

# A Libertarian Perspective on Economic and Social Policy

Lecture 7

Abortion

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# Introduction

- Over the past 45 years, government policy toward abortion has been one of the most contentious issues in American politics.
- Until the 1960s, state laws generally prohibited abortion;
  - Some, however, allowed in circumstances such as rape, incest, or to protect the health of the mother
  - In 1960s, a number liberalized their laws somewhat.
- Starting in 1970, several states legalized abortion “on demand.”
- Then, in 1973, U.S. Supreme Court ruled in *Roe v. Wade* that the U.S. Constitution prohibits states from banning abortion.
  - *Roe* prohibited restrictions on first trimester abortions and made it harder for states to limit later term abortions.

# Introduction, continued

- Due to *Roe v. Wade*, abortion has been legal in all states since 1973, but *Roe* did not end the debate:
  - *Roe* left the door open for state regulation of late term abortions, and several states have attempted such regulation.
  - Various Supreme Court cases have therefore addressed in more detail the ways that states can regulate later term abortions.
- In addition to continued debate about later term abortions, some states and the federal government have attempted to ban “partial birth abortion:”
  - Federal law did this in 2003; upheld by SC in 2007.
- Also continuing debate over whether Medicaid funds should be used to pay for abortions.
- Thus, the situation is far from settled.

# Introduction, continued

- The fundamental issue is whether, or under what circumstances, policy should prohibit women from terminating a pregnancy.
- Many, perhaps most, self-described libertarians tend to oppose restrictions on abortion, even while many libertarians are personally uncomfortable with abortion.
  - Again, libertarianism suggests that whether something is “undesirable” is distinct from whether policy should prohibit.
- But the case for legal abortion is more subtle than the case for many other libertarian positions.
- This lecture will make the case for legal abortion, but in a way that is probably unsatisfying to both pro-choice and pro-life views.

# Outline

- Brief History
- Arguments for banning abortion
- Arguments against banning abortion
- Constitutional Issues and *Roe v. Wade*
- Federal versus State Policy on Abortion
- Medicaid Funding for Abortions.
- RU-486 (the “abortion pill”)
- Partial Birth Abortion

# Brief History of Abortion

- Before the mid-19<sup>th</sup> century, the legal status of abortion rested on the common law, which held that a post-quickening abortion (after 15-18 weeks) was a felony.
  - Pre-quickening abortions were “tolerated,” i.e., not prosecuted.
- In the mid-19<sup>th</sup> century, states adopted legislation criminalizing all abortion. That is, they passed specific laws rather than allowing courts to deal with the issue based on the common law.
  - These statutory laws persisted for about a century.
- During the 1960s, twelve states changed their laws in ways that permitted legal abortions under “special” circumstances such as rape, incest, or to protect the life/health of the mother.

# Brief History of Abortion, continued

- In 1970, five states legalized abortion on demand (AK, CA, HI, NY, WA).
- Then, in 1973, the Supreme Court's *Roe v. Wade* decision ruled that all state bans on abortion were unconstitutional.
- Since *Roe*, several other decisions have modified the *Roe* framework:
  - States can now regulate mid-term and late-term abortions to some degree, subject to an “undue burden” criterion.

# Brief History of Abortion, continued

- Thus, under current law:
  - All states allow abortion on demand during the first trimester
  - Many states impose some restrictions on 2d and 3d trimester abortions.
  - These restrictions include parental notification rules, post-viability bans, waiting periods, spousal consent laws, partial-birth abortion bans, licensed physician rules, and several other kinds of regulation.

# The Argument for Prohibiting Abortion

- An unborn fetus is a person.
  - Equivalently, life begins at conception.
- Killing a person is murder.
- Governments always prohibit murder.
- So governments should prohibit abortion.
- Aside: This was in fact the reasoning in common law decisions about abortion, going back to the 13<sup>th</sup> century:
  - Although these decisions seem to have exempted early term abortions.

