[00:00:00] Jeffrey Rosen: Hello, We the People friends. In honor of the 234th anniversary of the ratification of the U.S. Constitution, the National Constitution Center is launching an exciting crowdfunding campaign. Thanks to our friends at the John Templeton Foundation, every dollar you give toward We the People will be doubled with a generous one to one match, up to a total of $234,000. This is a wonderful opportunity to show your support of constitutional education. And we're so grateful for your passion, your engagement and your devotion to lifelong learning and civil constitutional dialogue and debate. Please go to constitutioncenter.org/wethepeople. Now onto today's episode.

I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase

[00:01:00] Jeffrey Rosen: awareness and understanding of the Constitution among the American people. On December 1, the Supreme Court will hear oral arguments in Dobbs vs. Jackson Women's Health Organization, a case that challenges the constitutionality of a Mississippi law banning most abortions after 15 weeks. On this week's episode, we'll consider the arguments on all sides of the case with two of America's leading scholars on the question, Mary Ziegler and Carter Snead, and next week, we'll reconvene Mary and Carter to review the oral arguments. Mary Ziegler is the Stearns Weaver Miller professor at Florida State University College of Law. Her most recent book is Abortion and the Law in America, a Legal History: Roe v. Wade to the Present. She filed a brief for the American Society for Legal History on behalf of the respondents. Mary, thank you so much for joining.

Mary Ziegler: Thanks for having me.

Jeffrey Rosen: And Carter Snead is Professor of Law and director of the de Nicola Center for Ethics and

[00:02:00] Jeffrey Rosen: 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. He filed a brief with Professor Mary Ann Glendon on behalf of the petitioners. Carter, it's great to have you on the show.

Carter Snead: Great to join you both. Thanks for having me.

Jeffrey Rosen: This is an important episode. And I'd like to begin by focusing on the three part test that the Supreme Court will be using to decide whether or not to overturn precedent. In a case called Ramos, Justice Kavanaugh offered three factors for deciding whether or not to overturn a precedent that the court thinks may have been wrongly decided as an original matter. And because the justices may well be focusing on these three factors, let's begin with each of them. Here are Justice Kavanaugh's three factors in the Ramos case. First is the prior decision not just wrong, but grievously or egregiously wrong. Second, has the

[00:03:00] Jeffrey Rosen: prior decision caused significant negative jurisprudential or real world consequences? And third, would overruling the prior decision unduly upset reliance interests? Mary, let's begin with you with the first of these factors. As the court evaluates this question whether Roe and Casey were not just wrong, but grievously or egregiously wrong, how do you think that they should approach the question?

Mary Ziegler: Well, I think one of the interesting questions for the court is if Roe and Casey were egregiously wrong, how the court can then explain that decisions on same sex marriage were not egregiously wrong or contraception, because I'm assuming the court would be interested in the original public meaning of the 14th Amendment, when it comes to both the existence of a right to abortion and the recognition, potentially of personhood of, of a fetus or unborn child. But the 14th Amendment's

[00:04:00] Mary Ziegler: potential original public meaning would then be up for grabs in a variety of other arenas as well. So I think it will be hard for the court to explain how Roe was not just wrong but egregiously wrong, and then Kavanaugh's decision so as not to then put in question lots of other precedents. Of course, the court may be willing to put in question lots of other precedents. That's an entirely different matter. But I think to say that Roe is egregiously wrong, then would mean that much or all of the court substantive due process jurisprudence is egregiously wrong, and I don't believe that. So that's my initial thought on that question. Carter, Justice Kavanaugh said that in deciding whether a decision was egregiously wrong, the court may examine the polity of the precedent's reasoning, consistency and coherence with other decisions, change law, change facts and workability among other factors. Why do you and Professor Glendon argue in your brief that Roe and Casey were not just wrong, but egregiously wrong?

[00:05:00] Carter Snead: Yes, thanks for the question. And also thanks for having us. And it's such a pleasure to appear with such a wonderful historian as Mary, someone with such great integrity and scholarly excellence. It's a wonderful opportunity to have this conversation. And there's no better place to have this conversation than the National Constitution Center, which has such a reputation for fair mindedness and in excellence as well. So it's a great honor to be here. Professor Glendon and I did argue. We, we, we grappled and joined directly the question of Justice Kavanaugh's Ramos factors, and our view was that the decisions and Roe and Casey were both not just merely mistaken, but, but could be described as grievously or egregiously wrong, because A, they have no, in our judgment, meaningful connection to the text, history and tradition of the Constitution. Even further afield, I would argue, then, then Griswold, uh or certainly Obergefell. Uh in fact, there's a wonderful unpublished opinion by Judge Henry Friendly, iconic liberal judge of the U.S. Court of Appeals for the Second Circuit, who explains, I think very persuasively how one can recognize the right to

[00:06:00] Carter Snead: privacy that emerges from the due process clause that includes the right to contraception in Griswold, but does not include abortion. We won't get into that now. But I would recommend that to your, to your readers. But the fact that we argue that there's uh very little connection, and there's not a, there's not a theory of constitutional interpretation that Professor Glendon and I believe is uh appropriate that would generate the view that the right to abortion, uh much less a trimester framework or a binary pre versus post viability framework that emerges from the, the original public meaning or, or really any meaning that we could discern

from, from the due process clause, but Justice Kavanaugh also says that in judging whether an opinion is grievously or egregiously wrong, you don't merely consider the, the reasoning, you also consider whether they're a changed law, changed facts, and also importantly, workability. And our view is that Roe and Casey uh have not proven to be workable. In fact, there aren't five justices on the court right now that would, uh who would agree on what Casey requires, whether it's the Heller step balancing test, whether it's Chief Justice

[00:07:00] Carter Snead: Roberts' view that that's not appropriate, which he articulated in his concurring opinion in June Medical Services. In fact, lower courts are quite confused about which standard actually applies. So the story of American abortion jurisprudence is kind of a story of it constantly shifting and changing rationale, standards, and even normative principles, privacy, liberty, equality, all of which strike me as appropriate things to discuss in the political context. But I think when judges arrogate to themselves this responsibility and deprive us of the freedom that our friends and neighbors, say in Germany, France, Sweden, et cetera, have to govern themselves on this question, it strikes me as uh rising to the level of egregious uh and, and grievously wrong.

