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The *Dobbs v. Jackson* Case – Part 4

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CO 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.

[00:00:24] On Friday, June 24th, 2022, the Supreme Court released its opinion in Dobbs v. Jackson Women's Health Organization overturning Roe v. Wade. Here on We the People, we've had three episodes about this historic case and it's an honor to welcome back our Dobbs dream team for the final part of our conversation.

[00:00:49] 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. He is the author of What It Means to be Human: The Case for the Body in Public Bioethics. Carter, it is wonderful to welcome you back to the show.

[00:01:07] Carter Snead: Great to be with you and Mary today.

[00:01:09] Jeffrey Rosen: And Mary Ziegler is professor of law at UC Davis and author of Abortion and the Law in American History: A Legal History, Roe v. Wade to the Present and, most recently, Dollars for Life: The Antiabortion Movement and the Fall of the Republican Establishment. Dollars for Life, like Carter's book, What It Means to be Human was cited by The New York Times as among the 10 best books to understand the abortion debate in the United States. Mary, it is an honor to welcome you back to the show.

[00:01:36] Mary Ziegler: Thanks for having me.

[00:01:37] Jeffrey Rosen: Carter, what did the majority hold and what do you think of it?

[00:01:42] Carter Snead: Yeah. Um, for those of us who've been following this and who studied the the, the draft that was leaked there's not a lot newin the in Justice Alito's majority opinion. He holds, in short, that there is no fundamental right to abortion in the Constitution. He he provides a framework for an analyzing substantive due process, namely analyzing proposals of unenumerated rights or unwritten rights in the Constitution and he follows very closely what Chief Justice Rehnquist articulated in Glucksberg, namely that for an unenumerated right or an implicit unwritten right to be recognized by the court, it has to be deeply rooted in the nation's legal history and tradition and it has to be essential for the

preservation of ordered liberty. It has to be, it has to be necessary as to be an essential, an essential liberty interest.

[00:02:36] And he goes through the process of, of analyzing that question, evaluates the, the sweep of history, talks a lot about the common law, talks about the the Fourteenth Amendment due process clause which is the source of authority that Roe and Casey situated the right to abortion in. And concludes that the right to abortion was not, in fact, deeply rooted and I, and I should say, he doesn't, he ... So, he's sort of considers the common law, he considers the contemporaneous history of the ratification of the Fourteenth Amendment in the 19th century and then he, of course, talks about the history of abortion in America up until the day before 1973 in which abortion was legally restricted in 30 states although there was an interesting sort of political trend in the direction of liberalization, although I understand that it was a pretty complicated history. There's a kind of back and forth. New York, for example, sought to repeal its law, liberalizing abortion but was vetoed by Republican Governor Nelson Rockefeller, which is interesting.

[00:03:34] But concluded looking at the history that it, in fact, the right to abortion is not deeply rooted in, in American history. In fact, it had been up until 1973 legally disfavored or even the object of criminal prosecution and that ends that inquiry for him. He said that it's not it's not, therefore it is not an unenumerated right that we're going to recognize. He just distinguished that from, from other unenumerated rights, the right to same-sex marriage, the right to contraception from Griswold says those are, those decisions are distinct from the question before us right now. They're not on, they, they are not disturbed by the holding of this case. They won't be changed by the holding of this case. That's something Justice Kavanaugh goes out of his way to underscore in his concurring opinion.

[00:04:19] Um, he said and the primary distinction, that, that Justice Alito draws between those cases and, and this case is that those, those activities, same-sex marriage, contraception and others don't involve the intentional killing of a prenatal human life. And that's what makes, makes it different although there are, of course, other differences. There are other ways to distinguish the, the, the, the proposed right to abortion from those other rights.

[00:04:45] Uh, he and so then he analyzes the question from the perspective of stare decisis. He goes through a pretty well-familiar framework analyzing the question of whether or not even, if whether or not first was the case egregiously or grievously wrongly decided in the first instance. He, he says, "Yes," for the reasons he articulates in the first part of the opinion.

[00:05:05] Uh, then he talks about sort of prudential considerations like workability whether the doctrine's been hollowed out, whether or not the doctrine has or whether the precedent has had adverse consequences on other areas of the law, whether it's had adverse real-world consequences and then, of course, the question of reliance, whether or not reliance has built up on this on this, on this wrongly decided precedent. He works through those methodically as he did in the original draft opinion and concludes, "Uh, no. In fact, all the elements of stare decisis council in favor of overturning Roe and Casey."

[00:05:37] Um, so, not to go on and on about it but basically he analyzes the constitutional questions, says, "It's not deeply rooted." Uh, he analyzes the stare decisis question and then

looks at the precedents and asks whether or not the precedents require re- reaffirmation of those other precedents and he concludes that they do not.

[00:05:55] So not a lot of surprises here in Justice Alito's opinion. Um, as far as I read it. It, it's, it's, it's in all important respects the same as the, the draft that was leaked in the beginning of May.

[00:06:08] Jeffrey Rosen: Thank you very much for that. Mary, Justices Breyer, Kagan, and Sotomayor are dissented. What were the main arguments of the dissenters and what do you think of them?

[00:06:17] Mary Ziegler: Well the dissenters argued, I think, in part that the court didn't have to take this case, that Roe and Casey had already done as the dissenters saw it, a good job of dealing with and striking a balance given what they call the difficulty and divisiveness of the abortion issue. Um, they argued that that balance was a fair balance between the states' value on attached to fetal life or life in the womb and women's or pregnant peoples' interest in their life and health. Uh, they suggested that the majority had discarded that balance. That the effects of the majority's decision would be profound as the dissenters put it, "The curtailment of women's rights and of their status as free and equal citizens."

