



***Roe v. Wade* at 50**  
**Thursday, January 26, 2023**

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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. January 22nd mark the 50th anniversary of *Roe v. Wade*, the landmark decision about abortion that the Supreme Court overturned last June in *Dobbs versus Jackson Women's Health Organization*.

**[00:00:36] Jeffrey Rosen:** Joining us to discuss *Roe*, *Dobbs*, and the future of the abortion debate and the Constitution are scholars, Mary Ziegler and Carter Snead. They convened for a wonderful multi-part discussion in the months leading up to *Dobbs*, uh, last year, and it's an honor to reconvene them to discuss the anniversary of *Roe* in the post-*Dobbs* landscape. Mary Ziegler is the Martin Luther King Jr. Professor of law at UC Davis School of Law. She's the author of six books on abortion, including her newest book out just this week, *Roe: The History of a National Obsession*. Mary, welcome back to the show, and congratulations on your wonderful and superbly timed new book.

**[00:01:22] Jeffrey Rosen:** Thanks so much.

**[00:01:23] Jeffrey Rosen:** And 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's the author of *What It Means to Be Human: The Case for the Body in Public Bioethics*, which was named by the *Wall Street Journal* as one of the 10 best books of 2020. Carter, it is wonderful to have you back on the show.

**[00:01:42] Jeffrey Rosen:** Great to be with you and Mary today.

**[00:01:43] Jeffrey Rosen:** Let's begin with the post-*Dobbs* development and then we'll double back in history and move up to *Roe v. Wade* itself. According to the latest *New York Times* tracker, most abortions are now banned in at least 13 states, and in many states, the fight over abortion is taking place in courtrooms where there've been lawsuits to block the enforcement of particular laws and a number of important, uh, state supreme court developments. Um, Mary, uh, give us a sense of the legal landscape post-*Dobbs*.

**[00:02:17] Mary Ziegler:** It's very complicated and confusing, I think, as an overview. So, there are different kinds of battlefields as you mentioned. There are fights in state supreme courts. Um, people are closely watching developments in Kentucky that just had a hard-fought, uh, state

election over who will sit on that state supreme court, um, as to whether that state's, uh, abortion law is, is constitutional as a matter of state law. We had a kind of dueling decisions emerging in Idaho and South Carolina recently.

**[00:02:45] Mary Ziegler:** Idaho holding that its state law did not violate the state constitution while South Carolina judges held that its six week, uh, ban did violate the state constitution. All of that is going to, I think, put a, a spotlight on other state supreme courts, uh, going forward, um, both state supreme court elections and state litigation. I think, Carter will probably tell you more about litigation in, in his home State of Indiana. There's a lot of fighting in my former [laughs] home State of Florida, again, in part, key to the fact that the state supreme court's composition has changed dramatically in recent years, making it much more likely that the court will reverse, uh, existing state precedent and allow, um, bans on abortion at varying points in pregnancy.

**[00:03:30] Mary Ziegler:** There's, of course, some federal litigation, um, as well, much of it centered on abortion pills. Some of it relies on the theory that, uh, the Comstock Act, which was a 19th century law that prohibited the mailing of, um, obscene literature, birth control pills, and abortion pills, um, part of that is still in force, and some folks who are opposed to abortion have argued that it effectively prohibits all mailing of abortion pills anywhere in the country, including places that have, you know, chosen to protect abortion as a matter of state constitutional law.

**[00:04:04] Mary Ziegler:** There are, uh, lawsuits, several lawsuits that could bring that argument, um, into federal court and potentially all the way up to the US Supreme Court. There's still also ongoing [laughs] litigation about, uh, access to abortion and emergency scenarios under the Emergency Medical Treatment and Labor Act. There were, competing Federal Court rulings on that subject. So there's, there's lots of balls in the air, lots to follow, um, and a, a lot of uncertainty, I think given all of the litigation we're seeing. And I'm not...that's scraping the surface, [laughs]. There's a lot of other things I didn't say.

**[00:04:36] Jeffrey Rosen:** Thank you very much indeed for that. Carter, how would you describe the post-*Dobbs* legal landscape?

**[00:04:41] O. Carter Snead:** Yeah, I agree with Mary. It is...after 50 years of the political branches not having the, a wide range of motion to, to legislate in this space, there's not surprisingly been a very messy cascade of, of actions. Right after the leak, there were a series of, of, of actions taken by states at the legislative level, some, uh, by strongly pro-choice states to expand, uh, and protect abortion rights. In fact, even before *Dobbs*, states like California, Colorado, Connecticut, Washington DC, Delaware, Hawaii, and others, uh, moved to, to try to protect, um, abortion rights in those, in their, in the borders of those states.

**[00:05:24] O. Carter Snead:** Other states decided to pass 15-week bans, or even more restrictive bans. And by my very rough count, I think there are 23 states that have laws that are pretty restrictive banning abortions, and then there are about 24 states that have more access and it... But again, it's a moving target there for states without really, uh, very restrictive laws. And,

and, but as...they have 20-week bans or 24-week bans in place like New Hampshire or Pennsylvania.

**[00:05:53] O. Carter Snead:** But as, as Mary said, there's a lot of litigation now, and I count, including in my home state of Indiana, something like 17 different lawsuits happening, right? There may even be more in which the, uh, abortion rights, advocates have challenged the constitutionality of laws on the grounds of the state constitution. And basically, they're fighting, uh, what are effectively mini *Roe v. Wade*-type arguments, uh, in, pro and con in, in those states, making the argument that these, these, these constitutions, some of which were, you know, drafted in the 18th and 19th century, um, have implicit unwritten, uh, rights to privacy that, or, or liberty that extend to abortion.

**[00:06:33] O. Carter Snead:** And, the arguments are playing out very similarly as they did in *Dobbs*, namely, how do you interpret the Constitution? What is the role of history in text and tradition? What is the role of contemporaneous laws when, when abortion was a crime in many of these states? And this is sort of the first-time people are making the case that their state constitution have these arguments and...or have these implicit rights. And there've been a lot of injunctions.

**[00:06:57] O. Carter Snead:** The advocates for abortion rights have, have found sympathetic state court judges who have enjoined the laws in many, many instances, and they've bubbled up to, already to the state supreme court who've had oral arguments in the South Carolina's Court as, as, as Mary pointed out. In the Indiana Court this week, they had an oral argument. In Kentucky, uh, they had oral arguments right after the Kentucky referendum. So it's basically, it's, it's playing out in a messy fashion, um, but, uh, that's I think to be expected after, after many decades of, of inactivity.