Jeffrey Rosen: Mary, Carter said a lot in that answer, both that Roe and Casey couldn't be supported by any methodology of constitutional interpretation that he found persuasive, but also, that Roe's central rule wasn't workable. And in fact, workability was the first of the different three part test for precedent that the court identified in Casey

[00:08:00] Jeffrey Rosen: versus Planned Parenthood. There, the test for overturning precedent was one, is the rule workable? Second, could the rule be removed without serious inequity to those who have relied on it? And third, have there been changes in the intervening years in law or facts that have rendered the ruling unjustifiable? Let's focus on that workability question. What would you argue about why you believe that the rule of Roe and Casey, which is the viability rule is workable?

Mary Ziegler: One question is the degree to which we're conflating settled with workable, because much of what Carter says I think stems not from necessarily Roe's reasoning, but the intense political divide on abortion that we experience, the fact that states for example, continue to pass laws restricting abortion, I think it's beggar's belief to attribute that entirely to the reasoning or the quality of the reasoning in Roe. I think that something similar goes for the fact that the justices

[00:09:00] Mary Ziegler: continue to tinker with Roe. I think if Roe is unworkable because it isn't settled, then it's going to be quite difficult to settle questions that deeply divide us politically, whether that involves campaign finance, whether that involves the right to bear arms. And so I think workability conventionally, as Casey defined it, had more to do with whether there was a standard that courts applied. Now the court can be divided. That can produce uncertainty in the lower courts, frankly any kind of balancing analysis, or anything short of a bright line rule can produce disparate results in the lower courts. And I think if we were to say Roe and Casey are unworkable, either because they produced political contentiousness, or because they failed to produce bright line rules, the court would then have to apply a similar standard to many other precedents. Again, I think we've kind of created an exception for abortion

jurisprudence when we're thinking of workability that we wouldn't necessarily apply elsewhere. And as much as I

[00:10:00] Mary Ziegler: don't think the Supreme Court can settle the abortion debate, either frankly by overruling Roe or preserving Roe, I think the abortion debate predated the Supreme Court's intervention and will postdate anything the Supreme Court does. I think it's a mistake to equate workability with political contentiousness, which I think at times, some of the justices and some uh legal commentators have done.

Jeffrey Rosen: Carter, what's your response to Mary's argument that the test for workability is whether the legal standard can be easily applied, and that viability, as she argues in her brief, is the cornerstone of the Supreme Court's modern abortion jurisprudence, it is clear, and it is workable, and in that sense, there's no reason to revisit it.

Carter Snead: Thanks for the question. I think I would disagree respectfully with Mary's emphasis on political division. I certainly, but she's certainly right, that political division is driving much of this. And I agree entirely, that that's what's happening in the state legislatures. But I, I, I would

[00:11:00] Carter Snead: suggest that the actual the concept of undue burden itself is, is problematic in the sense that it requires a kind of balancing that the court is not equipped to do nor is the court warranted to do by virtue of its authority as the court or by virtue of any term or history or, or element of the Constitution. Judge Easterbrook on the Seventh Circuit had a very nice comment about this. He says that the undue burden approach announced in Casey doesn't call in a Court of Appeals to interpret a text, nor does it produce a result through interpretation of the Supreme Court's opinions. How much a burden is undue is a matter of judgment only the justices, the proprietors of the undue burden standard can apply to a new category of statute. And Chief Justice Roberts raised a similar concern in his concurring opinion in June Medical Services. The balancing that the court implicitly has to undertake to think about whether or not a restriction is an undue burden as balancing the incommensurable goods of reproductive freedom and self determination and autonomy that women uh have, uh alongside the state's interest in

[00:12:00] Carter Snead: protecting prenatal human life or promoting the integrity of the medical profession or, or even promoting respect for life more generally. These incommensurable goods are, in, in my judgment, at least, uh more appropriate to the political branches than the judicial branch and the judicial branch when it tries to engage this, the disagreements among the justices are normative disagreements, which I think are best to be again, uh to had in, in, in the, the public square. So my own view is that um it's actually the standard itself of undue burden, which is problematic, not merely but of course, Mary's right, uh the, the political division and disagreement. I would say, on viability, I agree viability was important in the, in the Roe decision. It's important in the Casey decision. It is the line between when, when the undue burden standard applies versus when the state has greater, in principle at least, greater latitude to regulate abortion, to govern abortion. But I would say that, that the viability line is and by the way, it's important to underscore that there are people who have tried to argue, not Mary, not, not

[00:13:00] Carter Snead: me, who have tried to argue that the court has some middle pathway where it can abolish the viability line, affirm the 15 week ban, but then not speak further on what comes next. I think that's not, I think that's a misreading of Casey. I think they're, they actually have to answer this question. Because again, viability is the binary dividing line between undue burden and, and uh in greater latitude for regulation. But as for viability, I don't think it's a workable line. It's a moving line. It moves according to technology. It moves according to access to medical resources, which of course it adversely affects people in poor areas, which is problematic from my point of view. And then finally, it varies even according to the physiology or the clinical case itself of the, of the unborn child. So and, and not to mention, I think viability actually doesn't have much of a, of a moral grounding to recommend itself. Namely, it seems to suggest that the more dependent a being is, the more vulnerable but a being is, the less in title to the protection of the law he or she is. And that, that strikes me as problematic. There are ways to care for mother

[00:14:00] Carter Snead: and child and family and community that uh, that we could embrace, that uh I think hopefully people, pro choice people, pro life people could agree on in the future.

Jeffrey Rosen: Mary, Carter just said that in evaluating workability, the question is not merely is, is the viability test workable, but is the undue burden test itself workable? The undue burden test came in the Casey decision from cases like Webster vs. Reproductive Health Services and Hudson vs. Minnesota. These are all decisions by Justice O'Connor, Thornburgh versus American College of Obstetrics. Tell us why you believe that the undue burden test, which asks courts to balance liberty interests against other interests, is deeply rooted in the law and is indeed workable.

