Roe v Nebbia: Could Roe Be in Constitutional Jeopardy?

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Abstract: This study provides a positive analysis of abortion price regulation. Given Court precedent on the issues of abortion and state price regulation, the implementation of an abortion price control would create a potential legal conundrum. The price of abortion best meeting a state’s needs may affect incidence of legal abortion as would a direct market limitation or ban. Abortion price controls are evaluated with respect to relevant issues of liberty and confiscation. Given the Court's allowance of abortion as a marketable service allocated by a (restrictive) price mechanism, it is ambiguous and confounding that a state-controlled abortion price would present a “substantial obstacle” to liberty. Provided the mobility of medical resources and a state's option to refrain from producing abortion services, it is further unnecessary that said price control would follow a confiscatory motive. The duality of abortion as market service and moral issue, and the legislative and judicial complexity thereof, is discussed.

Keywords: abortion, price controls, Roe v Wade
JEL Codes: E64, K20

I. INTRODUCTION

This study provides a positive analysis of the price regulation of abortion markets (i.e., one that seeks freedom from any political ideologies that the authors may or may not have). In the landmark rulings of Roe v. Wade 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), the United States Supreme Court held as unconstitutional any law directly and unconditionally banning abortion markets from functioning. In the more recent ruling of Planned Parenthood v. Casey 505 U.S. 833 (1992), the Court ruled that any state restriction placing a “substantial obstacle” or “undue interference” on a potential mother’s right to abortion is unconstitutional. We show that a prohibitive price control on abortion would have the same effect as the direct prohibition of the service, whereas a partially restrictive price control would have the same first-order effect (i.e., a reduction in the incidence of legal abortion). However, it is not clear that such a policy would place a “substantial obstacle” before a potential mother considering abortion. A free (unregulated) market price mechanism is, by definition, restrictive. Therefore, the very presence of a market for

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1 A price control on abortion would likely lead to a black market for abortions, as existed before Roe v. Wade. The present paper abstracts from the interdependence of legitimate and black markets.
abortion with some positive price places an obstacle before a potential mother who values abortion service. However, the Court’s allowance of a market for abortion as constitutional implies that the equilibrium market price does not constitute a “substantial obstacle.” The Court has previously stated that it does not hold a free (unregulated) market price as more just than a controlled market price (*Nebbia v. New York*, 291 U.S. 502 (1934)). It is unclear, therefore, that a (restrictive) controlled price would be ruled as a “substantial obstacle” to a potential mother’s abortion rights.

Given the Supreme Court’s view that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought" (*Williamson v. Lee Optical* 348 U.S. 483, 488 (1955) and “the Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs...” (*Duquesne Light Company v. Barasch*, 488 U.S. 299, 317 (1989)), the present study concludes that the implementation of a prohibitive, or partially restrictive, price control in abortion markets would create a potential legal conundrum for the Court. The price of abortion best meeting a state’s needs may restrict the incidence of legal abortion in a manner similar to a direct banning or limitation of abortion markets. Given the mobility of medical resources, human and capital, and a state’s option to refrain from producing abortion services, it is further unclear that such price controls would constitute a confiscation of private property.

The present analysis is politically relevant. Price controls and non-price rationing for medical procedures were an essential feature of the Clinton healthcare proposals and are likely to be a part of plans for Universal Healthcare as a political means to combat skyrocketing healthcare prices. There is an abundance of research on United States abortion policy. Conway and Butler (1992) note that our present abortion policy is by no means constitutionally entrenched. They then estimate each state’s private and public demand for abortion as a means of predicting the legislative
landscape should the aforementioned Supreme Court decisions be overturned. Conway and Butler find that state abortion policies would vary greatly if allowed to do so. Haas-Wilson (1996) estimates that state parental consent laws and Medicaid funding restrictions substantially limit the quantity of abortion services to minors. Kahane (2000) shows the activity level of anti-abortion groups to decrease the incidence of abortion in a state, whereas Medoff (2002) finds that advocacy groups affect a state's abortion policy. Though a lofty issue, these authors show that consumers (and producers) treat abortion as a standard, albeit externally influential, economic service that is therefore subject to the laws of market supply and demand. The purpose of the present paper is not to choose sides in one of the most heated debates in United States political history. It is rather to point out the duality of abortion as a moral issue and a market service and the resulting legislative and judicial complexity that this duality presents.

II. UNITED STATES ABORTION POLICY

In the case of *Roe v Wade*, the United States Supreme Court ruled as unconstitutional any law placing a direct ban on first or second trimester abortion. This decision was based upon the Court’s view of an early term fetus as a potential life and therefore void of constitutional rights. Potential mothers, on the other hand, possess a constitutional right to personal privacy according to the Court, as implied by the Ninth and Fourteenth Amendments. In the case of *Doe v Bolton*, decided on the same day as *Roe v Wade*, the Court ruled any law unconditionally banning abortion to be unconstitutional, regardless of trimester of pregnancy. Subsequent Court decisions on the subject of abortion have not deviated in spirit from these landmark decisions. *Planned Parenthood v Casey* acted to reaffirm *Roe v Wade*. *Casey* also introduced the “undue burden” standard by which abortion markets could not be restricted as long as such restrictions imposed a “substantial obstacle” on the potential mother intending to obtain an abortion.

