NATIONAL CONSTITUTION CENTER

The *Dobbs v. Jackson* Case – Part 3

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[00:00:00] Jeffrey Rosen: Hello friends, 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 non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. On May 2nd Politico published leaked draft of Justice Samuel Alito's opinion in *Dobbs v. Jackson Women's Health Organization*.

[00:00:34] Last fall, we convened two of America's leading scholars of the constitution and reproductive choice for a meaningful discussion about *Dobbs*. And it's an honor to reconvene them to discuss Justice Alito's draft opinion and its consequences for the future of the Supreme Court. Carter Snead is professor of law and director of the de Nicola Center for Ethics and Culture at the University of Notre Dame Law School. Carter, it is an honor to have you back.

[00:01:05] Carter Snead: Great to be with you, thanks.

[00:01:07] Jeffrey Rosen: And Mary Ziegler is a professor at UC Davis and author of *Abortion and the Law in America: A Legal History Roe v. Wade to the Present*. Mary it's an honor to have you back as well.

[00:01:19] Mary Ziegler: Thanks for having me.

[00:01:20] Jeffrey Rosen: Carter, what was your reaction to the constitutional reasoning of Justice Alito's draft opinion?

[00:01:28] Carter Snead: Yeah, so, I mean, I was distraught by the fact of the leak, but as to the merits of the, the draft opinion I think it wasn't all that surprising to be honest. I think when last we met, uh, when we, when Mary and I, and you had conversations after the oral arguments and before the oral arguments, we were speculating about what an opinion might look like if, if the court did in fact take the step of reversing *Roe and Casey*, which, which it appears to have done, if this draft holds and five justices, join this, join this draft.

[00:02:00] It begins with the standard from, a familiar standard from the *Glucksburg* case, asking the question of how do we identify unenumerated fundamental rights in particular, whether they're deeply rooted in the nation's history tradition, or even practices of the country. And then there's of course, the question about stare decisis. Those are really the two questions that were at issue in this case and Justice Alito analyzes those questions in a way that I think we

all anticipated, namely he finds that the right to abortion is not in fact deeply rooted in the nation's history and tradition.

[00:02:38] It therefore is a protected liberty interest. It's not a fundamental right, and therefore is subject to state regulation or even prohibition and the appropriate standard of review for those kinds of liberty interests is the rational basis standard, which your listeners probably know is a very deferential standard wherein the state can regulate or even prohibit a particular practice if they find that there is a legitimate state interest in doing so. And that the means to that end is, are rationally connected to the goal.

[00:03:08] The means are rationally related to the end. The stare decisis analysis, I think is also what we pretty much expected. He walks through, uh, the, the test, the familiar test from Ramos and other, other precedents arguing that, uh, first of all, that the prior decisions *Roe* and *Casey* were grievously wrong in their reasoning, but not only that, they offered unworkable constantly shifting standards that, created instability and , and more over had bad effects.

[00:03:36] He argued in his opinion on other areas of the law that when the topic was abortion, long standing jurisprudential doctrines would be modified or changed or bent. And then he also concluded that there was no, um, traditionally understood reliance centrist that would warrant standing by these, uh, opinions, which again, he regarded as, uh, grievously, uh, and egregiously wrongly decided. So I think when we last concluded, I think Mary and I both predicted that the court might very well overturn *Roe* and it looks as if they're on the cusp of doing that. And I don't think there were any big surprises in Justice Alito's reasoning. I think it was pretty much what we expected.

[00:04:14] Jeffrey Rosen: Thank you very much for that. Mary, what was your reaction to the constitutional reasoning of Justice Alito's draft opinion?

[00:04:21] Mary Ziegler: So, I mean, I think Carter is right that this is in line with what, um, what I was expecting. Um, I think that I had expected prior to the oral argument, and even after the oral argument that there would... I mean, I wasn't expecting just to be candid that the opinion would be drafted by Justice Alito. And I was a little surprised by the tone and places that didn't seem, I think, always to understand how this will be understood by a large portion of the country.

[00:04:52] There was almost sort of, um, a tone of scorn, I think at times in the opinion for Roe, which, I mean, I think obviously from Justice Alito standpoint was warranted because he thinks the decision was egregiously wrong. But it is potentially not advancing the court's goal if the court as Justice Alito suggests is concerned about *Roe* in part because the court believes *Roe* hopelessly polarized our politics. Then I think obviously the court has to proceed carefully not to contribute further to that polarization, and I'm not sure this draft achieved that.

[00:05:23] Parts of the, the, the draft were utterly in line with what I was expecting. The adoption of a kind of *glucksburg*, I would say sort of *Glucksburg* version of substantive due process or living constitutionalism was what I would've expected. The analysis of the history and the 19th century is what I would've expected. There were parts of the draft that were weaker than

I would've expected, particularly the reliance analysis, which I thought was weaker than some of what you saw in briefs that were sympathetic to the outcome.

[00:05:55] Um, I thought the court's treatment of the equal protection argument for abortion rights was weaker than I would've expected. So obviously I say all of this knowing that this is a draft and that those parts could be made more persuasive, but I agree broadly with Carter that this is what I would've expected in broad terms. And I don't expect in any kind of fundamental sense that it'll shift before a decision's released in June.

[00:06:20] Jeffrey Rosen: Thank you very much for that. Well, let's break down the constitutional components of the opinion and begin with the liberty and tradition analysis. Carter, Justice Alito says that until the latter part of the 20th century, there was no support in American law for a constitutional right to abortion, zero, none. He notes that at common law, uh, some authorities said that a pre-quickening abortion was not itself committed homicide, but he says that when the 14th amendment was ratified in 1868, three quarters of the states had enacted statutes making abortion a crime, even if it was performed before quickening. Tell us more about that analysis and why justice Alito concludes that there is no historically rooted rights to abortion at any stage in pregnancy.