Mary Ziegler: Well, I think if, if you look at how peer nations in Europe approach this, if you look historically at how the United States has approached this, there's always been a recognition that there are, as Carter I think correctly put it, deeply held beliefs and

[00:15:00] Mary Ziegler: constitutionally significant interests on both sides of the equation. Um I think that was true in the United States going back to colonial times. I think it's true in Europe as well, it whether you're looking at international human rights commitments that European nations have made, or European jurisprudence that's domestic. And so I think the unburden test is an attempt by the court to recognize and dignify those competing interests. Um is it easy to quantify competing constitutional considerations of that magnitude? No, it's not. But I think then for the court to say, that means there are no such constitutional considerations that in fact, autonomy or equality or dignity for women or for unborn life simply don't rise to the level of something that we have to take seriously constitutionally, because it's hard for us to quantify. I don't think that makes sense, either. Again, I don't know what makes abortion unique in these terms, because there are other arenas

[00:16:00] Mary Ziegler: where the court has to grapple with competing constitutional considerations. There are other arenas where the court has to do some sort of balancing analysis. Those balancing analyses don't often lead to answers that are predictable ex-ante. They tend to be fairly, I think, difficult and thought provoking for the justices. But I'm, I'm not convinced necessarily that abortion stands alone as being an area where the court is incapable of that kind of thinking, or really, frankly, more incapable than courts in other places, or an area where the

constitutional interests are that much less weighty. I think one thing that Casey did right that frankly, Roe had not done as clearly was to acknowledge that this is something that matters a great deal to a lot of people, and that there are matters of constitutional significance that need to be taken into account, whether one is pro life or pro choice. I think Casey

[00:17:00] Mary Ziegler: is uh attempting to balance those considerations. It doesn't qualify as unworkable.

Jeffrey Rosen: Carter, Mary just said that courts balance liberty interests all the time. And indeed, the briefs note that in the Glucksberg case, uh Chief Justice Rehnquist, in evaluating whether there's a right to die with dignity in the Constitution said you, you just look at the traditions of the people narrowly, not abstractly and find unenumerated liberty interests in those traditions, and you can balance those against other interests. So in rejecting the undue burden test, would the court have to reject the whole idea that there are what are called substantive due process liberty interests, and wouldn't that call into question a whole lot more than Roe v. Wade?

Carter Snead: Yes, uh I think the court wouldn't have to abandon the concept of substantive due process in order to, to overturn Roe and Casey. I think, my, my own view, I mean, I'm sure there are those who would, who would like to see substantive due process go away, I'm not, I'm not one of those people. I, I think that

[00:18:00] Carter Snead: Glucksberg is actually a, a really wonderful sort of window into how the court might simultaneously read the, and think about the history, text and tradition of the Constitution, those, those goods that are deeply rooted in the nation's traditions, those goods that are implicit in the concept of ordered liberty, that to me strikes me as a, as a way to tether the justices to the Constitution doing the work that substantive due process requires them to do. I would suggest that if we essentially argue in the book that if you apply the framework from Glucksberg to the question of abortion, you come up with a very different answer. You come up with actually probably with the same answer that the justices did nine to zero in Glucksberg, which is to say, there is no deeply rooted right to abortion in the Constitution. It's not implicit in the concept of ordered liberty, and therefore it's a matter for self governance. And we can join our, our peer nations and govern ourselves on these questions. That the, the major difference, I think, between us and countries around the world who grapple with this difficult question and, and manage political disagreement and manage

[00:19:00] Carter Snead: uh pluralism in a way that uh, that is sustainable, and isn't too disruptive, is to actually vote on these questions. And so, and, and we have in our Federalist system the possibility of people in different states pursuing different approaches that are congenial to the people within those states. I think abortion is unique, I think, uh in front in terms of other kinds of questions in which balancing might be permissible, because not just because of the level of disagreement or the political division, but because why there's the level of disagreement and political division, and, and this is something that Judge Friendly points out in his unpublished opinion that abortion uh involves the intentional killing of a living human organism in utero.

Now, there's a very pitched disagreement about what the moral standing of that being is or what we owe to that being or what we should recognize in the law, uh that being stature. Uh but in

Roe and Casey, the court says that states are not permitted to adopt, "one theory of life". They're not permitted to treat the unborn child as a legal person for

[00:20:00] Carter Snead: putting aside the question of what the word person means in the 14th Amendment, even to treat the unborn child with the basic protection as against the kind of private violence that abortion represents. And so I think, I think it is sui generis. I think it's a very unusual human context and human question uh and distinguishes abortion from other instances in which courts can balance competing goods. But again, I think I'm persuaded by Chief Justice Roberts, who says in this particular context, how do you balance freedom, autonomy, self determination on the one hand, versus the respect for life, uh respect for prenatal life, integrity, the medical profession and respect for life more generally in the other. That kind of balancing, first of all, it's not warranted by the due process clause or the Constitution. But even if we were to do it, my view is and it's somebody is going to have to do it right, if we're going to govern ourselves in the question of abortion, in my view, is that the place to do it is among the political branches. And I think that will heal our politics a little bit. I mean, our politics are pretty problematic right now. They're, we're pretty unhealthy as a country right now in terms of our polarization and

[00:21:00] Carter Snead: people are at each other's throats. And uh I think that one reason for that, one reason, the reason the presidential elections are so toxic, the reason that even Senate elections can be and for sure, judicial confirmation hearings are toxic, is because the court has held to itself the authority to settle this question, and these become proxy wars for what we should be doing in the political debate coming together, talking in a rational, civil way with our friends and neighbors about how to, how to deal with this question rather than having it settled by unelected uh justices.

Jeffrey Rosen: Mary, if you were arguing for why women's liberty interest in choosing abortion is in fact, deeply rooted in the nation's history and tradition, as Justice Harlan did in the Poe v. Ullman case from the 1960s, what kind of argument would you make?

Mary Ziegler: I think there's an argument that's nicely made in, in a brief for the Organization of American Historians and the American Historical Society, essentially that the, the evidence that uh at the time of the 14th

[00:22:00] Mary Ziegler: Amendment that abortion was considered wrong and criminalized is complicated in ways that we often fail to acknowledge. So first of all, I think there's good current historical research suggesting that the quickening standard was important, and it's worth for a long time, and even into the later 19th century in ways we sometimes haven't acknowledged. The quickening standard, I think very much was about what women themselves thought about reproduction, uh to know whether a pregnancy had reached the point of quickening depended on what a woman said. And so even though that appeared to be the state imposing some kind of external gestational standard, it often in effect depended on a woman's own account of what her pregnancy meant. I think there's also conflicting evidence as to why United States began to criminalize abortion in the late 19th century. They were doing so, the thought that it was uniformly a recognition of the value of unborn life seems wrong given that many of those who had

[00:23:00] Mary Ziegler: advocated for those laws did so in part because they were concerned about what we would now consider sort of eugenic concerns, in particular, the thought that immigrants from places like Ireland were reproducing at a much faster clip than Anglo Saxon women who would have been considered white, who were viewed to be the ones disproportionately seeking out abortions. So I think to, to look at that history, you, you can say at least that there's a fairly consistent practice of abortion. There's a consistent practice of not prosecuting women who have abortions. There was a fairly deeply rooted tradition of looking to women and asking when abortions would, in fact, be regulable through the quickening standard. And when we get to a point where states were more uniformly criminalizing abortion, I think the lessons we derive from that history now have to be complicated, because the reasons that that legislation was introduced were reasons that don't have to do with the kinds of,

[00:24:00] Mary Ziegler: I think more respectable and deeply held beliefs that we see in play now. They had to do in part with things that most pro life and pro choice people would find distasteful and ultimately even irrelevant.