# The Arguments Against Prohibiting Abortion

- An unborn fetus is not a person:
  - Thus, the question of murder does not arise.
- Women have the right to decide what occurs inside their own bodies:
  - In the Court's language, there is a right to privacy.
  - Relatedly, women should be able to choose what they believe is in their own interests.
- The children who would have been produced by terminated pregnancies are more likely than average to impose costs on society, such as crime, welfare costs medical costs, and the like.
  - Thus, terminating some pregnancies generates a positive externality, whether or not the fetus is a person.

# The Arguments Against Prohibiting Abortion, continued

- Prohibition does not eliminate abortion; instead, it drives the market underground, thereby generating undesirable side effects:
  - Greater health risk for those women who have abortions;
  - Disrespect for the law;
  - Enrichment of “criminals.”
- Banning abortion accepts and promotes the view that governments have the right to control what people do with their own bodies.

# Assessing the Arguments: Is an Unborn Fetus a Person?

- There is enormous diversity of views on this point.
  - At one extreme, some believe the critical point is conception; they regard every terminated pregnancy (or even the use of contraception) as murder.
  - At the other extreme, some believe the critical point is when birth occurs “naturally;” people in this camp would allow legal abortion right through the third trimester.
  - Many people think the right dividing line is something in between, perhaps based on “viability.”

# Is an Unborn Fetus a Person?, continued

- It is hard to see how economics, or any rational argument, can fully address this issue.
- There is no clean definition of “person” or “life” that can be applied in a scientific manner;
- The answer is inevitably subjective and based on moral, emotional, religious considerations.

# Is an Unborn Fetus a Person?, continued

- Relatedly, the “viability” test is elusive in practice.
- As medical science progresses, the point of “viability” changes, becoming earlier and earlier.
- Also, viability depends on the resources available; it is partly a question of what the relevant parties are willing to spend on medical interventions to help pre-term babies.
- So, viability does not produce a clean answer:
  - It might be relevant, but it’s not the whole answer.

# Is an Unborn Fetus a Person?, continued

- Ultimately, this is a subjective and highly emotional question:
  - Relatively few people in the U.S. feel that early term abortions should be criminalized
  - Relatively few oppose any and all restrictions.
- That is, most accept a policy that draws a line somewhere between conception and birth as the beginning of life:
  - And most accept legal abortion, even late-term abortions, for rape, incest, maternal health.
- This characterization will be relevant later on.

# Assessing the Arguments: The Right to Choose

- Many proponents of legal abortion argue that women must be allowed make whatever decision they believe is in their own interests:
  - In particular, women should be able to choose abortion if having a child would impose substantial costs on them or their families.
- Opponents find this argument unconvincing, if not offensive:
  - Their response is that one could make a similar argument for killing a one-year old, or a twelve-year old;
  - In this view, the value of every life is infinite; there is never a “rational” argument for taking a life.

# Assessing the Arguments: The Right to Choose, continued

- In fact, both existing law and widely held views accept that the value of life is finite and that there are legitimate reasons to kill:
  - Self-Defense is the classic example.
  - Pre-emptive invasion of a country that is allegedly aiding terrorists is perhaps another example.
  - Police killing of suspects in the line of duty;
  - Capital punishment
  - Assisted Suicide
- Thus, virtually everyone accepts the “cost-benefit” approach to deciding when killing is acceptable:
  - But people differ radically as to the details of these cost-benefit analyses, so there is still enormous room for debate.

# Assessing the Arguments: Externalities from Reduced Births?

- Existing evidence suggests that legalizing abortion reduces birth rates significantly.
- A key question for society, assuming one accepts the cost-benefit framework, is which births are avoided:
  - If these births would have produced persons with a high propensity to crime, or welfare uptake, or health care utilization, then terminating these pregnancies generates a beneficial externality.
  - Of course, adopting this approach raises serious moral dilemmas; leave those aside for now.

# Externalities from Reduced Births?, continued

- Recent work on abortion and crime suggests that legalizing abortion produced a decline in crime roughly 20 years later.
  - This evidence, however, has not survived “statistical scrutiny.”
- Other work does suggest that the “marginal” children would have been more likely to live in poverty, collect welfare, Medicaid, and the like.
- And without question, many terminations are of fetuses that have been diagnosed with serious medical conditions.
- Thus, there is evidence consistent with the externality view: in the medical case, this externality is plausibly large.