[00:07:15] The dissenters cast doubt on the conclusion drawn by the majority that other right were safe given as the dissenters put it, "That these rights were," quote, "All part of the same constitutional fabric." And the dissenters expressed concern about what this meant for the court as an institution and for the American people's perceptions of the court as an institution.

[00:07:43] In particular, there was a fairly direct accusation that this was a partisan decision taken because the court's membership had changed, not because anything about Roe or the surrounding law, whether that was the common law statutory law, law as involving fetal protections. None of that, the dissenters suggested, had meaningfully changed. What had changed was that Donald Trump and others had, has, had transformed the court and, and that simple fact alone, as the dissenters saw it, wouldn't be enough to justify the elimination of a right that had stood for 50 years and that many Americans would, would see it that way and ask serious questions about the court's legitimacy in the aftermath of this decision.

[00:08:25] Jeffrey Rosen: Thank you very much for that. All right. Now, let's dig deeply into the arguments in the majority, the concurrences, and the dissent. Dear We the People listeners, I'm always urging you to read the decisions. If you could now call up the decision and follow along with us, that would be wonderful and would help inform our learning together.

[00:08:45] Uh, let's talk first about the history and tradition argument in the majority. Justice Alito says, "Until the latter part of the 20th century, there was no support in American law for a constitutional right to abortion." This was a small change. The leak had "zero non," and that language was removed.

[00:09:00] Um, Carter, tell us about Justice Alito's quickening argument which begins with eminent common law authorities like Blackstone and Hale, has a debate about whether or not pre-quickening abortions were considered homicide at the time of the founding generation

and then emphasizes that, by 1868, when the Fourteenth Amendment was ratified, three-quarters of the states, 28 out of 37, had an active statutes making abortion a crime even if it was performed before quickening.

[00:09:29] Carter Snead: Yeah. So, I think the first thing that your listeners would be interested to know is, is the reason why he's going so deeply into the history as he does. I think there are two reasons. One reason we've, I've already said, namely his test. So, again, these, the most interesting one or the most ... This is very interesting in many different respects but the, the dispute between the majority and the dissent over how to do substantive due process is a major, major element of this case and it's going to have very significant consequences going forward.

[00:09:56] Um, Justice Alito thinks in his view as, and joined by four colleagues tracks the argument or the, the view that was articulated by Chief Justice Rehnquist in Glucksberg saying that when part- when a party comes forward and claims that there's a right that is not written in the Constitution or not embedded in the Constitution or is specifically entrenched by, by, in the text of the Constitution but rather implicit in it, an unenumerated right, the way to, to analyze that proposal is to ask whether or not the right is deeply rooted in the legal tradition of the United States and whether or not it is essential to, to, to the flourishing of ordered liberty.

[00:10:38] Now, the reason that that test was adopted in the first instance in Glucksberg is because substantive due process had previously been used in the minds of justices like Rehnquist and Alito to simply encode the policy preferences of the justices into the, into the Constitution, graft their policy preferences onto the Constitution, even though there was no constitutional warrant to do so. The substantive due process created a kind of temptation for judges and justices to read in their own preferences and so, because it invited justices to discover rights that were not mentioned in the Constitution explicitly.

[00:11:15] And so, what Chief Justice Rehnquist was trying to do in that case was to create a tether to cabin the discretion of the justices to something objective or something meant to be objective or more objective than just the, the justices' sense of justice or evolving standards of decency. Something that would tether the justices' discretion and, and per- and, and help the justice resist the temptation to simply do politics under the auspices of, of substantive due process.

[00:11:42] And so what the, the, the sort of cabining mechanism is history and tradition of the American legal system and whether or not how, how important the right is, namely whether it's implicit in the concept of ordered liberty or fundamental and essential for fundamental fairness. So, that's the first reason why Justice Alito goes so deeply into the history to try to disserve whether or not a right to abortion is in fact such a right. Is it deeply embedded in the fabric of our legal tradition?

[00:12:10] In 19, in the late 1990s in assisted suicide, it's ironic because in the, in the Glucksberg case, which was about whether or not there was a constitutional right to assisted suicide, the proponents of such a right invoked Casey itself for the proposition that there was a right to assisted suicide because Casey stood for the proposition that there was a broad right to self-determination, which included making existential decisions about life-changing things

like, like pregnancy and parenthood. Um, and, and then that case, assisted suicide but Chief Justice Rehnquist and all of his colleagues agreed that, in fact, there was no right to assisted suicide embedded in the history and tradition. If you read that opinion, they do a deep dive into the common law and into the history of e- early America as well.

[00:12:53] So, Alito looks to the common law and the 19th century and the 20th century to discern whether or not the right to abortion is deeply embedded in legal traditions and he finds no, it's not because of in analyzing the common law, what he found was at quickening, which was the, the point at which a mother can detect the presence of an unborn child in her womb abortion was pretty broadly criminalized. Um, prior to quick- And, and then, there's a question, of course, why quickening? Is quickening, does it have a moral significance? What is the reason they chose quickening?

[00:13:30] And Justice Alito says, "We don't really need to settle that question," although he notes that there is a common theory about why quickening was chosen, A, because of embryological understanding of the time didn't quite understand how the embryo develops from conception forward as a distinct, you know, self-perpetuating organism but also because it would be very difficult for a prosecutor to prove that an abortion had taken place because you can only tell at the time of the common law if a woman is pregnant if she can detect movement in her womb and that's quickening.

[00:14:00] However, prior to quickening, he points out that even though it was not subject to criminal punishment, abortion was still very significantly legally disfavored. It was legally disfavored in so far as it was the predicate for what we lawyers call and what the law calls felony murder. That is, if you are committing an unlawful act, if you're committing a felony and you accidentally kill someone which would ordinarily not be homicide or certainly wouldn't be first degree murder. If you're doing something felonious or unlawful and you accidentally kill someone, then you can be charged with murder because the felonious activity makes the behavior even more problematic, even more wrongful and, and punishable by the state's criminal law.

