

Half a Century of Strife: The Abortion Controversy's Inescapable Centrality in Modern American History¹

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ABSTRACT: The abortion controversy has been a central feature of American society for half a century. The Supreme Court's decision in *Roe v Wade*, far from resolving a growing issue, nationalized it, made it difficult to legislate even minimal compromises, and was seen as an exercise in raw judicial power, lacking legitimacy. It enormously energized and enlarged the nascent right to life movement which became one of the most notable social movements in American history. The movement has been characterized by its diversity, grassroots activism and endurance in the face of constant vilification. The relative stability of public attitudes to abortion of the period is proof of its impact. It has been a major factor in American politics. Recent attempts to minimize the extreme and destructive character of the *Roe* decision are unpersuasive. Clarke Forsythe's *Abuse of Discretion* is highly recommended for those who wish to understand the decision and its consequences.

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THE FOLLOWING REMARKS¹ do not pretend to be a systematic exploration of abortion and its role in American public life over the past half century and more. They are the reflections of someone involved with the abortion struggle from early on, one who has tried to develop a scholarly understanding of the pro-life movement, and one who recognizes the enormity of the topic. I should clarify immediately that referring to a half century of strife is not a precise figure, but it does suggest the long standing and enduring character of the conflict as a national issue. 1971 was the year the Supreme Court decided to take on abortion as an issue, and a faction within the Court determined to find a right to abortion in the Constitution, even before knowing how they would ground the claim. For fifty years we have been living with the consequences of that decision.

Certainly, abortion was a lively issue in many states before that, and vigorous right-to-life organizations had been founded.² They had begun to meet at annual conferences in 1970. By the 1972 election, however, abortion was already a national issue, with Republicans charging that the Democrats were the party of “Amnesty, Acid and Abortion.” However, federal politicians could dodge the issue and point to the states as the locus of control.

The 1973 decision in *Roe v Wade* changed all of that. If you have not already done so, I suggest that you read Clarke Forsythe’s *Abuse of Discretion: The Inside Story of Roe v Wade*. Based on extensive research, both in published material and the papers of eight of the justices involved, he has painted a clear and incisive account of what happened and why. He goes far beyond David Garrow’s *Liberty and Sexuality: The Right to Privacy and the Making of Roe v Wade* in exploring the process and its

¹ Remarks delivered on the occasion of the receipt of the Rupert and Timothy Smith Award, June 5, 2021.

² Daniel K. Williams, *Defenders of the Unborn: The Pro-Life Movement before Roe v. Wade* (New York NY: Oxford Univ. Press, 2016); Rosemary Nossiff, *Before Roe: Abortion Policy in the States* (Philadelphia PA: Temple Univ. Press, 2001); Keith Cassidy, “The Right to Life Movement: Sources, Development, and Strategies” in *The Politics of Abortion and Birth Control in Historical Perspective: Issues in Policy History #5* (University Park PA: Pennsylvania State Univ. Press, 1996), pp. 128–59.

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outcomes.³ Forsythe states: “The Justices nationalized an issue that, until *Roe*, had been a state issue. By nationalizing abortion, they nationalized the politics of abortion.”⁴ In his conclusion he notes that:

When states were just beginning to consider different approaches in the early 1970s, the Supreme Court imposed a rigid, one-size-fits-all edict. The freedom to implement different policies and observe their effectiveness is why the American system of federalism holds more promise than the one-size-fits-all straitjacket that has fostered such turmoil over the past forty years.⁵

Any serious work on *Roe v Wade* and its aftermath must engage with Forsythe’s research.

Roe v. Wade did three things of relevance to our discussion: it nationalized a state issue; the sweep and extremism of its judgment it rendered it very difficult for anyone to legislate even minimal compromises; and it was widely seen as an exercise of raw judicial power, lacking legitimacy. If the justices imagined that any furor would die down quickly and that the decision would be accepted as part of the fabric of American life, they were profoundly mistaken. The arrogance of the Court is striking and reflects in part a crucial weakness: as a particularly isolated part of the American governing class, it had lost touch with the moral core of the country. For the Court, the then fashionable concern about population control had greater weight than the common understanding of life.

The abortion issue has never faded in intensity. Look at the passions expressed over the nomination of Brett Kavanaugh to the Supreme Court, with the fear (or hope) that he would vote to undo *Roe*. If social peace is a predominant goal, then the *Roe v Wade* decision achieved the opposite.