**[00:07:32] O. Carter Snead:** As Mary pointed out, there's also interesting developments on the federal level. President Biden reacted very strongly to *Dobbs*, arguing that there should be, um, you know, uh, there should be a federal protection for abortion. He mobilized his administrative agencies, uh, to act accordingly. The DOJ is now aggressively prosecuting, uh, free access to clinic entrances, violations. In some cases, they're prosecuting, uh, folks for federal crimes, felonies for, uh, misdemeanors, state misdemeanors that have been dismissed.

**[00:08:03] O. Carter Snead:** So that's an interesting development. And then the FDA itself has moved to change some of its labeling on, on the morning after-pill. They've changed the labeling about the mechanism of action, um, to remove references to any, uh, post-conception effects that that drug might have. Um, and then, uh, even more importantly, for the, um, for abortion access, they, uh, they altered their, uh, abortion pill, their RU-46 protocol, uh, lifting the requirement, the internal requirement that the pill be dispensed in a doctor's office.

**[00:08:36] O. Carter Snead:** Now, it can be dispensed, uh, directly from the, from, uh, from drugstores, which is a major, a major sea change. So a lot of activity. I mean, of course, there have been federal statutes introduced, the Women's Health Protection Act, which is attempt to, to, to nationalize, uh, the question of abortion, make it legal and preempt state laws to the contrary. And then you have Lindsey Graham, uh, in the heat of the 2022 ele- midterm election,

introducing a 15-week ban, much like the Mississippi law, um, and, and, and therefore nationalizing the issue and creating quite a stir, by the way, in the Republican Party over strategy, whether or not the issue should be fought at the federal level or whether it should be battle... uh, fought at the state level.

**[00:09:17] O. Carter Snead:** I think there's a lot of disagreement among pro-life Republicans on that front. So, we're, we're seeing a lot of messiness, uh, and, and, uh, at all branches, all three branches of government, in both the federal and state governments. There's a lot of activity.

**[00:09:29] Jeffrey Rosen:** Thanks so much for that. We're seeing a lot of messiness at all levels of government. You're both agreeing on that. And, Mary Ziegler, that is a central argument in your new book, *Roe: The History of a National Obsession*. In this really illuminating and important book, you argue that the constitutional and political justifications for supporting and opposing abortion rights have changed constantly over the course of American history, in the 19th and 20th centuries leading up to *Roe*, in the *Roe* decision itself, in the decades, since *Roe* and since *Dobbs*, both, uh, opponents and supporters of abortion, you argue, have focused on different arguments which reflect different political concerns at the time.

**[00:10:15] Jeffrey Rosen:** I'd love to get your arguments on the table and have Carter respond to them. Let's begin with your first chapter. *The Making of Roe* takes us back, uh, to the beginning of American history and, and notes that the common law tended not to prosecute abortions, uh, before fetal quickening, uh, but that it was in the 1850s that, uh, states began to ban abortion throughout pregnancy, with new concerns about the prerogatives of doctors, and that the rationale shifted again in the '50s as states began to liberalize their abortion laws in response to concerns about women's health. It's a big story, but some up, if you will, the shifting arguments for and against abortion rights in the 19th and 20th centuries before *Roe*.

**[00:10:57] Mary Ziegler:** Sure. So, of course, there was a pro-life or anti-abortion movement in the 19th century, but in, in some ways quite different from the one we've become familiar with. That movement, um, I think mobilized for a variety of reasons. Some of them would be quite familiar. So Dr. Horatio Storer and others in the American Medical Association were quite clear that they believed that life began at conception, um, not at quickening, and that there had been a kind of misconception, a popular misconception on that front that had led, in Storer's view to a great moral wrong being perpetrated.

**[00:11:29] Mary Ziegler:** Storer had other arguments that I think would be less sympathetic today that he emphasized just as often, um, including arguments about women kind of forsaking their, um, their sexual and procreative responsibilities to their husbands when they tried to limit their family size, uh, arguments about, um, the relative kind of fertility of Catholic women who Storer saw as having lots of children and white Anglo-Saxon Protestant women whom he believed to be not having enough children.

**[00:11:55] Mary Ziegler:** He saw this as kind of a problem from the standpoint of the future of the polity. So as was the case with many, um, social movements, there's a kind of complicated set of justifications. What was noticeably absent were the kind of rights-based arguments that would become the kind of bread and butter of the pro-life movement in the '50s and '60s. And

the, the reasons for that are not hard to understand. Um, at the time, the Supreme Court didn't strongly protect individual rights. They tended to protect the rights of states against the federal government.

**[00:12:24] Mary Ziegler:** The individual rights that were available often didn't result in wins for, uh, people, individual litigants. And, uh, I think as a result, it, it didn't make sense to talk in rights terms. That was to change in the '50s and '60s when, uh... What was originally a prominently Catholic, but somewhat diverse movement began mobilizing to defeat the American longitude's reform model, which allowed abortion under some circumstances like rape, um, incest, fetal abnormality, and certain health conditions.

**[00:12:57] Mary Ziegler:** And the movement at that time began by arguing essentially that these reforms were unnecessary, because abortion in cases of rape was quite rare or even didn't happen, or that, uh, abortion was never medically necessary because there were always alternatives that could preserve fetal life. But those arguments weren't really slowing down the momentum of reform in state legislatures. And so, lawyers for the movement began to argue that abortion was unconstitutional, and that in fact, abortion was, uh, kind of a civil rights violation akin to the segregation of public schools or the kinds of civil rights violations that federal courts were just beginning to recognize.

**[00:13:36] Mary Ziegler:** And, and that idea that a fetus or unborn child as a rights-holding person, and that claim, a claim to a kind of equality tradition, um, I think in various forms has persisted ever since, although it's changed in profound ways over time. This, of course, was, I think, both reflecting and responding to changes on the abortion right side. The abortion right side was beginning to argue that access to abortion was a matter of health equity, because it was at that time that abortion was, um, much less safe for people who were reliant on public insurance and public hospitals rather than their own private insurance and private hospitals.

**[00:14:19] Mary Ziegler:** Abortion-related mortality and morbidity was much higher for patients with less money, patients, uh, often patients of color. So, the, there was an argument that this was a matter of health equity. There were arguments, some more familiar arguments connected to autonomy or privacy, especially as the Supreme Court recognized autonomy-based rights in the contracts of contraception. And there was even some sort of feminist equality-related arguments. Especially as the '60s and '70s continued, that became prominent.

**[00:14:46] Mary Ziegler:** Even some unfamiliar arguments connecting access to abortion, to things like lower legitimacy rates or welfare rates. So, both movements were kind of complicated, big tents in this period, but you began to see, the closer we got to the decision of Roe, the emergence of some of the arguments that I think we believe to be the defining arguments, even though, as you mentioned, um, the debate has always been much richer than that.

