *infra* note 280 and accompanying paragraphs.

226. See generally GEORGE M. MARSDEN, UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM 1–6 (1991); Conrad Hackett & Michael Lindsay, *Measuring Evangelicalism: Consequences of Different Operationalization Strategies*, 47 J. SCI. STUD. REL. 449 (2008).

227. LYDIA BEAN, THE POLITICS OF EVANGELICAL IDENTITY: LOCAL CHURCHES AND PARTISAN DIVIDES IN THE UNITED STATES AND CANADA 11 (2014).

228. NANCY CHRISTIE & MICHAEL GAVREAU, CHRISTIAN CHURCHES AND THEIR PEOPLES, 1840–1965: A SOCIAL HISTORY OF RELIGION IN CANADA 37 (2010).

229. The authors define Methodism in this epoch as “an egalitarian, emotional form of Christianity preached in the language of the ordinary people.” James C. Deming & Michael S. Hamilton, *Methodist Revivalism in France, Canada, and the United States*, in AMAZING GRACE: EVANGELICALISM IN AUSTRALIA, BRITAIN, CANADA, AND THE UNITED STATES 124, 133–34 (George A. Rawlyk & Mark A. Noll eds., 1994).

230. Bruce L. Guenther, *Ethnicity and Evangelical Protestants in Canada*, in CHRISTIANITY AND ETHNICITY IN CANADA 365, *supra* note 199, at 396.

From the 1970s onward, Canadian evangelicalism struggled to mobilize voters on abortion, sexuality, and gay rights, especially compared to the political success of the U.S. evangelical movement.<sup>231</sup> Canadian evangelical leaders also took more accommodating stances and were wary of being associated with radical American evangelicals in the public eye.<sup>232</sup> Evangelicals still remain among Canada's most devout groups and their ranks include several prominent politicians, including former Prime Minister Stephen Harper of the Conservative Party.<sup>233</sup> But the fact that Harper declined to reopen the debate on abortion during his nine years in office, from 2006 to 2015, epitomizes how both evangelicalism and Canadian politics have diverged from America.<sup>234</sup>

Modern America further stands out as the only Western democracy with a substantial proportion of citizens who gravitate toward Christian fundamentalism—a conception of faith rooted in ultra-traditionalist convictions and a literal interpretation of scripture. The term “fundamentalist” should not be equated with “evangelical,” as evangelicalism has non-fundamentalist currents, including moderate or liberal ones. Still, a substantial proportion of American evangelicals have historically gravitated toward Christian fundamentalism, alongside members of various other denominations. The term “fundamentalist” stems from *The Fundamentals: A Testimony to Truth*, a set of booklets published between 1910 and 1915 by leading evangelicals.<sup>235</sup> The booklets defended the “fundamentals” of Christianity against modern social mores and theological understandings, such as by reaffirming the literal truth of the Bible on Genesis, the virgin birth, and the Second Coming of Christ.<sup>236</sup>

Unlike in other Western democracies, Christian fundamentalism became embedded in much of American society, especially the South.<sup>237</sup> In particular, “fundamentalism played quite a small part in Canadian evangelicalism, as it did in Britain, versus the importance of that impulse in American Christianity.”<sup>238</sup> In fact, the movement to *liberalize* abortion in Canada was partly spearheaded in the 1960s by the United Church of Canada, an evangelical denomination.<sup>239</sup> The evolution of the United Church of Canada reflects the wider schism in the evolution of Protestantism that also occurred in America, where mainline Protestants similarly played a role in defending the liberalization of abortion.<sup>240</sup>

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231. BEAN, *supra* note 227, at 25–26.

232. *Id.*; CHRISTIE & GAVREAU, *supra* note 228, at 193–94; JOHN G. STACKHOUSE, JR., CANADIAN EVANGELICALISM IN THE TWENTIETH CENTURY 198–99 (1993).

233. Guenther, *supra* note 230, at 376.

234. *See supra* note 71 and accompanying text.

235. NOLL, *supra* note 41, at 381–86.

236. *Id.*

237. *See* STACKHOUSE, *supra* note 232, at 198–99.

238. *Id.* at 198.

239. KEVIN N. FLATT, AFTER EVANGELICALISM: THE SIXTIES AND THE UNITED CHURCH OF CANADA 18, 202 (2013). “While the United Church [of Canada] leaders never openly repudiated evangelistic practices, they quietly set about abandoning the church’s evangelical tenets [in the 1950s onward].” CHRISTIE & GAVREAU, *supra* note 228, at 193.

240. *See, e.g.*, KORNBLOH, *supra* note 44, ch. 3 (recounting how, before New York mostly decriminalized abortion in 1970, mainline Protestant clergy organized a referral

This divide *within* Christianity deserves closer attention. By the twentieth century, Protestant churches in North America were divided between modernist and traditionalist currents. Modernists argued that Christianity should evolve with the times, such as by accepting modern science, adopting more tolerant social attitudes, and being less condemnatory. Traditionalists instead viewed modern social mores and beliefs as a threat to Christianity. In practice this often meant defending a literal interpretation of the Bible, rejecting the theory of evolution, embracing a patriarchal conception of the family, and refusing to accept social practices perceived as morally decadent. In a nutshell, evangelical Protestant churches mostly gravitated toward the traditionalist worldview, whereas mainline Protestant churches gravitated toward the modernist one.<sup>241</sup>

TABLE 5

“Which of the following statements comes closest to your views on the origin and development of human beings: human beings have developed over millions of years from less advanced forms of life, but God guided this process; human beings have developed over millions of years from less advanced forms of life, but God had no part in this process; or God created human beings pretty much in their present form at one time within the last 10,000 years or so?” Percentage of response.<sup>242</sup>

| Year | God created humans in present form in last 10,000 years or so | Humans evolved, with God guiding | Humans evolved but God had no part | No opinion |
|------|---|----------------------------------|------------------------------------|------------|
| 2024 | 37  | 34                               | 24                                 | 5          |
| 2019 | 40  | 33                               | 22                                 | 5          |
| 2017 | 38  | 38                               | 19                                 | 5          |
| 2014 | 42  | 31                               | 19                                 | 8          |
| 2012 | 46  | 32                               | 15                                 | 7          |
| 2010 | 40  | 38                               | 16                                 | 6          |
| 2008 | 44  | 36                               | 14                                 | 5          |
| 2007 | 43  | 38                               | 14                                 | 4          |
| 2006 | 46  | 36                               | 13                                 | 5          |
| 2004 | 45  | 38                               | 13                                 | 4          |
| 2001 | 45  | 37                               | 12                                 | 5          |
| 1999 | 47  | 40                               | 9                                  | 4          |
| 1997 | 44  | 39                               | 10                                 | 7          |
| 1993 | 47  | 35                               | 11                                 | 7          |
| 1982 | 44  | 38                               | 9                                  | 9          |

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service to assist women in obtaining abortion, inspiring similar clergy initiatives in other states).

241. See generally FLATT, *supra* note 239, *passim*; MARSDEN, *supra* note 226, at 32–39, 135–52; NOLL, *supra* note 41, at 381–86, 430; STACKHOUSE, *supra* note 232, at 11.

242. *Evolution, Creationism, Intelligent Design*, GALLUP, [https://perma.cc/T8VJ-2XUD] (last visited June 4, 2025).

A benchmark of Christian fundamentalism is the proportion of people who interpret the Bible literally and reject the theory of evolution in favor of creationism. Table 5 shows that, as of 2024, 37 percent of Americans believed that God created humans in their present form within the last 10,000 years. That figure has remained high for the past four decades, ranging between 37 and 47 percent.<sup>243</sup> Alongside the social debate over teaching evolution or creationism,<sup>244</sup> these data can gauge religious traditionalism in American society, thereby offering context that one may miss by considering solely polls on abortion.

Creationism is either a fringe belief or a much less popular one in other Western democracies.<sup>245</sup> Insofar as it exists there too, it partly reflects the proselytization of American evangelical movements that have sought to promote creationist beliefs in various other nations, albeit with limited success.<sup>246</sup> Contemporary Western societies have largely rejected fundamentalist or radical conceptions of Christianity. In addition to becoming more secular and irreligious, these societies have gravitated toward modernist conceptions of Christianity that are substantively moderate.

TABLE 6

Percentage of U.S. adults who believe that abortion should be legal or illegal in all or most cases.<sup>247</sup>

| Demographic Group                  | Abortion Should Be Mostly Legal | Abortion Should Be Mostly Illegal |
|------------------------------------|---------------------------------|-----------------------------------|
| White Evangelical                  | 25                              | 73                                |
| White Protestant (non-evangelical) | 64                              | 33                                |
| Black Protestant                   | 71                              | 26                                |
| Catholic                           | 59                              | 40                                |
| Religiously Unaffiliated           | 86                              | 13                                |
| White                              | 60                              | 38                                |
| Black                              | 73                              | 24                                |
| Hispanic                           | 59                              | 38                                |
| Asian                              | 76                              | 24                                |
| Men                                | 61                              | 38                                |
| Women                              | 64                              | 33                                |
| Democrat / Lean Democrat           | 85                              | 14                                |
| Republican / Lean Republican       | 41                              | 57                                |
| Total U.S. Population              | 63                              | 36                                |

243. Another survey found that a smaller proportion of Americans, 18 percent, believed that human beings were created in their present form. David Masci, *For Darwin Day, 6 Facts About the Evolution Debate*, PEW RSCH. CTR. (Feb. 11, 2019), [<https://perma.cc/L6SJ-ZHHJ>].

244. See JOUET, *supra* note 4, at 92–94.

245. *Id.*

246. *Id.* at 93.

247. PEW RSCH. CTR., BROAD PUBLIC SUPPORT FOR ABORTION PERSISTS 2 YEARS AFTER DOBBS 8 (2024).

How evangelicals came to focus on abortion nonetheless deserves more attention, as the Catholic Church preceded evangelical churches in building the U.S. pro-life movement and denouncing *Roe*.<sup>248</sup> Abortion was not a major source of agitation among evangelicals before the late 1970s or early 1980s, until several years after *Roe*.<sup>249</sup> An early history of evangelical aspirations to build “a Christian America,” published in 1984, made only a passing reference to abortion.<sup>250</sup> This is a relevant historical question because, as Table 6 shows, all major religious and demographic groups in America now tend to support the right to abortion—except for white evangelicals and Republicans.

The nature of evangelicalism, as with presumably all faiths, has varied over time. Evangelicalism has a long history in the United States, emerging in the early eighteenth century during a period known as the Great Awakening, well before national independence.<sup>251</sup> Closer to our age, the advent of modernity would eventually lead evangelicals to organize against the teaching of evolution. Diverse scholars describe how the political influence of evangelicalism and its fundamentalist current declined after the Scopes “Monkey” Trial of 1925, which led to a Tennessee school teacher’s conviction for teaching the theory of evolution.<sup>252</sup> These events discredited evangelicals as backward-minded in the eyes of many Americans, undermining their capacity to organize as a political movement. “Soon it looked to be the last hurrah for fundamentalism,” the historian George Marsden recounts.<sup>253</sup> In reality, “fundamentalism was not disappearing but realigning,” continuing to “evangelize and build up local churches. . . . It was not until decades later, when fundamentalists and their evangelical heirs reemerged in American life, that many observers noticed this growth or took it seriously.”<sup>254</sup> This account should be nuanced by noting the activities of evangelicals in the interim, from the foundation of the National Association of Evangelicals in 1942 to Reverend Billy Graham’s rise as a national figure in the 1950s.<sup>255</sup> The evangelical movement would grow increasingly powerful as a national force from the 1970s onward.<sup>256</sup>

According to Randall Balmer, a scholar of evangelicalism, the issue that would help mobilize the evangelical movement in the 1970s was not abortion

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248. See generally DUBOW, *supra* note 209, at 19–20; EPSTEIN & KOBYLKA, *supra* note 218, at 153, 200, 207–09, 216; STONE, *supra* note 105, at 395–96; ZIEGLER, AFTER ROE, *supra* note 61, at 34, 177.

249. BALMER, *supra* note 47, ch. 5–7; STEPHEN PROTHERO, WHY LIBERALS WIN THE CULTURE WARS (EVEN WHEN THEY LOSE ELECTIONS) 193 (2016) [hereinafter PROTHERO, CULTURE WARS]; ANDREW L. WHITEHEAD & SAMUEL L. PERRY, TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES 73 (2020).

