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Majoritarian Interests and Non-Majoritarian Institutions:

A Case Study of the Supreme Court

and Public Opinion on Abortion

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Honors Thesis

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Abstract

Do non-majoritarian institutions established in a broadly majoritarian political system respond to public opinion? This honors thesis will address that question through an investigation of the U.S. Supreme Court.

Scholars tend to agree that the Court was designed to be non-majoritarian. However, debates continue over whether the Court responds to public opinion. Scholars also disagree on whether responsiveness occurs mostly in salient or non-salient cases. One school argues that the Court is responsive in salient cases. A second school contends that the Court is responsive in non-salient cases. A third school asserts that the Court is unresponsive to public opinion.

There are two reasons why justices may, on occasion, take into account public opinion. First, a Court whose decisions are incompatible with public opinion may find itself on shaky political ground. Consequences include harm to institutional legitimacy and disruptions to justices' private lives. Second, since the Court has no enforcement mechanism for its decisions, it may occasionally need to infuse case decisions with the calculus of popular politics. To that end, justices may cast votes counter to their own ideology.

It is in these ways that non-majoritarian institutions may make strategic accommodations to the broader majoritarian impulses of democratic systems. If this logic is sound, we should be able to observe counterattitudinal votes on issues that are especially salient to the public. One of those issues is abortion.

Literature Review

Debates continue on the extent to which the Supreme Court acts as a majoritarian or counter-majoritarian institution. However, there is agreement that the original purpose of the Court was to remain insulated from public opinion (Dahl 1957; Casillas, Enns, and Wohlfarth

2011). Per Article III, Section I of the Constitution, the judiciary is the only branch of government intended to be independent of public opinion. The purpose of the independent judiciary is for justices to follow the law without external influence.

In theory, lifetime appointments should be read as a constitutional directive to ignore public opinion. Judicial responsibilities are inherently different from those of Congress and the President. The latter two are elected to be representatives of the people. Low approval for either may lead to replacement in the next election cycle. The Court, however, sits insulated from such factors. Although, the Court does not have a formal enforcement mechanism for its decisions. Therefore, it cannot afford to be removed from the vast majority of the public.

These factors invigorate the debate over whether the Court is responsive to public opinion. One motivator of this research has been the increasing awareness of politicization in the Court. Firstly, as of 2023, the Court has six conservatives and three liberals. Party polarization is arguably at its most extreme yet over the right to an abortion. This polarization was also reflected in the Court with the recent *Dobbs* decision.

Secondly, religion has arguably enjoyed its clearest influence yet. Never has the Court had so many Catholic justices. The Catholic Church is also known for its staunch opposition to abortion. At a time when Americans are becoming less religious,¹ this trend may spell decreasing trust in the Court. Thirdly, the Court's legitimacy is in a state of crisis. In 2022, the Court's ratings dropped to a historic low among the public; a mere 40% of the public approved of how the Court is handling its job.² Disruptions to justices' personal lives, including threats issued to individual justices, have become an increasingly common reality.

¹ Jones, Jeffrey, "Belief in God in U.S. Dips to 81%, a New Low," *Gallup*, June 17, 2022, news.gallup.com. (accessed March 10, 2023).

² Jones, Jeffrey, "Supreme Court Trust, Job Approval at Historical Lows," *Gallup*, September 29, 2022, news.gallup.com. (accessed February 18, 2023).

A vast literature has discussed the relationship between public opinion and Supreme Court decisions (Mishler and Sheehan 1993, 1994, 1996; Link 1995; Stimson, MacKuen, and Erikson 1995; Flemming, Bohte, and Wood 1997; McGuire and Stimson 2004; Giles, Blackstone, and Vining 2008, as cited in Casillas, Enns, and Wohlfarth 2011). However, scholars continue to debate over whether the Court, itself, is directly responding to public opinion (Giles, Blackstone, and Vining 2008; Norpoth and Segal 1994; Segal and Spaeth 1993, 2002, as cited in Casillas, Enns, and Wohlfarth 2011).

Those who posit that the Court is responsive to public opinion have disagreed on whether this response is most pronounced in salient or non-salient cases (Casillas, Enns, and Wohlfarth 2011; Bryan and Kromphardt 2016). Casillas, Enns, and Wohlfarth (2011) found that the Court is more likely to respond to public opinion when a case is not salient. Their study was conducted a decade ago, but the political climate has changed drastically since then. These scholars could not have anticipated watershed events, such as *Roe* being overturned. The circumstances were also unpredictable. *Roe* was overturned when the issue salience of abortion was particularly high. The *Dobbs* draft opinion leak drew attention to the case.³ Demonstrations began outside of the Court on the day of the leak. Protesters and counter-protesters clashed, at one point even violently.

Enns and Wohlfarth (2013) note that a future study should consider how political polarization has affected decision-making on the Supreme Court. Currently, the issue of abortion is arguably at a historic level of public salience. The constitutional right to an abortion was overturned within the last year. Behind the economy, abortion was the second most salient issue in voters' minds in the 2022 midterm elections.⁴ Even now, states are continuing to restrict

³ Silverman, Ellie, Justin Moyer, and Joe Heim, "Crowds Protest at Supreme Court after Leak of Roe Opinion Draft," *Washington Post*, May 3, 2022, washingtonpost.com. (accessed March 16, 2023).

⁴ Saad, Lydia, "Economy Is Top Election Issue; Abortion and Crime Next," *Gallup*, October 31, 2022, news.gallup.com. (accessed March 10, 2023).

abortion access. The abortion pill, used in more than half of all abortions,⁵ will likely be taken off the market by a conservative district judge in Texas. In the event that the district court's ruling is challenged, the case could reach the Supreme Court. More than ever, a Court in which justices generally ignore public opinion can seriously harm institutional legitimacy.

Bryan and Kromphardt (2016) argue that the court is most responsive in salient cases, especially when public support for the Court is low. These scholars also argue that counterattitudinal votes are the best measures of whether the Court makes accommodations to public opinion. In their view, if the Court is insulated, it does not need to care about public opinion. Counterattitudinal votes are, therefore, unnecessary. As such, a justice who votes counter to their own ideology does so because they are responding to public opinion.

Bryan and Kromphardt (2016) also set either-or conditions for judicial responsiveness. Responsiveness increases as either public support for the Court decreases or case salience increases. As of now, both conditions have been met. In polls of U.S. adults, Gallup found that public approval of the Supreme Court has generally declined since 2020. A poll by Politico also found that a majority (64%) of Americans believe that *Roe* should not have been overturned.⁶

The aforementioned polls suggest that the Court is more likely to have been responsive in recent years. It also suggests that the Court is likely to continue being responsive for, at least, several more years given that public support for the Court continues to fall. The “most stringent test” for whether justices even care about public opinion is whether they vote counter to their own ideology (Baum 2006, as cited in Bryan and Kromphardt 2016). If this study reveals that justices have continually taken counterattitudinal votes on salient issues across a span of time,

⁵ Rachel Jones, et al., “Medication Abortion Now Accounts for More Than Half of All US Abortions,” *Guttmacher Institute*, February 2022, guttmacher.org. (accessed March 10, 2023).

⁶ Carroll Doherty, et al., “Majority of Public Disapproves of Supreme Court’s Decision to Overturn *Roe v. Wade*,” *Pew Research Center*, July 6, 2022, pewresearch.org. (accessed March 10, 2023).

then there would be strong evidence of judicial responsiveness that supports Bryan and Kromphardt (2016)'s arguments.

In a third camp, some scholars argue that the court is unresponsive to public opinion (Johnson and Strother 2021). These scholars believe that the Court enjoys the privileges of judicial independence and insulation.

Thus, a gap emerges from this scholarly disagreement, as well as the lack of focus on specific issues to test the significance of salience in a justice's decision calculus. There are also questions about how these studies were conducted. What constitutes a salient case? How many types of salient cases are available? Nearly all scholars who discuss the issue of salience and non-salience do so on an aggregate level, instead of focusing on key issues of reasonable importance to the public.

Significance of the Study

This study would benefit scholarly understandings of the Supreme Court and public opinion. In the past 20 years, an increasingly polarized public has debated whether the Court is too conservative or liberal.⁷ In 2022, a record high percentage (42%) of U.S. adults believed that the Court was too conservative. A mere 18% of U.S. adults believed that the Court was too liberal. Studying how judicial composition and responsiveness have changed would contextualize changing perceptions of the Court. Public trust, for instance, has decreased over time. These trends damage the Court's institutional legitimacy.

The preservation of institutional legitimacy is crucial to the Court, which has no real enforcement mechanism for its decisions. Polls have also shown diverging degrees of trust in the Court.⁸ In a 2022 Gallup poll, a majority (67%) of Republicans reported having a great deal or

⁷ Ibid.

⁸ Ibid.

fair amount of trust. Alternatively, a minority (25%) of Democrats reported the same. These differences exacerbate perceptions of an increasingly political climate in the Court.

This study would shed light on whether the Court is engaging in an unusually political manner or maintaining continuity. Otherwise, to most, the Court may appear as a highly political institution rather than a fair arbitrator. This study would also assist scholars in mapping out the historical relationship between the Court and public opinion. There has yet to be a study that thoroughly compares public opinion and Court rulings solely on abortion from 1973 to 2022.

There has also been a lack of focus when studying salient versus non-salient cases. Scholars have broadly discussed salience using Stimson's public mood, an aggregate measure of public opinion (Casillas, Enns, and Wohlfarth 2011; Mishler and Sheehan 1993; Giles, Blackstone, and Vining Jr., 2008; Johnson and Strother 2021). Stimson's mood distinguishes over 100 U.S. social and economic policy questions that have been asked in public opinion polls. Afterward, these individual issues are used to create a composite measure of public opinion. However, it is difficult to reach substantive conclusions about the influence of public opinion on judicial decision-making when scholars do not focus on individual issues. Aggregate measures neglect differences in public reactions to rulings in salient vs. non-salient cases.

There are also few studies that test existing theories on present circumstances. Comparable studies on issue salience end prior to 2016. Arguments about salience and non-salience have largely been undiscussed between 2016 and 2022, a period that ushered in multiple conservative justices and witnessed a decline in public support for the Court.

My study will support Bryan and Kromphardt (2016)'s assertions about the impact of case salience on judicial responsiveness. My study will challenge the assertions of Johnson and Strother (2021) that the Court is indifferent toward public opinion. Moreover, my study will

contrast Casillas, Enns, and Wohlfarth (2011)'s arguments that the Court is mostly responsive in non-salient cases. Instead, my study will argue that justices have greater incentive to be concerned with public opinion when trust is low and case salience is high.

This study will also help scholars understand Court incentives to align with public opinion. Such incentives have changed over time. For instance, the threat of court packing has become more conceivable in recent years. In addition, some justices have had their personal lives disrupted around the time of a major Court decision. A physical barrier had to be erected around the Court. After the leak of the *Dobbs* draft opinion, protests also occurred at the homes of several conservative justices. Personal threats are more common now than in years past.

Partisan politics may also affect justices' votes. Studying the nominating President, for instance, can help us understand why justices may be more or less extreme than the average member of the public. It can also help us consider whether justices exhibit some kind of political loyalty to their nominating or confirming party. After all, political affiliation may not necessarily be severed just by membership in an insulated institution. Partisan work experience, or even identification, can affect long-term abortion beliefs and party loyalty.

Consequences of an Unresponsive Supreme Court

What are the potential consequences of a Supreme Court staking out positions on issues that are removed from public opinion? Some instances of the Supreme Court clashing with elected officials and public opinion include the landmark cases *Texas v. Johnson* and *Swann v. Charlotte-Mecklenburg Board of Education*.

In *Texas v. Johnson*, the Supreme Court ruled, 5-4, that the act of burning the United States' flag is protected by the First Amendment of the Constitution as a form of political speech. Many members of the American public were angered by the Court's decision. This anger was

reflected in the public's push for Congress to pass the Flag Protection Act, which it did in 1989, to oppose the High Court. However, the Supreme Court struck down the Act a year later and reaffirmed the Johnson decision in *United States v. Eichman*. Flag burning remains a controversial issue in the United States. As recently as its 2006 session, Congress has nearly approved a ban on flag burning in new amendments.

In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court unanimously upheld busing and public school integration. However, public opinion was divided, with many Americans opposed to the decision. In this case, the constituencies of the Court decision were White communities with children in soon-to-be desegregated schools and Black communities supported by the NAACP. According to Supreme Court Historian Lucas Powe, the White communities were almost entirely opposed to school integration while the Black communities were split roughly 50-50. Anti-integration protests became more rampant and so-called White Flight occurred throughout the American South.

Hypotheses

Firstly, I shall address alignment between Supreme Court decisions and public opinion. I hypothesize that the ideological direction of SCOTUS decisions on abortion is directly correlated with public support for abortion. As public support for abortion increases, SCOTUS decisions become more liberal. Conversely, as public support for abortion decreases, SCOTUS decisions become more conservative. This hypothesis will be called the *responsiveness hypothesis*.

Secondly, I will discuss counterattitudinal votes. I hypothesize that justices will vote counter to their own ideology to align themselves with public opinion on abortion. One motivator for a counterattitudinal vote may be to protect institutional legitimacy. A conservative

may expand abortion rights if there is a long-term benefit, such as the maintenance of the Court's authority. This hypothesis will be labeled the *counterattitudinal voting hypothesis*.

