



Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to, We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. The Supreme Court recently agreed to hear a challenge to a Mississippi law, banning abortion at 15 weeks. The case could call into question the future of Roe v. Wade. On today's We The People, we break down the constitutional arguments for and against Roe so that you, We The People listeners can make up your own minds. And, to do that, we're privileged to be joined by two of America's leading scholars of the constitution. Leah Litman is Assistant Professor of Law at Michigan Law. She's also one of the co-hosts and creators of Strict Scrutiny, a podcast about the US Supreme Court. Leah, it is wonderful to have you back on the show.

Leah Litman: [00:01:03] It's great to be back. Thanks for having me.

Jeffrey Rosen: [00:01:05] And Teresa Stanton Collett is Professor at the University of St. Thomas School of Law, where she serves as director of the school's ProLife Center. Teresa, it is wonderful to welcome you to We the People.

Teresa Stanton Collett: [00:01:17] Delighted to be included. Thank you.

Jeffrey Rosen: [00:01:20] we have a series of constitutional arguments to break down, including arguments about liberty, equality, natural law and precedent. So let's take each of those in turn. In Roe v. Wade, Justice Blackmun rooted a right to privacy in the 14th Amendment's conception of personal liberty and restrictions on state action. Leah, tell us how Justice Blackmun rooted a right to choose abortion in the liberty clause of the 14th Amendment and whether you find his arguments persuasive.

Leah Litman: [00:01:57] So I think to answer that question, it's helpful to have a sense about what substantive due process is, because that's really the area of law that justice Blackmun was relying on. Some listeners might be familiar with the concept of procedural due process. The idea that the state can't deprive you of life, liberty, or property, unless it uses the very best procedures. Let's think of a criminal trial, notice, hearing, counsel, you know, full-blown procedures. Substantive due process is a little bit different. In that context, the question is whether the state can prohibit certain activity at all, that is even if the state uses the best procedures or processes trials, there are still some things that the state just can't regulate or prohibit. And it's that area of law that Justice Blackmun was relying on in Roe vs. Wade. Saying that the decision to carry a pregnancy to term is a protected liberty under the due process clause, such that a state can't prohibit or require you to carry a pregnancy to term.

So in that context, Justice Blackmun relied on an area of law and a doctrine substantive due process that by that point had become fairly well settled. That is by the time the court decided Roe vs. Wade, the court had already held that the state can't prohibit married couples or unmarried individuals from purchasing or using contraception. So the ability to bear or beget a child and control your reproductive health is already a protected liberty under the due process clause by the time of Roe vs Wade. And even before those decisions, the court had held that certain family matters like the decision of how to, raise your children

or educate them was also a protected liberty under the due process clause in decisions like Meyer and Pierce.

I think in light of those decisions, as well as a few others, and the only other one that I would Roe out is Rochin versus California, a super important due process clause case in which the court said it offended the principles of liberty protected in the due process clause for the state to forcibly extract the contents of someone's stomach in order to collect evidence. And I think that principle of bodily autonomy together with the idea that whether to bear, beget a child and family care, all of that is a protective liberty under the due process clause, is part of what supports Roe vs. Wade.

Jeffrey Rosen: [00:04:18] Thanks so much for that. Teresa, Leah has set out the doctrine of substantive due process and said that decisions in the 20th century, protecting rights of marital privacy and educational autonomy, provide a foundation for the right Justice Blackmun identified in Roe. You've argued that neither of the text of the constitution nor its amendments explicitly address the question of abortion and that America and early English law consistently treated abortion with strong disfavor. Tell us whether or not you find Justice Blackmun's derivation of a right to choose abortion in the substantive, component of the due process clause persuasive.

