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Michael Degnan

Russ Pannier

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by Michael Degnan, Ph.D., and Russ Pannier, Ph.D.

The authors are both on the staff of the Department of Philosophy, University of St. Thomas, St. Paul, MN.

Abortion. The very word stirs people's emotions. Some feel that the woman's right to her body is absolute, while others feel the same about the right to life of the unborn. Heated discussions about abortion rarely attend to the reasoning of the U.S. Supreme Court's *Roe V. Wade* decision which in effect overturned all state laws restricting abortions.[1] In this article we submit the Court's arguments to some techniques of logical analysis. We hope to show that even relatively simple applications of logical analysis can reveal serious weaknesses in the Supreme Court's reasoning in the *Roe* case.

In *Roe* the Court struck down a Texas statute which prohibited all abortions except those performed for the purpose of saving the mother's life. The Court fashioned a three-part rule for regulation of abortions:
(1) During the first trimester of pregnancy, government must leave the abortion decision to the medical judgement of the attending physician.
(2) After the end of the first trimester of pregnancy, government may, if it chooses, pursue its interest in the mother's health by imposing regulations reasonably related to maternal health.
(3) After the fetus becomes viable (approximately at the end of the second trimester), government may, if it chooses, pursue its interest in potential life by prohibiting abortion except where abortion is necessary to preserve the life *or* health of the mother.

The Court resolved the issue under the 14th Amendment's Due Process Clause, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The Court's basic theory was that this clause provides a special degree of protection for "fundamental" rights. This special degree of protection consists of a requirement that government demonstrates that any burden it imposes upon a fundamental right be a necessary means of promoting a compelling governmental interest.

This requirement on governmental laws concerning abortion is an instance of the Court applying a "strict" standard of review in contrast to a "minimum rationality" standard of review, the standard the Court uses most of the time. A standard of review is a Court created criterion used to determine when governmental interests can override personal rights.[3] The

"minimum rationality" standard requires that governmental regulations promote permissible objectives in a rational way. The minimum rationality standard differs from the strict scrutiny standard in two respects. First, instead of requiring the governmental objective to be "compelling" (an interest than which there is no other interest of greater importance), it merely requires that the objective be "permissible" (within the range of legitimate governmental concerns). Second, instead of requiring that the means used to promote the objective be "necessary" (indispensable for), it requires only that the means be "rationally related" to the objective (basically that it be conceivable that at least one rational person might think that the means is a useful step toward the objective).

The contrast between the two standards can be easily seen by considering the consequences of their respective applications. When the Court applies a minimum rationality standard of review, the governmental regulation at issue almost always survives constitutional scrutiny. The Court applies this standard to what it perceives as social welfare or economic legislation. For example, in 1976 the Court upheld a Massachusetts law that required state patrol officers to retire at age 50.[4] Judging this to be economic legislation, the Court let the law stand even though it overrides the rights of the patrol officers.[5] On the other hand, when the strict scrutiny standard of review is applied, the regulation is almost always invalidated. In 1925, for example, the Court found unconstitutional an Oregon law requiring children to be sent to public schools, for it deemed the parental decision about where to educate one's child as a personal right, fundamental to the notion of individual liberty.[6] The Court's practice has been to accord special scrutiny protection to personal rights it considers fundamental.[7]

In *Roe* the Court applied the strict scrutiny standard of review to the abortion question by means of the following syllogistic argument:

1. Any personal right that is fundamental has special scrutiny protection.
2. The right to have an abortion is a personal right which is fundamental.
3. Hence, the right to have an abortion has special scrutiny protection.

Of course, the argument is deductively valid. But noticing this is only the beginning. Most legal arguments can be put into a deductively valid form. Given such a formulation, the interesting question is whether the premises have been or can be plausibly supported by other arguments.

It is astonishing that the Court paid little attention to the matter of arguing for premise 2. The nearest thing to an argument in the long majority opinion is a few lines of a single paragraph in which the Court says that prohibiting abortions imposes upon pregnant women economic, physical and psychological detriment. The court writes,

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be

imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child.