**[00:15:10] Jeffrey Rosen:** Carter, you and Mary had a great discussion, uh, leading up to Dobbs, about whether or not history and tradition supported a right to choose abortion or supported a right to ban abortion throughout pregnancy. And without revisiting the constitutional implications of the debate, what do you make of Mary's argument that the history pre-Roe is

complicated, that both the pro- uh, abortion and anti-abortion movements shifted in their rationales over the course of the 19th and 20th century and embraced different rationales at different times, and that the emergence of autonomy, equality, and rights-bearing arguments really was a post-1950s phenomenon, and that the arguments shifted over time. Is that right or not?

**[00:15:54] Jeffrey Rosen:** Well,

**[00:15:54] O. Carter Snead:** I'm not a historian, and I would certainly defer to Mary's account of the, of the sort of intellectual history and the, and the political history. And, and I should just say that it's always a pleasure to appear with her because she's such a thoughtful and fair-minded person. And, and I don't think there's anybody better, uh, as a moderator than you, Jeff. Um, but lemme just... a couple reactions to Mary's, uh, comments. One is, um, I'm not, again, a historian, I am familiar, however, the history of the, of Catholic thinking on these questions and, um, and the Catholic Church has been a consistent, maybe the most consistent opponent of abortion throughout, uh, the, the political debates.

**[00:16:29] O. Carter Snead:** And I can tell you, and John Noonan has written about this in his own work, um, that even stretching back to the time of the apostles, there have been objections to abortion on the grounds. Not that, that it was a kind of intentional killing, uh, as embryology and, and knowledge of embryology in the church in particular, especially in the 19th century with the first visualization of the human ovum and, and understanding about how embryology worked. The church has refined, not changed, but refined its, its, its sort of account of, of, of, of the nature of, of abortion, the nature of, uh, embryo destruction.

**[00:17:05] O. Carter Snead:** And so by my lights at least, it's always, at least from that perspective, it's always been a kind of argument about, about, um, unjust, uh, killing, uh, of, of innocence, although that certainly maybe probably, yeah, didn't play out in the way... In the 19th centuries, Catholics didn't really have, uh, a strong political voice, um, early in our nation's history. But in any event, the interesting thing to me is...

**[00:17:28] O. Carter Snead:** And, and the argument, and I think it's worth focusing on the, the claims that we had discussed before, namely, the question before the court is, uh, if, if you're taking, uh, the position that, um, unenumerated rights are those rights that are deeply embedded in the history and tradition of the nation, and are also implicit in the concept of ordered liberty, which is the test that the court adopted in *Dobbs*, borrowing it from *Glucksburg*, um, the, the sort of how to, how to do substantive due process while retaining, uh, a limited role for judges and cabinining their discretion and tethering it to the Constitution in a reasonable way.

**[00:18:03] O. Carter Snead:** The question is whether or not there is a right to abortion that is in the text history or tradition stretching back. And I think the position of Justice Alito and the position of others has been that while there is complexity in the, in the grounds and rationales that have been asserted for the various pro- propositions, both on the pro-choice and the pro-life side, there's no evidence for the proposition that there was a right to abortion.

**[00:18:26] O. Carter Snead:** And then, at the time of the enactment of the 14th Amendment. And arguably even in common law, the question of, you know, quickening and these, these issues, some have argued that the reason that quickening was, was the line that was drawn at common law was not because of a moral judgment or an ontological judgment or judgment about the balancing of competing interest between unborn child and her mother, but instead, that was the moment at which you could actually prove the actus reus, that's the moment at which you could show that the, the, the vital signs of the alleged, um, innocent whose life was being taken were even present in the first instance.

**[00:19:04] O. Carter Snead:** So, I think it's important to separate the question of, how do we discern the trajectory of, of the ideas and, and rationales for protecting unborn children or for arguing for abortion rights from the, the narrow question of whether or not there is strong evidence of a right to abortion embedded in our nation's history and tradition. And I think on the latter point, um, I find Justice Alito's arguments persuasive.

**[00:19:27] Jeffrey Rosen:** Well, Mary, why don't we now focus on *Roe* itself. You talk about how Justice Blackmun's rationale changed. He was initially inclined to strike down the Texas law as unconstitutionally vague and use the end of the first trimester as a dividing point, and instead was persuaded to choose viability. Tell us about how *Roe* evolved and how Justice Blackmun embraced the arguments about history and tradition that you described in the first part of your book.

**[00:20:00] Mary Ziegler:** Sure. Yeah. So, originally, I think Justice Blackmun was searching for some kind of limit to the abortion right he was recognizing. Of course the initial idea was one that emerged, um, in, in, in lots of litigation circles in the abortion rights movement, um, a vagueness principle. The idea being that, Texas Islam in particular, which made an exception for, um, the life of the patient was unclear because doctors wouldn't know exactly when life was not or was at risk, and that would have a chilling effect.

**[00:20:33] Mary Ziegler:** That was not, I think, persuasive to his more progressive colleagues who pushed for something more ambitious, and thereafter emerged the, the kind of idea, the privacy or autonomy-based idea that *Roe* formulated, one that reflected Blackmun's time at the Mayo Clinic, um, and his, I think, kind of belief that a, a kind of medical rationale for a case on abortion rights might help to take some of the sting out of a rule, out of the debate or deescalate the conflict.

**[00:21:04] Mary Ziegler:** The viability limit, uh, emerged in part because justices, Douglas and Marshall worried that an earlier line, like, uh, at the end of the first trimester would be unworkable for, uh, low income people who would have a harder time, um, either finding the resources to get an abortion at that point, or navigating remaining hurdles, you know, including logistical hurdles in their states to access abortion. So, there was a sort of practical quality to the [laughs] liability limit, um, from the beginning, uh, that, that me- meant in part that Blackmun didn't justify it as much as I think either his supporters or critics w- would've liked.

**[00:21:45] Mary Ziegler:** One of the things, of course, that was striking about *Roe* is that *Roe* is very much a decision about physician's rights as well as patient's rights. And for that reason, I

think can be jarring to read for people who are unfamiliar with the abortion debate. And, and one of the questions that interested me when I was writing the book is how, how different the *Roe* we talk about in politics. And I mean, we in a big sense here, people who support and don't support abortion rights or people who just don't know what to think about them altogether, often use *Roe* to mean things that have a- almost nothing, or at least very little to do with this sort of very medical rights opinion that the Supreme Court rendered in 1973.

**[00:22:23] Mary Ziegler:** So there, there's sort of a cultural icon *Roe*, or even multiple [laughs] cultural icon *Roes*. And the 1973 *Roe*, which I mean, I remember even myself as a law student being really, um, struck and surprised by, uh, in reading, because it is a decision that has much more to do with the prerogatives of doctors than I had expected before I encountered it.