250. ROBERT T. HANDY, A CHRISTIAN AMERICA: PROTESTANT HOPES AND HISTORICAL REALITIES 205 (2d ed. 1984).

251. See generally NOLL, *supra* note 41, ch. 4.

252. See generally *id.* at 186–87; BALMER, *supra* note 47, at 16–19; HANDY, *supra* note 250, at 176; MARSDEN, *supra* note 226, at 60–61.

253. MARSDEN, *supra* note 226, at 61.

254. *Id.*

255. *Id.* at 69–70; PROTHERO, CULTURE WARS, *supra* note 249, at 186–87.

256. MARSDEN, *supra* note 226, at 76–77; NOLL, *supra* note 41, at 445–46; PROTHERO, CULTURE WARS, *supra* note 249, at 188–202.

but opposition to racial integration, especially in the South.<sup>257</sup> In the aftermath of *Brown v. Board Education*,<sup>258</sup> whites flocked to private Christian schools that accepted no Black students.<sup>259</sup> The Carter administration stepped up efforts to strip these “segregation academies” of their tax-exempt status.<sup>260</sup> These events led to a profound backlash that Balmer identifies as the genesis of the Religious Right. For instance, Reverend Jerry Falwell, the figure most associated with the Moral Majority, did not begin focusing on abortion until the late 1970s and was previously active in resisting racial integration at Lynchburg Christian Academy, which he founded in 1967.<sup>261</sup> Ed Dobson, another leader of the Moral Majority, observed that “[t]he Religious New Right did not start because of a concern about abortion,” instead tracing its rise to an alleged assault on religious freedom by reforms targeting Christian schools.<sup>262</sup> Balmer has thus suggested that the modern evangelical movement was constituted in hostility to racial desegregation and from then on was in a position to tackle abortion and other issues.<sup>263</sup>

While abortion does not appear to have become a central issue to the evangelical movement until several years after *Roe*, that does not mean that evangelicals were resolutely pro-choice beforehand. In the early 1970s, for example, delegates to the Southern Baptist Convention passed resolutions calling for legal abortion under certain circumstances.<sup>264</sup> The resolutions revealed ambivalence. In particular, the 1971 declaration accepted abortion in tragic circumstances, such as rape. It also went further in using language that could be construed as allowing elective abortion to support the “emotional, mental, and physical health of the mother.”<sup>265</sup> But it called for this language to be interpreted narrowly. Despite its nuanced tone, the resolution showed reticence toward a right to abortion:

WHEREAS, Christians in the American society today are faced with difficult decisions about abortion; and

WHEREAS, Some advocate that there be no abortion legislation, thus making the decision a purely private matter between a woman and her doctor; and

WHEREAS, Others advocate no legal abortion, or would permit abortion only if the life of the mother is threatened;

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257. BALMER, *supra* note 47, *passim*.

258. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

259. BALMER, *supra* note 47, at 38–39.

260. *Id.* at 38–49.

261. *Id.* at 42, 72–73.

262. *Id.* at 45–46.

263. Stephen Prothero notably reached the same conclusion. See PROTHERO, *CULTURE WARS*, *supra* note 249, at 185–94. While making this point too, Daniel Rodgers identified the backlash to Supreme Court decisions barring prayer in public schools as another root cause of the modern evangelical movement’s focus on constitutionalism. DANIEL T. RODGERS, *AS A CITY ON A HILL: THE STORY OF AMERICA’S MOST FAMOUS LAY SERMON* 273–74 (2018).

264. BALMER, *supra* note 47, at 33–34.

265. ANNUAL OF THE SOUTHERN BAPTIST CONVENTION 72 (1971).

Therefore, be it *Resolved*, that this Convention express the belief that society has a responsibility to affirm through the laws of the state a high view of the sanctity of human life, including fetal life, in order to protect those who cannot protect themselves; and

Be it further *Resolved*, That we call upon Southern Baptists to work for legislation that will allow the possibility of abortion under such conditions as rape, incest, clear evidence of fetal deformity, and carefully ascertained evidence of the likelihood of damage to the emotional, mental, and physical health of the mother.<sup>266</sup>

Still, *Roe* was not the object of a resolution at the 1973 meeting of the Southern Baptist Convention, which occurred a few months after the Justices' decision.<sup>267</sup> Its 407-page report actually reflects no discussion of abortion. In 1974, the Convention reaffirmed its 1971 resolution, praising it for taking "a middle ground between the extreme of abortion on demand, and the opposite extreme of all abortion as murder."<sup>268</sup> A motion to oppose abortion in all cases was equally defeated.<sup>269</sup> At the 1975 meeting, however, a committee expressed "concern for the widespread and irresponsible use of abortion."<sup>270</sup> Tolerance of abortion was increasingly unacceptable by 1976, when a new resolution denounced "abortion for selfish non-therapeutic reasons" and stressed that abortion "for whatever reason" ends "the life of an innocent human being."<sup>271</sup> Although that resolution also "reject[ed] any indiscriminate attitude toward abortion, as contrary to the biblical view" and spoke to "the limited role of government in dealing with matters relating to abortion," the language leaned heavily against *Roe*.<sup>272</sup> Consider the resolution's conclusion: "[W]e reject, as contrary to Southern Baptist doctrine and tradition, any suggestion that Southern Baptists should become political activists in support of permissive legislation."<sup>273</sup>

Within a month of *Roe*, *Christianity Today* had published an editorial excoriating the Supreme Court for embracing "pagan" values and dishonoring God.<sup>274</sup> The prominent evangelical magazine further blamed Chief Justice Warren Burger, a Nixon appointee, for "fatuously" concurring with the majority and disregarding fetal life.<sup>275</sup> A subsequent feature article acknowledged different theological perspectives, but sought to dispel the notion that scripture allows abortion.<sup>276</sup> At the same time, diverse evangelicals expressed tolerance for the right to abortion in the run-up to *Roe* and in its wake.<sup>277</sup>

266. *Id.*

267. ANNUAL OF THE SOUTHERN BAPTIST CONVENTION (1973).

268. ANNUAL OF THE SOUTHERN BAPTIST CONVENTION 76 (1974).

269. *Id.*

270. ANNUAL OF THE SOUTHERN BAPTIST CONVENTION 80 (1975).

271. ANNUAL OF THE SOUTHERN BAPTIST CONVENTION 57 (1976).

272. *Id.* at 58.

273. *Id.* at 56.

274. *Abortion and the Court*, CHRISTIANITY TODAY, Feb. 16, 1973, at 32.

275. *Id.*

276. Jack W. Cottrell, *Abortion and the Mosaic Law*, CHRISTIANITY TODAY, Mar. 16, 1973, at 6.

277. BALMER, *supra* note 47, ch. 5–7. See also RANDALL BALMER, THY KINGDOM COME: HOW

Tolerance or ambivalence on abortion would eventually diminish among evangelicals as the pro-life movement gained importance in the 1980s onward. The Southern Baptist Convention's moderate 1971 resolution was a far cry from its 2021 resolution: "Since 1973 more than 60 million unborn children have had their lives tragically ended through the evil genocide of abortion as a result of the Supreme Court's morally repugnant and unconstitutional ruling in *Roe v. Wade*."<sup>278</sup>

Insofar as evangelicals considered abortion a largely "Catholic issue" when *Roe* was decided,<sup>279</sup> conservative Catholics and evangelicals later found common ground in opposing abortion.<sup>280</sup> The rise of the Religious Right in the 1980s would transcend the historical divide, if not conflict, between Catholics and Protestants that had shaped much of American religious history.<sup>281</sup> Mounting opposition to abortion among evangelicals hearkened back to the divide between traditionalist and modernist conceptions of faith, deepening the split between evangelical and mainline Protestant churches.<sup>282</sup>

The historical interrelationship between religious and political movements in modern American conservatism leads us toward the vast scholarship treating abortion as a "wedge issue."<sup>283</sup> From this point of view, the Republican Party has used abortion to rally voters and win elections since the 1980s, just as it has used race and hostility to civil rights. Yet analyzing abortion solely as a "wedge issue" may suggest that calls to ban abortion do not reflect sincere religious beliefs but only a political strategy. If abortion did not become a central concern to the evangelical movement until several years after *Roe*, from then on it undoubtedly was a matter of genuine belief for many evangelicals that human beings exist from the time of conception.<sup>284</sup>

And inasmuch as banning abortion might be a "wedge issue," we should consider why it has hardly been one in other modern Western societies. Any "wedge issue" probably requires a receptive, critical mass of voters—not necessarily a majority but at least a sizable minority. The United States' distinctive religious environment sheds light on why an anti-abortion platform was able to gain and retain traction. A study published in 1981 illustratively recounts how

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THE RELIGIOUS RIGHT DISTORTS THE FAITH AND THREATENS AMERICA, AN EVANGELICAL'S LAMENT 63–64 (2006) (describing how the Southern Baptist Convention grew increasingly hardline in the late 1970s).

278. ANNUAL OF THE SOUTHERN BAPTIST CONVENTION 71 (2021).

279. BALMER, *supra* note 47, at xiv, 32.

280. See PROTHERO, RELIGIOUS LITERACY, *supra* note 180, at 144.

281. *Id.*

282. See *supra* note 241 and accompanying text.

283. See, e.g., WHITEHEAD & PERRY, *supra* note 249, at 73 (arguing that "for the last four decades abortion has been a wedge issue"). See also generally Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 953 (2016); Linda Greenhouse, "Justice on the Brink" and the Rule of Law, 47 U. DAYTON L. REV. 1, 9 (2022); Jennifer S. Hendricks, *Abortion Rights in the Supreme Court: A Tale of Three Wedges*, 13 CONLAWNOW 1 (2021); Ira C. Lupu, *Threading Between the Religion Clauses*, 63 L. & CONTEMP. PROBS. 439, 451 (2000).

284. See *supra* note 220 and accompanying text.

in this period a network of predominantly evangelical groups was mobilizing voters with a direct mail campaign focused on abortion, homosexuality, and traditional values.<sup>285</sup> To assess which candidates and elected officials were responsive, “moral report cards” were distributed by mail or to churchgoers.<sup>286</sup> Some politicians similarly used direct mail to rally voters and donors concerned about moral decay.<sup>287</sup> These “politics of moralism” were buoyed by Biblical literalism, an absolutist conviction that certain moral questions admit only one answer, and the notion that the morality of a politician or voter can be readily judged by their position on issues like abortion.<sup>288</sup>

None of this means that the clash over religion or abortion in modern America is simply one between believers and nonbelievers. Although a growing proportion of Americans are irreligious or nonobservant, atheists and agnostics remain a limited segment of society compared to other Western countries.<sup>289</sup> A significant segment of pro-choice Americans are actually people of faith. Table 6 demonstrates that white evangelicals are the only major religious group convinced that abortion should be illegal in all or most cases. Recall that white evangelicals are now far likelier than Catholics to insist that life begins at conception and that a fetus is a person with rights.<sup>290</sup> Most U.S. Catholics no longer adhere to the Vatican’s teachings on the matter,<sup>291</sup> reflecting a divide within Catholicism that is itself part of a wider divide. Historically, America’s religious conflicts have largely reflected divides *among* people of faith, especially between modernist and traditionalist Christians.<sup>292</sup>

The divide among people of faith was reflected in the *amicus* briefs filed in *Roe*, which not only comprised groups aligned with the Religious Right, but also religious groups with moderate or liberal views. One brief, which claimed that it would be an unconstitutional establishment of religion to restrict abortion based on “[t]he religious view that the product of every conception is sacred,” was signed by the American Ethical Union, American Friends Service Committee (Quakers), American Humanist Association, American Jewish Congress, Episcopal Diocese of New York, New York State Council of Churches, Union of American Hebrew Congregations, Unitarian Universalist

285. ERLING JORSTAD, *THE POLITICS OF MORALISM: THE NEW CHRISTIAN RIGHT IN AMERICAN LIFE* 72 (1981).

286. *Id.* at 82–86.

287. *Id.* at 72.

288. *Id.* at 5, 9–10, 13, 83. The historian of religion Daniel Williams has further suggested that “[g]ender alone . . . does not explain the continued saliency of the pro-life movement, but religion might . . . . For that reason, the pro-life movement’s greatest moments of conflict occur in countries with a sizeable traditional religious minority with enough political influence to believe they have a chance of stopping a secular, culturally liberal majority.” Williams, *supra* note 184, at 262.

