

# Foreword: *Roe v. Wade* at Forty

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*Roe v. Wade*<sup>1</sup> is, in many ways, the case that dare not speak its name.

For forty years it has been the Rosetta Stone of American politics; the frame for virtually every judicial confirmation hearing and the starting point for any conversation about the appropriate role of courts in modern life. Whether their political awareness was formed in support of or in opposition to *Roe*, for the past forty years, most Americans have learned to assess basic questions of privacy, morality, freedom, religion, intimacy, states' rights, judicial responsibility, and citizen activism largely through *Roe*-colored glasses. Indeed, *Roe* has probably formed and defined American views of the courts and judicial matters as much as any other case in modern history.

And yet the great paradox of *Roe* remains that for its opponents it is still larger than life, while for its supporters, it has become a receding memory. The two opposing sides have been talking past one another for at least two decades now. They have not just taken conflicting positions in this debate; they are gazing through opposite ends of the same telescope.

On any given day you can google *Roe v. Wade* and call up literally dozens of articles posted in publications that have set for themselves the sole mission of advocating its reversal—calls to redouble the effort to eradicate once and for all a decision held out to be the *Dred Scott* of the modern era.<sup>2</sup> By the same token, you can also find almost daily articles about state or local efforts to nullify the core holding of *Roe* by passing legislation lengthening waiting periods, or moving the test for fetal viability, such that in many jurisdictions abortions become virtually impossible to obtain.<sup>3</sup> One side is fighting an almost daily battle to kill off *Roe* once and for all. The other sees itself as conducting a rearguard action to keep what is left of it alive. *Roe*'s opponents mobilize their readers to end legal abortion once and for all. *Roe*'s supporters try to galvanize their readers to care enough to fight for what remains of the core holding.

To read the daily pro-life press is to experience *Roe* as an ongoing visceral assault on basic morality, a living, breathing judicial sin as grievous today as it was in 1973.<sup>4</sup> Whereas to read the pro-choice daily press is to experience *Roe* as a memory that is rapidly vanishing in the rearview mirror, a case that lives on in

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> See Debra Cassens Weiss, *Scalia Lumps Kelo Decision with Dred Scott and Roe v. Wade*, ABAJOURNAL.COM (Oct. 19, 2011, 7:05 AM), [http://www.abajournal.com/news/article/scalia\\_lumps\\_kelos\\_decision\\_with\\_dred\\_scott\\_and\\_roe\\_v\\_wade/](http://www.abajournal.com/news/article/scalia_lumps_kelos_decision_with_dred_scott_and_roe_v_wade/).

<sup>3</sup> See Editorial, *Bad Medicine for Women*, N.Y. TIMES, Nov. 7, 2012, at A26.

<sup>4</sup> See Jonathan Rogers, *Remember 40 Years of Roe v. Wade by Rededicating to Stop Abortion*, LIFENEWS.COM (Dec. 17, 2012, 4:17 PM), <http://lifeneews.com/2012/12/17/remember-40-years-of-roe-v-wade-by-rededicating-to-stop-abortion>.

name only as it is hollowed out to become the law in name only.<sup>5</sup> *Roe*'s opponents see the holding looming larger than ever. Yet its supporters almost find themselves longing for 1973 when, in their view, it briefly carried the force of law.

It is, perhaps, this daily disparity in how *Roe* is experienced—either as an ongoing sin, or as a rapidly vanishing memory—that accounts for the disparity in energy and focus on the issue in public discourse. Abortion opponents have indisputably been more organized, vocal, and laser-focused on the issue of nominating judges and Supreme Court justices who will overturn *Roe*.<sup>6</sup> This has been the case for decades.<sup>7</sup> Abortion supporters have been less effective in rallying support around their issue, in part because both sides tend to agree secretly that the original *Roe* opinion rested on rather shaky constitutional grounds.<sup>8</sup>

As a consequence, the public discourse over *Roe* and the enthusiasm gap that surrounds it means that the conversation occurs in a somewhat lopsided manner. For instance, the presidential election of 2012 featured a Republican nominee who felt wholly comfortable promising to appoint a Supreme Court justice who would overturn *Roe*<sup>9</sup> (although his surrogates quickly denied it)<sup>10</sup> pitted against a Democratic nominee who steered almost completely clear of the issue of *Roe* and the courts.<sup>11</sup> Certainly, the election season came to feature more than its fair share of media meltdowns over what were either abortion-related gaffes or heartfelt revelations by Republican Senate candidates such as

<sup>5</sup> See Sarah Kliff, *The Big Abortion Fight That May Not Happen*, POLITICO (Apr. 20, 2011, 4:35 AM), <http://www.politico.com/news/stories/0411/53432.html>.

