

Individual Rights and Abortion

Introduction

The U.S. Constitution was designed to minimize the role of government in personal lives. In general, it is designed to "promote the general welfare" and "protect the public good," while guarding privacy and individual freedom--points well articulated by the Founders and several Supreme Court decisions. The intent is to leave much of how people want to live to their individual consciences and moral customs.

Clearly, many moral issues in the diverse U.S. culture are defying consensus, e.g., homosexuality, pornography, prayer in the schools, abortion, suicide, just to name a few. In essence, the Constitution, as interpreted by the courts, says government (Federal, State, local) can step in to regulate behavior only if the behavior adversely affects the general welfare; they must show a "compelling government interest". As we know, the Supreme Court has the final decision on whether governments overstep their authority in regard to a specific law. For example, several states have passed legislation regulating private sexual behavior. In the early part of this century, Connecticut passed a law prohibiting the use of contraceptives, even among married couples. In the case of Griswold v Connecticut (1965), the Supreme Court ruled that the law violated constitutional guarantees of privacy and individual freedom.

Abortion as a Legal Issue

With respect to abortion, the Supreme Court addressed a rather restrictive Texas law that was challenged in Roe vs. Wade (1973). The general question before the court was whether abortion was of sufficient harm to the public good to warrant laws that prohibited it (under the circumstances specified by the law). The court ruled that the Texas law went too far, and declared it unconstitutional. The court decision then went on to articulate "rights to abortion" that states cannot take away. Subsequent court decisions have nibbled at Roe, but have not overturned it. The main point to be understood is that the courts judge if specific legislation violates the Constitution, which looks for that delicate balance between individual rights and the "public good." The Constitution is the basis of their decisions. In that regard, it is useful to quote the opening of the Court decision, written by Justice Blackmun:

“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s personal experiences, one’s exposure to the raw edges of human experience, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.” (U.S. Reports, Vol.410, p.113)

Note that the issue is addressed as a *constitutional* question even though the court recognized that religious beliefs and other values color the way people look at the issue.

With respect to whether or not the fetus could be considered a person and hence warrant the protection of a citizen, the court reviewed common law, the Constitution, and religious teachings. It concluded that the Constitution did not mention the subject, that under common law fetuses were not considered persons, and religious doctrine varied widely. The court decision was thus based on two essential holdings: 1) The right of privacy, however based, is broad enough to cover the abortion decision; therefore, there is a fundamental right to an abortion and 2) where fundamental rights are involved, limiting those rights may be justified only when there is a “compelling State interest”. Another issue was whether there was a compelling state interest in protecting the health of the woman. The court decided there was little danger involved during the first trimester, so abortion during this period could have little restriction. During the second trimester, there was greater threat to the health of the mother, and the State could increase regulation for therapeutic reasons. Thus, the first two trimesters focused on health issues. But, the court said, a woman’s right to have an abortion is not unlimited. At some point, they said, the State’s interest in preserving the potential life of the unborn child overrides any individual interests of the woman. They agreed that the third trimester met that standard. In summary, the Supreme Court, using the constitutional measurement free of emotion and ideological predilection, concluded the following:

The State’s interest in protecting the health of the woman does not become “compelling” until the end of the first trimester of pregnancy. Thus, the State can protect the health of the woman during the second trimester. The State’s interest in protecting the “potentiality of human life” becomes “compelling” only after viability, which was considered to be the beginning of the third trimester.

The Court modified Roe in Casey v. Planned Parenthood (1992) to say there must be no “undue burden” on exercising the right to abortion. The Court defined that as a substantial obstacle to abortion seekers in a large fraction of cases. In Ayotte v. Planned Parenthood (2005), the Court upheld a New Hampshire law requiring a 48- hour notification of parents for minors unless the abortion is needed to prevent the death of the pregnant woman. Judges can by-pass the law under certain circumstances. The various laws prohibiting what has been called “partial-birth abortion” are awaiting court action.

Abortion as a Moral Issue

The national debate on abortion reflects values and beliefs based on a mixture of theology, philosophy, and medical science; thus, the debate transcends the “constitutional measurement” used by the Supreme Court. As noted by the court, some people take an absolutist approach, others a contingency approach, e.g., population growth, poverty, etc. While absolutist views tend to reflect a theological point of view, this is not always the case; one may have an absolutist belief based on secular ideology. However, the absolutist position based on religious doctrine tends to be the most resistant to modification because such beliefs are based on faith in a "divine law." Thus, if one believes that all life is “sacred” because theology says it is, a certain position necessarily follows. This is one argument of those who oppose abortion under any circumstances. If one takes the absolutist point of view that human life begins at conception and that any destruction of that living organism (egg, zygote, fetus) is murder, there are several implications. For example, under that definition the use of an IUD constitutes murder, since it prevents the fertilized egg from attaching to the wall of the uterus. The circumstances of conception (rape, incest, or if the fetus is determined to be severely deformed, e.g., Siamese

twins, Spina Bifida, Tay Sachs, Anacephalism) are irrelevant; there is no justification to abort. In other words, consequences of not aborting are irrelevant to the issue. Surveys indicate that about 5% of the population holds this view. While most people who take this position base it on religious beliefs, this is not always the case. Others argue that any exception leads down the "slippery slope".

Anything other than the absolutist view calls for judgment based on certain conditions, circumstances, consequences, and situations. Whether one labels these approaches to moral judgment "situational," "consequentialist," "utilitarian," or some other term, judgment depends on variables. Thus, "shades of gray" appear and people differ on when they justify abortion. In essence, people who take this view have some form of "moral calculus" which weighs consequences of continuing a pregnancy against terminating a living organism. There are too many variables to discuss here, but they include rights of parents, society, degree of deformity, medical costs, etc. Also considered by some is the maturity of the egg/zygote/ fetus. The Supreme Court considered some of these variables in the Roe decision. Surveys show that the vast majority of people take a position somewhere along this "shades of gray" spectrum. On the extremes, a small percentage support the right to abortion without qualification and a small percentage is against abortion in any circumstances. The majority see abortion as wrong in many instances, but accept it as the lesser of evils considering consequences of not aborting in some circumstances. In essence, that is the position taken in the Supreme Court's Roe decision.

Summary

The purpose of the discussion of abortion is to illustrate the difficulty in dealing with highly emotional ethical issues. How does a democratic society solve such a controversial issue embedded with emotion and ideological beliefs? The short answer, of course, is "with great difficulty." In a pluralistic society with diverse values and beliefs, there is a need for tolerance of such diversity. It is extremely difficult to find this tolerance on issues where bumper sticker slogans on different sides of an issue reduce the argument to categorical assertions of right and wrong, heavily laden with emotional appeals and based on ideological beliefs.

My experience in teaching Ethics over the past 15 years is that 95% of students are able to address the issue of abortion in a rational, reasoned way, although often clouded with emotion. They do not necessarily change their position on the issue (though some do), but they generally demonstrate a tolerance for opposing views. The abortion issue illustrates ethical principles that apply to a wide range of health care issues such as life-support systems for terminally ill patients and assisted suicide. These issues are somewhat analogous to the abortion debate in the sense that they often involve the "dignity of life" theme and emotionally colored beliefs.

The central point of this discussion of abortion is that the Constitution establishes the process for resolving these controversial issues in a peaceful manner. It is the **process** public officials have sworn to uphold in spite of their personal beliefs. Former Surgeon General C. Everett Koop exemplified that loyalty by complying with Roe vs. Wade in his duties as Surgeon General even though he personally opposed abortion.