



I Am Roe, Hear Me Roar

FEATURED SERIES

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I am Roe, Hear Me Roar

EPISODE 3: THE CHASE THAT CHANGED ROE:

Planned Parenthood v. Casey (1992) - Part 1

This is episode 3 of I am Roe, Hear Me Roar.

The Roe v. Wade decision, which was handed down in January 1973, drew clear battle lines between the anti-abortion and pro-abortion camps.

Although Justice Harry Blackmun, the author of Roe v. Wade, believed that the decision would settle the abortion debate once and for all, we know from looking back almost 50 years later, that not only did Roe not settle the debate, it took it to an entirely new level.

In fact, the first two decades after Roe were fraught with high stakes litigation, sophisticated legal maneuvering, and political jockeying, on both sides. Cases were flying up and down the courts in what seemed like a nonstop merry go round. All the while, frustrations were mounting and the political environment was becoming increasingly toxic.

In 1992, then Supreme Court Justice Byron White had this to say:

“Roe fanned into life an issue that has informed our national politics in general, and has obscured with its smoke the selection of Justices to this Court ... ever since. [W]e should get out of [the abortion umpiring business] where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”

[INTRO]

In the 1970s and 80s, advances in medical technology increased the chances of a fetus surviving outside the womb earlier and earlier in the pregnancy, which meant that the state's ability to regulate abortion

earlier and earlier in the pregnancy technically become easier as well. This confluence of events created all kinds of political and cultural conflict as you can imagine. .

In Roe's trimester framework, abortions could only be prohibited in the third trimester since that's when the fetus would be viable outside the womb. In 1973, fetal viability was generally understood to be around 28 weeks, but that was no longer the case in the late 1980s. Since Roe ultimately tied state regulation to viability, as opposed to a particular week of gestation, things started to get messy.

You may recall from the last episode that the decision in Roe effectively overturned 46 state laws either regulating or prohibiting abortion, overnight. It was also the first time abortion was elevated to the national level where, according to one of the dissenting opinions in Casey, it is infinitely more difficult to resolve.

Among the 46 states where laws were overturned, 13 had already begun to liberalize their regulations through the democratic process - that is at the ballot box - and the demand for change was catching momentum throughout the country. But, Roe stopped that progress in its tracks by moving the debate to the courts, instead of state legislatures where laws are actually made. Suffice it to say, the blowback was fierce and fast.

Across the country, there were numerous efforts to pass what appeared to be permissible health and safety regulations regarding first and second trimester abortions, or pre-viability abortions, given the holding in Roe.

Abortion clinics and providers challenged most of these regulatory efforts and many of the cases made their way to the U.S. Supreme Court. Incidentally, nearly all of the regulations were struck down because they simply could not survive the strict scrutiny standard of review.

Let's break this down.

What exactly is a standard of review?

A standard of review is the criteria a court will use to determine whether a particular law is constitutional or unconstitutional. Think of it as the baseline, or threshold, for whether a law is enforceable or unenforceable.

In cases involving Constitutional questions, there are three standards or review:

- Strict scrutiny
- Medium scrutiny, and
- Rational basis

Strict scrutiny is, of course, the highest and most stringent form of judicial review.

Under strict scrutiny, a law or policy will be deemed constitutionally valid only if it does three things:

1 - it serves a compelling state (or governmental) interest or purpose

2 - it is narrowly tailored to achieving that purpose, and

3 - it uses the least restrictive means possible to achieve it.

This means that the law has to be written so precisely that it is not overbroad in the type of conduct it prohibits. Additionally, there cannot be any other way to achieve this compelling interest or purpose without infringing upon or otherwise affecting one's fundamental rights.

In simple terms, think of it like this - the shortest distance between 2 points is a straight line, right? So, the law has to follow a straight line, or whatever is the closest to it, to achieve its objective. If you've ever taken a road trip, you know that following a straight line to anywhere is a very TALL order.

Another complicating factor is that there is no bright line (or clear delineation) for when an interest is "compelling" or if it's just important. We know that "compelling" generally means that the interest is absolutely necessary and is not just a matter of choice or preference. Protecting fundamental rights is certainly a compelling state interest, as is a state's interest in protecting public health and safety. This, naturally, would include, for example, regulating violent crime. Compelling interests also include things like passing laws to meet the requirements of national security and military necessity.

