



Abortion Law in the U.S. and Abroad After *Roe*

Thursday, June 14, 2022, 7 - 8 p.m.

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[00:00:00] Melody Rowell: Welcome to Live at the National Constitution Center, the podcast sharing live Constitutional conversations and debates, hosted by the center, in person and online. I'm Melody Rowell, the center's podcast producer. The United States Supreme Court ruling in *Dobbs versus Jackson Women's Health Organization* overturned the landmark decision of *Roe versus Wade* and found no constitutional basis for a right to choose abortion. We convened a conversation exploring the role of the Supreme Court in shaping abortion rights under the Constitution, how U.S. abortion law compares to that of other countries, and what lessons the United States can learn from how other nations' laws treat abortion.

[00:00:44] Our panelists are Teresa Stanton Collet of the University of St. Thomas School of Law, David French of *The Dispatch*, Katherine Mayall for the Center for Reproductive Rights, and Mary Ziegler of UC Davis School of Law and author of *Dollars For Life: The Anti-Abortion Movement and the Fall of the Republican Establishment*. Jeffrey Rosen, President and CEO of the National Constitution Center, moderates. This conversation was streamed live on July 14th, 2022. Here's Jeff to get the conversation started.

[00:01:14] Jeffrey Rosen: Hello, friends. Welcome to the National Constitution Center and to tonight's convening of America's Town Hall. I am Jeffrey Rosen, the President of this wonderful institution. Tonight's program, which I'm so honored to moderate, marks the first of a series of programs that the National Constitution Center is presenting in partnership by the Center for Constitutional Design at Arizona State University's Sandra Day O'Connor College of Law. Uh, I'd like to thank our great partner, Stefanie Lindquist, and her team for their collaboration in putting together the great panel you're about to hear, and also, uh, generously sponsoring the event.

[00:01:51] And, uh, tonight's panel will include a focus on the international perspective of constitutional law, which we can learn so much from, and is so illuminating, uh, when it comes to the abortion debate, which we're talking about tonight. It's so meaningful to be in conversation with four of America's greatest thinkers about the abortion debate, who- who have an international perspective and- and- and really can help us, uh, learn together from different perspectives on this crucially important topic.

[00:02:22] It's wonderful to welcome all of you, and let's jump right in with you, Katie Mayall. Your map tracing abortion law in a comparative perspective is invaluable in giving us a sense of the broad categories and trends of abortion around the world. You note several important trends,

including different categories of abortion laws that you state first countries that prohibit abortion all together, which is 5% of the world, those that, uh, prohibit abortion to save a woman's life, 22%, to preserve health, 14%, on broad social economic grounds, 23%, and on request, 36%.

[00:03:04] It's a lot of statistics. So, help us make sense of what that means about which states broadly ban abortion throughout pregnancy, and those that make it available, um, at different points, and what should we make of the fact that the average, uh, of all the countries that allow abortion on request, the most common gestational limit is 12 weeks. So, a big topic, but help us understand the international state of abortion law.

[00:03:28] Katherine Mayall: Absolutely. Thank you so much, Jeffrey, and thank you so much for having me. So, I encourage folks to, um, also go to the map after this program, not right now, and to- to check it out and poke around on it yourselves. Um, but what we can see from the world abortion laws map is that about 60% of the global population lives in countries that permit abortion on request or on broad social and economic grounds, whereas the remaining 40% of countries, um, they generally have restrictive abortion laws, as Jeffrey mentioned, laws that either only permit abortion where the person's, uh, health is at risk, where their life is at risk, or that prohibit it all together.

[00:04:02] What we can see from the map is that, by and large, of countries that permit abortion on request, you see countries that, um, are, similar in legal tradition and in social structure and social systems as the U.S. So, we see, for countries that permit abortion on request, pretty much all of Europe, uh, Canada, Australia, and New Zealand, um, pretty much all western democracies. And then, what we see, generally, for countries that still have restrictive abortion laws, we see a lot of those, um, throughout what we would consider the global south. Um, so, uh, predominantly throughout Latin America, but that is rapidly changing, um, as folks might know with the green wave in Latin America, there's been a, uh, trend towards liberalization recently.

[00:04:41] Um, still a number of restrictive abortion laws throughout Africa and then some throughout Asia, but Asia is a little bit, um, more diverse insofar as what the, uh, legal systems look like. I think it's important to note that the- the map doesn't show the legal trends. I think the legal trends are also really important. So, overwhelmingly, what we've seen is over the past 25 years, countries liberalizing their abortion laws. So, over the past 25 years, nearly 60 countries have liberalized their abortion laws, and only four countries have actually removed legal grounds for abortion. Uh, those four countries being the U.S., Nicaragua, El Salvador, and Poland. Uh, and so, that's the- the lay of the land insofar as global abortion laws.

[00:05:19] Jeffrey Rosen: Thank you so much. What a wonderfully concise and illuminating summary. Very much appreciated. David French, what is your reaction to Katie's account of the global status of abortion laws. She said 60% of the world's population live in countries where abortion is broadly legal. The remaining 40% are in countries with more restrictive grounds. What do you make of them?

[00:05:40] David French: Yeah. You know, it's- it's interesting. I'm l- I- I kinda zoomed back from what Katie was talking about, and Katie provided some really outstanding data, here, on where the different laws are, and one thing that's interesting to me, um, is how- a- a question that

I have is- is sort of much less measurable by objectively looking at the laws themselves. And one of the questions I have is how contentious, for example, is abortion law in that particular society? That's something that is very interesting to me, and while I'm not gonna dive into every nation, to a large degree, it appears that a lot of countries have reached through democratic processes a- a- a- at least a form of societal consensus that is different from where we are.

[00:06:23] If- uh, we are a- a very sharply divided country on this basis, uh, and so, one of the distinctions, I think, that exists between the United States and many other developed countries is abortion is less contentious in, uh, many other developed countries than it is in the United States. Another interesting thing that I look at when I look at abortion around the world is the difference, not just in abortion laws, but abortion rates, and why are abortion rates sometimes quite different from country to country with similar abortion laws?