[00:07:10] Carter Snead: Yeah, some people were, a lot of lay people were surprised by there's, why is there so much time spent in the opinion focusing on such old, uh, historical periods and, and the common law, and why are they quoting different thinkers from that era who had retrograde views on other questions describing what the state of the common law was at the time.

[00:07:33] But the reason that Justice Alito digs into the history in the way that he does is because it's driven by the test that he chooses for substantive due process that namely the *Glucksburg* test. As a justice when you're presented with the question of whether or not a particular proposed right, is, uh, which is not written in the constitution, is nevertheless in there pursuant to the doctrine substance due process. He asked the question is whether or not the, the righted issue is deeply rooted in the nation's history and tradition.

[00:07:58] And this, this was most clearly stated as a test in the *Glucksburg* case, which involved assisted suicide in which the court said the right to assisted suicide was not in fact deeply rooted. And they go through a long historical account and that decision explaining how it was criminalized and suicide was legally dis-favored. And it's very similar here in Justice Alito's opinion. He, he points out that, there's some complexity around the concept of the word quickening, whether in the word quickening refers to a stage of gestational development at which the baby can be felt moving, or the fetus can be felt moving, or is, as my colleague, John Finnis has argued in a brief and in scholarship that the word quick with child simply means pregnant.

[00:08:37] That really, in some ways, doesn't matter here. What, what justice Alito is trying to articulate is instead of there being a deeply rooted liberty interest in abortion at any stage, in our, in our history prior to the latter part of the 20th century, in fact, abortion was always legally disfavored, even prior to quickening he argues and cites precedence for the proposition that while it was not homicide, as you say, there was something like a, a proto felony murder rule that was applied, meaning that if a life was taken in the, in the process of an abortion, then the person

could be charged in addition to another felony that there would be a homicide charge brought associated with it. And of course, contracts to perform abortions were void for public policy.

[00:09:23] So it's clearly legally disfavored prior to quickening, prior to viability if that's what quickening means in that context. But the larger analytic point that he's making is if you look at the sweep of history, and certainly if you look at the time at the, at time of theratification of the 14th amendment, which is the due process clause, which is the source of authority that Roe and Casey situate the right to abortion in, uh, abortion was in fact criminalized, and then became even more draconian in its criminalization, uh, in the year in which the ap- amendment was ratified.

[00:09:52] And that is consistent with his question of whether or not it's deeply rooted. He concludes that it's not deeply rooted and therefore it is not a fundamental right, um, that needs to over- overrun and overwhelm any state regulations or restrictions. So the contrary it's merely a protected liberty interest, which is only subject to, to the deferential standard of, of rational basis review. So the long historical account is in service of the question of whether or not the right to abortion is deeply rooted. He finds that it's not. Uh, in fact it was disfavor and even cri- the subject of criminal prohibition.

[00:10:25] Jeffrey Rosen: Mary, the briefs made arguments that the history is more complicated, which undoubtedly the dissenting opinions will pick up on including emphasizing that pre-quickening abortion was permitted or not criminalized before 1868. And that 20 states had repealed there bans on abortion throughout pregnancy by the time Roe was decided, and that the trend was moving in a liberal direction. Uh, tell, tell us more about what you imagine the dissent will say about the history and tradition argument.

[00:10:56] Mary Ziegler: Well, I, I think they'll say as you mentioned, not that the Justice Alito's argument is wrong on all points. Um, but rather that Justice Alito, I think makes a messy history sound very simple. Um, I think there's, it, it's very contested in the historical literature, whether abortion was always historically disfavored at common law, particularly before quickening. Um, a brief by the organization of American historians in the American historical association, for example, um, argues that most decided cases at the time before the late 19th century, uh, were quite reluctant to authorize any kind of criminal consequences for pre-quickening abortion.

[00:11:37] Uh, and I think as to, you know, what happened later in the 19th century, I think that's more established. I mean, Justice Alito's sort of main point I think that would be harder for this sense to address this, that no one thought abortion was a constitutional right in the 19th century, which I think is likely true if you're applying a Glucksberg sort of methodology. But pre-1700 cases don't obviously support the view that the common law or early America criminalized all abortion.

[00:12:06] I think that's a much more contested argument than Justice Alito, uh, suggests. And I think there's also interestingly and almost sort of unnecessarily Justice Alito also takes up the question of why states were criminalizing abortion in the 19th century, um, and rejects the argument, la- largely rejects the argument that those who are criminalizing abortion were doing

so partly for questionable, uh, reasons, reasons relating to nativism or eugenics as much as to protection of unborn life and suggest that the motives that were in fact driving that campaign were more or less entirely related to protection of life in the womb.

[00:12:44] I think you'll see the dissents question, whether the history really supports that, that narrative and will suggest that the, the motives of people pursuing bans on abortion were at the time much more, um, complicated and much more unfortunate than Justice Alito's draft would suggest. And then I think finally, the, the, dissents are likely to say that even the consensus that seemed to have been established, you know, in the 1860s, 1870s, 1880s, vis-a-vis the criminalization of abortion, um, were, was less successful than Justice Alito's draft would suggest.

[00:13:21] Um, they may indicate that at the time the 14th amendment was ratified nearly half the states had some vestige of the old common law. They, there were, I think, according to the American Historical Association and organization of American historians brief, there were 11 states that retained legality for pre-quickening abortion. Um, seven more imposed, a lesser punishment. So I think that the large, larger takeaway is essentially going to be that for Justice Alito, history and tradition are simple and many historians don't see the story entirely that way.

[00:13:58] Jeffrey Rosen: Thank you very much for that. Carter, let's take the history up to the present because as Justice Harlan said in Povey, Oman tradition, the living thing if Roe is overturned as it looks like it well maybe, how many states are likely to enact bans on abortion from the moment of conception? And what does that say about whether or not there is a tradition in this country now of protecting at least some early term pregnancies or not?

