

Abortion in the United States and the Separation of Church and State

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Abstract:

The First Amendment of The Constitution of the United States has a provision that prohibits the interference of religion in state matters – “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” However, following the ruling in *Roe v. Wade*, abortion legislation in various states have faced several challenges, in that states have the right to restrict abortion practices; naturally, restrictions on abortion have increasingly gained a religious inclination over time. This inclination leads to the question of whether issues revolving around abortion rights violate the separation of church and state. While the Supreme Court held that the rights accorded to individuals by the establishment clause could be applied through the Fourteenth Amendment, the fear of religious domination on matters of state, led to the drafting of the establishment clause—the focus of the clause sets the conditions for neutrality. This research paper examines the possibility of an interference of the state by the church; meaning, state legislation revolving around abortion are influenced by religious inclinations, which breaches the very heart of the U.S. Constitution.

To find correlation between religion and abortion laws, data from several cases of the Supreme Court revolving around rights to abortion and the religious tendencies of policy makers of the most abortion-restrictive states have been drawn. The results showed a significant effect of religion on state matters.

The legality of abortion in the United States depends on the Supreme Court ruling in *Roe v. Wade*, which preserved the right accorded to women to make private decisions without the state's interference. Questions regarding abortion raise religious undertones; religion is often cited in the quest to reverse abortion rights as interpreted from the *Roe v. Wade* ruling. Religion and its effect on the direction states take on abortion brings to the fore concerns regarding the violation of the First Amendment of the U.S. Constitution.

Introduction

The First Amendment has a provision that prohibits the interference of religion in state

matters. Following the ruling in *Roe v. Wade*, abortion rights face several challenges. States have the right to restrict abortion practices;

restrictions on abortion tend to have a religious inclination. This inclination leads to the question of whether issues revolving around abortion rights touch on the separation of church and state. While the Supreme Court held that the rights accorded to individuals by the establishment clause could be applied through the Fourteenth Amendment. The fear of religious domination on matters of state, led to the drafting of the establishment clause; the focus of the clause sets the conditions for neutrality. This research paper will delve into how through state laws, there is a possible interference of the state by the church through restrictive abortion laws.

Abortion in the United States rests on the historic ruling by the Supreme Court in *Roe v. Wade*. In *Roe v. Wade*. In the ruling, the Supreme Court established that the Constitution of the United States offers protection to pregnant women and their liberty to choose abortion without getting restricted by the government. Since the ruling in *Roe v. Wade*, there has been a nationwide debate on the extent to which the law applies even though the general narrative is that abortion is legal. The rulings in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Whole Woman's Health v. Hellerstedt* have further clarified the understanding of *Roe v. Wade*. The two rulings define the direction taken by states in passing abortion legislation. States, including Connecticut have exercised different approaches in regulating abortion practices to show that *Roe*

v. Wade only goes as far as shedding light on the position of the Constitution on abortion.

The right of women to have abortion became a reality with the Supreme Court ruling in *Roe v. Wade*. The interpretation of the Fourteenth Amendment by the Supreme Court insinuated that there is a right to privacy granted by the Due Process Clause (*Roe v. Wade*, 1973). Following this clause, women who are pregnant can choose to abort. However, such a right is balanced against the interests of the government to protect the health of women and the potential life of the unborn. *Roe v. Wade* became a reality because of the Texas law that seemed to challenge the Due Process Clause of the Fourteenth Amendment that accorded women the right of whether or not to choose abortion.

Planned Parenthood of Southeastern Pennsylvania v. Casey and *Whole Woman's Health v. Hellerstedt* help with the interpretation of the ruling in *Roe v. Wade*. In the *Planned Parenthood* case, the Court reaffirmed the stand in *Roe v. Wade* but introduced a standard for state laws to be constitutional in regulating abortions (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992). The standard the Court introduced was whether the law in question imposed an "undue burden," that in turn became a substantial obstacle that women seeking abortion have to deal with before the fetus becomes viable for life. The standard set in the *Planned Parenthood* case was used in the decision in *Whole Woman's Health v.*

Hellerstedt (Whole Woman's Health v. Hellerstedt, 2016). House Bill 2, as passed by the Texas Legislature, was determined to have failed the "undue burden test" and therefore unconstitutional.