[00:06:54] So, for example, uh, Germany has a relatively low abortion rate compared, at least to the latest data that I have, compared to some other European countries with similar abortion restrictions. Uh, Russia has a very high abortion rate, certainly a very high rate compared to the United States, and those are things that I think are very interesting to dive into on a- both a cultural and an economic basis. Why is that? Why do you have greater consensus in many developed countries? And why do you have widely divergent abortion rates in many of these developed countries? And I think that's- you know, as we're going forward into this new era where abortion laws are gonna be defined by the democratic process, state by state, for now, potentially federally, what are we- what can we learn about the possibility of consensus from other countries? What can we learn about, uh, factors that influence the abortion rate, aside from the law from other countries?

[00:07:53] Jeffrey Rosen: Such important questions. Why is there more consensus and why are there lower abortion rates in other countries and- and perhaps we can dig into both of those during our conversation tonight. Mary Ziegler, what is your reaction to the what the state of the law internationally, and what do you make of the fact that in countries that broadly consider abortion legal, 60% of the world's population, the average time period when abortion is available, up to, is 12 weeks, and then of the fact that in the 40%, the more restrictive countries, only 5% prohibit abortion all together and the remaining percentage allow abortion to preserve life or health?

[00:08:32] Mary Ziegler: Yeah, I- I guess I'll start with questions that interest me. So, I'm- I'm interested, too, in how laws that do criminalize abortion are enforced. You know, because we're- we're in the middle of, I think, state's figuring out how to enforce laws. Right? So, if they have some- either written into the law or as rationale for the law, protection for fetal personhood or fetal rights, how does one actually effectuate that? Is that through enforcement of criminal law, criminal prohibitions, [inaudible 00:08:58]. Um, is it through, you know, some sort of welfare provision in addition, or, um, instead of other penalties?

[00:09:06] I'm curious about that too, um, and, uh, that we can learn, uh, obviously, some things about that in places both that has some kind of fetal rights language, um, in their constitutional, um, traditions, like, Germany, as well as places that have strong criminal prohibitions, uh,

against abortion, um, in the global south, and I'm also- this is sort of, I think, the- the twin of David's question. I'm curious about the places where abortion is becoming more contentious, places like Brazil, and whether we can learn any parallels to what has made things contentious here, beyond the law, because again, I don't know to what extent- I think it's- it's tempting for us, as lawyers, to say it's all law, and it's law all the way down, and that's how this became contentious, but that's something that lawyers tend to say when they're not paying attention to political, cultural, social, economic history.

[00:09:51] Um, and so, I'm inclined to think that those explanations are radically oversimplified, and that we would learn from places where the law may not be similar to ours, but we're seeing, uh, the abortion debate become more contentious. I mean, what I take from- from the fact that there's some kind of consensus, um, I think it's- it's a little hard to draw the comparison, in part, because many of the nations that have gestational limits, at- somewhere- in- in much of Europe, just to take an example, um, between 12 weeks, 14 weeks, 15 weeks, depending on the country. Um, many of those countries also fund abortion earlier in pregnancy and have better social safety nets than we do, more expansive healthcare than we do.

[00:10:27] So, it may not be an apples-to-apples comparison, to the extent it is, I think the polling numbers in the United States that we have, with the usual caveat of our polling numbers not always being amazingly accurate, is that Americans seem to be sort of in the same place, in the sense that they don't really seem to want laws that- maybe not they don't seem to want laws that ban abortion at fertilization, they don't seem to be excited about really strongly carceral enforcement. Um, Americans United for Life had a fascinating recent poll that showed large percentages of Americans saying we like the idea of protecting fetal life, but we don't necessarily like abortion restrictions, which means they're people who are thinking about is there a way to be protective of fetal life that isn't just about punishing people. Right?

[00:11:11] And there's- there's interesting international comparisons there. But I think that there's an interesting sense in which the political parties in the U.S. don't necessarily line up with where most voters seem to be, which is closer to what we see internationally, right, which is landing somewhere in the middle. An interesting kind of potential caveat is, um, what do we make of, for example, the so-called hard cases? Right? So, in- in lots of the parts of the world that have the gestational limits we described, there may be broader access in cases of, you know, health threats, fetal conditions incompatible with life. And so, I- I'd also say we- we m- that might complicate the picture a little bit. It gets a little messier when you look at kind of exceptions to what are otherwise general prohibitions after certain gestational limits.

[00:11:52] But, on a kind of oversimplified- my oversimplified first take is that Americans are not very different from people in similarly-situated countries, in the kinds of gestational limits they might like to prefer, but our- our party politics, at least at the national level, um, almost entirely foreclosed that as a policy solution. Right? So, I don't- I don't foresee any state- I mean, maybe Florida- maybe Florida, just for the weird dynamics of Florida, will stay at 15 weeks forever, but I think barring that, the- the pressure in the United States is to go toward no restrictions or, you know, really sweeping restrictions in the states, which will make the U.S. an outlier again, just in different ways.

[00:12:32] Jeffrey Rosen: Fascinating. Thanks, both for putting those two new questions on the table, how contentious is abortion law in a particular society, and- and how are countries that have, uh, restrictive abortion laws- how do they enforce them, and also for that final observation that America's [inaudible 00:12:47] similar to people in similarly-situated countries in the rest of the world, but our part- party politics, as you said, forecloses the kind of moderate, uh, solution. Teresa Collett, your reaction to the global abortion law statistics that we've been talking about, and, given the fact that many of the western democracies that do allow abortion in- to an average of 12 weeks are Catholic countries or- or have- have a Catholic tradition. Would you say that that line is consistent with a pro-life position or would- would one have to be in the 40% of countries that restrict abortion greatly, to be considered pro-life?

[00:13:28] Teresa Stanton Collet: Well, I'd like to make the distinction between the country alignment, that Katie outlined, as opposed to the intervention of international organizations like the United Nations. We have seen a long historical effort on the part of the United Nations to force countries that don't have the wealth of western Europe and the United States to comply, things like the World Bank conditioning loans for new dams and roads and infrastructure, on having some sort of family planning, uh, program nationally, and there certainly have been international organizations, including those working with the World Health Organization, that have conditioned access to certain things, based on the embrace of certain positions.

[00:14:12] So, I think the idea that domestic policies of foreign nations necessarily represent, even in the absence of judicial overreach, a particular view of the people as a whole, uh, must be taken with a fairly large grain of salt, given, sort of, the granting of some of the largest, of course, foreign aid countries are those that have embraced wa- a very wide permissive policies regarding homosexuality, in general, and particularly regarding abortion. So, I think- I- I think that data is important for those who are viewing this to distinguish between, you know, democratic societies where it really represents a vision of the people and those societies that, frankly, are, some large degree, subject to the neo-clo- colonialism that a number of African nations have decried, particularly in the abortion area.

