

No. 2023-303

In The

Supreme Court of the United

States

SARAH JANE ROE

Petitioner

v.

NEW ZELDA

Respondent

On Appeal from the Supreme Court of the State of New Zelda

Brief For

RESPONDENT: New Zelda

Callum Holley

Counsel for New Zelda

4/17/2023

Facts of The Case

The recently initiated state of New Zelda passed a statute called the Sanctity of Marriage Act, which claims that marriage is a "unique relationship between a man and a woman. (New Zelda, 2023-0409). The act explains that the state has a special interest in "encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children." (New Zelda, 2023-0409) Under the new statute, same-sex marriages are held impermissible in the state of New Zelda, and any previous unions are revoked in accordance with the law.

Janet Doe is a 29-year-old female whose marriage to her 31-year-old wife, Sarah Roe, was recently revoked. The couple had attempted to become pregnant, and after many different tries, Janet became pregnant with triplets. At 16 weeks, two of the triplets were no longer viable, and the couple crossed state lines into Bedford Sands to perform an abortion. This act directly violated New Zelda's 2023-0408 statute, which prohibits aiding or abetting a pregnant woman in abortion trafficking. As such, proper procedure was executed, and Sarah Roe was placed under arrest for abortion trafficking outside of state lines.

Due to the couple's marriage being invalid, Sarah was compelled by law to force Janet to testify; the invalid marriage does not confer spousal privilege against self-incrimination. This was so, and Sarah was found guilty of the charges and sentenced to six years in prison with a \$50,000 fine. Sarah appealed from the state court through New Zelda's Supreme Court, all of which upheld the statute and reinforced the respondent. The case now offers itself to The United States Supreme Court through a granted cert as appealed by the petitioner. The court now answers the following question.

Question Presented

Whether spousal privilege from testifying at a criminal trial should be extended to a spouse in a state where a state law defining marriage as between only one man and one woman has been enacted after the marriage was legally recognized.

Substantive Due Process is a False Doctrine.

The crux of this case and legal backing for the petitioner rests upon the question of substantive due process, which is defined as "... the principle that the Fifth and Fourteenth Amendments protect fundamental rights from government interference." (Cornell, 1)

As explained by Justice Thomas in his concurrence in the *Dobs* Decision, Due Process is a mechanism of fairness that the government applies when forced to deprive individuals of their constitutionally provided freedoms. (*Dobs*, 2022) As he describes, "Due Process Clause at most guarantees process. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided." (*Dobs*, 2022)

In this way, the petitioner misunderstands Due Process. As Justice Thomas would describe, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." (*Dobs*, 2022), and indeed, it is an overbroad and intangible basis of law that lacks the strong foundation necessary for the protection of civil liberties. "Insinuated" rights strewn together from the Third, Fourth, Fifth, Ninth, and Fourteenth Amendments (*Griswold*, 1965) are fictitious and cannot provide the protections necessary for the people.

Indeed, Substantive Due Process's most significant downfall is its need for grounding in the Constitution. At a minimum, it is too weak to fortify the petitioner's claim for Roe, but Substantive Due Process can have much more significant and sinister consequences for our sense of justice.

Using this standard of reasoning allows one to bring protection to things not explicitly in the Constitution. The petitioner would likely argue that it is effective; surely the framers could not have foreseen the coming days, and Substantive Due Process is a way to broaden the law with the changing times effectively. The petitioner would be correct in saying this is very progressive and, at the surface level, makes logical sense. The error in this logic though comes from its very basis; it allows one to override the Constitution.

Although it is almost certain the petitioner has moral reasons for challenging the New Zelda law, Chief Justice Roberts, in the *Obergefell* decision, brings to light how Substantive Due Process was used for evil in the past. He states that "The Court first applied substantive due process to strike down a statute in *Dred Scott. V. Sanford (1857)*. There the court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders" (*Obergefell, 2015*)

Indeed, in a nation that purports that "All men are created equal" (Declaration of Independence, 1776), Substantive Due Process allows one to bypass state laws and the Constitution to enforce one's own sense of justice and agenda. Today, this is same-sex marriage, but tomorrow, could it be something our petitioner, or society at large, sees as entirely less virtuous? One could not know, but regardless, it would be pointless to blame the Constitution. As Chief Justice Roberts famously said in his *Obergefell* dissent, "It had nothing to do with it." (*Obergefell, 2015*)

Whether Same-Sex Couples Are Entitled to a Legitimate Marriage Is a Right Entrusted to the People

Without Substantive Due Process, petitioner Roe has little legal backing to reinforce her position. In the *Lawrence* decision, though, sodomy was argued as a fundamental right that triumphed over state statutes that considered that conduct illegal. (*Lawrence*, 2015) In this case, the logic that a right can triumph over a state statute forbidding it is relevant.