Jeffrey Rosen: Carter, what's your response to that historical argument, namely, that quickening, which occurs from 18 to 20 weeks of pregnancy, was the common law line from the time of the founding until uh the mid 19th century that abortion was restricted more severely around the time of the 14th Amendment for reasons involving gender and, and racial discrimination that are not considered acceptable today, and that ever since the '60s and '70s and beyond, quickening has generally been aligned rooted in the traditions of our people?

Carter Snead: So it's obviously I'm hesitant to, to weigh in on a historical question being a, a, a lawyer, but uh and not a historian as Mary is but I will suggest that this question is pretty vigorously contested.

[00:25:00] Carter Snead: One thing to note is that in 1868, when the 14th Amendment was ratified, abortion was criminalized by criminal code in 30 of 37 states, and, and 27 of those 30 states is my understanding is that they actually the abortion was criminalized from, from conception. I'm relying on other historians, um who are obviously respectable and thoughtful, even though they may disagree with other respectable and thoughtful historians, the proposition that I've seen and, and find persuasive from historians, including, um well, Joseph

[inaudible 00:25:30] Carter Snead: of course, you have John Keough, and you've got my colleague, John Finnis. You've got Justin Dyer at the University of Missouri, who have done a lot of uh spade work on these historical questions. And their judgment is that quickening was really a kind of rule of evidence. It was really a rule that was designed to allow for the uh litigation have an extrinsic standard for, for, for pregnancy, it's, it would be impossible, I think, to police a restriction on abortion prior to the moment at which the available technology allowed you to discern that there was a pregnancy, [

[00:26:00] Carter Snead: in fact, present. So I'll just, I'll just say, though, that my understanding is that there's a, there's a disagreement among respected historians about why these rules were put in place, why these laws were passed. Uh I will say there's one, uh the state of Ohio, for example, banned abortion from the moment of conception only a few months after it ratified the 14th Amendment on the ground that it was "child murder". I understand the American Medical

Association had a pretty significant role in getting the laws tightened up or codified, codifying what had been a crime previously in common law, although not very frequently prosecuted, perhaps, perhaps deemed a misdemeanor. I don't, I don't know. I'm not a historian. But, but I will say that I think that it's, it's, uh it's clear, to me, at least based on what I've read that there is not a right to abortion that is, was enjoyed, certainly not contemporaneous with the ratification of the 14th Amendment. And I think it's quite contested as to whether or not there was a, a right to abortion at common law at the time of the founding. But I will say, prosecuting women uh is something that I'm very pleased to say has not happened since the 1920s

[00:27:00] Carter Snead: uh in the United States, as I understand it, and, and I'm, I'm in print, arguing that if and when states have the freedom to regulate abortion, they should enact laws that protect not just unborn children, but their mothers as well as their families, provide for their welfare before, during and after the child is born, and that the notion of prosecuting women should be completely uh rejected in my own, again that's my view, but uh, but I thought it was relevant to the question.

Jeffrey Rosen: Just one more beat on this because it seems central for Justice Kavanaugh, in deciding whether or not Roe and Casey were egregiously wrong in their reasoning. In focusing on tradition, Justice Kavanaugh doesn't ask what the provision meant at the time of ratification, in other words, a snapshot of 1868. But what the tradition was over time, and then that tradition, as Justice Harlan said, is a living thing. So I, I understand that there's a debate among historians, but Mary Ziegler, I hear you saying that there really is no longstanding tradition in America of restricting abortion from the moment of conception. And [00:28:00] that for most of American history, pre quickening uh abortions in various ways, have in fact been protected. And indeed, there's a brief file by Reva Siegel and other historians saying that the mid 19th century status of abortion was really in that sense, an aberration. So one more word, because this is the central focus of your brief, Mary Ziegler on how pre quickening protections for abortion had been more the rule than not for most of American history.

Mary Ziegler: Yeah, I mean, I should be clear, it wasn't the point of our brief. Our brief was sort of more about the contemporary polarization caused by Roe, or not in our view entirely cause by Roe. So I'm, I'm not a 19th century historian as much as I'm a historian, but I think my understanding of race by Reva Siegel and Nancy Cott and other historians is essentially that there's a longstanding tradition of people practicing abortion in the United States, of

[00:29:00] Mary Ziegler: women and even abortion providers often not being punished for practicing abortion in the United States, except in scenarios where an abortion doctor actually killed a woman rather than just performed an abortion. And that the 19th century turn, which as, as Carter correctly points out was one led by the American Medical Association, was not one that reflected traditions we've seen carried through to the present. It was one, certainly the American Medical Association talked about the value of fetal life and the idea that an unborn child's life began at conception. But lawmakers were often persuaded by other arguments having nothing to do with the value of life at conception or later. They were often concerned about whether women had abandoned their traditional roles as wives and mothers, about whether the wrong sorts of women were having children. This was not just about the

[00:30:00] Mary Ziegler: fact that Anglo Saxon women were not having that many children. It was the fact that people who are viewed as eugenically undesirable immigrants were having lots of children. And so I think, to look at that 19th century moment, and say that's where we want to derive our sense of history and tradition, should be disturbing I think, to people who are pro life as well as pro choice, because that was not a moment when lawmakers or the American Medical Association was necessarily thinking about this issue in ways that we would like to emulate now. And again, I think there was never really a clear tradition, even after those laws were passed, of enforcing them in a consistent or coherent way. So uh I think while that history doesn't necessarily yield clear lessons about what rights there are or are not in this context, I think, to look at that and say, for example, that clearly there was no right to abortion in our history and tradition, or as partners

[00:31:00] Mary Ziegler: colleague, John Finnis and Robert George at Princeton do that there was in fact a longstanding history of protecting a fetus or unborn child such that abortion is in fact constitutionally questionable or unconstitutional. I don't think the history tells you anything that straightforward, um certainly something straightforward enough to make it obvious that Roe and Casey were egregiously wrong.