<sup>6</sup> See Lauren Feeney, *Timeline: The Religious Right and the Republican Platform*, MOYERS & COMPANY (Aug. 31, 2012), <http://billmoyers.com/content/timeline-the-religious-right-and-the-republican-platform/>.

<sup>7</sup> See Emily Bazelon, *Lifer: Charmaine Yoest's Cheerful, Incremental—and Successful—War on Abortion*, N.Y. TIMES MAG., Nov. 4, 2012, at 22, 22.

<sup>8</sup> Benjamin Wittes, *Letting Go of Roe*, ATLANTIC MONTHLY, Jan./Feb. 2005, at 48, 48, available at [www.theatlantic.com/magazine/archive/2005/01/letting-go-of-roe/303695/](http://www.theatlantic.com/magazine/archive/2005/01/letting-go-of-roe/303695/).

<sup>9</sup> WNWO-TV, *Hubert Wiggins Interviews Mitt Romney*, YOUTUBE (Feb. 29, 2012), [http://youtu.be/\\_NgEzWA1rXc?t=2m9s](http://youtu.be/_NgEzWA1rXc?t=2m9s) (Republican presidential candidate saying he will “appoint[] justices to the Supreme Court that will follow the Constitution, hopefully reverse *Roe v. Wade*”); see also Mitt Romney, *My Pro-Life Pledge*, NAT'L REV. ONLINE: THE CORNER (June 18, 2011, 12:50 PM), [www.nationalreview.com/corner/269984/my-pro-life-pledge-mitt-romney](http://www.nationalreview.com/corner/269984/my-pro-life-pledge-mitt-romney) (“I support the reversal of *Roe v. Wade*, because it is bad law and bad medicine.”).

<sup>10</sup> Sabrina Siddiqui, *Mitt Romney's Supreme Court Wouldn't Reverse Roe v. Wade, Surrogate Says*, HUFFINGTON POST (Oct. 31, 2012, 1:48 PM), [http://www.huffingtonpost.com/2012/10/30/mitt-romney-roe-v-wade\\_n\\_2042922.html](http://www.huffingtonpost.com/2012/10/30/mitt-romney-roe-v-wade_n_2042922.html) (citing Romney supporter Norm Coleman's statement that *Roe* is “not going to be reversed” under a Romney administration).

<sup>11</sup> Michael McGough, *The Supreme Court Didn't Make the Cut in Obama's Campaign*, L.A. TIMES (Nov. 6, 2012), <http://articles.latimes.com/2012/nov/06/news/la-ol-obama-romney-supremecourt-20121106>.

former Representative Todd Akin and Richard Mourdock.<sup>12</sup> Post-election post-mortems prominently featured soul-searching and hand-wringing over whether the promise to outlaw abortion should continue to play such a prominent role in our national politics.<sup>13</sup> It will. Such discussions tend to elide the fact that legal abortion does, and will, continue to polarize the country for the very foreseeable future, regardless of what respective party leadership likes or wants.

Polling numbers suggest that about equal numbers of Americans now call themselves “pro-choice” and “pro-life” (respectively around 49% and 45%).<sup>14</sup> Moreover, in about equal proportions (around 20%), Americans tend to either oppose abortion under all circumstances or favor it under all circumstances.<sup>15</sup> In short: abortion may well be the single most polarizing issue with which Americans now contend. And those numbers have remained largely static in the decades since *Roe* was handed down. Indeed, one of the most remarkable aspects of public opinion surrounding *Roe*—as compared to other so-called “culture wars” issues—is the extent to which there has been very little movement in the poll numbers on the abortion issue over decades,<sup>16</sup> whereas other hot-button matters, including marriage equality and the death penalty, have seen dramatic public opinion shifts in the same time period.<sup>17</sup> One question opponents and defenders of *Roe* might well ask of themselves is why public opinion on the matter is not subject to change or manipulation—is it the legal posture that allowed for such a hardening of views, or is it a question of failed public relations campaigns on both sides?<sup>18</sup>

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<sup>12</sup> See Brad Bannon, *Republican Rape Rants Will Ruin Party's Election Chances*, U.S. NEWS & WORLD REP. (Nov. 1, 2012), <http://www.usnews.com/opinion/blogs/brad-bannon/2012/11/01/republican-rants-on-rape-will-ruin-the-partys-election-chances>.