It is striking that while public opinion about abortion has seen changes over time, for fifty years there has been a remarkable consistency in attitudes: a majority have steadily accepted abortion when subject to some restrictions, while strong minorities either approve of it in all circumstances

³ Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (New York NY: Encounter Books, 2013); David J. Garrow, *Liberty and Sexuality:*

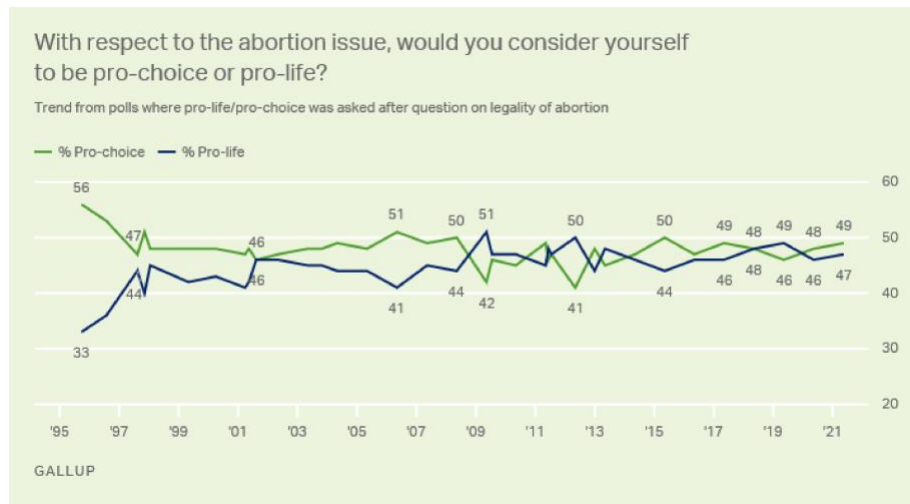
⁴ Forsythe, *Abuse of Discretion*, p. 10.

⁵ Forsythe, p. 208.

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or disapprove of almost all abortions. The literature on this topic is large,⁶ so for brevity's sake I point to the Gallup polls on the issue, from 1976 to 2021. In response to the question of under which circumstances abortion should be available, in 1976 21% said illegal in all, 54% said legal in limited circumstances, and 22% legal in all cases. In 2021 the percentages were 19%, 48%, and 32%. There was significant fluctuation. In the early 1990s the percentage in favor in all circumstances was as high as 34%.⁷

Another Gallup finding of interest from the same report is that in 1996 56% of the public identified as pro-choice. By 2021 this had fallen to 49%. Conversely in 1996 only 33% identified as pro-life, but this had risen to 47% by 2021. See the chart below.



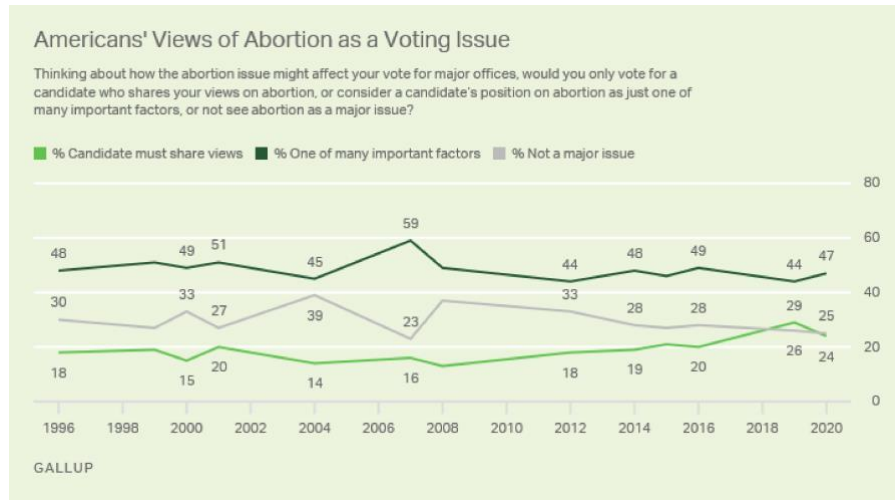
⁶ See, for example, Elizabeth Adell Cook, *Between Two Absolutes: Public Opinion and the Politics of Abortion* (Boulder CO: Westview Press, 1992); Everett Carl Ladd, *Public Opinion about Abortion: Twenty-Five Years after Roe v. Wade*, AEI Studies in Public Opinion (Washington, D.C.: AEI Press, 1997).