[00:14:30] Carter Snead: It's a really complicated question as to what happens after this. Uh, if, if this decision holds in *Roe* is repealed, *Casey* is repealed and states then have the freedom to regulate abortion as they wish. I mean, there's a kind of freedom on the part of legislators in a *Roe* and *Casey* era in which they can pretty much say whatever they wanna say, and they have a high degree of confidence that it, the court will strike it down. It's a different question when you actually have the authority to make these kinds of decisions.

[00:14:58] So I'll be interested to see how, what the, what forms these laws take. I mean, some states have what are called trigger laws. They'll be litigation around all of this, by the way, in terms of the efficacy of these trigger laws that will restore the prior legal regime before it was modified or struck down by *Roe* and *Casey*. Um, I mean, I think, I think my intuition is, and, and, and my sort of survey of the political landscape is that there are some states that are going to be very, um, enthusiastic, uh, about regulating and restricting abortion. There pro- there are states that we're probably well familiar with, states like Mississippi and Texas and South Dakota and states that have passed heartbeat bills like Ohio and, and others.

[00:15:40] Those states, um, some states like, uh, Florida, for example, just pa- or is, is, is working on a 15 week ban. It'll be... I mean, so it'll be fascinating to see exactly what approach these states take. Other states like New York and California and Illinois have already, uh, made moves to liberalize their, uh, their state laws on abortion, uh, to, to provide maximal access, not just, uh, sweeping away all limits on abortion, but also providing state funding for abortion. Um,

including in Illinois to people who are not even citizens of Illinois can go to Illinois and get, uh, free abortions.

[00:16:13] So we're gonna see a pretty messy patchwork of, of, uh, of, of different approaches. Um, one might defend that in the name of federalism say, that's what actually, uh, that, that's the way the issue should be resolved. If you take Justice Alito's view that this matter is, uh, the right to abortion is not a fundamental right, but merely a protected liberty interest, then that would entail that kind of differential approach. And I should say, we, we also should be, uh, keep our eye on state Supreme Courts because some state Supreme Courts will, will find a right to abortion, a fundamental right to abortion in their state constitutions.

[00:16:48] Some have already done that. The state of Kansas did that, a state that generally is associated with more politically conservative ideology. Although Kansas is complicated when you drill down into Kansas's kind of approached to abortion. It's a very complex state. Uh, so, uh, it's, it'll be interesting to see. I mean, I'm sure there'll be a lot of, um, messiness associated with the new, with the new, uh, um, if it turns out to be the case that this, this is the opinion that, that, uh, is adopted by the court, there'll be a lot of messiness out of the gate, both on the, on the, on the right and on the left. And, uh, we'll just have to see, um, how it, how it plays out.

[00:17:20] But I think that, um, it is a politically very interesting thing for lawmakers who in the past had been very firm advocates of very strict laws on abortion now that they actually have the re- the authority to apply it, what direction they'll go in. And then on the other end of the spectrum, I think we saw this play out in Congress just yesterday when there are advocates who are more full-throated supporters of really open-ended rights to abortion, maximalist rights to abortion when they seek to put that into place. Uh, I think there'll be some surprising political results as well.

[00:17:50] We saw yesterday, uh, Congress failed to, uh, even garner a majority in the cloture vote for, uh, the Women's Health Protection Act, which I think might have surprised some people.

[00:18:00] Jeffrey Rosen: Mary, as Carter says, it'll be complicated what the states do, but the Guttmacher Institute has estimated that about 26 states are likely to ban abortion in some form. As, as Carter says, it's complicated, but the majority of those would be trigger bans that would resurrect bans throughout pregnancy, but some are six week bans. I'm just trying to imagine Chief Justice Roberts' opinion might say he, he reportedly wanted to uphold the 16 week ban, but not permit bans from the moment of conception. And based on what's likely to happen after Roe, could it be plausibly argued that there is not a nationwide consensus of banning from the moment of conception. And in fact, there is a right to have some early term choice.

[00:18:49] Mary Ziegler: Yeah, it's interesting because I mean, one of the things of course, that will be contested about Justice Alito's draft is, is who counts when we're thinking about tradition and history. So there have been some commentators who are originalists who have said this, what they see in the Alito draft, um, very solemn for instance, is not originalism. There have been other commentators like Reva Siegel at Yale who, who invoke this idea of constitutional memory, essentially saying, why is it that the only people whose views matter were the people

who are in a position to make law in the 19th century, which of course, notably excluded women who were unable to vote at the time.

[00:19:23] And so I think that this broader question of whether history and tradition, you know, recent history and tradition indicates support for right to abortion or not will be interesting precisely for that reason because the conversation about abortion, both in the 19th century, but certainly more recently, certainly since the 1960s has, has been far broader than just what legislators are doing or what the Supreme Court is thinking.

[00:19:45] If you're looking at, you know, whether there's a consensus now, I think Carter's right that it's hard to say. Um, it's hard to say for a variety of reasons. On the one hand, obviously we've seen over and over again, repeated in recent days polling data suggesting that most Americans think Roe is rightly decided. Most Americans don't like the idea of criminalizing abortion. People who are pro-life or anti-abortion often respond that most Americans don't know what Roe is. Indeed many not, may not have even heard of Roe.

[00:20:12] They may favor restrictions that Roe doesn't authorize. I think most people who conduct polls would, would acknowledge that at, at a minimum, that opinion on abortion is complicated and likely doesn't reflect support either for what you see the 26 states planning to do, or what Roe V. Wade might have authorized. And this kind of 26 state approach, it's hard to know how much that reflects anything about the view of the people, either because as you indicated, um, many of those laws are so called zombie laws that were passed in the 19th century or in the case of Michigan in 1931 that will kind of spring back into life if Roe was overturned.

[00:20:52] So whether those laws reflect the will of the people in those states in 2022, uh, you know, it's hard to say. Trigger laws, I think are an easier case with, with the exception, obviously that legislators may have been chosen for their abuses on issues unrelated to abortion, because as Carter suggested for years, people made statements about abortion that never actually translated into enforceable law.

