Fanaticism of the Moderates—The Republicans and Abortion

by Hadley Arkes

My friend had been a close adviser to George Bush, and he pressed on me now this earnest question: The vexing issue of abortion could not be made to go away, but wasn't there some way of removing it from the center of politics so that the party would not be split by it? The strain most vivid to him was that found in the circle of corporate executives in New York, the traditional Republicans who gathered in clubs and retained a venerable prejudice in favor of smaller government and lower taxes. To put it gently, these Republicans have not settled in easily with the people who bring a religious fervor to the "moral" issues of politics, especially the matter of abortion, even though these new recruits have brought the party to the threshold of becoming the majority party.

And so my friend put this proposal: Could we not simply agree to get this issue out of the federal government and our national politics? He was taken aback when I said, "Yes, a deal of that kind might be possible—if you mean the federal courts as well." Would they not be covered in a formula to take the issue out of the "federal" government? After all, the federal courts brought the federal government into this issue in the first place, in *Roe v. Wade,* when they created a "right to abortion" under the federal Constitution. With that move, the courts indirectly nationalized abortion in the United States. All laws on the subject, at all levels of government, were now subject to review by the federal judiciary, where they were all, in effect, overridden and rewritten. To talk now about removing the issue from the federal government, but saying nothing about the federal courts—well, as the old joke used to go, that was like playing Hamlet without the first gravedigger.

By "removing the federal government from abortion," the old conservatives usually mean removing those parts of the federal government that have an interest in scaling down the right to an abortion and extending the protections of the law to the unborn child. There used to be, even among pro-lifers, a willingness to settle the issue politically by returning the problem of abortion to the legislatures in the separate states. But that strategy has now been stymied by events, and rendered, at best, a charade, and at worst, a dishonest hoax. For over the past 20 years, the corps of judges in the states has absorbed the same understandings of the Constitution and the same activist temper that has taken hold among the federal judges. Many of these judges are convinced that *Roe v. Wade* is indeed part of the logic of the present Constitution, and that it would override the charters and laws of their own states. And in other instances, the judges are prepared now to find, in the constitutions of their states, the same principles of "privacy" that brought forth the "right to an abortion." When candidates like Lamar Alexander propose then to return the question of abortion to the states and to the people, they would really be returning the matter to neither. They are simply offering a formula for delivering this matter into the hands of local judges who will take the issue away from legislatures and voters.

The sober political fact is that there really is no alternative to that celebrated, controversial plank of the Republican platform, the provision for a constitutional amendment on abortion. That amendment will eventually be needed, if for no other reason than to put beyond the reach of local judges the power of the states to protect unborn children. Still, I have been among those who have thought it a mistake for the party to place an *exclusive* reliance on this one proposal. It has been far too easy for Republican politicians to endorse a constitutional amendment—a proposal they knew had no near-term chance of passing—and then say nothing else about abortion in the balance of their campaigns. And so, I have been identified for a long while with the plan to offer a series of modest "first steps," which could plant some points in principle, and provide a focus of discussion. They could also help restore speech to a mute political class, which seems at a loss in framing this question and talking about it in public.

Over the last several years the pro-life movement has shown a willingness to accept modest measures that fall notably short of any sweeping, constitutional amendment. In this temper, they find support, and the grounds of hope, in surveys of the public. Even most people who describe themselves as pro-choice are not willing to accept a policy of abortion performed "on demand," for just any reason, at any stage of the pregnancy. Most people are against abortions performed in the third trimester, those performed for the sake of convenience, those that aim to reduce financial strain in the family. They simply do not consider these reasons as sufficiently compelling to justify the taking of a life.

In short, even people who are pro-choice find many abortions they would reject—and restrict. But surveys also reveal that only one person in ten understands that *Roe v. Wade* has in fact installed a regime of abortion on demand for any reason, at any stage of the pregnancy. Hence the suggestion that the Republicans begin with the most modest steps, which should command wide support. There has been a willingness to begin with restrictions on late-pregnancy abortions, but more recently, measures of even more staggering moderation have been offered: Some of us have proposed simply to protect the life of any child who survives an abortion. In one notable federal case, a child was born alive during an abortion and survived for 20 days. The question had been put: Was there an obligation to preserve his life? The answer, tendered by the federal court in *Floyd v. Anders,* was that under the premises of *Roe v. Wade* the child had no standing to receive protections of the law.