**[00:22:43] Jeffrey Rosen:** Carter, as you think about the 50th anniversary of *Roe* and the different rationale that Justice Blackmun considered embracing and that the court would ultimately embrace, how much did the reasoning of *Roe* matter. If *Roe* had been better reason, would it have been less controversial? And what are your reflections about the *Roe* decision itself on its 50th anniversary?

**[00:23:05] O. Carter Snead:** I think *Roe*...it's hard, because the question... I mean, really, what this illustrates and what's being even more clearly illustrated in the battles in the state supreme courts is, the question of abortion, uh, really raises the issue of, of the question of interpretation, of constitutional interpretation, the role of judges. I mean, um, listening to Mary's very thoughtful remarks just now, it becomes clear again why there is an angle of criticism.

**[00:23:31] O. Carter Snead:** We have justices who are confronted with a very difficult vexing question about which people very strongly disagree, people of goodwill, very strongly disagree, an almost incommensurable conflict. And the question is what, how, what, what guidance does the Constitution give a judge or justice as to how to resolve the question of the relationship of competing goods between a woman's freedom, autonomy, bodily integrity and health on the one side, and the intrinsic equal value of the unborn child's life on the other?

**[00:24:01] O. Carter Snead:** And then how you frame it in particular, and, and, and, you know, it matters as well. I mean, Justice Blackmun framed it as many abortion rights advocates do, as a kind of clash of interest among strangers, a woman who is, uh, inarguably a person in the eyes of the law, uh, who has a, a, you know, bodily integrity and, and a future and, and, and dignity and deserves to be treated with respect and, and accorded freedom and equality. And on the other hand, some kind of, uh, uh, uh, being a stranger of, of contested moral standing, uh, the unborn child.

**[00:24:32] O. Carter Snead:** I mean, once you frame it like that, it's not surprising that the result is licensing the use of force of one versus the other to defend, uh, the goods that are at stake. Now, if you reframe it, uh, as I would, as a kind of sometimes tragic crisis involving a mother and her child, then you come up with a very different set of kind of outcomes and views. Um, but the question is, does the Constitution take a position on how to frame it? And, and, and, and does it give judges guidance?



**[00:25:01] O. Carter Snead:** And it seems to me, in one of my criticisms of *Roe*, and I think others as well, is that the Constitution doesn't really help, uh, a whole lot with this question, unless you have a very, very flexible and dynamic view of the judges' role and constitutional interpretation where the judge can balance these competing goods as Justice Blackmun does in the opinion. It's unfortunate, uh, you know, for, for our purposes that *Roe* not only was the justice balancing and his colleagues balancing these competing goods, there was no evidentiary hearing, uh, for them to rely on medical evidence or historical evidence or sociological evidence in that case. And I think it made the case even more controversial, um, as well.

**[00:25:38] O. Carter Snead:** But, it's really... And this, this ultimately is... And this, this played out in the South Carolina Courts, for example. You saw Justices saying, "Is six weeks too long? Is it too short?" And the question I have is, well, does... what does the South Carolina Constitution say about when you should restrict, if ever should you restrict, restrict abortion? How do you balance these competing goods? And from my perspective, uh, and my view of what a judicial role should be, and constitutional interpretation, my view is, if the Constitution doesn't give the judges the tools or justices the tools to do that beyond their own freewheeling policy balancing and philosophizing, then the judges shouldn't be doing it.

**[00:26:14] O. Carter Snead:** And in fact, and, and as a structural matter, as a substantive matter, it should be, uh, uh, for the public square, which is a messy process, of course. But, I think that's one of the interesting through lines, is there's a deep disagreement about what judges should be doing and, and how to interpret the Constitution. And, I will say one final thing.

**[00:26:34] O. Carter Snead:** In the debates, as they've unfolded in the courts currently, there's the state supreme courts, and even in the public square, it's interesting how the South Carolina Supreme Court and others simply have refuse... those who have found there to be a right in their, uh, to abortion in their state constitutions have said, have simply said that the state's interest in the unborn child is not of the level and magnitude that the state wants it to be. That there is some kind of theory of personhood in the state constitution that prevents the state from treating the unborn child, uh, on an equal footing with his or her mother.

**[00:27:07] O. Carter Snead:** And again, that to me is, is, uh, it reflects a kind of mode of judicial interpretation and conception of the judicial role that I think is problematic, made *Roe* more complicated. And I'm not sure, given the absence of real concrete guidance, that, that it would be possible to make *Roe* less controversial than it was beyond the freewheeling statutory like opinion that the court ended up, uh, issuing.

**[00:27:32] Jeffrey Rosen:** Mary Ziegler, in your new book about the history of *Roe*, you argue that in the decades between *Roe* and *Dobbs*, the focus of both supporters and opponents of abortion rights changed. In the '70s and '80s, you argue new arguments framing *Roe* as a decision involving choice for women reflected the work of feminist anti-rape movements and of abortion rights supporters who wanted to activate a silent majority of pro-choice voters.

**[00:28:01] Jeffrey Rosen:** In the '80s, you argue the new right in the Republican Party wove *Roe* into the older attacks on judicial overreaching. By the '90s, the focus was on equality of opportunity for women as women joined the workforce in greater numbers. From the mid-'90s to

the 2000s *Roe* was at the center of debate about the relationship between politics and science. And finally, between the 2000 and 2010s, there was a focus on the dialogue about *Roe* and race. And there's one final decade, I'm summarizing it, because the book is so powerful and clearly organized.

**[00:28:33] Jeffrey Rosen:** The decade of the 2010 saw escalating struggles over *Roe* and religious liberty. We may want to delve into each of those decades, but share with our listeners the argument that I've just summarized, that far from being a, a monolithic or static debate about judicial activism or restraint, the debate about *Roe* shifted decade-by-decade, reflecting different political and constitutional focuses.

**[00:28:56] Mary Ziegler:** Yeah, I think one of the things that's clear from the history is that while *Roe*...of course, and I'm using *Roe* in the sense of the '73 ruling, put constraints on what, uh, the laws that people could actually enforce. There were always, I think there was always a pretty robust popular discussion about what, about the morality of abortion, about the legality of abortion, about the constitutionality of abortion, um, and, and some actual, you know, concrete fights that were happening in state legislatures.

**[00:29:23] Mary Ziegler:** There were ballot initiatives, there were state constitutional struggles, and all of those struggles tended to project ideas onto *Roe* that were not about just the things we tend to think there... the kind of stalemate between choice and life or judicial activism and judicial restraint. There was, that was... Things were already far more nuanced and complicated. So for example, you know, was *Roe* a symbol of progress for people of color because it had expanded access to abortion and reduced abortion-related mortality?