[00:21:14] So I think it, it much as it's hard [laughs] to, to look into the 19th century and say for sure what history tells us, I think if we're looking at a kind of evolving consensus or lack thereof, there's complexity there too. And I think if dissent or the majority acknowledge that, they'll be better served.

[00:21:33] Jeffrey Rosen: Well, there was an additional constitutional theory that Justice Alito considers and dismisses, and that's the equal protection theory. He says that neither *Roe* nor Casey saw fit to invoke this theory. And it is squarely foreclosed by our precedents, which established that a state's regulation of abortion is not a sex based classification. And that's not subject to heightened scrutiny. Carter, tell us more about the equal protection theory, most prominently advanced by the late Justice Ruth Bader Ginsburg and why Justice Alito rejects it.

[00:22:04] Carter Snead: Yeah, it's interesting because, I mean, since 1973, there have been, uh, a lot of different shifting, rationales, rules and justifications for the right to abortion. Of course, *Roe* starts out with pro... And even before that, the district court in Roe looked at the ninth amendment. And then of course, in the, uh, you have, uh, the court in Roe pointing to the

due process clause and the 14th amendment and focusing on privacy and that sort of changes to liberty, in the *Casey* decision. And then, and then you see in the, in Justice Ginsburg's Gonzales versus Carhart descent, a kind of focus on e- equality as the principle good that is advanced, uh, by the right to abortion and is the appropriate norm to look to in that way.

[00:22:47] And I think it's fair to say that among, uh, the most sophisticated law professors and commentators, uh, equal protection, uh, even if it's not the equal protection clause, the good of equal protection, which could be read into substantive due process also, uh, is, is the, is the way to go is the, is the most effective way to argue. And you see this in Justice Ginsburg, you see it in Reva Siegel, you see it in, you know, Cass Sunstein. There's a, a wide array of, of very sophisticated and thoughtful advocates for abortion rights who think that that's the appropriate avenue, the appropriate analytic frame to use in this area.

[00:23:18] Now, interestingly, uh, none of the parties in this case made an equal protection argument. Um, neither the solicitor general of the United States nor the advocates for the *Jackson Women's Health Organization* did. There was even oral argument itself. There was a specific question put to the, to the litigants which source of authority in the constitution are you invoking for this proposition and being, and un- understandably because what they were doing was defending two precedents, *Roe* and *Casey* that did not invoke the equal protection clause. Um, they said substantive due process, 14th amendment.

[00:23:50] Um, and I think that, uh, and, and so I think that's one sort of a basic argument as to why there's not a lot of time spent on that question, uh, in the, um, in Justice Alito's opinion. It'll be very interesting to see in if there, as I expect there will be dissents if they focus on equal protection.

[00:24:06] Now, I will say insofar as the question before the court was one of stare decisis namely, what is the continuing vitality of *Casey* and *Roe* to invent a new rationale for a right to abortion to try to reground it in the equal protection clause would not be in my judgment at least, and certainly not in the judgment of John Roberts and the five other justices who, who I think joined Alito's opinion. That’s not doing stare decisis.

[00:24:34] As Robert said, "Stare decisis is a, a doctrine of preservation and not transformation." It's not about coming up with new rationales for old, old outcomes. It's in fact about looking to those prior precedents and evaluating them on their terms, and those were not precedents about equal protection. Um, nevertheless, I mean, there's a certain intuitive appeal to equal protection as a, as a possible argument, although, um, as Justice Alito says, um, and, you know, we, we see in, in cases, uh, before the court an, an analogous context and the Bray decision in particular, uh, the court says in that case that opposition to abortion cannot reasonably be presumed to reflect a sex based intent.

[00:25:14] There are common and respectable reasons for opposing abortion, other than derogatory view of women as a class. And this court's, I'm quoting, "This court's prior decisions indicate that, that the disfavoring of abortion, uh, although only women engage in the activity is not ipso facto invidious discrimination against women as a class. So I think that's the, the thrust

of what Justice Alito is, is suggesting. And as I agree, doesn't spend a whole lot of time on it. Uh, but I think there are, there are practical reasons for that, which I just, um, sketched out.

[00:25:43] Jeffrey Rosen: Justice Alito does indeed quote the break decision as you say, on behalf of the idea that preventing abortion is not discriminatory animus against women, and he quotes the *Geduldig* case, which held that discrimination on the basis of pregnancy discriminates between pregnant women and non-pregnant persons, and then, and therefore is not sex discrimination. Mary are, are, is that a definitive response to the equal protection argument or as Professor Tribe noted in response to Justice Alito's decision if, if the court can reconsider *Casey* and *Roe*, it could also reconsider *Geduldig*?

[00:26:17] Mary Ziegler: Certainly. Yeah. I mean, I thought that part of the draft was among the weakest parts. I mean, as Carter notes, it, it was a little strange that the draft says anything about it, because if the court's position is that none of the parties were lying on this. And it was mentioned in passing in amicus briefs, why is this not something that the court should take up at another time?

[00:26:36] The idea, this just feels sort of like gratuitous, almost activists reaching out to foreclose any argument for abortion rights, including those that weren't fully before the court. Um, I'm also obviously a little [laughs] mystified by the idea that the reason that this argument fails is because of precedent when, of course this is an opinion that suggests that precedent is not sacrosanct, right? And that under the right circumstances, precedent should be revisited and e-especially the *Geduldig* decision, which is one of the decisions that I think is often criticized by scholars across the ideological spectrum.

[00:27:09] And it, and in its kind of title seven incarnation was rejected by Congress and the Pregnancy Discrimination Act of 1978. So I was a bit mystified as to what the equal protection analysis was doing there. And then I thought, given that many of you, the equal protection argument within the academy, certainly as the most sophisticated argument, um, to invoke two precedents, one of which was, I mean, I think the brave decision, not even entirely, it was decided in a statutory context, so slightly different in its application.

[00:27:42] Another that's been roundly criticized and then stopped, um, felt sort of as if it would not fully convince, uh, I think many people. So, if that's the final analysis of equal protection, I think many will find that part of the, the draft, uh, wanting.