[00:14:44] And so abortion itself, if a physician were performing an abortion in the colonial period and prior to that in England and accidentally killed the mother that, that physician would be, would be charged with felony murder. If the same physician were performing an appendectomy and accidentally killed the mother, he would not be charged with felony murder. So, you can see the legal status of even pre-quickening abortion was, was strongly disfavored. Of course, contracts for abortion would be nullified for public policy as well in that same period.

[00:15:14] So, now, w- why does he spend so much time with that and with Hale and Bracton and Blackstone? In part, it's not just to do the analysis that Glucksberg prescribes. It's also to be responsive to one of what he describes as the serious errors of Roe v. Wade itself. Roe v. Wade claimed that there was, in fact, prior to the 19th century a broad right to abortion prior to quickening. And even though he removes the sort of more provocative language, none, zero, zip, or whatever it was saying ... He does say that no one has ever produced a statute, a, a judicial opinion or a commentary that has ever said that there was a right to abortion prior to quickening up until the 19th century. In fact, the first person to make that argument in a serious way was Cyril Means, who was council to NARAL, wrote two law

review articles making a novel claim that even Jane Roe's team thought was a stretch that there was in fact a right to abortion prior to the middle of the 19th century.

[00:16:15] Justice Blackmun cited that those two opinions, I think, six times In his effort to show that that, in fact, the right to abortion was in some sense, deeply embedded prior to the 19th century and I think that's one of the reasons why Justice Alito goes into that, that, that common law period.

[00:16:34] But then, of course, he also focuses on the 19th century during which time it's undisputed that abortion was a crime and, as you say, in three-fourths of the states at the time of ratification of the Fourteenth Amendment and, of course, and the year thereafter even more states codified bans on abortion from the moment of conception tightening it up prior to quickening. And those laws stayed in place in one form or another and other laws also were adopted all the way up until Roe was decided in 1973.

[00:17:04] Now, there was a period of liberalization in the 20th century, some legislative liberalization but even, as I said, on the day before Roe, you had 30 states that still restricted abortion in a way that Roe and Casey would not have permitted.

[00:17:17] On the question of whether or not there has been a right to abortion as part of America's legal tradition, he makes the point essentially and I'll try to be concise here, that, you know, at the time of ratification of the Fourteenth Amendment, abortion was a crime. At common law, abortion post-quickening was a crime. Pre-quickening was very legally disfavored, and even up till 1973, abortion was the subject of criminal punishment in the United States, and even, and he goes further. In 2021, 26 states and amicus briefs, a majority of states asked the court to overturn Roe v. Wade.

[00:17:51] So, all of that in his judgment leads him to conclude that it is not, in fact, embedded in the fabric of our legal tradition and therefore it can't be an unenumerated right. It fails the first part of that Glucksberg test.

[00:18:05] Jeffrey Rosen: Thank you very much for that. Mary, the dissenters are withering in the majority's treatment of constitutional history. They accuse the majority of cherry-picking history and noting that common law authorities did not treat pre-quickening abortion as a crime, say that the majority then moves forward to look at its very post-ratification history, that in the gun case, Bruen, it said was not relevant. And then goes onto say that fixing the meaning of the Fourteenth Amendment in 1868 has been rejected by the Casey court. Uh, not least because women were not among those who ratified the Fourteenth Amendment. Tell us more about the dissent's criticism of the majority's treatment of history.

[00:18:54] Mary Ziegler: Well as you mentioned, Jeff, the, the dissent I think first thinks that the majority, the majority's approach to, to history seems to depend on the right at issue. Um, and that the, in, the majority is willing here to look at history after the Fourteenth Amendment to elucidate the meaning of the Fourteenth Amendment in a way that the majority was not willing to do when the right at issue involved firearms and the dissent thinks, of course, that that's no accident. So, that's all to say the dissenters get into the weeds about the history that the majority explores.

[00:19:31] The dissent suggests that common law authorities were not convinced that abortion was a crime before quickening, that most American law actually followed the common law rule. Um, certainly that the practice in the real world confirmed that and I think most importantly, as you mentioned that, as the, the dissent puts it, "We, the people, who ratified the Fourteenth Amendment in no way resemble the we, the people we have today." Men ratified the Fourteenth Amendment. Um, women and other people are capable of reproducing did not. And it seems perverse, the dissent suggests, to allow the reading of the Constitution or the limits of constitutional rights for half the population to be determined exclusively by the other half and another half writing in the 19th century.

[00:20:24] So, I think the, the suggestions here are twofold. I think one, there's a concern the dissent raises about whether in fact this appeal to history and tradition that Carter describes is actually has any kind of restraining effect at all because, of course, historical authorities disagree on the history of the 19th century notably that the majority relies very heavily on a single historian Joseph Dellapenna, primarily to the exclusion of other historians of the 19th century with, with some kind of notable selective usage. Um, and so if history is contested in this way, the dissenters ask to what extent a methodology based on history and tradition does any more to stop judges from imposing their policy preferences than any other methodology when it comes to substantive due process would. And I think then with this suggestion that the, the majority's vision of the people who count when it comes to delineating our constitutional rights as one that the dissenters want no part of and that other may not either.

[00:21:26] Jeffrey Rosen: Thank you so much for that. Carter, a methodological question. I had thought when I teach constitutional law that judges look to history and tradition only when the question is whether an unenumerated right, like the right to choose abortion exists. When it comes to enumerated rights like the Second Amendment, you just look at what the framers thought in 1791 or 1868 but this case, in the Bruen case seem to do the opposite. Dobbs focuses purely on 1868 as the question of whether or not the unenumerated right exists. Whereas, Bruen, the Second Amendment case does a very wide angle survey in history from medieval times to the present. Do I have that wrong or what is the court doing?

