

Can Federalism Solve America's Culture War?

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Can states' rights end the culture war? Commentators from David Brooks to Andrew Sullivan to David Gelernter believe that it can. According to Sullivan, in an essay in *The New Republic*, "The whole point of federalism is that different states can have different public policies on matters of burning controversy--and that this is okay."

Similarly, David Brooks argued in his *New York Times* column that each state should regulate abortion as it sees fit. According to him, *Roe v. Wade* was political poison. By taking the issue away from state legislatures, the Court "set off a cycle of political viciousness and counter-viciousness that has poisoned public life." Overturning *Roe*, he thinks, would end that cycle. Writing in the *Weekly Standard*, Gelernter adds: "An era where deep and fundamental moral questions divide the nation is in need of a revival of federalism. Federalism supplies the expansion joints that make America supple rather than brittle; make it a bridge that can ride out hurricanes without falling to pieces, that can sustain enormous twisting, turning, and tearing forces without cracking."

Gelernter, Brooks, and Sullivan are right in theory. Our federal system can allow for a certain degree of legal and cultural diversity in the Union. What we need to keep in mind, however, is that since the Progressive era, and particularly since the New Deal, Americans have forgotten the not just the virtues of federalism, but also the practice of federalism. A workable federal system requires forbearance on the part of the political class. It might take us a while to re-learn that virtue. Until then, I'm okay, you're okay might not be a workable political program.

A federal approach to cultural issues might worsen things, at least in the near term. As we saw in the Terry Schiavo case, separating state from national issues won't be easy. Federalism works when jurisdiction is clear, but cultural issues create murky and contentious jurisdictional controversies. That has allowed our advocacy groups to make federal cases of them.

Consider abortion. If *Roe v. Wade* were overturned, the states could pass a rainbow of regulations, reflecting the different shades of opinion. Abortion might be legal for nine months in New York, two months in Michigan, and not at all in South Dakota. States might adopt various informed consent laws, parental consent laws, and waiting periods. That might release a certain amount of cultural steam. It could also make the cultural pot boil over. State choice might bring local troops to the culture war by forcing us all to pick sides.

Whatever happens in the states, Washington will still weigh in. Last year, the House of Representatives passed a law making it illegal to take a minor across state lines to have an abortion without her parents' consent. The more variation there is from state to state, the more opportunities Congress will have to intervene. Suppose Utah declares that life begins at conception, and Nevada declares that it begins at birth. May a resident of Utah have an abortion in Nevada? According to Utah, she has crossed state lines to commit murder. According to Nevada she has done nothing wrong. National law will have to be biased in one way or the other. It might energize more citizens, rather than less, about the issues.

Settling gay marriage state by state raises similar problems. If a gay couple marries in Massachusetts and moves to Ohio, will Ohio recognize the marriage? If so, then gay marriage in one state effectively nationalizes the institution. If it does not, then the marriage is terribly flimsy. Congress has tried to tackle that problem with the "Defense of Marriage Act." Will the courts let it stand?

Gay couples with children will complicate things further. Would "deadbeat dad" laws apply when a spouse flees to a state that does not recognize gay marriage? Washington state now recognizes the parental rights of a lesbian partner who is not the biological mother of the child. Not long ago, they had what might very well become a federal case.

Two women, one lesbian and one bisexual, were married and started to raise a child together. The biological mother changed her mind and decided that she would rather marry the biological father. What would happen if the biological parents moved to a state that did not recognize same-sex unions? Could the jilted lover sue for divorce on the grounds of bigamy and abandonment and demand primary custody rights of her child? In Washington she wins the case, but elsewhere her case goes nowhere. Such cases might be rare, but they are already happening. As time passes, they'll occur often enough to keep both advocacy groups and tabloid journalists busy. Tough cases make great political theater.

In short, going local will probably heat up our culture war, at least in the near term. Civic peace requires self-restraint, and even a bit of self-denial. For it to work, we must be willing not to litigate certain cases. Compromise cannot always mean splitting the difference. Sometimes it means letting the other side win, and even ignoring injustice in the name of peace. After so many years of shouting, it will take a while to learn the virtues of self-restraint.

It might be healthy for our body politic to return these issues to the states, for principled contention and compromise are essential parts of citizenship. If we go that way, the transition will not be easy. We should not pretend it will be otherwise.