Teresa Stanton Collett: [00:04:54] Well, Leah of course, tried to characterize this as just the natural outcome of a long progression of cases. And that simply is not an accurate historical depiction. When we talk about Griswold versus Connecticut, which was the case in which the Supreme court reversed its prior position and said that states could not regulate the use of contraception between married couples, that was only in 1965. Remember that Roe vs. Wade was in 1973. So to call that a historic precedent in terms of long, long in effect is simply not correct. And it was in 1972 when the court rendered the Eisenstadt Opinion, which is where the court extended this right to use contraception to unmarried individuals using a completely different rationale. So there was not a long history, in fact, and there's, when you read about the court's, consideration of this question, the fact that they reheard oral arguments twice in the case that the justices changed in their composition and in their opinions regarding the case as various justices, withdrew or resigned, it's simply not that this is a natural progression of the law.

In fact, it was a significant break in the law. The court tries to justify it in part by a very bowdlerized, if you will, his-history of abortion that frankly, the courts never relied on since. They used a single article written by an abortion advocate to say that the only reason that abortion was illegal in the common law and throughout the United states at the time was because the, the legislatures were trying to protect women. And that in fact, in the early common law, it wasn't even illegal until after quickening. But when you actually go back and look at the early English cases, and you look at the, the legal history of abortion, what you find are references to the unborn child. And it is true that in the early common law, a woman had to be quick with child before criminal proceedings could be initiated that's because from an evidentiary point, how do you even prove the woman's pregnant without ultrasound with some of the medical advances we've made since the early common law?

And so if it's a capital crime, you want to make sure that in fact the crime occurred. So we now have a much better comprehensive understanding of the history of abortion. Again, the court has not relied on that historical analysis since *Roe* and in *Planned Parenthood versus Casey*, they significantly move their position as to its justification, they changed the rationale. So I simply think *Roe* was wrong at the start and the 50 years or almost 50 years, intervening hasn't improved the analysis.

Jeffrey Rosen: [00:07:49] Thanks so much for that. Leah, Teresa says that in fact, the basis of the liberty right in *Roe* did not have long roots and suggests that in the *Casey* decision in 1992, the court changed its rationale, to emphasize more women's equality than personal privacy and drawing on arguments made by, Justice Ruth Bader Ginsburg and others. The court said that restrictions on abortion impose limits on women's ability to choose their destinies that are not imposed on men. Tell us, what you think of the criticisms of the liberty argument, and also whether you believe the equality argument is more persuasive.

Leah Litman: [00:08:29] So I just think that the criticisms of the liberty argument in *Roe* are over-broad or necessarily depend on a conclusion about when life begins. So on the over-broadness of the criticism, you know, you can make the same argument about the text and history of the constitution, not supporting a particular right, not only about *Roe*, but also about the decisions that Teresa alluded to, *Griswold* and *Connecticut*, you know, 1960s, 1970s era decisions. And so if you agree that, you know, the constitution can't prohibit states from doing anything that isn't explicitly mentioned in the constitution, then that's not really unique to *Roe*. That's going to call into question this entire body of law that predates *Griswold* and *Eisenstadt*, but also includes them. And it also includes, you know, more modern cases like *Lawrence versus Texas* or *Obergefell versus Hodges*, the decision saying states can't criminalize same-sex sexual relationships, and can't deny marriage licenses to same-sex couples. All of those decisions if we're requiring some from historical evidence that a right has necessarily been protected for all time are going to get called into question.

and, you know, as to whether the re-arguments or the changes in the court's personnel cast doubt on the decision, you know, there, I would just say that, of course, you know, *Brown v. Board of Education*, the decision that was, holding segregation in public education and unconstitutional was also famously re-argued and went through, you know, multiple rounds. And so I don't know that, that's a particularly uncommon feature of Supreme Court decision making, at least during that era. The equality argument for abortion rights was as you noted famously advanced by Justice Ruth Bader Ginsburg, in part to respond to the perceived shortcomings of the liberty argument.

The equality argument rests on the idea that in order to participate equally in government, society, the economy, and to realize, you know, their full potential women need to have the ability to determine when and whether they will carry a pregnancy to term. You know, it is just the case that the sad reality in the United States is that maternity leave and maternity care is not particularly great. In part for that reason, you know, women who are deciding whether or not to carry a pregnancy to term are not just making a decision about whether to have a child, but are making a decision about how they will care for the child for perpetuity. And also whether to assume the social roles that, you know, we as a society have assigned

to, primarily women and mothers, and it's in part to give women control over their own personal autonomy, wellbeing, medical care, economic livelihood that Justice Ruth Bader Ginsburg said in order for them to participate in society, they needed to have the ability to control whether and when they become, pregnant.