The argument seems to come to something like this:

1. All interests whose frustration would cause economic, physical and psychological burdens are fundamental rights.
2. Frustration of the abortion interest causes economic, physical and psychological burdens.
3. Hence the abortion interest is a fundamental right.

Now, one of the most problematic aspects of this argument is its first premise. If it is true, then a great many interests are fundamental rights and so eligible for special constitutional protection. One can plausibly argue that, say, denial of free public education or a minimum wage would impose economic, physical and psychological burdens upon those unable to pay for such benefits. Yet the Court has been unwilling to hold that the Constitution requires public education or public welfare.[9] Furthermore, it seems that prohibiting the murder of, say, elderly people who can no longer care for themselves imposes substantial brudens upon families who have the primary responsibility for them. But does it follow that such families have special constitutional permission to take the lives of such dependents?

Thus, the first premise can be refuted with the logical principle, *modus tollens:* If a proposition P is true then another proposition Q is also true. But Q is false. Hence, P is false as well. As applied to the first premise we have: If all interests whose frustration would cause economic, physical and psychological burdens are fundamental rights then welfare and education interests are fundamental. But welfare and education interests are not fundamental. Hence, it is not the case that all interests whose frustration would cause economic, physical and psychological burdens are fundamental rights.

One might read the Court's citation of earlier privacy decisions as constituting implicit arguments by analogy. The suggestion would be that *Roe* follows by analogy from the facts and holdings of cases such as *Griswold v. Connecticut,* the decision holding that the use of contraceptive devices is entitled to special scrutiny protection under the Due Process Clause.[10] An argument based upon *Griswold* might take the following form:

1. Contraceptives are a means of birth control.
2. Abortion is a means of birth control.
3. Contraceptives are entitled to special constitutional protection.
4. Hence, abortion is entitled to special constitutional protection.

An argument by analogy is only as strong as the degree of relevant similarity between the objects of comparison. The use of contraceptive devices and abortion are distinguishable in at least one important respect. The latter involves termination of a life form; the former does not. Hence,

the analogy is weak.[11] There would have to be support for the claim that abortion is a privacy interest reaching beyond the kinds of considerations marshalled by *Griswold.* Similar points can be made concerning all of the privacy decisions cited in *Roe.*

Upon reading the Due Process Clause it may seem to some that the Court should have upheld the Texas statute since medical science agrees that from conception the unborn is a member of the human species, i.e., a human being. Three leading psychologists, Paul Mussen, John Congar, and Jerome Kagen wrote in a standard text, *Child Development and Personality,* "The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." Alan Guttmacher, before he served as president of Planned Parenthood, wrote in a book entitled *Having a Baby: A Guide for Expectant Parents,* that the exact moment of creating a baby was fertilization. Since *Webster's Third New International Dictionary of the English Language* as well as the *Oxford English Dictionary* define person as a living human being, it seems that the unborn must be considered a person. From this it should follow that abortions must be restricted so as not to deprive the unborn person of life without due process.

The Court, however, did not see things so simply. It refused to resolve the question of the time when life begins because it found a divergence of opinion concerning the time of life's beginning. But the word "life" misleads here, for surely the Court did not mean to deny that the embryo or the fetus is alive. It is more charitable to read it as asserting that the question of when *human* life begins need not be resolved. But since talk of human life is tantamount to talk of personhood, the Court was apparently refusing to determine when personhood begins.

However, the Court implicitly denied that the unborn ever becomes a person prior to birth. For, if there were a point prior to birth at which the unborn becomes a person then states would be constitutionally required to protect it from that point onward. This is a conditional proposition of the form "If P then Q." We know that the court denies Q, for it expressly said that the states are not required to protect the fetus at any point. The state's interest in potential human life takes effect only after viability and, even then, the states are not required to protect that interest. Thus, application of a simple principle of logic shows that the Court apparently contradicted itself. On the one hand, it said that it was not deciding the issue of when personhood begins. On the other hand, it held in effect that whenever personhood does begin, it certainly does not begin prior to birth.