The abortion law in Connecticut provides that no individual can perform an abortion after viability unless in a case where it is necessary to preserve the life or health of the mother (CGS, § 19a-602(b)). Connecticut has a legislative declaration aimed at affirmatively protecting women and their right to choose abortion (Kasprak, 1998). The law in Connecticut allows the decision to terminate a pregnancy to be made by the woman before the fetus becomes viable; the decision needs to be made after the pregnant woman consults their physician on the matter (CGS § 19a-602(a), (b)). Connecticut mandates that women should receive state-mandated information and materials on the development of the fetus before deciding on abortion. Minors are required to have counseling before undergoing an abortion. The laws by Connecticut explore the fact that the ruling in Roe v. Wade may not necessarily have made abortion legal but was shedding light on the constitutional position on the matter. As such, the state can still explore its options on limiting abortion by requiring a potential parent contemplating abortion to be compelled to think again on the issue before it is carried out.

Pros and Cons of Abortion

One advantage of laws that allow for abortion is that they empower women and allow them a chance to control what happens with their bodies. Abortion allows women to have a choice on whether to have children or not. This choice controls their independence and the ability to determine their future (Kaczor, 2015). Allowing abortion allows social workers to promote the human rights of women. The ruling in Roe v. Wade was supposed to promote the rights of women (Kaczor, 2015). Therefore, the good thing that comes with abortion is the independence of women and the ability to allow them to make their choices concerning their families.

The disadvantage of abortion is that it disregards the rights of the unborn as human beings who deserve to be protected by the right to life. The argument is that life begins at conception (Sheldon, 2016). After conception, an individual with a unique identity begins to develop and remains the same as long as life is preserved. The individual needs to be preserved with their right to life intact. The ruling in Roe v. Wade did not consider the rights of the unborn child as much as those of the pregnant woman. Inasmuch as a mother should have the right to determine what happens with her body; the rights of the unborn need to be protected (Sheldon, 2016). The only isolated case should be where the rights of the mother are impinged upon by the unborn (life-threatening cases).

The Decision in Planned Parenthood v. Casey

States have taken advantage of the decision in *Planned Parenthood v. Casey* (1992) to restrict the practice of abortion within their jurisdictions. The decision in the *Planned Parenthood v. Casey* case upheld abortion rights contemplated in *Roe v. Wade*, but it gave states the right to restrict abortion practices (Harper, Henderson, & Darney, 2005). Even though the decision upheld the right for states to legislate on abortion and restrict its practices, states could only do this if it did not create an undue burden for women. With the decision still intact, states have formulated laws that restrict the practice of abortion and, with such restrictions, greatly affect women who risk unintended pregnancy (Harper, Henderson, & Darney, 2005). The restrictions have been extended to the clinical settings that offer abortion services. States have taken up the prerogative to set up the zoning rules followed, state licensing practices, and inspection requirements (Henshaw & Finer, 2003). Therefore, while abortion is legal in the United States, it is for the state to determine the extent to which it can be practiced.

Abortion, Religion and the Establishment Clause

The ruling in *Roe v. Wade* has morphed into a debate whether Congress can act in a manner that would promote the interests of religion. A move by Congress to abolish abortion will be an act that supports the religious quest for the pro-life movement (Rocca et al., 2015). The establishment clause has a provision that ensures

Congress does not make laws that limit freedom of speech, the right to be in a peaceful assembly, and to conduct a process following a petition to the government to address grievances (Jones, 2011). The phrases formulated towards the construal of the First Amendment are the "Establishment Clause" and "The Free Exercise Clause". The understanding of the First Amendment has always changed with regard to the composition of the Supreme Court; a conservative or progressive reading of the "Establishment Clause" and "The Free Exercise Clause" has always depended on whether conservative or progressive judges dominate the Supreme Court justices.

The Court's pronouncement on abortion concerning antiabortion statutes and their possible violation of the provisions contained in the establishment clause is that antiabortion statute do not have such violations. Religion is said to have an obvious role in the abortion debate. Despite this role finding its way in some of the laws formulated by the state, Courts have rejected the notion that antiabortion statutes violate the establishment clause (Cummings, 1990). The Court has involved itself in the debate generated by the *Roe v. Wade* decision of 1973, which protects women and their right to have an abortion. However, it should be noted that *Roe* relied on arguments concerning zones of privacy (zones of privacy relied upon are contained in the Bill of Rights and the Fourteenth Amendment) to help reach the verdict rather than textual arguments.