Let's look at a non-abortion example of strict scrutiny in action:

State A passes a law banning individuals from burning the state's flag.

Flag burning has been deemed a form of protected speech under the First Amendment. As such, the new law will only be constitutional if it can pass strict scrutiny review, meaning it serves a compelling state interest (in this case, a state's police power, which includes the power to govern for public health and safety), be narrowly tailored to achieve that interest, and be the least restrictive means of achieving that purpose.

In this situation, there is likely no compelling purpose related to the state's police power that justifies limiting an individual's fundamental 1st Amendment rights. As such, the state statute would likely be held unconstitutional.

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Here's another example from recent history.

A state passes a law or implements a policy prohibiting people from leaving their homes during a pandemic. Stopping the spread of a virus is indeed a compelling state interest.

The question then is whether imposing travel restrictions is acceptable or overbroad in the behavior it prohibits. In this instance, so long as people can leave their homes for basic necessities - food, medical help, work if they're considered essential employees - and visit other private facilities, like friends at home, the policy is probably okay b/c it was narrowly tailored to achieving the states' interests and used the least restrictive means possible.

Absent a pandemic, this type of restriction would die quickly at the hand of strict scrutiny.

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Strict scrutiny is always the judicial standard of review used for determining whether laws burdening or abridging a fundamental Constitutional right are enforceable. In plain English, this means that any law that curtails one's ability to exercise their fundamental rights must be 100% absolutely necessary. The strict scrutiny standard is actually so rigorous that many in legal circles have actually called it "strict in theory, fatal in fact." See Gerald Gunter 86 Harv. L. Rev. 1, 8 (1972). Current Justice David Souter has said that strict scrutiny rarely has any survivors. Our flag example above certainly illustrates this point.

So, how do we know if a law burdens a fundamental right?

Fundamental rights are those that the U.S. Supreme Court has stated have a high degree of protection from government encroachment. Fundamental rights include those enumerated in the Constitution (primarily in the Bill of Rights), those retained by the people under the 9th Amendment (these are often codified in state or federal laws), and some unenumerated rights, or those not specifically listed in the Constitution, but still recognized by the U.S. Supreme Court as being fundamental under the liberty component of the Due Process Clause of the 14th Amendment. These unenumerated rights include matters of personal privacy, marriage, contraception, child rearing, interstate travel, and voting, among others. Note that in cases where the Supreme Court recognizes an unenumerated fundamental right, the court may later revoke its fundamental status. This is all part of a legal doctrine called substantive due process, which we will tackle in a future episode.

Here's why all of this matters.

Roe expanded the right of personal privacy to include a woman's right to choose to terminate her pregnancy, pre-viability. This meant that the choice was deemed a fundamental right. As such, any laws restricting her ability to access that right must pass the strict scrutiny test. As noted above, most of these laws did not survive strict scrutiny review,

save those that created some restrictions for minors, public funding for abortion, and some forms of parental notification and consent.

In fact, the test is so rigorous that by the late 1980s, SCOTUS had struck down more than 20 health and safety regulations, many of which enjoy broad support from a lot of Americans today, regardless of one's point of view.

A representative sample of some of the regulations that made it to the chopping block follow:

Regulations ...

- requiring a woman to provide informed consent at least 24-hours before having an abortion;
- requiring doctors themselves to provide women with information about the abortion procedure as well as available alternatives such as receiving certain types of medical assistance and adoption;
- requiring parental consent without judicial bypass - judicial bypass provides minors with a way to literally “bypass” their parents and get consent instead from a judge;
- requiring abortion doctors to have admitting privileges at a nearby hospital, or at least have an agreement with a physician who does; and
- requiring the humane disposal of fetal remains.

This “strike down streak” was long and intense, but by the end of the 1980s, it was about to end.

Indeed, the era of strict scrutiny came to a screeching halt with the Court's dramatic and controversial decision in *Planned Parenthood v. Casey*, which was decided in 1992.

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To understand *Casey*, one must recognize the perspective Justice Sandra Day O'Connor brought to the court regarding abortion regulation after her appointment in the fall of 1981.

Here's some background.

Justice O'Connor questioned the court's reliance on the strict scrutiny standard of review for abortion cases because, in practice, she believed it ignored a key element of *Roe's* holding, namely that states could regulate abortion care.