[00:27:57] Jeffrey Rosen: Well, let's turn now to the stare decisis part of Justice Alito's opinion, uh, and Justice Alito identifies five factors for deciding whether or not to overturn a decision. First, the nature of their error, second, equality of their reasoning. Third, the workability of the rules they impose on the country. Forth, their disruptive effects on other areas of the law, and fifth, the absence of concrete reliance. Carter, tell us about those five factors and how Justice Alito applied them.

[00:28:27] Carter Snead: Sure. Um, much of the opinion is spent, and I think this picks up on what Mary was observing earlier, namely, um, I mean, Roe and Casey have come in for a lot of negative, uh, analysis over the years, especially by, uh, folks who have the views that Justice

Alito and his colleagues have that as a kind of irrigation of judicial power not rooted in the Constitution's text history or tradition.

[00:28:52] So I think that the erroneous nature, the degree of error in *Roe* and *Casey* is underscored, I think, because I think there are strong feelings about it, but also I think because that's essential to the question of stare decisis. Was it egregiously and grievously wrong? And Justice Alito talks about what he perceives and others agree, uh, as the, sort of, as the unique weakness of the argumentation in *Roe* and *Casey*.

[00:29:19] Um, so much of the, we've already talked about a lot of that. The argument that in fact, *Roe* is basically, according to Justice Alito an, an invention, uh, uh, projection of a policy preference grafting onto the constitution that isn't justified by the text history or tradition. Um, but, and so the quality of reasoning, the nature of the error I think, are, are, are taken care of by that part of the decision.

[00:29:41] As far as workability goes, I think Justice Alito does a nice job of showing how really, um, the, the, the arc of, of the jurisprudence of abortion since *Roe* has been unstable. It's been it's, you know, you, you wouldn't even have five justices right now in the court who would agree on what, how Casey should be applied, the concept of an undue burden. We saw that actually in the, in the *June Medical Services* case in, in 2020 a case involving admitting privileges, uh, in Louisiana. There wasn't a five justice majority for the proposition of, of how to apply the concept of an undue burden.

[00:30:14] So the workability, uh, the instability, and what we've seen also is that state legislatures who wish to regulate or even ban abortion. The only way to know if what you're doing is comports with, with *Casey* or not is to actually litigate it in front of the Supreme Court. And that is I think, um, uh, an unworkable and unstable framework, and doesn't advance the goods of stare decisis, which are stability, transparency, workability, um, in a system that depends on, on, on precedent.

[00:30:40] Um, is in terms of disruption, uh, Justice Alito sites, other areas of the law, which some scholars have referred to as the abortion distortion or what, uh, Justice O'Connor, uh, I believe it was Justice O'Connor referred to as Roe v. Wade as a post hoc nullification machine of doctrinal principles, the usual rules for standing or res judicata, or even first amendment principles, which, which are consistently applied and most contexts, get a different kind of application when the, when the topic is abortion.

[00:31:11] Justice Alito appoints to that, to that, uh, that phenomenon, uh, in, in service of his view that *Roe* and *Casey* have been disruptive, jurisprudentially. And then in terms of the con-concrete reliance piece, um, he focuses on reliance as it was understood prior to *Casey* as an idea of settled interests that are, that were, that are put in place, uh, arrangements that are put in place that are disrupted by later legal developments. And he argues very much. And again, I will say one thing about this, this opinion more generally is it, it really reads a lot like Chief Justice Rehnquist dissent in *Casey*.

[00:31:51] I mean, there's, many of the arguments are very similar. They're updated, uh, in light of additional changed facts or changed legal doctrinal principles, but he echoes just- Chief Justice Rehnquist's comments in Casey, that reliance as a concept in stare decisis is really, um, is, is, is applied in a novel and innovative and problematic way in Casey because, uh, what the interests are at issue for abortion in terms of family planning and so on are, are prospective not retrospective. And that in fact, people can take account of changes in the law and then, and then shape their behavior accordingly.

[00:32:27] And that's not the same reliance interest traditional interested are more like commercial interest contracts that will be voided or nullified. Um, and that's what he means by concrete reliance interest. So this is in some ways a return to the much narrower understanding of what reliance meant in stare decisis prior to Casey.

[00:32:43] Jeffrey Rosen: Thank you very much for that. Mary, I wonder what you think of Justice Alito's, stare decisis analysis, and beginning with, uh, the question of whether the first two factors he identifies, uh, the nature of a decision's error and the quality of its reasoning. Those two factors don't appear in the *Casey* decision. Are, are those new factors and, and what do they say about the court's willingness to overturn any decision that it thinks was wrong?

[00:33:09] Mary Ziegler: Yeah I think that this is sort of the court, um, gradually tiptoeing toward, uh, Justice Thomas' position, which is essentially that if a decision is egregiously wrong, it should be overturned with no real regard for other stare decisis factors. Because I, I think the court's analysis of, um, of reliance is far... It doesn't really feel as if the Justice Alito is trying very hard to persuade people that, uh, that the reliance interest in *Casey* was wrong. And that's particularly striking because several amicus briefs on Mississippi's side do make that argument. He doesn't pick up on any of those threads.

[00:33:44] Uh, the workability argument, I think is one, of course, that's been made for years by folks who are skeptics of *Roe* suggesting essentially that when the court revisits or tinkers with precedents, they become unworkable. Of course, this would be if the court takes that presumption seriously, this would be an argument that could apply across a wide variety of areas of the law, um, especially to balancing tests, which by definition tend to generate inconsistent results.

[00:34:11] The court, even in the Roberts era has applied balancing tests in a variety of arenas, including, um, voting rights in the, in voter ID cases. And so I'm not sure to what extent this is kind of an exception that the court has drawn given that it, it sees Roe and Casey as egregiously wrong, or if the court is serious, that any kind of rule that generates inconsistent results or that the court tinkers with is necessarily unworkable. That would of course, lead to the overruling of many more cases than just Roe and Casey.