When one carries out an establishment clause test, they are likely to discover that the provisions on the establishment clause are violated when states legislate on matters of abortion. First, it should be noted that antiabortion statutes do not have a secular purpose but are often applied to the benefit of religious organizations (Cummings, 1990). Such provisions by states entangle the church and the state and place states on the side of a political matter that divides along religious lines (which in turn violates the provisions of the establishment clause) (Cummings, 1990). The Supreme Court might want to consider the debate on whether or not the establishment clause is violated when analyzing the statutes states formulate when regulating abortion. Judges will then have a sound precedent after considering the establishment clause relating to an issue underlying the abortion statutes adopted by states.

State Mandates to Abortion

The mandates that states place on abortion go beyond the targeted regulations that they formulate. There are abortion restrictions that impede access to services by individuals. For instance, there are waiting periods that states mandate for individuals along with counseling. Women may be required to view sonographic images and images concerning the development of the fetus (Harper, Henderson, & Darney, 2005). In some cases, parents may be involved where the abortion question involves minors. In

other cases, insurance restrictions are put in place for women seeking the procedure. Many states call on counseling, but the states of Louisiana, Mississippi, Utah, Wisconsin, and Indiana mandate counseling 18 hours before an abortion is carried out by the attending physician. With such a requirement, women would have to make an upward of two trips to the clinic or medical office (Alan Guttmacher Inst, 2004). Such requirements by the state can place significant burdens on women who have to travel for long before accessing a clinic, especially women in rural areas with low access to abortion services.

In some states, the requirement is for there to be parental consent or notifications to be given for minors; the alternative is a court order exempting minors from such a requirement. In numerous instances, consent from parents is required or a court order giving exemptions to the minors in question (Aiyer, Ruiz, Steinman, & Ho, 1999). The regulations governing abortions are complex when considered in themselves. They range from consent requirements, giving of notifications, judicial bypasses, involvement of older individuals (such as adults), exceptions for emergencies or incidences of abuse, incest, or neglect (Alan Guttmacher Inst, 2004). The variations in the laws could mean that very few individuals would be aware of all requirements needed for procuring an abortion.

Abortion has been limited through the limitation of coverage of costs. Patients seeking

abortion services can only receive payment from the Medicaid program in situations where their lives are endangered, incest occurred, or raped, as indicated in the Hyde Amendment [1977] (Harper, Henderson, & Darney, 2005). There are just 18 states that go beyond instances of rape, incest, and life endangerment to cover abortion costs. A state such as South Dakota would cover Medicaid recipients when the situations involved are life endangerment; the state excludes rape or incest (Alan Guttmacher Inst, 2004). States' prohibitions on the coverage for abortion are for public employees and private insurance plans. States like Colorado and Kentucky do not give abortion coverage for public employees; this restriction extends to public employees even when their lives are at risk. States like Idaho, Kentucky, Missouri, and North Dakota allow for private insurance to cover abortion when the situation involves life endangerment (Alan Guttmacher Inst, 2004). Therefore, while some states cover abortions to the extent that they are life-threatening, some states do not cover abortions at all.

Partial Abortion

Some states have a ban on abortion passed during the 1990s. Several states passed a ban on a procedure known as "partial birth" abortion. The medical term for the procedure is known as dilation and extraction, which is used in second-trimester terminations. It was responsible for close to 0.17% of abortions in 2000 (Finer & Henshaw, 2003). In the case of *Stenberg v.*

Carhart, the Supreme Court made a declaration towards a law that Nebraska had passed. In the law, Nebraska had criminalized partial-birth abortion (Harper, Henderson, & Darney, 2005). The reason for the declaration of unconstitutionality is that the law did not have an exception that would protect health and was composed broadly. State courts moved to block state bans in 18 states, while the remaining states did not have challenges to the ban (Alan Guttmacher Inst, 2004). The broadness of the law confuses dilation and extraction with second-trimester procedures such as dilation and evacuation.

The Federal Partial-Birth Abortion Act was passed following the legal movement to ban dilation and evacuation procedures. The Act has been in force since November 2003; hospitals and physicians have challenged its constitutionality because of the medically necessary procedures included (Harper, Henderson, & Darney, 2005). The Department of Justice issues subpoenas for medical records to patients who have a history of procuring abortions, though clinics and medical institutions argue that subpoenas are in violation of the patient-privacy provisions contained in the Health Insurance Portability and Accountability Act (HIPAA) (McLellan, 2004). The San Francisco Federal District Court rejected the ban on constitutional grounds. There are cases and appeals that may lead to the legislation appearing for determination before the Supreme Court.

