

NARAL_Ep4_v03_20200621.mp3

Jess McIntosh [00:00:00] This limited series podcast is based on the book, "The Lie that Binds" by NARAL Pro-Choice America president Ilyse Hogue with Ellie Langford. Each episode builds on the history terminology and figureheads established in the last, so we strongly recommend that you start from Episode 1 before jumping ahead.

Archive [00:00:18] The Supreme Court of the United States issued a ruling today on a Pennsylvania case concerning limits on a woman's right to an abortion. The justices' ruling affirmed certain states' rights to restrict abortion, but does not overturn the central holding of the Roe vs. Wade decision that legalized abortion.

Jess McIntosh [00:00:37] Our story starts in the summer of 1992 in Washington, D.C., the Supreme Court has just heard the most significant abortion case since Roe v. Wade.

Linda Greenhouse [00:00:46] So 19 years after Roe, along comes a real turning point. A case called Planned Parenthood against Casey.

Jess McIntosh [00:00:54] When it comes to abortion access in America, Roe v. Wade is definitely the most well-known case. But it's Planned Parenthood vs. Casey that defines today's legal right to abortion.

Linda Greenhouse [00:01:04] Planned Parenthood against Casey, People expect, as many people expected, that this would be the moment when the court would repudiate Roe v Wade.

Jess McIntosh [00:01:12] This is Linda Greenhouse. She's a Pulitzer Prize winning reporter who covered the Supreme Court for nearly three decades. And she's written extensively about this case. It seemed like Casey would overturn Roe for good reason. This momentous case hit the Supreme Court after 12 years of radical right control of the presidency. That meant 12 years in which Reagan and Bush had collectively nominated six justices to the Supreme Court. And yet the final decision reached by this stacked conservative court seemed to disappoint all sides at the time.

Archive [00:01:42] Men and women in this country simply cannot rely on the Supreme Court to uphold the fundamentals of Roe vs. Wade.

Jess McIntosh [00:01:51] That's the president of Planned Parenthood speaking to the press on the Supreme Court steps. He's surrounded by lobbyists and attorneys, liberals and conservatives, all ready to express their displeasure.

Archive [00:02:01] A giant setback for American women.

Archive [00:02:04] OK, let's get another point of view.

Archive [00:02:08] All right. I'm Phyllis Schlafly of Republican National Coalition for Life. This. This decision will not stop a single abortion.

Jess McIntosh [00:02:16] So the president of Planned Parenthood says it's a giant step backwards for women. But Phyllis Schlafly says this ruling won't stop a single abortion. The back and forth between the two sides just went on and on.

Archive [00:02:27] I am Katherine Kollberg. I am counsel of record on behalf of Planned Parenthood and the other abortion clinics in Pennsylvania. We think that this issue is not just about abortion, it's about the control of women.

Archive [00:02:40] My name is Randall Terry. I'm the founder of Operation Rescue. The blood of 30 million children is already crying out to Almighty God for vengeance. And today, three Reagan Bush appointees stabbed the pro-life movement in the back and affirmed the bloodshed.

Archive [00:02:58] We are appalled that Roe has been gathered and only a shell remains.

Archive [00:03:04] This is the first time in our history that United States Supreme Court has first granted and then taken away a fundamental individual human right.

Jess McIntosh [00:03:17] So which was it? Had the court just saved Roe v. Wade or had they opened the door to its destruction?

Linda Greenhouse [00:03:25] It didn't satisfy either side. And it came to a head quite a few years later in 2016. The case, called Hellerstedt against Whole Woman's Health. The Texas law that would have resulted in closing many, if not most, of the abortion clinics in Texas by requiring doctors who performed abortions at these clinics to get admitting privileges at local hospitals.

Jess McIntosh [00:03:48] From 1992s Planned Parenthood v. Casey to 2016s whole Woman's Health v. Hellerstedt to the most recent June Medical vs. Russo, the Radical Right has been behind the scenes manipulating the courts to incrementally erode abortion access in this country. Here's Ilyse Hogue, president of NARAL Pro-Choice America.

Ilyse Hogue [00:04:07] The sort of acknowledgment of a need for incrementalism through the courts has its origins in Planned Parenthood v. Casey. And that case was brought as a way to, again, sort of say, well, this isn't really about abortion, it's about federalism and states' rights. So the federal government should have no right to tell Connecticut or Missouri or Texas how it can and can not actually govern its own laws.

Jess McIntosh [00:04:43] Welcome to The Lie that Binds, a six part series exploring the insidious history of how the anti-choice movement was built from scratch. I'm your host, Jess McIntosh. And this week we're talking about the courts. It's ironic that Radical Right activists were so angry in 1992 because the Casey decision has undoubtedly been a victory for them in the long run. Win, lose or draw, the Radical Right machine has rigged the system so that any outcome can be leveraged in their favor. It was true then and it's doubly true now. In our last episode, we saw how that machine achieved its first major power grab. The election of Ronald Reagan. In this episode, we'll look at how a new organization, the Federalist Society, emerged out of the Reagan years to become one of the most powerful institutions in America.

[00:05:30] They weaponized the very concept of states rights and infiltrated the American judiciary, filling state courts across the country with anti-choice judges. Today, they hold more power than ever, and reproductive rights are hanging by a thread.

[00:05:46] To figure out how we got here, we have to understand what was at stake in this 1992 case. And to do that, we should really go back to 1973.

Archive [00:05:54] The Supreme Court today ruled that abortion is completely a private matter to be decided by mother and doctor in the first three months of pregnancy. The 7-to-2 ruling to that effect will probably result in a drastic overhaul of state laws on abortion.

Jess McIntosh [00:06:09] By 1973, 20 states had already recognized a woman's right to choose the Roe decision, simply recognized it at a federal level. The seven two ruling held that the right to an abortion was protected in the 14th Amendment, which says no state shall deprive any person of life, liberty or property without due process of law. However, it also determined that this right was not absolute. It had to be balanced with the state's interest in protecting women's health and prenatal life. To address this balancing test, the court established a trimester framework in Roe.

Archive [00:06:42] The closer the fetus was to being born, the more uncomfortable the court was with abortion. So the court created the concept of viability.

Jess McIntosh [00:06:51] Viability is essentially the point at which a fetus can survive outside of the womb. According to Roe, the decision to terminate a pregnancy during the first trimester was entirely a matter of privacy between a woman and her doctor. The state could not intervene.