And, you know, one statistic that people often note in this particular debate is that the majority of women who have abortions are themselves mothers. So it's not like these are women who don't value, you know, children, the sanctity of life. It's just whatever their circumstances are, they do not find themselves able to have another child and bring them into the world.

Jeffrey Rosen: [00:11:54] Thank you so much for that. Teresa, Leah has well articulated the equality argument advanced by Justice Ruth Bader Ginsburg, and, noted in the court's *Casey* versus *Planned Parenthood* decision. In a piece for a book called *What Roe v. Wade Should Have Said*, you argued the equality argument cuts the other way. You quote Elizabeth Cady Stanton, writing that, "When we consider women are treated as property, it's degrading to women. We should treat our children as property to be disposed of as we see fit." And you say, "By the rejection of abortion, these women, suffrage advocates demanded something more meaningful and more radical. Equality is full woman, not as chemically altered surrogates of men." Tell us more about why you think the equality argument cuts in the opposite direction.

Teresa Stanton Collett: [00:12:37] So the language of the plurality, which did not include, Justice Ginsburg, she had a separate opinion. But on this issue generally in her scholarship, before she came to the court was very clearly grounded in that way. But the language of, the plurality opinion that is the controlling opinion in *Casey* says for two decades of economic and social developments, people have organized their intimate relationships and made choices that define their views of themselves and their place in society. And reliance on the availability of abortion in the event that contraception should fail, the ability of women to participate fully to the economic and social life of the nation has been facilitated by their ability to control their reproductive lives. But the simple fact is that they provided no empirical evidence to make that true. And when we go back and we look at the actual historical evidence and, and the evidence that has been developed since, *Roe v. Wade* and *Planned Parenthood* versus *Casey*, there is not even a strong correlation between women's advancement and educational opportunities and professional opportunities, and what we would say, the culture generally and abortion.

At the very time that abortion is decreasing, women are participating more and more in higher education. Now it's more likely that a woman's going to be a college graduate than a man. And yet we've seen that happen during the decline of abortion. So the Supreme Court made this empirical statement with, with no evidence and certainly with none provided or cited to in the opinion itself. And when you go back and you really look at the history, it, there is a, there is not a correspondence more or less causation. The other problem is that what we have done is we have accepted, I would even say a stunted male reproductive model for our economic lives. People are supposed to be constant workers. And you hear this from men and women. That, that time, when biologically say from age 18 to 30, when

more most likely to conceive easily and bear child, is that time when you're supposed to be establishing yourself. It's, you are supposed to be beginning your jobs and your careers and your work life and your economic life.

And there's no room for bearing children. How often do you hear women say, "I would love to have a child, but I've got to get established. I need a big partner at the firm, or I need to get through med school, or I need to, I need to be a frontline supervisor." And so what we see is that this false correlation that they ground the abortion right in has actually retarded the ability of women to say, as Leah said, "No, I am a full person and workplace you need to accommodate that reality." We do need the opportunity to bear children, to nurture them. And that's been lost by this idea that we should have a sterile worker force that doesn't have to be concerned. And we've certainly seen that with the pandemic that when family responsibilities interfere, there are a lot of employers that refuse to adapt.

And part of it is because of what they said in Planned Parenthood versus Casey. Pregnancy is considered voluntary elective. And, and certainly it is voluntary or should be. But having said that it is an important part of our community and the future of our community, and we need to value it and we need to accommodate it. We have a Pregnancy Discrimination Act, and just two years ago, the New York Times did a huge expose on how major law firms and major corporations are discriminating against women when they're pregnant. Women are being denied promotions, are being denied the opportunity to pursue their career while they pursue creation of their family. This hasn't helped women, it's retarded our progress. It's let us get at best a quarter of a loaf when we're entitled as talented, gifted human beings to participate fully. And that means to have a life beyond work.

