

## **Text of a Podcast May 9, 2022, Ron Stockton (Stocktonafterclass)**

### **Is Roe Doomed? The leaked Alito ruling overturning Roe and Casey (with a vengeance)**

On May 2, the draft opinion by Justice Joseph Alito overturning Roe v Wade and Casey (the associated case) leaked to the public. This had never happened before, the leak of a draft opinion. Chief Justice Roberts confirmed that the draft was authentic but cautioned that it “does not represent a decision by the Court or the final position of any member.” He immediately activated an investigation to find out who had leaked the draft.

Those who read the text were stunned at how sweeping and harsh and radical it was. As someone said, “they are swinging for the fences.” Its style is definitely in the spirit of former Justice Scalia, whose opinions often reflected contempt for those who disagreed with him. For good reason people refer to the current justice as Scalito.

I have been trying for several days now to prepare a podcast summarizing its key points. It has been difficult to put it together. The decision seems nasty, polemical, argumentative. It seems to employ a spaghetti strategy, that you throw everything at the wall and hope that something sticks. Alito seems determined to answer every point that anyone in favor of Roe ever made, often with overwhelming force. He treats those who disagree with him with barely concealed contempt.

The case before the court (called Dobbs) grows from a law passed in Mississippi prohibiting abortions after six weeks. This is extremely early in terms of figuring out that you are pregnant, getting a proper diagnosis, and seeking a procedure. It was clearly a direct challenge to Roe v Wade, handed down in 1973, 49 years ago, and to the follow-up case called Casey, which modified but affirmed Roe. Every single young woman in the country has grown up under those rulings. (Roe declared that abortion was allowed and could not be prohibited until the third trimester. Casey modified the trimester concept to “viability.” Anyone confused on those points can go back to my earlier podcast focusing on the initial presentations to the Court in the Mississippi case.

When Texas then passed a law allowing individuals to bring civil suits against anyone who performed or facilitated an abortion, and the court did not “stay” that law until they were able to act on Dobbs, it was a very telling sign of their intention.

The Circuit Court had declared the Mississippi law in violation of Roe v Wade (1973) and struck it down. The Supreme Court issued a “stay,” leaving the Mississippi law in place and agreed to review the decision of the Circuit Court.

What I want to do here is to summarize the main points in the draft ruling, and to offer my impressions of what Alito wrote.

Before I go on, let me say that this podcast is not about abortion. It is about the Alito draft. I think it is an extremely bad draft, not in the spirit of temperate judicial analysis. I suspect Alito believed his analysis would be crushingly persuasive to those who disagree with him.

Those interested in some of the issues involving abortion itself are welcome to go back to my earlier podcast (and Deep Blue posting) on the Mississippi Challenge to Roe v. Wade.

Typically, the punch line in a decision is saved for the finale, but Alito puts his conclusion early, on page five of a 98 page document: “We hold that Roe and Casey must be overruled.” But then at the end he repeats himself:

“We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives. The judgment of the fifth Circuit [which had struck down the Mississippi law] is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered.”

How did Alito reach this conclusion? His argument, stated on page 5 is the following:

“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely – the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” The right to abortion does not fall within this category.”

Note: Justice Alito also references a common anti-Roe talking point, that the word “privacy” is not found in the Constitution. He only mentions that word a few times, then to dismiss it. Those who listened to my earlier podcast on the Mississippi challenge to Roe will know my own views on this. Our concept of a liberal, i.e., limited constitution, where personal rights are concerned, and various specified limitations on government intrusion such as on searches and required search warrants, have put personal privacy at the very center of our legal system. This is not a position on abortion, but a position on limited government vis-à-vis the citizenry.

Back to Alito. He uses two significant terms which we will discuss in a moment. “Deeply rooted in this nation’s history and tradition” and “the concept of ordered liberty.” Let’s keep those ideas in mind.

The five justices listed as supporters of the majority opinion are Alito, Gorsuch, Thomas, Kavanaugh, and Barrett. Interestingly, Chief Justice Roberts is not on that side. He made it clear that he wanted to support the Mississippi law while saving Roe. The Chief Justice – who is an authentic conservative, not an Originalist radical -- still has the robe, but he has lost control of the court.

Three of these justices – Gorsuch, Kavanaugh, and Barrett -- are Trump appointees. The Kavanaugh seat was “stolen” from Obama when Mitch McConnell refused even to hold hearings on the Merrick Garland nomination. This was an unprecedented action, but McConnell was determined to get one more Originalist justice on the court so there would be an unstoppable bloc. Bringing Amy Coney Barrett, a young, smart, hard-core Originalist ideologue, onto the

court to replace Justice Ruth Bader Ginsberg, created a dramatic and radical shift in the power balance. It also stuck a thumb in the eye of the RBG fan base, a female who would be the opposite of everything that Ginsberg stood for.

