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Canary in a Coal Mine: What It Means to Lose a Constitutional Right

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CANARY IN A COAL MINE: WHAT IT MEANS TO LOSE A CONSTITUTIONAL RIGHT THE 66TH HENRY J. MILLER DISTINGUISHED LECTURE SERIES

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Thank you for having me. I'm honored to be the first post-pandemic Miller lecture speaker too; that's very exciting.

So, to hear Justice Alito tell it, the destruction of abortion rights in the United States was a way to strengthen the nation's democracy. "The permissibility of abortion," he wrote, quoting Justice Scalia, "and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[1] The history of *Roe*'s death, I'm going to argue, and the history of what comes next is indeed a story about democracy, although I don't think entirely in the way Justice Alito described.

The story begins with efforts to use the courts to bypass changes in democratic politics and to revolutionize what equality meant—not just, of course, for unborn children, or people who can get pregnant, or women, but all protected classes, including people of color. It became an effort to change the ground rules of democracy—the way money flowed into federal politics, the relative spending power of different conservative constituencies, and even, eventually, the ability of people to cast a ballot in the first place. And so all of this means that the fall of *Roe* should concern you, whether or not you can be, or ever have been, or have any interest in becoming pregnant, or whether you take

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).

any interest in the pro-life or pro-choice movements themselves, because this struggle has very much become one about what kind of democracy we have.

So the story of the modern anti-abortion movement, I would argue, doesn't begin in the nineteenth century as Justice Alito would have us believe, although there was, of course, a pro-life or anti-abortion movement in that era when the American Medical Association and Dr. Horatio Storer—a Boston-bred, Harvard-educated, Harvard Medical School professor—led an effort to criminalize abortion throughout pregnancy—not just at quickening, which was the point often recognized at common law and in statute in the mid-nineteenth century.

Interestingly, though, the American Medical Association didn't describe its fight, its cause, as a constitutional one in the way that the modern pro-life or anti-abortion movement does. This may not surprise us in some ways. In the nineteenth century, at that time, the Supreme Court didn't recognize fundamental rights or privileges and immunities in a way we would become familiar with now. When those rights *were* recognized, and there were very few, they tended to be seen as belonging only to "citizens," which was a group that would have excluded many people of African descent and Native Americans. And the rights, such as they were, tended to mostly exist to protect the states from the federal government rather than individuals from the states, or as the Supreme Court explained in 1823, "to secure and perpetuate mutual friendship and intercourse among the people of different states of the Union."[2] So there may have been no point in talking about the constitutional rights of the fetus or unborn child.

What's interesting, though, was that many others were talking about personhood as a source of rights, particularly after the Supreme Court's decision in *Dred Scott v. Sanford*.[3] Abraham Lincoln thought that *Dred Scott* was wrong because it allocated rights based on

2. Hicklin v. Orbeck, 437 U.S. 518, 532 n.16 (1978) (quoting ARTICLES OF CONFEDERATION OF 1781, art. IX).

3. Dred Scott v. Sanford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

citizenship. He argued, instead, that the Declaration of Independence recognized a different set of rights—a set of rights, he argued, that applied to all men. All men, he argued, were equal in certain inalienable rights, among them life, liberty, and the pursuit of happiness.

Members of the American Medical Association could have drawn the comparison between this language and the rights of a fetus or unborn child, as later generations of anti-abortion or pro-life activists consistently have. But at the time, that would have been a no-go for the American Medical Association, which was deeply divided about questions of race and slavery, as its membership was distributed across the United States in both slave and free states. The organization quite clearly wanted to avoid any conversation about slavery and then later about reconstruction. It was, as one of its members put it in 1863, "an organization eschewing all politics."[4] Instead, the American Medical Association talked about when life began, describing abortion as "an act against nature and all natural instinct."[5] And the organization talked about the roles of women, suggesting that it was women's biological destiny to have a potentially unlimited number of children. "Were women intended as a mere plaything," Horatio Storer explained, "there would have been [no] need for her of []either [a] uterus []or ovaries."[6] So, in short, the early pro-life or anti-abortion movement said nothing about the Constitution, and the framers of the Fourteenth Amendment said nothing about abortion.

