

Begging the Question 2: Begging the Abortion Questions

One sphere of contemporary discourse where you encounter a fair amount of question begging is the debate in the US over abortion. This is by no means the only sphere where one or another form of question begging is rampant, but it's a notable one and the question begging surfaces in the arguments of both sides.

Because, it appears, journalistic balance (much less, neutrality) has been abandoned as an ideal by much of the Fourth Estate and because so many journalists and media outlets lean left, it's not hard to find instances of question begging in their 'reporting' on matters related to abortion. (And you'll also find plenty of examples of 'begging the question' being wrongly used as a synonym for 'raising the question', which it is not.)

A prime example is the shift that has been occurring in the designation of those who wish abortion to be legal in all states and under all circumstances. Those of this persuasion were, until fairly recently, most commonly labelled as 'pro-choice' (a designation which itself raises a lot of questions—but that's an issue for another day). Increasingly, since the Supreme Court handed down the *Dobbs* decision in 2022 (*Dobbs v Jackson Women's Health Organization*), this position is alluded to as championing 'abortion rights', 'reproductive rights' or even 'abortion care'.

Let's start with 'abortion rights'. Why is this an instance of question begging? *Dobbs* overturned *Roe v Wade*, which had found a right to an abortion to be contained in the US Constitution. The *Dobbs* decision argued that there was no such right that can be extracted from the Constitution. How could the opinions in *Dobbs* and *Roe* differ on this point? Surely the Constitution either maintains something is a right or it doesn't?

Roe had asserted that this right was to be inferred from the constitutionally-protected right to privacy—note 'inferred'. The right to privacy, however, was itself inferred from various sections of the Constitution: the First, Fourth and Fifth Amendments, but most notably from Section 1 of the Fourteenth Amendment, the Due Process clause. ('No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

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due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.') Part of the argument of the *Dobbs* decision was that *Roe's* inference from an inference was simply invalid.

In fact, *Roe* was on even shakier ground than an inference from an inference. One of the most important cases underlying *Roe* was *Griswold v Connecticut*, the case that addressed the right of a married couple to use contraceptives. The opinion in *Griswold* held that the right of use contraceptives was based on the right to privacy and grounded this right in these words:

'specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one' (*Griswold*).

Whether or not you agree there is a constitutionally-protected right to use contraceptives, *Griswold's* language is startling: a quasi-mystical claim of 'penumbras' and 'emanations' which have the curious power to confer 'life and substance'. *Roe's* inference of a right to abortion from an inferred right to privacy which is itself asserted in the haziest of language is not looking promising.

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And indeed, criticism of *Roe* came sharply and swiftly. In 1973, the very year *Roe* legalised abortion across the United States, under almost all circumstances, an article was published in *The Yale Law Journal* by John Hart Ely, a celebrated legal scholar, who stated that if he had had to draft a law on abortion, he probably would have come up with something very like *Roe* itself. Nevertheless, as a judicial opinion, he found it severely lacking. (See p 926 for his agreement in principle.) Most articles in academic journals die a death quicker than ice cream drips off a cone on a hot day—but not this one. Ely's article continues to be a thorn in the side of those making sheerly legal arguments for abortion, perhaps all the more because he declared himself to be on the side of legalised abortion.

His quarrel with the reasoning of the decision is stated in terms that should have made *Roe's* authors blanch. Here are some examples of Ely's excoriation:

'What is frightening about *Roe* is that this super-protected right [to an abortion] is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure' (935-36).

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'*Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine' (943).

'[*Roe*] is . . . a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.' (947)

Ely was by no means the only critic of *Roe* who was sympathetic to legal abortion in at least some circumstances. The late Supreme Court justice Ruth Bader Ginsburg was known to be critical of *Roe* because she thought it had not made the case for legal abortion in sufficiently unassailable terms, a prescient opinion, given that *Roe* was overturned not long after her death. Ely however remains notable for his detailed critique of *Roe*'s *reasoning*, rather than its conclusion.

To find a similarly incisive probing of *Roe*'s cogency, you can go to the *Dobbs* opinion itself: anyone wanting to challenge the notion that a right to abortion is not only not stated in the Constitution, but cannot even be plausibly inferred from it, would need to refute the arguments of both Alito (writing for the majority in *Dobbs*) and Ely. What is curious is that such refutations never seem to appear in the non-specialist press (and if they are appearing in specialist legal journals, no one in the non-specialist press seems to be citing these arguments in support of their contention that there is a constitutional right to abortion).

Nevertheless, the pro-abortion movement continues to use the language of 'abortion rights' along with its favoured slogan 'A woman's right to choose'. These are classic examples of question-begging in the broader sense of assuming a premise which is itself hotly disputed: the disputant blithely claims X is the case when the argument precisely

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concerns *whether* X is the case. The conclusion which should have been argued is now acting as the argument's major premise. If the US Constitution confers a right to abortion, an advocate of this position needs to make the case that it is there, including by refuting the counterarguments of *Dobbs* and Ely. If this

right is promulgated in some other document, advocates of the right need to cite that document. To request evidence of a right's existence is not the challenge of a nit-picker: it is to respect the very concept of rights. Not everything that is legal is a right: it's legal to park in the lot provided by a supermarket for its customers, but it's no one's *right*. The supermarket is under no legal obligation to provide customer parking in the first place. Nor is everything that is desirable a right.

Most people like ice cream, but I suspect those of us who do would say it would trivialise the notion of rights to enshrine guaranteed access to frozen treats as a human right. The concept of human rights is a solemn one and the area defined by it should be constrained. There is every reason to question those who assert rights without any evidence that there is a consensus that such rights exist.

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The *Dobbs* decision has been widely characterised by the pro-abortion movement as having 'removed' a woman's 'right' to abortion. That is a misunderstanding of its reasoning. The opinion painstakingly goes through the evidence for the existence of such a constitutional right and concludes there is no such right stated or implied in the US Constitution—in other words, that *Roe* had asserted a right where none had ever existed. Noting the absence of grounding in *Roe* for a constitutional right to abortion and

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overturning it accordingly is not removing a right. Those who appeal to 'abortion rights' need to explain in what authoritative source these rights are asserted.

There are other respects in which the rhetoric of the pro-abortion movement begs questions, but I mentioned earlier that the pro-life movement also uses questionable axioms as the basis for argument, without actually acknowledging that these axioms are in dispute. One of these is a slogan as dear to pro-lifers as 'a woman's right to choose' is dear to the pro-abortion lobby, namely 'Human life begins at the first moment of conception'. Exactly what is wrong with this slogan will take a fair amount of time to unpack, so I'll leave the detail for a later post, but for the moment: this assertion adds nothing towards advancing an argument if only because there is no agreement as to what should be defined as 'the first moment of conception'. The slogan therefore asserts nothing more than 'Human life begins at some point, a point about which there is a dispute whose existence we're not going to acknowledge'. Question begging, for sure—but more about its precise quality later.