Interestingly, these Trump justices are not conservatives in the traditional sense of the word. The Originalists are radicals who consider the major issue in a case such as this to be what the founders or early leaders of the country were thinking or what others in the past were thinking. We will discuss that further in a minute.

There is an argumentative tone to this ruling, raising every possible issue that could be raised. Roe is wrong because the Fourteenth Amendment does not apply; in the early 1800s abortion was considered a crime; Ruth Bader Ginsberg supports certain constitutional principles in other cases but not in this case; the states should decide these things.

**The Fourteenth Amendment:** There is an interesting argument about the fourteenth Amendment with its principles of due process and equal protection of the law, and why they do NOT apply in this case (even though Roe said they did). That Amendment was one of the three post-Civil War, Civil Rights Amendments. The Thirteenth abolished slavery and involuntary servitude. The Fourteenth made anyone born in the U. S. a citizen of the United States and guaranteed equal protection and due process to all such persons. The Fifteenth guaranteed the right to vote to all citizens.

The Fourteenth Amendment is exceptionally important in American constitutional law. When it declared that all citizens have equal rights, what are those rights? There are two types according to Alito, and on this point he is following standard interpretation. First there are the rights enumerated in the Bill of Rights. Those originally restricted the federal government from touching those rights, but *only* the federal government. Thus the First Amendment says the federal government cannot establish an official religion, but several states had official religions. The Fourteenth Amendment “incorporated” those rights in a way that also prevented the states from violating them. This is standard constitutional analysis. But then there are other rights that were **not** enumerated but were understood to be there but lurking in the shadows. The right for Black and white people to marry; the right of gay people to have sex; the right to have contraceptives; the right of any two people to be married, even if they are of the same sex. These were declared to be inherent in the constitution because of an assumed right to privacy or liberty. But. And here is a dramatic But. But these rights do **not** include abortion. Why? Well, because it is the only one of those rights that does harm. It takes a life, or at least a potential life. Plus, plus (of course you were anticipating another reason, weren’t you?) plus, it is not consistent with our traditions. Nor is it a part of our “ordered liberty.”

Let’s look at three legal concepts: Ordered Liberty, Our history and tradition, and stare decisis.

**Ordered liberty.** Justice Alito uses the term “ordered liberty” several times. What does that term mean? It originated in the 1700s with Edmund Burke, the English politician and political theorist. It posits that there is a tension between the interests of society and the interests of individuals. In the event of a conflict, the rights of the individual have to give way to the

interests of society. It is a very conservative concept if you think about it. We all know that in war, individuals will be sacrificed to the interests of society, but what does this have to do with abortion? Justice Cardozo picked up the term in the 1930s and introduced it into American jurisprudence. Cardozo suggested that there are rights that individuals have under some circumstances but not under other circumstances. The debate that Cardozo addressed had to do with which of the Bill of Rights would be applied to the states under the “incorporation” concept. This held that when the Fourteenth Amendment guaranteed all citizens “due process” it meant that protecting the fundamental rights of all humans against government intrusion also put limits on the states as well as the federal government. He concluded that certain rights, such as freedom of speech, of the press, of the free exercise of religion, of the right to peacefully assemble, and of the right to counsel in capital cases also applied to the states. However, other rights such as grand jury indictment, self-incrimination, and jury trials did not. These were totally different in nature. But how could he draw such a distinction? He said he had discovered a “rationalizing principle.” The Fourteenth Amendment covers only those rights that are “of the very essence of a scheme of ordered liberty.” These include rights that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Some rights, such as freedom of thought, and speech constitute “the matrix, the indispensable condition, of nearly every other form of freedom.” Other rights were not fundamental.

In the twentieth century, the fundamental rights doctrine referred to those important rights which deserve heightened protection under the concept of "strict scrutiny." Strict scrutiny places a very heavy burden on the government to prove that it has a "compelling interest" to justify the burden. In practice, strict scrutiny assumes the answer is “no” unless the government passing the law can prove that its law passes constitutional muster.