[00:15:09] I do think it's interesting, though, that even among those wealthy nations, uh, comprising western Europe, that there is a consensus that, certainly, after 12 weeks, the humanity of the unborn child is really evident, and- and I think that's, in part, the influence of ultrasound. I think it's, in part, the influence of, uh, just families experiencing once fetal movement, you know, the common law quickening was a line that was drawn, uh, because there wasn't really qu- questions about the existence of the separate and independent, uh, in the words of, uh, the North Dakota statue, "a separate, unique human" being involved in this decision making.

[00:15:52] I do think it's curious though, um, that if it is, if we recognize it as separate, unique human being, what grounds really justify a woman seeking to, um, terminate that separate, unique human being's life, uh, which is where I think you see that 40%, uh, falling. As far as church doctrine, I- I- I'm happy to address it. I- I didn't realize it was a part of the conversation we were having. I thought we were having a conversation about foreign law and s- international law, and the judicial influence of the U.S. Supreme Court, but certainly, uh, it's quite clear that, uh, Catholic church teaching, along with many other, uh, religious organizations throughout the

world, religious communities, uh, require, uh, respect for all human beings, uh, and that a wilful taking of another human being's life is a grave, grave matter of concern.

[00:16:51] Jeffrey Rosen: Thank you very much, uh, for calling our attention to the fact that some of these laws may not have been consistent with domestic public opinion, but may have been embraced under UN pressure, and also for, uh, helping us understand the distinction of, uh-

[00:17:06] Katherine Mayall: Jeffrey, can I just jump in to respond to Teresa?

[00:17:09] Jeffrey Rosen: If you- if you could, and- and, I also want you, um, in addition to responding, 'cause we've- you have to set up the next- there are a lot of questions to you, Katie, that- that, uh, Mary and David asked as well, but I think the big one that emerged that might be great for you to talk about is the how question, which Teresa did raise. How are these laws in different countries adopted? Are they adopted through democratic, uh, legislatures, uh, international pressure, judicial opinions? Obviously, a very complicated question, but give us a sense, in your wonderful way you have of bringing on this complicated data together of- of- of broadly, how these laws are adopted internationally.

[00:17:46] Katherine Mayall: Absolutely. So, I think, just to, um, also respond to a couple of questions that David and Mary had raised as well, I think I want to just raise in response to, uh, something that Mary had mentioned about looking at other countries about what the enforcement of these laws looks like in practice and what does it mean to actually have restrictive laws on the books. I wanted to just bring that home to say that, at the Center for Reproductive Rights, we know what that looks like, because we have offices around the globe, and we work with scores of women who have been in jail. In El Salvador, we work with women who have been in jail and who have sent- been sentenced for 30+ years for fetal homicide charges after they sought emergency medical care for missed miscarriages, where they were suffering from having miscarriages, and they sought healthcare, and then were accused of having illegal abortions.

[00:18:29] With the women we work with in El Salvador, by and large, these are indigenous women who didn't have access to due process, who didn't have access to, um, adequate representation, and now, have spent decades in prison. So, I just want to say that we- we do know what it looks like for these, uh, laws to be put into effect, and what it looks like in practice. There's also been a lot of talk about 12 weeks, and I just wanted to draw the distinction that, you know, I think as was- as was mentioned, we're not seeing 12 week bans. So, right now, we've seen six states that are enforcing full bans, four states enforcing six week bans, and about four states that have- where providers have just providing abortion services all together because of the legal confusion that's, uh, resulted.

[00:19:08] And so, these bans that we're seeing in effect, look far more similar to countries that only permit abortion where a person's life is at risk. So, we're not talking about- Europe is no longer the common comparator that we're looking at. Right? We're looking at, you know, so, laws in place that are more similar to what we see in Brazil, and I know Mary mentioned current abortion debates and tightenings around abortion access in Brazil, but we're looking at more akin to the laws across the U.S. looking similar to laws in Brazil and Guatemala, both countries where

we also work, and where we also have seen the devastating impacts of restrictive abortion bans, particularly on poor women.

[00:19:42] Uh, then, finally, to bring us back to the- the question about how these, um, reforms take place. So, yeah, certainly, reforms around abortion take place in all sorts of different ways. Certainly legislative reform is the most common type of reform that we've seen around abortion access. Uh, that's the most common way, globally, this happens. Actually, constitutional reform has been an interesting avenue, itself, for abortion access as well, and abortion legality. Uh, when Kenya refined its constitution a number of years ago, they actually instituted an explicit provision into the constitution around abortion being legal under certain circumstances, um, and left room for- for broadened, um, interpretations under the legislature.

[00:20:19] So, they actually created a floor in the constitution where abortion must be available where the person's life or health is at risk. Um, and so, that's also been another avenue, um, is actually explicit recognition of it in the constitution. And then, finally, the courts, of course. So, we've recently seen some really strong decisions coming out of Columbia, for example, which their constitutional court just, uh, liberalized their abortion law to recognize, um, abortion must be available on request through 24 weeks of pregnancy, and they really grounded that decision when looking at health and equality, as really, the- the centerpieces of why abortion must be legal up to that point.

[00:20:54] Uh, similarly, Mexico's supreme court just issued a constitutional decision as well recognizing they similarly have a federal system to the U.S., uh, where abortion is regulated at the state level, and they actually overturned a whole host of state-level, um, abortion bans, which states are now in the process of, um, incorporating into their respective laws because the court recognized that abortion must be available early in pregnancy, and also mandated the federal government to ensure that it's free as well. Um, so, those are the different avenues we've seen for law reform.

[00:21:22] **Jeffrey Rosen:** Fascinating. Thank you very much for that, for putting on the table, those different avenues for law reform, legislatures, constitutional reform, and courts, and also for this powerful claim that, uh, to the degree that states in the U.S. that are now banning abortion are doing so either throughout pregnancy or with a very small window. You- you argue that the U.S. looks more like Brazil and Guatemala than it does like Europe. David, what do you make of- of that response to the how question and then say more about your- your provocative, uh, comment in the- in the last round that, you know, you think that the U.S. might converge around a line that looked more like Europe if our politics were less polarized, but because of the extraordinary polarization on both sides of the political parties, that kind of moderate compromise is unlikely.