# Assessing the Arguments: Prohibition Causes Problems

- There is no question that, pre-1970s, black market abortions existed and that higher income women traveled to countries or states with legal access.
- The evils of black markets that occur in illegal drug markets (violent dispute resolution), do not seem to have been dramatic.
- Nevertheless, the negatives did exist to some degree:
  - In particular, elevated health risks for women who obtained black market abortions.

# Assessing the Arguments: Limits of Government Control

- If government can tell women what they can do with their own bodies, what else can it do?
  - Lock up women who drink during pregnancy.
  - Tell people what drugs they can consume.
  - Prohibit “sodomy” or pornography
  - Ban “subversive” books or ideas.
- These “slippery slopes” might seem extreme; yet they have all occurred.
- At least to a libertarian, a good rule of thumb would seem to be that the government’s power ends where my own person begins.

# Summary so Far

- The arguments for and against legalized abortion are to a substantial degree subjective and emotional:
  - There is not an obvious “slam-dunk” argument that dictates one position or the other.
  - Relatedly, public opinion is not in either “extreme” camp.
- A reasonable question, therefore, is whether there is a way to calm the debate without settling all the issues.

# The Constitution and Abortion

- As noted in earlier lectures, consequential libertarianism does not rely on the constitution, *per se*, as a basis for particular policy views:
  - For example, it does not use the 2d Amendment as a reason to oppose gun control.
- Instead, consequential libertarianism asks what is good public policy, regardless of what the constitution says.

# The Constitution and Abortion, continued

- It is nevertheless interesting to understand what policies the constitution reasonably supports or opposes and to ask what a “libertarian” constitution would look like, assuming one thought of constitutional fiats and prohibitions as “rules of thumb.”
- It is also useful to recognize that determining what the Constitution says and determining desirable public policy are distinct issues, and mixing them up generates confusion and muddled analysis.
- But, in this instance, going back to the Constitutional issues does suggest an approach to abortion law that, in the libertarian view, makes more sense than our current approach.

# The Constitution and Abortion, continued

- Note first that most “laws” in the United States are *state* laws:
  - Murder, assault, rape, robbery, larceny, ....
- Under the original Constitution, and to a substantial degree today, federal law addresses only those issues that are inherently “federal” or national:
  - For example, treason, evasion of federal income taxes, counterfeiting, patent infringement, ...
- This distinction has become muddied in recent decades:
  - For example, there are both federal and state drug laws:
  - There are also federal laws about violence against women, hate crimes, discrimination, ...
- But overall, it is still true that criminal law is state, not federal.

# The Constitution and Abortion, continued

- Consistent with this practice, there have never been any federal laws *prohibiting* abortion.
- Instead, each state prohibited or regulated abortion as it saw fit (typically flowing from that state's laws regarding murder).
- As discussed above, this allowed for different laws in different states.
- But, the Supreme Court decision in *Roe* said that the federal constitution prohibited state laws banning abortion:
  - That is, *Roe* inserted federal control in an arena that had always been left to the states.

# Is *Roe* “Correct” as An Interpretation of the Constitution?

- The argument for the *Roe* conclusion is that although the Constitution does not mention abortion, nor does it mention privacy, there are nevertheless critical implicit rights that “emanate from the penumbras” of the Constitution:
  - Specifically, a right to privacy, including abortion.
- The *Roe* decision mainly cites the due process clause of the 14<sup>th</sup> amendment; it also mentions the 9<sup>th</sup> amendment.
- To many legal scholars, including some *pro-choice* ones, this seems like a stretch.
- But, let’s leave this to the lawyers, for now.

# The Constitution and Abortion, continued

- Regardless of whether *Roe* was correct, the key fact is that repeal of *Roe* would *not* ban abortion.
- Instead, it would simply restore the pre-1973 situation in which states rather than the federal government regulated abortion.
- So this raises the question of whether abortion law should be state or federal.

# Should Abortion Law be State or Federal?

- Set aside the question of whether the federal Constitution is reasonably interpreted as banning states laws against abortion.
- As a matter of public policy, is it better to set abortion policy at the federal level or at the state level?