⁷ Gallup Inc, "Abortion," Gallup.com, <https://news.gallup.com/poll/1576/Abortion.aspx>.

It is also striking that the two major political parties moved to polarized positions on abortion, tentatively at first, then increasingly so over time. Abortion has been an issue in every presidential election since *Roe v Wade*, frequently over the issue of appointments to the Supreme Court.

In the 1976 election, abortion was an issue, but a minor one. While the candidates had differing stances they were not as clearly polarized as would become the norm later, and the issue had limited impact. By 1980 the parties had more fully polarized and abortion played a more prominent role, with the election of Ronald Reagan a huge boost for abortion foes. On July 7, 2020, the Gallup organization reported that:

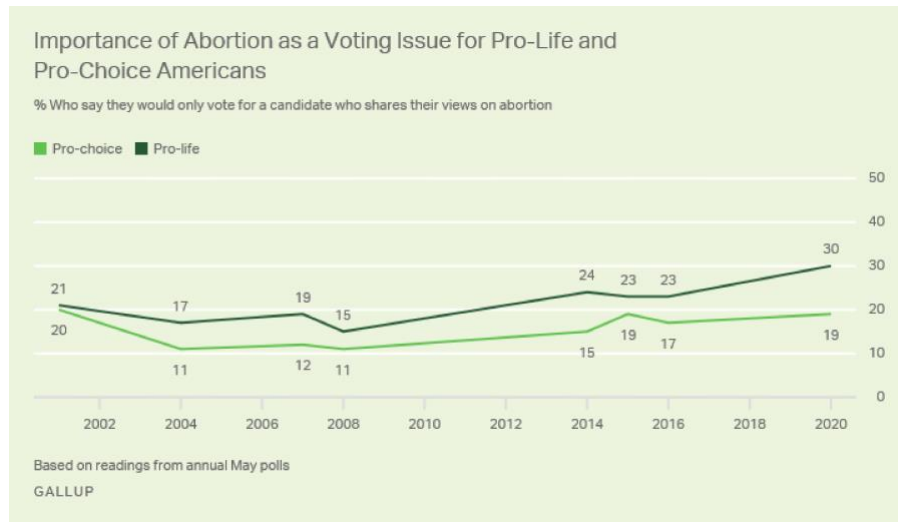
Just as Americans’ general views of abortion remain mostly steady, so too are their opinions of whether it is a key voting issue for them. Nearly half of U.S. adults (47%) polled in May, before the recent Supreme Court decision on abortion, say the issue will be just one of many important factors in their vote for a candidate for a major office; 25% do not consider it a major issue. At the same time, the 24% of U.S. adults who say they will vote only for a candidate who shares their views on the issue is, along with last year, significantly higher than most other years in the trend.



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The report later adds:

The latest findings, from Gallup’s annual Values and Beliefs poll conducted May 1-13, show the continuation of a trend seen since 2001 whereby Americans who consider themselves to be pro-life are more likely than those who identify as pro-choice to say abortion is a threshold issue.⁸



Let me turn to different issues. Abortion became interwoven with many subsequent policy debates. Mary Ziegler’s *Abortion and the Law in America: Roe v Wade to the Present* provides a useful account of many of the ways in which abortion has been debated, and the numerous areas of policy which it has played a role, and often a central one.⁹

Thus the ratification of the Equal Rights Amendment became inextricably tied to the abortion issue. Although Ziegler does not address

⁸ Gallup Inc., “One in Four Americans Consider Abortion a Key Voting Issue,” Gallup.com, accessed July 29, 2021, <https://news.gallup.com/poll/313316/one-four-americans-consider-abortion-key-voting-issue.aspx>.

⁹ Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present* (Cambridge UK: Cambridge Univ. Press, 2020).

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the legitimacy of pro-life concerns that the amendment would be a major constitutional basis for abortion rights, it seems clear that the refusal of ERA advocates to accept an “abortion neutral” ERA likely doomed it. There can be little doubt that without the abortion issue, the United States would have an Equal Rights amendment at present. Similarly, the issue of national medical insurance became more bitter and complex because of the issue of abortion funding.¹⁰

One of the major results of *Roe* was a greatly expanded and invigorated pro-life movement. The public was ill prepared for the decision, which struck many as deeply illegitimate, grounded neither on a political process, substantial public support, or any clear and coherent legal reasoning. The decision provided a shock which jolted the fledgling movement into high gear.

