

Howard Husock
What Happens Next – 05.29.2022

Howard Husock:

I am not a constitutional scholar. I'm not somebody who has expressed public opinions about the issue of abortion. I am very interested in the American federalist system and localism in America, the decentralization of our governmental structures that has tended to work out compromises on some of our hottest, most divisive issues. And I'm hoping that the leaked Justice Alito decision might end the abortion wars that we've had for the last 50 years. And let me explain how that might happen by using a very obscure example.

100 years ago, the most divisive issue in America was whether to allow the sale of alcohol. It was such a strong issue that Al Smith, the Democratic nominee for president in 1928 lost probably because he was a Catholic and from a wet state, New York. This is beautifully detailed in a wonderful book that I recommend called Last Call by the popular historian, Dan Okrent, about the rise and fall of Prohibition. Okrent points out that the strongest interest group was the Anti-Saloon League.

In 1915, 50% of the overall population lived in a dry state. But the Anti-Saloon League was not content. It did not want to rest until it passed a constitutional amendment to ban the sale of liquor. As hard it is to pass a constitutional amendment, they succeeded. This should've been their great victory but ultimately, it was the beginning of the end. And you'll see my parallel with Roe v. Wade.

The whole country was in a frenzy during Prohibition. The rise of organized crime. Al Capone. What happened? Franklin Roosevelt, the next governor from New York to run for president, was elected and quickly moved to repeal the 18th Amendment with the 21st Amendment. That was the end of Prohibition, but it was not the end. This is my key point here. It was not the end of dry states. Seven states remained completely dry and a significant part of the country adopted so-called local option where counties or municipalities had the right to remain dry.

So, after the repeal of Prohibition, compromise became the order of the day, and wet versus dry rapidly faded from our discourse that it seems like a bizarre footnote to our history. What's the parallel with Roe v. Wade? Well, before Roe we, Roe v. Wade, 20 states had adopted liberal abortion laws, including California, a law signed by Ronald Reagan in 1967. The trend was very clearly going in the direction of pro-choice, but then Roe v. Wade stopped the political process in its tracks. The possibility of compromise was eliminated and instead we've had 50 years of the most divisive debate in our politics.

So, what might happen post Roe v. Wade? Something not that dissimilar to post-Prohibition. Even the Mississippi law which came before the courts does not outlaw abortion. It legalizes it up to 15 weeks. First trimester. Some of these more draconian laws that we're seeing in Oklahoma and Texas, let's see if they withstand the will of the electorate. Right now up to this point we've had politicians who could take what I would call a free kick. They could oppose Roe

v. Wade without facing the voters. Well, if they continue to oppose abortion, they'll have to face the voters. A lot could change. The American tradition of localism and federalism could once again bring us to a happier place. It won't happen right away, but over time.

Larry Bernstein:

Thanks Howard, let's get right into it. I want to understand why prohibition is a good comparison with the abortion issue. Was prohibition based on a moral crusade to stop excessive drinking because of the attendant concerns that men will beat their wives and be unable to work in the morning?

Howard Husock:

This was a moral crusade led by Midwestern Protestants and the Anti-Saloon League that started in Oberlin, Ohio. They were progressives that wanted to uplift the masses who were pursuing an immoral way of life motivated small-town Protestants, who founded the WCTU, Women's Christian Temperance Union and the Anti-Saloon League. They were aided by state legislatures all over the country, in which counties were the unit which elected state legislators. So rural areas had disproportionate representation. Those rural areas tended to be church-going small-town Protestants. Second of all, they did not look very favorably on these new immigrants who were dominating the big cities, who were Catholics, Jews, other people who drank alcohol. And it was caught up with the immigration debates as well as a true belief that excessive drinking was immoral.

Larry Bernstein:

Given the difficulty of passing a constitutional amendment, how did the temperance movement succeed in getting the 18th amendment passed, and how did its opponents rescind it with the 21st amendment after just 15 years?

Howard Husock:

Well, reality bites, and there was a widespread recognition that drinking was driven underground, that respectable people wanted to drink. Remember, Roosevelt's elected during the depression.