Thirdly, I hypothesize that SCOTUS decisions on abortion are more likely to track in the direction of the politically active than politically inactive. Logically, justices should be more concerned about those who tend to be at the forefront of any backlash against Court decisions and, thus, have greater potential to undermine their institutional legitimacy. Those who are politically active are those who tend to be more educated (Lewis-Beck, Jacoby, Norpoth, and Weisberg 2008; Rosenstone and Hansen 1993; Smets and Ham 2013; Verba, Schlozman, and Brady 1995). This definition of the politically active, those who are highly educated, will be used to study the elite. This hypothesis, then, will be known as the *elite behavior hypothesis*.

Methodology

Salient abortion cases will be selected using the New York Times' front page and lists of key rulings from think tanks (e.g., Pew Research Center). The TimesMachine provides archival access to all issues of the New York Times between 1851 to 2002. Measuring issue salience by frequency of mention in the Times is a well-established practice in political science (Epstein and Segal 2000).⁹ Various think tanks have also developed lists of landmark abortion rulings. Overlap between the lists will determine which cases are salient.

There have been approximately 50 cases related to abortion since *Roe v. Wade* (1973). However, my study will not address all 50 cases. A pollster interested in abortion might ask respondents to name as many SCOTUS abortion cases as they can, but the number recalled is likely to be in the single digits. The number of cases recalled may increase as respondents with more education are polled. Therefore, I only consider eight Supreme Court cases on abortion.

⁹ Epstein, Lee, and Jeffrey A. Segal, "Measuring Issue Salience," *American Journal of Political Science* (2000): 66-83.

Among the eight cases I consider are *Roe v. Wade* (1973), *Harris v. McRae* (1980), *City of Akron v. Akron Center for Reproductive Health* (1983), *Webster v. Reproductive Health Services* (1989), *Hodgson v. Minnesota* (1990), *Planned Parenthood v. Casey* (1992), *Stenberg v. Carhart* (2000), and *Dobbs v. Jackson* (2022). Figure 1 below provides a timeline of these cases.

Figure 1: Timeline of Key Supreme Court Abortion Decisions



Source: Sara Wang

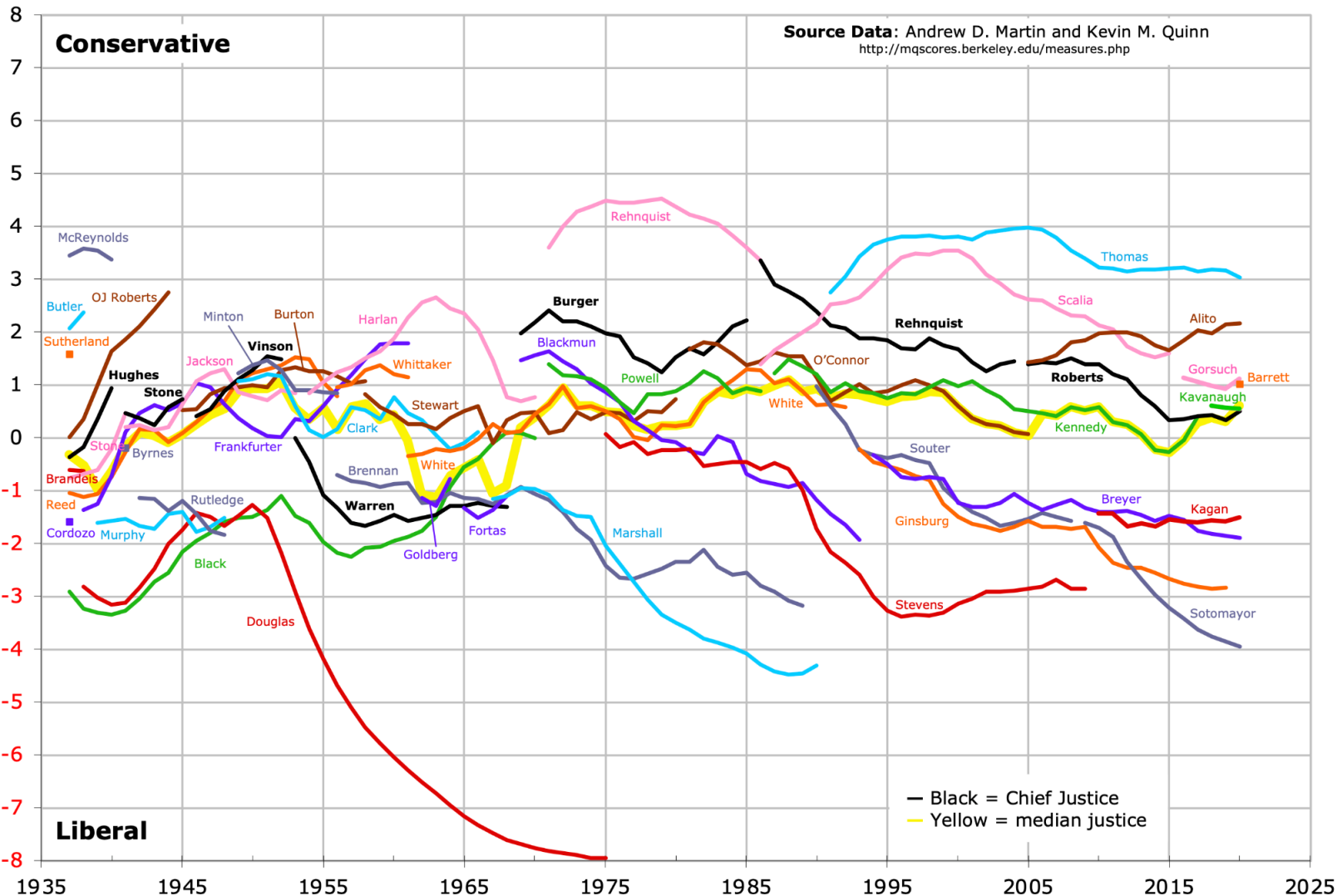
Some of these cases have already been overturned. Nonetheless, these cases mark milestones in abortion rights battles. They also cover a wide spectrum of abortion issues: from the constitutional right to an abortion to the timing of fetus viability.

The ideology of justices will be measured by a couple methods. The party of the nominating President, personal connections, religion, and party identification of a justice act as helpful indicators. The ideology of a justice based on their actual voting record can be measured

using the Martin-Quinn Score (MQ Score). An MQ Score of less than 0 is considered liberal; an MQ Score of greater than 0 is considered conservative.

Below is a celebrated chart developed by researcher Randy Schutt using data from Martin and Quinn (2002).¹⁰ The chart below displays the MQ Scores of every Supreme Court justice. For my purposes, however, I focus on the time period 1973 to 2022 (see Figure 2).

Figure 2: Ideological Leaning of Supreme Court Justices - by Martin-Quinn Scores



Source: Schutt (2020)

¹⁰ Andrew D. Martin, and Kevin M. Quinn, "Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo For The U.S. Supreme Court, 1953–1999," *Political Analysis* 10, no. 2 (2002): 134-153.

The Supreme Court Database by WashU Law also measures ideological voting direction. In a binary fashion, it checks whether justices voted like a liberal or conservative. These two methods, MQ Scores and the Supreme Court Database, provide a robustness check on judicial ideology. The aforementioned methods also aid in studying counterattitudinal votes.

To understand judicial rationales, this study will consider case syllabi and interviews. Syllabi provide the exact reasoning that justices give for their votes. Interviews reveal the priorities and concerns that weigh on justices' minds.

Mass public opinion will be studied and broken down by demographics: gender, age, and party identification. Data on support for abortion will be drawn from Gallup polls. To account for potential nuances in public opinion, elite opinion will also be studied. The elite are those who tend to be more educated and, in turn, politically active (i.e., college graduates). The causal relationship between education and political activity has long since been established in political science (Lewis-Beck, Jacoby, Norpoth, and Weisberg 2008; Rosenstone and Hansen 1993; Smets and Ham 2013; Verba, Schlozman, and Brady 1995). Justices have an incentive to listen to those who pose a greater threat to institutional legitimacy (i.e., those who are more likely to protest).

This study will rely heavily on Gallup's long-term abortion question. The question asks U.S. adults whether they believe abortion should be legal under any circumstances, some circumstances, or under no circumstances. Polls of its long-term question began in 1975. From 1975 onwards, it was consistently asked in each calendar year. The most extreme position is support for abortion under any circumstances. Thus, it will be the focal point when studying public opinion.

A Review of the Data

Roe v. Wade (1973)

In 1973, the Supreme Court grappled with whether there is a constitutional right to an abortion. The landmark case became known as Roe v. Wade.¹¹ The plaintiff, a Texan given the pseudonym “Roe,” alleged that Texas restrictions violated a woman’s right to choose whether or not to have children. These rights, according to the plaintiff’s lawyers, are protected by the ninth amendment. The ninth amendment states that rights not enumerated in the Constitution belong to the public. In Roe, justices had to decide whether to extend this interpretation to abortion rights.

In a seven to two decision, the Court established the constitutional right to an abortion. Justice Blackmun delivered the majority opinion. He was joined by Brennan, Burger, Douglas, Marshall, Powell, and Stewart. Joining an opinion means to agree with both the case decision and rationale. Justice Stewart, Burger, Blackmun, and Powell were expected conservatives. However, their votes expanded abortion rights. The majority opinion included an extensive medical-legal history. Blackmun reviewed the Hippocratic Oath, the stances of the American Bar Association, American Medical Association, and the American Public Health Association. Blackmun went on to explain the necessity of medical history in understanding why certain abortion laws exist.

The reasoning behind abortion laws can be sorted into three categories. Firstly, some laws seek to deter behavior that legislators consider immoral. Secondly, some laws arise over safety concerns surrounding abortion. Thirdly, some laws exist because states claim an interest in safeguarding lives. In Roe, the Court ruled that only the latter two reasons warranted an exercise of state power against abortions. Roe also determined fetus viability to be at the end of the first

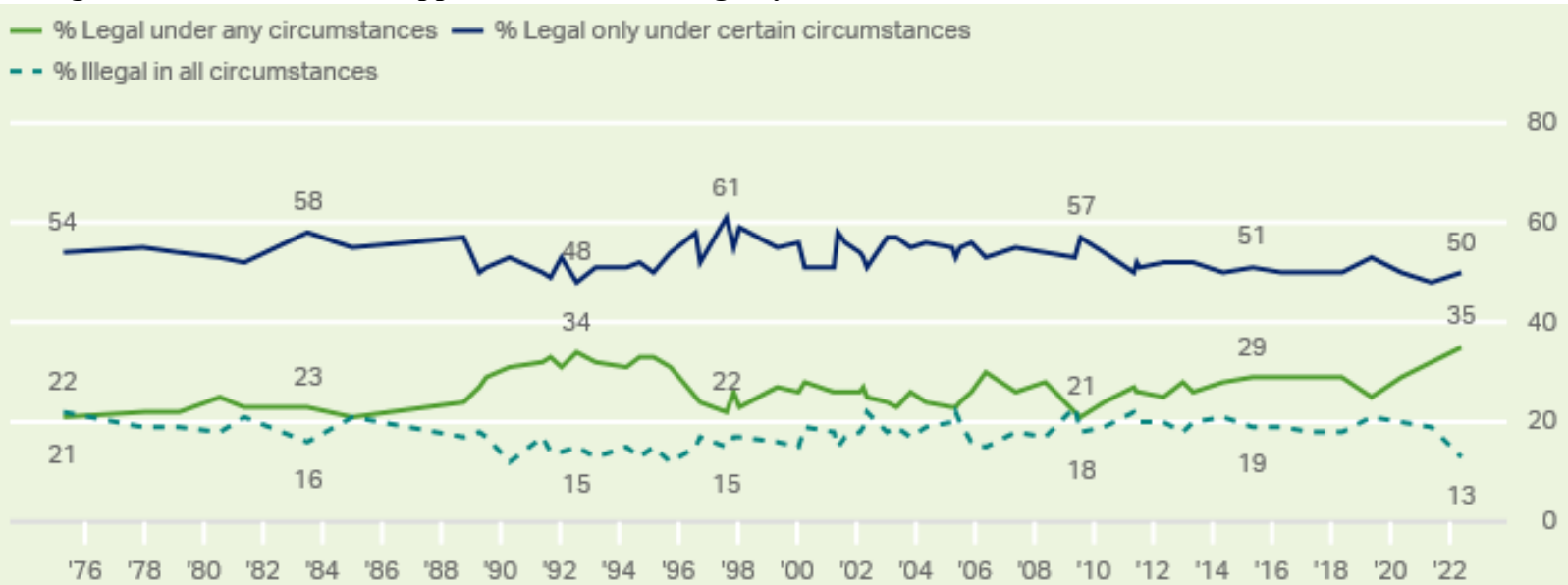
¹¹ Roe v. Wade, 410 U.S. 113 (1973)

trimester. Ergo, the Court ruled that abortions prior to the first trimester are constitutionally protected. Past the first trimester, states reserve the right to interfere.

Some justices conceded that the issue of abortion is inherently polarizing. Therefore, they wrote, it is likely to produce bias. Justice Blackmun opined that a person’s philosophy, life experiences, religion, and attitudes toward family inherently influence their abortion beliefs. This concession contradicted the purpose of the Court: to serve as a safeguard against public whims.

In 1973, Gallup had not yet begun asking its long-term abortion question. Polls on abortion were conducted two years after. Thus, data from 1973 will be used to represent public opinion in 1975. Respondents were asked Gallup’s long-term abortion question. The chart below shows general data on respondents’ beliefs regarding abortion legality (see Figure 3).¹²

Figure 3: % U.S. Adults’ Support for Abortion Legality Under Various Circumstances



Source: Gallup (2022)

In 1975, Gallup found that a majority (~75%) of U.S. adults broadly supported abortion. However, 22% of them believed that abortion should be legal under any circumstances.¹³ These

¹² “IN DEPTH: TOPICS A TO Z. Abortion,” *Gallup*, [gallup.com](https://www.gallup.com). (accessed March 11, 2023).