[00:22:10] **David French:** Yeah. You know, we- we have, um, I- this isn't a news flash to anybody. [laughs] We have pretty base-driven politics in the United States. And so, what you end up having is a dynamic of people- a- the dynamic in the United States is that, uh, while a majority of Americans would support abortion being legal, um, after the first trimester, broadly legal after the first trimester, uh, a minority of Americans are much more focused on broadly

prohibiting abortion, a minority of Americans would protect abortion rights up until birth. Um, it is those two minorities who are most engaged on the issue, and as we've learned in issue after issue, it is not a majority that necessarily dictates any given policy outcome in the United States.

[00:23:02] It's very engaged minorities. Okay. So, uh, a good example of- and- and one of the other interesting things about polling is that the- a- about our electoral experiences is that often, the very engaged pro-life, uh, minority is larger than the very engaged pro-choice minority. So, I'll- I'll give you a good example. Uh, in the Virginia gubernatorial election in 2021, um, Terry McAuliffe spent a lot of money saying, "Hey, this could be the first gubernatorial election in our l- you know, in men- most of our lifetimes where the governor can actually have a real impact if- if Dobbs comes out the way Dobbs ultimately came out, where the governor could have a real impact on abortion rights."

[00:23:50] And after all of that money, the exit polling showed that a very small percentage, only about 8% of Virginians voted abortion as the number one issue, but of that 8%, 60%, or almost 60%, were pro-life, and that really is, I think, quite illustrative of where the abortion debate often is in the United States. You have two competing committed minorities. Um, and again, nothing unique about abortion in that context. We'll often see that, for example, in gun rights debates. You'll have competing committed minorities on the issue, and sort of the larger majority point of view, at least what we understand it to be from issue polling, often gets lost, and I think, when you start to look at the breakdown of the maps of the United States, you're seeing that play out.

[00:24:39] So, in the south, where I live, where you have, A, very low abortion rates, with exception of Georgia, uh, and- and B, very restrictive- oh, very low abortion rates before Dobbs, uh, and B, now, much more restrictive abortion laws, you're gonna look much more like, say, a Mexico, for example. And then, if you look at New York or California, um, their abortion laws would be outliers in Europe. They would be well beyond what abortion laws are in Europe, and that's, I think, a representation of very base-driven politics where committed minorities tend to control in bright red or deep blue states.

[00:25:20] Jeffrey Rosen: Fascinating. Mary Ziegler, do you agree with David that because of our party politics, we're seeing much more polarized abortion laws than majorities, even in each of those states, support? And what is the international experience- tell us about what will happen as legislatures increasingly pass laws that are either more restrictive or perhaps even more permissive than their populations support. Um, what will the people of those states do to respond and what will the map look like in the U.S. when the dust settles?

[00:25:52] Mary Ziegler: Yeah. I mean, I think that David's probably right, that our politics- and I mean, there's- as a historian, I found pretty obvious archival evidence of this. You can go into presidential libraries for a variety of presidents and hear presidential campaigns saying more or less what David said, that the way the voters who actually turn out, based on the abortion issues, are the ones who matter to politicians. Other voters may have a view on abortion, but if they don't put money behind it or they don't go to the pa- the ballot to, um, make that clear,

politicians feel free to ignore them, and the dynamic, I think, historically, has been that, uh, pro-life folks were more motivated, in part, because they weren't relying on the Supreme Court.

[00:26:27] It'll be interesting to see if that dynamic changes. I've seen some signs that conservatives, now, seem to think that the Supreme Court is going to save them in the way progressives used to sound, which- so, it'll be interesting to see if we, um, we have a kind of court-based complacency, um, shifting. Uh, I think some of the interesting wrinkles, of course, um, in the United States, I think there's also an important dynamic in the United States involving negative and effective partisanship. So, um, there are states where we have fairly reliable polling, um, in- including conservative states where majorities don't seem to want absolute bans. They might seem- they might want laws and restrictions, but they don't want bans from fertilization.

[00:27:04] Um, again, maybe the polling isn't great, but the polling we have would suggest, like, just last year, for example, can- there were something like 60+% of Kansans said they didn't want an absolute ban. Um, I think, a- according to The Upshot at The New York Times, 51% of Oklahomans said they didn't want an absolute ban. So, there's also, I think, something going on where peo- voters' preferences in those states for electing Republicans are stronger than their preferences for people who may have more moderate on- uh, positions on abortion, and because our partisan divide runs so deep, it's- it's very hard to get voters to put their views on abortion ahead of their partisan preferences, especially when their partisan preferences may match their views on a wide variety of other issues.

[00:27:45] So, something that's interesting to watch, um, that we've seen happening in the international sphere, um, in Ireland, uh, and we're starting to see here, is that we've seen both, um, Republicans and Democrats, at times, trying to bypass partisan politics and go directly to voters. So, um, Kansans, on Au- August 2nd, will be going to the polls to decide whether to, um, uh, uh, basically, upend that state's constitutional law, the state's supreme court, um, had declared a state constitutional right to abortion. Kansans will have the ability to revisit that decision. We've seen an effort in Michigan to kind of go the other way. Michigan has a 1931, uh, abortion law that- a criminal law that was, um, it- will- will otherwise go back into effect. There's an effort, now, to say, essentially, um, Michigans will get to decide if they don't want that.

[00:28:29] And so, I- I think, in addition to our partis- our politics catering to the people who care the most, not necessarily the most people, um, there's also a- a dynamic where our- our politics don't necessarily line up even with- with that. Right? There's the usual concerns about things like gerrymandering and access to the vote, um, but I think negative partisanship makes a huge difference, in the sense that people even who care about abortion, are not prioritizing abortion when they could not possibly envision themselves voting for someone of the other party. So, um, that means that, uh, when the Supreme Court or someone tells you, you know, this is just about- everyone's gonna get to decide, it's not as simple as that. Um, it's more about kind of how partisan politics deal with the issue in the United States rather than how individual voters may like their reality to look.

[00:29:15] **Jeffrey Rosen:** Teresa, do you a- agree or- or no with- with David and- and Mary that abortion politics in the U.S. is polarized in a way that, uh, makes it difficult for majorities,

even within states to enact their preferences? And what is the international experience and- and the U.S. experience tell us about how majorities can best enact their views into law?