[00:22:12] Carter Snead: So, I have to confess that I don't know enough about the Second Amendment jurisprudence to have a responsible opinion on Bruen. Um, and, and so I haven't studied that question carefully but what I can say, though, and I think is I would gently challenge the premise. I, think that, that the reason that this opinion ... So, so I'll take your word for it on enumerated rights, if, if it turns out that you're supposed to simply confine yourself to the contemporaneous understanding of the, of the text itself and, and, and again, I'll take your word for it on Bruen, too, because, to be perfectly honest with you, I haven't actually read the opinion yet. Um, because I don't teach that, which is probably to my discredit.

[00:22:54] But nevertheless speaking only to the question of unenumerated rights, I think we're in agreement that, at least according to the Glucksberg standard, you're supposed to look at history and tradition to see if it's deeply embedded in the fabric of the American legal tradition. However, I, I would say that and I would take issue, I think, with the dissent's argument that it, it freezes our rights in amber in 1868.

[00:23:19] I actually don't ... I, I think Justice Alito will respond to that in his majority opinion and says, "No. In fact, that's not what we're doing." And, and w- the reason we talk

about the, the history of the 20th century up until 1973 and even the history as reflected by the, the states from 1973 to 2021 who continue to try to enact laws that were contrary to the, to the, to the strictures of, of Roe and Casey but that's further evidence for the proposition that it is not embedded in our legal tradition. That in fact, it's a, it's a full sweep analysis. It's not simply saying, "what did people believe in 1868?" Those are your rights now. And, of course, women didn't vote. It took, it took time for the court and for the country to figure out the meet, the entailment of things like the equal protection clause, right? I mean, you have Loving v. Virginia as a, as an example of that.

[00:24:09] Um, but nevertheless, I think that Justice Alito's analysis of the legal tradition is, is not limited to 1868, but we can put that to the side as well. I think, an interesting distinction between the majority and the dissenter here is the dissent actually doesn't they object to Glucksberg, the Glucksberg framing. They, they, they say that this is not the right way to analyze this question. And they gesture towards Justice Harlan's dissent in Poe v. Ullman in which, which is, which plays a very sig- It's all, it's funny how these are connected to the Glucksberg case. It comes back to Justice Souter's concurring opinion in, in Glucksberg in which he describes a com- a competing analytic framework to the Glucksberg framework which is, which he borrow from Poe v. Ullman. It's something more unlimited. It's, it's sort of reason judgment uh, in, in analyzing the question presented.

[00:25:00] And of course, Poe v. Ullman was a case involving contraception in which, in Justice Harlan dissented and said, "This is, this law shouldn't be should, can't, can't stand this law banning contraception because it intrudes upon uh, the intimate marital space of, of the family." Um, and, and, and, in fact, also says, "This is an entirely self-regarding private act," which again, distinguishes it from the context of, of abortion, at least, in, in, in so far as those states hold the view that abortion takes the life of an innocent third party.

[00:25:31] So it's a very ... And, and then in Justice Alito parries and says, "Well, you, you, you disclaim the Glucksberg sort of cabined discretion analysis of substantive due process. You, but you don't give us something that similarly cabins the discretion of the justices. The dissent disagrees. They say, "No. Not anything doesn't go." Um, but then Justice Alito finds what he finds missing and I tend to agree with him. There's not really a limiting principle in the, in the dissent as to what their approach to substantive due process would be insofar as it's clear because as they only gesture towards Poe v. Ullman. They don't actually spell out what the right framework is the way Justice Souter did in his concurring opinion in Glucksberg.

[00:26:09] Jeffrey Rosen: Thanks so much for that. That, that is a helpful distinction and Mary, Carter argues that Justice Alito is applying this Poe v. Ullman Glucksberg standard saying that we do look at the full sweep of tradition, but we have to define the rights in question narrowly. Is that a convincing response to the dissenters claim that the majority is calling into question other substantive due process rights including the right to same-sex intimacy and contraception? The dissenters say that the majority is calling into question a whole series of precedents including those advancing on bodily integrity theory of abortion rights and a familial privacy theory of abortion rights all of which are rooted in cases from the 1920s about familial privacy or from the 19 '60s about bod- bodily integrity. But Carter says that Jus- Justice Alito is saying, "Don't, don't worry about those cases because those might be more convincingly rooted in history and tradition than abortion. Do you find that response convincing or not?

[00:27:14] Mary Ziegler: Well, I, I think I'm not entirely convinced. I mean, in part because, of course, one of the most eloquent champions of the theory that you cannot justify right to same-sex marriage based on our deeply rooted history and tradition is Samuel Alito. So a little unpersuaded that Samuel Alito has had a dramatic change of heart in that regard or that other justices have.

[00:27:36] Um, and so, I mean, the case, I think, can be made, as that the dissenters suggest, that at the time of the 19th century, certainly same-sex marriage wouldn't have been regarded as a right. Um, states were criminalizing sodomy, of course much more consistently, punishing it more fiercely, describing it much more as an offense, having to do with homosexuality at, at precisely the time the court is interested in it. This is the way the court applies approach dealing with history and tradition. Something is similar of course, as well, especially for looking to some degree at post-ratification history of, of rights to use contraception.

[00:28:16] And I think Justice Alito's efforts to draw distinction here doesn't entirely ... I mean, I think obviously he says you can maybe make a stronger case for those rights looking to history and tradition, maybe in the case of married couples using birth control. You can appeal to the historical importance of marriage, the same goes maybe for same-sex marriage but that only is true if you describe that right at a level of generality that someone like Justice Alito would prefer not to do, right? Because, of course, there was no right to use contraception full stop much less for unmarried people, much less for anyone and certainly not for same-sex couples to marry.

[00:28:53] And so, I think, really here instead what you see the court doing is essentially issuing something like a disclaimer in saying, "Take our word for it. We're not going to do this." Carter, I think in our previous conversations had drawn other distinctions between the right to abortion and other rights.