<sup>13</sup> See Christian Heinze, *GOP Debates Stance on Abortion as It Looks to Expand Its Voting Base*, THE HILL: BALLOT BOX (Nov. 28, 2012, 5:00 AM), <http://thehill.com/blogs/ballot-box/christian-heinze/269711-gop-debates-stance-on-abortion-as-it-looks-to-expand-its-voting-base>.

<sup>14</sup> Lydia Saad, *Americans Still Split Along “Pro-Choice,” “Pro-Life” Lines*, GALLUP (May 23, 2011), <http://www.gallup.com/poll/147734/americans-split-along-pro-choice-pro-life-lines.aspx>.

<sup>15</sup> Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx>; see also Kirsten Andersen, *Poll: 17 Percent of Voters Say Abortion Is the Top Issue This Election; Most Are Pro-Life*, LIFESITENEWS.COM (Oct. 9, 2012, 7:36 PM), <http://www.lifesitenews.com/news/poll-17-percent-of-voters-say-abortion-is-the-top-issue-this-election-most>.

<sup>16</sup> See Saad, *supra* note 15.

<sup>17</sup> See, e.g., Marjorie Connelly, *Support for Gay Marriage Growing, but U.S. Remains Divided*, N.Y. TIMES (Dec. 7, 2012), <http://www.nytimes.com/2012/12/08/us/justices-consider-same-sex-marriage-cases-for-docket.html>; see also CNN Poll: *Number Who Prefer Death Penalty on Decline*, CNN.COM: CNN POL. TICKER (Oct. 12, 2011, 5:35 PM), <http://politicalticker.blogs.cnn.com/2011/10/12/cnn-poll-number-who-prefer-death-penalty-on-decline>.

<sup>18</sup> See William Saletan, *Polls Apart: Why Are Americans Becoming More Liberal on Homosexuality but Not on Abortion?*, SLATE (May 24, 2012, 10:09 AM),

It is for this reason that *Roe* has come to stand for so much more than just the fight over legal abortion in America. More than any other case, except possibly *Brown v. Board of Education*,<sup>19</sup> *Roe* has become a data point in the fight over the role of the U.S. Supreme Court in driving social and political movements. The notion that *Roe* created an almost irreversible political “backlash” that led to the creation of the powerful modern conservative legal movement is almost an article of faith among legal academics.<sup>20</sup> Liberals and conservatives alike tend to believe that, left to their own devices, the states would have implemented some kind of grand bargain in legislating abortion that would have been less polarizing and ultimately more democratic than the morass in which we find ourselves today.<sup>21</sup> Even feminist icon Ruth Bader Ginsburg has recently argued that the Court in *Roe* was guilty of going “too far[,] too fast.”<sup>22</sup> (Of course, academics being academics, the “backlash” theory of *Roe* has engendered its own backlash as well).<sup>23</sup>

The current debate about the fate of marriage equality at the Supreme Court in the 2012 term is thus freighted heavily with echoing concerns over whether it is best for courts to get out in front of the states or linger behind, or to just lay down on the road and hope for the best on these divisive culture war issues.<sup>24</sup> Indeed, there is no better example than *Roe* of a case that concentrated the American mind on the problem-slash-solution known as “judicial activism.”

For those who like to engage in such counterfactuals, it is certainly clear that without *Roe v. Wade*, the modern women’s movement would likely be unrecognizable today, alongside the modern conservative movement. Without *Roe* it is clear that single-issue abortion voters (in the November 2012 election they still represented one out of every six voters)<sup>25</sup> would probably not exist. Robert Bork may well have been confirmed as a Supreme Court justice without *Roe*, but then again, he would not have had *Roe* to overturn once he got there.