[00:34:40] And I think with reliance, of course, um, returning to an older idea of reliance may, may be necessary for Justice Alito because the, the court's conservative justices may not think there is a good account, um, of the idea that, reversing Roe will not disrupt the kinds of expectations that were laid out in *Roe* and *Casey*. So it, it does feel as if it's, um, certainly a, a

new approach to stare decisis and maybe, um, a step toward a quite radically different new approach to stare decisis.

[00:35:11] Jeffrey Rosen: Carter, do you agree or not that this is potentially a new or radically new approach to stare decisis where the court, uh, may be ready to overturn any decision if thinks is egregiously wrong without taking into account reliance on other, uh, precedential factors. And if, if so, why? Doesn't that mean that a whole host of decisions might be on the chopping block?

[00:35:34] Carter Snead: Yeah, I I think that the factors that Justice Alito appoints to are fair, are familiar factors as we've discussed in our previous conversations together, the *Ramos* decision, um, Justice Kavanaugh articulating the standards for stare decisis. We have other precedents in which Chief Justice Roberts articulates a framework for stare decisis.

[00:35:55] I don't think, I don't think anyone was surprised by the, the, the factors that he articulated. I think that *Roe* and this comes across in the substance of his critique of the reasoning in *Roe*. I think *Roe* and *Casey* are pretty unique, uh, in the sense that they have been so divisive, um, and so controversial in judicial circles, in commentary circles. I mean, I think we've constantly had been in conversation about will *Roe* and *Casey* be overturned?

[00:36:26] Up until 1992, *Casey* was a decision in which people thought that perhaps that was the moment that Roe would be overturned. So I think *Roe* and *Casey* are pretty sui generis in our system of, of jurisprudence. I don't detect an appetite for, for opening the books and going back through and trying to strike out all the prior decisions that these justices that now have a majority dissented in, for example.

[00:36:55] Um, and interestingly and I, and if you read the opinion itself, and this may be what you have in mind, Jeff, um, Justice Alito goes out of his way to say anyone who's concerned that this means that overturning *Roe* and *Casey* means that it's gonna be open season on any unenumerated right that people hold dear. You need not be concerned about that, um, because Roe and Casey deal with, uh, a right that is so conceptually distinct from those other, those other areas that, uh, that it's easily distinguishable.

[00:37:28] So if let's just take, for example, he points, he, he points out Griswold, he points out Obergefell. The question of are, are the issues of same sex marriage, uh, and, and, and contraception, are these, are these now on the table, are these prior precedent going to be overturned now that that *Roe* and *Casey* are gone? And he says, he says explicitly, uh, very directly, "No, that's not, that's not the case." And he distinguishes, and the distinction that he draws between the right at issue in *Roe* and *Casey* and the right at issue in those other cases, is that the right at issue in Roe and Casey is, is distinctive in the sense that it is not deeply embedded or even adjacent to deeply embedded goods that have been manifest throughout our nation's history and tradition.

[00:38:09] So marriage has always been something that has been deeply rooted in our nation's tradition, not same sex marriage exactly. But if, but if, but if you look at Obergefell and you see what that would, fundamentally, what that good is advanced by, you can see how that is a much

more deeply rooted kind of right Griswold itself, and both in the reasoning. And others relate to marital intimacy and sexual intimacy in the zones of privacy.

[00:38:31] And much like Judge Henry friendly observed in his unpublished opinion on abortion in the second circuit. He said, "It's easy to distinguish the rights to privacy of marital relations of, of intimacy, of child rearing. Things that are, things that are self-regarding from the issue of abortion, which involves the direct taking of another life. Now, of course, it's deeply contested as what the moral status of nascent unborn human life is. But nevertheless one can see the conceptual distinction between those things and Justice Alito underscores them specifically.

[00:39:02] So you have his explicit statement that it's not open season on unenumerated rights. He entertain- he doesn't say there's no such thing as UN enumerated rights or throws substantive due process out the window as a concept. Um, and then you, as I say, you have this conceptual distinction also stare decisis would be completely different, it seems to me, if you were analyzing the, the settled interest. I mean, looking, looking at marriage in particular, the idea of how destabilizing it would be to, to undo, uh, the right to marry for same-sex couples when there are millions of people, uh, in those relationships with children, uh, even if those relationships weren't even, marriages weren't dissolved, the stigma that would be applied to those marriages would be extraordinarily disruptive.

[00:39:40] And so too, also with access and the use of, of contraception. So I think reliance would be different. I think the ease of the rule workability analysis would be different, um, in terms of the undue burden standard, which I think is unworkable versus the, the, the, the obvious rule that same sex, uh, couples are entitled to marry. Um, and then finally, the one thing I would say about it, and that you see a lot of this in the media. Some people I think are genuinely worried about the stability, these other closely held and dearly held rights.

[00:40:08] Other people I think are, are, are perhaps, especially politicians I think are, are using this sort of so-called parade of horribles to, uh, to animate a political base. Uh, you mentioned Akhil Amar earlier, uh, offline. I mean, he is himself expressed some, some skepticism about the use of these, what he describes as a parade of horribles in the political discourse. And I have to say as a person who has observed American politics pretty closely for many decades, I don't see any, any initiatives at all, uh, to try to undo, uh, gay marriage, same sex marriage, or even access to contraception, even in the most conservative jurisdictions, even in jurisdictions, by the way, who were not deterred by *Roe* and *Casey* by enacting laws that would directly and squarely contradict *Roe* and *Casey*.

[00:40:55] Um, the, the, the precedent was no obstacle to those political groups to pursue their goals, which I think is another important distinction between the, the sort of pro-life movement against abortion versus what appears to be defunct movement, um, against, uh, marriage equality.

[00:41:11] Jeffrey Rosen: Uh, Mary, as Carter said, Justice Alito emphasizes nothing in this opinion should be understood to cast out on precedents that don't concern abortion. And Carter just, uh, thoughtfully argued that precedents, including marriage equality, contraception, and same sex intimacy shouldn't be called into question 'cause none involved fetal life and all

arguably are more deeply rooted on, in tradition than the right to choose in Roe. Are you reassured or not?