But the modern anti-abortion movement or pro-life movement had much grander ambitions. That movement mobilized in the 1960s as states began to reform their criminal abortion laws, mostly following a model developed by the American Law Institute, which carved out exceptions from criminal prohibitions in certain narrow circumstances like rape, incest, certain fetal abnormalities, and the like.

4. 14 TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION 51 (1864) (statement by Wilson Jewell, acting president of the American Medical Association).

5. HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN 15 (1866).

6. *Id.* at 80–81.

The early movement opposed to abortion was predominantly Catholic, white, and middle class and originally argued that there was simply no need to legalize abortion, either because the procedure was never medically necessary because of advances, like caesarean sections becoming safer and antibiotics becoming more widespread, or because even rape and incest exceptions, for example, were unnecessary because pregnancy after sexual assault was so rare.

But these arguments weren't working, in part because people seemed to be pursuing abortions whether or not they were necessary. And so, instead, movement lawyers began to argue that abortion reform itself was unconstitutional. They experimented with a number of arguments to make this point. Initially, they seized on the Due Process Clause at a time when the U.S. Supreme Court was creating what later scholars would call "the due process revolution,"[7] creating protections for criminal defendants that previously hadn't existed. The argument was that if there were procedural protections for even those accused of heinous crimes, surely a fetus or unborn child deserved the same respect. But there was the possibility, too, of an unenumerated right to life. There were scholars and commentators in the movement who pointed to *Griswold v. Connecticut*[8] as a potential source of support, suggesting that if there were *any* implied rights in the Constitution, surely there must be a right to life.

But there were problems with all of these arguments, and one of the most central was the rise of equality arguments within the abortion reform movement itself. The early abortion reform movement, much like the early anti-abortion or pro-life movement, was a predominantly white, middle class, even elite, movement concentrated in the city of New York. But it was making arguments about the effects of criminal abortion laws on people who had no resources and primarily on people of color.

By the early 1960s, abortion, and really pregnancy in general, had become much more safe than it had in recent decades. But the safety

7. *See, e.g.*, Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

8. Griswold v. Connecticut, 381 U.S. 479 (1965).

of pregnancy or abortion had everything to do with income and often with race. Those who had access to private hospitals or to private insurance could bank on having quite safe outcomes with either. But over ninety percent of women who had therapeutic abortions in most of these hospitals in places like New York were white. And that meant that people of color were instead relying on hospitals—municipal hospitals—that rarely offered abortion at all, even in the most extreme circumstances. That meant, in effect, that people—Black women, in particular, and other people of color—were relying on dangerous at-home methods, and their deaths due to illegal abortion actually doubled between the early 1950s and 1960s.

The effects of criminal abortion laws on low-income patients became a new argument for abortion reform, essentially that criminal law was unfair to the poor. As one reformer, Dr. Ernest Solomon, put it in 1965 in testifying before the California legislature, "the rich get the birth control they want, the rich get skilled abortions, and the poor get neither."[9] What was needed, people in the movement to end abortion thought, was an equality argument *against* abortion. And so they turned to the argument that the meaning of the word "person" in the Equal Protection Clause of the Fourteenth Amendment applied before, as well as after, birth, and that the protected or suspect classifications recognized under the Amendment included the fetus or unborn child.

Robert Byrn, a lifelong bachelor who worked at Fordham Law School and lived with his mother, was the major proponent of this theory. Byrn argued that the fetus or unborn child closely resembled people of color in the sense of being a protected class. He argued that discrimination against both depended on appearance rather than any kind of intrinsic worth. But there were, of course, complications with this argument because children in the womb or fetuses were physically dependent on others for survival in a way that adult people of color were not. And some pregnancies would remain, as the Supreme Court would later put it, *potential* life ending in miscarriage or stillbirth.

9. Muriel Dobbin, *2 Ask Action on Abortion*, BALT. SUN, Aug. 11, 1965, at 8.

Byrn turned these differences on their head in a way, saying that what mattered was dependence. Dependence, he thought, was the *sine qua non* of equal protection jurisprudence, or at least should be, not a history of past subordination or its present-day effects, not an immutable trait, but physical vulnerability and dependance rather than the kind of political powerlessness of which the court usually spoke. "The more dependent and helpless a person is," Byrn wrote in 1965, "the more solicitous [the Equal Protection Clause should be] of his welfare."[10] Of course, this argument would have had transformative effects. It would have called into question whether other protected classes, such as people of color, women, or children born out of wedlock were really entitled to the same kinds of protection they had enjoyed from the Supreme Court because, after all, those claims had been staked on a history of subordination, at least in part. But Byrn's argument spread like wildfire in the 1960s as the movement began forming single-issue right to life organizations and later, even after the Supreme Court decided *Roe v. Wade*[11] and people of color began questioning the framing of abortion as a right to choose.