Jeffrey Rosen: [00:16:53] Thank you so much for that. We've talked about liberty and equality, let us now turn to natural law. In Planned Parenthood v. Casey, Justice Anthony Kennedy said that at the heart of liberty is the right to determine one's own conception of meaning of the universe and the mystery of human life. Some have called that an argument derived from natural law, underlying principles of moral philosophy, rather than the text and history of the constitution. And indeed the Kansas Supreme Court in 2019 explicitly invoked natural law to declare abortion, to be among Kansan's fundamental rights and invoke John Locke's declaration that every man has a property in his own person, as a pre, political, natural right, as a basis for right to choose abortion. Leah, tell us what natural law reasoning is and why some have identified the argument in Casey about autonomy as a natural law and natural rights based argument.

Leah Litman: [00:17:52] So natural law is the idea that you can come up with some principles that should govern kind of society and individual's relationship to the government based on something intrinsic to human nature. That is just based on who people are, how they operate, you know, you can kind of deduce some principles, you know, under which government society, should be organized. and so some of the language in Casey that you were alluding to seem to call to some people's minds, you know, the idea that Justice Kennedy or, and, or the controlling plurality, believed that there are certain principles intrinsic to human nature that we just can't depart from.

You know, the idea that there is a destiny of an individual, or that it falls to each individual to define for themselves, or determine for themselves the mystery of human life. So the idea that there is just this core of human autonomy, that is just how people organize their lives seem to be an alternative conception about what the protective liberty of the due process clause was that the Planned Parenthood versus Casey plurality, protected. I did want to say one thing about the pandemic in particular, which is, you know, to my mind, the pandemic has revealed that even when we all collectively find ourselves [laughs] in extremely difficult circumstances, you know, working from home, maybe having to do childcare and school care on top of that, still employers haven't really found a way to make it work for women, men, or anyone else.

You know, what we have seen is just a massive exodus and almost extinction event for women in the workplace. So the idea that if we are all collectively banded together and no longer in a situation where we can control our reproductive lives, that employers will somehow accommodate this and allow for, you know, women to carry pregnancies to term if and when they would like, and that there would be an adequate, you know, economic safety net, healthcare safety net for, families is I think a little bit less plausible than thinking that women's ability to control their reproductive lives is, important for their ability to participate equally in all facets of society.

Jeffrey Rosen: [00:20:08] Teresa, you have argued the natural law arguments might protect the rights of the unborn and that unborn children may have constitutional rights that derive from God or nature rather than the constitution, explicitly. And this argument, as you noted, if accepted would put the constitutionality of laws that legalize abortion into question. Tell us about why you believe that natural law may, favor the rights of the fetus rather than the rights of women.

Teresa Stanton Collett: [00:20:38] Well, in part, because the Mill's and principle of liberty that you mentioned, the Kansas Supreme Court in part on this idea that, the most fundamental freedom is to control my own body is limited even by John Stuart Mill's Harm Principle, that, and the saying is that, "Your right to swing your fist ends where my nose begins." And so in this, unlike the li... The equality argument, where the unborn is a part of that argument, but my focus really is on women being accepted as whole women with a natural reproductive life into the culture and into the public square and into the, the economic, the marketplace. In this instance, what we're talking about is that there is a second being that is involved. It's no longer even arguable whether or not that which is within the woman once a pregnancy begins is a human being.

We have the en banc opinion in *Rounds versus Planned Parenthood* out of the eighth circuit that specifically said that Planned Parenthood provided no evidence to the contrary. Every abortion ends the life of a separate, unique human being as the state law that was at issue in that case requires to be told to a woman. So then the question is, does a woman's liberty to be free of the pregnancy, which is what the court has always called. It, it's the right to terminate the pregnancy, it's not a right to kill. It's a right to be free of an unwanted pregnancy. Does that trump the right of the child who in the vast majority of cases, she has voluntarily participated in the activity that created that child does. That right get trumped by

the woman's interest in terminating the pregnancy? And, and I think that we would not accept that argument in any other context.