This is significant not just because the pro-life movement is a major player in the abortion battles. Properly understood, outside the bitter rhetoric directed at it by its foes, it is one of the greatest civil rights and human rights movements in American history, notable for its persistence in the face of repeated setbacks, and the hatred directed at it by its foes.

Also notable is its diversity and adaptability. Its central motivation has always been a passionate defense of innocent life. I suggest that the left implicitly recognized that this devotion to a high ideal was a uniquely credible threat to the left’s claims to moral superiority, and a crucial reason why the motives of pro-lifers have been so consistently maligned or patronized. A large literature has grown, explaining the pro-lifers are misogynistic chauvinists, women suffering from status anxieties, or dangerous radicals. The motives and character of those campaigning for peace or for racial justice have not been subject to the same dismissive explanations.¹¹

¹⁰ William L. Saunders and Anna R. Franzonello, “Health Care Reform and Respect for Human Life: How the Process Failed,” *Notre Dame Journal of Law, Ethics, and Public Policy* 25/2 (2011): 593–636.

¹¹ Keith Cassidy, “The Right to Life Movement: Sources, Development, and Strategies”; Keith Cassidy, “Interpreting the Pro-Life Movement: Recurrent Themes and Recent Trends,” ed. Joseph W. Koterski, *Life and Learning IX* (Washington, D.C, 1999), <http://www.uffl.org/vol%209/cassidy9.pdf> (Accessed March 8, 2000); James Kelly, “Seeking a Sociologically Correct Name for

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The movement was diverse, with various religious affiliations, different views on contraception, women's roles, and the relation of abortion to other social justice issues. While the movement differed on how to attack *Roe*, it never wavered from its conviction that the decision was an illegitimate expression of power. The decision itself set the limited grounds on which it could be fought: a Human Life amendment? getting the Court to reverse its decision? chipping away at it with various restrictions, hoping that they would pass the Court's ill-defined criteria? Not surprisingly, activists came to differ on how best to respond to *Roe v Wade*.

Several things about the movement should be noted. First, that it was truly a *pro-life* movement, not just "anti-abortion." From the start it has fostered positive alternatives to abortion through crisis pregnancy centers and sought medical and social supports for pregnant women. As well, the rejection of euthanasia was a part of it from the beginning and became a major element in its work, as was the promotion of hospice care. It is notable that when asked about attitudes to capital punishment, movement members are significantly more likely to be opposed than are members of the general public.¹²

Ironically the authors of an article purporting to show that pro-life views are not part of a consistent framework note that NARAL and NRLC members oppose capital punishment nearly equally (60% and 54%, respectively) and far more than the general public (28%).¹³

Beyond its importance in combating abortion and euthanasia, the right-to-life movement energized and helped shape conservative politics in America. It played a crucial role in forming the American right and while it has in part been shaped by those with whom it has allied, it has in turn shaped them. This is not to concur with the view frequently advanced by

Abortion Opponents," in *Abortion Politics in the United States and Canada: Studies in Public Opinion* (Praeger, 1994), 15–40.

¹² James R. Kelly, "AIDS and the Death Penalty," *America* 157/7 (1987): 151; Cook, *Between Two Absolutes*, 76; James Davison Hunter, *Before the Shooting Begins: Searching for Democracy in America's Culture War* (New York NY: Free Press, 1994), pp. 103–06.

¹³ Donald Granberg and Donald Denney, "The Coathanger and the Rose," *Society* (New Brunswick) 19/4 (1982): 40.

opponents that the movement is best understood simply as part of the right. The right-to-life is not, or should not be an issue solely of concern to conservatives. There have always been pro-lifers who have identified with the left on issues like war and poverty.¹⁴ However, the Democratic Party has placed them in a very difficult, indeed nearly untenable, position. A full history of the relations of pro-life to conservative politics, and of the fate of the pro-life left, is greatly needed.¹⁵

One proof of the great impact of the movement is the public opinion data mentioned earlier. Given the enormous power held by those who support abortion in Hollywood, the news media, and academia, the only reason that abortion is still an issue in America is the tireless—and creative—work of the movement.

It should also be mentioned that the American movement has been a tremendous source of encouragement and support to the right-to-life movement internationally. Would there be a viable pro-life movement in many other countries without the example set in the United States, and without its help?