What is more interesting than imagining what life without *Roe* might have looked like in 2012 lies in understanding this paradox: how can a case that

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[http://www.slate.com/articles/news\\_and\\_politics/frame\\_game/2012/05/abortion\\_polls\\_gay\\_marriage\\_polls\\_why\\_are\\_we\\_becoming\\_liberal\\_on\\_some\\_issues\\_but\\_not\\_others\\_.html](http://www.slate.com/articles/news_and_politics/frame_game/2012/05/abortion_polls_gay_marriage_polls_why_are_we_becoming_liberal_on_some_issues_but_not_others_.html).

<sup>19</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>20</sup> See Michael J. Klarman, *Roe’s Backlash*, BALKINIZATION (Sept. 11, 2008, 4:31 AM), <http://balkin.blogspot.co.il/2008/09/roes-backlash.html>.

<sup>21</sup> See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2028–34, 2071–77, 2086 (2011).

<sup>22</sup> David Crary, *Ruth Bader Ginsburg Questions Timing of Roe v. Wade, Gives Hint on Same-Sex Marriage Issue*, HUFFINGTON POST (Feb. 10, 2012, 6:16 PM), [http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage\\_n\\_1269399.html](http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage_n_1269399.html).

<sup>23</sup> See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

<sup>24</sup> See Scott Lemieux, *The Backlash Argument Again*, AM. PROSPECT, <http://prospect.org/article/backlash-argument-again> (last visited Jan. 3, 2013).

<sup>25</sup> Lydia Saad, *Abortion Is Threshold Issue for One in Six U.S. Voters*, GALLUP (Oct. 4, 2012), <http://www.gallup.com/poll/157886/abortion-threshold-issue-one-six-voters.aspx>.

ostensibly represents the law of the land be so aggressively challenged and simultaneously nullified since it was reaffirmed in 1992's *Planned Parenthood v. Casey*?<sup>26</sup>

The real story of *Roe v. Wade* lies in the intriguing double-barreled opposition to it; a concurrent effort to get the issue back before the Supreme Court in the hopes that Justice Anthony Kennedy—who likely holds the deciding vote in his hands—will be willing in 2013 to do what he was unwilling to do in 1992 and reverse *Roe* once and for all. Proponents of legislation that is plainly in violation of *Roe*, such as the raft of recent “fetal heartbeat” laws, thus propose laws with the plain intention of forcing the issue before the existing Supreme Court and hoping that the timing is right for a reversal.<sup>27</sup> This is something of a win-win strategy for *Roe*'s opponents as they are quick to point out. As Reverend Pat Mahoney, director of the Christian Defense Coalition, told CBN News in April of 2011: “We don't have to see a *Roe v. Wade* overturned in the Supreme Court to end it . . . . We want to. But if we chip away and chip away, we'll find out that *Roe* really has no impact . . . . And that's what we are doing.”<sup>28</sup>

Because supporters of *Roe* suspect that the battle to overturn what is left of the law is indeed in peril of being won, they look warily at the current Supreme Court and try as hard as they possibly can to avoid a return. Indeed, as Terry O'Neill, president of the National Organization for Women, explained last spring, the fear that Justice Samuel Alito would vote to overturn *Roe* is so profound among the reproductive-rights groups that they may be opting to leave the state bans in place.<sup>29</sup> It goes without saying that state abortion bans that remain unchallenged become state law. In other words, the net effect of the aggressive spate of anti-abortion legislation in the states over the past two years has been a net loss of access to abortion around the country.<sup>30</sup> A spate of recent reversals in state courts notwithstanding,<sup>31</sup> the effort to make abortion in America more costly, more burdensome, and more rare has largely paid off. Opponents of that effort have had to content themselves with small victories at

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<sup>26</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>27</sup> See Mary McCarty, *Abortion Battle Heats Up in Ohio, Nation*, DAYTON DAILY NEWS, Apr. 17, 2011, at A6.

<sup>28</sup> Paul Strand, *Pro-Life Movement Gains Traction at State Level*, CBN NEWS (Apr. 19, 2011), <http://www.cbn.com/cbnnews/us/2011/April/Pro-Life-Movement-Gains-Traction-at-State-Level/> (internal quotation marks omitted).