At the time, the movement opposed to abortion clung ever more tightly to the idea of fetal personhood, focusing on a constitutional amendment that would not just overturn *Roe v. Wade* but end abortions performed by private citizens as well. Personhood at the time was appealing to the movement, in part because it was a sort of Rorschach test. It united some left-leaning Catholics who believed that personhood would entitle people not just to drive in the HOV lane but to enjoy child support and sweeping health and welfare benefits during pregnancy. It also appealed to others who saw women themselves as murderers and believed that criminalizing abortion or recognizing constitutional fetal rights would require harsh punishments for those who ended pregnancies—not just for those who performed abortions.

The plan shaped the movement's political future, leading activists to forge an alliance with the Republican party—which in some ways

10. Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. L. REV. 125, 133 (1966).

11. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

had been an unnatural fit—and marginalizing people within the movement uncomfortable with that alliance. The plan, of course, was that the Republican party would help to pass a constitutional amendment, first through Congress and then through the supermajority of state legislatures subsequently required. But it turns out it's not very easy to pass a constitutional amendment, as anybody who's followed the Equal Rights Amendment struggle knows. Even after Ronald Reagan swept into the White House and Republicans controlled both houses of Congress, the movement was nowhere near close to the votes it would need to pass a constitutional amendment banning abortion. And when other alternatives were proposed, they divided the movement so deeply that the movement did what movements do when they're divided, which was precisely nothing.

It seemed impossible to imagine what the future would be until a surprise hero from the women's standpoint emerged in Sandra Day O'Connor. O'Connor had been widely despised throughout the movement when she was nominated to the Court. Her selection was seen as a betrayal. She was rumored to have supported abortion rights during her time in the Arizona state legislature. But O'Connor, in a closely followed case from Akron, Ohio, not only dissented, suggesting that an abortion ordinance was, in fact, constitutional, but also that *Roe v. Wade* was fundamentally unworkable and on, as she put it, "a collision course with itself."[12]

O'Connor's dissent inspired the movement to develop a new strategy. As Americans United for Life, one national group, explained, the new plan was to reverse *Roe v. Wade* through the courts. So an alliance with the Republican party would count in a new way. Rather than securing votes for a constitutional amendment, Republican senators could vote to confirm the Justices nominated by Republican presidents. That didn't mean, of course, that arguments for fetal personhood ever disappeared, even temporarily; instead, they went underground. And interestingly, the more the movement relied on the

12. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

Republican party, the more those arguments were anchored to the idea of criminalization.

In the 1980s and 1990s, the movement's primary initiative was to make *Roe*'s conclusion about fetal personhood an outlier by changing as many other areas of the law on fetal rights as possible. But they didn't change all areas of law. They focused primarily on fetal homicide laws and laws regarding child abuse, child endangerment, or chemical endangerment during pregnancy, particularly for pregnant drug users. As Clarke Forsythe of Americans United for Life explained, "[a] clear high standard should be placed on prosecutors to determine willful, malicious child abuse before any pregnant woman is charged."[13] But what is important, he argued, is that "the principle that the unborn child in the criminal law is a person and a victim should be upheld."[14] The more the Republican party presented victims as those denied rights and suggested that the way to vindicate rights was to harshly punish and ultimately incarcerate those who wronged them, the more the movement against abortion echoed the same language.

There, too, came a shift when the movement altered its constitutional arguments. The old equal protection claims centered on caretaking and dependance didn't make sense to a movement that had reframed its strategy around criminalization. And so the movement latched on to a plan of attack that had developed in the context of fights against sodomy bans. This, too, had been a bit of a stretch. Initially, sodomy bans were hard to fight in terms of due process rhetoric when it seemed that you could logically extend the right to privacy recognized in *Roe* or *Griswold* to sexual intimacy. Instead, Conservative lawyers—particularly Conservative, Christian lawyers and the Rutherford Institute, which was one of the first Conservative, Christian litigation shops—seized on what we would now think of as a history and tradition test similar to the one in *Dobbs*.