[00:29:38] Teresa Stanton Collet: I do think that both, uh, David and Mary have identified a real problem, uh, not just on abortion. I mean, uh, the partisanship surrounding, uh, the right to parent, the partisanship surrounding, uh, private schooling, the partisanship surrou- I mean, name it- the cause of inflation, the formula crisis. [laughs] I mean, pick your poison. Um, and so, I think there is a, um, uh, a real difficulty in engaging in the sort of civic conversation and dialogue that is an indicator of a healthy body politic. Uh, that's why I'm involved with the Br- Braver Angels Association, uh, and some other really good organizations that the point is not to change people's minds. The point is to get them to just talk to each other and understand [laughs] the other side, and that that's good. That's good. We're done. [laughs] You know, we're not asking, you know, whether we changed your mind, uh, sort of thing. So, I'm a fan of that. I think they're very insightful on that.

[00:30:41] I- but- I appreciate that David brought up, you know, Katie listed off, uh, and Mary did that, you know, Oklahoma and, uh, various other states are moving toward more restrictive abortion laws, but, you know, I'm involved in a case in New York where they repealed their infanticide law, uh, so that- a law that had been in place for 50 years, where a woman who's attacked by a thug on the streets, who's, uh, pregnant, and the baby is viable, and the baby dies, that woman doesn't have any opportunity to see justice when their- her attacker, other than it's an enhanced penalty for the assault on the woman. There's no acknowledgement that she lost a child.

[00:31:22] So, you know, there are lots of extremes in this [laughs] country, like lots of other issues, um, and I do think, um, at one level, my students who are very strongly pro-choice truly believe women's equality is at stake. My students who are truly pro-life on the issues, truly believe this is about the taking of an innocent human life. Both those principles are really tough to compromise on. [laughs] And so, I appreciate the- the polarization, but I also think that having the people decide, as Justice Alito set out, is- in the referendum process that Mary mentioned, I think there is great value in that, because I can make peace to some degree with my fellow citizens having a different judgment, as long as I feel like there's a fair process, as opposed to having my judgment completely independent.

[00:32:22] Uh, a good friend of mine once wrote an article about judges and said you can pick the politics in the back room or you can tick- pick the politics at the ballot box. I think that's true in a lot of these issues.

[00:32:33] Jeffrey Rosen: Fascinating. Well, that's such an important, uh, consensus point that all of you have converged around, which is that our politics are polarized in a way that is making it difficult for majorities to enact heir preferences into law. Um, you're so right, Teresa, to, uh, praise organizations like Better Angels, that just get people to talk with one another. Of course, that's what we're doing here in this discussion at the National Constitution Center, as we always do, by bringing together people of different perspectives to try to think through how we can respectfully explore areas of agreement and disagreement.

[00:33:05] So, Katie, given this important consensus that we've converged around, which is that in the U.S., states may adopt more polarized results than people actually favor, and given Mary's suggestion that a referendum, state by state, might better reflect public preferences than, uh, the way that the laws actually made, what can the international experience tell us about the best way of reflecting majority preferences into law? In other words, are the- are the states that have referendum-like systems, uh, less polarized than those that aren't and what can we learn from the international experience?

[00:33:41] **Katherine Mayall:** Thank you so much, Jeffrey. I am not the person [laughs] who is equipped to talk about the best, uh, you know, democratic systems to make sure the will of the people are reflected, uh, in the, uh, legislation that is passed, but I do think there is a lot we can learn from other countries around, um, abortion law and policy, and about the social structures and systems that enable, you know, the exercise of, uh, individual autonomy and decisions for people about pregnancy and childbirth, and I think, going back to what David mentioned, also about things that, um, drive down abortion rates or, um, things of that sort.

[00:34:13] So, I think, in reflecting on what we can learn from other countries as well, I think what we see across, um, western nations, um, by and large, is also better systems for supporting people, whether or not they decide to become parents, and in particular, supporting those who do beco- decide to become parents. Um, so, you know, I think, by and large, when we think about those who do decide to become parents, things like paid family leave, support for breastfeeding, um, stipends for childcare, um, things that just make it easier to become parents. I hear from everybody I know that moves to the U.S. from abroad it is so hard to be a parent here. It is so difficult and our social systems and our policies make it difficult, and it doesn't need to be that way.

[00:34:52] I think, a- also, uh, in thinking about, um, what we can learn from other countries, is also, you know, I think they're probably isn't a lot of consensus, [laughs] uh, on both sides, but I think, at the very least, you know, uh, we could talk about making sure that people who need abortions are early to do so early in pregnancy, that they're not driven further into pregnancy, being unable to access it, and a lot of countries have actually followed the evidence and followed the data and have been able to get this to make it so that it's easier to access abortion early in pregnancy.

[00:35:18] So, things like making sure abortion is integrated within sort of formal healthcare systems. Of course, a big gap between the U.S. and pretty much every other, uh, developed nation, is the lack of a universal healthcare system, or a sort of compulsory s- uh, health insurance scheme that makes access to care possible. But I think, definitely, looking at things, um, like public funding for abortion care, um, ensuring that there aren't procedural barriers like mandatory waiting periods, enforced ultrasounds that, uh, tend to also delay access to, um, abortion services.

[00:35:48] You know, those are some of the things. I think we can look at other countries, if we, you know, if people are serious about, um, enabling access to care earlier in pregnancy, or actually helping people to not become pregnant, access to contraception, certainly, you know, the

FDA is looking at over the- over the counter access to contraception, and that would be a huge way to enable people to actually prevent pregnancy from the beginning.

[00:36:09] Jeffrey Rosen: Thank you very much for that- for the important insight about support for women abroad, and that picks up on a question that Arlene Sherman Lewis asks about how do other countries define the legality of when child support begins and who's responsible for childcare and insurance. David, I think- w- we've have a really, uh, p- a- a real possibility for bipartisan consensus here. If there were referendum held state by state, what do you think abortion law would look like? Giv- give us a sense of where people would draw the line and what the range of options would be.

[00:36:45] David French: There's no question it would vary widely. There's no question about that. The abortion laws in Utah, for example, or Utah, the most church-going state in the Union, uh, heavily LDS, uh, would be very different from, uh, the laws maybe in the most secular state in the Union, New Hampshire, because, uh, abortion supporter opposition isn't directly a match with religiosity in the U.S. Of course, there's a wide variety of views on abortion within American religions, but there's a high- you know, there's a high overlap, um, in abortion attitudes with different kinds of religious beliefs.