We don't allow people to take the lives of others when we need their organs. We don't allow... We don't even require a parent to compel, their child today to donate their organs for a sibling, et cetera. And so this idea that because the woman, again, in the vast majority of cases, even at the time of Roe versus Wade had voluntarily participated in the activity that brought that child into being because she no longer wants to be pregnant, that she can terminate the life of that child and not allow it to continue to develop is deeply problematic. And that's why for so many of us, the opinion is fundamentally unjust. It is something that the only other context where we require another human being to give up their life is in the military context. And even there, we have an all volunteer army now.

And so the idea that the woman has to have this control, we've talked about liberty, I don't think it's meaningful there. We've talked about, but in this instance, if we look in States like New York and Virginia, where it's post viability, at that point the woman could have labor induced prematurely. The child could be born and there's in every State in the union, there is a safe haven law, a law that says you can leave the baby at the hospital with no legal repercussions. And so this right to kill that the right to abortion is, has, has been, and is becoming clearer and clear that that's what the right is exists is, is not something that you can build an ordered liberty on.

Jeffrey Rosen: [00:24:22] Leah, Roe and Casey held that there's a fundamental right to abortion rooted in the due process clause. That restrictions on abortion before fetal viability, which takes place around 24 weeks are presumptively unconstitutional. And the Casey decision said that any of those restrictions have to be evaluated according to the so-called undue burden test. Now that the court's about to reconsider all that. Tell us what a court that felt that precedent had some weight and didn't want to overturn Roe explicitly might do with that undue burden test. Could it, apply it in ways that allowed for pre-viability abortions, which is the central question in this case, and would there be any limits on the kind of pre-viability abortions that a court that maintain the undue burden test might, might, sustain?

Leah Litman: [00:25:18] So the doctrine of stare decisis, the idea that courts should respect prior decisions even when they think they are incorrectly decided is of course, deeply associated and interconnected with the abortion right. In Planned Parenthood versus Casey, the 1992 decision we've been talking about the court declined it, an invitation to overrule Roe versus Wade invoking the doctrine of stare decisis. Just last term in June Medical Services versus Russo, once again, the justice whose vote was pivotal to the outcome, Chief Justice Roberts invoked the doctrine of stare decisis to decline to overrule the court's previous decision in Whole Woman's Health versus Hellerstedt which had invalidated the admitting privileges requirement, that was also an issue in June Medical.

So there is a tradition of courts invoking respect for precedent and stare decisis in abortion cases as grounds not to revisit prior rulings. Traditionally stare decisis has turned on a few factors, whether subsequent legal developments have called the opinion into question, whether the case is an aberration or, you know, kind of a sore thumb sticking out in the

court's jurisprudence, whether subsequent facts have called the decision into question, whether there are reliance interests on the decision. and you know, those are, have been some of the key factors. More recently, some justices have focused on other factors or at least reframed them such as whether the decision is egregiously wrong or demonstrably erroneous. That is how wrong a decision is affects whether to overrule it. they've also focused on the quality of reasoning and the decision, and basically asking, "You know, how good or how bad or very bad, you know, the reasoning in that prior case was."

you know, it's my view that respect for precedent would require adhering to the Casey standard. The idea that before viability, states can't ban abortion, and that restrictions that fall short of an outright ban should be subject to the undue burden test. as we've been talking about, you know, the doctrine of substantive due process is not unique to Roe or Casey, it is in fact present in many of the court's more recent decisions, as well as decisions, predating Roe. also no subsequent facts have eroded the idea, that, you know, the decision whether to bear to get a child is a protective liberty or an important component in controlling, you know, one's own life. And Mississippi, isn't arguing that the ban on pregnancy or... Sorry. That the ban on abortions after 15 weeks of pregnancy does prohibit, abortions before viability.

So there's no argument that subsequent facts have somehow moved the period of viability earlier to a point where Mississippi's ban doesn't run afoul of that. So, you know, to my mind, all of the kind of traditional stare decisis factors would counsel in favor of upholding, Casey and Roe. that doesn't mean that I think that's what the court is going to do. but I do think that, you know, a traditional or healthy regard for precedent would lead to that result.