**[00:29:57] Mary Ziegler:** Or was *Roe* instead a symbol of intentional racism, or a legacy, a kind of unfinished legacy of eugenics and racism in the family planning movement? Was *Roe* something that had facilitated attacks on religious liberty, uh, by those who were willing to preserve abortion rights at any cost? Or was *Roe* instead a kind of guarantor of freedom of conscience and unnecessary step in religious liberty, including for those who believed that abortion rights were important or who didn't have a religious faith at all?

**[00:30:31] Mary Ziegler:** The, these debates that were, of course, in some way tied to abortion reached well beyond it and meant at times that *Roe* became this sort of interesting cultural symbol. Scholars often talk about the, the canon and the anti-canon as sort of touchstones of our constitutional culture. So the canon being decisions we all agree are right, like *Brown versus Board of Education*, even if we don't agree on why they're right. The anti-canon being decisions we all agree are wrong, uh, like *Plessy versus Ferguson*, even if we don't agree on their symbolism.

**[00:31:02] Mary Ziegler:** And *Roe* in this period sort of functioned in, in this unique way, because it was neither part of the canon or the anti-canon. It was sort of a shorthand for a lot of the nation's polarization. And interestingly, in all of these meanings, people mobilized of it, sometimes there were nuances expressed that went beyond the polarization, right? That suggested that people were capable, um, and often were thinking about abortion and related issues in much more complicated, um, and sometimes much more productive ways.

**[00:31:32] Mary Ziegler:** So, I found writing about that to be kind of hopeful at a time when, of course, these conversations about not just abortion, but related issues are kind of multiplying and intensifying. It, it was hopeful to me to see that they... there had always been more nuanced conversations happening, um, and always conversations happening beyond just the halls of the Supreme Court.

**[00:31:53] Jeffrey Rosen:** Carter, as you've just heard, Mary argues that far from being a, a kind of lawyer's debate about judicial activism and restraint with the pro-choice side on one side of that debate and the pro-life on the other, this has been a complicated nuanced debate where both sides have embraced arguments of both activism and restraint at different times, and both sides have reflected the political and empirical focuses decade-by-decade, and the Supreme Court has responded.

**[00:32:21] Jeffrey Rosen:** It's a complicated argument, but as you hear this, what is your response to the history that Mary has focused on and her argument that this complicated historical debate has in fact been reflected in Supreme Court opinions between *Roe* and *Dobbs*?

**[00:32:36] O. Carter Snead:** Yeah, no, well, my first response is, I can't wait to read the book, because it sounds so interesting and well-argued and thoughtful. My second thought is, you know, as I've observed it both as a legal scholar and a lawyer as well as I guess partly involved in the, in the pro-life movement, um, is that it is... you know, a- as the movement, it has multiple layers, and I'm sure this is true, my, my friends and neighbors who are in the pro-choice movement too.

**[00:33:02] O. Carter Snead:** It's, I mean, it's, it's, it's not monolithic, it's not a, it's not an intellectual, ideological, or strategic monoculture. There are different arguments and politics always. Arguments change depending on, you know, and change depending on context, depending on circumstances. I mean, I do think it's true though, I mean, at least my observation is that at the time *Roe* was, uh, announced, it did strike some, John Hart Eley and others as being s- strikingly unbounded in terms of... uh, and, and, and quite an extension from the substantive due process tradition that it, it meant to be a part of, namely, *Griswold* and the kind of cases involving what are described as zones of privacy.

**[00:33:44] O. Carter Snead:** That it seemed like a, a, a kind of significant extension, um, arguably an improper extension of, of that, of that stream of jurisprudence. So, I do think there, from its inception, there were observations that this is, that the court was doing something different and quite aggressive, uh, as a jurisprudential matter. As far as that being reflected in the arguments of activists, you know, I, politics in the United States is a, is a coalition exercise.

**[00:34:09] O. Carter Snead:** Unfortunately, in my view, the Republican Party is the party where most of the pro-life activity takes place now. Sadly, in my view... It's not, it's not a bipartisan issue, they're... I'm sure this, I mean, it's, it's... Politics is in some ways less interesting also because of the polarization, uh, of this issue and, and how easy it is to predict what someone is gonna say, based on their party affiliation, rather than, uh, judging whether they thought very deeply or carefully about it.

**[00:34:39] O. Carter Snead:** And it makes sense, uh, it seems to me, that, uh, the same kinds of arguments, the same kind of, so... you know, arguments made by judicial conservatives would, um, would be, would be emphasized and foregrounded as in, in terms of responding, to *Roe* and, and then later, uh, and later on to *Casey* as well. One thing that struck me about what, um, about what Mary was saying also in terms of the disagreements, especially on the question of, of the racial dimension, uh, at issue, I mean, all, all, all of it turns on what you think abortion is and what you think is... who or what you think the unborn child is.

**[00:35:17] O. Carter Snead:** If, if a person regards abortion as simply healthcare, one healthcare procedure that's beneficial among others, then it does seem like an injustice that it would be, uh, uh, that it would be, um, uh, more difficult to access for communities of color and for the poor. If on the other hand you think that abortion is the taking, unjust taking of human life, uh, then, then it starts to look quite different and it starts to look kind of sinister to have such an emphasis on promoting abortion in communities of color and, and the poor, and, and, and folks have reacted accordingly.

**[00:35:49] O. Carter Snead:** I mean, of course, we have the famous examples of Fannie Lou Hamer civil rights icon, who herself was quite pro-life advocating against abortion, while at the same time George Wallace was advocating for abortion, uh, on the grounds that he wanted less people of a very particular kind. And now in the, in the modern era, you have white supremacists like, Richard Spencer and others who support abortion rights because they recognize that abortion is more common, or at least proportionately, in certain kinds of communities of color.

**[00:36:17] O. Carter Snead:** So again, it's funny and it's difficult. And I, and the one regret I have about the current debate, both in the courts as well as in the public square it's hard to have an argument about the, the, uh, both sides of the question. We can have an argument about the, the value of women and their futures and their bodily integrity and their autonomy, and so, and their equality. It seems to me one thing lacking, at least certainly in the, in the judicial decisions of some of these state courts and in the actions of some state legislatures, um, uh, sufficient, uh, attention being paid to the, to the moral standing and the ontological standing of the unborn child.

**[00:36:51] O. Carter Snead:** But at the same time, one could say the same thing about some jurisdictions where the interest of women, uh, are not being sufficiently taken into account. And to, not, not to jump too far ahead, but my view and what I would favor is a kind of both-end strategy where the needs of mothers, babies, and families are thought of as one piece and, and moves to aid all of them in a humane and, and comprehensive way, is the, is the pathway of the law.