<sup>29</sup> Sarah Seltzer, *Maddow: New Abortion Restrictions Unchallenged Because Roe's on the Line*, ALTERNET (Apr. 15, 2011, 4:59 AM), [http://www.alternet.org/newsandviews/article/561596/maddow:\\_new\\_abortion\\_restrictions\\_unchallenged\\_because\\_roe%27s\\_on\\_the\\_line/](http://www.alternet.org/newsandviews/article/561596/maddow:_new_abortion_restrictions_unchallenged_because_roe%27s_on_the_line/).

<sup>30</sup> See Dahlia Lithwick, *Roe v. Wade: Is It Still the Law of the Land?*, SLATE (Apr. 19, 2011, 6:49 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/the\\_death\\_of\\_roe\\_v\\_wade.2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/the_death_of_roe_v_wade.2.html).

<sup>31</sup> See Cheryl Wetzstein, *Abortion Fights Heat Up as Roe v. Wade Turns 40*, WASH. TIMES, Jan. 7, 2013, at 14.

the state level as they wait for a Supreme Court likely to be more receptive to their appeals.<sup>32</sup>

What the current U.S. Supreme Court would do with a future abortion case remains a matter of intense speculation, although with four of the sitting justices quickly approaching the age of eighty, the question has become more academic than real. Whether the Court will ever hear one of the “personhood” cases, or the cases extending waiting periods, or the challenges by physicians unwilling to read prescribed scripts is one question, but looming over it all is profound uncertainty about what Justice Kennedy, who was for *Roe* (in *Casey*) until he was against it (in *Gonzales v. Carhart*),<sup>33</sup> might do the next time. Without a doubt, it is clear that the replacement of Sandra Day O’Connor with Samuel Alito at the Court has created the reality both sides in the abortion wars must now contend with: wherever Justice Kennedy decides to go, the country will follow.

Justice Kennedy seems to have developed an increasing solicitude for the welfare of the fetus and the mental health of the mother, and his majority opinion in *Carhart* reflects a deep concern about both,<sup>34</sup> positing that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child.”<sup>35</sup> Relying on studies that show that women may suffer tragic consequences if they opt to terminate a pregnancy, Kennedy wrote that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>36</sup> That shift in Kennedy’s thinking emboldened abortion opponents to pass new laws that would create new test cases with an eye toward pushing Kennedy to the unavoidable conclusion that abortion in all cases is immoral.<sup>37</sup>

In addition to the inexorable aging of the Supreme Court, one other important development is likely to inform the future fights over abortion in America: science. On the one hand, scientific and medical advancements are making it clear that arbitrary lines about fetal viability that were drawn in *Roe* are clearly outdated.<sup>38</sup> Babies can survive outside the womb longer than they

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<sup>32</sup> *Id.*

<sup>33</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>34</sup> See Dahlia Lithwick, *Dr. Kennedy’s Magic Prescription for Indecisive Women*, SLATE (Apr. 18, 2007, 7:21 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/04/father\\_knows\\_best.2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/father_knows_best.2.html); see also *Carhart*, 550 U.S. at 145, 159.

<sup>35</sup> *Carhart*, 550 U.S. at 159.

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., Tim Lindgren, *Tim Lindgren, Bismarck Letter: Anti-Abortion Bill Deserves N.D. Senate Approval*, GRANDFORKSHERALD.COM (Apr. 21, 2011, 12:05 AM), <http://www.grandforksherald.com/event/article/id/200952/group/homepage/>; Parker Wallace, *House Rejects Changes to Abortion Bill*, GPBNEWS (Mar. 27, 2012, 4:31 PM), <http://www.gpb.org/news/2012/03/27/house-rejects-changes-to-abortion-bill>.

<sup>38</sup> Mark Osler, *Changes in Medicine Should Prompt New Limits on Abortion*, CNN.COM (Feb. 1, 2012, 8:36 AM), <http://www.cnn.co.il/2012/02/01/opinion/osler-abortion-viability/index.html>.

could in 1973, and medical science can keep them alive from an earlier date.<sup>39</sup> But, at the same time, advances in abortion drugs mean that surgical abortions have become rarer, and there is reason to believe that the rigid trimester system of *Roe* will become obsolete with the rise of so-called “do it yourself abortions.”<sup>40</sup> Medication is now used in about one-quarter of early terminations, according to the Guttmacher Institute.<sup>41</sup> As claims that life begins earlier collide with easier non-surgical abortions, the debates we are having today about “fetal pain,” personhood, and maternal regrets may be obviated by medical technology itself.