In light of such policy, what would be the legal consequence if a state government, for example, decided to control the price of abortion in a manner that prohibited or significantly restricted market activity? That is to say, what would be the consequence if a state implemented a binding price control upon abortion
such that the incidence of the service declined or perished? Given the Court’s allowance of abortion as a marketable service allocated by a (restrictive) price mechanism (i.e., subject to a restrictive market equilibrium price), it is ambiguous and confounding whether a state-controlled abortion price would be viewed as constituting a “substantial obstacle” to a woman’s abortion rights. As will be shown in Section III, the Court has consistently recognized state power in the control of prices, especially in cases where consumer interests are at stake. The Court does not view price controls as unconstitutional on the grounds that they violate consumer rights to privacy, consistently leaving such matters as consumer interest to legislators. Given the Court’s historical stance upon price controls and abortion, there are at least two major legal issues regarding the constitutionality of abortion price controls: 1) Do they violate a potential mother’s right to privacy? (i.e., present a “substantial obstacle” to the abortion-seeking woman) and 2) Are they confiscatory? In this section, we will address the first issue through graphical analysis of the abortion market. In Section III, we will discuss the issue of confiscation as it relates to the Court’s price control precedent.

The set of figures below shows the potential effects of price controls on the incidence of legal abortion. Figure 1a displays the effect of a price ceiling implemented not only below the state’s equilibrium price for abortion services but also below the supply choke price. In Figure 1b, the price ceiling fails to choke off all supply but rather limits the amount that would be supplied in the market. Figure 1c shows the effect of a restrictive price ceiling that cuts along a supply curve that allows for some pro bono production.

(Figure 1a-1c here)

Figure 2a shows the effect of a price floor implemented above a market’s maximum demand price, while Figure 2b displays the effect of a price floor that fails to choke off all demand but rather limits the amount that would be supplied in the market.

(Figures 2a – 2b here)

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2 It should be noted that a monopoly, which does not face a supply curve, increases production in response to a binding price ceiling. This paper makes the generally valid assumption that abortion services are supplied in a competitive manner. See, e.g., Landsburg (2002) for a comparison of price control under perfect competition and monopoly.
Figure 3 shows the market for abortion under three distinct scenarios: a) without any form of government intervention, b) in the presence of a production subsidy as the sole form of intervention, and c) in the presence of a binding price control.

(Figure 3 here)

In Figure 3, which market scenario presents a “substantial obstacle” to abortion? The Court does not view a market’s unconstrained equilibrium price as an absolute benchmark of justice (*Nebbia v New York* and subsequent avoidance of such a standard). Therefore, none of the three market scenarios features a sacred precedent. The free market case is less restrictive than the case of a restrictive price control but more restrictive than the case in which the government subsidizes abortion ($Q_{\text{supplied, ceiling}} < Q^* < Q^*_{\text{subsidy}}$). Interpreting a mother’s right to privacy in terms of accessibility to abortion, it is not clear that a free market for abortion is constitutional. In other words, if a binding abortion price control were to be labeled as unconstitutional on the grounds that it restricts access to abortion (as compared to the free market case), a free market for abortion featuring a restrictive price mechanism could be labeled in the same manner when compared with a production-subsidized abortion market. To rule that an abortion price control presents a “substantial obstacle” to the potential mother seeking abortion would be to ride a slippery slope that calls into question the constitutionality of a free market for abortion.

**III. THE CONSTITUTIONALITY OF PRICE CONTROLS**

In *Munn v Illinois*, 94 U.S. 113 (1877), a case that considered the constitutionality of price ceilings on grain storage in Chicago and other parts of Illinois, the Court established the government’s right to enact price controls on goods that serve a public interest. In its ruling, the Court cited seventeenth century Lord Chief Justice Matthew Hale, who concluded that so-called private property ceases to be strictly private when it is used to serve a public interest. In its
decision, the Court recognized the potential for such state power to be abused but did not view the policing of potential abuses to be a matter for the courts:

To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts.

The Court did impose some limitation on the state’s ability to enact price controls in *Stone v. Farmers’ Loan and Trust Company* 116 U.S. 307 (1886). In *Stone*, the Court stated that a government’s “power to regulate is not a power to destroy. The Court held that the State cannot “do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.”