Now, it is true that the Court apparently believed that at the point of viability the fetus becomes what might be called a "quasi-person," where that term connotes the legal status a life form has when government may, if it chooses, protect it by law. There are at least two logical points which can be made about this notion of quasi-personhood.

First, the Court offers no argument for its claim that viability is a relevant criterion for quasi-personhood. But the claim is surely not self-

evident. Why should ability to survive outside the womb be deemed relevant on the question of when quasi-personhood begins?

Second, the Court revealed its unstated (and controversial) assumption that personhood is a comparative, rather than a categorical, concept. That is, the Court apparently assumed that there are degrees of personhood. One life form can have the characteristic of personhood in a greater degree than another life form. The Court implicitly rejected the idea that either a life form is a person or it is not. In addition, the Court apparently assumed that the degree of legal protection to which a life form is entitled is a direct function of the degree of personhood that form possesses.

Now, being unstated assumptions, it is not surprising that the Court offers no support for them. But they require support. Consequences which many believe unacceptable apparently follow from them. For example, if personhood is a matter of degrees, and if legal rights are a function of the degree of personhood one has, then it is difficult to see why, say, mentally retarded persons have a right to life. To simply assume without statement or argument premises which seem to have such startling implications seems, to say the least, logically careless.

Still one might insist that the Court allowed for the protection of prenatal life in the third trimester and so afforded some protection to the unborn. This protection, however, is illusory. The Court held that at the third trimester abortions *can* be regulated by the state in the interest of prenatal life except when an abortion is necessary to preserve the life *or* health of the mother. However, given the Court's definition of health as expressed in *Doe v. Bolton,* a companion decision to *Roe,* the Court in effect allowed for virtually no restrictions on abortions even in the third trimester.

The Court wrote that "the medical judgment may be exercised in the light of all factors- physical, emotional, psychological, familial, and the woman's age- relevant to the well-being of the patient. All these factors may relate to health,"[12] According to the Court if a woman can convince one doctor that her emotional and psychological well being will be disturbed by giving birth to a child, then the state's interest in protecting prenatal life can be overridden. It would be a rare case where a doctor willing to perform an abortion would not be convinced that his patient's emotional well being required the abortion she asked for. So the protection the state can give to third trimester prenatal life is severely limited.

In fact there seems to be an inconsistency here. The Court said that states can restrict abortion in the 3rd trimester to protect its compelling state interest in prenatal life at this stage. Yet it effectively denied the state the means to exercise this protection in any way discernably different from what was allowed in the 2nd trimester. The Court withdrew with one hand the protection it appeared to extend with the other.[13]

With this examination we have shown that the *Roe* case has serious logical and constitutional difficulties. *Roe* can be considered bad

constitutional law for some of the reasons that our logical analysis has uncovered. This result might simply be of interest to lawyers and logicians were it not for the fact that this Court decision has made possible the legal destruction of over twenty million unborn human lives since 1973.

References

1. *Roe*, 410 U.S. 113 (1973).
2. *(Roe v. Wade* at 164-165).
3. The very practice of interpreting Constitutional provisions in light of standards of review can itself be challenged. There is nothing in the Constitution which authorizes or even suggests that its clauses are to be construed by means of such devices. The entire theoretical fabric of standards of review is judge-made.
4. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).
5. For other examples see *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), *Harris vs. McRae*, 448 U.S. 197 (1980).
6. *Pierce v. Society of Sisters*, U.S. 510 (1925).
7. For other examples see *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Loving v. Virginia*, 388 U.S. 1 (1967).
8. *Roe* at 153.
9. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970).
10. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
11. Although the Court itself points to this distinction between *Griswold* and *Roe*, it fails to explain why *Griswold* is legally relevant despite that difference.
12. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).
13. This point is made by John T. Noonan in his book *A Private Choice: Abortion in America in the Seventies*, (The Free Press, 1979), p. 12.