There was a pro-life movement before *Roe v. Wade*, and there would have been one had the decision been different—if, for example, the Court had decided that abortion was a matter for state jurisdiction alone. Before speculating further about what the world would have been without *Roe*, I want to turn for a moment to the work of a scholar who has offered a very different view of the significance of the decision. I have already mentioned one of the works by Mary Ziegler, a professor of law at Florida State University, *Abortion and the Law in America: Roe v. Wade to the Present*, published in 2020 by Cambridge University Press. Her earlier work, *After*

¹⁴ For the presence of liberal pro-lifers from the beginning of the movement, see Williams, *Defenders of the Unborn*, pp. 156–78; Ashley Fetters, “What It’s Like for Secular, Liberal Pro-Lifers at the March for Life,” *The Atlantic*, January 19, 2019, <https://www.theatlantic.com/family/archive/2019/01/march-life-secular-liberal-pro-lifers-feelwelcome/580837/>.

¹⁵ Daniel K Williams, *God’s Own Party: The Making of the Christian Right* (Oxford UK: Oxford Univ. Press, 2010), and Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge MA: Harvard Univ. Press, 2015), are both useful.

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Roe, The Lost Years of the Abortion Debate, was published by Harvard University Press in 2015 and won a major award.¹⁶ The books display deep and intensive research and are highly regarded, and they are likely to be quite influential. This is significant because Ziegler is advancing a thesis that, if not novel, is certainly a minority view: that the *Roe* decision did not have the importance it has been given:

Generally, scholars assign the Supreme Court tremendous influence. However, as the following chapters show, the abortion conflict turned on a number of events unrelated to the *Roe* decision. Moreover, activists on either side of the abortion issue did not merely react to major social changes. Often without focusing on the Supreme Court, members of both movements made choices that raised the stakes of the abortion wars.¹⁷

She rightly emphasizes the diversity of the right-to-life movement, and the multiple avenues it explored, but she ignores the ways in which the decision, as so well shown by Clarke Forsythe, set the terms of engagement and severely limited the options available. Where is she going with her analysis? May I suggest what these books have as an agenda? I think that she wants to influence the Supreme Court in any upcoming decision that might invalidate *Roe v Wade*. She tries to debunk claims that the decision was polarizing and served to delegitimize the Court, and thus lessen to pressure to overthrow it.

This seems evident in the following passages:

We often view the Court's entry into the abortion wars as the moment when conflict intensified, compromise became impossible, and lay contributions to the constitutional debate about abortion declined, but the Supreme Court's decision did not dictate the course of the abortion wars in the decade to come. Instead, after 1973, a variety of shifting beliefs and strategic decisions continued to influence the struggle.¹⁸

Both Scalia and Ginsburg use reaction to *Roe* in service of claims for legal change. For Ginsburg, *Roe's* history points to the merits of an

¹⁶ Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (Cambridge MA: Harvard Univ. Press, 2015).

¹⁷ Ziegler, *After Roe*, p. 22.

¹⁸ Ziegler, *After Roe*, p. 19.

equality-based approach to abortion. Reaction to the opinion also sounds a cautionary note for justices who risk moving too far too fast, whether in the context of abortion or same-sex marriage. Scalia also draws on social-movement history in arguing for the overruling of *Roe* and for the more consistent adoption of interpretive methods limited to text, history, and original intent. Understanding *Roe*'s history may make the difference between the decision's preservation, reworking, or undoing. If Scalia's account has merit, judicial opponents of the *Roe* Court's methodology or holding have additional ammunition for demanding the overruling of the decision. Conversely, if Ginsburg's historical analysis is correct, we would have more cause than ever to change the constitutional foundation for abortion rights.¹⁹

In particular, note her claim: "Understanding *Roe*'s history may make the difference between the decision's preservation, reworking, or undoing." It seems clear that she intends to write a history that de-emphasizes *Roe* in order to save it. How good is her argument? There is no question about the depth of her research. However, it does not seem that her conclusions flow from her evidence. Much of the variety of actions by the right-to-life movement can be explained by the constraints imposed by *Roe*. It is unsettling to realize that she ignores Clarke Forsythe's work, which appeared two years before *After Roe*. If she disagrees with him, a forthright account of why would have been appropriate. In her subsequent book, *Abortion and the Law*, she does mention Forsythe's book in two footnotes but never directly engages his argument about the ways in which *Roe* shaped and distorted the abortion debate. Her treatment of Robert Bork's ill-fated nomination to the Supreme Court is instructive. This episode, as much as any, revealed to the degree to which the *Roe* decision had led directly to the extreme politicization of the Court. Bork was opposed because of his views on the legal adequacy of *Roe* and its antecedent decision *Griswold*. A ferocious campaign of vilification was directed at a distinguished legal scholar and indeed led to the word "borking" being added to the language.²⁰ Ever since, Supreme Court nominations have been

¹⁹ Ziegler, *After Roe*, p.12.