There would be no need to argue here over the beginning of human life. One would simply articulate a premise that should

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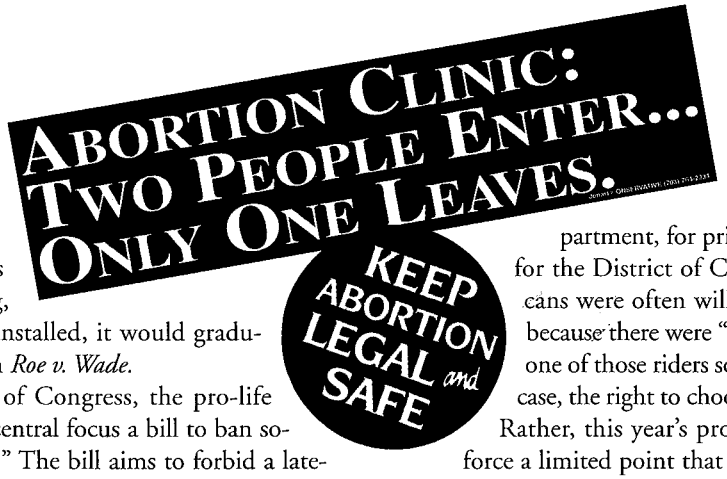

cause no upheaval among people of moderation: namely, that the right of a child to legal protections should not pivot on the question of whether anyone wants her. That is, by any reckoning, a modest premise. Yet, once installed, it would gradually unravel the law built upon *Roe v. Wade.*

In the current session of Congress, the pro-life members have taken as their central focus a bill to ban so-called "partial-birth abortions." The bill aims to forbid a late-pregnancy procedure of uncommon ghoulishness: With the legs and torso of the child removed from the womb, the surgeon punctures the head and then suctions out the brains, so that the dead child can be removed "intact" from the birth canal. There are a few hundred of these abortions performed every year, not a large portion of the 1.3 to 1.5 million abortions carried out annually in this country. But this small step in legislation carries a momentous point: It would mark the first time in which Congress voted to ban a method of abortion out of a recognition of the harm inflicted on the child. For the first time, the child is recognized as a victim, and as the bearer of certain rights.

For that reason, and that reason alone, this modest measure has stirred the most extravagant opposition among the members of Congress described as pro-choice. They have detached themselves from any natural sympathies for the child, and profess to see only the interests of the pregnant woman. This unwillingness to see what is plainly before them is itself a sign of the inversion that has taken place in our public language on this matter. In surveys of opinion, about 60 per cent of the public are opposed to about 90 per cent of the abortions that are permitted under our current laws. But most people are serenely unaware that these surgeries they find abhorrent are actually permitted. Yet in the reports on National Public Radio and in the *New York Times,* the politicians who defend abortion on demand—the people who are not willing to restrict or forbid a single one of the million-and-a-half abortions performed each year—are referred to as "moderates." In all strictness, they should be labeled as "zealots." Only about 18 per cent of the public share their judgment, and yet, remarkably, they are never called "extremists." That brand seems to be reserved for the members of Congress who are seeking to restrict a handful of abortions.

This inversion of language has its uses, and one striking effect is that it has screened from public notice a bizarre pattern that has emerged in this first year of the Republican Congress. In a series of critical votes, the so-called Republican "moderates" have been willing to break the cohesion of the party and vote against measures that reflect the traditional conservatism of the party: scaling down the government, returning more powers to the states, and cutting taxes. In major appropriations bill, for example, a bloc of "moderates" led by Rep. Greg Ganske (R-Iowa) resisted an amendment that sought to prevent students and schools from being forced by the government to participate in abortions as part of medical education. Rep. Jim Kolbe (R-Ariz.) led another fight against the Istook Amendment to the same bill, which sought to return to the states the freedom to reach their own judgments on the funding of abortion in cases of rape and incest. The same kinds of clashes occurred in appropriations for the military and the State Department, for prisons and federal medical plans, and for the District of Columbia. The pro-choice Republicans were often willing to vote against these measures because there were "riders" on abortion. But not a single one of those riders sought to deny to any woman, in any case, the right to choose an abortion.

Rather, this year's pro-life amendments sought to reinforce a limited point that is still consistent with the holdings of the courts: Abortion may be a "private choice," but it is not necessarily a "public good" that deserves to be sustained with government funds. For those funds are drawn, through the compulsion of taxes, from citizens who may regard abortion as morally abhorrent. If the moderates had really been "pragmatic" politicians, there should have been no cause for alarm, for these were mainly symbolic issues that touched nothing in the substance of abortion. And yet, the Republican moderates broke ranks with their party precisely because there seemed to be an issue purely of principle: They were moved to opposition because they devoutly wished to resist any suggestion in our laws that abortion is a fit object of moral reproach, or that abortion is anything less than legitimate and desirable.

When a faction persistently votes against the main program of its party, when it is willing to hold up everything else in order to make certain symbolic defenses, the label would seem obvious: We would be in the presence of a "single-issue" group, so contracted in its concerns, so adamant in its position, that it might even be called "fanatic." In contrast to this pro-choice fanaticism, the pro-lifers agreed from the outset that they would put aside any agenda of their own during the first hundred days of the Congress. And even beyond, the pro-lifers have been willing to subordinate their own concerns to the more prominent goals of the party. When they have balked, they have been subjected to reproaches and pressure from the leadership. But there seems to be no comparable reproach for the other side. The complaint has never yet been sounded by the Republican leadership that the "moderates" on abortion have been subordinating the broader concerns of the party to their almost religious insistence on resisting anything in the laws that even hints at reservations about abortion.