Jeffrey Rosen: [00:28:38] Teresa help us understand what the court might do if the justices decide not to overturn Roe entirely, to say there is some, weight to precedent, but that under an undue burden like standard, the interests of the fetus should be balanced against those of the woman. would that, lead to the upholding of a ban on abortion at 15 weeks and, and, help us understand the constitutional arguments that the court might apply, under this approach.

Teresa Stanton Collett: [00:29:10] Well, factually in the United States, the vast majority of abortions are completed prior to 12 weeks. And certainly prior to 15 weeks, so numerically, we're talking about a small number of abortions. And so the impact at one level, if the court simply upholds the Mississippi ban and in some way supports it, perhaps with the fetal pain argument that Mississippi has presented, at the appellate level that we anticipate they'll, include in their arguments to the Supreme Court, that if the court takes that position, it's actual impact given the sort of health exception that the Doe v. Bolton case requires in a post viability setting, really will have very little impact on the actual practice of abortion in this country.

the vast majority of abortion providers themselves do not do abortion, certainly after 20 weeks, they don't. And, and many of them don't do them after, 12 or 14 weeks. So as far as its actual impact on the practice, there would be very little, impact on that. And it could be argued that a woman can assume a duty in a pregnancy that she did not willingly, create or participate in the creation off by virtue of her delay. And that is at least there are those who

are making that argument that, if you have... And this is the rule in most European countries, right? That you have this protected period of time in which a woman can choose to reject a pregnancy, but that her delay for in this instance, almost four months, would indicate that she has acquiesced or consented to the continuation of the pregnancy at least till the, the child can be born alive. And then again, under the safe haven laws simply be left at the hospital if she doesn't want to undertake, the, the work of nurturing and parenting that child.

So that would be one way to do it, is simply to say, "We are so far out of step with the rest of the Western world, at least on this issue that it makes no sense." And Mississippi argues that the methods of abortion become less and less safe for women. And we hear that from the abortion industry all the time, that the longer we delay, the more dangerous the abortion, becomes. We certainly hear that in the context of rushing minors through an abortion, without their parental involvement. and so that's conceded that the abortion becomes more and more dangerous to the woman. It's also, pretty barbaric the methods after you hit a certain point. And Jeff, I would correct you on a couple of things and your description of, Casey, the court backs off the fundamental right analysis. And in fact says that the abortion is a liberty interest, which can be balanced against other interests.

And one could argue that the interest of the unborn child begins to mature in the same way that we have other cases where perhaps you don't have full constitutional personhood, think about corporations, but you have some constitutional rights in some context. And so as the child begins to mature within the womb, and it becomes to, it comes to acquire greater and greater capacities within the womb that those rights begin to accumulate, including the right to be protected against the intentional causation of its death. The other thing is, as Justice O'Connor had noted in a number of previous opinions that if you tie it to viability, the problem with that is that it's something that is decreasing and decreasing. Yes, the courts have generally said that at 24 weeks, we can be confident that the vast majority of pregnancies are viable at that, or the child is viable at that point.

But now actually the medical literature indicates it's closer to 22 weeks. And we know that there have actually been in some instances, children who have survived a premature delivery at 21 weeks. And so tying it to that sort of marker creates an instability. Finally to me, and it's part of the analysis of stare decisis is, has the opinion proved unworkable? And I would argue that unlike even Obergefell, where you don't see legislatures across the country, trying to, to change it and trying to legislate in such a way to narrow it, you've got fairly broad acceptance of Obergefell and of the, the cases related to it. Lawrence v. Texas, you don't, and still, I don't think ever will have that sort of acceptance of this. This is a question that has to be left to our collective judgment as a people.

And stare decisis, even under the court's own doctrine does not apply with the same strength in an instance where it is a decision that has historically been a legislative decision. So in this instance, the reversal of Roe, yes, will lead some states to prohibit abortion largely in its territory, but other states like New York, and we had this before Roe. Hawaii had legalized abortion, New York had legalized abortion before Roe. Led the people make this decision.