[00:29:10] Justice Alito's I think most convincing distinction is simply that abortion, in his view and in the view of the 26 states asking that Roe be overturned involves the taking of a life and other rights do not. But simply as a matter of consistently applying the court's methodology it would seem that many of those cases were wrongly decided and it would seem to be more a matter of policy or pragmatic concerns on the part of the court that those rights not be overturned much more so than it would be a kind of consistent application of the methodology that Justice Alito lays out in the case. And I think Justice Thomas and his concurrence suggests as much. So it's not, I think there's other on the court, other conservatives who are already convinced that Justice Alito's reassurances are, are good for a short time only before the court is willing to, in fact, reconsider those other decisions.

[00:30:03] Jeffrey Rosen: Thank you so much for that. Um, Carter, Justice Kavanaugh explicitly says in his concurrence that cases involving same-sex intimacy and marriage and contraception are not up for grabs, whereas, Justice Thomas, as Mary noted calls for those cases to be overruled. Descriptively, what distinctions do you imagine Justice Kavanaugh would make between the same-sex marriage and contraception cases and abortion and are there five votes on behalf of that proposition or not?

[00:30:37] Carter Snead: So, I was I took that fact that there's only one justice who's suggested that these other precedents would be in danger to be confirmation of my intuition that there was not on, among the justices, a view that abortion was sufficiently similar to these other areas to, to, to sweep them into the, into the holding of this case. Uh, Justice Thomas, it should be said is, he, he goes further than simply saying, "You know, we should revisit Griswold and these other cases." He says, "Substantive due process itself is illegitimate." Uh, that's a position that I gather no one else on the court holds. That's, that's a one, one justice group universe for that proposition. He wants, he takes this opportunity in his concurring opinion to say the entire enterprise of finding unenumerated rights is illegitimate and should be, should be shunned.

[00:31:30] And so he, he's willing to dismantle the whole process and that, by the way, doesn't merely include contraception, marriage. It, that includes a whole host of areas of the law involving punitive damages, involving criminal procedure. I mean, there's a whole array of substantive due process jurisprudence that goes well beyond what we're talking about now, but I think Justice Thomas would like to dismantle and, in that way, I think he is alone. I don't see any other takers for that proposition.

[00:31:48] Um, and as I say, and this actually leads me to something. And Justice Kavanaugh, again, his, his concurring opinion is very, very telling in that he wants to make it clear. I mean, he is, you know, the, it takes five votes to overturn Roe and Casey and he is, you know, the ... Any of them could be considered the fifth vote but he, let's, let's just say for the sake of argument, he's the fifth vote to do that. He's effectively signaling that I will not vote for for, for transgressing into these areas.

[00:32:25] He also puts down some other markers as well, which we can talk about if we have time but, but there's something about Justice Kavanaugh's concurring opinion and, for that matter, that echoes something in Alito's opinion that gets to a major difference between the majority and the dissent here that I think is worth pointing out, which is to say the fundamental disagreement, aside from how to do substantive due process is whether or not the Constitution authorizes the court to do the balancing between the competing goods of bodily autonomy and reproductive freedom on the one side of the ledger which the dissent, by the way, really underscores is not merely about bodily intrusion or even psychic harms from pregnancy but actually they focus on the, on, on the, the consequences of a woman's entire future uh, of having an unwanted child. Uh not just an unwanted pregnancy.

[00:33:16] And that's, so that's, so that to me is interesting that they, that they really underscore that as in, when they set forth the balance they include very strongly the kinds of arguments made in the amicus briefs by women saying, "If we didn't have abortion, we wouldn't be able to succeed in business, we wouldn't be able to success in professional sports," and so on. There was some amicus briefs filed to that effect and they really lean into that argument.

[00:33:38] So you have that on the one side of the ledger. That's how we got the right to abortion in the first instance in Roe and Casey was balancing the interests of the women on the one hand versus the state's interest in a variety of things but most prominently pre-natal life.

[00:33:52] Justice Alito and Justice Kavanaugh makes very clear they do not believe that the Constitution authorizes them to do that balancing, to balance the, the competing goods in that calculus and the dissent, as Mary correctly points out says, "We had a fair balance before between these interests." The viability standard represented a fair balance although I, I question whether the dissenters would support and hold the constitutional opposed to viability ban but especially given the way they describe the interest on the women side but put that, put that to the side. That doesn't matter for present purposes.

[00:34:26] Um, the notion of a balance at all is what the majority disagrees with. I the authority to, to conduct that sort of a balance is the very thing the majority says the Constitution doesn't authorize them to do.

[00:34:39] And the, I think that's a key distinction between the abortion context and the context of same-sex marriage, the context of contraction. Um, and, and one of the things that I think was unsatisfying about the dissent's arguments was that they failed to give full weight to both sides of that ledger. Like, they spoke very eloquently and powerfully about women's interests and those are all extraordinarily important. But I don't think they took seriously the state's arguments on the other side about the important equal dignity and value of prenatal human life including post-viability or pre-viability human life because if they did, I think that they would, it would have been clear that it's a much more complicated and difficult question, right?

[00:35:23] It's arguably the hardest question we have in American public life. How do you, how do these commensurable goods stand in relation to each other? How do we deal with that? Um, and with the majority in Kavanaugh says and I think in a persuasive way is the Constitution doesn't tell us that we the court can do that for you. The only people that can do that are the American people through their political branches and if, if people overreach and if, and if women's interests are given short shrift or if the unborn's interests are given short shrift, then they're, then the, then the, the representatives who did that will be held accountable by, by the people themselves.

[00:36:02] So, I think, I'm sorry, it's a long-winded way of answering your question, but I think that's a key distinction, the complexity of the question before the court in abortion is just different from the question of same-sex marriage, contraception because of the clash of incommensurable goods that are involved.