The Supreme Court Skewing Conservative

Following *Roe v. Wade*, the Supreme Court has dealt with the abortion issue while skewing more conservative each time with new rulings that eliminating the responsibility of the state. The Court has made at least 20 rulings that eliminated the responsibility placed on states to provide abortions (Maier, 2018). Courts have recognized the interest the state has in the fetus during the potential mother's pregnancy while attempting to balance this interest with the right a woman has in choosing whether to go through with the delivery as contemplated by the undue burden clause. There has been a recent re-criminalization of third-term abortions. The judgments made by the courts set up a testing ground at the state level for the antiabortion movement and the incrementalist strategy it is pursuing in restricting, conditioning, and making abortion inaccessible to women. As such, states have biopolitical dispositive instituted with the sole purpose of disciplining female body-species differently. It can be termed as a geo-biopolitical divide in reference to the geographical variances at the state level in reproductive health policymaking that impact the bodies of women and the decisions they make.

The strategies pursued by the antiabortion strategists have changed from the demand for full re-criminalization of abortion to an incrementalist approach. The morphing of antiabortion strategies is based on the new quest to have more restrictions using numerous tactics

(Maier, 2018). Antiabortion movements pursue an audacious incrementalist approach that raises more restrictions using numerous tactics to condition personal decisions and professional services to meet specific requirements (Callahan & Callahan, 2012). The religiously grounded discourse has led to the development of close to 285 antiabortion measures from 2011 to 2013 that curb reproductive rights accorded to women in 32 states; the curbing happens though the rights are nationally guaranteed by the Supreme Court through its rulings (Boonstra & Nash, 2014). As such, the abortion question seems to raise concerns of the postindustrial era, with political dilemmas coming to the fore. There is, therefore, a growing appetite for the need to balance religious orthodoxies seeking to ease the walls of separation of the church/religion and state (Constitution Society, 2016). The appetite comes in light of a push for states to realize their rights on the abortion question.

Following the ruling in *Roe v. Wade*, the shift towards religiosity or secularity informs the disparate biopolitical imperatives that define the abortion debate. The United States has regional differences between the religious and the secular factions that inform the disparate imperatives that point to the fracturing of the country when views regarding abortion are in question (Maier, 2018). With a reconfigured global order and the consolidation of a neoliberal state, abortion is an emblematic question that comes up with the renewed tensions featuring the separation of the church and state.

The Hobby Lobby Case

The Hobby Lobby case provides a viable example that explores the conflict concerning the fault lines existing between religious freedom and the responsibility of the state in ensuring public welfare. The decision of the Court in the Hobby Lobby case is a recognition of the right accorded to individuals in religious for-profit corporations to exempt corporations from mandates such as the contraceptive mandate contemplated under the Affordable Care Act; the ACA covers the costs incurred for birth control using company-sponsored medical insurance (Maier, 2018). The Supreme Court finding in the decision has raised a debate on whether corporations enjoy rights as individuals (citizens) do because religious protection was applicable to individuals that enjoyed autonomy but lacked the influence enjoyed by corporate powers.

The ruling in Hobby Lobby indicates a turning point in the understanding of religious liberty in the United States such that the premise of separationism is questioned. Further, the ruling provides an understanding of the implications of validating the preferences generated by religious enterprises over devotional or secular practices exhibited among employees (Maier, 2016). In the process, it recalibrates the walls set up by civil religiosity in the interactions of capitalists within their labor relations. Through the debate, the principle that belief systems are equal comes to the fore and gets interrogated.

The legalization of abortion in 1973 made the abortion question become a contested issue. The

United States has a number of contesting discourses the conflict with each other. The discourses are linked to religious or secular interpretations of the social reality to the point of making abortion a central issue of the debaters' worldviews (Kimport, 2016). There are historical, religious, and philosophical discussions concerning ethical and life values leading to tensions linking transitional contexts; the tensions feature productive and technological models and the shifts in the social patterns (Maier, 2018). There is a conversion of models from the stable, comprehensive, and industrial paradigm to a fragmented, globalized, and postindustrial one. The conversion has led to a sense of disjointedness between two models, the outmoded industrial institutions and the daily needs of fast-paced, ever-changing, contemporary lifestyles (Maier, 2018). There has been a progressive sapping of socio-political institutions in their cohesive, systematic functioning and institutional vacuums that invite paradigmatic confrontations that seek to have the privilege that comes with cultural meaning (Maier, 2018). The voids generated invite contending separationist and religious perspectives in their quest for institutional representation.

