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Abortion Nation

By James Q. Wilson

Contentious social issues like abortion and gay marriage should be decided in state legislatures, not in the courts or through constitutional amendments.

When South Dakota passed a law banning all abortions save those that threaten the physical health of the mother, opponents of abortion were cheered and defenders of it outraged. I think both sides were mistaken.

Roe v. Wade, decided in 1973, did not create abortion; it created a right to an abortion. The decision had few merits on constitutional grounds, and it was a disaster on political ones. For nearly a quarter of a century American politics has been convulsed by this polarizing debate. No one can become the Democratic presidential candidate without favoring abortion, and—so far—no one can become the Republican candidate without opposing it. This has driven the candidates and parties far apart even though most Americans occupy a middle ground on the issue.

Abortion has become the key test for selecting people for high-level judicial offices. When Senator Charles Schumer (D-N.Y.) says he favors using "ideology" as a test for judges, the ideology he has in mind is abortion. When other senators oppose a "litmus test" for judges, the test to which they refer is about abortion. We closely watch Supreme Court decisions to see if they will oppose even the slightest restriction on this "right."

By contrast, abortion is scarcely an issue in most European democracies, not because the people who live there have views radically different from American ones, but because legislatures—not courts—authorized abortions using language that tried to strike a reasonable balance among competing views.

When other countries authorized abortions, they did not authorize a right to one. Their laws were designed to give varying degrees of respect to unborn life. (Only in China is there a law as permissive as that conferred by *Roe v. Wade*.) When Professor Mary Ann Glendon surveyed abortion laws here and abroad in the late 1980s, she found that in France, Germany, Italy, the Netherlands, Switzerland, and the United Kingdom there existed pre-abortion waiting periods, mandatory counseling, time limits on when during a pregnancy an abortion could occur, and a requirement that several physicians agree on the need for an abortion.

Suppose, in response to a lawsuit brought against the South Dakota law, *Roe* were overturned. Abortion would not disappear. Women would not visit quack doctors or travel to Sweden. Abortion would be legalized in many states (it was legal in five before *Roe* was decided), but having been made legal by state legislatures, the laws would—as in Europe—accommodate the diverse views of proponents and opponents. Ardent defenders of abortion would realize that, in exchange for a small bus fare, a woman in South Dakota could go to a nearby state where abortions were easy to obtain. Ardent opponents would know that if they wished to live in an abortion-free state, they could move to one.

James Q. Wilson is the chairman of AEI's Council of Academic Advisers. A version of this article appeared in the *Wall Street Journal* on March 18, 2006.

Federal versus State Powers

In making these decisions, the states would be exercising their police powers—that is, their right to pass laws that protect the lives, health, and morality of their citizens. The federal government has no such police power; it can only act in ways that can be plausibly derived from the Constitution. The Framers would have never imagined that the national government would pass laws about abortion—or marriage, or parenting, or private sexual acts.

There are, of course, checks on the states' police powers. They cannot be used in ways that plainly deprive people of rights guaranteed by state or federal constitutions. A state regulation must be reasonably related to the provision of a public good. But within those limits, states can and do regulate sex, marriage, divorce, parenting, and communicable diseases.

The states should also decide about gay marriage. Some conservatives are urging Congress to propose a constitutional amendment banning this, but this would be a mistake. People should vote on this matter and about the conditions of life they wish to experience where they live. Though I oppose gay marriage, voters in some states may approve it. If they do, we will have a chance to learn what it means in practice, with the costs and benefits falling on people who have accepted it.

Moreover, a state-by-state vote on the matter provides an opportunity for gay advocates of this policy to make their case. A constitutional amendment would deny them that opportunity, leaving them perpetually angry. Since feelings run high on this matter, it would be a mistake to let it be decided as the right to abortion was decided. If there were the gay marriage equivalent of *Roe v. Wade* or a constitutional ban on it, we would infect the nation with the divisive anger that followed *Roe* and our earlier attempt at alcohol prohibition.

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If there is to be a constitutional amendment, it would be better if it said this: "Nothing in this Constitution shall authorize a federal judge to decide that a marriage can be other than between one man and one woman." If I could think of language to bar judges from making other social policy decisions, I would add it, but the words fail me.

The rising demand that every personal preference become a constitutional right is a worrisome disease. People, of course, do have rights; the Constitution and the first ten amendments spell most of them out. That document defines the essential requirements of life and liberty. Adding new invented rights by either a ratified amendment or judicial overreaching is a mistake.