Archive [00:07:04] During the second three months of pregnancy it ruled the state may regulate abortion procedures, but only to ensure the safety of the mother. And in the last three months, whatever state laws say prevails.

Jess McIntosh [00:07:16] In creating the trimester framework the court drew a line in the sand. Only at viability did the state's interest in potential life outweigh a woman's constitutionally protected rights. This was the state of the law from 1973 to 1992, when Planned Parenthood v. Casey arrived at the court.

Archive [00:07:34] What are the facts of this case and how does it relate to Roe v. Wade?

Archive [00:07:37] Well, the case is a direct challenge to Roe versus Wade.

Jess McIntosh [00:07:40] That's Kathryn Kolbert, the ACLU attorney who argued the case for Planned Parenthood.

Archive [00:07:45] The law at issue is a Pennsylvania law that was passed in both 1988 and again amended in 1989, which enact a series of roadblocks in the path of women obtaining abortions.

Linda Greenhouse [00:07:57] Planned Parenthood against Casey presented to the court a series of abortion restrictions. Doctors had to read a script to the woman. There was a waiting period. Things that had been declared unconstitutional in the early post Roe cases.

Jess McIntosh [00:08:14] Pennsylvania Governor Bob Casey claimed that these roadblocks were enacted in the name of promoting women's health. There was a counseling requirement that directed doctors to read from a script and provide information about the theoretical risks of the abortion procedure. The law also stipulated that this information had to be shared at least 24 hours before the procedure to give enough time for the message to sink in. This counseling and waiting period was all bundled under the reasonable sounding header of informed consent. Under this provision, a woman was also required to inform her husband and receive his approval.

Linda Greenhouse [00:08:50] These same restrictions were struck down as unconstitutional back in 1986 by the Supreme Court under Roe versus Wade. In this instance, the whole strategy of adopting this law was to force the question of whether Roe vs. Wade remains the law to the high court.

Jess McIntosh [00:09:05] Over a decade of Reagan era morality politics and dealmaking had emboldened the right to continually test the resolve of the court. They could feel the tide shifting in their favor.

Linda Greenhouse [00:09:15] Now, in between Roe and Casey, there have been some quite important abortion decisions that showed that the seven to two strong majority in favor of abortion reform had been whittled away.

Jess McIntosh [00:09:32] A good example is the 1980 Supreme Court decision that upheld the Hyde Amendment, which we talked about in Episode 2.

Linda Greenhouse [00:09:38] We came to 1990 to the tectonic plates were really in motion at that time. William Brennan, who was a strong supporter of Roe against Wade, had retired. He was replaced by David Souter. Nobody knew how David Souter was going to vote. Thurgood Marshall, also a supporter of Roe against Wade, had been replaced by Clarence Thomas. People had a pretty good idea what Clarence Thomas was going to do.

Jess McIntosh [00:10:02] Clarence Thomas was the newest conservative justice on the bench. He was narrowly confirmed by the Senate after a bitter confirmation battle. And this was the first abortion case to reach the Supreme Court since his arrival. With Thomas, people on both sides of the issue widely believed that there were now at least five votes willing to overturn Roe. It was in front of this bench of seven Republican appointed justices, six of whom were Reagan or Bush appointees, that Kathryn Kolbert presented her oral arguments.

Archive [00:10:30] The genius of Roe and the Constitution is that it fully protects rights of fundamental importance. Government may not chip away at fundamental rights. Make them selectively available only to the most privileged women. If the right to choose abortion remains fundamental as established in Roe versus Wade, the strict scrutiny standard is applicable. The protection offered by Roe's heightened scrutiny lies at the core of this important decision to abandon heightened review is to overrule Roe.

Jess McIntosh [00:11:02] Strict scrutiny is the highest standard of judicial review. And it comes into play when a fundamental constitutional right is at risk. The same restrictions were presented to the court in the late 80s, and they were struck down specifically

because they did not meet the strict scrutiny standard. Nothing had changed except the makeup of the court.

Archive [00:11:21] The Bush Supreme Court could well overturn Roe in the Pennsylvania case this year, putting millions of women and their families at grave risk.

Jess McIntosh [00:11:31] In 1992, while the nation waited for the decision, the reproductive rights community braced for defeat. So it was quite a surprise when a coalition of three Republican appointed justices David Souter, Anthony Kennedy and Sandra Day O'Connor announced their joint opinion.

Archive [00:11:47] Some of us as individuals find abortion offensive to our most basic principles of morality. But that can't control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. After considering the constitutional questions decided in Roe, the principles underlying institutional integrity of this court, we reaffirm the constitutionally protected liberty of the woman to decide to have an abortion before the fetus attains viability.

Jess McIntosh [00:12:21] Against all odds, the authors of the joint opinion upheld the central holding of Roe. However, they also ruled that Roe's strict scrutiny standard gave too little power to the states. Here's Justice Anthony Kennedy reading from the joint opinion.

Archive [00:12:34] Yet it must be remembered that Roe vs. Wade speaks with clarity in establishing not only the woman's liberty, but also the state's important and legitimate interest in potential life. That portion of the decision in Roe has been given too little acknowledgment and implementation by the court in its subsequent cases.

Jess McIntosh [00:12:49] To address this concern, They took aim at rose trimester framework.

Archive [00:12:53] That trimester framework, no doubt, was erected to ensure that the woman's right to choose, not become so subordinate to the state's interest in promoting fetal life. That her choice exists in theory, but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. The woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the state is prohibited from taking steps to ensure that her choice is thoughtful and informed.

Jess McIntosh [00:13:19] Kennedy's opinion accepts the patronizing premise that a woman needs outside forces to intervene in order for her to make a thoughtful decision. It also accepts at face value that the state was acting with good intentions in a genuine effort to promote public health. One of the most significant ways that Casey undermined Roe was to empower the state to issue restrictions from the beginning of pregnancy.

Archive [00:13:39] Throughout the woman's pregnancy, the state may enact measures designed to persuade the woman to choose childbirth over abortion. Put another way, the state may not place an undue burden on the woman's right to choose an abortion.