[00:36:19] Jeffrey Rosen: Thank you very much for that. Mary, are you persuaded by Justice Kavanaugh's statement that same-sex intimacy, contraception, and marriage cases are not at issue. The dissent uses the memorable phrase scout's honor to characterize the promise that those cases are okay. That sounded like a line from Justice Kagan although-

[00:36:42] Carter Snead: I'm sure it is.

[00:36:43] Jeffrey Rosen: ... it's hard, it's hard to say. [laughing]

[00:36:44] Mary Ziegler: Yeah.

[00:36:45] Jeffrey Rosen: But were you persuaded by that and then address this broader and fascinating question of the rejection of balancing as, as, as, as Carter says, "The court here say, 'We, we, the court, are not going to balance. It's up to legislatures.'" In the Bruen case, Justice Breyer has a remarkable footnote saying, "The majority seems to reject constitutional balancing entirely in the Second Amendment and abortion context," and suggests that this is a dramatic change from existing law. Um, what is the significance of that debate?

[00:37:13] Mary Ziegler: Right. I mean, I'm, I'm a little skeptical of, of Justice Kavanaugh's promise as well. Um, I, I remember back to 2020 when Justice Kavanaugh was writing simply that you needed more evidence to have a sounder application of the undue burden test. And you fast-forward two years with one new member on the court and Justice Kavanaugh's now writing a full-throated defense of what he views as constitutional neutrality.

[00:37:37] Now, Carter's right that no one joins Justice Thomas's opinion but I don't know how much we can read into that either, because Justice Thomas had long had a habit of writing concurrences where he called for the overruling of Roe. Often, he was not joined in those concurrences or he was joined maybe by Justice Alito and, of course, it turned out that he had far more support for that view than we might have believed based on those concurrences alone.

[00:38:03] So, I certainly think that Justice Kavanaugh's concurrence means that Justice Kavanaugh will not be voting to overturn Obergefell v. Hodges in the short term, but if we take Justice Alito at his word and the existence of opposition to a case signals that it may not be good law if we take Justice Kavanaugh at his word that we should, the court should seriously consider overruling any decision that fails to settle a divisive social issue. He calls out the Roe court and Casey court for failing to settle the abortion issue. I hardly think that Obergefell has settled the issue of same-sex marriage. And we've seen in the days or even hours after the Dobbs decision, some conservatives renewing their claim that Obergefell was bad law and deserves reconsideration.

[00:38:53] So, I think there's really a time horizon question here. Justice Kavanaugh may not be prepared to overrule Obergefell today, but if there is a kind of push in the states to renew that fight, if you have 26 states coming to the Supreme Court in a few years, saying something similar about Obergefell that it failed to settle the, the debate, that it was a vague and anomalous standard that was unworkable, all things that Justice Alito himself, of course, had said before. I'm not sure Justice Kavanaugh won't be prepared to hear that. Um, I don't know what ... Like I said, I think often the court has had, had promises that have expiration dates.

[00:39:33] Of course, when Justice Kennedy was the, the swing vote on the court in Lawrence v. Texas, he famously issued the same kind of disclaimer about same-sex marriage when issuing a decision on same-sex intimacy and then, of course, the court took that back in 2015. So, I think that, at most, there's a reassurance that we won't be seeing that kind of decision in the next few years but past that, I don't think we really can predict.

[00:39:59] Um, as for balancing, I, I do think it's striking that this court seems to be moving dramatically away from balancing. I had expected that to be a rejection of balancing primarily as a rejection of the idea of a right to abortion. I didn't expect the court to be

moving, I, I guess, as consistently in that direction as it seems to be. Um, and I take Carter's point that people on the pro-life side had been, I think, felt, you know, sometimes correctly that the court's liberal members had not done a good job of conveying respect for the views of people who were pro-life.

[00:40:36] I think the Casey opinion actually goes to some length to try to do that. Um, the cases after Casey, I think, speak quite often of the dignity of fetal life. So, the court I think was trying quite hard actually to convey respect for those views. The dissenters maybe less so in this opinion.

[00:40:54] But think it's also fair to suggest that what the majority here is doing is not free of value judgment, right? The majority spends almost no time talking about the interest of people on the side of Roe v. Wade, right? The majority dedicates a grand total of a paragraph to claims about equality on the basis of sex and abortion, which many, I think, including the court's conservative members would have viewed as the most serious argument for abortion rights, that and the majority's view deserves about a paragraph and nothing more spends almost no time on reliance interest and how those would affect people.

[00:41:32] And so, the idea that historical approaches are somehow stripped of value judgements, I think is also not very convincing. Um, and if the dissent has some sort of failure to account properly for the deeply held views on both sides of this issue, I would think the same would be true of the majority which is why I've always thought that, if I were uh, wanting to overrule Roe and I were to pick a justice to do it, I would not pick Samuel Alito for precisely this reason. I, I think that that was probably something that will not make this decision as effective for those who are unhappy with the Roe decision as it might otherwise have been.

[00:42:10] Jeffrey Rosen: Thank you very much for that. Let's talk about the analysis of precedent. Uh, the court identifies five factors, the nature of the court's error, the quality of the reasoning, workability, the effects on other areas of the law, reliance interests are the prongs.

[00:42:24] Carter, what have we learned from the application here? You've ... The majority and dissenters strenuously disagreeing about the application of all of those prongs. What do they say about the future of the other cases we've been talking about like Obergefell and contraception and are you persuaded by the application of the stare decisis analysis or not?