But the history and tradition test of the era was nothing like the one in *Dobbs*. It had been most clearly articulated by Justice John Marshall

13. Marney Rich, *A Question of Rights: Birth and Death Decisions Put Women in the Middle of Legal Conflict*, CHI. TRIB., Sept. 18, 1988, at F1.

14. *Id.*

Harlan in dissent in a case called *Poe v. Ullman*,[15] which, of course, was the precursor of *Griswold v. Connecticut*. And Harlan stressed that his version of history and tradition was a middle ground between living constitutionalism on the one hand, which he saw as kind of too unanchored and unable to constrain judges, and a kind of rigid understanding of the past. He described tradition, in his words, as a "living thing," something that would both limit judges but account for the fact that different people defined what tradition was over time and that different traditions could fall out of favor or become ascendant.[16]

The Rutherford Institute defined tradition very differently. Essentially, if a tradition did not have roots in either the Middle Ages or the period in which the Fourteenth Amendment was developed, it was illegitimate and therefore not deeply rooted. In fact, the Rutherford Institute would suggest that even principles not rooted in biblical principles or scripture might themselves not be deeply rooted. *Bowers v. Hardwick*[17] didn't exactly adopt this test but adopted something like it. And this would become the anti-abortion movement's argument of choice going forward because it enabled the movement to argue that not only was there no deeply rooted right to choose abortion in America's history and tradition, but in fact, criminalization of abortion was deeply rooted in the history and tradition of the nation and, in fact, potentially even required by the nation's constitutional traditions.

All seemed to be going well for the movement's strategy in 1992 when the Supreme Court was about to decide *Planned Parenthood v. Casey*.[18] There were what appeared to be six votes in place to overturn *Roe v. Wade* and the Court had been signaling in its recent decisions that it was prepared to do just that. But the Court defied expectations and preserved what the Court would call the "essential holding" of

15. Poe v. Ullman, 367 U.S. 497, 522 (Harlan, J., dissenting).
16. *Id.* at 542.
17. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
18. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

Roe: that there is a right to choose abortion before viability.[19] *Casey* forced the movement back to the drawing board.

The strategy had been simply to elect Republicans, and the assumption would be that Republicans would pick the right people for the Court. In retrospect, it seemed that some Justices were better than others for the job, and the movement pointed particularly to Clarence Thomas. Thomas had endeared himself to the movement in any number of ways. He had been outspoken about opposing abortion before his confirmation to the Court. On the Federalist Society lecture tour, he had favorably cited articles describing abortion as being similar to the Holocaust. He was both an originalist and a textualist and deeply Conservative. But the movement was also pleased with his response to the sexual harassment accusations raised by Anita Hill and others. Thomas, of course, had been defiant, suggesting that he had been the victim of what he called a "high-tech lynching,"[20] and seemed at times to almost relish confrontation with either his accusers or those who believed him.

For people within the movement—the anti-abortion movement or pro-life movement—this was a perfect proxy for how Thomas would react when the chips were down. In other words, when he was asked to overrule a decision like *Roe v. Wade*, when the lights were the brightest and the backlash might be the most intense. What was needed, the movement believed, were more Justices like Thomas, who were not only Conservative, not only originalists, not only textualists, but impervious to backlash. In other words, committed enough to their approach, whether ideological or jurisprudential, that they would be willing to do what they needed to do, regardless of the consequences to their own legacies or even to the institution of the Supreme Court.

What was needed, then, was not just to win elections, people in the anti-abortion movement or pro-life movement began to conclude, but to change how the Republican party worked and to gain more purchase

19. *Id.* at 846.

20. *See* Mikayla Bouchard & Marisa Schwartz Taylor, *Flashback: The Anita Hill Hearings Compared to Today*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/anita-hill-kavanaugh-hearings.html [https://perma.cc/NU7Q-EE57].

in the party. And how would the movement go about doing that? Well, the answer, unsurprisingly, had something to do, as so much in politics does, with money. At the time, politics and money in particular tended to run through political parties. You may remember soft money, which was often funneled through parties. And that meant that parties often had an incentive to destroy, in effect, candidates they believed to be unelectable.