¹³ *Ibid.*

data cannot be sorted into more specific categories (e.g., elite versus mass) due to a lack of tested demographics. As such, the *elite behavior* hypothesis cannot be tested on the Roe decision. *Roe* was liberal. Public opinion was also liberal. This alignment and counterattitudinal votes would typically provide support for the *responsiveness hypothesis* and *counterattitudinal voting hypothesis*, respectively.

While personal opinion may have affected the Court's decision, it is unlikely that public opinion did so. The constitutional right to an abortion had not yet been established. There was no precedent for the public to expect. Nor was there an expectation of *stare decisis*, upholding precedent unless given a strong reason otherwise, on the part of the Court. Moreover, the public was almost equally split abortion opinions.¹⁴ Had the Court considered public opinion, there was still no clear indicator of a more "popular" side nor incentive to align without precedent.

Roe established a precedent for the public to consider later on. As such, it will be used as a starting point for data analysis. Consistent polling of Gallup's long-term question also began after the constitutional right to an abortion was established. Thus, other cases may have more context for understanding the influence of public opinion on judicial decision-making.

Harris v. McRae (1980)

Abortion continued to be a salient issue in 1980. The New York Times discussed the issue 49 times on the front page. Another salient abortion case was heard. In *Harris v. McRae*,¹⁵ the Court considered whether to uphold the Hyde Amendment. The amendment banned federal funding of abortions, regardless of medical necessity.

The case began after McRae, one of the plaintiffs, sought an abortion in the first trimester. While a first-trimester abortion was protected under *Roe*, McRae was a Medicaid

¹⁴ Brody, Jane, "Gallup Poll Finds Public Divided on Abortions in First 3 Months," *New York Times*, January 28, 1973, [timesmachine.nytimes.com](https://www.nytimes.com/1973/01/28/gallup-poll-finds-public-divided-on-abortion-in-first-3-months). (accessed March 7, 2023).

¹⁵ *Harris v. McRae*, 448 U.S. 297.

recipient. She depended on now-restricted federal funds to pay for her procedure. The plaintiffs also alleged that there was a religious component to the restrictions. These restrictions coincided with the beliefs of the Catholic Church. Thus, they argued, the Hyde Amendment violated the Establishment Clause of the First Amendment.

By a vote of five to four, the Court further restricted abortion rights. There was a clear ideological split. Two justices may be considered partial exceptions. Justice Blackmun began his tenure as a documented conservative but steered toward the center (MQ: 0) by 1980. Conversely, Justice White was a documented liberal that steered toward conservatism (MQ: .25) by 1980.¹⁶

On the one hand, Blackmun joined the dissenting opinion. The dissenters discussed the effects of the decision on the public. Medicaid participants seeking abortion likely rely on Medicaid alone for payment. Therefore, they argued, this limitation denies women the constitutional right to an abortion. The dissenters focused on the public's interests. They characterized the majority opinion as an attempt to justify a clearly unconstitutional decision. There was no concurring opinion; all justices either agreed entirely with the rationale of the majority or dissenting.

On the other hand, Justice White joined the majority opinion. The majority argued that women can seek other means of paying for an abortion. This reasoning applied to both state and federal funding. The Hyde Amendment, they argued, aligned with the Catholic Church's beliefs by circumstance, not intention. Therefore, it was ruled that the Hyde Amendment did not violate the Establishment Clause.

The religious subtext of this decision warrants review of the potential influence of religion on justices. Upon further examination, no justice in the majority was Catholic.¹⁷ The

¹⁶ Martin and Quinn (n 10).

¹⁷ Vinson, Henry, "A Model Conservative," (N.p.: Christian Faith Publishing Incorporated 2017).

Court's only Catholic justice, Brennan, voted against upholding the Hyde Amendment. The five justices in the majority were Presbyterian (2), Episcopalian (2) or Lutheran (1).¹⁸ The Presbyterian Church and Episcopalian Church broadly supports abortion but with some limitations.¹⁹ The Lutheran Church broadly opposes abortion.²⁰ Although, the dissenters also broadly fit into these religious groups. Consequently, religion did not have a strong influence on judicial decision-making.

Polls from 1980 show broad public support for abortion rights. Gallup's long-term abortion question, instituted two years after the Roe decision, asks U.S adults whether abortion should be legal in any circumstances, legal only under certain circumstances, or illegal in all circumstances. In 1980, ~77% of respondents in Gallup's poll broadly supported abortion; although, 23% believed that it should be legal under any circumstances.²¹

Groups can be divided into subpopulations (e.g., age, politics, gender) to account for differences in opinions. Firstly, gender alone had little impact on abortion beliefs. In 1980, 26% (24%) of women (men) believed that abortion should be legal under any circumstances.²²

Age had a mild effect on abortion beliefs. Support generally increased with age. Those aged 18 to 29 were most likely (30%) to support abortion (see Figure 4). They were followed closely (27%) by those aged 30 to 49 (see Figure 5). The third group, those 50 and older, were the least likely to support abortion; only 19% reported unconditional support (see Figure 6).²³

¹⁸ Ibid.

¹⁹ Masci, David, "Where Major Religious Groups Stand on Abortion," *Pew Research Center*, June 21, 2016, [pewresearch.org](https://www.pewresearch.org). (accessed March 7, 2023).

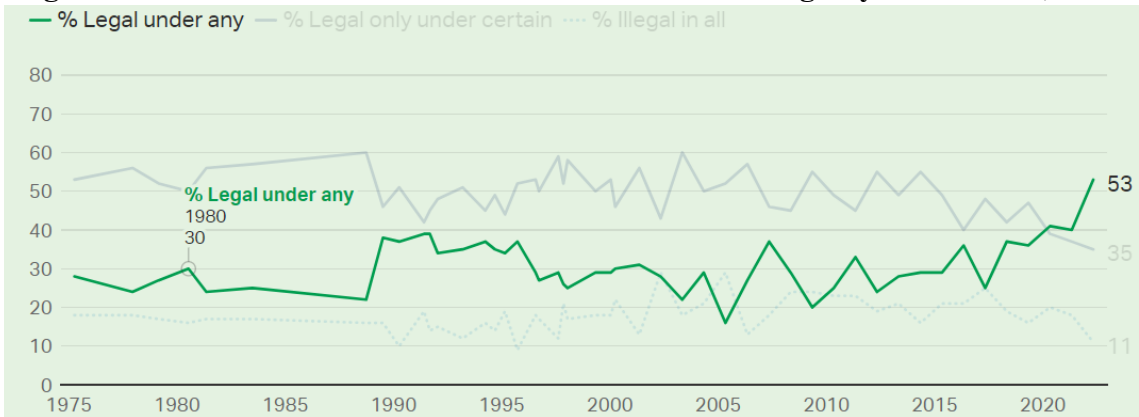
²⁰ Ibid.

²¹ *Gallup* (n 12).

²² "Abortion Trends By Gender," *Gallup*, [gallup.com](https://www.gallup.com). (accessed March 11, 2023).

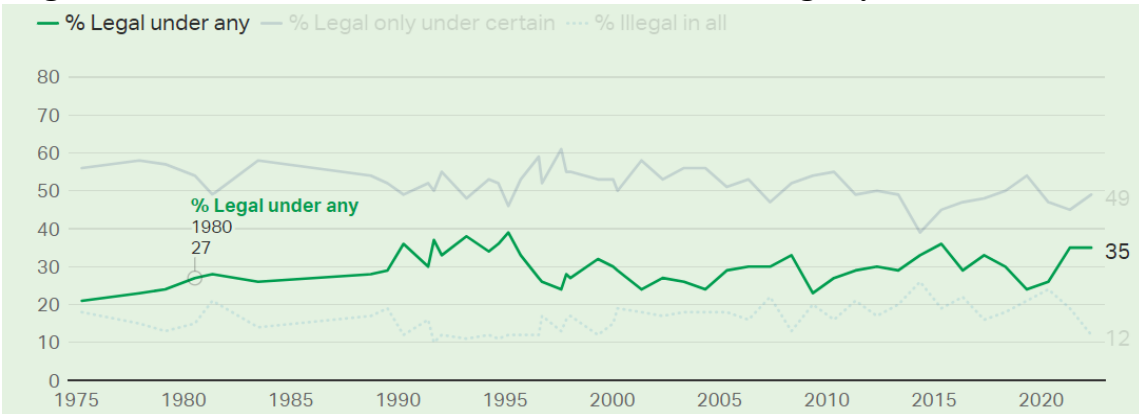
²³ "Abortion Trends by Age," *Gallup*, [gallup.com](https://www.gallup.com). (accessed March 11, 2023).

Figure 4: 18- to 29-Year-Olds' Views on Unconditional Legality of Abortion, 1980



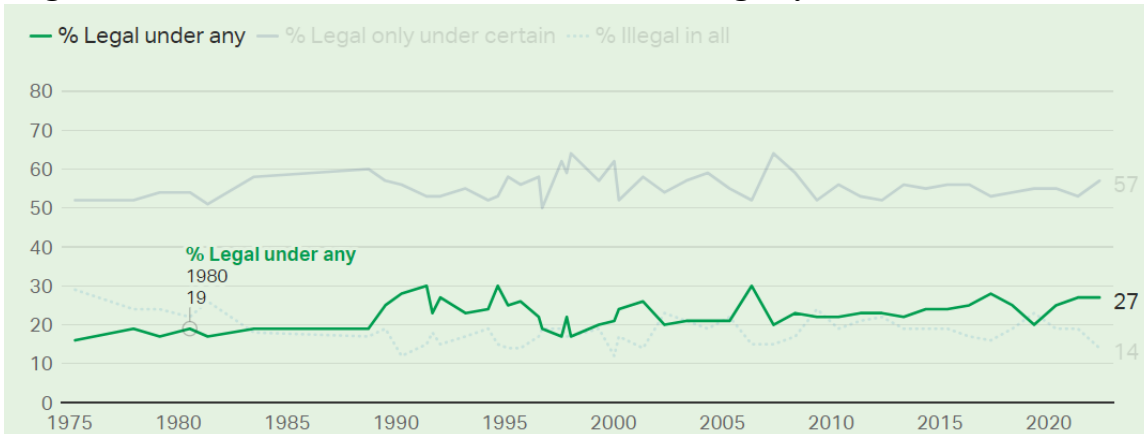
Source: Gallup (2022)

Figure 5: 30- to 49-Year-Olds' Views on Unconditional Legality of Abortion, 1980



Source: Gallup (2022)

Figure 6: 50+-Year-Olds' Views on Unconditional Legality of Abortion, 1980

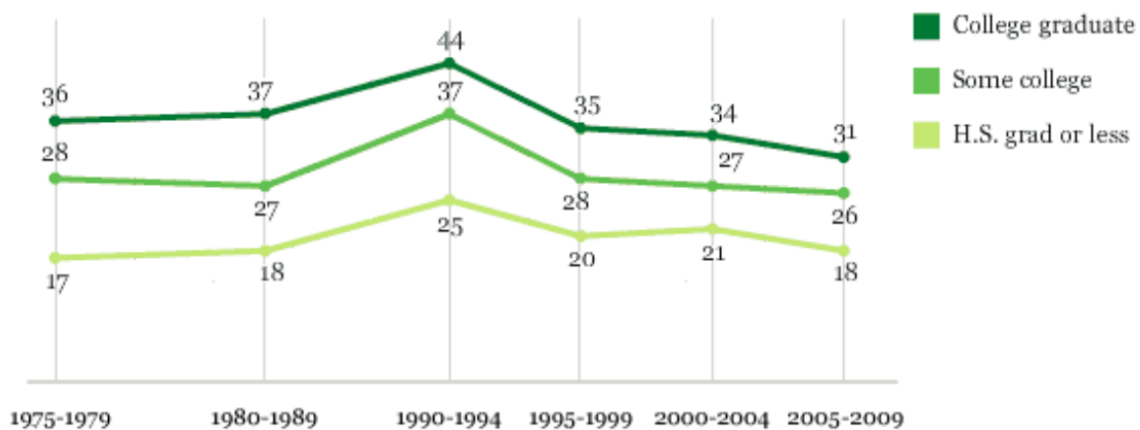


Source: Gallup (2022)

Lastly, party identification (ID) also influenced abortion opinions. In 1980, 22% of Republicans believed that abortion should be legal under any circumstances, compared to 25% of Democrats.²⁴ This three-percentage-point gap suggests broad bipartisan agreement over abortion.

Like mass opinion, elite opinion showed broad support for abortion. In this study, the elite members of the public are those who are highly educated. Figure 7 shows the average percentage of respondents who supported abortion under any circumstances, sorted by education.

Figure 7: % Support for Abortion Under Any Circumstances - by Education



Source: Gallup (2022)

In 1980, specifically, an average of 37% of college graduates supported abortion in any circumstances. That percentage was followed by 27% from some college and 18% from high school or less (see Figure 7).²⁵ College-educated adults are the most likely to favor abortion under any circumstances. Education appeared to be a strong determinant of abortion support.

In theory, the Court should have been more responsive following *Roe*. Polls on abortion became more focused. Justices should have had a better handle on public opinion compared when there was no case precedent in 1973. However, the Harris decision was conservative. Overall, there was no support for the *ideological direction hypothesis*. The conservative decision

²⁴ “Abortion Trends by Party Identification,” *Gallup*, [gallup.com](https://www.gallup.com). (accessed March 11, 2023).