289. See PEW, *THE RELIGIOUSLY UNAFFILIATED*, *supra* note 43.

290. See *supra* note 220 and accompanying text.

291. Compare Table 6 with U.S. CONF. CATH. BISHOPS (USCCB), *Statement of USCCB President and Bishop Chairmen in Advance of Supreme Court’s Ruling in Dobbs v. Jackson Women’s Health Organization* (Mar. 21, 2022), [https://perma.cc/BM7F-2L4B].

292. JOUET, *supra* note 4, at 8, 80–81.

Association, United Church of Christ, and United Methodist Church.<sup>293</sup> In a subsequent case, an analogous *amicus* brief was signed by Catholic Women for Reproductive Rights, Catholics for a Free Choice, the Episcopal Women's Caucus, and the National Coalition of American Nuns.<sup>294</sup> Similarly, in *Dobbs*, over fifty religious groups filed an *amicus* brief taking a pro-choice position.<sup>295</sup>

America's "culture wars" are not solely the fruit of a longstanding traditionalist movement, but also of a modernist one. Liberal regions of the United States historically were among the pioneers in recognizing gay rights and women's rights within the Western world. America has simultaneously stood out among modern Western societies in retaining geographic areas where an anti-modernist conception of Christianity plays a dominant role, thereby fueling conflict between oft-irreconcilable worldviews.<sup>296</sup>

Without the benefit of this history certain events may seem mystifying. Reverend Rob Schenck organized a stealth campaign to influence the Supreme Court from 2000 to 2018.<sup>297</sup> The strategy entailed pairing Justices and their spouses with like-minded couples who were wealthy donors to Faith and Action, the group Schenck founded.<sup>298</sup> Various individuals incrementally built rapport with the Alitos, Scalias, and Thomases.<sup>299</sup> Donors even hosted the Alitos at their retreat in Wyoming.<sup>300</sup> The reverend disclosed how he visited Scalia and Thomas in their chambers, where he weaved political messages into prayers, using phrases like "the sanctity of human life."<sup>301</sup> In 2018, Schenck left Faith and Action and eventually sought to undo what he had done by revealing his actions.<sup>302</sup>

Schenck was a former leader of Operation Rescue, one of the most hard-line anti-abortion groups.<sup>303</sup> In 1992, Schenck participated in a scheme where a protester threw a dead fetus at Bill Clinton when on the campaign trail.<sup>304</sup>

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293. EPSTEIN & KOBYLKA, *supra* note 218, at 176–77.

294. *Id.* at 257.

295. Brief for Catholics for Choice, National Council of Jewish Women, Religious Coalition for Reproductive Choice, Muslim Advocates, Presbyterians Affirming Reproductive Options, Jewish Women International, Auburn Theological Seminary, Muslims for Progressive Values, African American Ministers in Action, and 45 Other Faith-Based Organizations as Amici Curiae Supporting of Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

296. JOUET, *supra* note 4, ch. 4.

297. Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), [<https://perma.cc/E8PH-TCKA>].

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. See MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 98–100 (2020) [hereinafter ZIEGLER, *ABORTION AND THE LAW*] (describing Operation Rescue's intransigence and its blockades of abortion clinics).

304. Kevin Sack, *Protestor Thrusts Fetus at a Surprised Clinton*, N.Y. TIMES, July 15, 1992, at A11. See *New York v. Foreman*, 834 F. Supp. 116–17 (S.D.N.Y. 1993) (holding Schenck in civil contempt for violating preliminary injunction against presenting fetus to Clinton).

Randall Terry, the head of Operation Rescue, was sentenced to five months in prison.<sup>305</sup> Over two decades later, Schenck had an extraordinary paradigm shift that led him to disavow the radical anti-abortion and evangelical movements.<sup>306</sup> In his captivating memoir, *Costly Grace*, Schenck recounted his path toward supporting abortion rights and a more moderate or liberal conception of evangelicalism.<sup>307</sup>

In his stealth campaign at the Supreme Court, Schenck allegedly became privy to confidential information from Justice Alito about the outcome of *Hobby Lobby*,<sup>308</sup> a controversial 5–4 decision that struck the contraception-funding mandate from the Affordable Care Act for closely-held corporations with religious beliefs.<sup>309</sup> Justice Alito has denied any wrongdoing.<sup>310</sup> Even though it is implausible that Schenck’s campaign had any bearing on *Hobby Lobby* or *Dobbs*’s outcomes, it should be understood as a facet of religion’s substantial influence in American public life.

Offering “a realist explanation” for *Dobbs*, Neil Siegel has suggested that the decision is grounded in “moral opposition to abortion, which is reflected in the beliefs of both the Justices in the majority and their ideological allies. Each member of the *Dobbs* majority is a religious conservative who almost certainly opposes abortion personally on moral grounds.”<sup>311</sup> That being said, the entanglement between religion, law, and politics can blur the cause-and-effect. Do religious convictions drive political mobilization and attempts to reshape the law? Or do political ambitions lead to the use of religion? Both appear true in modern America, as neither dynamic is mutually exclusive, and they seem intertwined.<sup>312</sup>

Nancy Stearns, who played a leading role in the U.S. women’s rights movement as a litigator and advocate, has spoken about this social feature:

We have a society that is very divided but really the division is a religious division . . . . The people who are most vehement [about abortion] . . . truly, firmly believe—and I think they should believe it forever because it’s their belief—that a fetus is a human being from the moment of conception, that we cannot terminate fetal life, and that the fact that it harms women is irrelevant. But it is a deeply held religious belief and I respect their religious belief. I don’t agree with it but I respect it. What I do not accept is

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305. *United States v. Terry*, No. 92CR.MISC #1PG.46 (RJW), 1995 WL 46679 (S.D.N.Y. Feb. 7, 1995).

306. ROB SCHENCK, *COSTLY GRACE: AN EVANGELICAL MINISTER’S REDISCOVERY OF FAITH, HOPE, AND LOVE* (2018).

307. *Id.*

308. Kantor & Becker, *supra* note 297.

309. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

310. Jodi Kantor & Jo Becker, *Supreme Court Defends Alito After Breach Allegation*, N.Y. TIMES (Nov. 28, 2022), [<https://perma.cc/5YJP-UV2H>].

311. Neil S. Siegel, *The Wages of Crying Roe: Some Realism About Dobbs v. Jackson Women’s Health Organization*, 2 J. AM. CONST. HIST. 101, 115 (2024).

312. *See also* DAVID DOMKE & KEVIN COE, *THE GOD STRATEGY: HOW RELIGION BECAME A POLITICAL WEAPON IN AMERICA* (2008) (documenting the normalization of strategic public displays of faith by Republican and Democratic politicians from the Reagan Revolution onward).

that their religious belief should be able to control what happens to women's lives.<sup>313</sup>

Stearns described how religion is enmeshed with other dimensions of the U.S. abortion debate, including gender and women's rights. In the run-up to *Roe*, Stearns had led a separate test case, *Abramowicz v. Lefkowitz*, challenging the constitutionality of abortion bans with arguments placing more emphasis on women's rights and equality.<sup>314</sup> While legislative reform in New York, where the case was filed, eventually made *Abramowicz* moot, some have debated whether it could have provided a stronger basis for abortion rights than *Roe's* focus on privacy.<sup>315</sup> In the aftermath of *Dobbs*, however, Stearns was skeptical that a different framing would have changed the equation: "In terms of where we are today, I will be honest, I don't think it would have made one whit of difference because the people who have struck down the right to abortion would have just said, well, women didn't have a right to equal protection when the Constitution was founded."<sup>316</sup> Stearns instead traced the main divide over abortion to religion and argued that it shaped conceptions of women's rights in this context.<sup>317</sup>

In sum, the resilience and intensity of religious traditionalism in American society is key to understanding why the U.S. anti-abortion movement has succeeded where counterparts in other modern Western democracies failed. Because religious beliefs are foundational in shaping one's worldview, opposition to abortion may remain significant in American society unless its religious landscape evolves over time. That does not mean that the anti-abortion movement is monolithic or that opposition to abortion cannot be understood through other frameworks. Yet we saw that attitudes toward gender and women's rights—another explanatory framework—are intertwined with the exceptional weight of religious traditionalism in American society.

## V. Between Religious Freedom and Secularism

The United States' distinctive religious landscape has not only buoyed a remarkably influential anti-abortion movement, but has also raised legal questions that are unusual in the modern Western World. In particular, should people be allowed to criminalize abortion on the basis of their religious objections? Would it violate their religious freedom to preclude them from criminalizing abortion? These questions have often been subsumed under the issue of whether abortion bans are an establishment of religion infringing the First Amendment of the U.S. Constitution. This section does not seek to answer these questions, but to further describe how they reflect the United States' singular historical evolution. These questions may not have been so

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313. *An Abortion Rights Champion of the 1970s on Life Before and After Roe*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/podcasts/the-daily/abortion-rights-nancy-stearns-roe.html?showTranscript=1> [hereinafter Stearns Interview].

314. KORNBLUH, *supra* note 44, at 120–31, 137–43.

315. Stearns Interview, *supra* note 313.

316. *Id.*

317. *Id.*

atypical several generations ago, before the decline of Christian traditionalism and anti-abortion movements elsewhere in the West. The endurance of these social features in the United States has led to comparatively atypical debates.

At the outset, the movement to ban abortion in the United States has long had a profoundly religious dimension that may not be apparent at first glance. Until the final decades of the nineteenth century, abortion was generally legal in America until quickening, the outset of fetal movement in the womb.<sup>318</sup> In the second half of the nineteenth century, the American Medical Association (AMA) mounted a campaign to ban abortion at all stages of pregnancy.<sup>319</sup> Seeking to dispel the idea that the fetus was not alive before quickening, the AMA declared that a human being exists from conception and that abortion should be a crime.<sup>320</sup> By the early twentieth century, the campaign generally succeeded in criminalizing abortion, except to save the mother's life, in the overwhelming majority of states.<sup>321</sup> The AMA would not change its position and come to support the liberalization of abortion until 1967.<sup>322</sup>

Horatio Storer (1830–1922), a doctor and lawyer, spearheaded the AMA campaign to criminalize abortion.<sup>323</sup> Storer had diverse motivations for condemning abortion, including patriarchal beliefs about women's place in society, the notion that unwanted pregnancies stemmed from sexual immorality, and concern that abortion undermined the demographic strength of white Americans relative to minorities.<sup>324</sup> His opposition to abortion also reflected religious convictions. Storer focused on legal reform because he realized that Christianity alone had “failed to check the increase of criminal abortion,” as “the crime was known in ancient times” and persisted in nineteenth-century “Christian communities.”<sup>325</sup> His campaign blended religious, moral, and medical arguments. In an 1868 treatise on criminalizing abortion, he endorsed the Catholic Church's stance on the issue.<sup>326</sup> In order to deter abortion among Catholic women, Storer further embraced intra-uterine baptism.<sup>327</sup> In a separate book intended for female readers, Storer declared that “the rites of law and religion would seem to have extended to [the] foetus every possible safeguard,”<sup>328</sup> and that an abortion would fill a woman “with the consciousness of

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318. See *supra* note 211 and accompanying text.

319. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900* ch. 6 (1978).

320. *Id.*; DUBOW, *supra* note 209, at 16–22; LUKER, *supra* note 209, at 20–22; LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973* 14–15 (2d ed. 2022).

321. EPSTEIN & KOBYLKA, *supra* note 218, at 140–41.

322. *Id.* at 146.

323. See generally MOHR, *supra* note 319, at 147–59.

324. See generally *id.*; REAGAN, *supra* note 320, at 10–11; Mayeri, *supra* note 44, 180–82; Siegel, *Memory Games*, *supra* note 45, at 59.

325. HORATIO R. STORER & FRANKLIN FISKE HEARD, *CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW* 69 (1868).

326. *Id.* at 71–74.

327. *Id.* at 70–71.

328. HORATIO R. STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 68 (1867).

guilt against God.”<sup>329</sup> In 1893, J. Milton Duff, who chaired the AMA Section on Obstetrics, concurred that abortion was “a pernicious crime against God and society.”<sup>330</sup>

In this period, “[m]any doctors came to believe that life began at conception, and that abortion was [murder].”<sup>331</sup> That does not mean that religion was the sole or primary reason for their stance, as they especially fused these “ethical arguments” with claims about “social order,” insisting that women seeking abortions “were abandoning their wifely and maternal roles . . . .”<sup>332</sup>

Yet the AMA campaign led by Storer exemplifies how secular and religious objections to abortion have been intertwined in American history. That may be true of most Western societies, as Christian traditionalism or ultra-traditionalism has often been at the heart of anti-abortion movements. If so, it would follow that as religiosity declined in modern Western societies opposition to abortion would decline. That is indeed what has happened throughout most of the West, thereby leading America to be increasingly isolated in debating whether abortion can legitimately be banned based on religious opposition.

