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What both sides of the abortion fight can learn from Antonin Scalia | Bruce Ledewitz

Bruce Ledewitz

by Bruce Ledewitz, Pennsylvania Capital-Star February 21, 2023

In January, Linda Greenhouse wrote a [column](#) in the New York Times entitled, *Does the War Over Abortion Have a Future?*

In the column, Greenhouse observed that since the Dobbs decision overturned *Roe v. Wade*, there had been a massive national shift on the abortion issue. As a string of losses on state ballot initiatives demonstrated, the anti-abortion movement has lost the country and Republicans are scrambling to figure out how to adjust to this new political reality.

She wrote, “There is a case to be made...that abortion access has won the culture war.”

I almost laughed out loud when I read that. Not because, as Greenhouse acknowledged, there are still extreme abortion restrictions all over the country.

No, I laughed because, though Greenhouse would never admit it, this is precisely the sort of outcome that Justice Antonin Scalia predicted would occur if only the Supreme Court would get out of the way by overruling *Roe* and letting the voters decide the abortion issue.

Scalia argued consistently—most cogently in his dissent in *Planned Parenthood, v. Casey*—which was also overruled by Dobbs—that by nationalizing the abortion issue and removing it from ordinary politics, *Roe* had rendered the abortion issue much more difficult to resolve.

Now, after Dobbs, Americans were coming to a consensus about abortion, just as Scalia said we would.

Of course, Scalia would be unhappy personally with the result of the emerging consensus that Greenhouse describes. Scalia was resolutely anti-abortion.

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But Scalia always tried to distinguish politics from law. He meant it when he wrote in his *Casey* dissent that the Constitution left the abortion issue to the states and they could resolve it any way the people chose.

In this sense, his position, like that of Justice Samuel Alito's majority opinion in Dobbs, reflected neither his politics nor his religion, despite what readers have been told to the contrary.

As Greenhouse also wrote, Dobbs “freed people to acknowledge—or even shocked them into realizing—that a civilized country requires access to abortion.” Somewhere, Scalia is smiling: “I told you so.”

Despite Scalia's prescience, both sides are still ignoring the other half of his formula for national peace and reconciliation over abortion—the issue should be left to the states.

There are a lot of regional differences in America over abortion. That is why federalism, by emphasizing the autonomy of each state to go its own way on the issue, is so important to resolving it. California is not Arkansas.

Both sides are committing a political error by trying to nationalize the issue again, this time in Congress.

Democrats may actually understand this. Their efforts to pass abortion protection legislation at the federal level during the past two years have seemed half-hearted. President Joe Biden devoted almost no political capital to that fight.

Democrats apparently realize that they can make significant inroads in red states by promoting local abortion protection legislation and opposing proposed abortion bans by Republican-dominated state legislatures.

Abortion may even be part of the reason that Democrats now control the state House in Pennsylvania.

Meanwhile, the national anti-abortion movement is pursuing a catastrophic course by insisting that its support in the 2024 Republican Presidential primaries, where such support is critical, will depend on a candidate's commitment to a [national abortion ban](#).

If the 2024 Republican presidential nominee is forced to take that position to procure the nomination, it will be a considerable albatross in winning the election. There is practically no support for a national abortion ban, and especially none among voters who are not already certain to vote Republican.

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Meanwhile, there is no threat more likely to motivate moderate women voters as the likelihood of losing abortion access no matter where they live.

Presumably, cooler heads will prevail in the Republican Party. The anti-abortion movement should only insist that on a candidate's pledge to veto

any Democratic Party effort to pass pro-abortion legislation in Congress, thus leaving the issue to the states. There is a lot of political support nationally for that compromise position.

Aside from the immediate political fallout, a state-centered abortion issue is also in the anti-abortion movement's long-term interests. As Ross Douthat and other commentators have [written](#), opposition to abortion will never become a majority position until people can see a humane alternative.

That alternative, a family-friendly social services net that really supports women and children as an alternative to abortion, is not going to happen any time soon at the federal level.

But there are states where the anti-abortion movement is sufficiently powerful to push aside Republican Party opposition to the higher taxes that will be necessary to fund such a program.

The states have always served as laboratories of experimentation. A positive anti-abortion project is the logical next step for the movement. And it can only happen in a state where the stakes of such a program are understood.

For the goal of the anti-abortion movement has never been simply to outlaw abortion. Abortion was illegal in America for years and it is estimated that a very large number of illegal abortions took place anyway, often endangering the women who procured them.

The goal had always been to create a more humane country in which all life would be valued, from conception to natural death.

Now, with the end of Roe and the end of nationalized abortion rules, there is a real chance to try that approach, so that abortion eventually becomes not so much illegal, as unthinkable.