As a journalist, and not an academic, one other observation is in order: there is no other issue—not religious freedom, not gun control, and not capital punishment—that is much in evidence on the steps of the U.S. Supreme Court than abortion. Day after day, week after week, and year after year, regardless of the case being argued and the case being handed down, the issue that brings protesters to the plaza of the Supreme Court building is abortion. They may stand silently with red tape over their mouths, or wave signs about choice aloft, but—especially in light of the fact that the Court has not heard oral argument on an abortion case since 2007<sup>42</sup>—abortion represents a daily battle at the Supreme Court, and one that transcends the reality of the Court’s docket. The High Court has become the ultimate symbol of the abortion wars in ways that bear no correlation to the progress of any one case in the courts. No doubt, when the justices look out their windows on the plaza below, they wonder why Americans seem to hold the Court more responsible for reproductive matters than anything else.

Forty years after *Roe*, it is worth noting what has changed and what has not, which is the focus of this collection. From my vantage point as a court watcher, what has changed is strategy, objectives, and medicine. What has changed is the underlying doctrine, which once concerned itself with the sphere of privacy surrounding a woman and her physician, and has shifted to protect women from their own decisions and the special bond that exists between women and their babies.<sup>43</sup> As a consequence of that doctrinal change, there has been a change in the ways states have sought to regulate abortion, creating a host of new legislation that seeks to inform and protect mothers from the risk of making a bad decision.

What has also changed is a generational shift—the rise of the millennials—that may skew liberal on most matters but determinately skew to the center on

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<sup>39</sup> *Id.*

<sup>40</sup> See Ada Calhoun, *The Rise of DIY Abortions*, NEW REPUBLIC, Dec. 2012, at 14, available at <http://www.tnr.com/article/politics/magazine/111368/the-rise-diy-abortions?page=0,1#>.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Gonzales*, 550 U.S. 124 (2007).

<sup>43</sup> See Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317, 319 (2006).

reproductive-rights issues.<sup>44</sup> What has changed is the nature and substance of confirmation hearings, which will never again occur without obsessive and ultimately futile efforts to discern a potential nominee's position on abortion and privacy.<sup>45</sup> Perhaps most importantly, what has changed is the composition of the Court, and the thinking of the Justice—Kennedy—who is poised at the very center of this dispute.

But what *has not* changed in the intervening four decades is almost more remarkable: passions, public opinion, moral certainty, and the impossibility of compromise. What has not changed is the centrality of *Roe* to the debate about what judges do every day and how they do it. What has not changed is the pervasive public sense that since the Supreme Court created this mess, it remains incumbent upon the Supreme Court to fix it. This is why a Court that has been silent on the question of abortion for almost ten years now, is still the locus of all national attention: of protests, of confirmation fights, and of political discourse. The ultimate fate of *Roe* may or may not be decided at the highest court of the land. But because of the shock and drama of *Roe* itself, and as a result of the backlash it produced, and the political movements it has launched, all eyes are fixed upon the Court long after it stopped being the locus of any real action.

The paradox of *Roe*, then, forty years later, is that it represents a conversation about a Supreme Court whose time has passed, a doctrine that has been overtaken by science and medicine, a legal architecture that is a mere ghost of itself, and a symbol of the role of courts in an era that has seen the courts construct a vastly different role. *Roe* as a decision is frozen in amber; a symbol of everything we believe about the law. In the meantime, however, the law, the debate, the tactics, and even the courts themselves, have long ago left the stage.

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<sup>44</sup> See ROBERT P. JONES, DANIEL COX & RACHEL LASER, PUB. RELIGION RES. INST., COMMITTED TO AVAILABILITY, CONFLICTED ABOUT MORALITY: WHAT THE MILLENNIAL GENERATION TELLS US ABOUT THE FUTURE OF THE ABORTION DEBATE AND THE CULTURE WARS 12 (2011), available at <http://publicreligion.org/site/wp-content/uploads/2011/06/Millennials-Abortion-and-Religion-Survey-Report.pdf>.

<sup>45</sup> See, e.g., PAUL SIMON, ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES 88–91 (1992); BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 95–96 (2006).