The U.S. anti-abortion movement’s position is largely premised on the religious belief that a person created by God exists from conception.<sup>333</sup> The pro-choice movement generally opposes this position on two grounds, namely that a person genuinely exists from the time of birth, not conception, and that the anti-abortion movement’s agenda infringes upon secular government.<sup>334</sup> These conflicting perspectives are at the heart of the U.S. social, political, and legal debate over abortion.

The belief that a person exists at the time of conception was asserted, albeit in secular language, in Texas’s brief in *Roe*. The brief indicated that Texas sided with those convinced that “the fetus is human from the time of conception, and so interruption of pregnancy cannot be justified from the time of fertilization.”<sup>335</sup> During oral arguments, the attorneys for Texas reaffirmed this belief, stating: “[I]t is the position of the State of Texas that upon conception we have a human baby, a person within the concept of the Constitution of the United States and that of Texas also;”<sup>336</sup> and “We say there is life from the

329. *Id.* at 49.

330. REAGAN, *supra* note 320, at 82.

331. Franklin & Siegel, *supra* note 45, at 21.

332. *Id.* Besides religion, scholars have offered various explanations for the campaign to ban abortion in the second half of the nineteenth century, such as sexism, natalism or concern about the safety of abortion in pre-modern times. *See generally id.*; EPSTEIN & KOBYLKA, *supra* note 218, at 139–40, 347 n.12; LUKER, *supra* note 209, ch. 2; REAGAN, *supra* note 320, ch. 3; Mayeri, *supra* note 44, at 180–82. It must also be noted that the campaign was not spearheaded by the Vatican or singularly Catholic. Hostility toward Catholic citizens or immigrants actually was relatively common in nineteenth-century America. *See MOHR*, *supra* note 319, at 186–87.

333. *See supra* note 220 and accompanying text.

334. *See generally* CAHN & CARBONE, *supra* note 117, at 92–95.

335. Brief for Appellee at 9, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70–18), 1971 WL 134281, at \*30.

336. Oral Argument (Reargument Oct. 11, 1972) at 27:06, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70–18), [<https://perma.cc/CF2K-HC4H>].

moment of impregnation.”<sup>337</sup> Principles of secular government and conventions of legal argumentation can preclude religious claims from being made openly in court. But religious beliefs can be secularized for legal purposes.

In 1980, the constitutionality of anti-abortion legislation founded on secularized religious rationales was litigated in *Harris v. McRae*, which concerned the Hyde Amendment’s ban on federal funding for abortion under Medicaid.<sup>338</sup> The plaintiffs argued that “the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences.”<sup>339</sup> Furthermore, they argued that the Hyde Amendment infringed upon the decision to obtain an abortion consistent with distinct religious beliefs, namely “certain Protestant and Jewish tenets.”<sup>340</sup> The United Methodist Church was among the plaintiffs, thereby evoking the longstanding battle between modernist and traditionalist denominations in American faith.<sup>341</sup> The diverse cast of plaintiffs also included indigent pregnant women and the New York City Health and Hospitals Corporation.<sup>342</sup>

Writing for a 5–4 majority, Justice Potter Stewart was unconvinced: “[T]he fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.”<sup>343</sup> One difficulty for the pro-choice movement was that, for centuries, diverse areas of law have been influenced by religious convictions to some extent. “That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny,” Stewart observed.<sup>344</sup> He added that the plaintiffs lacked standing on various other claims, notably because the pregnant women had not demonstrated that they “sought an abortion under compulsion of religious belief.”<sup>345</sup> None of the four dissenters in *Harris* addressed the Establishment Clause, focusing instead on how funding restrictions impinged on *Roe*.<sup>346</sup>

However, a decade later Justice John Paul Stevens’ dissent in *Webster v. Reproductive Health Services* reached the conclusion that the *Harris* plaintiffs had aspired to. Missouri had enacted an anti-abortion statute preambled by the “findings” of the Missouri legislature that “[t]he life of each human being begins at conception” and that “[u]nborn children have protectable interests

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337. Oral Argument (Dec. 13, 1971) at 55:49, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70–18), [<https://perma.cc/CF2K-HC4H>].

338. *Harris v. McRae*, 448 U.S. 297, 302–03 (1980). On the Hyde Amendment, see also *supra* note 106 and accompanying text.

339. *Harris*, 448 U.S. at 319.

340. *Id.*

341. See *supra* note 241 and accompanying text.

342. *Harris*, 448 U.S. at 303–04.

343. *Id.* at 319–20.

344. *Id.* at 319.

345. *Id.* at 320.

346. See *id.* at 329 (Brennan, J., dissenting); *id.* at 337 (Marshall, J., dissenting); *id.* at 348 (Blackmun, J., dissenting); *id.* at 349 (Stevens, J., dissenting).

in life, health, and well-being.”<sup>347</sup> Justice Stevens observed that “[t]he preamble to the Missouri statute endorses [a] theological position,”<sup>348</sup> and that, “[a]s a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth.”<sup>349</sup> “Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause,” Stevens concluded.<sup>350</sup>

Nevertheless, the 5–4 majority led by Chief Justice William Rehnquist declined to rule on the constitutionality of the preamble on the ground that it had not been applied or enforced.<sup>351</sup> Yet the convictions expressed in the preamble were the premise behind the anti-abortion regulations that the Court upheld in this momentous case, which weakened *Roe* and proved a stepping stone toward *Dobbs* three decades later.

*Webster* should not merely be understood in the context of modern abortion history, as it reflected a wider movement to chip away at secular government in America. For years, the U.S. Christian right has contested the “premises of ‘secular legalism’ that both legal liberals and mainstream legal conservatives in American law and most of the Western world have embraced since the nineteenth century,” as the political scientists Amanda Hollis-Brusky and Joshua Wilson observe.<sup>352</sup> That legal objective remained unfulfilled as an embattled Christian right faced an increasingly secular America. Despite the movement’s eventual success under the Roberts Court,<sup>353</sup> its discourse has shifted from casting itself as the Moral Majority to a moral minority facing religious discrimination for its beliefs.<sup>354</sup>

The merits of U.S. Supreme Court decisions are ultimately not the object of this Article. Suffice to say that the multifaceted constitutional issues surrounding abortion are intricate precisely because American society faces strong internal divides on the matter. If there were greater social consensus on

347. *Webster v. Reprod. Health Services*, 492 U.S. 490, 501 (1989) (plurality opinion) (quoting MO. REV. STAT. §§ 1.205.1(1), (2) (1986)).

348. *Id.* at 568 (Stevens, J., dissenting).

349. *Id.* at 569.

350. *Id.* at 566.

351. *Id.* at 506–07.

352. AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, *SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT’S RADICAL STRUGGLE TO TRANSFORM LAW AND LEGAL CULTURE* 4 (2020).

353. According to Lee Epstein and Eric Posner, the Roberts Court has converted the religion clauses of the First Amendment “from protections for religious dissenters to means for advancing conservative Christian values.” Lee Epstein & Eric Posner, *How the Religious Right Has Transformed the Supreme Court*, N.Y. TIMES (Sept. 20, 2022), [<https://perma.cc/LZJ4-PEN6>]. In the run-up to *Dobbs*, which was decided on separate grounds, the Religious Right already experienced remarkable success in the courts. From the start of the Warren Court in 1953 to the end of the Rehnquist Court in 2005, the majority ruled in favor of religious parties approximately 50 percent of the time, whereas under the Roberts Court that figure surged to nearly 90 percent. *Id.*

354. HOLLIS-BRUSKY & WILSON, *supra* note 352, at 29–30.

abortion or secularism, as in other modern Western democracies, constitutional debates would neither take the same form nor appear as intractable.

To be clear, debates over religious freedom, secularism, and tolerance are hardly unique to the United States, as they exist in various societies.<sup>355</sup> For example, restrictions on the Islamic veil in public schools and other settings have sparked debate in Belgium, France, Quebec, Switzerland, Turkey, and other societies.<sup>356</sup> Other legal debates have concerned the role of religious symbols in public life, such as the legitimacy of crucifixes in public Italian classrooms.<sup>357</sup> Since the nineteenth century America has also faced a host of legal cases over the role of religion in public schools, religious symbols or monuments on public land or in government buildings, and beyond.<sup>358</sup> However, within the modern Western world, the United States largely stands out in facing a debate over the legitimacy of religiously-motivated prohibitions on abortion.<sup>359</sup>

We can now pinpoint more precisely two key factors behind American exceptionalism on abortion. First, religious traditionalism, ultra-traditionalism, and fundamentalism have remained intense in American society in the fifty years following *Roe*. The substantial minority of the public gravitating toward these convictions has buoyed an influential anti-abortion movement. Second, by holding that religious opposition to abortion can legitimately be channeled through secularized laws and policies, the U.S. Supreme Court has enabled this movement to remain highly effective. By contrast, opposition to abortion drastically declined in other modern Western democracies as they grew increasingly secular and irreligious. Leaving a few nations aside, the rest of the West has largely moved on from divisions that existed at the time it legalized abortion. America has instead been refighting and relitigating a battle over abortion with no end in sight.

## VI. From Abortion to Political Transformation

The U.S. anti-abortion movement gained significant influence partly due to another feature of American exceptionalism—the outsized role of money

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355. See generally DENIS LACORNE, *THE LIMITS OF TOLERANCE: ENLIGHTENMENT VALUES AND RELIGIOUS FANATICISM* (C. Jon Delogu & Robin Emlin trans., 2019) (exploring debates over tolerance in modern Western societies).

356. See generally Christophe Alonso, *La laïcité: Une exception française au regard du droit constitutionnel?*, in EXISTE-T-IL UNE EXCEPTION FRANÇAISE EN MATIÈRE DE DROITS FONDAMENTAUX? (Marthe Fatin-Rouge Stéfani & Guy Scoffoni eds., 2013); Laurence Burgogue-Larsen, *La laïcité dans la jurisprudence de la Cour européenne des droits de l'homme*, 8 JUSTICE ET CASSATION 91 (2019); Frédéric Mégret, *Lost in Translation? Bill 21, International Human Rights, and the Margin of Appreciation*, 66 MCGILL L.J. 213 (2020).

357. The European Court of Human Rights held that crucifixes in Italian public schools do not violate the rights of parents and children under the European Convention on Human Rights. *Lautsi and Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2011).

358. See generally NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* (2005).

359. See also Tebbe, *supra* note 44, at 2377 (arguing that *Dobbs* “opens the door to laws that rely on religious reasons for banning abortion”).

and lobbying by special interests over American government.<sup>360</sup> By the early 1990s, the U.S. anti-abortion movement was experiencing remarkable success in contrast to its beleaguered counterparts elsewhere in the West. A series of cases upheld sweeping restrictions on public funding and granted states leeway to restrict abortion rights.<sup>361</sup> Still, the eradication of the constitutional right to abortion remained elusive. These circumstances eventually encouraged the pro-life movement to take steps that would not only reshape the abortion debate, but also the U.S. political system.

In *Dollars for Life*, Mary Ziegler documented how the pro-life movement supported the deregulation of laws on political spending to achieve its goal of banning abortion.<sup>362</sup> Repeated setbacks had steered the movement toward a new strategy. The 1976 presidential election of Jimmy Carter—a Georgia evangelical who said he personally opposed abortion—initially heartened the movement. But Carter’s ambivalence and refusal to support a pro-life amendment to the U.S. Constitution undermined hopes that his Democratic Party would join a bipartisan push to end abortion.<sup>363</sup> After handily defeating Carter, Ronald Reagan entered the White House as a resolute supporter of the pro-life movement—distancing himself from legislation on abortion access that he had signed as Governor of California.<sup>364</sup> Yet *Roe*’s eradication was nowhere on the horizon by the end of his two-term presidency. The anti-abortion movement’s drive for a constitutional amendment enshrining fetal rights required an unattainable super-majority and the Republican Party otherwise failed to deliver on its promises to ban abortion.<sup>365</sup> These circumstances spurred the anti-abortion movement’s drive to eviscerate regulations on money in politics in order to have more Republicans elected nationwide; and ultimately have Republican presidents appoint carefully-vetted anti-abortion judges to the Supreme Court.<sup>366</sup> The watershed *Citizens United* decision and its progeny<sup>367</sup> are seldom thought of as abortion-related cases, but Ziegler demonstrates the interrelationship between shifts in these two areas of law.