[00:41:38] Mary Ziegler: Well, I, I think first I'm, I'm not convinced by the fact of the disclaimer. Um, some, you know, people who listen to this show know that these disclaimers are not an unfamiliar part of Supreme Court jurisprudence. Um, Anthony Kennedy was quite fond of them. Uh, he used one in Lawrence versus Texas, a decision about the criminalization of same sex intimacy to essentially say this was not a decision about marriage. That was not marriage equality on the line. And then of course, he wrote the opinion recognizing marriage, uh, equality in 2015.

[00:42:06] So the fact of the disclaimer doesn't really mean much to me one way or another. I think there's certainly a colorable argument that abortion is different because fetal life is different or that abortion is different because the degree of resistance to Roe, um, has been different. That said, I think people who are concerned about this are, who are, are pointing to the fact that the court's methodology, the Blacksburg approach, which looks at whether something is deeply rooted in history or tradition quite clearly in my view would suggest that there is no right for same sex couples to marry that's deeply rooted in history and tradition as Justice Alito understands it.

[00:42:44] Indeed in the 19th century, much as abortion was being criminalized, states were also criminalizing sodomy, um, just to take one example. And so I think if there is, uh, a willingness or an unwillingness on the court to revisit other precedents in which many justices currently on the court dissented and in, in the case of Justice Alito, Justice Alito just recently, in a case involving Kim Davis who refused to issue marriage licenses to same sex couples wrote separately with Justice Thomas, when the court declined to hear her case that *Obergefell* had had disastrous consequences and deserved to be revisited.

[00:43:20] I think there certainly will be some interest on the court in potentially, um, revisiting that precedent down the line as well. And that's certainly a possibility that's left open by the methodology outlined by the court. I don't know if that's gonna happen because again, I think the court could lean on this idea that abortion is different or that the politics or alliance interests are different, but there's certainly justices on the court, including Justices Alito, who don't necessarily think those differences hold water and have recently called for the overruling of Obergefell for reasons that are reminiscent of those outlined in the opinion that apply to Roe.

[00:43:53] Um, and then finally I'd note, obviously I'm not a fortune teller, so I don't know what the social movement politics of these issues will look like going forward. But o- of course, you know, it's, it's not impossible that states that oppose, uh, marriage between same sex couples could change their views on legislating if they are aware of the fact that some substantive due process opinions have been called into question.

[00:44:17] So the fact that that hasn't happened yet, um, may or may not mean that it won't happen in the future. So I think that remains very much to be determined. Um, but I think when the court reassures you that something is never going to happen, you always have to take that with a grain of salt if history is our guide.

[00:44:36] Jeffrey Rosen: Carter, one thing that comes through the stare decisis analysis is a strong sense of certainty. The, the two new prongs about whether a decision is egregiously wrong and whether it's reasoning was correct suggests that if the court does conclude, as Justice Thomas has said that his decision was wrong, it should overturn it without giving weight to the fact that other justices may have viewed things differently. What does that new certainty say about the court's general willingness to overturn precedent? And does that mark a change in the court's approach to stare decisis?

[00:45:14] Carter Snead: I think I read that a little bit differently. I mean, I, I keep, I keep coming back to the Ramos concurrence by Justice Kavanaugh in which he fo- when he coined the phrase, he might have been quoting something, but he certainly uses the phrase, uh, grievously and egregiously wrong, um, as a threshold question for whether or not, um, a prior precedent should be revisited. But in, in that decision, it seems to me, he, he says, and I, and I also... And I don't need Justice Alito to say simply that if something is egregiously wrong, then every other consideration involving stability, transparency, reliance, et- disruption, et cetera, are, are not relevant.

[00:45:51] Um, I, I don't get that from this decision and, and what I took Justice Alito to be doing in articulating the framework for stare decisis was to recapitulate familiar elements that Chief Justice Roberts and Justice Kavanaugh have subscribed to in recent years. I mean, uh, in addition, not, not meant, I don't mean to suggest that it was cynical of Justice Alito to do so, but when you are constructing an opinion and you want to get justices to join, you want to articulate the doctrine in a way that is recognizable and appropriate in, in those justices judgment.

[00:46:24] So it didn't... So, you know, I saw this in amicus briefs too. I saw in my own amicus brief, I would, um, I looked to Ramos and to, uh, Citizens United to try to find the threads, uh, uh, in the Roberts and Kavanaugh opinions that suggested what they considered to be the most relevant questions for stare decisis. Um, and I think that the egregiousness and grievousness of the decision be, and the reasoning of the decision is an important, is an important consideration.

[00:46:52] And this course came up also in the con in the oral argument in which the solicitor general of the United States and Justice Alito had a colloquy about does the decision have to be, uh, as wrong as it's ever gonna be in the moment it's decided, or does it have to become in retrospect, uh, with the passage of time, um, self-evidently more mistaken. And I think ultimately they agreed, even though there was some disagreement in the early stages of the colloquy, the solicitor general and Justice Alito agreed for, and they were talking about *Plessy versus Ferguson*.

[00:47:21] *Plessy* was wrong the day it was decided. It didn't get more wrong as time passed, but it was important. The egregiousness and the grievous of the quality of the reasoning and the substance of the opinion is, is important. Again, I, I say, um, I don't detect in this a kind of sea change in the direction or of enthusiasm for revisiting more and more precedents simply on the grounds that they were wrongly decided before.

[00:47:46] Jeffrey Rosen: Mary, do you detect any change in the way the court is approaching precedents? You wrote in the Atlantic that the most distinctive quality of the draft is its certainty.

Uh, do you agree with Carter that the courts simply applying the stare decisis test that Justices Kavanaugh Roberts had embraced? Or do you think this is a new test that shows a new certainty?