Jeffrey Rosen: Hello again, We the People friends. The National Constitution Center relies on your support to offer nonpartisan constitutional education, learning and light to Americans of all ages. Thanks to the John Templeton Foundation, every dollar you give to support We the People's podcast campaign will be doubled with a generous one to one match, up to a total of $234,000. Visit constitutioncenter.org/wethepeople. And thank you for your support of the show and of our mission. Our motto in the spirit of Justice

[00:32:00] Jeffey Rosen: Brandeis is come let us reason together and it's so meaningful to learn with you every week. That's constitutioncenter.org/wethepeople.

Carter, of course, we're not going to resolve the historical debate. But I want our listeners to understand is it correct that for someone who cares about history and tradition, like Justice Kavanaugh, the correct inquiry is not simply what did the framers think in 1868, a snapshot of that view, but instead of wide angle lens of a changing tradition, from the time of the framing to today, which, which could include the liberalization of abortion laws that uh accelerated in the 1960s and '70s, leading up to Roe and if that's the kind of tradition that the court would have to examine.

Carter Snead: It's an interesting question, I would want to study Justice Kavanaugh's opinions more carefully before I ascribed a view on that to him. My sense is in thinking about, I know that he's spoken very favorably about Glucksberg, uh and in so far as he's done that, my reading of Glucksberg is the, the question is whether or not something is deeply rooted in our

[00:33:00] Carter Snead: traditions. I think that isn't merely a snapshot in time. I think it does, in fact, extend, is something deeply rooted in our tradition, you know, from the beginning, or at least from the beginning of the provision that we're trying to interpret in question up until the present moment. And as you said, it has to be formulated at a fairly precise level, not simply a broad level of abstraction of reproductive autonomy or decisional autonomy at the end of life. It's something about the right to assisted suicide, the right to abortion. And I suppose my view is that

I think, uh again, I'm not a historian, but in so far as the historical record is ambiguous on this point, then I think that suggests that there's not a deeply rooted right to abortion. The test is, is there a deeply rooted right to abortion in our nation's history and tradition, and if the record is ambiguous, people disagree. In my understanding, there's disagreement about this. I would suggest that that would show that there is not a deeply rooted right to abortion uh in our, in our history and tradition.

Jeffrey Rosen: Well, that was a thorough mooting of the first of Justice Kavanaugh's prongs is, is the prior decision not just wrong, but grievously or egregiously wrong. Let's now turn to the second

[00:34:00] Jeffrey Rosen: prong, and I'm going to read the whole thing because these are not easy prongs to run through, but we're going to do it. Second, has the prior decision caused significant negative jurisprudential or real world consequences? In conducting that inquiry, the court may consider jurisprudential consequences, some of which are also relevant to the first inquiry, such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the court may also scrutinize the precedent's real world effects on the citizenry, not just its effects on the law and the legal system. All right, Mary, there's a lot in there. But the question is, has the prior decision caused significant negative jurisprudential or real world consequences, including not only workability, which we've talked about, but also consistency and coherence with other decisions and real world effects on citizenry?

Mary Ziegler: Our brief was about real world consequences, so I should probably start there. I think it's easy to

[00:35:00] Mary Ziegler: blame Roe for some of the things Carter mentioned earlier, for example, the politicization of Supreme Court nominations, the deepening of polarization around any number of issues, whether it's the treatment of the legacy media that we view scientific evidence, just partisan divides more broadly. Uh I think as any historian would tell you, that kind of simple causal argument is almost never correct. Right? It's messier than that. I think it's also convenient to blame Roe for political divides that many more people are accountable for. So uh I think arguments that Roe created this divide are obviously historically incorrect. The abortion debate was extremely inflamed before Roe, in part because people have deeply held beliefs about things like when life begins, or what autonomy means, or what roles men and women should play that of course, predated

[00:36:00] Mary Ziegler: anything the Supreme Court said and of course, cannot be resolved by the Supreme Court either by removing itself from the equation, by preserving a right to abortion and so on. I think there's, if we're looking, for example, at judicial nominations, just for example, the idea that Roe instantaneously politicized Supreme Court confirmation seems wrong. If you look at John Paul Stevens, the first justice to be confirmed after Roe was decided in 1975, was asked absolutely zero questions about Roe. That was not because abortion was not politicized, or people weren't upset. It was simply because the transformation of Supreme Court nominations was complicated. It's not something that Roe magically accomplished overnight. You really have to get through decades of complexity and political maneuverings to get something like we have now, when it comes to Roe figuring centrally in Supreme Court confirmations. That process is not something the court could control or frankly resolve. So

[00:37:00] Mary Ziegler: I think as much as we all may not like where we are in terms of polarization, the thought that the Supreme Court can save us by overruling Roe and Casey any more than frankly, it could save us back in 1973, by deciding Roe, just completely flies against most of the historical evidence from the, the past 50 years. I think, if you're thinking about other things like consistency with other decisions, of course here I think the doctrine is more complicated, because we have different approaches to what substantive due process ought to look like, some of which are quite closely connected to Roe and Casey, um for example, Obergefell or Lawrence, other decisions that rely on sort of interconnected concepts of equality and self determination that are very reminiscent of something you would see in Casey. And you'd have other decisions like Glucksberg that focus more

[00:38:00] Mary Ziegler: heavily on history and tradition. I don't think that clearly tells you that there's been a disconnect between Roe and content... or in Casey and contemporary jurisprudence, although again, I don't think the doctrine points you clearly in one direction as to how we should be viewing substantive due process.

Jeffrey Rosen: Carter, your thoughts on Justice Kavanaugh's second prong? Has the prior decision caused significant negative jurisprudential or real world consequences, including considerations not only about workability, but consistency and coherence with other decisions and the President's real world effect on the citizenry?