And the idea "We're broke and hungry and we can't even have a drink?"

Larry Bernstein:

(laughs)

Howard Husock:

Roosevelt had a strong motivation to quickly move against prohibition. The only way to undo it was to pass another constitutional amendment. And we're hearing this with Roe v. Wade. It would be quite unfortunate, in my opinion, but both proponents of choice and proponents of life are talking about federal legislation or a constitutional amendment, and so we would bring back this national policy, which has proved so divisive, just as prohibition was extraordinarily divisive.

Larry Bernstein:

Do you expect that pro-choice advocates will push for Federal legislation to make abortions legal?

Howard Husock:

Before Roe v Wade, 20 states had already legalized abortion. Chances are very good that most states will not prohibit abortion, so it would be a tremendous overreach on the part of pro-choice advocates to push for federal legislation, and federal laws can be changed, and so there would be nothing permanent about it.

Larry Bernstein:

Prohibition is your example for how anger around an issue can be diffused over time. Evanston Illinois where my son attends Northwestern University used to be at the center of the temperance movement and Evanston was a dry city for a long-time, and a neighboring town of Highwood Illinois which was next to the army base of Fort Sheridan has always been wet. How should we think about differences of towns next door to each other making different choices, and then those citizens from both towns traveling to the wet town to drink?

Howard Husock:

10% of the population of the United States today lives in a dry jurisdiction.

Larry Bernstein:

That is incredible. I suspect that there are easy workarounds for those looking to buy liquor.

Howard Husock:

It must vary tremendously. You might be able to buy a six-pack in a gas station but not be able to buy liquor in a restaurant, and you might have to bring your own bottle. There are all sorts of variations. In inner city communities, a proliferation of liquor licenses can be deleterious to the social fabric, lead to rowdiness and undermine civility.

Localism acts as a safety valve in the United States, and that's what we've suppressed with the Roe v. Wade decision.

Larry Bernstein:

How would you compare prohibition with the legalization of marijuana?

Howard Husock:

The legalization of marijuana parallels the prohibition story. I happen to be quite concerned about the legalization of marijuana, and the use of drugs in our population, but it is interesting as a political matter, and localism matters, since that's what we're talking about here, that legalization in California and New York, to ban it or not, more than half the localities in New York State, for instance, have said, "Not here. You can't sell it, you can't use it in a bar, equivalent for marijuana here." And localism is once again providing a safety valve.

Larry Bernstein:

Is abortion fundamentally different than prohibition. The pro-life advocates compare abortion to murder. Alcohol does not seem comparable.

Howard Husock:

Let's be plainspoken here. This is a human rights issue. This is more like slavery for these groups.

The abolitionists wanted to say, "slavery can't be a local option any more than public accommodations can be a local option in Southern States." The pro-life side sees this as a moral issue, and so the idea of compromise is especially difficult here, because the core constituencies for both sides see it as a human right issue, as opposed to alcohol, maybe not quite as absolutist. New York will allow abortion up to the point of birth, and Mississippi will say, "Not past 15 weeks," that's a compromise. For those two core constituencies, that may never be acceptable. At the same time, as a political matter, returning it to the states may mute the divisiveness.

Larry Bernstein:

Corporations have been adopting progressive positions for the past year in the public press. Delta opposed Georgia's voting right acts, Disney condemned Florida's bill that limited sex education to toddlers, and McDonald's abandoned Russia after Ukraine was attacked. Do you expect corporations to discontinue doing business in states that limit the rights to abortion?

Howard Husock:

Well, corporations ultimately are going to be responsive to their bottom lines. They can virtue signal for a period of time. I think Delta and Coca-Cola, in terms of the election laws in Georgia, they felt that it was in their interest to signal this way, or they wouldn't have done it, perhaps because of their employees' view, and consumer views outside of Georgia. We should presume that people in the C-suites in these companies are not recklessly expressing these views, even if we happen to disagree with them.

Larry Bernstein:

I am confused by the religious nature of the pro-life movement. I would have expected that the states that would be pro-life would have a substantial Catholic population. Oklahoma and Mississippi have few Catholics and many evangelical Christians.