So Pat Buchanan was a cautionary tale. Some of you may remember Pat Buchanan. He was, in many ways, the forerunner of Donald Trump. He held many positions similar to Trump. He was fond of denouncing women who worked as unnatural. He would wave a literal pitchfork on the campaign trail. He liked to mock his opponent, Bob Dole, in 1996 for being either dead or a funeral director. He was good TV, he was extremely Conservative, and primary voters loved him. In fact, in 1996, he won, what was then the first in the nation, Louisiana caucus. He won in New Hampshire. He seemed to be unstoppable. It was very much a Donald Trump narrative. And then he was crushed under a tidal wave of campaign spending and soft money. The vice president of Bob Dole's campaign was one of the Koch brothers. He had donations from soft money groups, from Nabisco to Philip Morris, with, weirdly enough, the Gallo Wine Company leading the way.

And so the message, I think, to the movement was that to get a candidate like Pat Buchanan who was either that Conservative, that opposed to abortion, or that willing to listen to Conservative movements, you needed to change who had the money in the party. And so groups like the National Right to Life Committee plunged fully into a campaign to lift all limits on campaign spending. Jim Bopp, the National Right to Life Committee's general counsel, launched a litigation shop designed to challenge all and any campaign finance regulations. Mitch McConnell was the honorary chairman and Betsy DeVos was one of the board members. National Right to Life Committee began changing its rankings of lawmakers as pro-life or not, based in part on their votes on campaign finance. And, of course, the movement began focusing on litigation, including, of course, most

famously, the decision of *Citizens United v. FEC*,[21] which Bopp himself brought at the beginning.

The focal point of *Citizens United* for the movement and for social conservatives generally was supposed to have been dark money in transparency. This had emerged after the struggle over same-sex marriage in California, in particular Proposition 8, which restored a state ban on same-sex marriage. In the aftermath of this struggle, California, which has robust public records and sunlight laws, saw the addresses and identities of many donors to the Prop. 8 fight publicly revealed online by groups like KnowThyNeighbor.org. This led to a tremendous backlash in what was generally a very blue state—boycotts of businesses, graffiti, protests outside of stores, lost clients and business. And it became quite clear to a variety of groups, including the people in the movement against abortion, that their ability to get donors to open their pocketbooks would often depend on secrecy.

And so the plan in *Citizens United* was to argue that the relevant parts of the Bipartisan Campaign Reform Act on things like disclosure were unconstitutional. Of course, *Citizens United* did something very different; it focused on independent corporate expenditures. But that, too, turned out to be a boon to the movement, one that would help cement its relationship with the Federalist Society, which had long been difficult, and one that would help cement its new framing of abortion: one that suggested that people who had abortions were victims. Interestingly, this strategy, too, was complicated. It required, as one group, Americans United for Life, put it, "lov[ing] the wrong-doer, without embracing the wrong."[22] But the challenge was to explain how women could be victims because they didn't know what they were doing, when for decades the movement had been displaying images of real abortions and of fetuses or aborted children and when some women themselves insisted that they understood what abortion was.

21. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

22. Paige Comstock Cunningham, *Can We Love Women Who Abort?*, AUL F. (Ams. United for Life, Chi., Ill.), March 1993, at 1, 1.

The movement here drew inspiration from an unlikely place—emerging lawsuits against tobacco companies. Tobacco lawsuits had often been unsuccessful for some time because juries, quite simply, couldn't accept that smokers weren't to blame for their own injuries. After all, how could they not know that smoking was unsafe? Plaintiffs' attorneys in the late 1980s and 1990s, and often states' attorneys general who were also beginning to experiment with litigation, began stressing both that big tobacco created injuries so severe that they couldn't be ignored and also that the industry had been so deceptive and so sophisticated that consumers had no idea what they were getting themselves into, even if they had a generalized knowledge of the dangers of smoking.