Carter Snead: As for the jurisprudential consequences of Roe, I think it's pretty widely agreed that when the case involves abortion, very settled propositions and precedents generally are frequently not applied. Justice O'Connor referred to abortion jurisprudence as a "ad hoc nullification machine", meaning when the topic is abortion, the usual settled law, no matter what the settled law might

[00:39:00] Carter Snead: be, the court applies a different standard and departs from that settled law. And I would argue that's a jurisprudential disruption. And again, the examples of this include statutory interpretation, Rules of Civil Procedure, rules connected to the First Amendment, rules involving Article Three standing. Settled rules, which would apply in a very normal and mechanical way are frequently departed from if the issue is abortion because the issue for whatever reason, because people feel the justices treat, this, this matter as sort of sui generis. I think that's unhealthy for the jurisprudence. I think it's, it creates instability and it kind of is in deep intention with the goods that stare decisis is supposed to advance, namely stability, transparency, coherence, sustainability. As far as the real world effects go, I mean, the, the most obvious real world effect of Roe v. Wade and Casey, is the fact that because states in the political branches of government are forbidden from extending the protections of the law to prenatal human beings, there have been 62 million abortions in this country and that explains the deep controversy. It explains the moral

[00:40:00] Carter Snead: disagreement that we have with our friends and neighbors on these questions. As far as the divisiveness goes, I think uh again, we, we could only find out for sure if uh, if the court returns this question to the political branches for deliberation, and, and resolution, but we do have a little bit of a natural experiment that, that we can look at. We have, and my colleague, Mary Ann Glendon is a, is a renowned comparatist. She is a, a scholar of comparative law. And her view is, and this we argue this in the brief, is that if you look at those nations that

get to deliberate and decide and govern themselves in abortion, their politics is healthier than ours, uh certainly around uh judicial nominations, certainly, and, and I think I read the, the, the recent history a little more differently, I think a little differently than, than Mary does. I mean, the big moment in which the judicial Supreme Court confirmation process was transformed, I think, is in the late 1980s when Robert Bork was nominated. And I think, I think most people agree, including the activists that mobilized the surprising way to, to many people to, to ultimately

[00:41:00] Carter Snead: frustrate and take down that nomination was precisely because they were worried about abortion. Abortion was the principal political argument that was on the minds of the activists who, who mobilized against Bork in a way that was unprecedented. And, and I think that was the moment in which our Supreme Court confirmation process was transformed. Why it took until 1986 to, maybe it had to do with the balance of the court, the balance of justices on the court at the time and the real possibility that, that a change in personnel might actually mean that Roe would be overturned. But as a person who follows these things closely in terms of judicial confirmation process is, it's clear to me my friends who are pro choice, my friends who are pro life, what's on their mind when the Supreme Court nominations arise is not the Commerce Clause. It's not, it's not uh the Affordable Care Act, as you know, it is the question of abortion.

Jeffrey Rosen: A big question, Mary, your response to the claim by Carter Snead and Mary Ann Glendon, that returning abortion to the political process would normalize our politics as in Europe, that our politics became polarized

[00:42:00] Jeffrey Rosen: because of the Bork hearings in '87, and that overturning Roe would make things better.

Mary Ziegler: Again, it, it's just more complicated. So I don't want to overstate the claim and say that somehow, Roe didn't matter to our politics. I mean, that's clearly wrong. If you look at the pro life movement immediately after Roe versus before, there are differences, right? It's a more national movement. It's a more organized movement. It eventually becomes a movement that more successfully enmeshes itself in party politics. I think if you're to say that the difference between the United States and European nations when it comes to abortion, boils down entirely to judicial intervention. I think again, you're ignoring other distinctions. To take one obvious one that I already alluded to, on party politics are quite relevant. So for example, if you look at Brazil, Brazil, this issue has become very, very politically divisive, in part because it's been seized by Jair Balsonaro's party as a wedge

[00:43:00] Mary Ziegler: issue in a way to turn out voters, much I think as both Democrats and Republicans have used abortion as a way to mobilize single issue voters. Did Roe make that inevitable? I mean we don't have a Roe in Brazil, and we're seeing something similar unfold. Again, that isn't to say Roe didn't matter. It did. But I think U.S. party politics have been fairly unique, especially compared to what we've seen in Europe, in ways that have created, I think, unfortunate dynamics, negative partisanship in the United States, the idea that we not only disagree with people on the other side of partisan lines, but we view them with tremendous distrust and hostility. That's something that's increased exponentially in the United States since

the 1980s, in ways we don't see in other parts of Europe. And so I just don't think that we can confidently blame so much of our polarization on Roe when we see countries

[00:44:00] Mary Ziegler: following parallel paths with party politics, often reaching levels of polarization like ours, and when we see other ways that we differ from these qualities, that should be taken into account. So I mean, if, if, if the if the claim is maybe it would help somewhat, that's certainly possible if the claim is that our abortion debate is going to deescalate significantly without Roe in the picture. I would be very not confident as to that prediction, um again, because I think at bottom, in the United States, we have deeper disagreements substantively about abortion. Another natural experiment was one we ran before Roe came down, in which states were deeply divided about this. There was an active pro life movement and an active pro choice movement. When states reached settlements, they were not left untouched. New York for example, repealed all abortion restrictions, only to have pro life forces in that state try to reinstate

[00:45:00] Mary Ziegler: them, only to have a pro choice governor veto them. Both pro life and pro choice groups were jockeying in the courts. And I think it's worth saying that for me to even believe that the court overruling Roe would put an end to the judicialization of abortion in the United States seems disingenuous to me. We've seen on, on the pro choice side, groups already strategizing about what litigation would look like in a post Roe United States, including at the federal level, including things involving court reform. We've seen pro life groups already positioning themselves to argue that abortion is unconstitutional under the 14th Amendment, so I think to believe that overruling Roe would be the final word when it comes to the federal judiciary in abortion in the United States ignores what both social movements have been telling us um in the lead up to Dobbs, and really in the past 50 years they've been contesting this issue.

Jeffrey Rosen: One more beat on the second prong, Carter, Justice Kavanaugh asked, not only are there significant

[00:46:00] Jeffrey Rosen: negative real world consequences, but also might there be significant negative jurisprudential consequences? And earlier in our discussion, Mary suggested that overturning Roe would call into question decisions like Obergefell and the marriage equality decisions, which built on Roe and Casey. Do you agree that overturning Roe and Casey would call into question Obergefell and the marriage equality decisions or not? And what are their other jurisprudential consequences of overturning Roe?

