

# An Economic Commentary on Reproductive Rights in the United States

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**Abstract:** In recent years the issue of reproductive rights in the United States has gained prominence in the media through several important legal cases, most notably the Supreme Court's ruling in *Roe versus Wade*. The issue has received little, if any, attention from economists. Economics appears, however, to be well suited to address the issue. This paper examines the issue of reproductive rights by employing a combination of economic and legal concepts. Couching the issue in this context affords economists the opportunity to consider the efficiency aspects of various legal scenarios that pertain to reproductive rights.

**Keywords:** Economics appears, reproductive rights.

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Few issues in American history have created so much controversy and divisiveness as the debate over abortion. Supporters of abortion rights argue that women have a constitutional right to the exclusive control of their own reproductive organs without any government interference. Opponents of abortion rights, frequently citing religious notions, assert that once conception occurs, an embryo becomes a living entity that should be guaranteed the same rights as a human being. In this view, abortion represents a denial of these rights. These opposing points of view typically generate much debate, often filled with passion and anger.

January 22<sup>nd</sup> of 2016 marked the 43rd anniversary of the United States Supreme Court's ruling in the landmark case of *Roe versus Wade*-- the legal decision which struck down many state laws prohibiting abortion. The ruling essentially established a framework based on the length of gestation of a typical pregnancy for determining when a pregnancy could be legally performed. The Supreme Court separated the term of a pregnancy into three trimesters and ruled that (1) a state cannot regulate abortion during the first trimester, (2) a state could regulate abortion during the second trimester, but only to protect a woman's health, and (3) a state could prohibit abortions entirely, except to save the woman's life in the third trimester.[1] The Court, in the companion decision of *Doe vs. Bolton*, also ruled that a state may not unduly burden the exercise of that right with regulations that forbid or restrict access to abortion.

The Supreme Court has, since the *Roe v. Wade* decision, permitted states greater latitude in regulating abortion through two other cases—*Webster v. Reproductive Health Services* in 1989 and *Planned Parenthood v. Casey* in 1992. But the Court's original ruling still is largely intact today. However, passage of the first federal ban on partial-birth abortion (many abortions performed in the second or third trimester) in 2003 which President Bush signed into law, enlivened public discourse and brought new legal challenges. The law was challenged in numerous legal venues across the United States before it was ultimately ruled constitutional by the Supreme Court in 2007. In a new report Shimabukuro presents a brief, but comprehensive, review of the major reproductive rights cases at both the state and federal levels of the last forty years.[2]

During the last few years the partial-birth ban has continued to bring attention to the old debate of the constitutionality of a woman's right to choose. The recent passing of Justice Antonin Scalia has renewed hopes among abortion rights activists that the partial-birth abortion ban can be reversed and that the constitutionality of *Roe v. Wade* can be preserved.

Legal scholars' opinions vary on the constitutionality of the *Roe v. Wade* ruling, ranging from those of Oxford University Law Professor Ronald Dworkin to those of Harvard University Law Professor Lawrence Tribe and others. Their views are

not necessarily mutually exclusive, but they are steeped in differing philosophical leanings which yield various legal interpretations. Professor Dworkin asserts that the abortion debate is really a disagreement over how best to respect the sacredness of human life when “continuing a pregnancy would itself frustrate or damage human life in some other grave way.” The abortion debate, Dworkin asserts, is a religious and spiritual argument about the significance and value of human life itself, but not about rights. And as a result, he argues that the role of government should be to provide information about the “gravity” of such decisions, but not to mandate which decision should be made.[3]

Alternatively, Lawrence Tribe calls the abortion issue a clash of absolutes: women’s reproductive rights versus the right to life. It is characterized, Tribe believes, as a conflict between state control and individual control of reproductive organs.[4] He argues that the right of privacy to control one’s own body should be firmly entrenched as a constitutional principle otherwise the government could legally mandate abortion (or some other form of force) for some other social goal such as population control or eugenics.

These differing scholarly views on the constitutionality of abortion raise the question of whether the Supreme Court’s decision in *Roe v. Wade* is consistent with the economic principle of efficiency, which states that a resource is efficiently allocated when it is employed in its most highly-valued use. The Neoclassical idea of economic efficiency is conventionally used as a normative device by economists to analyze economic matters pertaining to resource allocation, but it is not sufficient by itself to solve any major ethical problem. This has been acknowledged by economists as early as Bator’s work in welfare economics.[5] But, applying the concept of economic efficiency to reproductive rights is convenient for conceiving a meaningful economic understanding of the issue.