**[00:37:18] Jeffrey Rosen:** Mary, one thing that really struck me about your book was your argument that far from operating in a vacuum and ignoring the political debate on both sides on the ground, the Supreme Court in the decades between *Roe* and *Dobbs* focused on those arguments. And after *Roe*, the focus on choice and consent led to decisions protecting the right to choose. In the '80s, a concern about judicial restraint led to increased deference. A new focus on

women's equality was embodied in cases involving Operation Rescue and the right of women to access abortion clinics.

**[00:37:58] Jeffrey Rosen:** The debate about scientific evidence was embodied in the partial birth abortion decisions. *Roe* and *Case* involved important questions about access to abortion clinics and the court. And finally, debates about the scope of religious liberty were embodied in Supreme Court decisions, uh, about the ability of religiously scrupulous employers to opt out. I, I'm, I'm summarizing your wonderful book quickly, but give our listeners a sense of the ways in which you were struck about how the Supreme Court was more responsive to particular debates about the scope, pro and anti-abortion rights, uh, perhaps than many had thought before your book was written.

**[00:38:36] Mary Ziegler:** I would be, and I try to be very cautious about causal claims because, of course, what the court is doing and why it has lots of different reasons and sources. So, I can't, and don't argue that, you know, there's a kind of one-to-one correlation, but I think it's quite clear in, in the context of abortion that the court's always been part of a kind of broader dialogue with parties and movements.

**[00:38:59] Mary Ziegler:** Obviously there, there are direct ways in which that happens, like the Amicus briefs and other briefs that bring, um, arguments from the broader culture to the court. There are other ways this happens, of course, in terms of the selection of the justices and how that, um, brings different considerations to bear on the justices' reasonings. But I think just in terms of the, the reflections we see, shifting ideas of what abortion rights mean and how... and what rights for an unborn child mean, and how those rights change when the broader culture is changing too, or bringing different considerations to bear quite clearly, those debates are reflected in the way the court is talking and thinking about abortion.

**[00:39:41] Mary Ziegler:** And exactly how that mechanism is happening is, is not something I would... [laughs] I'm not claiming to know, but, uh, I think it does paint a different picture of where our ideas of abortion rights or fetal rights or whatever we think the Constitution ought to look like in this space. Those ideas have always not come from the court down to the rest of us. Even at a time when the federal courts were, were arguably the kind of main site of contestation, even then, there were lots of other influences filtering in and shaping the dialogue.

**[00:40:16] Mary Ziegler:** Even then, of course, state courts were getting involved, um, and there were valid initiatives. Voters were getting involved on the state constitutional side. So I think it does help to kind of reorient our thinking. We're not transitioning from an era in which there was a federal constitutional conversation, and somehow the rest of us were silenced. We're not in a world where the Supreme Court gives rights and takes them away in a vacuum. There's always been a kind of popular conversation that's much more complicated. That conversation has influenced the court, unsurprisingly. But I think it's, it's also just helpful to think of this as a debate that is much bigger than the Supreme Court.

**[00:40:56] Mary Ziegler:** It always has been a debate that's much bigger than the Supreme Court. And I think that's, that's a healthy thing in a democracy if, if other people view themselves as part of We the People and think that they have something valuable to say about what our

rights ought to be, what the good life looks like. All, all of that I think is, is a good thing. And that kind of engagement has been a hallmark of conversations about even just what *Roe* is, frankly, but certainly what abortion and the Constitution have to do with one another, uh, for, for decades.

**[00:41:27] Jeffrey Rosen:** Thank you so much for that. Carter, you're hearing this argument. I know you're looking forward to reading Mary's book, but what do you make of her argument, that far from operating in a vacuum, the U.S. Supreme Court between *Roe* and *Dobbs* did respond to particular arguments on the pro-life and pro-choice side. For example, the debate about fetal heartbeat laws and whether or not medical professionals deserve deference or don't was reflected in the partial birth abortion, uh, decisions.

**[00:41:54] Jeffrey Rosen:** And similarly, concerns about women's equality gained special salience in the *Casey* decision when that was live in the country as a whole. Does it seem right as a descriptive matter that the Supreme Court has tended to channel the particular arguments raised by the pro-choice and pro-life sides in its abortion decisions? And is that a good or bad thing?

**[00:42:17] O. Carter Snead:** I mean, it's a very interesting idea. And, and I do think that there have been the, the sort of the penetration of new ideas and new arguments, in the arc of jurisprudence from, from *Roe* to *Dobbs*. And I do think it's interesting and I would... I can't wait to, to, to read the, the sort of fine-grained account of, of the historical trajectory, but it certainly is clear that the, the court's arguments change.

**[00:42:43] O. Carter Snead:** In *Roe* the focus is on privacy. In *Casey*, with the influence of Justice Kennedy, liberty and kind of libertarian principle becomes infused into the, into the argument. And then you see over time, uh, and you saw this incipiently in, in, in the discussion of stare decisis and *Casey*, but also in Justice Ginsburg's dissent in the, uh, in the, in the se- in the second partial birth abortion case. You really see the notion of women's equality coming to the fore.

**[00:43:13] O. Carter Snead:** And I have to say, one thing that's interesting is, I was actually disappointed in the dissent in *Dobbs* and, and, and I would've liked to have heard more from the majority on this principle of equality. That's something, it, it felt to me like I felt pretty confident looking, observing that arc and watching the jurisprudence unfold, and the scholarship unfold with Reva Siegel and others making the case for sort of equality-based argument echoing Justice Ginsburg and vice versa.

**[00:43:41] O. Carter Snead:** I was expecting more of a kind of argument about women's equality in the *Dobbs* dissent, even, maybe even a more extended discussion of equal protection, um, or the concepts of equality undergird due process. It wasn't in the way that I would've liked it to have been. I would... It wasn't as fleshed out in terms of the, the back and forth. And so it feels both in the majority and the dissent as being kind of, uh, proforma, just sort of touching a base, mentioning equality.

**[00:44:08] O. Carter Snead:** But it's clear that it's on their minds and I, it seemed to me that in the cases leading up to *Dobbs*, there did seem to be the infusion of new ideas from scholars in

amici and others. So yeah, I, I think it's a really interesting idea, and it's interesting also as an-kind of a negative example that proves the rule, the stalling of the conversation about equality in the *Dobbs* majority and in the dissent.

**[00:44:31] Jeffrey Rosen:** Well, that returns us to the post-*Dobbs* world. And, Mary, your argument suggests that state court decisions about the right to abortion post-*Dobbs* should continue to channel these debates about women's equality and about science in the same way that the Supreme Court did. Are we seeing in the post-*Dobbs* decisions at the state level more fleshed-out equality arguments? And what other kinds of arguments are state courts and federal courts, interpreting state constitutions, invoking to protect or reject a right to choose abortion?