Linda Greenhouse [00:13:51] They transformed Roe. They announced that abortion would no longer be considered a fundamental right, but rather that the Constitution

requires that simply that no, quote, undue burden be placed on access to abortion. What's an undue burden? It's kind of in the eye of the judges who are ruling on it.

Jess McIntosh [00:14:14] And that's where the radical right in the years since has come out ahead. The subjective nature of undue burden provided all the wiggle room they needed to bombard the legislative and judicial branches with authoritarian anti-choice regulations.

Ilyse Hogue [00:14:28] The undue burden test is what gave us a whole slew of laws that I call shaming laws, so state mandated waiting periods. You have to go to the clinic to talk about your intention to terminate your pregnancy and then take a time out as though women don't think long and hard before they make these decisions themselves. Those laws have both material impact and that if you have a waiting period and you're traveling long distance to a clinic and you need childcare and you need money for transportation and you're missing days of work, it's much, much, much more onerous. But they also have a much more insidious sort of cultural effect, which is reinforcing this idea that women cannot make these decisions on their own, that the state actually has to force them to think about it force them to have more information. And that really links back to sort of this idea of women as lesser characters who are deserving of fewer freedoms and fewer rights.

Jess McIntosh [00:15:31] Today, 29 states have legislatures where both the House and the Senate are anti-choice. In most of these states, abortion access has been severely limited through the enactment of these types of laws.

Ilyse Hogue [00:15:40] That undue burden test is the one that they've been sort of nibbling at and encroaching on for the subsequent decades to the point where in many states abortion almost doesn't exist anymore.

Jess McIntosh [00:15:54] As Linda Greenhouse and her co-writer Reva Siegel put it in the Yale Law Journal, in writing Casey no longer did the court look outward toward the authority of doctors or the science of pregnancy. It reached for a settlement between the contending forces within the Constitution itself. Here's Chief Justice William Rehnquist reading from his Casey dissent.

Archive [00:16:15] This is why Justice Scalia, Justice Thomas and I are of the opinion that the court did err in Roe when it determined that the Constitution includes a fundamental right to abortion.

Jess McIntosh [00:16:25] Little known fact: when Casey came to the court Rehnquist wrote a draft opinion fully overturning Roe. And frankly, with a stacked bench of seven Republican appointed justices, it's still shocking that it didn't happen. The Radical Right was denied their best opportunity to strike down Roe. Even more upsetting for them, the loss came at the hands of Republican appointed justices. Up until this point there had been a slow and steady effort to foster conservative judges. But after Casey, the right adopted a much more aggressive strategy. In order to avoid these surprises in the future, they understood that they needed to take a much harder approach to vetting and grooming potential nominees.

Dahlia Lithwick [00:17:03] There is a machine that is an input output machine that has been building conservative judicial candidates for decades.

Jess McIntosh [00:17:12] That's Dahlia Lithwick, senior editor at Slate and host of the Amicus podcast.

Dahlia Lithwick [00:17:17] Starting at the law school level, finding people who are apt to be like minded, grooming them, getting them the very best clerkships, making sure then that clerkship vaults them onto the next clerkship, really making sure that there is a huge, deep, wide bench. But there is no analog on the left for that.

Jess McIntosh [00:17:37] Here's Ellie Langford, director of research at NARAL Pro-Choice America.

Ellie Langford [00:17:42] One of the conservative movement's biggest achievements in terms of building their power and constructing this network of institutions was in stacking their bench of potential district, circuit and Supreme Court nominees.

Jess McIntosh [00:17:58] It's true this effort was amped up after Casey, but it started in the early days of the Reagan presidency. As the Heritage Foundation worked to control the legislature and the Moral Majority mobilized the evangelical vote to influence the executive branch, a new organization of young conservatives sought out to take on the judiciary.

Ellie Langford [00:18:15] The Federalist Society is, of course, the lead group behind that work and came out of this same foundation that Weyrich and Falwell built.

Archive [00:18:26] Most Americans have never heard of the Federalist Society for Law and Public Policy Studies. But it's time that everyone knew about that secretive organization.

Jess McIntosh [00:18:35] To be fair, the founding members of the Federalist Society had no idea how vast their scope of power would become when they first got started. The society was founded in 1982 by a small group of law students at Yale, Harvard and the University of Chicago who felt their conservative values were at odds with those promoted in these liberal institutions.

Archive [00:18:55] In the law schools future lawyers are taught not that the courts are bulwarks of the Constitution, but that they are vehicles for social change to be used when the people refuse to vote as certain groups would like.

Jess McIntosh [00:19:08] The new group's goal was to promote conservative and libertarian speakers and their ideologies at elite law school campuses across the country.

Archive [00:19:15] None of the professors are conservative where I attend law school. Most of the students are liberal, but I believe that their ideas can be changed. That's why I, along with another student, founded a chapter at my law school.

Jess McIntosh [00:19:29] The Federalist Society's first national symposium at Yale Law School in 1982 featured Reagan appointed federal appeals court judges Robert Bork and Antonin Scalia. Here's Alfred Ross, founder and president of the Institute for Democracy Studies, speaking on Democracy Now.

Archive [00:19:45] If one looks at the history of the Federalist Society, which was established at the inspiration of Robert Bork, their entire trajectory has been to move our judicial system in an extremely radically right wing direction.

Jess McIntosh [00:20:02] They set up an office in Washington and saw chapters start to pop up all over the country, first at 15 law schools, then 30. Today, there are over 200 student chapters on campuses across the United States. Seeing the exponential growth of their student chapters in the late 80s, the Federalist Society opened its membership to practicing lawyers. Here's a clip from a 1986 Federalist Society video announcing their new lawyers division.

Archive [00:20:27] Now, law students who were in the Federalist Society while they were law school graduate joined with established lawyers in the lawyers division and begin to form a real national conservative legal network. Such networking can help ensure that good judges get on not only the federal bench, but on the neglected state benches as well.

Jess McIntosh [00:20:46] Its members filtered into presidential administrations and federal courts. Here's top Reagan adviser Kenneth Cribb.

Archive [00:20:52] Quite frankly, that's the kind of lawyer we're looking for in the Reagan administration. And the Federalist Society has been a very valuable source of legal talent for us. The Federalists, I think, would be fair to say, occupy key offices in many of the most important provisions of the government.

Jess McIntosh [00:21:10] The Federalist Society's pipeline has effectively infiltrated every level of the American legal system. Here's a clip from an interview with Michael Avery, an author who has covered the society's rise to power.

