



# **I am Roe, Hear Me Roar**

## *EPISODE 5: ABORTION LAW AND THE RISE OF REGULATION*

This is episode 5 of I Am Roe, Hear Me Roar!

As I was planning this podcast, my team and I were gearing up for an end of June/early July launch, in order to align with the Supreme Court's opinion in the "big abortion case" - Dobbs v. Jackson - pending before it. Given the magnitude of the case and its potential impact, I assumed it would be one of the last opinions issued by the court for the current term. And, that proved to be true. What I didn't expect though was for the draft opinion to be leaked in early May.

The leak is what we call a "chance event" in strategy - while we knew that abortion rights were on the chopping block, we weren't expecting the leak or the attendant controversy, anxiety, and disruption to come as early as it did. This meant that I needed to adapt on the fly and launch earlier than anticipated so we could cover just enough background for the forthcoming Dobbs decision to make sense. We skipped most of the details, so we're going to step back and catch up on the things we temporarily set aside.

Abortion law is extremely complex and, when added to the cauldron of politics, the details and nuances are often lost. But, they matter and there's a reason they say the devil is in the details. In fact, many conflicts are won or lost in those same details. So, let's devil-up and dive right back in!

[INTRO]

The sole purpose of I Am Roe, Hear Me Roar! is to isolate the legal reality of Roe from the public perception of Roe, and to analyze the history of it and its legal ascendants in appropriate context. Then, and only then, can we understand where we are and define a realistic path forward.

With that - let's figure out where we are right now.

As of June 24, 2022, abortion regulation has been returned to the States. This means that state laws prohibiting abortion before fetal viability cannot be overturned by the U.S. Supreme Court on the grounds they violate a woman's Constitutional right to choose to terminate a pre-viability pregnancy. Note - women have never had the right to terminate a post-viability pregnancy absent an intervening medical emergency.

This limited Constitutional right was first recognized in *Roe v. Wade* and redefined in *Planned Parenthood v. Casey* 19 years later. The significance of *Casey's* new definition of this "right" was an important distinction since it reclassified the right from fundamental to non-fundamental.

Under the Constitution, fundamental rights are sacrosanct and can't be abridged by the federal government, except in very narrow circumstances. Most fundamental rights are enumerated, or written, in the U.S. Constitution. But, some are not, including a group of personal privacy rights, one of which was articulated in *Roe*.

We also have a slew of rights that are important, but not fundamental. These rights are protectable, of course, but not to the extent of fundamental rights. This basically means that non-fundamental rights are not superior to, but rather equal to, competing state interests in protecting maternal health and fetal life, effectively resulting in some infringement of those rights.

Let's unpack this in the context of abortion.

If a woman has a fundamental Constitutional right to an abortion, then any laws that regulate abortion are, by their very nature, abridging this right. Now, abortion regulations are passed for the intended purpose of protecting maternal health and fetal life, so there's a fine line between what is acceptable and what's not vis-a-vis infringing a fundamental right. But what that looks like in practice varies from state to state.

Here's some background on abortion regulation.

Abortion has always been regulated in the United States, whether at common law or by statute. Common law refers to unwritten law; while statutes refer to written, or codified, laws.

By the late 1800s, abortion was illegal on the books nationwide. That means there were written laws outlawing abortion in every state. But, by the 1960s, with changing social mores, states were slowly loosening their 19th century abortion restrictions. That process was sped way up with *Roe v. Wade* in 1973, given that it created a new set of rules for when and how states can regulate abortion. Basically, *Roe* made it extremely difficult to regulate the abortion procedure beyond the most minimal requirements to ensure a safe procedure for women.

*Planned Parenthood v. Casey* in 1992 chucked *Roe's* rules and, in doing so, opened the regulatory floodgates, meaning that, so long as a regulation didn't effectively prohibit a woman from having access to an abortion, it was legally permissible. As such, regulations burdening abortion rights have been on the rise for 30 years.

That begs the question, what exactly is an abortion regulation and what does it mean?

An abortion regulation is a law that does one or more of the following things:

- (1) causes a delay before the abortion is performed;
- (2) raises the cost of an abortion;
- (3) reduces the availability of abortion by directly or indirectly causing the number of legal abortion providers to decrease;
- (4) requires the pregnant woman to receive information about the procedure she has not requested and to provide informed consent;
- (5) causes the woman to find the person/s whom the state has required that she notify or obtain consent from;
- (6) causes the woman to endure any negative or hostile response from a person whom the state has required the woman to notify or obtain consent from; and/or
- (7) takes away the power to decide whether to have an abortion by giving another person, usually a parent or spouse, a veto power on the abortion decision.

Most regulations implicate the first three of these - delay, cost, and availability.

Regulations requiring some form of notice or consent implicate the others.

As suggested above, before *Casey*, it was pretty tough for abortion regulations such as these to hold up for pre-viability abortions. That's because they infringed on a Constitutionally protected right.

But, after Casey reclassified this right as non-fundamental, it was open season and the lion's share of regulations previously struck down were now held enforceable, during all 9 months of pregnancy. Roe practically prohibited any regulation during the first trimester so this was a huge shift.

Now, to be clear, many of these regulations made sense because they were directly related to ensuring the health and safety of the pregnant woman; but many others were put in place as a way to restrict access and, as a result, reduce the number of abortions.

Mind you, all of this legal jockeying has been in progress for the last 50 years. In fact, once the pro-life movement shifted its focus from passing a Constitutional amendment regarding fetal personhood, they adopted an aggressive strategy to reduce access through aggressive regulation. And, they've had a much better success record than their pro-choice counterpart.

Legal strategy and execution matter - A LOT. And, make no mistake, abortion rights have been in a perpetual state of erosion since 1992.

In our next episode, I'll illustrate exactly how this regulatory shift happened by looking at the evolution of Pennsylvania's Abortion Control Act, first passed in 1974, which has been the subject of not one, but three U.S. Supreme Court cases, including *Planned Parenthood of Southeastern Pennsylvania v. Robert Casey* (then governor of Pennsylvania).

If you ever doubted the role of the law and legal strategy in abortion access, you won't after listening to this!

Here's the TL;DR

Abortion was returned to the states with the *Dobbs v. Jackson* decision on June 24, 2022. This meant that state laws banning abortion could no longer be overturned on the grounds they violate a woman's Constitutional right of privacy. Whether laws that restrict abortion are acceptable is to be addressed democratically by the people.

When it comes to abortion regulation, there are seven types of restrictions states can enact, related to costs, delays, availability, and consent. So, even though one has a "right" to something, it's another thing to be able to exercise that "right." While women theoretically have had a right to choose to terminate a pre-viability pregnancy, regulations, including public funding bans, have certainly burdened access to that right.

We'll illustrate regulation in action on the next episode when we dissect Pennsylvania's Abortion Control Act, which has been the subject of not just one, but three Supreme Court decisions, including the famous 1992 decision - *Planned Parenthood v. Casey*.

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Alright my friends, that'll do it for Episode 5. Come back next time for the dirty details of the long and sordid path of Pennsylvania's Abortion Control Act and how it struck a massive blow to the rights articulated in Roe.

As always, I appreciate you, your time, and your feedback ... and I'll see you on the next episode of I Am Roe, Hear Me Roar!