This war against big tobacco groups, the movement against abortion realized, could be a new model for the 1990s. They, too, could argue that women had been the victims of a massive, dishonest industry that had actively misled them. This proved to be a perfect bridge-building tool because, after all, at the time, Operation Rescue was mounting massive clinic blockades and urging members of the movement to act like abortion was murder if they believed it to be so. But if abortion was murder, then how was it that women weren't murderers too? The answer was that they didn't know what they were doing. But this was a salve to those in the movement who eventually were open to the idea of punishing women, because, in theory, if women at some point could be proved to have known what they were doing, then potentially punishment would be justified after all.

This argument, too, was one of the points of entry for the work of a reproductive justice movement, which argued that it was ridiculous to insist that the problem women faced was simply making a wrong turn in choosing abortion and that this was the reason for negative health outcomes that women experienced. Reproductive justice organizers pointed to a variety of negative health outcomes that disproportionately affected people of color, from negative rates of maternal mortality to heart disease to cancer to diabetes and a variety of other ailments. They also stressed that the focus on criminal punishment emerging in the anti-abortion movement would inevitably

impact communities of color that already felt disproportionate impacts of prosecution or policing.

But all of that was easy to forget for the movement opposed to abortion when *Citizens United* came out because it seemed to be a perfect opportunity to reorient spending in the GOP—not because of what it said about disclosure but because of what it said about independent expenditures.

Citizens United led to a surge in what we now think of as outside spending—so, spending not formally controlled by parties but by super PACs and nonprofits. Of course, as you know, there's nothing stopping party figures from forming super PACs or nonprofits. In fact, some of the most famous early super PACs and nonprofits were run by people like Karl Rove, who, as we all know, is a consummate outsider. Just kidding. So instead, what changed, though, was that groups like the National Right to Life Committee or Tea Party-aligned groups could start their own nonprofits and super PACs and not really have, in fact, the party leadership pulling the strings anymore.

That meant that when Donald Trump emerged as a candidate in 2016, there was no cavalry coming to rescue the Republican establishment as there had been in 1996. There was no tidal wave of money to crush Donald Trump as there had been with Pat Buchanan. That doesn't mean that Trump's rise was attributable only to money; it wasn't. There were lots of shifts, including the polarization of the American electorate, which has been severe and pronounced since the 1980s; the rise of what political scientists call negative and effective partisanship, which essentially means that people vote in large part because of disgust and distrust of the opposing party rather than affection for their own party's candidate, which makes crossing party lines virtually unimaginable for most voters; and the rise of the conservative media, which tended to reward candidates for refusing to compromise and being ideologically pure rather than working across party lines. It's worth noting, too, that Trump himself didn't outraise or outspend his primary opponents and had, of course, his own resources to fall back on. But outside spending gave him, I think, a

crucial cushion to survive primary races that might not have otherwise been possible.

And this was by design. For groups in the anti-abortion movement who believed that candidates like Trump, who are often relatively weak and relatively unpopular, would be more beholden to Conservative movements than candidates like George W. Bush with broad popular mandates and support within the party. Candidates like that could afford to turn their backs on social movements when it suited them and cater to social movements when it suited them. But candidates like Trump, and eventually Presidents like Trump, had no such option. And it's no surprise in many ways, then, that Trump delivered for the movement more than any other President had—whether in terms of the Justices he appointed, the policies he adopted, or even his willingness to show up in person at the March for Life.

This interest in changing the rules of campaign finance soon extended to changing the rules of voting. Bopp worked closely with a variety of groups like Cleta Mitchell, the president of the National Republican Lawyers Association, and organizations like Judicial Watch in advocating for voter ID laws and eventually defending them in court. He became the lawyer for True the Vote, an organization that was originally an offshoot of a Houston-based Tea Party group, the King Street Patriots, which then went on to lobby for things like voter ID laws and training workers to verify voter signatures and do what its founder, Catherine Engelbrecht, described as poll watching.

Bopp would later accelerate these efforts. In April 2020, he filed lawsuits in New Mexico and Virginia to stop those states from mailing ballots to all registered voters. He insisted that over 20 million registered voters were ineligible for a variety of reasons. And in November 2020, in representing True the Vote, he filed four lawsuits challenging polling practices in eighteen counties across the crucial states of Pennsylvania, Georgia, Michigan, and Wisconsin, all of which the press at that point had called for Joe Biden. He eventually bowed out of the case and dismissed the four lawsuits, but, as he told me in an oral history, the reason was that he thought Rudy Giuliani was a terrible lawyer and not because he thought, in fact, that it was

wrong to try to overturn the election. He said that he still stays up at night playing out how much better the election challenge could have gone with better tactics, a better strategy, or a better lawyer—presumably him.