During the Great Depression, the state of New York implemented a price floor on milk in an effort to help dairy farmers. A grocer, Leo Nebbia, decided that he held ownership over his store’s milk inventories and therefore should not be told what price to charge. Nebbia deliberately violated the state-imposed price floor.\(^3\) In *Nebbia v New York*, the Court ceased to judge the constitutionality of price controls according to the nature of the targeted industry and began to focus upon the nature of the controls themselves. This change of course did not, however, lead to a loss of state power to control prices in years directly following the new precedent. In explanation of *Nebbia v New York*, the United States Constitution (amend. XIV, sect. 1, annotations p.4) states,

…Nor was the Court disturbed by the fact that a ‘scientific validity’ had been claimed for the theories of Adam Smith relating to the ‘price that will clear the market.’ However much the minority might stress the unreasonableness of any artificial state regulation interfering with the determination of prices by ‘natural forces,’ the majority was content to note that the ‘due process clause makes no mention of prices’ and that ‘the courts are both incompetent and unauthorized to deal

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\(^3\) It is curious to note that many of Nebbia’s (unprosecuted) clients also violated the price control law. Lott and Roberts (1989) show that one-sided enforcement of price control legislation sharply reduces incentives to make illegal transactions.
with the wisdom of the policy adopted or the practicability of the law enacted to forward it.

In explaining the significance of Nebbia and the precedent that it overturned, the Court concluded, “To the State was transferred (prior to Nebbia v. New York) the task of demonstrating that a statute interfering with the natural right of liberty or property was in fact “authorized” by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same. In 1934 the Court in Nebbia v. New York discarded this approach to economic legislation and has not since returned to it” (The CRS Annotated Constitution amendment XIV, sect. 1, p. 1577).

In Olsen v. Nebraska, 313 U.S. 236, 246(1941), the Court found that “differences of opinion” as to the “wisdom, need, or appropriateness of [such] legislation” show that these choices should be left to the States. States have subsequently retained a large degree of discretion in the control of prices. An important decision on business regulation came in 1955 (Williamson v. Lee Optical), in which Lee Optical, Inc. challenged the Oklahoma state attorney’s right to implement artificial barriers to entry in the optometry and ophthalmology industry. The Court’s decision, which upholds the precedent set in Nebbia v New York reads, “[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.” In the case of Duquesne Light Company v. Barasch 1989, the Court further concluded that, “[t]he Constitution within broad limits leaves the States free to decide what rate-setting methodology best meets their needs….”

In the previous section, it was shown to be ambiguous whether abortion price controls would constitute an infringement of a potential mother’s liberty by presenting a “substantial obstacle” to her abortion rights. This result rests upon the Court’s allowance of a market for abortion, as well as its historical view of the equilibrium price in a market as a judicially arbitrary value. Given Court precedent on price controls, it is also not evident that an abortion price control could be charged as
unconstitutional on the grounds that it constitutes a confiscation of private property. To confiscate is to seize for the public treasury. The productive resources, human and capital, utilized by an abortion clinic are largely general to those of any medical clinic and certainly to those used in an obstetrician-gynecologist clinic. In the sense that many of an abortion clinic’s resources could be put to another private use, a restrictive abortion price control would not necessarily lead to state seizure of private property at severely discounted rates. Further, if a state government were not affiliated with the production of abortion services and did not purchase equipment from abortion clinics after the binding price control took effect, the Court should have little apparent grounds to find the motive or practice of confiscation.

IV. CONCLUSIONS

Building upon previous works, this paper considers the (private) demand and supply of abortion services. Price controls and non-price rationing for medical procedures were essential features of the Clinton healthcare proposals and are likely to be a part of plans for Universal Healthcare as a political means to combat skyrocketing healthcare prices. We show that abortion price controls can be used to achieve the same outcome as a direct banning or limitation of abortion markets. This finding leads us to question whether Supreme Court rulings on price controls and abortion are mutually consistent in effect. An analysis of Court precedent finds that abortion price controls would not necessarily be considered as unconstitutional on the traditional grounds of either confiscation or a mother’s right to privacy (i.e., her right to obtain abortion without a “substantial obstacle”). The purpose of the paper is not to choose sides in one of the most heated debates in United States political history. It is rather to point out the duality of abortion as a moral issue and an economic service and the resulting legislative and judicial complexity that this duality presents.

V. REFERENCES


United States Constitution. amendment XIV, section 1.

United States Constitution. amendment XIV, section 1, annotations.

Figure 1a. Prohibitive Price Ceiling

Figure 1b. Restrictive Price Ceiling
Figure 1c. Abortion Market with Price Ceiling and *Pro Bono* Supply

![Diagram of Abortion Market with Price Ceiling and Pro Bono Supply](image)

Figure 2a. Prohibitive Price Floor

![Diagram of Prohibitive Price Floor](image)
Figure 2b: Restrictive Price Floor

Figure 3: Subsidy and Price Ceiling