²⁵ Saad, Lydia, “Education Trumps Gender In Predicting Support For Abortion,” *Gallup*, [gallup.com](https://www.gallup.com). (accessed March 11, 2023).

did not align with liberal public opinion. Furthermore, the *counterattitudinal voting hypothesis* received minor support. Only one justice, Blackmun, voted counter to their own ideology to align with public opinion.

City of Akron v. Akron Center for Reproductive Health (1983)

In 1983, abortion was mentioned 37 times on the Front Page. Another salient abortion case, *Akron*, was also heard in 1983.²⁶ It began after the City of Akron enacted the “Regulation on Abortions” ordinance. The ordinance regulated the location and timing of abortions, consent requirements dependent on age and marital status, and proper protocol for discarding fetal remains.²⁷ The Akron Center for Reproductive Health alleged that multiple provisions of the city ordinance violated *Roe*. These regulations, the plaintiffs alleged, created a burden for women seeking an abortion.

By a six to three vote, the Court struck down Akron’s ordinance, protecting abortion rights. However, the Court’s composition was mostly conservative: six to three. If voting along ideological lines, the conservative majority would have restricted abortion rights. Instead, a majority of justices voted counter to their own ideology. Four conservative justices--Burger, Blackmun, Powell, Stevens--voted in a liberal direction. One expected-liberal justice, White, voted in a conservative direction.

Justice Powell wrote the majority opinion in *Akron*. He was joined by Burger, Brennan, Stevens, Marshall, and Blackmun. Powell underscored the burden that women would face as a result of the ordinance. He outlined his concerns about facility accessibility and financial costs. Powell also worried that women would be dissuaded from the procedure had the Court upheld Akron’s ordinance.

²⁶ *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416.

²⁷ Lawton L. Jackson and Malladi, Lakshmeeramya, “City of Akron v. Akron Reproductive Health,” *The Embryo Project Encyclopedia*, November 8, 2017, embryo.asu.edu. (accessed March 10, 2023).

Justices' rationales suggest various motivating factors. One factor was the preservation of an independent judiciary. Firstly, Blackmun expressed in speeches the need to prevent ideological extremity. By his Martin-Quinn Score, he was barely liberal.²⁸ Nonetheless, he voted liberally in the past two salient abortion cases. Secondly, in interviews, Justice Stevens rebuked the idea that he had become a liberal. He told NPR that he was responding to an increasingly radical and conservative court.²⁹ Thirdly, Justice White was known to be non-doctrinaire. He took an individualized approach to each case. Although, he was an expected-liberal nominee of President Kennedy. Kennedy even called White the "ideal New Frontier Judge."³⁰

Another motivating factor was public interest. Justice Powell, a notorious swing justice, opined that an abortion is a "highly personal" decision between a woman and her doctor. Powell also argued that the dissents contradicted Roe and threatened to revitalize underground abortions. His utilitarian approach emphasized the dangers of reversing Roe. Powell was deeply concerned about excessive financial costs when seeking an abortion.

In 1983, public support for abortion was higher than in 1980. About 80% of U.S. adults broadly supported abortion rights; although, ~23% of respondents believed that abortion should be legal under any circumstances.³¹ Like in 1980, there was not a major difference in the percentage of women (22%) versus men (24%) who totally supported abortion.³² These results suggest that gender was not a strong determinant of abortion beliefs.

²⁸ Martin and Quinn (n 10).

²⁹ Totenberg, Nina, "Retired Justice John Paul Stevens, a Maverick on the Bench, Dies at 99," *NPR*, July 16, 2019, npr.org. (accessed February 18, 2023).

³⁰ Hutchinson, Dennis, "'The Ideal New Frontier Judge,'" *The Supreme Court Review 1997 (1997)*: 373–402, jstor.org.

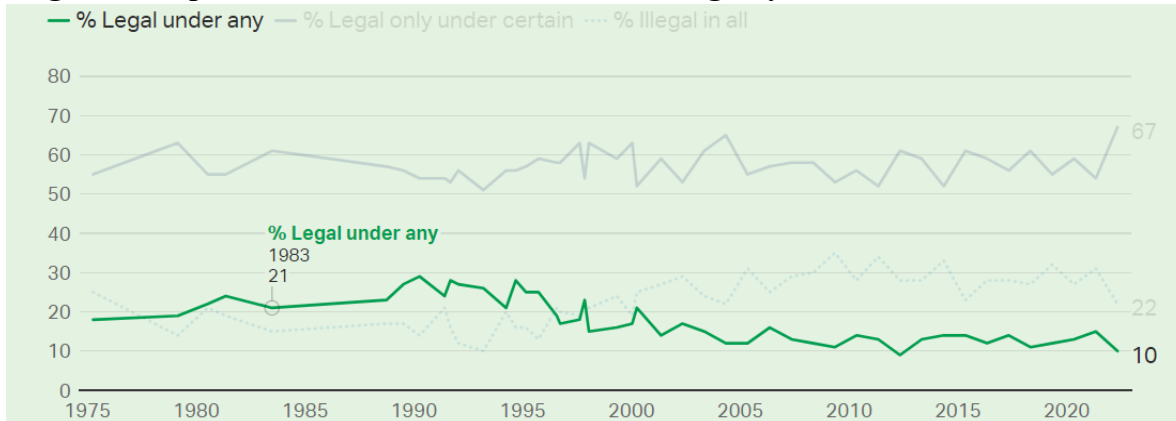
³¹ *Gallup* (n 12).

³² *Gallup* (n 21).

Age continued to have an effect on abortion opinions. This effect appeared to be most pronounced in people aged 50 and above (19%). That percentage can be compared to support from those aged 18-29 (25%) and 30-49 (26%).³³

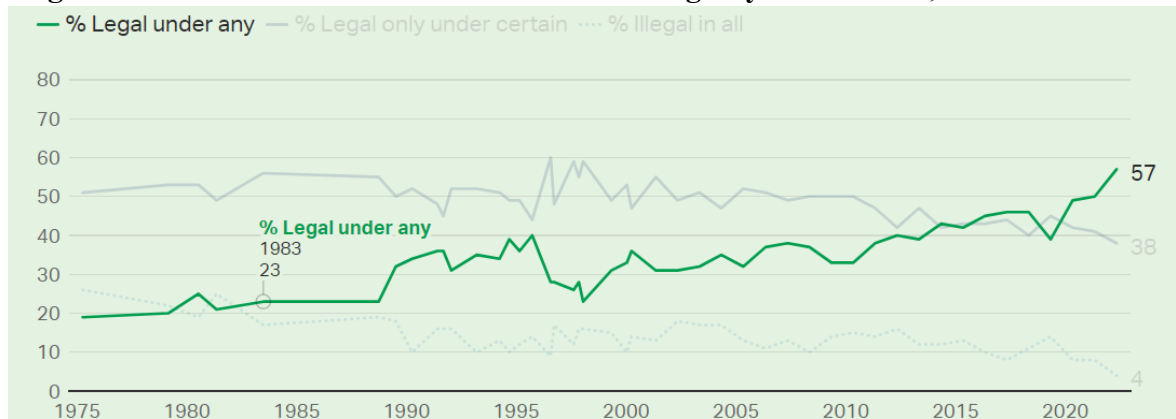
Party identification did not yet have a strong influence on abortion beliefs. Republicans and Democrats in 1983 held similar beliefs about the extreme. Among Republicans, 21% believed that abortion should be completely legal (see Figure 8). In comparison, 23% of Democrats believed the same (see Figure 9).³⁴

Figure 8: Republicans' Views on Unconditional Legality of Abortion, 1983



Source: Gallup (2022)

Figure 9: Democrats' Views on Unconditional Legality of Abortion, 1983



Source: Gallup (2022)

³³ Gallup (n 22).

³⁴ Gallup (n 23).

While differences between elite and mass opinion continued, they retained the same average rates as in 1980. Again, an average of 37% of college graduates, 27% from some college, and 18% from high school or less supported abortion in any circumstances.³⁵

Public opinion in 1983 was liberal. The *Akron v. Akron* decision was also liberal. This alignment supports the *responsiveness hypothesis*. As public support for abortion increased in 1983, the Court issued a liberal decision in *Akron*. Not only did justices align with public opinion on abortion but a majority of them also voted counter to their own ideology. This finding provides strong evidence for the *counterattitudinal voting hypothesis*. Elites were, on average, more supportive of abortion in polls from the 1980s than 1970s. Thus, the even greater lack of alignment between the Court and elite opinion undermines the *elite behavior hypothesis*.

Webster v. Reproductive Health Services (1989)

In 1989, the Supreme Court heard arguments for *Webster v. Reproductive Health Services*.³⁶ At issue were Missouri's anti-abortion laws, which stated that life begins at conception, utilized the viability standard for abortion legality, and banned public funding of non-medically necessary procedures.³⁷ Issue salience was clear. Abortion appeared 103 times on the New York Times' front page.

In a five to four decision, the Court upheld Missouri's requirements. The Court underscored, however, that it would not revisit *Roe*. The Court had a conservative majority. However, it was not just self-identified conservatives who voted in favor of Missouri. A once expected liberal, Justice White voted to uphold Missouri's laws. On the other hand, two

³⁵ *Gallup* (n 24).

³⁶ *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

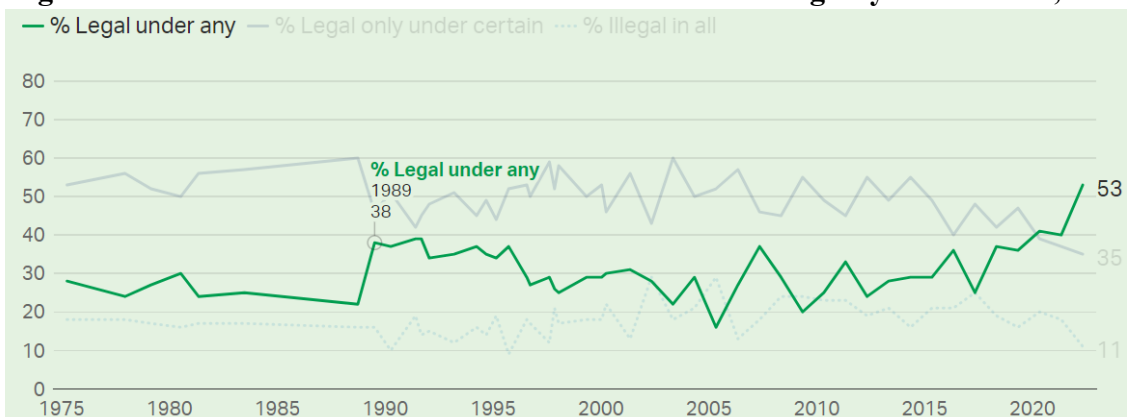
³⁷ Abboud, Carolina, "Webster v. Reproductive Health Services (1989)," *The Embryo Project Encyclopedia*, February 26, 2017, embryo.asu.edu. (accessed February 18, 2023).

conservative justices had cast liberal votes. Both Justice Stevens (MQ: -2) and Blackmun (MQ: -1) voted like liberal justices by *Webster*.³⁸

Blackmun actively acknowledged his centrism. He told the LA Times that neither Republicans nor Democrats accepted him; he was content with having “allegiance to no one.”³⁹ The votes of Stevens and Blackmun supported the *counterattitudinal voting hypothesis*. Their reasoning aligned. Both feared undermining institutional legitimacy.

Despite broad public support for abortion in 1989, the Court did not align with public opinion. The lack of alignment weakens the *responsiveness hypothesis*. About 80% of U.S. adults, a similar estimate to 1983, broadly supported abortion. Approximately 29% of these respondents supported it under any circumstances.⁴⁰ Division into subpopulations reveals some differences. Gender-wise, 31% of women believed that abortion should be legal under any circumstances. This rate compares to 29% among men.⁴¹

Figure 10: 18- to 29-Year-Olds’ Views on Unconditional Legality of Abortion, 1989



Source: Gallup (2022)

Age also affected abortion beliefs. As age increased, support for abortion decreased. The effect was most pronounced among those aged 18 to 29 (see Figure 10). Unconditional support

³⁸ Martin and Quinn (n 10).

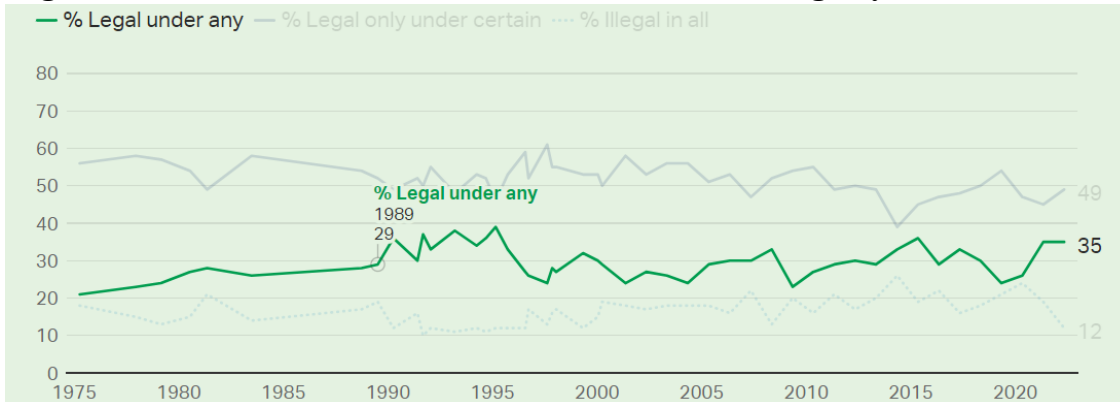
³⁹ “Blackmun: A Jurist in Search of Justice: Nixon Appointee Was Wise, Intelligent and Compassionate,” April 7, 1994, *L.A. Times Archives*, latimes.com. (accessed February 18, 2023).