**[00:45:10] Mary Ziegler:** Well, I think personally, just in terms of my personal preferences, I would be the happiest with, with ballot initiatives, which I think tailor the politics and ideas of the Constitution more to actual voters. I'm less excited about state legislatures, which I think at times because of gerrymandering or limits on voting or just the dynamics of, of campaign finance and voter preferences don't always reflect people's preferences or views on, on fundamental issues like this.

**[00:45:39] Mary Ziegler:** But I think state courts have very different... I mean, one of the things that's striking about state court litigation is that states have their own constitutional traditions. So, there are many reasons the South Carolina and Idaho rulings came out differently, but one of them is that South Carolina, um, has decided it has clearer state, privacy language in its state constitution and a more developed body of jurisprudence on the idea that there's a sort of state constitutional right to self-determination.

**[00:46:07] Mary Ziegler:** States have varying ideas of equality, um, in terms of how clearly, they're stated, how much they might or might not connect to abortion rights. The same goes for state, um, traditions when it comes to religious liberty. This has become another flashpoint, uh, as some religious groups, Muslim groups, Jewish groups, and others have argued that under some circumstances, or lack of access to abortion raises liberty, religious liberty issues, just as, uh, people who may have objections to abortion have raised concerns that having to prescribe abortion pills or even emergency contraceptive violates their religious liberty.

**[00:46:45] Mary Ziegler:** So, I think the, the state constitutional picture is one in which there are many different contested [laughs] traditions. I've been surprised in a way to see, uh, privacy arguments actually have enjoyed, I would say, more attention than I would've expected. In part, I think because the original 1973 *Roe* decision cast a long shadow for some time. So, there was always a kind of state con- not always, but often, state constitutional conversations about what it would mean to codify *Roe* or how a state constitutional tradition resembled or did not resemble *Roe*.

**[00:47:18] Mary Ziegler:** And so, there's been, I think, more of a focus on privacy language, um, than we might have expected, in part because I think the original '73 decision's focus on privacy had, had knock-on effects in states, um, especially in the '80s and '90s. And that, that has had, I think, an influence on state courts more recently. But we're seeing, I think, these

conversations happening, um, in state supreme courts and also I think in ballot initiatives that are much more local and harder to generalize, in terms of what...

**[00:47:54] Mary Ziegler:** In other words, there's no sort of one-size-fits-all debate about what the best argument is or isn't. That'll depend, I think in many instances for advocates on both sides and of course for people living in these states, on, on the specific state and the audience in it.

**[00:48:08] Jeffrey Rosen:** Carter, in his book, *51 Imperfect Solutions*, Judge Jeffrey Sutton argues that it's a good thing that state courts are reaching different conclusions about the scope of constitutional rights based on their distinctive traditions. Do you think it's appropriate for some states to more broadly construe privacy or equality or religious liberty rights for, against abortion, depending on the language and traditions of their state constitutions? And how much variation do you imagine at the state court level when it comes to abortion moving forward?

**[00:48:38] O. Carter Snead:** It's a, it's an interesting question. It seems to me important that the state be faithful, the state court be faithful to whatever its tradition happens to be and whatever... and, and its principles of stare decisis, as well as the mode of jurisprudence that, you know, governs the court in, in other decision-making. So, for example, in the Kentucky case, the Kentucky Supreme Court has been very clear that it has a very strict, sort of *Glucksberg/Dobbs*-type mechanism of evaluating claims of unenumerated rights.

**[00:49:11] O. Carter Snead:** They have to be very firmly rooted in the history and tradition, and there has in, in the sort of contemporaneous history matters. So, if the argument under that framework would make it kind of implausible, my, by my lights at least, that there's an implicit right to abortion in the Constitution that, uh, abided the, the criminalization of abortion for up until, up until *Roe v. Wade*, overturned that state decision.

**[00:49:35] O. Carter Snead:** Now, if you have a state supreme court that has a jurisprudence that is much more unbounded and more dynamic and authorizes the justices to make what are basically policy decisions to balance the competing goods in a way, then, then I suppose it's appropriate for the justices and those courts to, um, to follow the, the rules. I mean, my, my concern is, is, um, is, uh, justice's hewing to not hewing to the rules that otherwise bind them in other contexts, creating kind of abortion exceptionalism, uh, which we saw in part, in, in the, at the federal level between, between *Roe* and *Dobbs*.

**[00:50:11] O. Carter Snead:** And it's very interesting to see also how this question of state supreme courts have drawn our, our attention, certainly my attention to not just state court jurisprudence, but also the process of judicial selection for judges and, and justices and raises interesting questions about the propriety of election versus appointment versus a kind of merit selection process involving the local Bar Association.

**[00:50:38] O. Carter Snead:** In South Carolina, for example... I haven't studied the question deeply, but a friend of mine who is an expert and lives in South Carolina told me that the way justices in South Carolina are chosen, it's pretty straightforward. There's a small committee in the state legislature where they, where they give the... they, they make the appointments or they, they're decisive in making the appointments. And there is... It has been argued that the...



becoming a state supreme court justice in South Carolina is not as fully vetted a process as in other jurisdictions.

**[00:51:08] O. Carter Snead:** Then you have the question of election., I was an expert witness in the Kentucky case, and we sat in the, in a courtroom with a judge who was up for reelection within two months of our hearing. And it was impossible, and the judge, I'm sure did his level best to be thoughtful and fair-minded, and I'm, and I'm sure he... I'm not suggesting anything to the contrary, but it did feel strange to know that this judge was gonna submit himself to an election in a, in a jurisdiction, a very progressive jurisdiction that would've looked unfavorably at him not finding a right to abortion in the state constitution.

**[00:51:41] O. Carter Snead:** And so, it raises all kinds of questions of institutional competence and selection and structural design. And, and so it's a, it's a very interesting moment to be a student of politics and of the courts. And I've seen as, as Mary pointed out, interesting arguments made about religious freedom.

**[00:52:04] O. Carter Snead:** That's an argument that's made in, in the Indiana Court, it was an argument that was made in the Kentucky Court, that there is... that the State Religious Freedom Restoration Act, gives a right to abortion and it's an, an inappropriate burden on religious freedom to prevent certain folks who subscribe to those religions or, or faithful, members of the faithful and those religions to restrict their access to abortion.

**[00:52:29] O. Carter Snead:** And then if you [laughs]... It actually gets even more interesting when you think about the, the, the federal jurisprudence on these issues, and the question of, does the presence of an exception mean that you have to always have... if you have one exception for anything, you have to have an exception for religious freedom? So if there's an exception in a homicide statute for self-defense or insanity, or some other justification or excuse, do you also have to have an exception for religious freedom, if the state chooses to treat abortion as a kind of homicide?