The anti-abortion movement thus played a role in changing the U.S. political landscape in areas extending far beyond reproductive rights. Expanding the role of money in politics undermined the Republican establishment, thereby facilitating the rise of populist movements, from the Tea Party to Trumpism.<sup>368</sup> The Republican Party previously had guardrails to preclude the rise of candidates it deemed too extreme or unelectable, such as Pat Buchanan

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360. See JOUET, *supra* note 4, at 152–54 (discussing the weight of moneyed interests over U.S. government).

361. See *supra* note 105 and accompanying text.

362. ZIEGLER, *DOLLARS FOR LIFE*, *supra* note 60.

363. *Id.* at 35.

364. *Id.* at 6, 8, 18–19, 34–35, 43–44, 51.

365. *Id.* at xii–xiii. See also EPSTEIN & KOBYLKA, *supra* note 218, at 236, 294 (discussing the pro-life movement’s relative disappointment with Reagan).

366. ZIEGLER, *DOLLARS FOR LIFE*, *supra* note 60, *passim*.

367. See *generally* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (2014) (plurality opinion).

368. ZIEGLER, *DOLLARS FOR LIFE*, *supra* note 60, at 173–75, 178–79, 186, 200.

in the 1990s.<sup>369</sup> A network of major donors and seasoned staff could be oriented toward candidates the party establishment favored.<sup>370</sup> The deregulation of money in politics, from campaign finance to political advertisements, combined with the rise of right-wing media and the internet, hindered the party's ability to do so.<sup>371</sup>

While Ziegler sheds light on how radical elements weakened the Republican establishment, the establishment's own evolution enabled this social transformation. Since the Reagan era the Republican Party has taken positions far more to the right than mainstream conservative parties elsewhere in the West, such as on reproductive rights, health care, climate change, and human rights.<sup>372</sup> George W. Bush, for example, disavowed Trump and may be a quintessential member of the Republican establishment.<sup>373</sup> But during his tenure he was hardly considered a moderate president by U.S. historical standards or Western standards,<sup>374</sup> as demonstrated by his invasion of Iraq on questionable grounds,<sup>375</sup> reintroduction of torture as an official practice in Western civilization,<sup>376</sup> proposed constitutional amendment to ban gay marriage,<sup>377</sup> and successful scuttling of the Kyoto Protocol, a crucial treaty on climate change.<sup>378</sup> The Bush presidency reflected a wider evolution in the Republican establishment that facilitated the rise of more radical figures like Donald Trump.<sup>379</sup>

Another nuance is necessary, namely that the impact of money in elections is relatively ambiguous and a matter of scholarly debate.<sup>380</sup> Some candidates lose elections despite outspending opponents and many voters do not appear influenceable by heavily-funded campaign ads.<sup>381</sup> But the relevant

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369. *Id.* at 82–83.

370. *Id.* at 163.

371. *Id.*, *passim*.

372. JOUET, *supra* note 4, *passim*.

373. See generally Patrick Svitek, *After Trump Election, Bush Says "Anger Shouldn't Drive Policy,"* TEX. TRIB. (Nov. 15, 2016), [https://perma.cc/A24J-7QFK].

374. Beyond the West, Bush was highly unpopular in most of the world, as exemplified by celebrations in many countries after the end of his presidency and following the election of Barack Obama. See Ethan Bronner, *Around the World, a Sense of Wonder*, INT'L HERALD TRIB., Nov. 5, 2008, at 1–2.

375. See generally WHY DID THE UNITED STATES INVADE IRAQ? (Jane Cramer & A. Trevor Thrall eds., 2012).

376. See generally HUM. RTS. WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 6–7 (2011).

377. Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage*, WASH. POST, Feb. 25, 2004, at A1.

378. Julian Borger, *Bush Kills Global Warming Treaty*, GUARDIAN (Mar. 29, 2001), [https://perma.cc/M2GX-4CCE].

379. JOUET, *supra* note 4, at 26–32, 189, 265–66.

380. See, e.g., Alexander Coppock, Seth J. Hill & Lynn Vavreck, *The Small Effects of Political Advertising Are Small Regardless of Context, Message, Sender, or Receiver*, 6 SCI. ADVANCES 1, 5–6 (2020); Jörg L. Spenkuch & David Toniatti, *Political Advertising and Election Results*, 133 Q. J. ECON. 1981 (2018).

381. See, e.g., Karl Evers-Hillstrom, *Senate Democrats Raised Record Cash, But Much Went to Losing Candidates*, OPEN SECRETS (Nov. 4, 2020), [https://perma.cc/T4K2-Z3FT] (noting that “there’s no data to suggest that money alone can overcome demographic or partisan advantages working in favor of a candidate”).

issue is not only who wins but also what is proposed and debated. Money helps put special interests on the agenda because politicians believe they depend on donations.<sup>382</sup> They additionally fear mobilization and primary challenges from organized moneyed interests if they do not satisfy their expectations.<sup>383</sup> These circumstances enable rather unpopular causes, such as banning abortion, to carry disproportionate weight in the political arena.

The pro-life movement still had to overcome internal disagreement over whether campaign finance reform was a distraction or misguided strategy in the fight against abortion.<sup>384</sup> At the end of the day, the strategy appeared more than successful and contributed to Trump's election. "[T]he idea of controlling the courts could unite a divided conservative movement" or resolve "second thoughts about a candidate," Ziegler underlines.<sup>385</sup>

Trump's appointment of three Justices was the culmination of this long-term strategy. Amy Coney Barrett, Brett Kavanaugh, and Neil Gorsuch, Trump's picks, all voted to overrule *Roe*. It was anomalous to appoint three Justices in a single term. In two terms, Bill Clinton, George W. Bush, and Barack Obama each appointed only two Justices. Obama should have placed a third Justice during his second term following the death of Justice Antonin Scalia, but Mitch McConnell, then the Senate Majority Leader, blocked a vote on the nomination of Merrick Garland. Obama had been elected and reelected with wide margins in both the Electoral College and popular vote.<sup>386</sup> Nevertheless, McConnell suggested that it would be illegitimate for Obama to appoint a Supreme Court Justice to replace Scalia, a conservative icon. McConnell insisted that the winner of the next presidential election should instead do so, thereby treating the race as a referendum on a Supreme Court appointment.<sup>387</sup> Trump's election consequently led to Neil Gorsuch's appointment. McConnell

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382. See generally Martin Gilens & Benjamin Paige, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. POL. 564 (2014); Tilman Klumpp, Hugo Mialon & Michael Williams, *The Business of American Democracy: Citizens United, Independent Spending, and Elections*, 59 J.L. & ECON. 1 (2016); Jeff Smith, *Passion or Dollars? How Mobilization Can Spoil the Mother's Milk of Politics*, 68 POL. RSCH. Q. 253 (2015); Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315 (2014); Suzanne Robbins, *Money in Elections Doesn't Mean What You Think It Does*, THE CONVERSATION (Oct. 29, 2018), [<https://perma.cc/4HKP-XFVM>].

383. See Arend Lijphart, *Polarization and Democratization, in SOLUTIONS TO POLARIZATION IN AMERICA* 73, 74 (Nathaniel Persily ed., 2015) ("There is broad agreement that the primary system fosters extremism, because primary elections tend to have low turnout and the more committed and ideologically extreme voters are much more likely to turn out to vote than more moderate voters.").

384. ZIEGLER, DOLLARS FOR LIFE, *supra* note 60, at 91, 103–04, 138.

385. *Id.* at 141, 205.

386. In the 2008 presidential election, Obama won the Electoral College 365–173 and the popular vote by nearly ten million votes. In 2012, he was reelected by a 332–206 margin in the Electoral College and won the popular vote by almost five million votes. *The American Presidency Project: Election Results*, U.C. SANTA BARBARA, [<https://perma.cc/27WK-WE5N>].

387. Harper Neidig, *McConnell: Don't Replace Scalia Until After Election*, THE HILL (Feb. 13, 2016), [<https://perma.cc/4GB6-E9D2>].

later changed his stance after the death of Justice Ruth Bader Ginsburg, a prominent liberal, rushing the appointment of Amy Coney Barrett in the final weeks of Trump's presidency.<sup>388</sup> These maneuvers pointed to the growing importance of the Supreme Court as an arbiter of crucial issues in an increasingly polarized America. The pro-life movement was keenly aware that Justices whose nomination it supported would be inclined to resolve the abortion debate in its favor. All of these events led experts to observe that the law in America has grown far more politicized than in most other Western democracies.<sup>389</sup>

The weight of lobbying and spending by moneyed interests is a facet of American exceptionalism identifiable in numerous areas of law and government. For instance, lobbying by powerful industries and special interests is a relevant factor behind the United States' remarkably limited gun control and its lack of universal health care—two areas in which it is an outlier internationally.<sup>390</sup> The role of money in law and politics tends to be far more limited and regulated in other Western democracies.<sup>391</sup> It is plausibly among the reasons why the battle over abortion in American society has been refoUGHT and relitigated for decades even as it subsided elsewhere in the West.

In fact, for over thirty years Gallup had polled the public about whether it believed *Roe v. Wade* should be overruled. Table 7 shows that this was always a minority view espoused by 36 to 25 percent of the public. A contradiction exists between such evidence and the power of the anti-abortion movement, as further reflected by how over half of state governments asked the Supreme Court to overrule *Roe*.<sup>392</sup>

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388. Seung Min Kim, *Senators Engage in Bitter Floor Feud Over Barrett Nomination to Supreme Court*, WASH. POST (Oct. 23, 2020), [https://perma.cc/M3ZV-QXTT].

389. See generally Gerard J. Kennedy & Mark Mancini, *Canadian Courts Are Not Politicized in the American Way*, POL'Y OPTIONS (Jan. 23, 2023), [https://perma.cc/7R5M-58LF]; David Orentlicher, *How Europe Creates Ideologically Balanced Courts*, U.S. NEWS WORLD REP. (Sept. 23, 2020, 12:18 PM), [https://perma.cc/KGX5-MTCJ]; *Why US Top Court Is So Much More Political Than UK's*, BBC (Sept. 21, 2020), [https://perma.cc/TB7H-WSV9]. Whether American law is more politicized is actually a longstanding debate. See, e.g., Élisabeth Zoller, *Considérations sur les causes de la puissance de la Cour suprême des États-Unis et de sa retenue*, 33 NOUVEAUX CAHIERS DU CONSEIL CONSTITUTIONNEL (2011) (questioning French jurists' enduring perception of the U.S. Supreme Court as exceedingly powerful and politicized).

390. See JOUET, *supra* note 4, at 66–67, 157–62, 227–30.

391. See *id.* at 143, 152–54, 166, 227–29. This does not mean that the outsized influence of moneyed interests is the only feature of American government that can undermine the will of the majority, as scholars have emphasized that various features of U.S. constitutionalism can lead to this outcome. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323 (2021).

392. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 261 (2022).

TABLE 7

“Would you like to see the Supreme Court overturn [the] *Roe v. Wade* decision concerning abortion, or not?” Percentage of response.<sup>393</sup>

| Date            | Yes, overturn | No, not overturn | No opinion |
|-----------------|---------------|------------------|------------|
| 2022, May 2–22  | 35            | 58               | 7          |
| 2021, May 3–18  | 32            | 58               | 10         |
| 2019, Jun 3–16  | 33            | 60               | 7          |
| 2018, Jul 2–8   | 28            | 64               | 9          |
| 2012, Dec 27–30 | 29            | 53               | 18         |
| 2008, May 8–11  | 33            | 52               | 15         |
| 2007, May 10–13 | 35            | 53               | 12         |
| 2006, May 8–11  | 32            | 55               | 13         |
| 2005, Jul 7–1   | 28            | 63               | 9          |
| 2002, Mar 22–24 | 36            | 60               | 4          |
| 1992, Aug 13–14 | 34            | 60               | 6          |
| 1989, Oct 5–8   | 33            | 61               | 6          |
| 1989, Jul 6–7   | 31            | 58               | 11         |

Growing tolerance of abortion in America is at odds with its recriminalization. The General Social Survey, which parses rationales for abortion, finds solid support for elective abortion, namely abortion for “any reason.” Figure 2 shows that public support in 2022 was a solid 55 percent and that this number has surged in recent decades—an inverse trend to the mounting power of the anti-abortion movement in American law and politics in that period. Table 8 indicates equivalent support for abortion based on other measures of personal choice, such as not wanting more children or not wanting to marry the would-be father. The survey likewise shows solid support for abortion based on socio-economic hardship with 55 percent approving abortion for people who are destitute and cannot afford more children. Finally, it captures the wide public consensus on abortion being allowed in cases of rape, danger to the health of the mother, or serious birth defect. While these last three questions generally concern the most tragic situations where one may seek an abortion, the U.S. anti-abortion movement has often fought for a ban without such exceptions.<sup>394</sup> But the first question is arguably the best benchmark for abortion rights—“the woman wants it for any reason”—as it raises the right as a matter of personal choice and without having to justify yourself. Even though public support for abortion on request would plausibly diminish if the General Social Survey had asked about abortion post-viability,<sup>395</sup> recall that the crux of the question is the broad liberalization of abortion throughout most of pregnancy.<sup>396</sup>

393. *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited June 4, 2025).