Archive [00:21:19] Presidents Reagan and George H.W. Bush and George W. Bush believe very strongly that one way to change the law was changing the judges. And so Federalist Society members in the office of White House counsel and in the Department of Justice, in the administrations of both the Bush presidents, were the primary people responsible for vetting candidates for federal judges.

Jess McIntosh [00:21:43] But the Federalist Society is not just about appointing justices. In addition to building a network of potential conservative judges, it also supports the ideological training ground to foster new ones. The society established 15 practice groups devoted to developing new legal theories for every area of American law.

Archive [00:22:00] And if one goes through the publications of their practice groups, one can only gasp not only at the breadth of their agenda, but the extremism of their ideology.

Jess McIntosh [00:22:11] It's this ideology that helps keep members faithful to their society training once they're on the bench. A key part of the Federalist Society success is their ability to persuade libertarians and conservatives to unify around judicial philosophy that claims to be politically neutral and grounded in the Constitution. Some call themselves constitutionalists. Others originalists. Both rely on the fiction that it's possible to know the original intent of the Constitution. Here's attorney general to Ronald Reagan, Edwin Meese, speaking at a Federalist Society event.

Archive [00:22:40] A jurisprudence that is based on first principles is an instrument that's neither conservative nor liberal, neither right nor left.

Jess McIntosh [00:22:49] On its surface it actually sounds like a bipartisan, common sense approach to interpreting the law.

Archive [00:22:54] It's a jurisprudence that is faithful to the Constitution itself.

[00:22:58] But in reality, originalism is just another Trojan horse. If you dig even a little bit into the ideology, the downsides of holding modern society to the standards of 1788 become apparent very quickly. It demands the law look beyond the text to apply the outdated, racist and sexist social mores held by the white male framers. In practice, originalism is almost always used in inconsistent, opportunistic ways by conservative justices looking to further their agenda. Here's a clip from an interview with Amanda Hollis Russkie, author of the book "Ideas with Consequences. The Federalist Society and the Conservative Counterrevolution."

Archive [00:23:34] It's a very malleable philosophy because it involves digging through history, digging through records, trying to tease out what the original public meaning was of very ambiguous phrase is within the Constitution. And so originalism really provided a way for conservatives and libertarians to shape the Constitution in a particular way to really effectively use history in a way that would narrow the nation's commerce power. That would help deregulate various parts of industries. That would really usher in a pre 1937 understanding of constitutional power and tend limited government.

Jess McIntosh [00:24:14] The Federalist Society found that originalism worked to build a judicial coalition. And today it has increasingly become a codes term used to signal a far-right approach to the law when it came to growing their network of young, ambitious legal minds. They also found that abortion was an excellent litmus test. A young lawyer who was openly hostile to Roe v. Wade was far more likely to adhere to the broader control agenda.

Ilyse Hogue [00:24:37] One of the things we sort of have to recognize is to grapple with where we are today is that Paul Weyrich and his buddies were actually successful in in sort of acculturating generations that came after them to the idea that abortion is evil. So there were lots people out there that do, in fact, believe that now, even though the forefathers of the movement were like 'eh, whatevs.'

Dahlia Lithwick [00:25:03] I think that the purpose of the machine depends on the day. In other words, I think one strand of it is there is an evangelical base and a lot of money and it is going to overturning Roe, and it is going to unsettling civil rights protections for LGBTQ Americans. Right. That's a part of it. There is another part of this machine that is just dismantling the regulatory state, whether it's the clean air staff or the water pollution stuff or worker protections, whatever it is, dismantling anything that would preclude big business from big businessing.

Jess McIntosh [00:25:39] Many self-identified conservatives consider abortion the most important issue, guiding their vote. But the legislative agenda that comes along with the so-called pro-life party is often very unpopular.

Ilyse Hogue [00:25:49] It's like abortion is a piece of the puzzle. But when we actually give it outsized influence on what we believe they're doing, we are blind to the larger ideological battle that when we acknowledge it, we can actually win.

Dahlia Lithwick [00:26:06] I mean, I think they certainly understand that they have not been able to effectuate through legislative and electoral victory the ends that they want. And this is where, you know, you do have to talk about the religious valence here, that there is an immense community of people who really believe that this is God's law and that God wants to reverse Roe and to end abortion. And also, by the way, contraception. And now we're hearing surrogacy and IVF. I mean, this is a whole litany of religious based dogma that is being imposed onto the courts because the belief is that the courts will fix this. And so I think that there is this layer of it that is it doesn't matter what democratically elected entities want. What matters is what God wants and what God wants us to do in a religious country.

Jess McIntosh [00:27:03] Reagan ushered in a generation of Moral Majority politics, which gave rise to a vast network of interconnected think tanks and interest groups. All of these are working in tandem to gradually shift our perception of law while simultaneously capturing the courts. Here's Imani Gandy of Rewire.News. She's a former lawyer who now covers reproductive justice and the courts.

Imani Gandy [00:27:25] Once the federal courts are captured by conservatives that may need to go and capture all the state courts. And if they can capture all the state courts, and if they can maintain Republican rule in those states through gerrymandering and through voter suppression, then it doesn't matter that the majority of Americans think that abortion should be legal at some point. None of these things matter. It only matters what the people who have captured through lobbying, through through money, who have captured those politicians, it only matters what they believe and if they believe abortion is a sin and it should be criminalized, then that's going to become the law of the land. And honestly, we are not that far from that point. And that frightens me to death.

Dahlia Lithwick [00:28:08] I mean, I think this is one of those places where one, "team" in this battle has been organized and effective and has had deep pockets and has been laser focused on this project for decades. Right. It was clear that winning the courts would be winning everything in the reproductive rights space. And the other, the pro-choice, pro-contraception, pro-everything, now, it's not just about abortion anymore, has kind of been on screen save, I think has just sort of hit the snooze button after Roe v. Wade, you know, kind of perked up for a couple of days during Casey roused itself occasionally on confirmation hearings. But I just think failed utterly to understand that the courts were systematically being captured.

Imani Gandy [00:29:04] Just one of the biggest frustrating points for me over the last several years has been the fact that a lot of even Democrats, you know, politicians have ignored the importance of the courts. And so that's why we are where we are.