⁴⁰ Gallup (n 12).

⁴¹ Gallup (n 21).

grew by 16 percentage points between 1988 (22%) and 1989 (38%). In comparison, 29% of respondents aged 30 to 49 totally supported abortion (see Figure 11). Among those aged 50 and above, 25% did the same (see Figure 12).⁴²

Figure 11: 30- to 49-Year-Olds’ Views on Unconditional Legality of Abortion, 1989



Source: Gallup (2022)

Figure 12: 50+-Year-Olds’ Views on Unconditional Legality of Abortion, 1989



Source: Gallup (2022)

The backlash occurred in response to *Webster*. In fact, the goal of the 1989 March for Women's Lives was to protest Missouri's restrictive laws. The march, the largest in Washington since the anti-war protests of the '60s, drew over half a million participants.⁴³ Participants skewed young in this demonstration. Protesters were largely college students, young

⁴² Gallup (n 22).

⁴³ Toner, Robin, "Right to Abortion Draws Thousands to Capital Rally," *New York Times*, April 10, 1989, timesmachine.nytimes.com. (accessed February 18, 2023).

professionals, and mothers and daughters. The young age of these protesters elucidates why polls of young people [18-29] showed relatively higher support for abortion.

As for party identification, there was a marked increase in abortion support among Democrats in 1989. Support grew by nine percentage points between 1988 (23%) and 1989 (32%). Republicans exhibited minor growth. Between 1988 (23%) and 1989 (27%), support among Republicans increased by only four percentage points.⁴⁴ These values indicated increasing politicization of abortion. If both parties continued in this pattern in other years, then party identification may be seen as a strong predictor of abortion beliefs.

Gallup was the only major organization that conducted polls on abortion trends by education level. However, averages were used to represent support. Since the years 1980 to 1989 were grouped together, support in these years share the same average value.

In the 1980s, 37% of college-educated respondents supported abortion under any circumstances.⁴⁵ There was an eight-percentage-point difference between elite and mass opinion on abortion. Overall, elites in the '80s were relatively more supportive of abortion than the mass public. The Court's conservative opinion, then, was even less responsive to elite public opinion. This finding undermines the *elite behavior hypothesis*.

Organizer Gloria Steinem commented on the front page of the Times, asking whether the Court would affirm Roe or be "held captive to the extreme right wing." Some protesters told the Times that the right to an abortion faced a "danger like never before."⁴⁶ The Court faced a conundrum. It could either affirm Roe or risk damaging institutional legitimacy. Public perceptions about politicization of the Court raised the stakes of the ruling. The fact that *Webster* restricted abortion rights suggests that most justices did not prioritize public opinion.

⁴⁴ Gallup (n 23).

⁴⁵ Gallup (n 24).

⁴⁶ Toner (n 43).

Hodgson v. Minnesota (1990)

Appearing 96 times on the New York Times' front page, abortion continued to be a salient issue in 1990. Concurrently, the Court heard another case involving the consent process for minors seeking an abortion. The issue in question was a Minnesota statute. Two sections, section two and section six, of the statute required parental consent. Section two mandated that both parents of a minor be notified at least forty-eight hours in advance of the procedure. Section six provided an exemption: parental consent would be unnecessary if the abortion is court-approved. Court approval is known as the judicial bypass option.

The plaintiff, Hodgson, argued that the Minnesota statute violated the Fourteenth Amendment. Minnesota's restrictions only applied to minors and therefore, she argued, did not treat all women equally under the law. Hodgson also alleged that the restrictions burdened minors in a single or no parent household. The core disagreements were 1) whether minors are mature enough to consent to an abortion; and 2) if the statute unfairly burdened minors.

Hodgson was split into two rulings: one conservative and one liberal. For the purposes of this study, however, the decision is considered conservative. Restrictions that make abortions more inaccessible are considered conservative.

In a five-to-four ruling, the Court ruled that the dual-parental consent requirement in section two was unconstitutional. This decision protected abortion rights and, thus, was liberal. Of the five justices, two justices voted counter to their own ideology: Stevens and O'Connor.

Justice Stevens authored the majority opinion. He was joined by Blackmun, Brennan, and Marshall. Stevens wrote that the consent requirements were unconstitutional as, regardless of parental consent, the state has no interest in controlling abortions. On the contrary, he argued, parental consent may oppose state interest as some minors live in nontraditional households.

O'Connor filed a separate opinion. She wrote that, absent the option to substitute parental consent with court approval, the dual-consent requirement was unconstitutional. These opinions highlighted the increased difficulty that minors would face when seeking an abortion.

The second ruling was conservative. In a six-to-three vote, the Court ruled that the statute, with the judicial bypass option, was constitutional. The Court also supported a 48-hour waiting period and parent notification. A waiting period, they argued, furthered a state's interest in protecting life. Parental notification was deemed acceptable given the ability to circumvent the requirement through judicial bypass. Justice Stevens wrote the majority opinion. He was joined by Kennedy, O'Connor, Rehnquist, Scalia, and White. These justices were focused on defining state interest.

The remaining three justices concurred and dissented in part. Justice Marshall, joined by Blackmun and Brennan, agreed with part of Stevens' rationale. The Constitution, Marshall opined, does not allow states to require minors to inform parents about an abortion. He agreed that the parental notification requirement was unconstitutional. However, he disagreed that judicial bypass made parental notification constitutional. Judicial bypass was inherently unconstitutional. It permitted the state and parents to "usurp"⁴⁷ a woman's decision-making power. These justices concentrated on the potential harms to be inflicted on the public.

In their votes, the justices generally adhered to their own ideology. With the other cases, Blackmun and White were the only justices to regularly vote counter to their own ideology. In 1990, this trend continued. Justice White's votes in abortion cases have been conservative, and Blackmun's votes liberal, since *Roe*. Only Blackmun aligned himself with the public, however. White's conservative votes were continually unaligned with public opinion.

⁴⁷ *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Overall, the Court was ideologically split. It issued a conservative ruling amidst an increase in liberal sentiment. This increase was even more pronounced in the elite than mass public opinion. These circumstances weaken both the *ideological direction* hypothesis and *elite behavior* hypothesis. It is difficult to reach a solid conclusion about the *responsiveness hypothesis*. Despite his original ideology, Blackmun was the only justice to consistently align with public opinion.

Compared to the previous case year, public support for abortion had grown. Roughly 83% of U.S. adults broadly supported abortion in 1990. Of these respondents, about 32% supported abortion under any circumstances.⁴⁸ Unlike the other cases, *Hodgson* focused on one factor: age. If the case was salient in the public mind, those aged 18 to 29 should have supported abortion at a higher rate. After all, this age group is closest to the group in *Hodgson* (<18 years).

Despite the case's emphasis on age, age did not produce noticeable differences in abortion beliefs. Gallup found that those aged 18 to 29 exhibited more support (37%) for abortion than other age groups. However, this percentage was not substantially greater. Those aged 30 to 49 trailed closely behind (36%). Although, those aged 50 and above showed the least support (28%).⁴⁹ Despite the case's emphasis on age, age did not produce noticeable differences in abortion beliefs.

Gendered differences in abortion opinions continued to widen between 1989 and 1990. In 1990, gender had a greater impact on abortion beliefs than years prior. Among women (men), 36% (30%) believed that abortion should be legal under any circumstances. Unconditional support for abortion also grew at a faster rate among women than among men. Between 1989 and 1990, support among women grew by five percentage points. In comparison, support among

⁴⁸ Gallup (n 12).

⁴⁹ Gallup (n 22).

men grew by only one percentage point. These changes, albeit slight, indicated a broader trend of increased support among women, with men lagging slightly behind.

As for party ID, there was only a five percentage point difference. Of Republicans (Democrats) polled, 29% (34%) supported abortion under any circumstances.⁵⁰

Mass opinion and elite opinion diverged in 1990. Figure 13 shows support for unconditional legality of abortion by education level between 1975 and 2009. Focusing on 1990, 44% of college graduates, on average, totally supported abortion. Compared to the mass public, this percentage was about ten points greater. Those who attended some college trailed behind at 37%. However, those who only attended high school or less showed the lowest percentage of support; a mere 25% supported abortion under any circumstances.⁵¹

Figure 13: % Support for Abortion Under Any Circumstances - by Education



Source: Gallup (2022)

These values suggest that education was an effective predictor of abortion beliefs. The *elite behavior* hypothesis assumes that those who are politically active tend to be more educated. In 1990, public opinion tended to be liberal.

⁵⁰ Gallup (n 23).

⁵¹ Gallup (n 24).

Concurrently, there was a notable event in 1990. Over 200,000 protesters marched against abortion in 1990. Organizers estimated that closer to 700,000 were in attendance. The demonstration was covered on the front page of the *New York Times*.⁵² President George H.W. Bush and other elected officials spoke at the rally. Bush pledged his support to those seeking to outlaw abortion.

Widespread support for the anti-abortion movement may have served as a conduit for the Court's anti-majoritarian ruling. *Hodgson* was decided approximately one month after the protest. The Court's ruling may have been affected by public opinion through a different mechanism, namely the President. The President can exert influence on Congress through bargaining; for example, Congress requires the President's assistance in nominations and approving bills.⁵³

Neustadt (1960) found that congressional bargaining may be less effective when there is a divided government. When a President is popular, opposition to the presidential agenda is especially damaging to Congress.⁵⁴ Republican George H.W. Bush was an exceptionally popular President during his tenure. He averaged a 61% approval rating between 1989 and 1993.⁵⁵ In these four years, however, the Democratic Party controlled both chambers of Congress.

Based on Neustadt's theory, public appeals would have been more effective than bargaining for Bush's agenda. By extension, the Supreme Court had less of an incentive to concern itself with political activity. The President, alone, could appeal to the public to support the Court's decision.

⁵² Toner, Robin, "200,000 Demonstrate Against Abortion," *New York Times*, April 29, 1990, [timesmachine.nytimes.com](https://www.nytimes.com/1990/04/29/us/200000-demonstrate-against-abortion.html). (accessed February 18, 2023).

⁵³ Neustadt, Richard, "Presidential Power," New York: New American Library, 1960.

⁵⁴ *Ibid.*

⁵⁵ Reinhart, RJ, "George H.W. Bush Retrospective," *Gallup*, December 1, 2018, [gallup.com](https://www.gallup.com/2018/12/01/george-h-w-bush-retrospective.aspx). (accessed February 18, 2023).

Planned Parenthood v. Casey (1992)

Abortion's salience was clear in 1992. It appeared 146 times on the New York Times' front page. Also in 1992, the Supreme Court heard challenges to a 1982 Pennsylvania law.⁵⁶ The Pennsylvania Abortion Control Act of 1982 regulated abortions in several ways. Some provisions were based on age and marital status. A minor must receive parental consent unless granted judicial bypass. A married woman must provide her husband with advance notice. All abortion seekers must obtain informed consent and undergo a 24-hour waiting period.

The aforementioned provisions were challenged by several abortion clinics, including Planned Parenthood. Planned Parenthood argued that Pennsylvania's provisions directly contradicted *Roe* and would repopularize back-alley abortions. The right to privacy, they contended, would be dismantled if the Court upheld any of the requirements.⁵⁷ *Casey* presented a dilemma for the Court: uphold or overturn *Roe*. As such, *Casey* would become a cornerstone precedent alongside *Roe*.

In a five-to-four decision, the Court upheld all but one of Pennsylvania's provisions. It upheld the waiting period and parental consent requirement but struck down the spousal consent provision. The Court reaffirmed *Roe* but created two new standards. Firstly, the Court implemented the "undue burden" standard. An undue burden is any obstacle intentionally created to make more burdensome a woman's right to seek an abortion prior to fetus viability.

Secondly, the Court replaced the trimester system that *Roe* established with the viability standard. Justices Kennedy, O'Connor, and Souter jointly composed the majority opinion. They acknowledged the extreme controversy of abortion. According to them, however, that fact

⁵⁶ Planned Parenthood v. Casey, 505 U.S. 833.

⁵⁷ Seward, Sheraden, "Planned Parenthood v. Casey (1992)," *The Embryo Project Encyclopedia*, January 13, 2009, embryo.asu.edu. (accessed February 18, 2023).

strengthened their resolve to uphold *Roe*. Absent a compelling reason, reexamining *Roe* would have irreparably damaged the Court's legitimacy.

In 1992, the public still generally supported abortion. Around 81% of the public supported abortion rights; of them, roughly 32% supported abortion under any circumstances.⁵⁸ There was a general, albeit slight, decrease in support compared to 1990. This pattern aligned with the Court's heightened awareness of public scrutiny around abortion.