394. See generally ZIEGLER, *AFTER ROE*, *supra* note 61, at 189–90; see also *supra* note 38.

395. See *infra* note 408 and accompanying text.

396. See *supra* notes 39, 76 and accompanying text.

FIGURE 2

“Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if the woman wants it for any reason?”<sup>397</sup> Percentage of “Yes.”

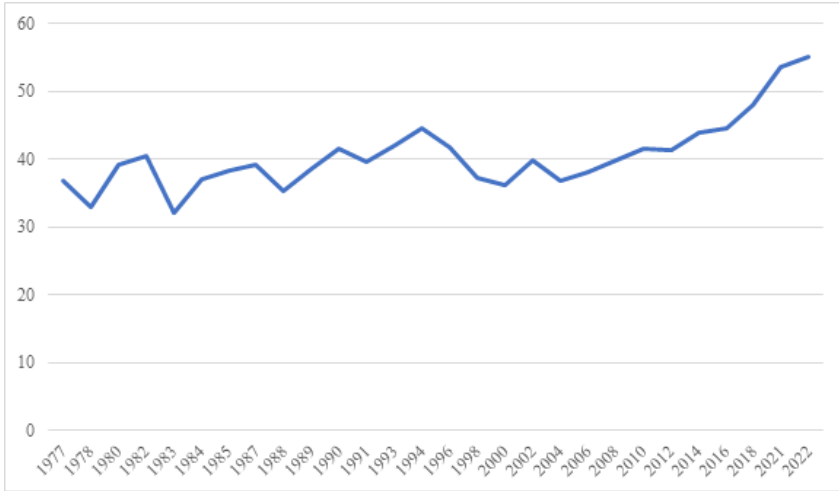


TABLE 8

“Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if . . .”<sup>398</sup>

| Question   | Yes |
|--|-----|
| “the woman wants it for any reason?”                                       | 55% |
| “if the family has a very low income and cannot afford any more children?” | 55% |
| “if she is not married and does not want to marry the man?”                | 54% |
| “if she is married and does not want any more children?”                   | 57% |
| “if there is a strong chance of serious defect in the baby?”               | 78% |
| “she became pregnant as a result of rape?”                                 | 83% |
| “if the woman’s own health is seriously endangered by the pregnancy?”      | 91% |

The bottom line is that only a segment of Americans support the type of criminal ban on abortion that the pro-life movement has demanded for decades. Overall, 54 percent of Americans identified as “pro-choice” compared to 41 percent “pro-life” as of 2024.<sup>399</sup> Although polls on abortion are relatively ambiguous and can yield different answers depending on how a question is asked, several other polls conducted after *Dobbs* again found that

397. General Social Survey (2022) by NORC at the University of Chicago. See *GSS Data Explorer*, NORC U. CHI., [https://perma.cc/27PR-M53G] (last visited May 12, 2025).

398. *Id.*

399. GALLUP, *supra* note 393.

most Americans opposed overruling *Roe*. Compounding the findings in Tables 6 and 7, one survey indicated that 65 percent of Americans thought that the end of *Roe v. Wade* “represents a major loss of rights for women in America.”<sup>400</sup> Another question suggested that 58 percent of Americans support elective abortion until fetal viability.<sup>401</sup> Expanded news coverage and social debate since *Dobbs* appear to have undermined the anti-abortion movement, plausibly because more citizens grasped what prohibiting abortion meant in practice once bans or stringent restrictions went into effect.<sup>402</sup> Polls show that categorical opposition to abortion has declined since *Dobbs* in 2022.<sup>403</sup> In 2021, 19 percent of Americans believed that abortion should be “illegal in all circumstances,” a similar figure to prior years.<sup>404</sup> A poll conducted from May 2 to 22, 2022—shortly after the *Dobbs* draft was leaked on May 2—asked the same question and found that figure had dropped to 13 percent.<sup>405</sup> The 2024 installment of the poll again found only 12 percent support for a categorical ban.<sup>406</sup> And the share of people who identified as “pro-choice” rose to 54 percent in 2024, up from 49 percent in 2021, whereas those “pro-life” declined from 47 to 41 percent in this period.<sup>407</sup> But opposition to abortion mounts depending on the stage of pregnancy. In 2023, 69 percent of Americans thought that abortion should be legal in the first trimester of pregnancy, compared to 37 percent in the second trimester and 22 percent in the final one.<sup>408</sup> However, as public opinion is more supportive of abortion rights than of bans or stringent restrictions, campaign strategists have advised Republican candidates to stop simply calling themselves “pro-life.”<sup>409</sup>

Even voters in red states have sometimes confounded the pro-life movement. In 2011, a Mississippi referendum to recognize fetal personhood failed, 58 to 41 percent.<sup>410</sup> In 2022, following *Dobbs*, Kansas voters rejected a state referendum to remove protections for abortion rights from the state constitution by a margin of 59 to 41 percent.<sup>411</sup> Voters in Kentucky, Michigan, Montana,

400. Hannah Knowles, Emily Guskin & Scott Clement, *Americans Dismayed at End of Roe Are Less Certain They Will Vote, Poll Finds*, WASH. POST (July 29, 2022), [https://perma.cc/9FCC-N68J].

401. That question specifically asked: “Do you support or oppose a federal law establishing the right to have an abortion before a fetus can survive outside the womb, which is 22-to-24 weeks into pregnancy?” *Id.*

402. See Lydia Saad, *‘Pro-Choice’ Identification Rises to Near Record High in U.S.*, GALLUP (June 22, 2022), [https://perma.cc/P7N3-NQPS] (noting that *Dobbs* “has clearly jolted a segment of Americans into identifying with the pro-choice side of the issue and expressing more unequivocal support for abortion being legal”).

403. GALLUP, *supra* note 393.

404. *Id.*

405. Saad, *supra* note 402 (indicating that the poll began “shortly after” the *Dobbs* leak).

406. GALLUP, *supra* note 393.

407. *Id.*

408. *Id.*

409. Michael Scherer, *Divisions Over Abortion Roil 2024 GOP Presidential Field*, WASH. POST (Oct. 8, 2023), [https://perma.cc/8JWH-L8U3].

410. ZIEGLER, DOLLARS FOR LIFE, *supra* note 60, at 177.

411. Mabel Felix, Laurie Sobel & Alina Salganicoff, *Addressing Abortion Access through State Ballot Initiatives*, KFF (Feb. 09, 2024), [https://perma.cc/VW4L-9AFC]

and Ohio followed suit in supporting abortion rights and rejecting the movement's aspirations in red and purple states.<sup>412</sup> The picture was more mixed in the 2024 election but remained lopsided. Ballot initiatives on abortion rights won in Arizona, Colorado, Maryland, Missouri, Montana, Nevada, New York, yet lost in Florida, Nebraska, and South Dakota.<sup>413</sup> This tally includes 57 percent of Floridians voting to liberalize abortion till viability—short of the sixty percent threshold to amend the state constitution.<sup>414</sup> All in all, abortion rights prevailed in seven out of ten referenda in 2024.<sup>415</sup>

The end of *Roe* raises new challenges for the Republican Party's relationship to the pro-life movement. As long as *Roe* was the law of the land, it was a useful target for politicians who could "make symbolic gestures" by denouncing it while chipping away at abortion access to "gain plaudits from their most strongly pro-life constituents," as Jack Balkin suggested.<sup>416</sup> But eliminating the constitutional right to abortion entirely may endanger the Republican coalition by alienating voters with more moderate views and creating a political problem that will be difficult to resolve.<sup>417</sup> Brent Crane, a Republican state legislator in Idaho, fittingly observed: "A post-*Roe* environment is totally different. In pre-*Roe*, all legislation was crafted to try to set questions up before the Court. Well, now, you're in a post-*Roe* environment where you have to govern. And that means you have to have legislation that is going to work."<sup>418</sup> This may remain a challenge, as the human toll of bans and sharp restrictions in red states post-*Dobbs* has garnered substantial media attention.<sup>419</sup>

Trump's reelection in 2024 may therefore have occurred in spite of, not because of, his opposition to abortion. His campaign also likely benefited from a mix of disinformation and malleable positions. When taking credit for overruling *Roe*, he falsely claimed that "everybody" wanted this to happen and that Democrats instead supported "execution after birth."<sup>420</sup> At times, Trump otherwise sought to dissociate himself from the hardline anti-abortion movement, resisting calls to endorse a nationwide ban and complaining that "[a] lot of politicians who are pro-life don't know how to discuss this topic."<sup>421</sup> He still kept courting the Religious Right, calling himself the "most pro-life"

("Since *Dobbs*, 6 states – California, Kansas, Kentucky, Michigan, Vermont, and Ohio – have voted on abortion related constitutional amendments, and the side favoring access to abortion prevailed in every state.").

412. Rachel M. Cohen, *How Abortion Rights Advocates Won Every Ballot Measure This Year*, VOX (Nov. 11, 2022), [https://perma.cc/L6AD-YAJZ].

413. See Chantelle Lee, *How the 10 States' Abortion Ballot Initiatives Fared in the 2024 Election*, TIME (Nov. 6, 2024), [https://perma.cc/48XR-5LA7].

414. *Id.*

415. *Id.*; see also McCann & Walker, *supra* note 28.

416. Jack M. Balkin, *Abortion, Partisan Entrenchment, and the Republican Party*, in ROE v. DOBBS 81, *supra* note 44, at 99 [hereinafter Balkin, *Partisan Entrenchment*].

417. See *id.*

418. *This American Life: The Bear at the End of the Tunnel* (Act 2), *supra* note 57, at 48:15.

419. See *supra* notes 38, 54 and accompanying paragraphs.

420. Read *Trump Abortion Statement*, THE HILL (Apr. 8, 2024), [https://perma.cc/9WBB-QHZ8].

421. Meredith McGraw, *Trump Tells Conservatives: Don't Blow It on Abortion*, POLITICO (Sept. 15, 2023, 10:47 PM), [https://perma.cc/SF2X-MCNE].

president in history,<sup>422</sup> and making such statements: “You just can’t vote Democrat. They’re against religion. They’re against your religion in particular.”<sup>423</sup> Insofar as his campaign had a definitive position on abortion, it was that this matter should now be decided at the state level.<sup>424</sup>

The anti-abortion movement’s strongest argument against *Roe* may indeed have been that people should be allowed to decide the issue at the state level, which would enable recriminalization in red states but allow abortion in blue ones. The strength of this argument lies in its capacity to reach a wider audience by suggesting a compromise based on principles of federalism. In reality, the movement’s history and declarations show that this is not its genuine aspiration. It has long aimed to categorically ban abortion. Some of the movement’s members have supported exceptions, such as to save the mother’s life or in rape cases, yet this has usually been a strategic concession while maintaining the goal of incrementally forbidding abortion altogether.<sup>425</sup> Even if the movement came to accept narrow exceptions under tragic circumstances, it will never accept elective abortion, which would eliminate its *raison d’être*. The movement’s main internal divide over the past five decades has been over the means to achieve its criminal ban, especially whether to push for incremental restrictions or an immediate ban.<sup>426</sup> The movement has its eyes set on banning abortion nationwide by having the Supreme Court recognize fetal personhood under the Fourteenth Amendment.<sup>427</sup> In what might prove another stepping stone toward the recognition of fetal personhood, some states have expanded the use of criminal law in the area of pregnancy and fetal protection beyond the sphere of abortion.<sup>428</sup> This trend, which began years before *Dobbs*, has encompassed a surge in prosecutions, notably of underprivileged women, in reaction to prenatal drug use, stillbirth, and miscarriage.<sup>429</sup>

*Dobbs* exacerbated the polarization of American society, where most people tend to support reproductive rights. Although a substantial segment of poll respondents appeared pleased or ambivalent about *Roe*’s demise,<sup>430</sup> the recriminalization of abortion may be partly understood as a minority cause enabled by the considerable influence of special interest groups over American government.

