

Guest Opinion: Why Congress Should Leave Abortion to the States

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Abortion regulation is an intractable problem mainly because no one knows the true nature of reality. Differing opinions about the existence and nature of God, the human soul, objective morality and other “first principles” lead to irreconcilable opinions about abortion.

If Congress, state legislators and judges want to address abortion now that *Roe v. Wade* has been overturned, they will need to address various difficult questions. The primary question is how the government should balance the rights of a pregnant woman with the rights of the preborn developing in her womb when those rights conflict.

Specifically, given that (1) each human being originates at conception and (2) development in the womb is the first stage of each human being’s life, when does each person first acquire rights under the law, including the right to life? At conception? At birth? At some point in-between? Or at some point after birth?

Three possible scenarios might be true, although some people stubbornly refuse to acknowledge all three:

—If a human being does not acquire rights under the law until birth or some point after birth, then the abortion debate is over. That is, unrestricted abortion should always be legal as long as it is not forced or does not otherwise violate the rights of a pregnant woman.

—If a human being acquires rights under the law after conception but at some point before birth, then abortion should always be legal before that point. However, how such a point could be determined objectively seems highly problematic. Past proposals, such as so-called viability or the first detection of a heartbeat, have been subjective.

Even if such a point could be determined objectively, the government would still need to determine under what circumstances, if any, a pregnant woman's rights outweigh the right to life of the preborn. For example, abortion might be legal even after the point at which a preborn acquires rights if the pregnancy threatens the pregnant woman's life.

—If a human being acquires rights under the law at conception, including the right to life, the government will need to determine if there are any circumstances in which a pregnant woman's rights would outweigh the right to life of the preborn, such as a threat to the pregnant woman's life.

Is there any way to objectively establish (1) when a human being first acquires legal rights, including the right to life, and (2) under what circumstances, if any, a pregnant woman's rights would outweigh the right to life of a preborn? These are the fundamental questions lawmakers and judges must answer to determine whether and under what circumstances abortion should be legal or illegal.

The answers depend on which “first principles” are correct. No one knows, however, which “first principles” are correct. That's partly why abortion is such a heated and contentious issue because it's ultimately a debate about which religious beliefs are correct. Abortion, therefore, will remain unresolvable until those “first principles” can be established objectively.

Lawmakers and judges are confronted with an impossible but unavoidable task. Some pregnant women are going to seek abortions. How should the government respond?

With ultimate truth so elusive, perhaps it would be best for Congress to leave abortion regulation to the states. At least that would allow Americans with differing opinions to choose among different options rather than force the entire country to abide by a single law that would be as inherently divisive as it would be inherently subjective.