Jess McIntosh [00:29:15] To better understand the importance of the courts in maintaining civil rights, we spoke with Vanita Gupta. She was appointed by Barack Obama to lead the civil rights division at the Department of Justice and served as chief civil rights prosecutor for the United States.

Vanita Gupta [00:29:28] I think our opponents understand pretty profoundly the degree to which power and these democratic institutions that define and allocate power in our political system, the role that they play in their ability to win on everything else. I frankly think that they are a few decades ahead of us on this. As progressive and civil rights actors, we often fight on our issues and are very equipped at fighting on issues. But we have been slower to recognize the importance of understanding the mechanisms of power to actually preserve and advance rights. And therefore, there's been a vast under investment in the work it takes to protect the courts.

Jess McIntosh [00:30:16] But remember, it's not just about appointments. They have us beat because they built a believable body of lies and sold it as a judicial philosophy.

Dahlia Lithwick [00:30:25] And this is just a larger failure of, I think, progressive messaging around the courts. But for decades, conservatives have had a really elegant story that they tell about the courts, whether it's true or not immaterial. But John Roberts says we're calling balls and strikes, you know, originalism, original intent, whatever it is, it's very elegant, right? There is no parody on the left. And I think that part of the problem the Democrats have had is the argument that we're going to keep Roe a thing and Roe is being hollowed out from the inside. But we can't exactly explain what our judges would do to stop that is not a campaign ad.

Vanita Gupta [00:31:06] I think that our opponents have been investing in those efforts. They've been investing in the long game to take over the courts. They've been investing in ways to weaponize the census and try to achieve a systematic undercount of the very communities that in some ways most need political representation and economic resources. And so that's where I think we have to catch up and we have to understand that we can't just fight on our single issues anymore. We're not going to win unless we really understand the ways in which power and the institutions that allocate power play a role.

Jess McIntosh [00:31:46] So why, if these institutions are so instrumental to upholding basic civil rights, why haven't mainstream Democrats campaign more aggressively around the courts?

Dahlia Lithwick [00:31:56] I do think that one of the reasons that it hasn't quite been salient for Democratic voters yet is because the court's been really smart about chipping away at Roe in ways that most people, with the exception of, you know, the really shocking the Georgia bans or the Ohio bans, you know, the ones that we saw when states just got into this deranged foot race. You know, we're 'screw the health of the mother, screw rape and incest exceptions. We're just in it to win it. We're going to make sure that doctors go to jail, women go to jail.' That was new. What had been happening until that point was this, 'Oh, we're just worried about making sure women make good decisions.' This was the basis of the TRAP laws.

Ilyse Hogue [00:32:42] TRAP laws are kind of law that, if we were honest, would just be called clinic closure laws. TRAP stands for targeted regulations of abortion providers, which basically means abortion providers are regulated differently than any other outpatient service. It has nothing to do with the safety of the procedure. In fact, people pointed to the fact that colonoscopies are more dangerous than first trimester abortions. No matter, there are onerous regulations in the states that are being put on these abortion providers in an effort to just at the end of the day, have them cry uncle and close the doors.

Jess McIntosh [00:33:17] They have to do this because quick reminder, the majority of Americans don't believe a woman should be forced to carry a pregnancy to term against her will.

Ilyse Hogue [00:33:26] And so how do we think about incrementally reducing the actual physical ability of women to go in and terminate pregnancies without saying we just want to do away with abortion?

Jess McIntosh [00:33:39] This is why we started with Casey. That nineteen ninety two decision paved the way for this tactic. The new twist of prioritizing women and safety is just a continuation of the old messaging campaign.

Dahlia Lithwick [00:33:51] All of that came about in this sort of candy coated wrapper of we just want women to be safe. And that, I think, was pretty salient, I think, for an awful lot of voters who believed in reproductive health generally, they were like, 'well, you know, all they want to do is have safe abortion. Who's against that?'

Jess McIntosh [00:34:09] This messaging didn't come out of nowhere. It was constructed in Episode 2 we explored the convoluted network of conservative organizations that pump disinformation into model legislation. A key part of that network is Americans United for Life, AUL for short. In 2013, AUL hit Radical Right gold with a Texas law that would eventually be known as HB 2. The bill required doctors to have admitting privileges at a hospital no more than 30 miles away and set clinical standards for abortion providers as if they were surgical facilities. The lawmakers who sponsored the bill justified these prohibitive roadblocks as a matter of safety.

Ilyse Hogue [00:34:49] That's a total fallacy and not actually how medical service delivery happens. If you go to the emergency room, you are seen by the emergency room physician. So that's one thing. But the other thing is an infinitesimal number of abortion procedures end up requiring any kind of hospital care. So they built this whole narrative that's like, 'oh, God, what if somebody has to go to the hospital? The doctor won't be able to continue through with the procedure.' And in fact, almost nobody goes to the hospital. And if you go to a hospital, you're seen by the person who is at the hospital, not the doctor that referred you.

Jess McIntosh [00:35:29] Despite the faulty logic this bill made its way to the Texas Senate and was guaranteed to pass. Then one senator decided to do something about it.

Archive [00:35:38] I'd say that if you vote for this bill, you're simply happy to ignore medical science and watch women and children die for no reason.

Jess McIntosh [00:35:48] That's Wendy Davis from the Senate floor during her now famous 2013 filibuster. We had the pleasure to speak with her about that day.

Wendy Davis [00:35:56] For me, not really understanding how challenging the day would become mentally was a good thing, because I think I would have had a lot more anxiety leading into it. I tried to start the day in a really centered place.

Jess McIntosh [00:36:12] This was critical because ahead of her was an uphill climb and it was all being covered in real time.

Archive [00:36:18] You're looking live at State Senator Wendy Davis of Fort Worth Filibuster's, a vote on the abortion bill that passed the House yesterday.

Archive [00:36:24] And according to Senate chamber rules, that means no bathroom break, no sitting or leaning and no eating or drinking. The Democratic senator is fighting to speak for 13 hours straight.

Wendy Davis [00:36:36] People were coming from all over the state to share their stories and on that day, unexpected for all of us, thousands of people showed up.

Archive [00:36:46] Thousands of supporters filled the Capitol Rotunda.

Archive [00:36:49] Thousands of people have showed up. Even as the filibuster plays out.