[00:37:25] So, it would be a wi- there would be a wide variation. Um, there would be m- uh, maybe, a few states, I think, that would d- enact not a total ban, but very close to it, and there would be a few states that would enact something along the lines of where New York or California is now, which is, uh, protecting abortion rights- broadly protecting right up until birth, but I think you would settle with a pretty- uh, with a between a six and a 15 week, varying between states. Um, ev- moving from sort of the heartbeat bill kind of formulation that you would see in a lot of southern- that is passed in a lot of southern states and moving towards the 15 week mark, which, um, some recent polling indicated has around 70, 72% approval, according to a Harvard/Harris poll recently.

[00:38:19] So, I think you would see variation. You would have a few states on either far edge, but the bulk, I think, would end up between six and 15 weeks, and that prediction and \$5 will get you a cup of coffee at Starbucks. So... [laughing]

[00:38:33] Jeffrey Rosen: Well, we may get you more, because we're gonna find what- I- I'd love to know what- what Mary and Teresa think of that. Uh, Mary, what- what do you think? Is that broadly what things would look like and is there any possibility that when the dust settles, wherever that- whenever that may be, uh, the states might converge on a compromise like that or are our politics too polarized to make anything like that possible?

[00:38:56] Mary Ziegler: Yeah. I mean, I think on the one hand, it's difficult to get direct democracy right. So, even, um, in Kansas, there's been some concern that the ballot on the state constitutional question is happening during a primary when turnout is low, um, and is- sometimes these things are not written in ways that are very clear. And so, whenever you put things to the people, um, and I think this is something that both Katie and Teresa raised, like, you don't always know that this is what people actually want, and unsurprisingly, when the people writing these things are politicians, they may not really care what people- [laughs] Right? They-

they maybe, again, catering to the people who are their donors or the people who care the most. They may not be interested in making things as clear for voters as possible.

[00:39:36] So, I think, um, how- a- and I think David's probably right, that states would, um, would end up in a variety of positions. I don't know, you know, what percentage would end up where. I'm not sure. Um, I'm not- in- in terms of how promising a solution this is, I think it'll depend on how well people can actually craft things for people to vote on that- that reflect their preferences. And then, I think, too, it'll- it'll depend on, in part, on how- how convinced people are, either that, um, this kinds of abortion laws we're seeing passed in some states actually work. Um, that isn't something we talked about yet, but I think it's something we should touch on, that- that there are plenty of places, like Ecuador and Kenya, where to the best of our knowledge, they have very restrictive abortion laws, and also very high abortion rates.

[00:40:20] So, there's questions, and, uh, David raised this earlier, about what drives abortion rates, and the law is certainly part of that. I don't mean to say that that isn't part of the- the picture. Um, there's- but I think, you know, even in the United States, you know, for the first time, I think, and sometime, the abortion rate recently went up between 2017 and 2020. That was not because states, um, in the south and Midwest were enacting fewer restrictive abortion laws. They certainly weren't. If anything, it was the opposite, because we had the Supreme Court changing at the same time, ener- which energized pro-life voters and legislators.

[00:40:50] So, I think what you see is that, often, abortion rates track things like poverty rates. They track things like access to healthcare. They track things like whether people feel that they can raise children in away they want, which, of course, um, mirrors not only people's economic status, but their individual experiences, which is one of the reasons why there may be concerns you see people in some, um, elements of the Black church, who are opposed to abortion, saying I still don't think we should criminalize it because of the- the ever-presence of racism in American society. We're not at a point where we can do that yet.

[00:41:24] And so, um, I think there are- there are questions, too, in terms of what we can learn from the international experience about whether this is something. Um, if you think the abortion rate should be lower, which not everyone does. Some people will argue abortion is a positive good that's a definite aspect of the modern reproductive justice movement, but assuming you would like the abortion rate to be lower, um, or assuming that you would like people who would rather carry a pregnancy to term, if they have the resources to do that, to be able to do that.

[00:41:50] It's not clear that this is something that you can achieve primarily or exclusively or as heavily as we have in he United States, um, through legislation, and especially legislation that I think almost exclusively addresses supply of abortion and leaves people's, um, interest in abortion, uh, almost entirely to kind of private sector charities, which is a solution we've primarily landed on, but not one you see, um, necessarily succeeding in lowering abortion rates, uh, elsewhere in the world.

[00:42:20] Jeffrey Rosen: Thank you very much for putting on the table the- the crucial question, which we should indeed discuss about the relation between restrictive abortion laws and abortion rates. Um, Teresa, I'd- I'd love you to address that question. What is the relation

between restrictive abortion laws and abortion rates in the U.S. and if you could also, uh, just 'cause it'd be so helpful to have your views, um, tell us whether or not you agree with David French that referendum would result in a few outlier states with total bans or total permissiveness, but most states adopting a- something between a six and 15 week ban.

[00:42:57] Teresa Stanton Collet: Sure. In responding to your first question, part of the problem with doing anything, uh, statistical analysis in the area of abortion in the United States, and I am not a fan of universal healthcare, unlike Katie, but, I- I do see the value of it from a data perspective. The simple fact is all- pretty much all the research we have in the United States is done by the abortion industry or their advocates. Um, Guttmacher, frankly, is relied on far more than the CDC report on abortion rates, et cetera, for the simple reason that they have access to abortion providers and they willingly contribute to that, even in the states that they're not required to report.

[00:43:35] So, this- we just don't have good American data that is independent. In fact, our data is pretty similar to that of the Tobacco Research Institute. Uh, it's an industry-driven database, and it's a problem, whereas when we look to European studies on a variety of issues, because they do have universal healthcare, we actually can track women who have obtained abortions, and what are the mental health effects, and what are the causes of death subsequently, and what injuries have been incurred, et cetera. So, I think that's a real problem, uh, which isn't to say that we can't learn something from the data we have, but it is deeply problematic and even, uh, Stanley Henshaw, who was a chief demographer for the Guttmacher Institute, which is an outgrowth of the Planned Parenthood, uh, organization, um, decried the- the problem with data.