You see, Justice O'Connor always focused on all three parts of the *Roe* holding, not just the first one, which tends to get most of the attention:

Here are the three parts of the Roe Holding:

Part 1

Roe recognized a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State. The State's interests before viability are not strong enough to support prohibiting abortion imposing substantial obstacles to the woman's effective right to elect to have an abortion. This right, albeit limited, was deemed fundamental by the Roe court.

Part 2

Roe also confirmed the State's power to restrict, or even prohibit, abortions after viability, so long as the restrictions contain exceptions for pregnancies endangering a woman's life or health; and

Part 3

Roe confirmed that the State has legitimate interests in protecting the health of the woman, and the life of the fetus that may become a child, from the outset of the pregnancy and throughout its duration.

Given the nature and number of post-Roe SCOTUS decisions that had struck down virtually all pre-viability state regulations, Justice O'Connor observed that they had cast doubt on the meaning and reach of Roe's holding, particularly regarding a state's ability to further its interest in protecting maternal health. In fact, some scholars called this post-Roe period a "public health vacuum endangering the lives and health of women." (Forsythe & Kehr, 57 Vill. L. Rev. at 65.)

A clear imbalance had emerged.

To "course correct," so to speak, Justice O'Connor suggested the court employ a different standard of review for use in abortion cases.

Enter the now famous - or infamous, depending on who you talk to - undue burden standard.

The undue burden standard was viewed as a sort of middle ground that recognized not just a woman's fundamental right to choose to terminate a pre-viability abortion, but it also recognized Roe's limitations on that right. This effectively changed the privacy right at issue from a fundamental right to a "protected liberty interest." More on that later.

While this new standard still subjected legislation that unduly burdens a woman's fundamental right to choose a pre-viability abortion to strict scrutiny review, it also said that legislation that does NOT unduly burden a woman's fundamental right to choose a pre-viability abortion will be permissible so long as it rationally relates to a legitimate state interest. Rational basis is the lowest form of judicial scrutiny in constitutional cases. So, the undue burden was a bit of a hybrid standard - until then a judicial outlier.

This also begs the question - what is an undue burden?

Justice O'Connor first articulated the undue burden standard in her dissent in a 1983 case called *Akron v. Akron* (later abbreviated to *Akron 1*), but applied it affirmatively in the majority opinion, which she authored, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Applying her then version of the undue burden standard, rather than strict scrutiny, the Court upheld a Missouri law that prohibited the use of state funds or facilities for abortions.

After *Webster*, *Roe* was still technically the law of the land, but its reach had been checked.

Interestingly, it has been observed that if *Webster* checked the reach of *Roe*'s power, *Planned Parenthood v. Casey* diminished its potency.

Let's take a look.

Planned Parenthood v. Casey signaled the climax of nearly 20 years of exhausting and very high stakes litigation over Pennsylvania's abortion control laws. Interestingly, *Casey* wasn't the first, but the third Pennsylvania abortion case to make it to the high court in the post-*Roe* years.

But unlike the first two cases, *Casey* was different. This time, Justice O'Connor was in charge.

Calautti v. Franklin (1979) and *Thornburgh v. American College of Obstetricians* (1986) were the first two Pennsylvania cases to make it to the high court. Both challenged various versions of Pennsylvania's Abortion Control Act (the 1974 and 1982 versions) on the grounds there were unconstitutional.

Here's a quick rundown of the key regulations that were implicated.

- a mandatory 24-hour waiting period for all women seeking to have an abortion;
- a parental informed consent/judicial by-pass procedure for minor women seeking to terminate their pregnancy;
- spousal notification provisions;
- physician-only disclosure requirements
- and various reporting and disclosure requirements.performance of abortions.
- the Act also disregarded the court's definition of medical emergency

When subjected to strict scrutiny review, none passed the test.

Undeterred, Pennsylvania's General Assembly (that's the state legislature) went back to the drawing board and in 1988 and 1989 passed amendments to what remained of the Abortion Control Act. The amended Act included restrictions very similar to those identified above. We'll discuss the reasoning for this in the next episode.

Although these regulations had already been reviewed by the Supreme Court, with a new standard of review gaining traction, Pennsylvania bet on the outcome being different. They lost at the trial court in 1990, but their luck took a turn in the appeals court in 1991. And, by the time Casey made its way to the Supreme Court in 1992, Justice O'Connor's undue burden standard had become the law of the land. Given this massive legal shift, Pennsylvania and much of the American public were prepared for Casey to be the case that overturned Roe.