Archive [00:36:53] I'm planning to stay here until midnight tonight with Senator Wendy Davis.

Wendy Davis [00:36:57] What I learned later was that it was the first time the Capitol had ever had to be closed because it filled to capacity. Every hallway and every level of the rotunda full. And then people still came and gathered outside on the Capitol lawn.

Archive [00:37:13] You can see that it's double wrapped here around the rotunda here under the Capitol dome. And they're all just waiting for their chance to get into the Senate gallery where it's already packed and they're only letting people in two at a time.

Archive [00:37:25] And they were still chanting. It was so loud lawmakers couldn't even hear each other.

Wendy Davis [00:37:30] And so I could hear that. I could feel that energy. And I knew something amazing was happening. And the magical sort of made-for-TV thing that came out of that, no one could have predicted. It started with my sister, Senate colleague Letitia Van De Putte. Out of frustration Leticia asked the question...

Archive [00:37:53] Mr. President, parliamentary inquiry.

Archive [00:37:54] State your inquiry.

Archive [00:37:56] At what point must a female senator raise her hand or her voice to be recognized over the male colleagues in the room?

Wendy Davis [00:38:07] And it was the spark that lit the gallery of people who had been sitting in the Senate gallery watching respectfully all day. They began screaming and pounding their feet. And that spread up and down every hallway and every level of the rotunda until it was just this incredible, beautiful chaos. But also organized chaos, right? Of what it means to participate, not just figuratively, but literally in using your voice in a democracy.

Jess McIntosh [00:38:50] The chaos that erupted from the crowd was enough to delay the roll call. The Texas Senate session ended before the bill could be passed into law. But the story doesn't end there.

Wendy Davis [00:39:00] The governor immediately called us back to a second special session for the sole purpose of passing that bill. And, of course, they moved it rapidly through the committee hearing process and onto the floor of both chambers with, you know, I think we saw 20 days left in the session. So there is no way that we could filibuster it again.

Jess McIntosh [00:39:21] The bill passed under a new name and the effect on women's health care access in Texas was sudden. Within a year, 27 of the 42 abortion clinics in Texas were forced to close.

Wendy Davis [00:39:32] Immediately almost half of our clinics closed. We would have been down to only five clinics left if all of the provisions had been allowed to go into place.

Jess McIntosh [00:39:46] The law went through a series of lawsuits in the lower courts and eventually was brought to the Supreme Court in 2016 as Whole Woman's Health vs. Hellerstedt. This is the case. Linda Greenhouse mentioned up top as a contemporary consequence of the Casey decision. But the makeup of the court in 2016 looked very different than it did in 1992.

Dahlia Lithwick [00:40:06] For me, what was astounding at Whole Women's Health was it was the first time that there were three women on the bench for an oral argument about women's reproductive health.

Jess McIntosh [00:40:17] Dahlia Lithwick was in the room for the 2016 Whole Woman's Health hearings with Elena Kagan, Sonia Sotomayor and Ruth Bader Ginsburg presiding.

Dahlia Lithwick [00:40:25] And also Justice Breyer, who we always forget. He is without a doubt I think the radical fourth feminist on the court. But Breyer, Kagan, Sotomayor, Ginsburg at oral argument at Whole Women's Health I described it in my piece that day as a four-car train of whoop-ass because they were just relentless.

Archive [00:40:46] Acknowledged that some doctors do believe that there are benefits for the ASC and admitting privileges requirement.

Archive [00:40:52] What what is the benefit of the medical two pills that you take? What is the benefit of having an ambulatory surgical center to take two pills when there's no surgeon, no surgical procedure at all involved?

Dahlia Lithwick [00:41:06] And Texas' solicitor general was up there trying desperately to justify that HB 2 had not been enacted in order to close clinics and they just wouldn't let him talk.

Archive [00:41:19] What's what what's the need? You've seen your brief seems to be telling us that there's no role for the court to judge whether there's really a health benefits to what you're doing.

Archive [00:41:30] Well, there would be three elements of the doctrine. There's the rational basis test.

Archive [00:41:34] I'm talking about the doctrine I'm talking about the question I asked.

Dahlia Lithwick [00:41:38] And it was an amazing spectacle to see, because I think we forget, you know, Griswold was decided by all men. Roe was decided by all men. We forget what it's like to have women on the court. And I'm standing here talking as though three out of nine is some miracle. But I do think it was the first time I really saw the power of women's voices, women's bodies, women's physical presence on the bench, hammering away on women's reproductive rights. And so for me, that was an amazing, amazing event. And also, I think just seeing that which was later manifest in Justice Breyer's majority opinion in that case, that Texas had no answers. I mean, they just had nothing. And, you know, name one person who has benefited from your admitting privileges law.

Archive [00:42:37] Which were the women on what page does it tell me their names? What the complications were and why that happened?

Archive [00:42:49] Justice Breyer, that is not in the record.

Dahlia Lithwick [00:42:52] At their best sometimes litigation can serve as a kind of massive public airing of these bad pretextual arguments are really bad pretextual arguments. And for me, that was Whole Women's Health that you can say over and over and over and over again, we're passing these laws because we care about women making good decisions. And when you have no answer to this is what happened when all those clinics closed. It's done.

Archive [00:43:22] The Supreme Court just handed down an important ruling on abortion by 5-to-3 vote. The eight justices struck down new regulations in Texas that have forced many abortion clinics to close.

Archive [00:43:35] This decision was written by Justice Stephen Breyer writing for the Supreme Court. He said that restriction that Texas tried to put in place would have led to an undue burden on a woman's right to abortion.

Jess McIntosh [00:43:48] That's right. Undue burden was the determining factor in the Whole Woman's Health outcome. But don't invest too much value in it as a saving grace. Undue burden continues to put abortion access on shaky ground. Because the language is so vague, the safety of reproductive rights still depends entirely on individual justices. In 2016, just like 1992, Justice Kennedy played a critical role.

Archive [00:44:13] Justice Kennedy is a conservative. He was nominated by President Reagan, but he has refused to strike down Roe vs. Wade, which, of course, guarantees a woman's right to an abortion. However, Kennedy sided with conservatives in allowing restrictions on abortion. This marks the first time that Justice Kennedy has found an abortion regulation that he didn't like, that he thought went too far. So today he sides with the liberals and provides that key fifth decisive vote to strike down these regulations.