[00:42:54] Carter Snead: Yeah. So, one of the ... There's a deep disagreement about how to read Casey as a precedent. They call, the dissent calls it a precedent on precedent. We really need to defer to Casey's assessment of stare decisis. I think that the majority and Justice Kavanaugh disagree with that. They, they, they take the view that again, it was clear in the, in the draft opinion as well that that, that, that in some ways, Casey was an outlier in terms of its assessment and it's application of stare decisis. Um, and I, of course, there's disagreement between the majority and the dissent as to whether or not the rule at issue had been workable or not. I find that majority's argument that it pretty persuasive that not only was the, were Roe and Casey grievously and egregiously wrong as a matter of law in the first instance, but, in fact, they have proven to be problematic in other ways.

[00:43:49] T standard, the undue burden standard has caused confusion, that there, there aren't even five justices in the court right now who could agree what Casey required in terms of an undue burden. They talk about how even, in Casey itself the justices and the majority disagreed amongst themselves about which provisions of the Pennsylvania Abortion Control Act were an undue burden. Justice Stevens thought some things were undue burdens that the plurality didn't think were undue burdens so they had to cobble together their votes with the votes of those who dissented about retaining what the majority described as the core holding of Roe v. Wade.

[00:44:24] And then, I think, again, and this is to Mary's point. The argument that you hear in the public square made by laypeople and, and political actors is, is connected to this reliance point, right? So, the idea in Casey is that reliance means perspective, conditional contingent, possible use of a right announced by the court. Now, in the future of circumstances present themselves that that precedent would be needed by you, namely if you, if to, to, to make it more concrete. Um, you know, if there's the, the Casey opinion or the Roe opinion was that objective reliance by people who thought they might become pregnant in the future in an unplanned way or in a manner that they didn't wish to continue.

[00:45:13] Um, Justice Alito makes the point that reliance and Justice Kavanaugh makes the point as well, that reliance is a technical matter never meant quite what Justice or the plurality said it meant in the Casey decision but, in fact, reliance was a retrospective analysis where you ask a question about whether there is a settled interest using a, usually an economic or commercial interest that was taken in reliance on a particular state of the law and then to change the law would disrupt that past settled interest. Um, otherwise, anything could be the object of reliance, any rule could be the object of reliance going, looking forward into the future and therefore, it would be such a significant ex- you know, significant consideration that, that you wouldn't overturn any precedents as a result of that.

[00:45:58] Um, and so, I think so, there's a disagreement about how reliance works between the majority and the dissent and it is true, I think, that the, the majority doesn't spend a lot of time on talking about reliance because they simply, A, disagree with Casey's understanding of w- of how to do reliance analysis but, B, also, I think they wanted to shy away from anything that looked like ... I mean, I'm speculating. Who knows what they were thinking but balance, balancing the two competing interesting on uh, the interests on the woman on the one side versus the interests of the prenatal human being on the other and the other, other interest that the states invoked to restrict and regulate abortion involving the integrity of the medical profession or promoting respect for life more generally or pro- promoting maternal health.

[00:46:43] Um, so I, I think, I think that I mean, there's just a disagreement about how to do stare decisis in this particular instance but I'm persuaded by the proposition that the history of American abortion jurisprudence has never been stable exactly. It was, it's, you know, we've had a series of shifting normative goods. We started with the privacy in Roe. We moved to liberty in Casey. Uh, we have different rules. We have the trimester framework. We, then we pivoted to an undue burden standard. Then, we pivoted again to a kind of burnt benefits burdens balancing in Hellerstedt which, and then we kind of didn't know where we were in June Medical Services in 2020.

[00:47:18] Um, so the goods of stability and transparency and reliability that stare decisis are meant to serve. I don't think were ever present or manifest in the abortion jurisprudence itself. I mean, it's a big change to no doubt what the court's doing here but I think Justice Thomas said it well in his concurring opinion that the history of American abortion jurisprudence has been a kind of conclusion in search of a rationale and that being the case, stare decisis is not a strong reason to retain the precedent, especially including, and I'm sorry for going on and on but including the fact that the abortion jurisprudence has, I think had deleterious effects on other doctrinal areas, First Amendment standing, res adjudicata, et cetera.

[00:48:01] Jeffrey Rosen: Thank you so much for that. Mary, the dissenters are withering about this stare decisis analysis. They say that the standards of Roe and Casey are perfectly workable, tens of millions of American women have relied on the right to choose, the majority has overruled Roe and Casey for one and only one reason, because it has always despised them and now has the votes to discard them. Tell us more about the dissent's stare decisis analysis.

[00:48:25] Mary Ziegler: Well, I think the, the dissent's stare decisis analysis on workability picks up on a point we've been discussing before, which is that there's nothing uniquely unworkable about the kind of balancing analysis that, that Casey and Roe acquire. Um, and, and that, in fact, constitutional balancing test can be found all over constitutional law and that there was nothing particularly difficult for the lower courts which had been faithfully applying the undue burden test for some time. Um, I think that the dissenters were, were skeptical of the idea that the fact that the court had tinkered with Roe and Casey was a sign of a fatal flaw in Roe and Casey more than it was a sign that, that there were justices who had never been happy with Roe and Casey and that there were Americans who thought Roe and Casey were wrongly decided who continued to challenge them.

[00:49:19] So, unless simply being unsettled makes a decision unworkable, then there was no, the dissent suggested, no real profound question about workability. Uh, the dissent, I think, really tries to take the majority to task on the reliance point I think suggesting that they, in the dissents either there's no question there were serious reliance interests that people were planning and structuring their lives around the availability of abortion, particularly people who didn't have the option to have support in making other decisions and that their lives would be upended by this decision in ways the majority doesn't account for.

[00:49:58] I think that the dissent suggests as well that often changed facts or changed law warrant the reconsideration of a decision and, as the dissent suggests, the only real significant change, in fact, here is the change in the court's competition. There was no profound change in substantive due process warranting this decision. There was no buildup in the court's abortion jurisprudence warranting that decision other developments that the majority notes such as the availability of safe haven laws and the demand for adoption, the dissent suggests haven't changed significantly whereas things that have remained constant like maternal, the risk of maternal mortality in the United States the lack of adequate health care coverage for many women and pregnant people, the existence of intense pregnancy discrimination in the workplace, the unavailability of paid family leave, the reasons that even people who might want to carry a pregnancy to term are unable to. None of those things have changed. But what has changed, the dissent suggests, is the court.