**The second concept** has to do with the idea of laws “consistent with our traditions and values.” I found this argument confusing and, well, argumentative. To understand this, I think we have to think of three schools of jurisprudence in interpreting the law. The first school is called conservative. Such justices try to stay close to the text. They are not rigid about it, but they look for something written. The second school is the ‘living constitution’ school. They believe that there are principles inherent in the constitution so that the rights of citizens evolve as our understanding of the constitution and of human rights evolve. The third school are called Originalists. In spite of what they are called, Originalists are NOT conservatives. They do not focus on the text so much as what the founders and our early leaders were thinking. This is a bit weird given that our Founders were as divided as we are today, so saying what they thought is like saying you will follow what Congressional thinking is. How can you tell? Are you thinking of the hard right Freedom Caucus or the leftist Squad? Plus they were as good at manipulating words back then as we are today and would often use ambiguous words to patch over differences, just as we do today. Alito himself makes this point when he addresses the word “liberty.” This is a “capricious” term, he says, with over 200 meanings. It is of “little guidance” unless we can find it “objectively, deeply rooted in this Nation’s history and tradition.” Moreover, he notes, liberty is not mentioned even once in the Constitution. Note: Our Founders might have had something to say about that.

When Alito starts citing his sources, some of them make you cringe. For example, Blackstone was a great English professor of law in the 1700s who wrote a four-volume book defining the essential principles of English law. Lincoln and Frederick Douglas. both credited it with shaping their thinking. I like it because of how clear Blackstone is in defining terms. But where women are concerned, Blackstone is on a different planet, or at least in a different age of history. For example, in the section on torts, he describes adultery as something committed by a married female. It is a property violation against the husband's property, i.e., his wife's body. Ouch! Then Alito goes on to cite laws regarding abortion in the early 1800s. This is an embarrassment. In those days, white people had the right to own black people and women did not really have rights. They did not have the right to own property, the right to divorce their husbands, the right to custody of their children. Why in the world would we look upon those "traditions and values" to form our opinions today on women's rights? Most of us would prefer to run in the opposite direction. But Alito loves those days, and those thinkers.

**The third concept is Stare Decisis.** This means "let the decision stand" and refers to the idea that if an earlier court made a decision on a certain matter, other courts should treat that with exceptional respect. This is especially true in what are called "landmark cases" decided by the Supreme Court. This provides stability, predictability, and deference. Several of these are considered foundational by almost all legal experts. For example, Brown versus the Board (1954) overturned Plessey versus Ferguson (1896) which had legalized segregation. Marbury versus Madison established the right of judicial review. Miranda affirmed that accused people had to be informed of their rights. Those who have had a class in American Government know most of these cases. But Alito says that stare decisis is not binding in this case.

"Stare decisis, the doctrine on which Casey's controlling opinion was based, does not compel unending adherence to Roe's abuse of judicial authority. Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, Roe and Casey have enflamed debate and deepened divisions. It is time to heed the Constitution and return the issue of abortion to the people's elected representatives . . . That is what the Constitution and the rule of law demand."

To make his point, that stare decisis is not inherently binding, he cites 30 or more cases covering over two pages of small footnote text, when the Supreme Court overruled earlier decisions. It feels like battering-ram overkill. But only one of these is the Supreme Court overruling the Supreme Court: Brown overturning Plessey by declaring segregation unconstitutional. Moreover, observers have noted that Dobbs will be the only case on that list that *removes* a right recognized by an earlier court.

It looks to me as if Alito is compiling a set of arguments, extracted from pro-life talking points, and tying them together with some legal concepts. At times he gets very far from serious jurisprudence and delves into polemics. He says we must 'set the record straight.' This sounds like a mediocre politician in a candidate debate forum. Also, he says there no right to an abortion in our tradition. Zero. None. I expected him to continue with Nada and Zilch. This is

not the kind of phrasing we expect in a Supreme Court decision. Rush Limbaugh maybe, but not from the Supreme Court. As someone said, his rhetoric is just above a talk show rant.

**Here is another quote:** “Roe’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both Roe and Casey acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

There are times when Alito appears to get caught up in his own arguments. He says that we must avoid “inquiries into legislative motives” in passing a law, but on the very next page says that the legislatures passing restrictions on abortion were “spurred by a sincerely held belief that abortion kills a human being.”

Then he adds, a bit disingenuously in my opinion, that “our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests...” I wonder. Is he saying that a state can declare that the moment an egg and sperm unite is when life and rights begin? Even before implantation? There are people advocating that position.