Texas and Ohio on Abortion Rights

States such as Texas and Ohio have laws considered to be hostile to abortion rights. Texas and Ohio are examples of how restricting and setting the landscape for women regarding

where to obtain medical services (Jerman, Frohwirth, Kavanaugh, & Blades, 2017). Texas passed the HB 2 law in 2013 that contained several targeted regulation of abortion provider (TRAP) restrictions. One provision was a requirement that providers should have admission privileges that facilities should meet the physical standards of ambulatory surgery centers (Grossman et al., 2014). The number of facilities providing abortion in Texas reduced from 41 to 22 after the law was enacted and may reduce as the law gets applied further. With the reduction in the number of abortion centers, it is evident that Texas might reduce the number of abortion centers further. On its part, Ohio, with its restrictions, which are similar to those of Texas, has witnessed the closure of at least 18 abortion clinics (Jerman, Frohwirth, Kavanaugh, & Blades, 2017). The closure took place between 2011 and 2014 after the TRAP law was implemented in a similar manner as that of Texas (Jones & Jerman, 2017). Women have turned to Michigan and other neighboring states so that they can obtain abortion services. Women move from Ohio to neighboring states because of the restriction that comes with gestational age limit restrictions and in-person waiting time of 24 hours.

Roe v. Wade and Political Liberalism

The ruling in Roe v. Wade has been seen for a long time as an advancement of the progressive ideas of the left. The left has been seen as having a political agenda and advancing a doctrine

where there is a belief held that protecting and enhancing the freedom of individuals in a state forms the most central basis for politics (Rawls, 2005). The challenges that come with Liberalism is that a government that has been put in place to protect and advance the ideals of freedom and liberty can pose a threat through methods such as policy formulation or agenda legislation that impinges on the rights and freedoms of individuals (Keown & George, 2013). The rights and freedoms in question are privacy rights; governments may breach privacy rights to ensure the security of individuals. Abortion rights form part of privacy rights as contemplated by the ruling in Roe v. Wade.

The Risk of Reversing Roe v. Wade

Banning abortion would increase the risks that patients might have when undertaking the procedure. Procedures outside the legal framework lead to women finding quack doctors to take them through abortion procedures. Abortion bans can result in moral ambiguities where quack doctors that manage the processes use the wrong methods that endanger the lives of the patients (Seymore, 2013). Illegal abortion procedures can lead to more deaths when compared to legal abortion, which is regulated.

The reversal of Roe v. Wade would present a moral ambiguity given that it would expose women to the possibility of death while undergoing the procedure. Some women might seek abortion procedures from medical

practitioners who are not recognized by the law and risk their lives in the process (Assifi, Berger, Tunçalp, Khosla, & Ganatra, 2016; Berer, 2017). Through abortion rights, women have the opportunity to decide what happens with their bodies, such that denying them such a right would be immoral (Oberman, 2018). Allowing laws that decide for women concerning what happens in their bodies gives the notion that the privilege to determine such events belongs to other individuals that are not the women (Sheldon, 2016; Williams, 2002). Through abortion bans, women appear to have ceded their powers to other entities to decide what should happen to them concerning whether to deliver or not.

Conclusion

The legality of abortion in the United States depends on the Supreme Court ruling in *Roe v. Wade*, which preserved the right accorded to women to make private decisions without the state's interference. Questions regarding abortion raise religious undertones; religion is often cited in the quest to reverse abortion rights as interpreted from the *Roe v. Wade* ruling. Religion and its effect on the direction states take on abortion brings to the fore concerns regarding the violation of the First Amendment to the US constitution. The interpretation of *Roe v. Wade* is further clarified by the rulings in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Whole Woman's Health v. Hellerstedt* help to clarify the

interpretation of *Roe v. Wade*. While abortion allows women the right to their bodies, it might impinge upon the rights of the unborn. The ruling in *Roe v. Wade* is monumental in the sense that it helps women make choices on whether they should keep the fetus or not. Though the First Amendment prohibits the interference of religion in matters of state and vice versa, state laws that restrict abortion practices seem to propagate the desires of religious institutions. After the ruling in *Roe v. Wade*, abortion rights have been challenged as the Courts become more conservative. The issues on abortion rights touch on the separation of the church and the state as long as religious institutions influence certain legislation. The establishment clause was drafted because of the fear of religious domination on matters of the state. The establishment clause seeks to set the conditions that would ensure that there is neutrality. Restrictive abortion laws create room for religion to interfere in matters of the state or place an undue burden on pregnant women seeking to procure abortions.

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