[00:51:06] Um, and so, I think this is, in a way, a suggesting that if Casey changed the way the court often applies stare decisis, the dissent would argue that so does Dobbs.

[00:51:17] Jeffrey Rosen: Thank you so much for that. Well, it's time for closing arguments in this important and illuminating discussion. Carter first one is to you. Uh, what are final aspects of the majority decision you'd like We the People listeners to know about and why do you think they're correct?

[00:51:34] Carter Snead: Yeah. Well, I think the most persuasive thing in the majority opinion is and echoed in Justice Kavanaugh's opinion is that, that the very difficult question tragically difficult question of how to, of how to reconcile the competing interest that we care about, both of which we care about very deeply, mainly reproductive freedom and the futures of women and their, their, their right to self-determination. Uh, it, it, against the backdrop of a history where women have not been treated the way they deserve to be treated in our country on the one side versus the, the, the, the fundamental good of protecting innocent prenatal human life. Uh living, living human organism, member of the species. Uh, as well as the, the additional issues of preserving the integrity of the medical profession and promoting respect for life more generally and promoting maternal health, all of which are on the sort of state side of the ledger. This is a very, very hard question. People disagree very strongly and it's important for all of us to, to be mindful of, of the things that the vital interest that people on both sides of this issue care about and to be respectful of that and to do our best to really understand where they're coming from, especially if we disagree with one another.

[00:52:45] This is such an usual question. There's no other instance in which I'm familiar with in which there is a, a literal, vital conflict, a zero sum life and death question weighing these kind of interests against each other in our public life and I just don't see the Constitution authorizing the Supreme Court to settle that for us by their own judgment, their own analysis of those competing normative goods and that, and the majority is very direct in saying, "This is not our job. The Constitution doesn't allow it. Abortion is different. Abortion is different from same-sex marriage. It's different from contraception. It's different from the other areas of child-rearing and family intimacy and family matters. It's just different because, because it involves, it involves killing of what many of us recognize as, as, as an innocent human life."

[00:53:36] And so I, I find that very persuasive and, of course, it'll be a wrenching moment and there are a lot of people who are deeply anxious and upset about this and those of us who, like myself, who, who, who believe that it's important to defend every, everyone from conception to natural death that regardless of who they are or what others think of them or how dependent they are or how small they are. Um, it's important for people like me to be very, very thoughtful and mindful of the hurt that other people in our country are feeling right now and really take this moment to reach out a, a hand of friendship to those to say, "Let's ... Look, this has now been decided. Let's find ways of common ground to care for the things that you care about and the things that I care about in so far as we can find overlapping agreement and to move forward in the spirit of friendship."

[00:54:22] Jeffrey Rosen: Thank you so much for that. Mary, the last word is to you. Please tell We the People listeners what final aspects of the dissent you think that they should pay attention to and why you think they're correct.

[00:54:33] Mary Ziegler: Well, I, I think the dissent has two points I think in closing that are important. Um, one, I think that the dissent points out that it's, it's unusual for the court to eliminate what had been a fundamental constitutional protection. I think the dissent dwells on this fact and acts us to think what, what it means that the court has eliminated what has been a fundamental constitutional protection. The, the momentousness of that. And in light of that, ask us to take seriously the possibly that the court may not be done, right? If the court can lightly dispose of a constitutional right like this at a time when there was no circuits [inaudible 00:55:07] or pressing need to take up this case, it's unclear if this is the end.

[00:55:12] The dissent suggests, of course probably more than I would, that Roe and Casey were successful, right, that they described this as a sort a settlement or a successful balance. I think probably this exaggerates the importance of the court for good or ill in our constitutional politics, but I think the dissent also raises important questions about the kind of damage that this decision may do to the court in particular the perceived legitimacy of the court. And I think that's another question that we can take away from this decision.

[00:55:46] Um, regardless of what, how one thinks the legitimacy of the court is earned or should be earned, we know descriptively that when the court is viewed as partisan people tend to lose faith in it and then and we know that there's a real danger, I think, of this happening because of the way this decision was rendered because of the, the tone in which it was rendered, because of the lack of respect it showed for people at times who disagree with the, the majority decision.

[00:56:11] Um, and so I think that, as the dissent frames it, this is a moment that some will view as the dissent puts it, with sorrow, not just for people who are unhappy about what they view as the erasure of a fundamental right but people who are concerned about the future of the court.

[00:56:26] Jeffrey Rosen: Thank you so much, Carter Snead and Mary Ziegler, for an illuminating, thoughtful, and above all, civil four-part series about the Dobbs case. You have provide We the People listeners with a model of civil constitutional dialog on the most hotly contested constitutional issue of our time. Mary, Carter, thank you so much for joining.

[00:56:49] Mary Ziegler: Thanks for having me.

[00:56:50] Carter Snead: Thanks. It's a pleasure to be with both of you.

[00:56:52] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by David Stotz. Research was provided by Colin Thibault, Vishan Chaudhary, Samuel Turner, Sam Desai and Lana Ulrich. Homework of the week, dear We the People friends, please read the Dobbs decision. Read the majority opinion, read the concurrences, read the dissent, and make up your own mind. And if something strikes you about the decision, or if your mind is opened or changed from your reading, drop me a note and let me know what it was, JayRosen@ConstitutionCenter.org.

[00:57:25] Please rate, review, and subscribe to We the People on Apple Podcasts and recommend the show to friends, colleagues, or anyone, anywhere, who's eager and who is not in these anxious times, for civil constitutional debate. And always remember that the National

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