[00:48:06] Mary Ziegler: Well, I, I think it's, it's fair to say that the Roberts court's approach to stare decisis as Carter noted has been shifting before this case, so I, I don't think this was somehow a bolt out of the blue. I, I think obviously the court has been leaving a kind of breadcrumb trail that it's, its approach to precedent is not the one that we've become familiar with over the years. So that's true. Um, as far as it goes, but I think that there's a lot of weight, uh, put in this draft on, um, how wrong the court thinks reasoning is.

[00:48:35] And, uh, many of the other stare decisis factors are treated in, in much more casually. And so while I don't think this is yet a full blown indifference to those factors, it's certainly moving in that, in that direction and moving toward Justice Thomas's view, which is that the, the, the wrongness and of opinion is the, the only thing we should care about. I don't think this opinion fully adopts that position, but I think it's certainly closer to that than we might have seen before.

[00:49:00] Jeffrey Rosen: Well, it's time for closing arguments in the civil, thoughtful and engaged discussion. It is so urgently important in these polarized times that the National Constitution Center continued to convene thoughtful scholars who vigorously disagree for precisely this kind of conversation and I'm so grateful to both of you for having modeled it. Uh, Carter, uh, the first final thoughts are to you. Uh, why do you think that Justice Alito's draft opinion is constitutionally convincing and what should We The People listeners think about the possibility that the court may be on the verge of overturning worldview Wade?

[00:49:38] Carter Snead: Um, well, first of all, I, I wanna thank you, and also thank Mary. It's always a pleasure to, to have these conversations and it is important for us, those of us who disagree on fundamental matters to do so in a way that is respectful and civil and even modeling friendship, I think. Um, so, and by the way, and that, and that's not unrelated to what I think, uh, is must come next if this opinion holds. It seems to me, uh, I do find Justice Alito's reasoning persuasive.

[00:50:02] I think that the Glucksberg's approach is the right approach to identifying enumerated rights. And I think his analysis of stare decisis is persuasive now, if, and, and if this opinion holds, we're gonna see a major sea change and the states are now gonna have authority that they haven't had for 50 years, uh, to actually govern, uh, the, the area of abortion, which is fraught about people very strongly disagree.

[00:50:23] And I think it's very important, and I think it's good that we're gonna have that opportunity, uh, to, to govern ourselves on that question. But I do think civility and kindness and compassion, especially among those like myself who have advocated for Roe and Casey to be overturned, uh, that what this means is not that we have won something and we should, we should celebrate that. Uh, but rather now begins the hard work of working with our friends and neighbors, with whom we disagree on these matters to find common ground as to how we can rightly care for women, uh, in crisis situations and their children born and unborn and families and communities.

[00:50:59] And to, and to, to, um, to, to draw upon what I think is the spirit, um, of the movement that is, uh, opposed *Roe* and *Casey*, which is the idea of unconditional love and concern and moral concern, regardless of a person, whether we agree or disagree, regardless of who we are, what we look like, where we live. And I hope that the American people and I expect that the American people are up for the challenge of governing this complicated question in a way that is, uh, responsible and respectful and honors all the goods at the core of our, of our, uh, American experiment.

[00:51:31] Jeffrey Rosen: Thank you very much for that, Carter. Mary, last words in this important discussion are to you. What do you think of Justice Alito's draft opinion and what should We The People listeners think about the possibilities the court's about to overturn worldview Wade?

[00:51:45] Mary Ziegler: I think the, the most ironic and kind of sad thing about Justice Alito's opinion is that it, it says over and over again that part of the reason Roe was so disturbing to the court's majority is that it was polarizing. And yet I think much of the draft, um, handles arguments that are believed very deeply by people who support abortion rights to be constitutionally sound handles those in a kind of dismissive and kind of scornful way. And so I'm, I'm not optimistic that if this draft becomes a final opinion, that we won't be talking about *Dobbs v. Jackson Women's Health Organization* as a source of polarization.

[00:52:16] And I think much like Carter, that's not the world I'm hoping we find ourselves in, but I think it's the world we will find ourselves in. Um, and I think in terms of the dismantling of Roe v. Wade, there, there are lots of people now who find themselves on thresholds deciding what to do, including the leaders of states, um, whether they in fact, want to expand, who will be punished, um, for seeking abortions, whether they want to try to regulate what happens outside of their state lines.

[00:52:41] And I think if, if we all agree that our conflict has become hopelessly ugly, I hope that some lawmakers step back from the brink and do things that will deescalate the conflict rather than doing as I think we've historically done, which is simply to blame the Supreme Court for the mess that we're in and absolve ourselves of responsibility, um, whether we're lawmakers, activists, lobbyists, academics, um, for how, how bitter, um, this conflict has become. But, uh, reading this draft I'm, uh, this does not feel like a draft written with, with empathy to people who disagree or understanding of people who disagree. And, and that gives me some real pause.
[00:53:14] Jeffrey Rosen: Thank you so much for that. I'm so grateful to both of you for having modeled civility, kindness, compassion, and friendship in discussing the most hotly contested constitutional question of our time. And we'll very much look forward to convening you again after the decision comes down to continue to help model those qualities for We The People listeners. Carter Snead, Mary Zeigler, thank you so much for joining.

[00:53:39] Mary Ziegler: Thanks for having us.

[00:53:40] Carter Snead: Thanks very much.

[00:53:46] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Greg Scheckler. Research was provided by Sam Desai and Lana Orrick. Please rate, review and subscribe to We The People on Apple and always remember that the National Constitution Center is a private nonprofit. Always remember two friends that we are standing by to continue to convene these civil thoughtful dialogues that model the fact that people who disagree vigorously about the constitution can debate these issues in a spirit of mutual respect.

[00:54:16] That is so urgently important in these polarized times. And it's an honor to convene scholars like Carter and Mary to do just that. You can support the mission by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including this podcast at constitutioncenter.org/donate. Thank you, friends. And on behalf of the National Constitution Center, I'm Jeffrey Rosen.