There was not a gendered difference in abortion beliefs in 1992. Among women and men, 33% supported abortion under any circumstances. For women, this value represented a three percentage point decrease in support since 1990; for men, this value represented a three percentage point increase.⁵⁹

Age-wise, as age increased, unconditional support for abortion decreased. All groups exhibited a decrease since 1990. Those aged 18 to 29 were the most likely to wholly support abortion (34%), followed by those aged 30 to 49 (33%) and 50 or older (27%).⁶⁰

Politically, both Republicans and Democrats demonstrated a decrease in support for abortion. Polls showed that 27% of Republicans strongly supported abortion. (see Figure 14). In comparison, 31% of Democrats believed the same (see Figure 15). These findings suggest that party identification was not yet an effective predictor of abortion beliefs.⁶¹

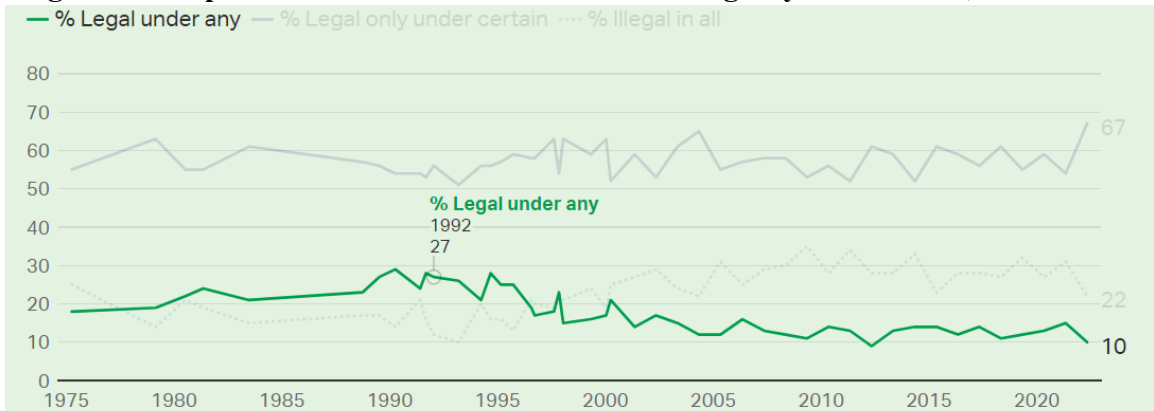
⁵⁸ *Gallup* (n 12).

⁵⁹ *Gallup* (n 21).

⁶⁰ *Gallup* (n 22).

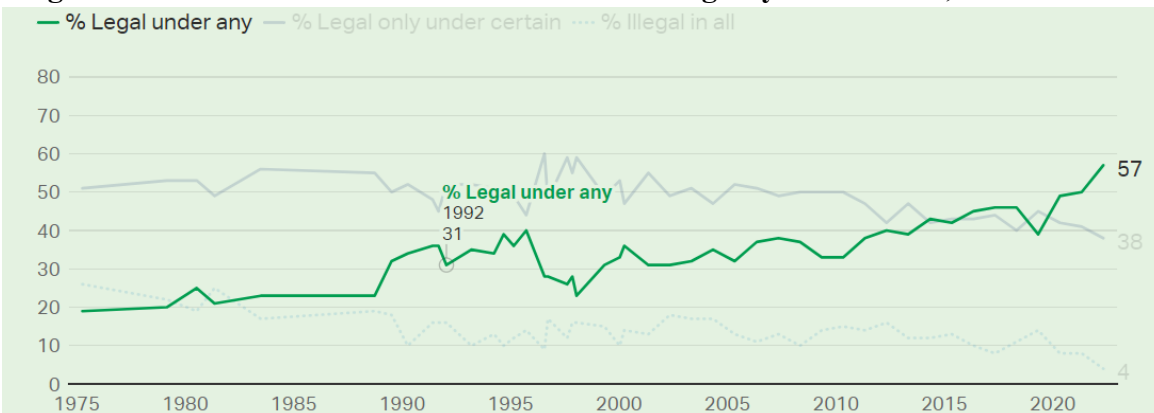
⁶¹ *Gallup* (n 23).

Figure 14: Republicans' Views on Unconditional Legality of Abortion, 1992



Source: Gallup (2022)

Figure 15: Democrats' Views on Unconditional Legality of Abortion, 1992



Source: Gallup (2022)

Elite opinion differed remarkably from mass public opinion. The former was more liberal than the latter. An average of 44% of college graduates supported abortion under any circumstances. Compared to those with a high school education or less, support for abortion was nearly 20 percentage points greater. A mere 25% of respondents with a high school education or less totally supported abortion. On average, 37% of those with some college education responded the same. This difference of seven percentage points was still notable. Compared to the general person (32%), college graduates also reported greater total support by eight percentage points.⁶² These values suggest that education continued to be a strong determinant of abortion beliefs.

⁶² Gallup (n 24).

A conservative trend in public opinion in 1992 translated to the conservative *Casey* decision. This alignment provides evidence for the *responsiveness hypothesis*.

Whether or not justices voted counter to their own ideology is questionable. For one, the Court was mostly composed of conservative justices. The fact that they upheld *Roe* indicated a reluctance to end the right to an abortion. Perhaps the conservative trend in public opinion provided an inadvertent directive for conservative justices to vote closer to their own ideology. However, a conservative vote from a conservative justice would not be counterattitudinal. Thus, *Casey* provides little support for the *counterattitudinal voting hypothesis*. In *Casey*, there was the least support for the *elite behavior hypothesis*. Elites tended to be more liberal in their abortion opinions. The conservative direction of *Casey* did not align with public opinion.

Stenberg v. Carhart (2000)

In 2000, abortion's issue salience was once again high. It appeared 132 times on the New York Times' front page. The *Stenberg* case presented challenges to both *Roe* and *Casey*. *Stenberg* arguably posed the greatest threat to both precedents than any other case had in decades. It began after the state of Nebraska restricted non-medically necessary partial-birth abortions. Partial-birth abortions were defined as those that deliver a "living unborn child before killing the...child."⁶³

Carhart, a clinician, brought suit against the state. He alleged that the statute violated a woman's constitutional right to an abortion. Carhart also argued that the vague regulation created an undue burden for both the woman and physician.

In a five-to-four decision, the Court agreed with Carhart that Nebraska's statute was unconstitutional. This decision was liberal. However, justices were bitterly divided. Justice Breyer delivered the majority opinion. He was joined by Justices Ginsburg, O'Connor, Souter,

⁶³ Stenberg v. Carhart, 530 U.S. 914 (2000).

and Stevens. The limitations, they argued, placed an undue burden on women and their doctors. Fear of being prosecuted, convicted, and incarcerated constituted barriers to abortion. Nebraska did not provide any exceptions, even in the case of medical necessity.

Medical complications were heavily discussed in the opinion. Bans on common methods like dilation and evacuation, the justices argued, served no purpose other than to make abortions less accessible. These justices stressed the potential consequences on everyday people. They also prefaced the judgment with a discussion about the inherently controversial nature of abortion. Such differences, they mentioned, are irreconcilable.

Of the five justices who supported abortion, three cast counterattitudinal votes. Although, Justice O'Connor, in a concurring opinion, expressed willingness to restrict abortions under narrower terms than those set forth by Nebraska. Restrictions that accounted for medical emergencies, for example, would have earned her support.

Justice Souter projected care for the Court's image. One gauge of his thinking came in his 1992 speech about centrist Justice Brennan, who he called his "great contemporary."⁶⁴ Souter emphasized the negative impacts that abortion restrictions would have on everyday people. He also worried that overturning *Roe* would irreparably harm the Court's legitimacy.

To contextualize Souter's vote, consider his most comparable peer: Thomas. All else equal, the contrast between Souter and Thomas' vote suggests the influence of public opinion on the former. Their shared background should have, in theory, produced similar results. Both were nominated by President George H.W. Bush. Both were expected to vote as conservatives. Souter was characterized as a "home run" for conservatism⁶⁵ and Thomas as a "true" conservative.⁶⁶

⁶⁴ Greenhouse, Linda, "Liberal Giants Inspire Three Centrist Justices," *New York Times*, October 25, 1992, nytimes.com. (accessed February 21, 2023).

⁶⁵ Shenon, Philip, "Conservative Says Sununu Assured Him on Souter," *New York Times*, August 24, 1990, timesmachine.nytimes.com. (accessed February 21, 2023).

⁶⁶ Jefferson, Margo, "BOOKS OF THE TIMES; The Thomas-Hill Question, Answered Anew," *New York Times*, November 11, 1994, nytimes.com. (accessed March 12, 2023).

Despite expectations, Souter and Thomas' legacies were drastically different. Souter established himself as an open-minded justice. His voting direction gradually moved toward the center. By 2000, his votes were reliably liberal (MQ: 1.5). In contrast, Thomas' votes were reliably conservative. By 2000, Thomas was the most conservative justice by votes (MQ: 3.75).⁶⁷ If not based on internal factors (e.g., ideology), differences between Souter and Thomas suggests external influences, chiefly public opinion.

Public opinion showed steady support for abortion in 2000. About 84% of the public broadly supported abortion rights. Of these respondents, about 26% unconditionally supported abortion.⁶⁸ Support increased from the previous case year: 1992.

Gender-wise, women were more supportive of abortion than men by five percentage points. In 2000, 30% of women supported abortion under any circumstances, compared to 25% of men.⁶⁹ Both genders reported relatively less support in 2000 than 1992. By eight percentage points, support among men had decreased more than among women.

Age-based differences also emerged. Among those aged 18 to 29 or 30 to 49, 30% totally supported abortion. Those aged 50 and above showed the lowest support level (24%).⁷⁰ Compared to 1992, there was a decrease in support among all age groups. From the *responsiveness hypothesis*, a decrease in public support should have yielded a conservative decision. However, the liberal direction of *Stenberg* indicates that the Court was not particularly responsive to the mass public.

Sorting by party identification shows drastic differences in support for abortion. Since the last case year (1992), support grew among Democrats and fell among Republicans. In 2000, an

⁶⁷ Martin and Quinn (n 10).

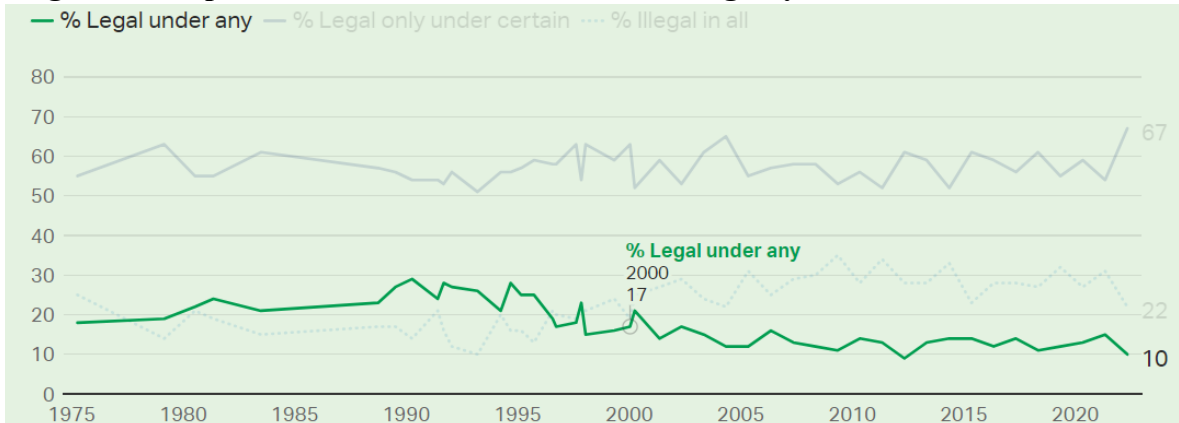
⁶⁸ Gallup (n 12).

⁶⁹ Gallup (n 21).

⁷⁰ Gallup (n 22).

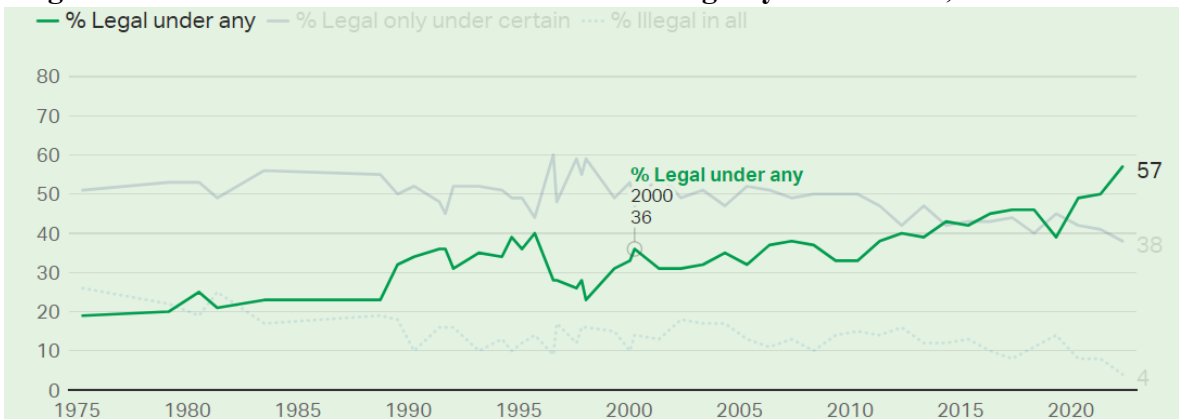
average of 19% of Republicans totally supported abortion (see Figure 16). In comparison, 35% of Democrats, on average, reported the same (see Figure 17).⁷¹ This difference of 16 percentage points indicates that party identification strongly influenced abortion beliefs.

Figure 16: Republicans' Views on Unconditional Legality of Abortion, 2000



Source: Gallup (2022)

Figure 17: Democrats' Views on Unconditional Legality of Abortion, 2000



Source: Gallup (2022)

Elite opinion differed noticeably from public opinion. An average of 34% of college graduates supported abortion under any circumstances. This value can be compared to the 26% of the mass public who reported the same.⁷² The difference of eight percentage points strengthens the argument that the Court is more responsive to the elite. More justices voted counter to their

⁷¹ Gallup (n 23).

