

Perils in simplifying debate

Does 14th Amendment protect fetuses?



ROBERT BAIRD
Board of
Contributors

Prominent legal scholar John Finnis, emeritus professor of law at the University of Notre Dame, has recently opened, or reopened, a particular argument against permitting abortions. I'll come back to that.

I think a lot about abortion. Of course, if you're a reader of the Waco Tribune-Herald, my friend and former Baylor colleague John Pisciotta will not let you not think about abortion. And Pisciotta has company. A recent issue of this newspaper published a long list of Wacoans opposing abortion.

Because it's such a complex and troublesome issue, I never feel comfortable with my thoughts about abortion, though on one matter I'm rather sure: The abortion debate is often poorly framed or described. The question — Are you for or against abortion? — is so misleading. Everybody approves of abortion under some circumstances. And nobody approves of abortion under every circumstance.

Let me restate that: 99% of us approve of abortion under some circumstances. If all physicians involved agreed that a continuation of the pregnancy would result in the death of both the woman and the fetus, I'm confident 99% of us would judge the abortion justified. I did have a student once who argued that even under those circumstances abortion was not permissible. His argument was that in such a situation, God had willed the death of both the woman and the fetus. Even the most conservative of my students were shocked if not appalled by such a view of God.

And so, yet again, almost everyone approves of abortion under some circumstances.

On the other hand, I never encountered anyone who thought that a woman in the ninth month of pregnancy for some casual reason, like foreign travel, was justified in having an abortion.

So nobody (exception noted above) falls at the extreme ends of the continuum. Nobody opposes abortion under every circumstance and nobody approves of abortion under every circumstance. Everybody falls somewhere on a continuum between the extremes. Many reasons are given for having an abortion, of course:

- The life and/or health of the woman.



MARK ROGERS, A-J MEDIA VIA TRIBUNE NEWS SERVICE

Teresa Clark addresses the crowd after celebrating early returns at an anti-abortion election watch party at Trinity Church in Lubbock on May 1. Lubbock became the largest city in Texas to approve a municipal ban on abortions, by an almost 2-to-1 margin.

- Medical issues related to the well-being of the fetus.

- Rape, incest, failure of birth control, the extreme youth of or the emotional stability of or the financial solvency of the couple.

The list goes on. The fewer reasons one sees as justifying abortion, the more one moves toward one end of the continuum. The more reasons one accepts as justifying abortion, the more one moves toward the other end.

So the debate is not over "abortion/yes" or "abortion/no." The debate is over when abortion is morally justified and when not. And notice we're talking about morality here. There is a difference between morality and legality.

Something can be legal and immoral or moral and illegal. Slavery, for example, was once legal in this country, but immoral. On the other hand, interracial marriage was once illegal, but that such relationships are moral eventually resulted in our changing the law.

The connection between morality and legality is reflected in our hope that our laws and morality match up. As we have seen, sometimes they do and sometimes they don't. One of the arguments for changing the law is to help get our laws and morals in sync.

But whether we're talking about morality or legality, everyone (everyone!) wishes that there were no abortions in the sense that everyone wishes there were no unwanted pregnancies and no unhealthy pregnancies. I have often wondered, by the way, how many unwanted pregnancies, and therefore abortions, were avoided as a result of Planned Parenthood's educa-

tional program "Nobody's Fool." I don't know how such numbers could be determined, but it may be that Planned Parenthood is not only a provider of abortions but also one of the greatest preventers of abortions.

Wouldn't it be interesting, encouraging really, seeing members of Pro-Life Waco volunteering to help Planned Parenthood carry out its "Nobody's Fool" educational program? After all, both organizations wish there were no abortions in the sense that both organizations wish there were no unwanted pregnancies.

In fact, could not Pro-Life Waco do this (support Planned Parenthood's educational program) while still adamantly opposing Planned Parenthood's providing abortion services? This is not a far-fetched idea. After all, it is quite possible to approve of and support some activities of an organization while disapproving of and strongly opposing other activities of that organization. Think of those who love our country, support most of what the United States does, yet took to the streets opposing the government's prosecution of the Vietnam War.

As I say, the whole issue is complex and troubling. Perhaps the greatest provider of abortions is Mother Nature if you think of miscarriages as spontaneous abortions. According to a Mayo Clinic document, about "10 to 20 percent of known pregnancies end in miscarriage. But the actual number is likely higher because many miscarriages [spontaneous abortions] occur so early in pregnancy that a woman doesn't realize she's pregnant."

These spontaneous abortions typically occur because of prob-

lems with fetal development. Of course, a problem with fetal development is one of the reasons women and/or couples sometimes choose to have a medically induced abortion.

But now let me pick up on the renewed argument against abortion by John Finnis referenced in the first sentence of my column: Most opponents of abortion have aimed at overturning *Roe v. Wade*. That would, in effect, return the issue to the states, resulting, many have argued, in red states legally prohibiting abortion and blue states permitting them. But Finnis moves in a different direction, arguing that fetuses are persons under the 14th Amendment to the Constitution and should, therefore, be protected as such.

The first proposition of the 14th Amendment refers to persons born or naturalized in the United States. That clearly would not refer to fetuses. Finnis notes, however, that the third proposition asserts: "nor shall any state deprive any person of life, liberty or property without due process." Finnis then argues that when the amendment was approved in 1867, the context included familiarity with Blackstone's Commentaries on the Laws of England. Those commentaries assumed that the fetus was a person, as did, argues Finnis, the states that ratified the 14th Amendment.

The likelihood of Finnis carrying the day with his argument seems slim. After all, extremely conservative judges Robert Bork (1927-2012) and Antonin Scalia (1936-2016) both rejected the claim that the 14th Amendment applies to fetuses. The conservative state of Mississippi in 2011 also rejected a referendum designating the fetus as a person.

And that is the question: Is the fetus a person? When a man and a woman conceive, clearly the fetus is human. It is not a frog fetus or a dog fetus. It is a human fetus. But is the early developing fetus a person? It is certainly a potential person, but is it yet a person? That is the perennial philosophical debate over what should count as personhood. The never-ending complexity of that debate is precisely why this country splits almost evenly over the issue and why so many of us "fall into the conflicted middle."

All controversial issues are controversial precisely because strong and legitimate arguments exist on both sides. So it is in the abortion debate. If each side acknowledged that to the other, would the tone of the debate be different?

Robert Baird is professor emeritus of philosophy at Baylor University.