Efforts to limit access to the vote have spread throughout the movement. The Susan B. Anthony list, which, as many of you know, is a group that seeks to elect politicians who are opposed to abortion, and the Family Research Council, a Christian rights group, which are often seen as sort of pragmatic groups within the movement, have both recently created new initiatives to stop early and mail-in voting. The Thomas More Society, which has made a name for itself lately for proposals limiting travel for abortion, created its own effort. The Amistad Project that champions the independent state legislature doctrine, which of course, is before the Supreme Court now.

All of this, I think, is because what we've seen since *Dobbs* is what historians, and even people following the polls, would expect. The Court told us that if *Roe* was overturned, we could all expect things to calm down. Brett Kavanaugh was sort of saying that maybe now the Court's reputation will be redeemed, and we can all just move on and talk about other fun stuff, like what's on Netflix. In fact, that wasn't what happened. The conflict escalated because, of course, for the movement opposed to abortion, the goal had never been states' rights but rather some road to a national ban.

It's going to be virtually impossible, regardless of who controls Congress, to pass a national statute banning abortion, and, at least at the moment, the U.S. Supreme Court isn't interested in recognizing fetal personhood. And even if they did, it's not clear how it would be enforced given that that would, in theory, only apply to state action. So, instead, there has been a kind of state-by-state struggle, and that has been frustrating for people opposed to abortion because voters in general, while they've been in the middle about abortion, don't tend to support broad criminalization of it. That's part of the reason why voters in six of six ballot initiatives that we've seen since *Dobbs* came down chose either to preserve or expand protections for abortion. The

2022 election, which seemed to galvanize Gen Z voters, suggested that these issues, at least for a time, matter to voters too.

The response, I think, in large part has been a return to principle for groups opposed to abortion. Some states have considered measures to make it harder to get ballot initiatives before voters to derail that kind of step. In other states, we've seen legislatures that are essentially politically uncompetitive—this is true certainly of blue and red states. But in Conservative states, we've seen legislatures that are either gerrymandered or polarized to the point where there is no real need to be accountable to voters in terms of abortion and where policies can just be designed to please voters who are going to be in the primary or even political donors. That's created an opening for laws that are unpopular, including the so-called "abortion trafficking law" that was introduced in Idaho recently that will limit travel within the state, laws criminalizing people for helping one another obtain abortion, proposals to regulate websites that provide information about abortion, the revival of the nineteenth century Comstock Act, an anti-vice law that members of the movement claim effectively criminalizes all abortions because any abortion, of course, requires something put through the mail, whether a medical device or a pill. And that, they argue, applies to any drug or device adapted for abortion, too. It's not clear whether that would apply to drugs counter-indicated for pregnancy and not just what we might think of as conventional abortion drugs.

The gold standard, of course, remains a national ban, but everything I've said will not work simply because of voters and it won't happen through Congress. The key to success remains ultimately Conservative judges—Conservative judges who may take abortion pills off the market in a case in Texas that I'm hoping doesn't come down during my talk. Some may depend on the Comstock Act. Some are hoping, eventually, that the Supreme Court will endorse some principle of fetal personhood. And all of this, again, ironically, is not about letting voters decide—it never has been—because both movements on the side of this struggle see it as a human rights struggle that's bigger and more important than democracy.

That means in some ways that how we see abortion politics unfolding is a litmus test for how healthy our democracy is and who's getting to decide some of the most crucial questions before us. This was a point made by women of color in the reproductive justice movement years ago as they berated groups like Planned Parenthood for refusing to advocate for voting rights in states like Mississippi and Georgia, even as they focused on initiatives involving things like family planning and abortion.

Conservatives long understood that you couldn't separate issues of reproduction from issues of voting or campaign finance. And history makes abundantly clear that they were right because from the 1960s on, the fight over abortion has been a fight about equality under the law and who gets it, not just in the context of pregnancy. And it's become a fight not just about the kind of courts we have or the kind of rights we have but the kind of democracy we'll have in the future.