422. *Id.*

423. Michelle L. Price & Peter Smith, *Donald Trump Tells a Group That Calls for Banning All Abortions to Stand Up for ‘Innocent Life’*, AP (June 10, 2024, 12:58 PM), [<https://perma.cc/J6Q3-5QC4>].

424. *Read Trump Abortion Statement*, *supra* note 420.

425. ZIEGLER, *AFTER ROE*, *supra* note 61, at 189–90.

426. *Id.* at 58–91.

427. ZIEGLER, *DOLLARS FOR LIFE*, *supra* note 60, at 211–12. *See also* ZIEGLER, *AFTER ROE*, *supra* note 61, at xiii, xv, 37–38, 41 (discussing rationales for a nationwide abortion ban).

428. Boone, *supra* note 44, at 202–03.

429. *Id.* at 200–03. These circumstances impede and dissuade reproductive care, as pregnancies facing complications can readily become targets of criminal investigation on suspicion of fetal harm or illegal abortion. *Id.* at 205–06. *See supra* note 55 and accompanying text.

430. *See generally* Knowles, Guskin & Clement, *supra* note 400.

## VII. A Cause and Reflection of Social Polarization

The battle over abortion is a major dimension of wider “culture wars” that are themselves part of a wider phenomenon, namely the intense polarization of modern America. No contemporary Western democracy faces as many divides over “fundamental questions about the role of government, access to health care, wealth inequality, financial regulation, climate change, science, sexual propriety, reproductive rights, the literal truth of the Bible, warfare, and human rights.”<sup>431</sup> Due to a host of societal factors whose explanation lies beyond these pages,<sup>432</sup> the United States tends to drastically diverge from Europe, Canada, Australia, and New Zealand on these matters. Certainly, modern America shares various sources of polarization with other Western societies, such as tensions over the rise of anti-establishment populism, immigration, xenophobia or globalization.<sup>433</sup> These parallels are exemplified by the 2022 trucker protests in Ottawa<sup>434</sup> or attempts to dismantle the European Union.<sup>435</sup> The point is not that significant social divides do not exist elsewhere in the West, but that the United States has more sources and forces of polarization. These circumstances lead to intense clashes over elementary matters that are either nonissues or far less divisive in other Western democracies, such as whether to have universal health care, an unbridled right to bear arms or a right to abortion. Acute social polarization has become a defining feature of American exceptionalism.<sup>436</sup>

Yet how to define, assess, and measure the polarization of American society has become a subject of scholarly debate.<sup>437</sup> The same may be said about polarization over abortion.<sup>438</sup> An important question is whether either form of polarization is a phenomenon limited to elites, such as politicians, journalists, and activists, or a phenomenon encompassing the American public as a whole.<sup>439</sup> Indeed, the American public can be relatively indifferent or ambivalent about politics or hot-button issues, notwithstanding the extensive

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431. JOUET, *supra* note 4, at 21.

432. *See generally id.*

433. *See generally* Richard H. Pildes, *The Age of Political Fragmentation*, 32 J. DEMOCRACY 146 (2021).

434. *See* Mark Scott, *Ottawa Truckers' Convoy Galvanizes Far-Right Worldwide*, POLITICO (Feb. 6, 2022), [<https://perma.cc/CLC9-M58M>].

435. *See* TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 30–32, 176 (2018).

436. JOUET, *supra* note 4, ch. 1.

437. *See* ALAN ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* (2018); MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (3d ed. 2010); HETHERINGTON & WEILER, *supra* note 179; LILLIANA MASON, *UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY* (2018); NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2d ed. 2016); Nathaniel Persily, *Introduction, in SOLUTIONS TO POLARIZATION IN AMERICA* 3, *supra* note 383, at 3–10; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

438. *See generally* FIORINA, ABRAMS & POPE, *supra* note 437, ch. 5.

439. *See generally id.*, ch. 9; HETHERINGTON & WEILER, *supra* note 179, at 16–25.

media coverage they receive.<sup>440</sup> Still, quantitative and qualitative evidence suggests that the dichotomy between elite and public polarization is questionable. While certain actors undoubtedly play a significant and disproportionate role in the public debate over abortion and other divisive issues, the social attitudes of ordinary citizens have also influenced the nation's historical evolution.<sup>441</sup> At the very least, the magnitude of polarization in American society appears comparatively stronger than in fellow Western democracies.<sup>442</sup>

The political scientists Marc Hetherington and Jonathan Weiler have suggested that research into America's polarization should take into account salience, or "the degree to which an issue is important to people."<sup>443</sup> "To us, the essence of polarization is when hot-button issues become salient concerns for a large percentage of people," they write.<sup>444</sup> "People feel intensely about these issues because they tap into something deep inside them. . . . When it becomes difficult for people to understand how their adversaries come to have the preferences they do, the political system feels polarized."<sup>445</sup>

However, abortion is a relative source of polarization in America, not an absolute one. In general, "culture war" issues over abortion, gender, sexuality, and related matters tend to have less political weight in modern America than economic questions. Social scientists have long underlined this point.<sup>446</sup> Recent polls corroborate their findings. Even after tremendous press coverage about the end of *Roe* and the recriminalization of abortion, only 5 percent of voters identified abortion as "the most important problem facing the country today."<sup>447</sup> Barely 9 percent of women, 1 percent of men, and 13 percent of voters under thirty held this view.<sup>448</sup> Conversely, a combined 35 percent identified the economy or inflation.<sup>449</sup> Another poll found that 31 percent of Americans identified abortion as one of their most important voting considerations, compared to 39 percent for inflation.<sup>450</sup> But certain poll questions may obscure public opinion by asking voters to identify "the most important problem." People can have beliefs on multiple matters even if they ultimately deem economic wellbeing the most important consideration. In other words, abortion and other "culture war" issues play a non-negligible role in the U.S. political debate.

A comparative perspective cautions against false equivalences about the nature and degree of societal polarization in America and other Western

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440. See generally FIORINA, ABRAMS & POPE, *supra* note 437, at 14–15, 55, 127; HETHERINGTON & WEILER, *supra* note 179, at 26.

441. ABRAMOWITZ, *supra* note 437, at 1–2, 11–12, 15; JOUET, *supra* note 4, at 31–32, 117.

442. JOUET, *supra* note 4, *passim*.

443. HETHERINGTON & WEILER, *supra* note 179, at 22.

444. *Id.* at 24.

445. *Id.* at 24–25.

446. See generally LARRY BARTELS, *UNEQUAL DEMOCRACY* (2d ed. 2016); FIORINA, ABRAMS & POPE, *supra* note 437, at 134–38; HETHERINGTON & WEILER, *supra* note 179, at 18.

447. N.Y. TIMES & SIENA COLL. RES. INST., *July 5–7 2022: 849 United States Registered Voters* (July 12, 2022), [<https://perma.cc/3TLM-PZU6>].

448. *Id.*

449. *Id.*

450. Knowles, Guskin & Clement, *supra* note 400.

democracies. On one hand, certain divides facing American society are analogous to those found abroad. Far-right populism has notably grown influential in Europe and it converges with features of Trumpism, especially a nativist and anti-establishment ideology.<sup>451</sup> On the other hand, European populism focuses on a narrower set of issues, especially hostility to immigration, the European Union, and elites. These movements are not preoccupied with multiple other issues that play a salient role in contemporary American populism, such as vehement opposition to gun control and universal health care.<sup>452</sup> In particular, abortion tends to be either a nonissue or a minor issue in modern European populist movements.<sup>453</sup> Populism and religious traditionalism instead have a symbiotic relationship in America, where white evangelicals are overwhelmingly loyal Trump supporters.<sup>454</sup>

Canada is more similar to Europe than to neighboring America on these matters. Abortion is neither a salient issue nor a pillar of influential populist movements in Canada today. Consider how the Quebec government has maintained a strong pro-choice position notwithstanding allegations that its ruling party has a nativist populist platform. François Legault, the Premier of Quebec, the equivalent of an American governor, denounced the U.S. Supreme Court's *Dobbs* decision as a "sad setback for women's rights."<sup>455</sup> Legault's remarks reflected the broad acceptance of abortion rights in modern Canada, given that he is a controversial figure accused of right-wing populism.<sup>456</sup> Opponents of Legault's political party, *Coalition avenir Québec*, perceive it as nativist due to its French language policies and efforts to bar the Islamic veil for public school teachers and other civil servants.<sup>457</sup> At any rate, all members of Legault's government and all of his party's candidates in the 2022 Quebec elections reportedly were pro-choice.<sup>458</sup> "It's not normal" for political parties

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451. See generally GINSBURG & HUQ, *supra* note 435, at 30–32, 176, 239; Pildes, *supra* note 433, at 146–49.

452. JOUET, *supra* note 4, at 191–92.

453. The French far-right, for example, has members who have called for a ban on abortion, though its leader Marine Le Pen has limited her past proposals to restricting funding and access. After *Dobbs*, Le Pen and Jordan Bardella, a leading figure in her party, emphasized that they supported the right to abortion. Wanting to focus on their own priorities, they argued that France should not reopen a debate over reproductive rights based on American events. Ivanne Trippenbach, *Marine Le Pen embarrassée par l'inscription du droit à l'avortement dans la Constitution*, LE MONDE (June 26, 2022), [<https://perma.cc/7ARN-Z7JD>].

454. See PEW RSCH. CTR., WHITE EVANGELICALS SEE TRUMP AS FIGHTING FOR THEIR BELIEFS, THOUGH MANY HAVE MIXED FEELINGS ABOUT HIS PERSONAL CONDUCT (2020).

455. Verity Stevenson, *Quebecers Protest Roe v. Wade Reversal in Defiance of Anti-Abortion Sentiments*, CBC NEWS (June 26, 2022, 3:19 PM), [<https://perma.cc/H4MC-6LEE>].

456. See generally Sheema Khan, *The Proof of Systemic Racism Is in Quebec Premier François Legault's Own Bill 21*, GLOBE & MAIL (Dec. 20, 2021), [<https://perma.cc/V6K2-WJRS>].

457. *Id.*

458. Philip Authier, *All CAQ MNAs and Candidates Are Pro-Choice, Legault Says*, MONTREAL GAZETTE (May 4, 2022), [<https://perma.cc/UTE5-T85E>].

to accept candidates who stand against abortion rights, Legault declared.<sup>459</sup> “There should not be [any].”<sup>460</sup> Isabelle Charest, his minister for the status of women, underscored that “we will never allow this right to be called into question” in Quebec.<sup>461</sup>

To Legault’s right lies Quebec’s provincial Conservative Party in which the anti-abortion movement has no path in sight. After a party candidate was accused of being anti-abortion, Éric Duhaime, the party leader, responded: “I remind you that *the Conservative Party of Quebec and me are pro-choice*. This said, individuals are perfectly entitled to have personal religious convictions, and all citizens are allowed to become candidates.”<sup>462</sup> A conservative leader insisting that his party is pro-choice but that it will not exclude candidates who personally oppose abortion might be controversial in modern Canada, yet that would reflect a society where abortion issues are not remotely of the same magnitude as in the United States.

In sum, comparative analysis reveals that America’s evolution in the half-century following *Roe* hardly resembles what has occurred in European nations, Canada, Australia, and New Zealand.<sup>463</sup> There, both liberals and conservatives largely came to embrace or tolerate abortion rights. Moreover, populist or far-right movements in these countries have scarcely focused on abortion in comparison to their American counterparts.