Carter Snead: I think there's a very simple, jurisprudentially coherent way to overturn Roe and Casey without obviously interfering with the Obergefell line of cases or for sure the Griswold line of cases. It's important to make a practical point here that I'm not aware of any state legislature at this moment who is seeking to undo the Griswold precedent. You'd have to have a case or controversy to grapple with that. And moreover, or even for that matter, I'm, I'm unaware even very conservative states of efforts to try to undo Obergefell. I think that the normative issues are quite different in those

[00:47:00] Carter Snead: cases than they are on the abortion question. But also, I think there's uh, and it's funny, I could be wrong about this. But my vague recollection is that in Justice Kennedy's opinion on Obergefell, he doesn't actually cite Casey, as in, in the long line of

substantive process cases that he cites for the proposition that there is a, a right to marriage that includes same sex couples, and that, that it's unconstitutional to, to restrict that. I know that a lot of the advocates invoke Casey, just as they did in the context of assisted suicide, because it's a very, Justice Kennedy's language in Casey about self determination and autonomy is so broad in that case that it could be, it, it's applied frequently in other contexts, and most, most prominently in the, the so called Philosopher's Brief in the Glucksberg case about assisted suicide. But no, I think that there's a very simple way to suggest that substantive process is a legitimate uh mode of interpretation to legitimate doctrinal principle. But Roe and Casey are even granting that the legitimacy of substantive process are, in fact, so far afield of that not just because of the

[00:48:00] Carter Snead: um, the sense in which they are further afield of the text, history and tradition of the Constitution, but also these, these principles of stare decisis. And I think it's in some ways, I think, I think it's that's borne out by the fact that the, the most uh strongest advocates for abortion rights, mostly focused on stare decisis. And I guess that's why we're talking about it now, rather than the original, you know, the original question of text, history and tradition, mostly to talk about these factors that you have so think wisely focused our conversation on. And that I think indicates that, that even among those pro choice justices, it's hard to defend Roe and Casey as a, as the fruits of legitimate constitutional interpretation, unless you're prepared to say that, that you embrace a mode of interpretation that takes you quite afield of the text, history and tradition and untethered to justice and gives him or her uh a latitude that I think a lot of folks might be uncomfortable with. But no, I don't think it's, I don't think it's difficult at all. And I think for people who would like to read more deeply about especially about Griswold, I think Judge Friendly's uh opinion is really interesting. It was published by his former

[00:49:00] Carter Snead: clerk, Judge A. Raymond Randolph of the U.S. Court of Appeals for the DC Circuit in the Harvard Journal of Law and Public Policy. It's a tour de force of drawing distinctions between privacy, and he grants a right to privacy emerging from the due process clause, but then shows that the context of abortion is factually, humanly, morally and legally distinguishable from contraception, and frankly, from marriage equality.

Jeffrey Rosen: Fascinating. Thanks very much for that citation for We the People listeners. Well, it's time for Justice Kavanaugh's third factor, and I'm going to read that one now. Would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the court may examine a variety of reliance interests, and the age of the precedent, among other factors. Mary Ziegler, tell us why you believe that overruling roe and Casey would unduly upset reliance interest.

[00:50:00] Mary Ziegler: Obviously, Roe has been around for 50 years. I think to some degree, both pro life and pro choice people um have even almost just be, begun to imagine what post Roe United States would look like. I think that tells you that certainly, even people who don't like the decision would agree that I think it's been woven into our cultural fabric for nearly half a century. As for reliance interests, I think we see some evidence of what that means in Texas now that that state has functionally banned abortion. People, I think as Casey put it, have assumed that abortion would be available if contraceptives fail. That's particularly important, because in the United States, we don't, for example, have universal healthcare. We don't necessarily have a

safety net that would support people who had pregnancies that they did not plan. And we've seen people

[00:51:00] Mary Ziegler: taking steps that are not necessarily wise when they discover themselves to be pregnant, don't find themselves to have other solutions. And so I think, obviously, there are briefs in the Dobbs case that capture this, people who felt they relied on abortion to achieve certain life goals, people who felt that they had to jeopardize their health, because they were seeking out abortions that were illegal, or being refused other forms of care, because doctors were afraid that those forms of care, for example, post miscarriage treatment, because they felt that a medical emergency exception might not apply. There are lots of I think real world examples that suggest that people do rely on the availability of abortion, and that there really has not been in recent United States history an alternative to that. I think arguments that pro life folks have made have

[00:52:00] Mary Ziegler: often sort of been either that abortion is in fact harmful to women, and that whether they do rely on it or not, they should not rely on it, and that it's no longer necessary, essentially that women have achieved great things while balancing parenthood and career or education. I think, certainly, people disagree about the evidence of abortion's effects. But I think it's quite clear that there are people who struggle to reach that ideal of balancing work and parenthood, particularly people with fewer resources, who have no social safety net to fall back on, who do in fact rely on abortion. And I think in, in our present political circumstances, those people would be affected in ways we see playing out at the moment in Texas.

Jeffrey Rosen: Carter, you argue that overruling Roe and Casey would not unduly upset reliance interests. Tell us

[00:53:00] Jeffrey Rosen: why.

Carter Snead: Reliance is a jurisprudential term of art in the context of stare decisis that is different, I think from the more colloquial sense in which people configure their lives in a prospective way based on certain understandings. Reliance traditionally is referred to retrospective effects, concrete interests, mostly settled contracts, economic interest. Would a subsequent opinion disrupting a prior decision undercut a settled interest that has to be retroactively changed as a result? So I think it's, this is another example of abortion law, affecting and transforming jurisprudence in unusual ways because reliance was nev... prior to Casey, reliance was never really used as a term, as a jurisprudential term of art in, in the way that we're talking right now. But even putting that to the side, and in Casey actually is very, is very straightforward about that, Justice Kennedy, I assume is just as kind of it could be any one of the plurality justices writing, they talk about how reliance in this context is taking on a new meaning. They're, they're adopting a different meaning. Now, they do say in the opinion that reproductive planning

[00:54:00] Carter Snead: could take virtual, and I'm quoting now from Casey, "Reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." That again, that's a point about the meaning of the word reliance in the legal context. But as far as the real world human consequences of returning the question of abortion to the political branches of government, I think that the discussion of what, how to help women in

difficult circumstances is going to be front and center to those conversations. Uh and in fact, among the, the pro life folks that I know, they are deeply concerned about caring for women who find themselves in difficult circumstances and to do everything they can. And there's a great deal of support for strengthening the social safety net, and even I would say, universal healthcare. Now, one of the strange artifacts of our politics is that a lot of people who are strongly pro life tend to have, have joined a party and I think this is regrettable. I think, uh based on what, I agree with what Mary was saying, it's regrettable that political affiliation in this country leads pro lifers to affiliate themselves with a party that is less