[00:44:24] So, this isn't just pro-life, pro-choice. We just don't have, you know, the sort of comprehensive data we would have otherwise. So, it's hard to say, you know, with precision, yes, more restrictive abortion laws generate either more abortions or less abortions, and these laws are effective and these laws aren't effective, and there's a huge debate in the scholarly literature on that question. I would say, however, that when we're talking about criminalization, and Mary's brought this up several times, that, uh, there's sort of an inference that we're talking about criminalization of women obtaining abortion, and my good friend, uh, Paul Linton, has done a- a serious review and published it. The claim is often made that women prior to Roe v. Wade were actually pros- prosecuted, uh, for obtaining abortions, and he has, uh, found that- been unable to find any case where the- where a woman was actually prosecuted, went to trial, with perhaps one possible exception.

[00:45:23] So, this idea that when we talk about criminalization, we certainly, I think, could have agreement on this group, that criminalization of coerced abortion, uh, particularly of minors by adult men who have impregnated them, that that ought to be treated seriously, and I would hope we would have consensus that abortion providers performing abortions on minors who are under the age of consent should retain the fetal body parts for purposes of DNA identification of any criminal prosecution. There's at least one reported case where a prosecution had to be dismissed because the fetal, uh, remains were not retained and there was insufficient evidence.

[00:46:00] So, there's- it's a complex issue. The referendum question, turning to your second question, uh, the referendum question. Uh, again, Paul Linton has just recently published a- a very compelling argument, particularly for people like myself who advise various state legislators across the country, um, and on- on occasion, uh, legislators in foreign, uh, parliaments and foreign, uh, legislative bodies, uh, is that at least in the United States, the success of constitutional amendments at the state level really lies with neutrality amendments. The main message we get from, uh, the outcome of these initiatives, like the one in Kansas, is that Americans want to decide this issue for themselves. They don't want it decided by am- a- a series of unelected judges.

[00:46:52] They believe that their judgment should matter, but, as Mary pointed out, and as David pointed out by inference, uh, it's one thing to have a broad question that says should- where does the authority to regulate abortion lie? Is it the people in the legislative body? Is it the- the judiciary? That's- that's a pretty clean question. It's a much more complex question to legislate by referendum, [laughs] which California has some experience with, where their passing, you know, things that really are more appropriate, you know, uh, within a legislative body that can have hearings and ha- and have experts assist them, and that sort of thing. So, like everything, it's complicated. [laughs]

[00:47:37] **Jeffrey Rosen:** It is, indeed, and- and thank you for, uh, helping us understand those two questions so clearly. Katie, I- I th- this may be our- our last round, and there's- there's lots to wrap up, but you've done such important work on the question- the relationship between restrictive abortion laws and abortion rates, and your report has concluded that there's not a clear relation. Highly restrictive laws don't correlate with lower abortion rates, but they do correlate, you conclude, with more unintended pregnancies. On this very broad question of the relationship between, uh, laws and abortion rates around the country, give us a sense of, uh, some of your data, if you would.

[00:48:15] **Katherine Mayall:** Absolutely. So, the global data, and according to the World Health Organization, clearly shows that more restrictive abortion laws do no lead to lower rates of abortion. What they do correlate with and lead to are higher rates of unsafe abortions, um, and in turn, rates of maternal death, and maternal morbidity and mortality. Along with that, you know, Teresa talked a bit about the difficulty with the data, actually, the difficulty with the data is largely that the impacts, the negative impacts on individuals of unsafe abortion are actually highly under-counted because of the stigma associated with abortion, and of people admitting that these, um, whatever sites of long-term disabilities they might face, actually stem from an unsafe abortion.

[00:48:54] That being said, I want to also emphasize that, um, you know, there's been talk about looking at pre-Roe and the- the effects of restrictive abortion laws and whether or not people will be criminalized. I guess- I don't know why we would look back to pre-Roe to think about whether or not people would be criminalized. Instead look at, you know, the current context of other countries, where people are actively being criminalized, and to look at the effects that it have- that it has had. But I think, at the same time, it's also important to recognize that the advent

of medication abortion, of course, changes the dynamics around, um, whether or not illegal abortions will be safe or unsafe.

[00:49:25] So, certainly, greater access to medication abortion makes it easier for individuals to terminate pregnancies on their own, and the World Health Organization actually recognizes that medication abortion is so safe, that it can be safely administered to individuals, ingested in the comfort of their own home, where they, um, are able to access a, uh, skilled provider if they need one, but generally, that medication abortion is so effective that, uh, the pregnancy will be terminated on their own, and, by and large, individuals are- are fine to, uh, terminate pregnancies that way.

[00:49:54] Um, so, that's what the evidence shows us around the correlation between abortion rates and, uh- or between unsafe abortion and restrictive laws, and I think that that kind of caveat around in some places, we see, um, not as high rates of, um, maternal deaths and maternal morbidities, but that can largely be looked at from access to medication abortion. I also, though, wanted to just briefly touch on something that I think unsettled me a bit about the earlier conversation about, um, the decision about when somebody can terminate a pregnancy, being some sort of a democratic exercise.

[00:50:23] It blows my mind that we would think about whether or not an individual- whether or not half the population, people who can become pregnant, have the right to their own physical autonomy and their own integrity, and that we would leave that to a portion of the rest of the population to decide for them, and I think we should really ask ourselves, as we talk about abortion laws and that decision being made by the democracy, talking about that decision being made for whom. We're talking about the decision making- being made for individuals about whether or not they can even make that decision themselves. And I think that that should actually unsettle all of us who, you know, are looking at a Constitution that's really founded in liberty and equality. I think that's really, uh, something we should be thinking about.

[00:51:04] Jeffrey Rosen: Thank you for that important argument that, in your view, abortion rights should not be left up to democratic referendum, but are ultimately, uh, a question of fundamental rights. Uh, David, among your closing thoughts, uh, you recently argued that abortion was much more common in the U.S. when it was mostly illegal, and that this single factor should be much of the debate in the months to come. Tell us about your view of the relation between, uh, restrictions and abortion rates in the U.S. and then closing thoughts in this really illuminating debate.

[00:51:36] David French: Yeah. Go- uh, with the caveat that Teresa laid out, that our abortion reporting is not as good as the abortion reporting in other countries. The best evidence that we have indicates that abortion was more common in 1973, the rate by- there was a higher abortion rate in 1973, when abortion was broadly illegal, than there was in- in 2021, even after the increase during the Trump years, in the abortion rate, the first real increase during a presidency since Carter. Um, that the- abortion became much less prevalent. There was almost a 40-year, pretty steady decline in abortion rate in the U.S.