In *Lawrence*, the respondent argued that prohibitions against sodomy have long been established. However, the court pointed out that such prohibitions are more contemporary than the respondents claimed and that more recent cases have overturned laws against homosexuals and homosexual behavior. Because of these developments, the court held that the right for homosexuals to engage in sodomy could triumph over state statutes because that liberty has expanded and gained importance over time. (*Lawrence*, 2003) In effect, the court ruled that it can make anything a right at the current moment because it believes it is liberty.

Applied to this case, same-sex marriage has not historically been normal or accepted, as discussed by Chief Justice Roberts in his dissent in *Obergefell*. New Zealand's Sanctity of Marriage Act would not be unusual to the longstanding Judeo-Christian institution the founders both belonged to and would have been perfectly aware of. Indeed, the framers view obviously did not see marriage as a constitutional right afforded to government intervention. However, according to Justice Thomas, "Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in-making vows, raising children, and otherwise enjoying the society of one's spouse-without governmental interference. (*Obergefell*, 2015)

The petitioner would be correct in saying that in recent years, same-sex marriage has gained importance, with the country changing its general stance on the issue. Indeed, without Substantive Due Process, they would question how one can codify protections like same-sex marriage not explicitly listed in the Constitution into law. Moreover, how can one justify a right to privacy, abortion, or solve any other issue past May 25h, 1787? There is consistently used rhetoric that the founders did not have infinite foresight, and while this is true, it is convenient that they created a way to deal with these questions.

Indeed, the framers were aware of their potential shortcomings and left all "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." (10th Amendment)

It is because of the recent historical development of same-sex marriage, that the people are entitled to change their laws through their elected officials. As Chief Justice Roberts stated in the *Obergefell* decision though, "The fundamental right to marry does not include a right to make a state change its definition of marriage." (*Obergefell*, 2015), but "... Our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples or to retain the historic definition."

Stated for this case, the court cannot force New Zelda to discard its statute without concrete constitutional backing (which is not present with Substantive Due Process) like it did in *Lawrence*. The *Dobs* decision has already started the decommissioning of Substantive Due Process cases. However, rightly so, the people can use the democratic process to create a new definition or set of laws regarding same-sex marriage.

If this is not far enough, the right to same-sex marriage can be solidified by adding it as an amendment to the Constitution. Just as slavery was abolished through the 13th Amendment,

the people can right injustice through its appropriate constitutional means. Indeed, a constitutional amendment solidifying same-sex marriage would be the concrete Constitution rule of law needed to overturn the New Zelda statute.

If this court decides to side with the petitioner, though, it disrespects the democratic process. Unlike the legislature, the court is not a policy-making body. As Justice Kavanaugh stated in his *Dobs* concurrence, "The issue to the court is not the morality of abortion, but rather what the constitution says about it." (*Dobs*, 2022) In this case, the court must ensure it considers precisely what the Constitution affords towards same-sex marriage instead of its own sense of morality. Anything other than this turns the court into a partial policy-making body, which Chief Justice Roberts aptly warns of in the following. "It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law." (*Obergefell*, 2015)

The evidence presented shows that Substantive Due Process is an outdated and dangerous tool the court should discard at once. Therefore, the respondent urges the court to encourage the petitioner to use her civic means to bring awareness to the New Zelda statute if she so desires. For the logistics of this case, though, the respondent asks the court to affirm the decision of the New Zelda Supreme Court.

Respectfully submitted,

-Callum Holley

Additional Works Cited

Legal Information Institute. (n.d.). *Substantive due process*. Legal Information Institute.
Retrieved April 22, 2023, from https://www.law.cornell.edu/wex/substantive_due_process