The issue has received scant attention from economists. Perhaps the most notable application of economics to the topic of abortion is the somewhat controversial work of Levitt and Dubner which linked the higher incidence of abortion with a lower incidence of crime.[6] In the same year Tipler briefly analyzed abortion using Coase’s Theorem, suggesting that a perfectly-informed society should permit abortion on a case-by-case basis. In this view the legality of abortion would be considered using a cost-benefit framework. [7]

The abortion debate can be construed in economic terms as a dispute between a woman and the state over the property rights to her womb for the duration of a pregnancy. Even though a womb is not traditionally conceived as real property, it is useful to cast it in those terms as a way of abstracting from the emotional and political aspects of the abortion debate. Property, in a general sense, is a legally enforceable claim of one individual against another. An individual has a property right when she is capable of legally forcing another to do, or not to do some act. When the actions of one individual cause damage to a landowner, for instance, the landowner can invoke her property right and legally force their cessation. As Hirsch (p. 25) states:[8]

The concept of property rights relates to the set of privileges and responsibilities accorded to a person in relation to the owning of property in general and real property in particular.... The right to property is the power to exclude others from or give them access to a benefit or use of the particular object.... Under what conditions is a system of property rights efficient? The conditions include universality, exclusivity, and transferability. Universality implies that all resources should be owned by someone. Exclusivity is defined as the right to exclude people who might want to take part of the property. Transferability provides for voluntary exchanges that in general are value enhancing.

An important complement to determining economic efficiency is Coase’s Theorem, which states that when property rights are efficient, in the absence of transaction costs, the initial assignment of a property right will not determine the ultimate use of the property. Rather, the property’s ultimate and efficient use will be determined by the party who places the highest market value on it. Thus, if one person holds the property right to a resource that is more highly valued by another person, the latter will buy the property right from its original owner and the resource can be used efficiently—a socially desirable outcome. One would presume that reproduction is the most highly-valued use of a woman’s womb.

In the context of Coase’s Theorem, it was important for the Supreme Court to determine who initially has the right to a woman’s womb during pregnancy, when it unequivocally granted it to women for the first trimester of a pregnancy. As such, a pregnant woman in the first trimester of pregnancy has the right to continue, or to discontinue a pregnancy. A pregnant woman who intends to carry her pregnancy to term obviously reveals the most highly valued use of her womb. However, it is difficult, if not impossible, to determine if the womb of a pregnant woman is in its most highly valued use

during this period if she prefers to abort, because a fetus who would presumably prefer the pregnancy be continued, is not able to negotiate the terms required for the woman to continue her pregnancy.

While a fetus cannot act on its own accord, an agent acting on behalf of the fetus (perhaps a couple wishing to adopt a child or an abortion opposition group) may have an interest paying a pregnant woman an acceptable amount not to abort. In this instance and similar others, the most highly valued use of the womb is to continue the pregnancy. If no such transaction occurs, the woman may opt for an abortion. Coase's Theorem suggests, however, that a private legal market possibly could exist in light of the Roe v. Wade decision whereby an agent on behalf of a fetus could negotiate with a pregnant woman for the reproductive right to control her womb during the entire pregnancy. This would insure that opponents of the Roe v. Wade decision would have a chance at least to compensate a woman not to have an abortion.

The Supreme Court's Roe v. Wade ruling seems consistent with Coase's Theorem because it initially assigns the reproductive right to a woman for the first two trimesters of pregnancy but it allows an agent acting on behalf of a fetus to negotiate with a pregnant woman for the right to temporarily use her womb during the first and second trimesters of pregnancy. That is, if the agent places a higher value on a mother's womb than she does with an unwanted pregnancy. The Roe v. Wade ruling essentially creates an efficient property right out of a reproductive right—a right which is universal, exclusive, and transferable. The transaction costs of negotiating for the reproductive right during the first two trimesters might prove a formidable impediment to an efficient outcome in all pregnancies, however.