Jeffrey Rosen: [00:34:48] Thanks very much for that. Well, we've talked about the main constitutional arguments for and against, *Roe v. Wade*, including liberty, equality, natural law and precedent. It's now time for closing arguments in this illuminating discussion. Leah, the first one is to you, w-why and on what grounds do you believe the constitution protects a right to choose abortion before fetal viability and why do you think that the court should uphold the core protections of *Roe v. Wade*?

Leah Litman: [00:35:16] I think the most persuasive argument for protecting the rights to abortion is the one that justice Ginsburg articulated, the equality right. The idea that it is essential to women's ability to participate equally in modern society, that they be able to control when and whether they have a child. some of the Amicus briefs, filed in the most recent abortion litigation I think powerfully spell out how in today's society, you know, we have successful lawyers, doctors, law students, all of whom have been able to take on, you know, the lives that they lead, because they were able to decide, you know, under what circumstances they were going to have a family.

and it is that right, that I think, the courts should protect. although as I have alluded to, I think the more likely scenario is that the court will be cutting away at the right in the way that Teresa was alluding to, namely suggesting that states can prohibit abortions, before viability.

Jeffrey Rosen: [00:36:08] Thanks so much for that. Teresa, the last word's to you, please tell We The People listeners why you think the constitution does not protect a right to choose abortion before fetal viability and why, and on what grounds you think the court should overturn the core protections of *Roe v. Wade*?

Teresa Stanton Collett: [00:36:23] Well, the simple fact is there's no, empirical evidence that abortion has directly facilitated women's, ability to participate in society. In 1925, we had our first female governor in this country. That was almost 50 years before *Roe*. In '32, we had our first female senator, in '33 we had our first female cabinet member, which I would note was secretary of labor. we had our first supre... We had our first Court of Appeals judge. We had our first, woman nominee in '64 to be president. we had the first woman to own a seat in the stock exchange and the first woman to be a director of the New York Stock Exchange, all of that predates *Roe*. The simple fact is that women's acceptance and full participation society is dependent upon cultural norms, allowing women the opportunity to pursue advanced educations and to use their gifts and talents.

And the presence of *Roe* has not facilitated it. And I would argue it has in fact, retarded it and retarded the accommodation of the unique aspects of our life. More importantly, it is a question of continuing turmoil. And for those of us who believe the science, an argument that we keep hearing from on lots of other topics who believe the science, that when that sperm and egg come together, it creates a unique, separate human being. And that at its most fundamental level government's job is to protect human beings from acts of private violence. *Roe vs. Wade* can't stand. It is an injustice just as the injustice of slavery that we did not correct until 1865 with a bloody civil war. And this is an injustice that our grandchildren will look back and they will find it unbelievable that we're allowing babies to be killed that could be born and could live healthy, happy, productive lives.



Jeffrey Rosen: [00:38:25] Thank you so much Leah Litman and Teresa Stanton Collett for a vigorous, deep and civil discussion of the constitutional arguments for and against upholding Roe v. Wade. tLeah Litman, Teresa Stanton Collett, thank you so much for joining.

Leah Litman: [00:38:40] Thanks for having us.

Teresa Stanton Collett: [00:38:41] It was a great conversation. Thank you.

Jeffrey Rosen: [00:38:46] Today's show was engineered by David Stotz and produced by Jackie McDermott. Research was provided by Mac Taylor, Anna Salvatore, and Lana Ulrich. The homework of the week, please check out Live at the National Constitution Center. It's the companion podcast to We The People, it's the live audio feed of all the wonderful townhall programs that we're running every week. They've been so rich recently, they're spreading so much light on topics from the constitution and American literature to the Founders Library. All of us learn so much every week from them, and I hope that you will too. So please check them out. And also of course, please rate, review and subscribe to We The People on Apple podcasts and recommend the show to friends, colleagues, or anyone anywhere who's hungry for a weekly dose of constitutional debate. And always remember that the National Constitution Center is a private nonprofit.

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