I am Roe, Hear Me Roar

EPISODE 4: THE DAY THAT ROE DIED

This is Episode 4 of I am Roe, Hear Me Roar

If Roe v. Wade is the most famous abortion decision in the United States, then Planned Parenthood v. Casey is the second. Until June 24, 2022, they stood as the twin pillars of abortion jurisprudence in American law. They were, as they say, the law of the land.

49 years after Roe, and 30 years after Casey, the United States Supreme Court overturned both cases in a stunning decision called Dobbs v. Jackson Women's Health. While Roe may no longer roar, she certainly casts a very long shadow.

[INTRO]

Dobbs did it.

Dobbs overturned two of the most controversial cases in American law. Abortion has been returned to the states, where it will be regulated by the people via the democratic process, at least for now.

As an aside, it's interesting to note that with Dobbs, the late Justice Byron White finally got his wish - for the court to get out of umpiring the abortion debate. He had to wait 30 years, but alas, the court is indeed out of the abortion umpiring business, which Justice White said does neither the court nor the country any good. On that, he was not wrong.

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Americans were stunned on Friday, June 24, 2022, when the United States Supreme Court issued its opinion in Dobbs v Jackson which overruled Roe v. Wade and Planned Parenthood v. Casey, and a slew

of other cases relying on them. Emotions have been running high and people have been in full-on freakout mode. While I understand that reaction, for those of us nutty enough to eat, drink, and sleep the development of abortion law, it wasn't unexpected. In many ways, it signaled the end of a long, ugly, sordid legal story that would never have a happy ending, no matter how you sliced it. At the end of the day, you can put lipstick on a pig, but … it's still a pig.

My initial plan for this episode was to dive into Planned Parenthood v. Casey and work through how states regulate abortion using that case as a backdrop. But given the breaking news (this is being recording on June 30, 2022), I'm going to push that off for a future episode and focus instead on the heartbeat of this issue - the constitutional right to have an abortion. How that right was initially recognized and how it was changed over the course of 50 years, is the single most important and single most misunderstood part of this entire process.

The Dobbs ruling, while expected given the leak from the court in May, has been accused of taking away 50 years of rights. That's kinda true, but there's a lot more to the story.

You see, there's a presumption that American women have had a positive fundamental right to an abortion for 50 years. That's simply not the case.

This fundamental "right" was acknowledged and justified in Roe v Wade in 1973 but was downgraded to a non-fundamental right in Planned Parenthood v. Casey in 1992. As a legal matter, this distinction is a very big deal and had an enormous practical effect.

Let's unpack:

Fundamental rights are in a special class under the U.S. Constitution.

They are "found" in four places:

1 - they're enumerated in first 8 Amendments to the Constitution, which, along with the 9th and 10th Amendments, create the Bill of Rights

2 - they're retained by the people under the 9th Amendment

3 - they're recognized as unenumerated rights under the privileges and immunities clause in Article 2 of the Constitution and the 14th Amendment

4 - they're recognized as unenumerated rights under the Due Process Clause of the 14th Amendment.

We'll look at each in turn.

1 -

The first 8 amendments identify various fundamental rights that cannot be infringed by the federal government absent a compelling purpose. These rights are enumerated. While the nature and scope of proper governmental intrusion into these rights is hotly contested, their existence as constitutionally protected rights is not. Of course, these federal protections were incorporated against the states via the 14th Amendment in 1868, meaning that neither the feds nor the states could infringe these rights.

2 -

The 9th Amendment says that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." These, of course, are also unenumerated. There isn't a lot of 9th Amendment jurisprudence, or case law, but it's an extremely critical one. Unenumerated rights, that haven't been classified as fundamental, simply don't enjoy the higher level of judicial scrutiny as fundamental ones do.

3 -

The privileges and immunities clauses in both Article 2 and the 14th Amendment ensure that no state can deny the privileges it provides to its citizens to those from another state. Voting and interstate travel are considered privileges and immunities of citizenship. This is why a driver's license issued in one state is valid in another.

4 -

Finally, we find fundamental rights in the due process clause of the 14th Amendment. These, too, are unenumerated rights and have only been recognized by the U.S. Supreme Court via a doctrine called "substantive due process." This doctrine was first used by the court in 1905 in a case called Lochner v. New York. It was summarily rejected in a case called West Coast Hotel in 1937.

Let's get some context on the 14th amendment and then swing back.

The 14A was passed by Congress in 1866 and ratified in 1868.

It has 5 sections: the first 4 include the actual text being added to the Constitution, and the last is the implementing clause, giving Congress the power, via legislation, to enforce the amended language.

The 14A was a big deal because, among other things, it incorporated most of the federal restrictions in the Bill of Rights to the states. The Bill of Rights says that the federal government can't infringe on the enumerated rights in the first through eighth amendments - the 14A

says state governments can't infringe on those rights either.

But, it's just Sec. 1 of 14A that's at issue in abortion law.

Here's the text:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

Nor shall any State 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 laws.

The third clause (called the due process clause) is at the center of the abortion debate, because that is the textual source for rights associated with abortion.