If the transaction costs are prohibitive so that no private agents would act on behalf of a fetus when the reproductive right is held by the mother, the use of Eminent Domain, which is specified in the United States Constitution, may be justified on economic grounds for temporarily acquiring the reproductive right of the woman to prevent an abortion. Eminent domain is the process whereby the government exercises its power for a public purpose with just compensation and according to due process of law. The primary economic rationale for the exercise of eminent domain is that the government may be able to produce a good or service that has strong public good characteristics. The principles which guide government in its exercise of eminent domain are found in the constitution.

The Fifth Amendment to the constitution states that "No person shall be...deprived of property without due process of law; nor shall property be taken for public use without just compensation." The Fourteenth Amendment states that no state may deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. Invoking eminent domain is economically efficient only if its expected public benefits exceed the expected social costs. Compensation to the harmed parties should equal what an owner loses, as determined by fair market value.

Making abortion illegal under all circumstances as proposed by many, seems to be an unorthodox variation of eminent domain. In essence, the government upon a condition of unwanted pregnancy would temporarily take control of a woman's reproductive organs in the interest of a social goal: the protection of an embryo or fetus. If the state wishes to avert abortion via eminent domain, it would have to pay a competitive price for using a female's reproductive organs during pregnancy, however. Conceivably, eminent domain could be invoked during any trimester of pregnancy. Even if a woman is granted the reproductive right initially, the state could seize that right by declaring all fetuses at any time during pregnancy to be protected under eminent domain.

Aside from objections based on legal or political grounds, certain aspects of such an action would make its implementation economically impossible. The transaction costs associated with such a policy would probably be exorbitant; determining and negotiating the market value of reproductive organs would be particularly expensive. State rental of reproductive organs would be sufficient incentive for many women to become pregnant and bear what would otherwise be unwanted children by them. The burden of such a policy would also be unfair because it would likely be borne by taxpayers who would not in the great majority of instances be associated with that activity. This all seems a rather moot point and discussion, unless the Supreme Court overturns the Roe v. Wade decision—a seemingly remote possibility.

Adverse possession is perhaps a stronger economic rationale for granting a fetus, or agent thereof, temporary control of a woman's reproductive organs. Adverse possession is defined as follows: If, in a given period of time you hold property adversely to the real owner (i.e. not as tenant or agent, etc.) claiming it as your own and the real owner does not act to regain the property, it becomes yours. The period of time varies across states; seven years is most common. Successfully

claiming property via adverse possession is that it enhances the efficiency of private property. Claims for adverse possession are most legitimate when the actual use of property is identical to how the average owner would use it.

In the case of unwanted pregnancy, to temporarily obtain possession of a womb adversely, the agent of a fetus (in this case government or some other interested party) would seemingly have to show (1) some claim of rights to a woman's reproductive organs, (2) that the fetus had occupied the womb for a sufficient period of time, and (3) that the organs were used as the average owner would use them. Satisfying the latter two conditions may not be very difficult since most women use their reproductive organs to bear children. Further, an advanced pregnancy (six or more months) may be sufficient time, (i.e. relative to the total duration of the typical pregnancy) to demonstrate that a fetus occupied the reproductive organs for an extended period of time.

In its *Roe v. Wade* decision, the Supreme Court attempted to establish the legal concept of fetus viability, stating that abortion should be legal during all but the last three months of pregnancy. Viability is defined as a condition in which a fetus, possibly assisted by medical technology, can survive outside its mother's womb. Viability is rare before the seventh month of pregnancy. While the Supreme Court's intent was to define viability, it may also have fortuitously invoked the principle of adverse possession in *Roe v. Wade*. In that context, fetus viability at six months may coincidentally imply that a fetus has adverse possession of the womb after six months of pregnancy and therefore would have claim to it through adverse possession during the third trimester of pregnancy.

And because a fetus acquires a right to the womb by residing there sufficiently long to attain viability, it automatically gains the protection of the state, implying that adverse possession of the womb has fortuitously occurred. As medical breakthroughs continue to gradually reduce the amount of time for a fetus to reach viability, the time requirements for adverse possession of a mother's womb also will decline.

The transaction cost of negotiating for the reproductive right during the first two trimesters might prove a formidable impediment to an efficient outcome in all pregnancies. But the Supreme Court's ruling at least allows for the possibility that economic efficiency could be achieved in those cases—implying that many, not all, abortions could be avoided while preserving the reproductive rights of women during the first six months of pregnancy. And if a pregnancy advances to the third trimester, the Supreme Court ruling appears to have fortuitously afforded a form of protection for the unborn via adverse possession.

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