**[00:52:55] O. Carter Snead:** So it's a very... I mean, it, you end up down some really interesting and strange alleys as these cases unfold. But one thing, the last thing I'll say is that in the oral argument Ind- Indiana, um, the court, I, it sounds like it's been reported in the news that the court was struggling a little bit at oral argument with finding a limiting principle on the, uh, on the, on the unenumerated right to abortion that was being advocated by the party, the ACLU, and the attorneys

**[00:53:24] O. Carter Snead:** And I think this is gonna be... this, this is where the heart of the matter lies. Is, is it, is it for the courts to balance these competing goods? And does this, the individual state constitution an issue give them the tools, um, to do that? But, uh, but it's a very interesting moment to be, uh, to be an observer of this, of this issue.

**[00:53:43] Jeffrey Rosen:** It is indeed. And both of you are always so illuminating and casting light on it, and I, I know that this, that our conversation will continue, but it's time for closing thoughts and this installment of your conversations. Mary, your great new book concludes, "The history I've described here does not suggest a clear path forward in our civil war over abortion.

The reasons for our divisions are complicated and history supplies no easy answer." But you say that more often than we realize, our conversations have reached beyond what Professor Tribe called the clash of absolutes, and we've begun a more robust, popular constitutional practice when it comes to abortion than our fixation on *Roe* would suggest.

**[00:54:21] Jeffrey Rosen:** As you look to the debates ahead, how would you advise pro-choice and pro-life advocates to make their case in legislatures courts and in the political arena in light of the complexities of history?

**[00:54:36] Mary Ziegler:** I think there are, there are kind of two things I, I guess I would advise. I mean, first, I think, and I'm assuming I think Carter will agree with me on this, that there's more room for what I think some people on both sides would see as conversations about reproductive justice, which is to say conversations, not just about what access to abortion should or shouldn't look like, but on what a kind of better world for people who have, can get pregnant and women looks like.

**[00:55:01] Mary Ziegler:** So, I think that would be a necessary step, I think, to bolster the credibility of people who are, who are supportive of access to abortion and people who oppose it, right? Because if, if there is a claim that this is about, in part, uh, for either side the dignity and equality of women and other people who give birth, there's no better way to show that than to do something for those people unrelated to abortion, right?

**[00:55:26] Mary Ziegler:** I mean, so we had the recent, uh, federal law, the Pregnant Workers Fairness Act, which I thought was... I was heartened to see supported by people, um, on both sides of this issue pretty vigorously. I think on the question of abortion itself, uh, I think it's a moment to remember that, uh, [laughs]... And this is a tension. I think that both movements see their causes as human rights causes, and that is not something that really tends to lead to a lot of dialogue and compromise.

**[00:55:53] Mary Ziegler:** These are... I think that's what Professor Tribe saw when he described this as a clash of absolutes. That people could see no possibility for compromise at times in, in what were, um, constitutional principles of the highest order. But we're, we're, at a moment, I think where... the, the most effective, uh, solutions and the most effective arguments are gonna be those that are tailored to local audiences. So, I think now to the, the ballot initiative struggles of 2022, um, there were six of them.

**[00:56:23] Mary Ziegler:** It's very striking if you dig into how those battles were waged. The arguments were quite different. There... they didn't resemble what you saw. This is not surprising [laughs] in some ways, right? But what you saw in Kansas or Kentucky or Montana was quite different, um, from state-to-state and of course very different from what you might have seen in Michigan or California. So, I think we're also at a moment where, um, you have to kind of meet voters where they are, whichever side of this you're on.

**[00:56:50] Mary Ziegler:** And remember that this is still something that, um, you know, is, is, it's bigger than partisanship, it's bigger than the objectives of individual movements. And that

means that any kind of effective argument is going to have to be one that resonates, uh, at the local level, I think, at least at the moment.

**[00:57:06] Jeffrey Rosen:** Carter Snead, your final thoughts for what pro-choice and pro-life advocates can constructively do as they make their arguments moving forward?

**[00:57:16] O. Carter Snead:** Yeah, I think, I mean, one, um, benefit of the current moment is that it, it does create new opportunities for, uh, those on the pro-choice side and the pro-life side to come together and find areas of agreement, overlapping agreement. And as Mary pointed out, that can be really hard to do, uh, after 50 years of antagonism, and especially as she said eloquently, that both sides regard the- themselves to be defending something essential and in fact, a human right.

**[00:57:47] O. Carter Snead:** And so it, it seems essential to me that those of us who are on the pro-life side really, um, do our very best to, to win the trust of those, uh, who disagree with us strongly on these issues by, by focusing on and proving that we care deeply, uh, for mothers, babies, and families, that the core of the, the principle that animates the, the pro-life movement is one of radical hospitality and unconditional love for everyone no matter what they... who they are or what we think of them or even, or what our relationship is.

**[00:58:20] O. Carter Snead:** At Notre Dame, for example, we've, we were beginning this, uh, initiative called my center, the de Nicholas Center, the Women and Children First Initiative, which is trying to create a world in, in which mothers and babies and families are... s- succeed and flourish in, in terms of healthcare and, and anti-poverty initiatives and such like.

**[00:58:35] O. Carter Snead:** But this, this may sound Pollyannish, but at the end of the day, I think the, the key to anything positive moving forward ultimately is going to be, uh, the, the, the genuine friendship and, and, and gen... and trying to become friends with those, extending the hand of friendship in earnest, uh, to those who we don't agree with and working closely with them on things about which we do agree. And then insofar as the things we disagree about, to keep talking in a respectful and loving way to each other.

**[00:59:02] Jeffrey Rosen:** Thank you so much, Mary Ziegler and Carter Snead, for embodying the vision of civic friendship that both of you so eloquently embrace and defend. It's a privilege to host this conversation, and I'm much looking forward to continuing it on *We the People*. Mary Ziegler, congratulations on your great new book, and thank you again for joining Carter Snead to discuss it on *We the People*. Thank you both.

**[00:59:29] O. Carter Snead:** Thanks for having us.

**[00:59:30] Mary Ziegler:** Thanks, Jeff.

**[00:59:32] Jeffrey Rosen:** Today's show was produced by Lana Ulrich and Bill Pollock. It was engineered by Greg Scheckler. Research was provided by Emily Campbell, Sophia Gardell, Liam Kerr, Sam Desai and Lana Ulrich. Homework of the week, read Mary Ziegler's new book, *Roe: The History of a National Obsession*. And always remember it, that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the

engagement of people from across the country who are inspired by the model of nonpartisan civic friendship that you just heard. It was a great discussion, and I'm so grateful to all of you for being part of it.

**[01:00:06] Jeffrey Rosen:** You can support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership), or give a donation of any amount, \$5, \$10 or more to support our work, including this podcast at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.