But it wasn't.

While Casey affirmed Roe generally it was (and remains) an extremely controversial decision, as much for its reasoning as its outcome.

Like Roe before it, it too purported to be the case that FINALLY settled the abortion debate once and for all. Well, monkey see, monkey do.

Not only did it not "solve" what we now understand to be an "unsolvable" issue, it complicated it even more. Some of the unwelcome results were an uptick in social discontent, increased confusion in the lower courts, and highly politicized Supreme Court confirmation hearings.

We'll dissect all the gory details of Casey in the next episode, but we can't wrap before talking about how Casey ends.

The Planned Parenthood v. Casey opinion was issued in mid 1992. Note that Casey was a plurality opinion, as opposed to a majority opinion, which meant that while a majority of the justices did agree on the ultimate judgment of the court - that is the bottom line of the case so to speak - they did NOT agree on how to get to that judgment - or what we call the reasoning of the case.

Now, plurality opinions do not hold any less precedential weight than majority opinions, but, because in American law, the reasoning of a case is as important as the actual decision, plurality opinions tend to provide less guidance to lower courts on how to decide future cases. This "double duty" makes precedential analysis, or what we call stare decisis, far more complex than most believe it to be.

While Casey's judgment upheld nearly all of Pennsylvania's Abortion Control Act, except for the spousal notification requirement (more on that in the next episode), it's holding is the star of the show.

First, Casey reaffirmed the core holding of Roe - all 3 parts;

Second, it ditched Roe's strict scrutiny standard in favor of the undue burden test which effectively shifted the abortion right from a fundamental one to a protected liberty interest; and

Third, it threw out Roe's trimester framework and replaced it with a viability test.

This means that pre-viability abortions can be regulated to protect maternal health and fetal life, but they cannot be prohibited.

Whereas post-viability abortions can be regulated and prohibited.

When a fetus is deemed viable is an entirely different question, whose answer depends on myriad medical, economic, social, and behavioral factors. Suffice it to say, there is NO clear answer.

In view of the above, one can surmise that Casey effectively invalidated, or basically gutted, many of the court's decisions over the previous 20 years that struck down scores of regulatory measures because they failed to pass strict scrutiny.

So, no Casey did not settle anything, but it reset everything.

I know this is a lot, so here's the TL;DR:

Roe v. Wade and Planned Parenthood v. Casey are the twin pillars of abortion law in the United States.

In 1973, Roe said the right to have an abortion before the fetus was viable outside the womb was protected as a fundamental privacy right under the 14th Amendment. It also said that the state has an interest in protecting maternal health and fetal life, so it could regulate abortion in certain instances. To balance these competing interests, the Roe Court established a trimester framework for addressing when and how a state can regulate abortion.

Here's the framework:

First trimester:

A woman's privacy right was superior to the state's interests.

Second trimester:

A state's interests began to emerge as the woman's privacy interest began to decline

Third trimester:

A woman's privacy right was fully subordinate to the state's interests.

Because Roe established choice, limited as it was, as a fundamental right, any laws burdening that right in any way - so basically any regulations passed by state legislatures or Congress - must be

subjected to the heightened judicial standard of strict scrutiny review.

19 years later, in 1992, the court revisited the holding of Roe in Planned Parenthood v. Casey.

While the court upheld the core holding of Roe, it ditched the trimester framework in favor of a viability test, and replaced strict scrutiny with a new undue burden standard. With these changes, Casey overturned many of SCOTUS's abortion decisions from the previous two decades and paved the way for more robust regulatory authority regarding abortion.

It goes without saying that abortion proponents disfavored Casey, while abortion opponents saw it as a step in the right direction.

Thirty years later, things are still a gigantic mess.

But I'm going to try to keep explaining them so they seem, well, a little bit less of a mess.

We're just getting started on this issue, so don't move an inch - we'll be right back with a deeper dive into Casey and how its reasoning, in particular, has changed abortion jurisprudence, or abortion law, ever since.

As an aside ...

As of the date of this recording - June 22, 2022 - Casey and Roe are still governing law. We're waiting on the court to issue its opinion in Dobbs v. Jackson, which may, of course, change the entire game and grant Justice White's wish for the court to get out of the abortion umpiring business exactly 20 years after he died.

For now, that's a wrap. But don't go anywhere ...

I'll see you soon in Episode 4 of I am Roe, Hear Me Roar.