Howard Husock:

There was a terrific book written by Kristin Luker. She was early to point out that the division over abortion for the Catholics it was about life begins at conception, but for cultural conservatives and evangelicals, it was libertine women who were going to undermine the traditional family and gender roles and that idea took hold amongst evangelicals.

Larry Bernstein:

What do you think was Senator McConnell's calculus when he announced that he would not support federal legislation on the abortion question, but would instead encourage that this matter be handled by local communities and the states?

Howard Husock:

Well, I can't speak for Senator McConnell-

Larry Bernstein:

Sure you can.

Howard Husock:

I think what he's thinking about every day when he gets up is, "How can I flip the Senate and the House?" And, "What will be most advantageous to my party?" And I think he feels it's most advantageous to his party not to inflame the issue, and that that's the best way that he can satisfy his right and moderate flanks without inflaming the issue. He's an expert tactician.

Larry Bernstein:

In what kind of elections will the abortion issue be pivotal?

Howard Husock:

It's much more likely to have a big impact on gubernatorial races. Will governors support or veto abortion legislation? It will inevitably begin to play itself out in state legislative races, and the grandstanders will be the candidates for federal office, because they're not likely to have much say on this, since McConnell is ruling this out, Democrats decide they do wanna pass national legislation and candidates for congress campaign on the idea that they will endorse national legislation making abortion legal across the country.

Larry Bernstein:

For the Democrats to pass Federal Legislation legalizing abortion nationwide would require 60 votes to pass the filibuster. But the Democrats lack the votes in the current senate with only 49 Democrats who support expanding abortion rights. Two Democrats, Manchin and Sinema support the filibuster. If there is an upset in the 2022 midterms and the Democrats hold the House and pick up 2 senate seats, do you expect that the Democrats would blow up the filibuster to pass a national pro-choice abortion law?

Howard Husock:

Well, you can't rule that out, can you, because this is a core issue for the Democratic left.

Larry Bernstein:

What kind of abortion laws will pass in the various states?

Howard Husock:

Well, the beauty of decentralized government is that it is unpredictable, and there are a lot of Catholic voters in New York state. That could become a voting issue in the state senate. You can't rule that kind of thing out. There are a lot of northerners moving to Austin, Texas. They may say, "Wait a minute, we don't want to live under a regime like this," and so we could see changes.

The whole politics is likely to change and that the restrictionists and the "up until the point of birth" may face the wrath of moderate voters. I wouldn't want to hazard a guess. That's the beauty of our federalist system that it evokes unpredictable compromise.

Larry Bernstein:

In your opening remarks, you said it was bizarre that people could have fought over getting a drink at a saloon.

Howard Husock:

Yeah (laughs).

Larry Bernstein:

How long will it take for us to think it's bizarre that we would be so upset about whether or not someone will get an abortion in Mississippi?

Howard Husock:

Eight years.

Larry Bernstein:

How'd you come up with that?

Howard Husock:

Two election cycles. It'll work itself out in the body of politic.

Larry Bernstein:

What will the equilibrium look like?

Howard Husock:

I would say if there were 20 states that had liberation abortion laws in 1970, I think you're getting close to 40 states.

Larry Bernstein:

Do you think any states will ban abortion altogether?

Howard Husock:

Oklahoma just has pretty close, but again, that governor's going to have to face the people. Seven states remained dry after prohibition, so let's use that as our benchmark. Seven states will continue to be restrictionists.

Larry Bernstein:

I end each episode on a note of optimism. How are you optimistic about as it relates to the abortion issue?

Howard Husock:

I'm very optimistic about this court decision because it's going to pop the cork on all this pressure that has built up around the abortion issue for so long, and it's dominated our political discourse to the detriment of our addressing a range of important issues, especially as it regards the Supreme Court.

The idea that we could move on and reach a compromise in a country that has become so famously polarized is a really attractive prospect. My truly optimistic Pollyanna-ish note would be that the liberals on the Supreme Court would say, "You know what? We're personally pro-abortion, but we agree that the case of Roe v. Wade was decided on faulty constitutional grounds, so this is going to be a nine-zero decision."