As used in the Constitution, the term liberty in the DPC means freedom from arbitrary and unreasonable restraint upon an individual. Initially, this term was used in its literal sense - no one can be deprived of their liberty (as in physical liberty) without due process of law. Due process means being given notice of why your liberty may be taken away, having a fair hearing, and the like. There are procedures set up so people can't arrest you and take you to the gallows without a fair trial before a jury of your peers. Bottom line - you can't be denied liberty without the government going through the "process" or "procedures" so to speak.

In the early 20th century, the U.S. Supreme Court expanded the definition of liberty in the DPC to include something broader than physical liberty. They expanded it to include various "fundamental values not traceable directly to constitutional text, history, or structure" that relate to matters of reproduction, family, sex, and death. The general reasoning is that some liberties, or values, are so important that they cannot be infringed, regardless of how much "process" is given. This line of thinking became known as "substantive due process" as opposed to "procedural due process."

While the protection of unenumerated rights isn't anything new, deciding to protect them under the due process clause was curious, given that there were other textual sources that would have been a much better fit. This, many argue, would have ensured that "such important rights" would not have been dependent on a newly expanded definition of a term that was not tied to any textual source in the Constitution nor did didn't enjoy wide support among the justices then (or now for that matter). This expanded definition of liberty formed the basis for the most controversial judicial doctrine since the 19th century.

Initially, the doctrine was used as a way to strike down economic regulations that hurt big business. It was actually created by SCOTUS in 1905 in a case called Lochner v. New York as a way to keep big business from being subject to economic regulations.

Here are the basic facts.

New York state passed a law saying bakers couldn't work more than 10 hours/day. In striking the law down, the court said that bakers had a "freedom to contract" under the liberty component of the due process clause and that the state's regulations deprived them of that right. So, basically, the court said that telling a business they have to limit their workers' hours to 10/day is a violation of the workers' rights b/c it unduly burdens workers' "fundamental freedom" to negotiate their hours. The irony here is that the legislation was intended to protect workers by saying bakeries couldn't overwork their employees. As if the workers had the ability, opr bargaining power, to exercise that right even if they wanted to?

The Lochner opinion was a textbook case of judicial activism, which essentially means that the court is writing to a predetermined conclusion and finding a reason to justify it. The decision was controversial at the time and is controversial now. While the doctrine of substantive due process gave the court a "reason" for decision making, it really did nothing more than serve the pro-business policy preferences of the justices who agreed with the Lochner decision. Lochner is in many ways so famous given Justice Harlan's scathing dissent where he said the court shouldn't get involved in striking down laws. He continues … and I paraphrase … if that's what the people want, it's my job to help them get there.

It took a while, but 32 years later, in 1937, Lochner was finally overruled & the doctrine of substantive due process was repudiated in a case called West Coast Hotel. Interestingly, West Coast Hotel upheld minimum wage laws to protect workers, which was the exact opposite of the Lochner ruling.

The era of substantive due process, or "Lochnerizing" as they called it, was over and the working class finally got some protection from big business.

But substantive due process would have a resurgence.

It was resurrected in the famous 1965 case - Griswold v. Connecticut, which held Connecticut's law outlawing contraception for married people was unconstitutional. It used the doctrine of substantive due process as the rationale for its decision, but this time the court stated they were striking down laws that regulated "noneconomic" liberties, as opposed to the economic liberties at issue in Lochner (with economic referring to one's ability to make money), such as a right to personal privacy in matters of marriage, sex, family, and death. These

noneconomic liberties were found in various parts of the Constitution.

Justice Douglas, writing for the majority in Griswold, famously said that personal privacy rights are found in the penumbras - or shadowy edges - of the Bill of Rights and 14A of the Constitution. And, those penumbral rights were violated by Connecticut's anti-contraception law. Griswold's holding (or result) has been affirmed, but its penumbral reasoning has not.

Every SDP case has generated new rights without reliance on any particular constitutional provision or agreed-upon doctrinal understanding. There is no one standard, test, baseline, or benchmark for what SDP means, and there is no consensus regarding which rights should be read into the 14A and which should not. This is the heart of the problem. Since its "second coming" so to speak, courts that have invoked substantive due process have done so inconsistently and with a mixed bag of results.

Let's dig a little deeper.

When a court anticipates making a determination that an "implied right" is so important that no amount of "process" is acceptable, they look to previous decisions, or other sources of authority, for reaching that determination. Under the doctrine of stare decisis, it is ultimately the court's prerogative to determine whether to follow precedent, or set a new precedent. The historical trend has shown that, if the established criteria doesn't support the preferred outcome, the court won't necessarily follow it and will create a new one.

A common test for determining whether a fundamental value should qualify for protection as a fundamental "noneconomic" liberty under the Due Process Clause was set forth in a case called Washington v. Glucksberg. In Glucksberg, the court held the right to assisted suicide is not among the fundamental values protected under the due process clause. The Glucksberg court looked to a 1976 case called Moore v. East Cleveland to inform its decision.