²⁰ Steven F. Hayward, *The Age of Reagan: The Conservative Counterrevolution, 1980-1989*, 1st ed. (New York NY: Crown Forum, 2009), p.

the frequent scene of bizarre protests and an extravagant language of alarm. How does she describe this? She says his nomination was “extremely divisive.”²¹ A frank recognition of the damage done to the Court’s public standing by *Roe* would have been more appropriate.

Also disturbing is her treatment, in both of her works cited, of nineteenth-century abortion law. She simply ignores Joseph Dellapenna’s magisterial *Dispelling the Myths of Abortion History* (2006). This massively researched work covers all of the relevant cases and material and must be included in any discussion of the topic. It is not mentioned here in her book, even to be dismissed.²² A word to future pro-life litigators in any case calling for *Roe*’s reversal: expect to encounter Mary Ziegler’s works used in an attempt to authoritatively rehabilitate *Roe v Wade*.

The abortion situation in America is different from any other country in the world, with higher levels of engagement than elsewhere. Only one other Western country has abortion laws as lax as the United States, and that is Canada. The complexity of the Canadian situation is beyond our scope here, but it seems clear that in large measure the American situation is the result of *Roe v Wade*.²³

568; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York NY: Free Press, 1990) describes his experience.

²¹ Ziegler, *After Roe*, p. 85.

²² Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham NC: Carolina Academic Press, 2005); also useful are John Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge UK: Cambridge Univ. Press, 2002), Marvin N. Olasky, *The Press and Abortion, 1838-1988* (Hillsdale NJ: Erlbaum Associates, 1988), and Marvin N. Olasky, *Abortion Rites: A Social History of Abortion in America* (Wheaton IL: Crossways Books, 1992).

²³ The following cover some aspects of a very wide subject: Cook, *Between Two Absolutes*; Drew Halfmann, *Doctors and Demonstrators How Political Institutions Shape Abortion Law in the United States, Britain, and Canada* (Chicago IL: Univ. of Chicago Press, 2011); Marthe A. Chandler and Ted G. Jelen, *Abortion Politics in the United States and Canada: Studies in Public Opinion* (Westport CT: Praeger, 1994); Raymond Tatalovich, *The Politics of Abortion in the United States and Canada: A Comparative Study*, Comparative Politics Series (Armonk NY: MESHARPE, 1997); Alphonse De Valk, *Morality and Law in Canadian Politics: The Abortion Controversy* (Dorval, Montreal: Palm Publishers, 1974).

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Let me close with a counter-factual scenario: suppose that in 1973 the court decided that abortion is solely a matter of state jurisdiction. What happens then? There is still an abortion controversy, but it is a series of state-by-state battles, with differing outcomes. Over time some states are open to abortion in a wide range of circumstances, while others ban it with only limited, life-of-mother exceptions. The battle is fiercer in some states, but it is not a national issue and the parties do not polarize on it.

Surely this is desirable: there is less polarization and conflict at the national level. Or is it? In the absence of a strong national pro-life movement, with a coordinated campaign of education, would the public not slowly drift in a more pro-abortion direction? Would the abortion battle be lost in other countries more readily?

To take a different scenario: imagine that the Civil War had been averted by compromises that secured for the South the right to hold slaves for as long as they wished. Such compromises were offered and rejected. What if they had been accepted? The horror of the Civil War would have been averted, but there would be no Constitutional end to slavery, no 13th, 14th and 15th Amendments, and slavery would have lingered, eventually devolving into peonage, but with no national commitment to equality. If that would have been the price of peace, would it have been worth it? If the price of social peace on abortion is its disappearance as an issue through dilution in fifty states, is that desirable, or is it better of the issue of kept clear and unavoidable?

If *Roe* is overturned, it is not clear, however, that the issue can ever be put on a back burner—too much has happened and too many organizations and forces have been mobilized for the issue to fade away. The next fifty years promises to be as eventful as the last fifty.