[00:55:00] Cater Snead: aggressive in using the organs of the state to care for people like women in need through the expansion of Medicaid through the change of the healthcare system, but not just the healthcare system. I mean, it's there's a whole overhaul that has to happen. But as far as the question of should the court retain the constitutionally unfounded, the so-called right to abortion and Roe and Casey because of the, the benefits that abortion provides to women who find themselves in difficulties or have aspirations uh involving their rise in the social and economic life of the nation, again, to paraphrase language from Casey, I would commend to your listeners the brief written by Helen Alvare, Erica Bachiochi and Teresa Colett. It's a brief of 240 women professionals who strongly disagree with the proposition that, that abortion itself has been the, the, the key to women's success in equality and freedom. They have social science evidence to that effect that show that metrics of women's success actually rise as abortion rates go down. They tend to have comparative data that's showing that in those countries and jurisdictions where

[00:56:00] Carter Snead: abortion is more restricted, it doesn't have an adverse effect on women's flourishing in terms of economic and social markers. And also, they make a moral argument. They say that, that, that no, and they say that their argument ignores other developments, including important revolutionary changes in anti discrimination law, cultural changes, embracing women's equality more fully, although not, not completely fully. We have a lot of work to do there as well, in terms of embracing women's full equality, that there are ways to approach these very serious concerns that don't involve the right to abortion. And it's impossible to talk about this, again, this question of reliance, and, and what abortion, abortion seen as a good for those who support abortion rights, without think... thinking about the mechanism itself. That is, it's impossible to disentangle the question of reliance on abortion, from what abortion is, and the argument about what abortion is about which we strongly disagree. And those of us who feel that abortion is a, is a grave injustice, it's the taking of an innocent life. And again, uh back to my original view, I think that these questions about reliance really can be

[00:57:00] Carter Snead: a part of the conversation that we have when we are, if we, if we are allowed to govern ourselves on these questions. And one other benefit by the way of being able to govern ourselves, rather than simply defer to unelected justices on the court is that the losers in those political debates, those of us feel as if they were able to participate in a way that was fair, and that they had there an opportunity for their voices to be heard in a meaningful fashion in the political space. Whereas if whether it's a pro life victory or a pro choice victory, what's handed down from the Supreme Court in my view pressurizes the conversation, empowers the more extreme voices on either side in a way that's not healthy for our polity.

Jeffrey Rosen: Well, it's time for closing arguments in this extremely illuminating, nuanced, and thoughtful debate about the three part test that Justice Kavanaugh set out in Ramos for deciding whether or not to overturn previous decisions. Mary Ziegler, in just a few sentences for our great We the People

[00:58:00] Jeffrey Rosen: listeners, please tell us why you think that applying the Ramos factors, Roe and Casey should not be overturned.

Mary Ziegler: The idea that Roe is egregiously wrong in ways that set it apart from other substantive due process decisions, I think it's difficult to maintain, without the court staking out a position on when life begins or on personhood of a fetus or unborn child in ways that would not restore this to the democratic process and would not allow states to decide. So I think for the court to explain what makes Roe different, would either require the court to head in a direction that does not look like restoring this to the people or to rely on I think, a flawed historical account that blames Roe for political polarization that I think, unfortunately reaches well beyond anything the Supreme Court has done or could do. So I think setting Roe

[00:59:00] Mary Ziegler: apart requires the court either to be disingenuous about how it views other precedents, or to be disingenuous about how it views a much richer and more complex historical record than the one presented by some of the advocates in the case.

Jeffrey Rosen: Carter, the last word is to you. Please tell We the People listeners why applying the Ramos factors, you believe that Roe and Casey should be overturned.

Carter Snead: Yes, I think since 1973, the court has put us on a course of constantly shifting changing rationales, really a conclusion in search of a rationale to provide a policy outcome, a legal policy outcome that binds the nation in a way that's not mandated by the Constitution that's been very unhealthy for our polity and have resulted in a massive injustice through the views of the lens of folks like me who regard abortion as the taking of innocent life. I think the best thing for our country would be for the court to return this question to the political branches where we could have a, a conversation, in friendship and uh in, in civility, to try

[01:00:00] Carter Snead: to reach some kind of judgment about how best to care for mothers and babies, born and unborn and children and families in a manner that is, that is respectful and supportive of all the, the goods that are at stake in this issue. I think it was a mistake for the Supreme Court to arrogate this question to itself. I don't think it had the constitutional justification to do so. I think it's proven to be unworkable and chaotic. It's harmed our polity. It's harmed the health of our relationships with one another. But I will say in a positive note, having a conversation with a thoughtful and, and wonderful person like Mary Ziegler, and being able to discuss these things in a forum like yours gives me hope, that if and when the court does overturn Roe and Casey, we can have a good and civil conversation about the many competing goods at stake here and come to a resolution that people can live with.

Jeffrey Rosen: Thank you so much, Mary Ziegler and Carter Snead for a conversation in friendship and civility. That's precisely what this has been about the most contested issue in our constitutional law today. Dear We the People friends, your homework

[01:01:00] Jeffrey Rosen: is to read the briefs in the Dobbs case. They're all online. Mary Ziegler and Carter Snead have given us a wonderful introduction to the major arguments on both sides. And then we'll reconvene next week after the oral arguments in Dobbs to review the justices' questions. Until then, thank you so much, Mary Ziegler and Carter Snead.

Mary Ziegler: Thanks, Jeff.

Carter Snead: Thanks for having me.

Jeffrey Rosen: Today's show was produced by Jackie McDermott and engineered by Kevin Kilbourne. Research was provided by Michael Esposito, Chase Hanson, Sam Desai and Lana Ulrich. Your homework of the week, if you're willing to accept it, to prepare for the oral arguments in the Dobbs case next week, read the briefs. You can find them online. There are lots of them, and then we'll reconvene next week with Mary Ziegler and Carter Snead to review the oral argument. Please rate, review and subscribe to We the People on Apple Podcasts. Recommend the show to friends, colleagues, or anyone anywhere who is

[01:02:00] Jeffrey Rosen: hungry for a weekly dose of civil, thoughtful and illuminating constitutional debate. And always remember that the National Constitution Center is a private nonpartisan nonprofit. We rely on the support of listeners like you, and that's why we're so excited to be launching this crowdsourcing campaign thanks to our friends at the John Templeton Foundation. For a limited time, every dollar you give to support the show will be doubled up to a total of $234,000. Please go to constitutioncenter.org/wethepeople. On behalf of the National Constitution Center, I'm Jeffrey Rosen.