Here's how the test goes:

When analyzing the substantive guarantees of the Due Process Clause, the high court will focus on two things:

1 - Protecting those rights and liberties which are, objectively, deeply rooted in this Nation's history, traditions, and legal practices and implicit in notions of ordered liberty; and

2 - Cautiously describing what exactly constitutes the due process liberty interest. People need to be able to identify what exactly is included and what isn't.

Regarding, the first element, here's what the famous Justice Harlan said in a scathing dissent in Poe v. Ullman:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society ...

He continues ...

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed, as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

The bottom line is that determining whether a fundamental value is deemed a fundamental liberty interest under the due process clause is a balancing test between individual rights

Applying this test, the Glucksburg Court held that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause given that its practice has been, and continues to be, offensive to our national traditions and practices.

Second, the Court has required a "careful description" of the asserted fundamental liberty interest.

This inconsistency is extremely frustrating for the American people because they never know what to expect now. To be clear, at present, all personal privacy, or privacy-related rights "protected" under the American Constitution rest on the continued acceptance of the ever-changing, ever-shifting doctrine of substantive due process doctrine.

Justice Thomas' concurrence in Dobbs criticized this doctrine and said cases decided under it were clearly erroneous, not because of the outcome, but the faulty reasoning and the unpredictable nature of it. In fact, he expressed his preference to see all substantive due process cases rejected by the court and the issues returned to the states where the people can decide at the ballot box. These issues, simply put, are not for the courts, but for the very people from whom the court derives its power.

Here's an excerpt from his concurrence that explains his views on how substantive due process has informed the abortion debate.

Thomas writes, "substantive due process exalts judges at the expense of the People from whom they derive their authority." Because the Due

Process Clause "speaks only to 'process,' the Court has long struggled to define what substantive rights it protects." In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis." The Court divines new rights in line with "its own, extra constitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees.

"Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. In Roe v. Wade the Court divined a right to abortion because it "fe[lt]" that "the Fourteenth Amendment's concept of personal liberty" included a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

In Planned Parenthood v. Casey, the Court likewise identified an abortion guarantee in "the liberty protected by the Fourteenth Amendment," but, rather than a "right of privacy," it invoked an ethereal "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

As the Court's preferred manifestation of "liberty" changed, so, too, did the test used to protect it, as Roe's author, Justice Blackmun, lamented. In Casey, Justice Blackmun wrote that [t]he Roe framework is far more administrable, and far less manipulable, than the 'undue burden' standard." But, he, of course, lost the day.

Now, in this case, the nature of the purported "liberty" supporting the abortion right has shifted yet again. Respondents (that's Jackson Women's Health) and the United States (the government was on the pro-choice side) propose no fewer than three different interests that supposedly spring from the Due Process Clause.

They include "bodily integrity," "personal autonomy in matters of family, medical care, and faith … and women's equal citizenship."

That 50 years have passed since Roe and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification. Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.

Thomas concludes his opinion with these comments, which are the primary source of the virulent anger toward him:

He's saying that …. [b]ecause the Dobbs Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. This means that he agrees with the result, not the reasoning.

But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away."

Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

He goes on to list famous 20th century cases decided under SDP, but those are beyond the scope of this episode.

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Needless to say, the doctrine of substantive due process is not only controversial, but it's malleable and fluid - two things no one wants when establishing baseline standards for anything, especially what is protectable as a fundamental right under the Constitution.

So, what does this have to do with Dobbs?

In applying the Glucksberg test, the court said that the positive right to an abortion is not deeply rooted in this nation's history or traditions and therefore does not rise to the level of a fundamental right protectable under the liberty clause of the 14A. It therefore is properly regulated at the state level by the people. If the people want positive rights to abortion, they can legislate it into being.

Here's the TL;DR.

Dobbs overturned Roe, ending a 50 year battle royale between the pro-choice and pro-life movements in the U.S. Supreme Court.

In the majority opinion, Dobbs found that the right to an abortion is not included among the fundamental rights protected under the due process clause of the 14A. The judicial doctrine that recognizes rights under this clause is called substantive due process and is highly controversial.

The courts have established a 2 part test that is sometimes adhered to and sometimes not to determine when a fundamental value should be recognized as a fundamental right under the 14A. The test requires the court to look at the country's history and traditions (those we follow and those from which we broke), legal practices, and implicit in the notions of ordered liberty, and to define the right with specificity.

The right to choose to terminate an abortion pre-viability was recognized by Roe v. Wade as one that can be inferred from the 14A. In applying the Glucksberg 2 part test, Dobbs disagreed with Roe. Because the right to an abortion has never been deemed to exist anywhere else in the Constition, Dobbs overruled Roe and every case that relied on it. With that move, abortion was returned to the states for the people to decide.

And if the reactions to the decision are any indication of what's next, the people WILL decide.

Thank you for listening. This is heavy complicated stuff and I appreciate your time, interest, and attention.

Although Dobbs overturned Roe, the abortion wars are far from over. We'll keep at it in the next episode of I am Roe, Hear Me Roar.