Jess McIntosh [00:44:45] If he had not surprised everyone by siding with the liberal justices, the entire case would have gone the other way. That razor-thin margin for error should be a wakeup call for every progressive voter who cares about maintaining reproductive freedom in this country.

Ellie Langford [00:44:59] I think it's really important that the progressive coalition isn't complacent about, you know, our ability to protect freedoms in this country. And I hate to say it, but I think that we trusted a little too much that the court would stand up for the values of freedom and justice. The court is an organization that can be manipulated.

Jess McIntosh [00:45:27] This is a good time to note that Whole Woman's Health was tried before an eight person court rather than the usual nine justices. Why? Because one of the seats was being held hostage. Which brings us back to the Federalist Society. No one knows better how thoroughly the courts can be manipulated than them. Their greatest opportunity to seize power came alongside the loss of one of their most significant figureheads, Antonin Scalia.

Archive [00:45:54] You were very generous to mention our labors in promoting the confirmation of Justice Neil Gorsuch. It's true. We had the Federalist Society gave that effort a role if the aim is a free and virtuous society under the rule of law, what caused in recent years could be as crucial as assuring a worthy successor to Justice Antonin Scalia.

Jess McIntosh [00:46:17] That's Federalist Society bigwig Leonard Leo speaking at the Acton Institute in 2017.

Ellie Langford [00:46:23] A key leader in the Federalist Society, Leonard Leo, has been singlehandedly managing Trump's nominations process.

Archive [00:46:32] My guest today has been seen by many conservatives as President Trump's Supreme Court whisperer. To many liberals, he is a legal Svengali whose influence could degrade the civil rights of all Americans.

Ellie Langford [00:46:43] He also is a key force for pushing the judiciary firmly to the right.

Archive [00:46:49] It is at the juncture of traditional values and liberty, the frequently bloody battleground of the culture war itself, where originalists and the Federalist Society find themselves embroiled in controversy, a controversy that recently transformed the Supreme Court confirmation process into political chaos and inflamed an already deeply divided electorate.

Archive [00:47:08] When we lost Justice Scalia more than a year ago, it looked like we were fated to lose even more. It seemed the court would, once and for all become the instrument of the progressive liberal agenda. And one of history's sharper turns, however, that proved not to be so inevitable after all, we Constitutionalists are back in the fight. And if my firsthand impressions of President Trump are any guide, I'd even say we have the upper hand.

Jess McIntosh [00:47:41] Throughout 2016, Trump used the courts as his primary political leverage. He didn't figure this out on his own.

Dahlia Lithwick [00:47:48] Again, there's this massive asymmetry. And because the Federalist Society has been and this is not new to Trump, it's been deeply involved in Bush administration judicial selections. But because this machine is so powerful, it is unbelievably well-funded, often with dark money that we don't know anything about, the minute Donald Trump looked around and said, 'well, I don't know anything about judges and P.S., I don't care.' This machine just absolutely moved into the vacuum.

Jess McIntosh [00:48:20] The machine went to work on the right and there was not an equivalent strategy to oppose them.

Dahlia Lithwick [00:48:25] We walked into the 2016 election. We had a seat that had been held open for almost a year. We had an 83 year old, a 79 year old, 78 year old on the Supreme Court. And progressives just didn't come out. And particularly Senate Democrats who had just been pants utterly and completely for months by Mitch McConnell, who wouldn't even give Merrick Garland not just the courtesy of a vote and a hearing, but they wouldn't even have meetings, Republicans on the Hill with him. And the idea that you don't go out and campaign on that.

Jess McIntosh [00:49:01] Meanwhile, the Radical Right's message to their base was crystal clear.

Archive [00:49:05] The Supreme Court is in the balance. Each of those nine justices carries a lot of weight. And by the end of the next president's term, five of them will be over 70 years old. Three over 80. It's very likely that our next president will appoint, and our next Senate will confirm, three or even four new justices. Like it or not, many pivotal cases have been won and lost by a five to four margin. As Christian conservatives, imagine if some of these close votes protecting our freedoms and the sanctity of life were reversed here.

Jess McIntosh [00:49:38] The ad ends with the line, 'consider these decisions when making your decision.'

Dahlia Lithwick [00:49:43] In political science terms, it's called an enthusiasm gap. But this is not an enthusiasm gap. It's a knowledge gap, passion gap and then a messaging gap.

Jess McIntosh [00:49:54] During the 2016 election, Trump's willingness to openly align himself with Radical Right groups like the Federalist Society was a key part of pushing him over the top. He didn't simply promise to appoint so-called pro-life judges. He bolstered this promise by credentialing his choices as being Federalist Society approved.

Archive [00:50:11] And we're going to have great judges, conservative, all picked by Federalist Society.

Jess McIntosh [00:50:16] Along with the list, Trump also knew to adopt the coded banner of far-right law.

Archive [00:50:20] One of the top things I would ask you often is your judicial philosophy. You mentioned, as I said, Scalia and Thomas. They are what we call originalist constitutionalists,.

Archive [00:50:29] Correct?

Archive [00:50:30] You are a constitutionalist.

Archive [00:50:31] Correct. And I'm also I want high intellect. I want great intellect. These people are all a very high, high intellect. They're pro-life. And so that's my list.

Jess McIntosh [00:50:44] The Federalist Society's influence on Trump didn't stop after he got into office.

Dahlia Lithwick [00:50:50] I think we have to really reckon with Trump's success at reshaping the way the courts look in our society. He has completely changed the makeup of the Supreme Court, but also the circuit and district courts.

Jess McIntosh [00:51:03] In less than three years as president, Donald Trump has done nearly as much to shape the courts as President Obama did in eight. And the Federalist Society has influenced every judge along the way.

Dahlia Lithwick [00:51:14] I mean, that's the short answer for why he has been so effective at this and so utterly useless at anything else. Is he just contracted it out to Leonard Leo and a machine that kicked into gear on day one. And with the help of of Mitch McConnell, who just said, 'we are going to just approve every single one of your nominees except for the one or two that we balked at.' Who, by the way, I suspect if they were renominated today, would all get through.