⁷² Gallup (n 24).

own ideology, aligning with public opinion, in this case than the others. However, the greatest influence on abortion opinions still stemmed from politics.

In the later 1990s, the influence of partisan politics became more apparent. Justices took care to preface judgments with acknowledgment of abortion's charged nature. On many occasions, they even reaffirmed their impartiality in decision-making. Out of fear of harming institutional legitimacy, they proclaimed that their decisions are purely based on legal arguments.

Promises alone can have had little effect in convincing the public. Some justices did little to conceal their politics. Public records show, for example, that Justice Scalia regularly voted in Republican contests.⁷³ The Republican Party has historically been associated with anti-abortion views. Its platform has acknowledged unborn life.⁷⁴ In contrast, the Democratic Party has historically been associated with pro-abortion views. Its platform emphasizes the need for safe and legal abortions.⁷⁵ Justice Ginsburg was a registered Democrat and voted frequently in Democratic contests.⁷⁶ The Court is intended to be nonpartisan. Thus, open partisanship politicizes perceptions of the Court and justices.

The 2000 Presidential Election cycle may also explain the sharp divergence between Republicans and Democrats. Abortion was a central election issue. Candidate George W. Bush was touted as an anti-abortion leader. Al Gore, on the other hand, was touted as the pro-abortion candidate. Bush fueled speculation about how he would seek to end abortion. He discussed his plan to appoint strict constructionists, citing Scalia and Thomas as justices he most respects.⁷⁷ Strict constructionists tend to argue that the Constitution does not grant the right to an abortion.

⁷³ Robert Barnes and Lucy Shackelford, "As on Bench, Voting Styles Are Personal," *Washington Post*, February 12, 2008, washingtonpost.com. (accessed February 25, 2023).

⁷⁴ Lipka, Michael, "A Closer Look at Republicans Who Favor Legal Abortion and Democrats Who Oppose It," *Pew Research Center*, June 17, 2022, pewresearch.org. (accessed February 25, 2023).

⁷⁵ *Ibid.*

⁷⁶ Barne and Shackelford (n 71).

⁷⁷ Toner, Robin, "THE 2000 CAMPAIGN: FOCUS ON THE ISSUES; Both Sides on Abortion Issue Step Up Fight," *New York Times*, October 27, 2000, nytimes.com. (accessed February 18, 2023).

Both camps in the abortion debate worked to mobilize voters. These circumstances likely widened the schism between the pro-life and pro-choice camps. With *Roe* on the line, Republicans and Democrats were at odds. The eighteen percentage point difference in their beliefs was relatively predictable. Voters in this hyper-political climate may also have been unsurprised that conservative justices Scalia and Thomas voted solidly conservative on abortion.

Religion has served as a litmus test for abortion beliefs. Catholicism, in particular, has been a major similarity between justices since the 1990s. Justices Thomas and Scalia were both raised Catholic and attended Catholic schools. Faith can determine one's fundamental belief about life. In the Catholic Bible, life begins at conception. In the Talmud, the central book of Jewish theology, life begins at birth.⁷⁸

Thomas denied allegations that he would be swayed by religion. However, the fact that he is arguably the Court's most religious justice, and the most removed in his votes, suggests a religious influence. His party identification is private, so no definitive conclusions can be drawn from his electoral voting record. The public (62%) still generally approved of the Court's job performance in 2000.⁷⁹ Perhaps there had not been enough cases of justices being removed from the public. During a period of low trust and high polarization, this perception may change.

The remaining four justices dissented in *Stenberg*. Their dissents symbolized the divide between those in favor of and those against abortion. Justice Scalia vehemently disagreed with the majority that the Constitution in any way prohibits states from restricting abortion. He also opined that the Court should not have acted as an arbitrator in the abortion discussion. Thomas once remarked that the intensity of his confirmation was due to the politicization of the judiciary.

⁷⁸ "Judaism and Abortion," *National Council of Jewish Women*, May 2019. ncjw.org.

⁷⁹ Jones (n 2).

Through *Roe*, the Court positioned itself as mediator of the abortion debate. In so doing, the Court was at the forefront of the public's mind.

Public opinion was more liberal in 2000 than previous years. The five-to-four decision was also liberal. Alignment between the two provides support for the *responsiveness hypothesis*. Elite opinion was even more supportive than mass public opinion. Thus, alignment also supports the *elite behavior hypothesis*.

Three conservatives voted counter to their own ideology, aligning with public opinion. The voting patterns of justices in *Stenberg* support the *counterattitudinal voting hypothesis*. At least two of them--namely Souter and Stevens--appeared to do so out of concern for public interest. Souter believed that the lack of a health exception was unconstitutional and that women would face an undue burden if they cannot access the most common abortion methods. Despite also having a similar background to Thomas, the two diverged in their votes.

Stevens cited the "extremely personal" nature of abortion. He wrote that the decision should be left to the woman. The state, in Stevens' eyes, had no legitimate interest in regulating abortion. The third justice who voted counter to their own ideology was O'Connor. She, however, could be convinced to vote in favor of Nebraska had the restrictions been more persuasive. Nevertheless, the facts generally support the *counterattitudinal voting hypothesis*.

Dobbs v. Jackson (2022)

Another landmark Supreme Court decision came in 2022. *Dobbs v. Jackson* began after the state of Mississippi passed the Gestational Age Act.⁸⁰ The act prohibited, with few exceptions, abortions after 15 weeks of gestation. Jackson Women's Health Organization alleged that the act was unconstitutional as all pre-viability abortions are protected under *Roe* and *Casey*.

⁸⁰ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

The core question was whether to uphold these precedents. *Dobbs* posed the greatest challenge yet to the constitutionality of abortion in decades.

In a six-to-three decision, the Court overturned both *Roe* and *Casey*. *Dobbs* ended the constitutional right to an abortion. The conservative majority specified that the Constitution makes no mention of abortion. As such, the reasoning in both *Roe* and *Casey* was faulty.⁸¹ Framing the Constitution as an unchanging reference is originalist in thought. Originalism tends to be associated with ideological conservatism. It limits one's constitutional interpretation, rarely extending beyond original intent unless necessary.

Originalism played a major role in conservative justices' votes. Three of the six conservative justices were nominated by President Trump. Trump drew his nominees from the Federalist Society's membership list.⁸² The Federalist Society is a renowned conservative organization known for promoting originalism. Trump-era nominees Gorsuch, Kavanaugh, and Barrett are each members of the Federalist Society. In fact, all six of the Court's conservative justices are members.⁸³ Their membership makes less surprising the ideological divide in *Dobbs*.

All six conservatives voted to overturn *Roe* and *Casey*. Justice Alito wrote the majority opinion. The conservative majority described *Roe* as "egregiously wrong" and on a "collision course" from the start.⁸⁴ *Dobbs* reflected a sentiment expressed by Scalia 30 years ago; the Court should no longer be the arbitrator in the moral debate over abortion. However, as the Court is generally expected to uphold precedent (i.e., *stare decisis*), allowing states to decide abortion rights could still be interpreted as an overstep.

⁸¹ Ibid.

⁸² Jonaki Mehta and Courtney Dorning, "One Man's Outsized Role in Shaping the Supreme Court and Overturning *Roe*," *NPR*, June 30, 2022, npr.org. (accessed February 24, 2023).

⁸³ Canellos, Peter, "'A Moment of Truth for the Federalist Society': Politics or Principle?" *POLITICO*, November 10, 2022, politico.com. (accessed February 24, 2023).

⁸⁴ *Dobbs v. Jackson Women's Health Organization* (n 78).

Concerns about upholding institutional legitimacy were more apparent from the liberal wing. All three liberal justices dissented in *Dobbs*. Justice Sotomayor asked whether the Court could weather the storm of the public viewing the Constitution and its interpretation as mere politics. She cited the Mississippi legislature’s reference to the “new justices”⁸⁵ as the reason behind its challenges to *Roe* and *Casey*.

Justice Breyer voiced his apprehension about overturning landmark decisions without a compelling reason. *Dobbs*, they argued, had no real purpose than to provide what conservatives had hoped but had yet to secure a majority for: an end to abortion. These justices were also concerned about public well-being; they opined that the decision would relegate women to second-class status and disproportionately impact poorer women.⁸⁶ They also feared that other rights derived from the right to privacy would end.

Decades of political activity, aimed at either preserving or overturning the right to an abortion, preceded *Dobbs*. Speculation that *Roe* would be reversed ran rampant after the confirmation of the Court’s sixth conservative justice, Amy Coney Barrett.⁸⁷ Then-Presidential candidate Donald Trump fueled these concerns. He promised to nominate only pro-life justices to ensure the end of *Roe*.⁸⁸

With *Dobbs*, *Roe* was arguably in its most vulnerable state in history. Abortion’s frequency of mention on the New York Times’ front page also set a record: 147 instances. Paired with record low job approval (~40%) and perceived politicization of the Court, abortion’s

⁸⁵ Ibid.

⁸⁶ Bill Chappell and Nell Clark, “The Supreme Court’s Majority and Dissent Opinions on *Dobbs* Reveal a Massive Schism,” *NPR*, June 24, 2022, npr.org. (accessed February 25, 2023).

⁸⁷ Kapur, Sahil, “Republicans May Have a Real Shot at Overturning *Roe v. Wade*. But Political Danger Lurks,” *NBC News*, October 5, 2020, nbcnews.com. (accessed February 24, 2023).

⁸⁸ Carmen, Irin, “2016 Debate: On Abortion, Trump and Clinton Give Passionate Answers,” *NBC News*, October 19, 2016, nbcnews.com. (accessed February 24, 2023).

saliency should have raised the stakes of the *Dobbs* decision. Instead, the court did not align with widely liberal public opinion.

Public opinion showed broad support (85%) for abortion in 2022. Compared to the prior case year, 2000, unconditional support had grown substantially. The highest percentage, 35%, of respondents yet supported abortion under any circumstances.⁸⁹

Gender had a greater effect on abortion support among women than men. In 2022, 38% of women and 30% of men totally supported abortion; relative to 2000, these values had grown by 11 percentage point increase for women and a five percentage point increase for men.⁹⁰

Age also had a pronounced effect on the opinions of those aged 18 to 29. A majority (53%) of respondents aged 18 to 29 unconditionally supported abortion in 2022. The other two age groups, 30 to 49 and 50 or above, trailed behind. Like the mass public, 35% of those aged 30 to 49 also supported abortion rights. Respondents aged 50 or above continued to show the lowest support for abortion: 27%.⁹¹

Young people had the highest rates of support for abortion. However, studies show that young people tend to be less politically active than older Americans.⁹² These findings may explain why the conservative Court was not responsive to an increasingly liberal public. Support among both the mass and elite public show that public opinion was largely liberal. Regardless of education, a majority of Americans broadly supported abortion in 2022.⁹³

Perceived politicization of the Court, coupled with increased party polarization, should have produced noticeable differences between the opinions of Democrats and Republicans. A

⁸⁹ *Gallup* (n 12).

⁹⁰ *Gallup* (n 21).

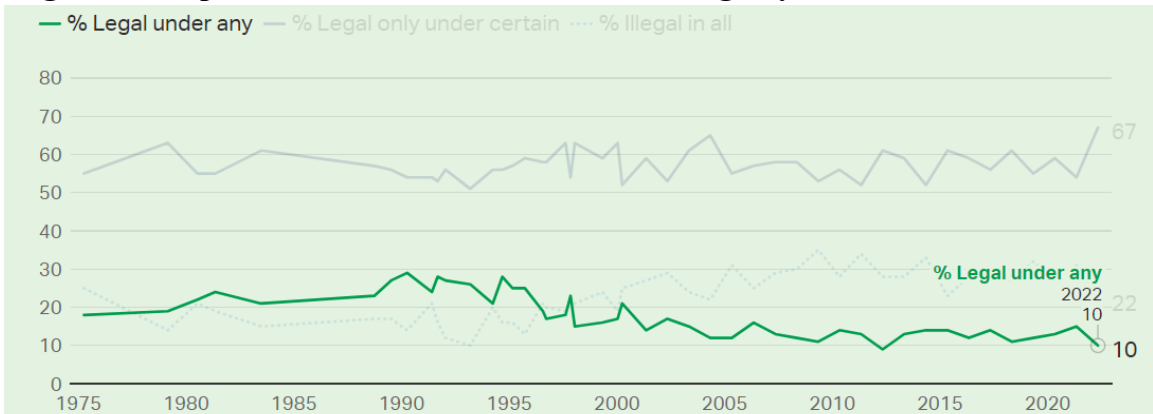
⁹¹ *Gallup* (n 22).

⁹² File, Thom, "Voting in America: A Look at the 2016 Presidential Election," *United States Census Bureau*, May 10, 2017, census.gov. (accessed February 24, 2023).

⁹³ Besheer Mohamed, et al., "America's Abortion Quandary," *Pew Research Center*, May 2022, pewresearch.org. (accessed February 26, 2023).

