

The Future on Abortion

By Amy E. Wong



Stephen E. Gottlieb, professor at Albany Law School, made a bold headline that is sure to send chills through abortion activists: “Roe’s not done yet. The conflict between state and federal rights could eventually lead to rejection of the Partial Birth Abortion Act.”

I’ve been thinking that the abortion story was over and done with, at least until the 2008 presidential elections. The Supreme Court upheld the federal Partial Birth Abortion Act last Wednesday. However, some legal experts are debating over the actual repercussions of the ruling.

The actual effects of the Partial Birth Abortion Act will actually depend on the court’s take on federalism. Gottlieb notes that the government has been acting like a “very nationalist court,” even though they verbally assert that they are federalist. Instead of preserving our federation by allowing national and state governments to make key decisions, the Supreme Court has been acting as our central governing authority.

At times like these, it’s important to analyze just how much power the Supreme Court chooses to wield and how much power they’ll relinquish to state governments. This is, after all, the determining factor on whether or not your state will ultimately take a liberal or conservative direction.

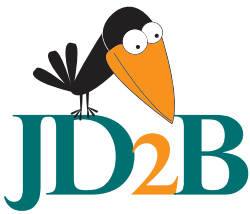
Before Justice Samuel Alito replaced Justice Sandra Day O’Connor, the court had more liberal inclinations. The liberal O’Connor was firm in creating an exemption in the abortion act in cases when the mother’s health is in jeopardy.

O’Connor’s decision to legalize partial birth abortions sideswiped the state laws that restricted abortions. Justice Anthony Kennedy was completely enraged by O’Connor’s move, asserting that it displayed no sensitivity to state laws that approved restrictions and abortions.

O’Connor had overthrown state power.

Although the justices do not endorse any specific party, it’s widely known that the liberals consist of John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. They

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will consistently support a woman's right to abortion. The conservative wing, comprised of Anthony Kennedy, John Glover Roberts, Antonin Scalia, Clarence Thomas, and Sam Alito, will consistently vote in support of state restrictions. The only swing vote is Justice Anthony Kennedy, a moderate conservative, who often determines the outcome of close cases.

Kennedy refused to overturn *Roe v. Wade*, but still conceded to several restrictions, including partial birth abortions. Additionally, Kennedy clearly stood in opposition with O'Connor in the Supreme Court's 2000 ruling. Given these factors, the outcome for the Partial Birth Abortion Act case was pretty predictable.

The ban against partial birth abortion will continue until there is another vacancy within the Supreme Court. Even then, there is much uncertainty on whether the court will have a liberal or conservative inclination. It would ultimately depend upon which justice leaves, the nominating President, and the approving Senate.

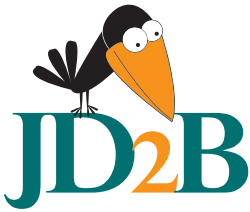
However, as I mentioned before, we are not a nationalist government, so the Supreme Court does not have the last word regarding abortion rights. The federalist doctrine, which splits laws between national and state decrees, prevents political majorities from exercising political power whimsically.

Vikram David Amar, professor of law at the University of California, Hastings College of Law, and Alan Brownstein, Professor of Law at UC-Davis School of Law, noted that our federalist government is instrumental in empowering the political minority. The professors wrote in their *FindLaw* [article](#):

"Today and for the foreseeable future, with a Republican President, a Republican-controlled Congress, and a Republican-appointed federal bench, the Left side of the political spectrum is pretty much shut out of the corridors of national power. As a result, the idea of state autonomy might have renewed appeal to the Liberals.

"For the last seventy years or so, the Left has viewed the national government as a source of positive, progressive political change. Conversely, it has viewed federalism as little more than a constitutionalized disguise for racism or intolerance. But that may change now: If the Left is to exercise power these days, that power may have to come from the states."

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Gottlieb also supported this contention, saying, “If the federal act is overturned, the dilation and extraction procedure will remain unavailable in many states under state law. But disagreement over federalism could sustain state programs that are otherwise unpopular among conservatives, just as their support of state power once curtailed federal programs they disliked.”

He added, “If the liberals can find it within themselves to support state regulations when federal laws are unclear about state authority, we could have a judicial revolution on our hands.”

For more information on Gottlieb’s article, please click [here](#).