A significant divide over elective abortion has persisted in America irrespective of how the debate has been framed. Facing accusations that *Roe* had invented a constitutional right to abortion rooted in another dubious constitutional right to privacy, the pro-choice movement strategically chose to have the public debate focus less on legal rights. It instead sought to frame abortion as a matter of public health that could ideally be approached through objective empirical evidence and policy analysis.<sup>464</sup> As Mary Ziegler has shown, this reframing failed to settle the debate. Anti-abortion activists made opposite claims about public health, such as asserting that abortion causes mental and physical harm to women.<sup>465</sup> This encompassed the allegation that abortion leads to trauma and breast cancer, which experts have found misleading or false.<sup>466</sup> Nor has either side’s appeal to science resolved disagreement over whether a human being exists from the time of conception.<sup>467</sup>

The Supreme Court has likewise failed to resolve these divides because the interpretation of the U.S. Constitution is another major area of divide. In principle, a constitution in a democratic society should be a source of national cohesion. Mutual recognition of core constitutional principles can ideally

459. *Id.*

460. *Id.*

461. Stevenson, *supra* note 455.

462. Authier, *supra* note 458 (emphasis added).

463. Again, Poland is the other main outlier. See *supra* note 35 and accompanying text.

464. ZIEGLER, *ABORTION AND THE LAW*, *supra* note 303, ch. 5.

465. *Id.*, *passim*.

466. *Id.*

467. *Id.* See also JOHNSTONE, *supra* note 128, at 31–32, 145 (discussing claims that abortion hurts women).

foster common ground. Yet the meaning and purpose of the U.S. Constitution has long been the object of profound divide over countless matters, from slavery to civil rights, gender equality, health care, economic regulations, commerce, states' rights, and beyond. Abortion would ultimately crystalize the longstanding clash over the meaning of the U.S. Constitution, a debate raising more features of American exceptionalism.

In addition to allowing the recriminalization of abortion in an age where Western democracies embrace reproductive rights, *Dobbs* diverged from constitutional courts in peer nations in the methodology it employed to eliminate these rights. While *Dobbs* is sometimes described as an "originalist" decision given its focus on whether a right to abortion was recognized in past centuries,<sup>468</sup> scholars are presently debating whether the "history-and-tradition" test used in *Dobbs*<sup>469</sup> and *Bruen*, a contemporary gun-rights case,<sup>470</sup> actually differs from originalism, is identical or is a variant on its themes.<sup>471</sup> In any event, the clash over the legitimacy of "history and tradition" echoes the persistent divide over originalism.<sup>472</sup>

468. See, e.g., Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in Dobbs Threatens Privacy and Free Speech Rights*, 38 COMMUNICATIONS LAW. 24, 28 (2023) (depicting *Dobbs* as the product of an "extreme originalist methodology" putting "tremendous weight on the historical question of what the relevant constitutional provision meant at the time it was adopted"); Stephen E. Sachs, *Dobbs and the Originalists*, 47 HARV. J.L. & PUB. POL'Y 539, 539 (2024) ("*Dobbs* is indeed an originalist opinion: if not distinctively originalist, then originalism-compliant, the sort of opinion an originalist judge could and should have written.").

469. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 250 (2022) ("[A] right to abortion is not deeply rooted in the Nation's history and traditions").

470. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.").

471. See Harvard Law Rappaport Forum, *Who Cares About Tradition? Constitutionalism After Dobbs and Bruen*, YOUTUBE (Nov. 18, 2022), [https://perma.cc/C2PM-DJQN] (panel on "history and tradition" moderated by Daphna Renan and featuring William Baude, Jamal Greene, and Kathleen Sullivan); JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 42–44, 200–09 (2024) (discussing uses and misuses of history in *Dobbs* and *Bruen*); Balkin, *Partisan Entrenchment*, *supra* note 416, at 90 ("Justice Alito's decision in *Dobbs* was not originalist."); Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism*, in *ROE V. DOBBS* 129, *supra* note 44, at 133 (positing that *Dobbs* "is emphatically not originalist," even though it "make[s] a strong gesture toward textualism" and is "concerned with the problem of judicial discretion"); Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 164 (2023) (describing how *Dobbs* diverged from a prior "pluralist history-and-tradition test that framed the nation's traditions as fluid, dynamic, and inclusive").

472. See generally Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J. FORUM 946, 949 (2024) (advancing that the history-and-tradition test's malleability and opacity enable judges to "achieve preferred outcomes while claiming they are simply deferring to the past"); Mayeri, *supra* note 44, *passim* (offering a critical history of *Dobbs*); Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99 (2024)

Irrespective of the merits or flaws of originalism, one of its features is its originality. It is not a common form of constitutional interpretation in modern Western democracies or beyond.<sup>473</sup> “If we take originalism to require that the original understanding of a constitutional text is dispositive when known, it is an exceedingly unpopular view around the world,” Jamal Greene has observed.<sup>474</sup> The resulting clash between theories of original intent and living constitutionalism, under which interpretation should evolve with the times, is a related facet of American exceptionalism. For instance, the Supreme Court of Canada has surely faced divisions and dissenting opinions on abortion and many other issues, although it has not been strongly and recurrently divided on basic principles of constitutional interpretation.<sup>475</sup> This is partly because, similarly to other Western democracies, Canada has a more recent constitution than the United States. The Canadian Charter of Rights and Freedoms was adopted in 1982 in order to supplement the Constitution of 1867. By contrast, America’s constitutional text dates to 1787, making it “the world’s oldest operative, organic document.”<sup>476</sup> The U.S. Bill of Rights was ratified in 1791, and the Fourteenth Amendment in 1868 following the Civil War. The age of the U.S. Constitution helps explain why America’s constitutional debate focuses heavily on questions that either do not exist abroad or do so to a much lesser extent, such as whether modern rights should depend on the rights that existed in 1791 or 1868. These constitutional debates do not merely appear peculiar to foreign observers, as many Americans have themselves questioned whether the protection or criminalization of abortion should rest on attitudes toward women’s rights in past centuries—an age when they could not even vote.<sup>477</sup> In employing this method of constitutional interpretation, it is doubtful that *Dobbs*’s reasoning will prove more popular than the reasoning of *Roe*, which it had denounced as divisive.<sup>478</sup> Whatever the case may be, American society will continue to debate the utility and legitimacy of originalism or “history and tradition” versus living constitutionalism.<sup>479</sup> The constant is irreconcilable perspectives on the U.S. Constitution’s essential meaning.

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(arguing that “history and tradition” is conservative living constitutionalism because it leads to the judge’s desired result while invoking neutrality).

473. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 18–61 (2009).

474. *Id.* at 19. See also David Fontana, *Comparative Originalism*, 88 TEX. L. REV. 189 (2009); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT’L L. 780 (2014).

475. See generally *supra* note 142 (sources on Canadian abortion history); see also Greene, *supra* note 473, at 20–40 (discussing the absence of originalism in Canada).

476. See GINSBURG & HUQ, *supra* note 435, at 205.

477. See generally Siegel, *Memory Games*, *supra* note 45, at 11; Tsesis, *supra* note 44, *passim*.

478. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231–32 (2022) (insisting that “*Roe* was egregiously wrong” and that it “deepened division” over abortion).

479. See Mugambi Jouet, *Projecting the Past Into the Future of Constitutionalism: History, Atemporality, and American Society*, 173 U. PA. L. REV. ONLINE 1 (2025) (analyzing the enduring debate between traditionalism and modernity in American constitutionalism).

As this Article went to press, interstate conflict over abortion was brewing. Louisiana and Texas were pursuing criminal and civil charges against a New York doctor, Margaret Daley Carpenter, for mailing abortion pills to residents of these Southern states.<sup>480</sup> By enabling the safe termination of a pregnancy without a surgical procedure, the advent of this medication shippable from out-of-state “has completely transformed the world of illegal abortion.”<sup>481</sup> New York refused to cooperate with demands for the doctor’s extradition, as it was one of eight states that had by then adopted “shield laws” to protect the right to abortion against out-of-state prosecutors.<sup>482</sup> “I will not be signing an extradition order that came from the governor of Louisiana—not now, not ever,” New York Governor Kathy Hochul memorably declared.<sup>483</sup> Should the Supreme Court be called upon to settle the matter, its decision will probably satisfy only one of the two sides in this battle. Interstate conflict may thus become part of the intractable nexus of abortion, criminal justice, constitutionalism, federalism, and social polarization.

Polarization over abortion in American society will plausibly remain significant in the foreseeable future, as both the modernist and traditionalist sides of the debate have universalistic aspirations. For reasons that are understandable within their respective worldviews, neither side will probably prove content with a situation where reproductive rights will be expansive in blue states and restrictive in red states. Unless a paradigm shift occurs, each side will keep trying to universalize its model at the federal level. The anti-abortion movement will keep pushing toward a nationwide abortion ban through federal legislation, a Supreme Court decision, or constitutional amendment. To fulfill this aspiration, it will seek to incrementally add more and more states to the dozen that currently ban abortion.<sup>484</sup> The successful campaign to eviscerate *Roe* after half a century may lead it to conclude that a nationwide ban on abortion is achievable in several decades. Its opponents will aspire to defend reproductive rights state-by-state and reestablish a right to abortion nationwide.

## Conclusion

The enduring battle over abortion is a feature of American exceptionalism in the comparative sense of the phrase that America is an “exception.” This feature is intertwined with many other dimensions of American exceptionalism, such as a distinctive religious landscape, a political system over which special interests carry outsized influence, and a high degree of societal polarization. Through a multidisciplinary and comparative methodology this Article has identified key elements that a strictly legal and narrowly domestic

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480. Pam Belluck, Benjamin Oreskes & Emily Cochrane, *Abortion Provider Won't Be Extradited to Louisiana, N.Y. Governor Says*, N.Y. TIMES (Feb. 13, 2025), [<https://perma.cc/R52X-QC55>].

481. Oberman, *supra* note 173, at 6.

482. Belluck, Oreskes & Cochrane, *supra* note 480.

483. *Id.*

484. McCann & Walker, *supra* note 28.

analysis would miss. Just as the law cannot be understood in a vacuum, no country can be understood in total isolation.

In doing so, this Article has cast doubt on the notion that *Roe* is the primary cause of the persistent clash over abortion in modern America. A prevalent idea in this debate is that *Roe* stirred public outrage because it epitomized judicial activism in inventing a right to abortion.<sup>485</sup> The view that *Roe*'s reasoning was unconvincing in resting on a right to privacy also gained traction among some proponents of abortion rights convinced that women's rights, gender equality or other rationales would have provided a better basis for a decision oft-perceived as illegitimate.<sup>486</sup>

Yet the extensive scholarly and public debate over how *Roe* was written can at times eclipse the heart of the matter. Hypothetically, certain actors might have been more receptive to *Roe* or the pro-choice movement's arguments if they had been framed differently, such as once swing Justice Sandra Day O'Connor.<sup>487</sup> After all, intransigent conceptions of rights on both sides of the U.S. abortion battle have plausibly impeded compromise.<sup>488</sup> However, it is difficult to conclude that any legal reasoning would have satisfied the pro-life movement if the outcome had been tolerance of elective abortion, given the intensity of opposition to abortion among an influential segment of the U.S. population.

As judicial reasoning is a malleable social construct, the law is replete with cases whose reasoning could have been framed in one way or another. The reasoning of a case is unlikely to attract significant public attention, much less stir social polarization, if its ultimate conclusion is accepted. Legal scholars critique numerous court decisions that garner little to no public attention. They also critique court decisions that do garner public attention that usually dissipates once grievances have been aired and the news cycle shifts.

No other modern court decision has been a chronic source of public debate for decades. This hardly seems explainable by *Roe*'s reasoning, from the right to privacy to the trimester framework and beyond. While the way *Roe* was decided may have exacerbated the social divide to an extent, the roots of the divide within American society primarily lie elsewhere. This Article has demonstrated how exceptional religious, sociopolitical, and institutional features have shaped an extraordinary battle over abortion in the United States. While a single factor can hardly explain this intricate social phenomenon, the conflux of several distinctive factors can result in a nexus of polarization.

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485. See ZIEGLER, AFTER ROE, *supra* note 61, at xi-xiv, 227–29 (describing the salience of this view in debates over abortion in modern America).

486. *Id.* at xiv, 230. For competing perspectives regarding *Roe* and its impact, see generally STONE, *supra* note 105, at 396–98, 400; WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack Balkin ed., 2005); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

487. EPSTEIN & KOBLYKA, *supra* note 218, at 296, 308.

488. See generally GREENE, *supra* note 72, *supra* at 114–39; see also *supra* note 88 and accompanying paragraphs.

In the end, American exceptionalism on abortion should neither be understood as historical determinism nor cultural essentialism. Contingent circumstances have led the United States to diverge from peer Western democracies in modern times, but they may someday converge, as they once did. History is always in movement.