Burke once remarked that parties offered "hard essays in practiced fidelity." They gave their members practice in bearing obligations and honoring some interest other than their own. That is the test that the new members of the Republican coalition now bear for the Old Republicans. Yet, in alliance, they have the prospect of attaining a political dominance they have never seen in their own lifetimes. When there is such a concert of purpose, and such ties of sentiment, why will the Old Republicans not grasp the hands that are offered so often, and with so little asked in return?

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The Most Politically Significant Supreme Court Case of 1996

by Gilbert S. Maguire

Perhaps the most important decision that will come out of the U.S. Supreme Court in 1996 will be its ruling in *Evans v. Romer,* the Colorado gay rights case. A landmark opinion with ramifications rivaling the *Roe v. Wade* abortion decision could result. For the Colorado case will influence not only issues like gay marriage and adoption, but also the standing of all other minorities in the U.S., and their ability to secure special protections and preferences within our political system.

Colorado's "Amendment Two," ratified by voters in 1992, prohibits any state body from enacting a law that entitles homosexuals to protected status, quota preference, or claims of discrimination based on their sexual orientation. Opponents argue that this strips gays of all protection from discrimination. That interpretation has been widely accepted by the media, who appear to believe that the majority of voters in Colorado, motivated by homophobia, want to deny homosexuals their basic rights.

This view ignores the avowed purpose of Amendment Two, which was to prevent the establishment of *special* rights for homosexuals. Proponents of Amendment Two explicitly state that homosexuals are entitled to equal protection of the law. If Amendment Two is allowed to stand, Colorado homosexuals will still be sheltered by the many U.S. and state provisions that protect all citizens from discrimination, assault, and so on.

Gay activists maintain that the homosexual rights ordinances enacted by politicians in Aspen, Boulder, and Denver, which Amendment Two is designed to overturn, merely provide needed insulation from bias. This ignores the practical legal effects, however, of extending new rights coverage to a specific group. Today, any law that singles out a minority for protection creates a presumption that failure to hire or promote a member of that group is a discriminatory act. This places a guilty-until-proven-innocent burden on employers, admissions officers, landlords, and others. As a result, many parties give hiring, promotion, admissions, housing, and other preferences to members of the protected class, merely to avoid legal actions. People who allegedly sought only equal status thus end up with invidious reverse-discrimination benefits—a sort of affirmative action by default.

Amendment Two does not, and legally could not, curtail the rights of homosexuals to equal protection of the law. The real issue before the Supreme Court is whether the voters of a state will be allowed to curtail the access of interest groups to special protected status, with all the "anti-discrimination" powers and preferences that go with that.

There are several legal strategies the Court could use to analyze and decide this case, but the most likely course is that the justices will directly confront the fundamental question of whether sexual orientation deserves explicit protection. The Supreme Court applies something called "suspect-class status" when it wants to give a certain minority group special protection. A suspect class is defined as an obviously distinguishable minority, subject to a history of discrimination, that is so politically powerless as to be in need of special assistance. So far, the Supreme Court has established only three suspect classes: race, national origin, and alien status.

The court has shown great reluctance to expand this list, even to categories like age and physical handicap. The problem the justices face is where to stop. If the elderly are to be protected, why not children? If the handicapped are to be a suspect class, should alcoholics and drug addicts be included? The overweight? The introverted?

Colorado homosexual activists have already lost once on the issue of whether sexual orientation qualifies as a suspect class. The Colorado trial court ruled it did not. For homosexuals to qualify as a suspect class, the court said, three elements must be proven: that they suffer from discrimination; that they exhibit obvious, immutable, distinguishing characteristics that define them as a group; and that they are politically defenseless. Homosexuals have suffered discrimination, the court concluded. Under the second criterion, however, they found evidence that environmental as well as genetic factors affect a person's sexual orientation, which in any case is not an externally distinguishing characteristic. As for the third criterion—political powerlessness—the Colorado court concluded that the Amendment Two campaign itself proved the political influence of homosexual advocates: While representing less than 4 percent of the total population of Colorado, gays were able to raise twice as much money as the amendment's backers, and convinced 46 percent of the state population to vote for their cause.

The suspect-class argument is probably the strongest one homosexual advocates have. Yet the trial court exposed some major flaws in that line of attack. These flaws were again revealed in a recent Federal Court of Appeal decision, *Equality Foundation v. Cincinnati,* that also found homosexuals not to be a suspect class.

Ultimately, the Supreme Court may decline to venture into the uncharted waters of sexual orientation, particularly to overturn the verdict of a popular referendum. This is a controversial area where deference to legislative and voter sentiment would seem prudent. A decision extending suspect-class protection to homosexuals could kick up as much controversy as *Roe v. Wade* did, undermining the Supreme Court's credibility with a citizenry seeking retrenchment from the political extravagances of the recent past.

Gilbert Maguire has written many appellate briefs to the Court of Appeal and the Supreme Court of California.

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