# The Argument for Federal Policies

- Assuming that legal abortion is the right policy, it might seem natural to impose this policy on all states:
  - Otherwise, some states will not adopt this policy.
- But there are other considerations:
  - Abortion is an emotional topic; there are not clear cut answers to the issues involved.
  - Thus, imposing one view is polarizing; it ignores the fact that divergent but reasonable views are not only possible but obviously exist to a substantial degree.

# What Would Happen if Abortion Law Were Left to the States?

- Many states (the “blue” ones) would have abortion on demand with few, if any, restrictions.
- Some states (the “red” ones) would have legal abortion but with more restrictions.
- A few states might ban abortion entirely.
- Overall, a substantial majority of women would have ready access to legal, early term abortion and many would have reasonable access even to later term abortion.

# What Would Happen if Abortion Law Were Left to the States?, cont.

- Would this situation be ideal, assuming one thinks all abortion should be legal?
  - No.
- But this approach would be consistent with the views of a broad majority of the population and avoid the polarization created by forcing one policy on everyone.
  - It is plausibly also a more accurate interpretation of the Constitution.

# What Would Happen if Abortion Law Were Left to the States?, cont.

- More broadly, the repeal of *Roe*, under which states would again have free reign to choose abortion policy, would accept that there is an inevitable gray area to be addressed in regulating abortion.
  - Given this inherent ambiguity and the potential for controversy, it is good for policy to be less rather than more centralized.
  - This might not be “perfect” but it is plausibly the best we can do.

# The Libertarian View on State Policies

- Early term abortion should be legal, with few if any restrictions:
  - All the arguments raised above are at least partly right, especially the view that people should have control over their own persons.
- For later term abortions, there is not an obvious answer:
  - Libertarians would tend to leave that issue to doctors, but there is no hard line.

# Partial Birth Abortion

- This term is the common label for a procedure that is sometimes used in late term abortions:
  - The doctor partially delivers the fetus, except the head, then punctures the head and removes the brain before fully extracting the fetus from the womb.
- There is little dispute the procedure is “unappealing.”
- But the ban does little to reduce late term abortions and probably causes some harm in affecting the way that such abortions occur.
- Also, a federal ban inserts the federal government in an issue that is appropriately left to the states.
- Even at the state level, there is no compelling argument that a ban does more good than harm.

# Medicaid Funding of Abortion

- Medicaid is the federal government program that provides health care for the poor.
- Since 1977, Congress has restricted the use of Medicaid funds to cover abortion.
- This controversy is one reason to question the direct provision of health care by the government.
- But given the existence of Medicaid, it is not obvious why the use of Medicaid funds should be restricted in states where abortion is legal.
- And there is at least a plausible argument that subsidizing abortion generates a positive externality by reducing future welfare and related expenditure.

# RU-486

- RU-486 is the “abortion pill:”
  - It is taken early in pregnancy (first 9 weeks) and, with an extremely high success rate, produces a “medical” abortion with low risk.
- Aside: RU-486 would have been available sooner in the U.S. in the absence of the FDA.
  - Used in Europe starting in 1989, but not approved in U.S. until 2000.
- Aside: The demand for RU-486 would plausibly have been much stronger if *Roe v. Wade* had not mandated legal abortion in all states.
- The availability of RU-486 will gradually defuse most aspects of the abortion debate:
  - Used early in pregnancy
  - Administered in the privacy of a physician’s office: no clinics.
  - It can be supplied in rural areas, small towns, and states that restrict abortion.

# Conclusions

- The libertarian view is in favor of legal abortion.
- The libertarian view recognizes, however, that the case for legal abortion is not trivial:
  - There is a fundamental and unavoidable balancing of costs and benefits.
- It is hard to justify a ban; but it is also hard to *a priori* rule out all restrictions.
- Choosing the correct dividing line is subjective:
  - The balancing should be carried out state by state, not by the federal government.
- This would produce only mild reductions in abortion availability, but substantial reductions in the acrimony, bitterness, and polarization that now surrounds the debate.