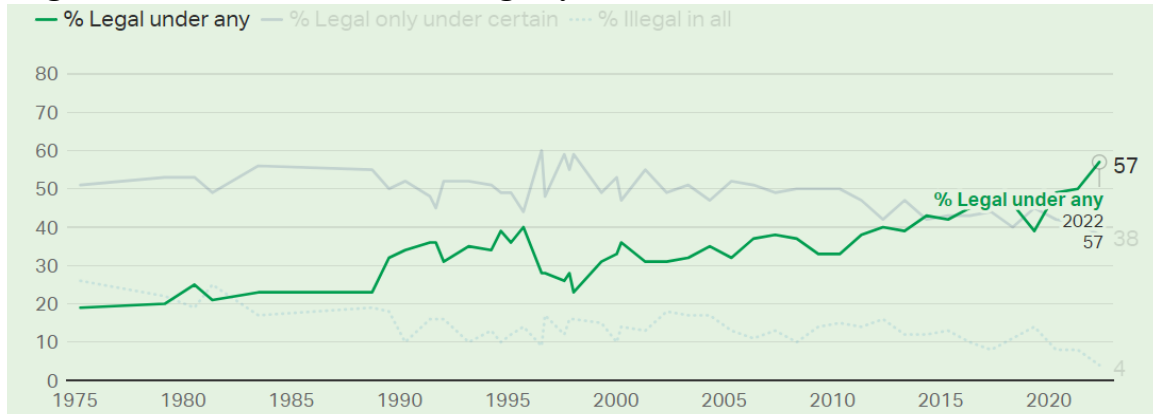
mere 10% of Republicans supported abortion under any circumstances in 2022 (see Figure 18). In comparison, a majority (57%) of Democrats reported the same (see Figure 19).⁹⁴ This percentage represented the greatest, unconditional support yet for abortion rights. This difference of over 40 percentage points showed a clear partisan divide over abortion.

Figure 18: Republicans’ Views on Unconditional Legality of Abortion, 1992



Source: Gallup (2022)

Figure 19: Democrats’ Views on Legality of Abortion, 1975-2022



Source: Gallup (2022)

Party polarization may also explain the ideological divide in *Dobbs*. Justice Breyer is a registered Democrat. Records show that he votes regularly in elections.⁹⁵ In a CNN interview, Breyer voiced his dislike of the *Dobbs* decision.⁹⁶ He also explained his efforts to persuade other

⁹⁴ Gallup (n 23).

⁹⁵ Barne and Shackelford (n 71).

⁹⁶ Cole, Devon, “Breyer Warns Justices That Some Opinions Could ‘Bite You in the Back’ in Exclusive Interview with CNN’s Chris Wallace,” *CNN Politics*, September 23, 2022, edition.cnn.com. (accessed February 26, 2023).

justices to protect *Roe* and *Casey*. Outside of the Court, there was little attempt to mask his politics. His position on abortion and party identification were clear. If one were to connect party affiliation with abortion beliefs, Breyer’s vote was foreseeable. Party affiliation can affect public perceptions of the Court as a political institution.

On the Republican side, justices generally made an outward effort to appear nonpolitical. However, records searches uncovered a different reality. Justice Gorsuch insisted that there is “no such thing” as a Republican or Democratic judge. An investigation found that he was last registered as a Republican.⁹⁷ Kavanaugh also sought to distance himself from party politics. Although, political operatives close to him revealed his past work for, and previous connection to, the Republican Party.⁹⁸ Intense partisan effort, by Republicans, to confirm both Gorsuch and Kavanaugh hindered their attempts to appear nonpolitical.

In addition to politics, religion can impact abortion opinions. Lack of proportionate, religious representation may explain why the Court was removed from the public. Catholic representation on the Court was greatest in 2022.⁹⁹ Five of the six justices who voted to overturn *Roe* and *Casey* are Catholics. The Catholic Church’s opposition to abortion is clear. Justice Gorsuch also voted to overturn both precedents, but his religious identity is currently unclear. Although, he was raised Catholic and had studied alongside a prominent Catholic philosopher.¹⁰⁰ It is important to note that religious identity is different from religious intensity. However, one can make inferences about the personal religiosity of the justices. Each conservative Catholic had

⁹⁷ Cassens Weiss, Debra, “Which SCOTUS Justices Are Registered Democrats or Republicans?” *American Bar Association Journal*, February 3, 2020, abajournal.com. (accessed February 26, 2023).

⁹⁸ Brock, David, “I Knew Brett Kavanaugh during His Years as a Republican Operative. Don’t Let Him Sit on the Supreme Court,” *NBC News*, September 7, 2018, nbcnews.com. (accessed February 26, 2023).

⁹⁹ Sarah McCammon and Domenico Montanaro, “Religion, the Supreme Court and Why It Matters,” *NPR*, June 7, 2018, npr.org. (accessed February 25, 2023).

¹⁰⁰ Burke, Daniel, “What is Neil Gorsuch’s Religion? It’s Complicated,” *CNN Politics*, March 22, 2017, cnn.com. (accessed February 25, 2023).

an intensive Catholic education, frequently added Mass or explicitly expressed their faith at a confirmation hearing.¹⁰¹

The Catholicism of the Court, however, was not representative of the broader population. In 2022, a mere 23% of the population identified as Catholic, compared to the 67% Catholic representation on the Court. Gallup also found a general decline in religiosity among Americans.¹⁰² By 2019, a majority of Americans did not believe that religion was “very important” in their own life. In 2022, the greatest percentage (28%) of Americans believed that religion was “not very important.”

Religious practice (e.g., church attendance) also decreased over time; half of Americans (50%) in 2022 reported being dissatisfied with the influence of organized religion.¹⁰³

Conceptions about when life begins are often derived from religious sources. The increasingly irreligious public and highly religious Court were unaligned. The Court worsened its legitimacy crisis. The *Dobbs* decision led to a sharp decline in support for the Court. A Gallup poll conducted after *Dobbs* found that public approval of the Court dropped to the lowest level in three decades.¹⁰⁴

Public disapproval materialized into personal threats and protests outside justices’ homes. For Supreme Court justices, such confrontations are relatively new phenomena. Before *Dobbs*, picketing near residential properties was largely an issue between anti-abortion protesters and physicians.¹⁰⁵ Leading up to *Dobbs*, abortion protesters and counterprotesters staged multiple protests outside justices’ homes.

¹⁰¹ Newport, Frank, “The Religion of the Supreme Court Justices,” *Gallup*, April 8, 2022, [gallup.com](https://www.gallup.com). (accessed February 25, 2023).

¹⁰² *Gallup* (n 12).

¹⁰³ *Ibid*.

¹⁰⁴ Carroll Doherty, et al., “Positive Views of Supreme Court Decline Sharply Following Abortion Ruling,” *Pew Research Center*, September 1, 2022, [pewresearch.org](https://www.pewresearch.org). (accessed February 26, 2023).

¹⁰⁵ Hudson Jr., David, “Protests in Neighborhoods,” *The First Amendment Encyclopedia*, n.d., [mtsu.edu](https://www.mtsu.edu). (accessed February 26, 2023).

Tension over *Dobbs* also escalated to death threats. An assassination attempt on Brett Kavanaugh, and at least two other justices, occurred after the *Dobbs* draft opinion was leaked.¹⁰⁶ Armed bodyguards were provided for the justices. Personal residence aside, the Supreme Court itself also witnessed an increase in political activity. After the *Dobbs* leak, a defensive metal barrier was installed around the Court. It was not removed until months after the *Dobbs* decision.¹⁰⁷ These protective measures are unprecedented for the Supreme Court. Comparable measures were taken after the January 6 insurrection and before President Biden’s first State of the Union address.¹⁰⁸

In an era of extreme party polarization, perceivably political acts (i.e., banning abortion) may be seen as imposing one’s will on another party. Politics has perceivably become more absolute. In 2020, about 8 in 10 Democrats and Republicans believed that the other differed in “core values,” not just policies.¹⁰⁹ Roughly 9 in 10 Democrats and Republicans viewed victory by the other party as a threat to national welfare.¹¹⁰ Both parties remain polarized in their views on abortion. There is little perceived room for compromise.

In *Dobbs*, the lack of alignment between the Court and public opinion weakens the *responsiveness hypothesis*. Elite opinion has continually been more supportive of abortion than mass opinion. An unresponsive Court, then, is more out of touch with the elite than the general public. As such, there is little support for the *elite behavior hypothesis*. In addition, no

¹⁰⁶ Holmes Lybrand and Tierney Sneed, “FBI Says Man Accused of Attempting to Kill Brett Kavanaugh Said He Was ‘Shooting for 3’ Justices,” *CNN Politics*, July 27, 2022, cnn.com. (accessed February 26, 2023).

¹⁰⁷ De Vogue, Ariane, “Supreme Court Fences Come Down Two Months after Dobbs Decision,” *CNN Politics*, August 29, 2022, cnn.com. (accessed February 26, 2023).

¹⁰⁸ Rebecca Shabad and Fiona Glisson, “Non-scalable Fence Erected outside Supreme Court amid Abortion-Related Protests,” *NBC News*, May 5, 2022, nbcnews.com. (accessed February 26, 2023).

¹⁰⁹ Michael Dimock and Richard Wike, “America Is Exceptional in Its Political Divide,” *Pew Research Center*, May 29, 2021, pewtrusts.org. (accessed February 26, 2023).

¹¹⁰ *Ibid.*

counterattitudinal votes were taken. All six conservative justices upheld the Mississippi ban. *Dobbs* presents no support for the *counterattitudinal voting hypothesis*.

Conclusion & Future Areas of Improvement

After *Roe* established the constitutional right to an abortion, there were countless attempts to overturn or weaken it. These attempts include the eight key Supreme Court cases. Cases that were close to overturning *Roe* (e.g., *Webster*) led to increases in political activity and support for abortion. Understanding public opinion around the time of each case helps scholars analyze Court responsiveness.

Mass public opinion broadly supported abortion. Gender was not a strong determinant of abortion beliefs. Although, women were relatively more supportive of abortion rights than men. Clear differences began relatively recently (i.e., around 2020). Since 2020, there has been at least a seven-percentage-point difference between women and men.

Age has had somewhat of a noticeable effect on abortion beliefs. As age increased, support for abortion decreased. Those aged 18 to 29 tended to be the most supportive of abortion, followed by those 30 to 49 and 50 or above. Generally, age-based differences in abortion opinions were greater in the past. In the past two decades, the opinions of those aged 18 to 29 and those 30 to 49 have converged. Those 50 or above remain the least supportive of abortion.

Party polarization also played a role. Differences by party identification aligned with increasing party polarization. Political differences on abortion were relatively narrow prior to the 1990s. Since the 1990s, however, Republicans and Democrats have become increasingly divided on abortion. Republicans have tended to be opposed to, and Democrats in favor of, abortion rights. These differences are clear in the party platforms. By 1990, the frequency in which

abortion was mentioned on the New York Times' front page was almost consistently over 100. This pattern also aligns with increasing party polarization over abortion in the 1990s.

The seven cases following *Roe* were largely successful in restricting abortions. Of the seven cases, the Supreme Court aligned with public opinion in three. As the starting point of this study's analysis, *Roe* is excluded. Alignment between the Court and public occurred about 42% of the time. This finding weakens the *responsiveness hypothesis*.

There was not a clear finding of Court responsiveness to public opinion. The Court generally did not align with elite opinion. The elite, those who tend to be more educated and politically active, were even more supportive of abortion than the mass public. Thus, the Court's unresponsive voting suggests that justices have not been particularly swayed by the elite. In theory, political activity should have posed some threat to the Court. An increase in protests and threats are indicators for justices about the salience of their decision. Nevertheless, the Court has often been unresponsive to public opinion. The current Supreme Court has been even more unresponsive than Courts past. Justice Amy Coney Barrett joked at a 2022 Federalist Society dinner that, after an uptick in political activity outside her home, she was appreciative to hear "noise made not by protesters."¹¹¹

Although, in some cases where the Court was not responsive to the public, justices still voted counter to their own ideology to align with public opinion. Counterattitudinal voting occurred in five out of seven (71%) cases. This finding supports the *counterattitudinal voting hypothesis*. Some justices, including Blackmun and White, even began consistently voting with the other ideology. Interviews pointed to a general concern about institutional legitimacy and perceived politicization of the Court. Oral arguments included questions of whether the Court

¹¹¹ Cole, Devon, "4 Supreme Court Justices Who Voted to Reverse Roe Get Warm Reception at Federalist Society Dinner," *CNN Politics*, November 11, 2022, [cnn.com](https://www.cnn.com). (accessed March 4, 2023).

would survive the “stench” of overturning the constitutional right to an abortion. Court opinions prefaced rulings by stating that abortion is an understandably controversial issue.

Despite the relatively recent nature of party polarization, justices have been historically concerned about perceived politicization of the Court. Some justices (e.g., Stevens) discussed their efforts to have no outward allegiance to a political party. Nonetheless, perceived politicization of the Court has worsened over time.

Even the process of nominating and confirming justices has become highly politicized. Ideological conservatism and religion essentially became litmus tests for abortion opinions. Consequently, Federalist Society and Catholicism became highly influential in the 21st century. Five of the Court’s current justices are Federalist Society members and Catholic. All five voted to overturn *Roe*. Given the relative modernity of Catholicism’s influence on the Court, there are still unanswered questions about how much of an influence it exerts. A future study can expand on the influence of religion on the Court over time.

Another area for future improvement is studying how states responded to the *Dobbs* decision. The Court overturned *Roe* to allow states to decide on the right themselves. In theory, then, largely Republican states should have banned abortion after *Roe*. Conversely, largely Democrat states should have codified *Roe* into law. Brief analysis of the 2022 midterm elections indicates otherwise. For example, voters in Kentucky rejected an amendment to the state constitution that would have banned abortion. The amendment was introduced by Republican politicians. As such, Kentucky’s referendum result may be seen as a rejection of conservative attempts to end abortions. Further studies can be conducted to consider how states and voters have generally reacted to Supreme Court decisions.

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