[00:52:15] And so, I think that that's a- a very, very important, um point to raise, when we're talking about abortion in the United States, is how prevalent is it and why is it less prevalent than

it used to be? Uh, wh- and even less prevalent than when it was broadly illegal, and I'm very intrigued, for example, uh, you know, I've been diving into European numbers. Germany, for example, has an abortion rate about less than half of the U.S. Um, it has a 14-week gestational limit, but it's got an abortion rate less than half of the U.S. and less than half of France's, next door. Why is that? With substanti- very similar a- abortion laws?

[00:52:53] And I think those are things that, uh, especially somebody like me, who's long been a part of the pro-life movement, who's really motivated and trying to decrease the number of abortions in the U.S. Why does that happen? Why- why is Germany such- so different? And- and just to respond just briefly to what Katie said. I think the- one of the answers to the question about why would this be not simply the women- the woman's decision, is that they're- pro-life position is that there's another human being involved, another human being, being the unborn baby who doesn't have a voice at all, and that the democratic process is at least a way of providing that voiceless individual with a voice.

[00:53:32] Jeffrey Rosen: Mary, your final thoughts, both in response to Katie and more broadly, about the relationship between restrictive abortion laws and abortion rates and what we can learn from the international experience about the abortion debate in the U.S.

[00:53:47] Mary Ziegler: I think this just draws on something we've said a few times, but the thing that always strikes me in looking abroad is that, um, many nations that have either, um, you know, restrictions on abortion that will be less than what we see in some conservative states, um, but just, in general, many nations that are sort of [inaudible 00:54:04] nations, do more to support, uh, women and pregnant people and new parents and children, and, um, it's- it's sort of depressing to me that states that say that they want to do that, say essentially, that protection for fetal life is mandatory. Right? It's something that the state is going to require, and that support for parents and pregnant people and women is optional, um, or is something that we- is best left to the private sector.

[00:54:28] Um, I think that, you know, or that, you know, it's okay- basically, maternal mortality is not something we should legislate about. That's something that should be- you know, is left to private sector actors. I think that, even if you- so, I mean, the most striking thing to me is not necessarily just that our abortion politics are different, but that our general sort of, um, I think indifference to some of the outcomes we're seeing for pregnant patients and mothers, um, at the legislative level is- is striking and disturbing to me, because I think, again, you know, if you're thinking about a gestational limit of 14 weeks in a country that does much more to support parents, that feels like a different conversation to me.

[00:55:08] So, I- I would hope that, regardless of our views on abortion, that we could have a meaningful conversation about, you know, how can we do better by pregnant workers, how can we do better by parents, how can we do better, in terms of paid family leave and so on, um, and not- not everyone will agree on that either, but I think the most striking thing, to me, was not just that abortion was, um, is something that, you know, was framed as a right and taken away, but that that right has higher stakes in a country that doesn't really have a meaningful social safety net for parents.

[00:55:34] Jeffrey Rosen: Teresa, and a last word in this really illuminating discussion is to you, uh, final thoughts about what we can learn from the[inaudible 00:55:41] experience about the abortion debate in the U.S.

[00:55:44] Teresa Stanton Collet: So, let me begin by agreeing with those Katie, Mary, and I suspect, David. We all agree that there are things that we need to do to support pregnant parents. Uh, we need absolutely to strengthen our pregnancy discrimination laws. The New York Times did an expose three years ago that talked to me, the most compelling case, where it talked about, you know, successful executives who were basically sidelined when they came back to work. There was a woman that worked for Walmart that was not given reasonable accommodations, uh, for her last trimester, and it was appalling to me.

[00:56:17] And so, there's no question that we need to be more serious about protecting women who need to continue or could choose to continue their, uh, activities in the workplace while they are pregnant. That is an important point. We also need to prote- we need to extend more p- uh, support for families. One of the most appalling deficits, and there are many, [laughs] but one of the most appalling deficits that I'm aware of is that there is no federal or state program that funds diapers. Diapers are expensive to new parents, and if you are a working class mom and you need to put your baby in daycare, it ain't gonna be grandma or it ain't gonna be your sister, uh, you usually have to have one month's supply of diapers. That's expensive.

[00:56:56] And it's not part of the WIC program. It's not part of any other program. And so, that's a huge problem. There are a number of other things we can do to support, uh, pregnant women, their families, et cetera. And so, I think you've got another point of consensus there. I would note, though, that the data between the restrictive abortion laws, depending on the type of the law, and the abortion rates, uh, that David cited, uh, to me, is, uh, a point of disagreement. When an activity is legal, it's hard to get good data on it. Uh, the CDC attracted before 1973, so I'm not sure that the abortion rate was higher in 1973 than it- say, it was in 1978.

[00:57:37] The pattern that we saw in our women's brief that's on, um, the resources list for this, uh, indicates actually, that there was a 20-year expansion of the numbers of abortion and the abortion rate in this country, and then, it's the past 30 years that we've really seen it declining. So, I do think D- David made the most important point. The fundamental difference between Katie and I or Mary and I, uh, is that, like the convention on the rights of the child, uh, convention that's been ratified fo- by the vast majority of countries in this world, there is a responsibility to a child before its birth, and that responsibility, I believe, requires us to preserve its life, absent extraordinary circumstances.

[00:58:22] Jeffrey Rosen: Thank you so much. Teresa Stanton Collett, David French, Katie Mayall, and Mary Ziegler for a really rich, illuminating and deep discussion about this crucial issue, and thanks to our wonderful partners at the Center for Constitutional Design in Arizona State University, Sandra Day O'Connor College of Law, and Stefanie Lindquist. This is the first of a series of collaborations with ASU about the international dimensions of constitutional law, and it set a high standard for the conversations to come. Thanks to all of you for joining, and look forward to seeing you soon.

[00:59:00] Melody Rowell: Today's show was produced by Tanaya Tauber, John Guerra, and me, Melody Rowell. It was engineered by Greg Scheckler. Research was provided by Vishan Chaudhary, Colin Thibault, Samuel Turner, and Lana Ulrich. For a list of resources mentioned throughout this episode, visit ConstitutionCenter.org/Debate. While you're there, check out our upcoming shows and register to join us virtually. You can join us via Zoom, watch our live YouTube stream, or watch the videos later in our media library at ConstitutionCenter.org/Constitution. If you liked this show, please help us out by rating and reviewing us on Apple podcasts or by following us on Spotify. On behalf of the National Constitution Center, I'm Melody Rowell.