Jess McIntosh [00:51:44] In the appeals courts, which are the final word on most federal cases, more than a quarter of those judges are now Leonard Leo picks. The district courts have been similarly transformed. And as for the Supreme Court. Well, let's think about Justice Kennedy, who provided the critical swing vote in 2016 for Whole Woman's Health. In 2018, Kennedy retired. And Trump nominated D.C. Circuit Judge Brett Kavanaugh. Much like Trump, Kavanaugh's path to power required credentialing himself as strongly anti-choice.

Dahlia Lithwick [00:52:14] Immediately, Kavanaugh starts to kind of lobby to get on the list. He gives a speech in which he cites William Rehnquist as his hero and explicitly saying that Rehnquist's objections to Roe would be his. And then he really inserts himself into the middle of the litigation about migrant, pregnant migrant teens on the border. And he's really being inflammatory and using very much coded anti-choice language that everybody who is watching him says, 'oh, this is a tryout. He's he's actually now auditioning to be on the short list' and his dissents in those cases really do read as not much more than waving around his hands and saying, look at me, look at me. I'm your guy, too. And then mysteriously, yet not so mysteriously, he appears on the list.

Jess McIntosh [00:53:05] Kavanaugh's 2018 confirmation was a bit of judicial deja vu. In 1992, Federalist Society member Clarence Thomas was also confirmed to the Supreme Court, despite credible accusations of serial sexual harassment by Anita Hill.

Archive [00:53:18] The Bush administration launched a feeding frenzy against Professor Anita Hill, who dared who dared to challenge a power figure.

Jess McIntosh [00:53:31] The confirmations of Clarence Thomas and Brett Kavanaugh each sparked an outrage that mobilized women to run for office in record numbers.

Archive [00:53:38] These women are challenging those counsels of political power because they have been dominated by white male policy makers. And that's wrong.

Jess McIntosh [00:53:53] In fact, both 1992 and 2018 were dubbed the Year of the Woman.

Archive [00:53:58] They called '92, the year of the woman, they're calling 2018. The year.

Archive [00:54:01] Yes. Yes.

Archive [00:54:02] You know, if 1992 was inspired by your Supreme Court confirmation this year, there was inspiration, coverage and confirmation hearings involving Brett Kavanaugh.

Archive [00:54:10] This is the first cycle where women who are upset about Donald Trump winning the presidency are running for office. And we're seeing that across the country. 255 women are running for Congress. 16 women are running for governor seats. And it's definitely going to be an uptick in the number of women in office.

Jess McIntosh [00:54:27] 2018 saw a record number of women win seats in the House. The new total included 31 first-time House members, seven more than the record set for freshman women during the 1992 year of the woman. This progress is promising, but it's just the beginning. Here's Vanita Gupta again.

Vanita Gupta [00:54:44] I think the Kavanaugh nomination really woke up a much broader progressive movement to understand why the courts matter, why they have a huge role to play in all of our lives, and why we have to actually kind of roll up our sleeves and do the political work it will take to protect the courts. And we are on the verge of a pretty significant precipice. And so now we're on the defensive and it is forcing us now to rethink and to have to invest in the long game.

Jess McIntosh [00:55:16] It's true that Kavanaugh's confirmation rallied the left, but it has also emboldened conservative state legislatures.

Dahlia Lithwick [00:55:22] I think the rubber hit the road last spring is soon as Brett Kavanaugh is confirmed, when state legislatures get way ahead of where the Supreme Court is. And so I think as soon as there was a sense on the part of the contingent of the anti-choice movement that we could get everything here and we could get it fast, we could get to five, then all of that spadework goes away in all the years of faux solicitousness to mothers and maternal health and making good choices, and we'll just, you know, help her not have regrets. All that just *kuchuchuchuchu* falls away. And what's left is this arrow shot. Right, which is what you're seeing in the state legislatures that the folks who'd been holding back and who'd been told we're not there yet, we don't have five votes yet now think they have five votes. And then it just raises this intriguing question, which is, do they?

Jess McIntosh [00:56:21] And that's how we got to where we are today with June Medical vs. Russo calling into question the Whole Woman's Health decision from only four years ago.

Ilyse Hogue [00:56:29] Nothing has changed since 2016 except the makeup of the court. It is testing the public appetite for this court to nuke very recent precedent. And I think it's a little bit of that Trojan horse effect because this court wants to dismantle all sorts of precedent. But they think if they lead with abortion and they test the public's willingness to

accept undercutting precedent on an abortion case, that they can then follow with all sorts of other dismantling of rights and freedoms. And we won't notice.

Jess McIntosh [00:57:06] It's true that abortion rights are hanging by a thread, but the implications of these cases go far beyond abortion. With their hold on the courts, the Radical Right can fully implement its ideology of control in all aspects of our lives: marriage equality, trans rights, health care, voting rights, all of these are in jeopardy if the right's control over the court remains unchecked. So what can we do?

Ilyse Hogue [00:57:28] Organizing an education about the intersection of all these issues is our best weapon.

Dahlia Lithwick [00:57:36] The court desperately relies on public acceptance. If we wanted to turn the lights off at the U.S. Supreme Court, we could do it. They don't have an army. They can't enforce their will. The only power they have is the American public exceeding to their authority.

Ilyse Hogue [00:57:52] So we've got to be eyes wide open because people need to understand what's really happening and stand up en masse against it.

Dahlia Lithwick [00:58:01] It is our duty to say we're watching. We're watching.

Jess McIntosh [00:58:09] Next week, we learn more about a person you heard at the beginning of this episode.

Archive [00:58:13] My name is Randall Terry. I'm the founder of Operation Rescue. Suffice it to say, you will see a lot of unrest in the streets. A lot of incredible anger from people who want to restore moral sanity and protection to babies.

Jess McIntosh [00:58:29] What happens after 20 to 40 years of spreading Radical Right lies? Well, the people you're lying to start to believe it. We'll see how disinformation led to decades of violent extremism and harassment, from the bombing of abortion clinics in the 90s to the organized harassment of women online today. And how members of both factions have been welcomed into the Trump coalition.

[00:58:53] The Lie that Binds is a production of NARAL Pro-Choice America and produced by Jackie Danziger, our associate producer is James Tyson. Our music is by Hannis Brown, mixing in engineering by Kegan's Zema. This series is adapted from the book "The Lie that Binds" by Ilyse Hogue with Ellie Langford, published by Strong Arm Press. Currently available at TheLieThatBinds.com.