Alito seems to make arguments dear to the heart of his allies on the Court. Justice Amy Comey Barrett has praised “safe haven” laws which allow a woman to drop a baby anonymously at a hospital or elsewhere without being charged with child abandonment. This makes abortion unnecessary, says Barrett. As Alito describes it, “a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.” Well, maybe. While there are good foster parents caring for a child until it finds a permanent home, and others eagerly seeking adoption, the number are not as cheerful as Alito suggests. There are now 424,000 children in foster care. Some are there temporarily, but others are long-term. Those adopted wait 18 months. And 20,000 children per year “age out” of foster care without ever being adopted. Many of these do not have happy lives.

Throwing more red meat to fellow justices, Alito notes that some arguments before the court say some supporters of abortion have been motivated “to suppress the size of the African-American population.” Alito adds that “it is beyond dispute that Roe has had that demographic effect. In fact, a highly disproportionate percentage of aborted fetuses [39% we note] are black.” Herman Cain had argued that abortion was “planned genocide” and Justice Thomas had seen a parallel with the Eugenics movement and abortion.

Alito anticipates some criticisms and engages in preemptory strikes against them.

First, is this ruling a slippery slope decision that will lead to the reversal of other rights? The Justice says not to worry. “to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. “ I doubt that the Court can guarantee that. When they are handing down a decision about state’s rights that principle might well go beyond the current case.

Moreover, House Minority Leader McConnell was asked what would happen if Republicans gain control of the House and Senate and Presidency. Might they introduce a bill to ban abortion throughout the land, overriding state options. He said it was “possible” that they would. And Leonard Leo, the former head of the Federalist Society, who vetted and recruited Donald Trump’s three justices to make sure they were originalists and would vote to overturn Roe has spoken about overturning the Obergefell decision that legalized same-sex marriage. It was based on the same logic of privacy as Roe. And three of the Justices – Roberts, Thomas, and Alito – all voted against Obergefell. Moreover, there are voices across the country to ban certain birth control procedures such as IUD and Plan B pills. This may be just the beginning.

Second, he responds to a point Justice Sotomayor made during public arguments. “We must address one final argument . . . The argument was cast in different terms, but stated simply, it was essentially as follows. The America people’s belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not “social and political pressures.” There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial “watershed’ decision. A decision overruling Roe would be perceived as having been made ‘under fire’ and as a ‘surrender to political pressure, and therefore the preservation of public approval of the Court weighs heavily in favor of retaining Roe. This analysis starts out on the right foot but ultimately veers off course. (The argument) was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public’s reaction to our work “

Apparently thinking of the fact that the public supports Roe by two to one, Alito quotes Chief Justice Rehnquist: “The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of stare decisis is an adjunct of this duty and should be no more subject to the vagaries of public opinion than is the basic judicial task. In suggesting otherwise, the Casey plurality went beyond this Court’s role in our constitutional system.”

Third, regarding the belief that this is an attack on women’s rights, he says it definitely is not a “sex-based decision.” If so, it would be subjected to “heightened scrutiny” with a presumption that the Mississippi law is not constitutional.” As he puts it, “a State’s regulation of abortion is not a sex-based classification and is thus not subject to the ‘heightened scrutiny’ that applies to such classifications. The regulations of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext designed to effect an invidious discrimination against members of one sex or the other.’” He says the key issue is the rights of states to regulate medical issues.

“Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so.” And just to note the point, he adds that in the last election, Mississippi women, who make up 51.5% of the population, were 55.5% of the “voters who cast votes.” Leaving aside the fact that if Alito were my student and referred to “voters who vote” I would tell him that a voter is someone who votes and someone who does not vote is not a voter. Let’s not quibble over that point. But we can note Alito’s assumption, at least in his argument, that women somehow constitute a cohesive element. In fact, they do NOT. Women are predisposed but not united on these issues so suggesting that they can grab control of the Mississippi legislature through collective action is word play.

Ah! But the issue of States rights. Where have we heard that before? Oh, yes. The Civil War was NOT about slavery. It was about the principle of state’s rights and protecting the Southern Way of Life. Pardon me if I seem to gag. We did not lose 700,000 Americans in that war so that the South could continue to drink mint juleps in the afternoon shade. State’s Rights is a diversionary argument.

Fourth, might one of the majority justices, seeing the furious reaction against this decision, decide to reverse course? I can’t see this. When he was running for President Donald Trump promised unequivocally that he would appoint judges who would overturn Roe. Then he outsourced selection of his justices to the Originalist Federalist Society by promising he would not appoint any Supreme Court justice unless the name came from their list. Trump appointed Gorsuch, Kavanaugh, and Barrett. Alito wrote the opinion and Thomas is to the right of Alito. These people are not going to reverse. They are doing what they were put there to do.

Let’s look at some data. There have been four major polls in recent months. Support for keeping Roe v Wade ranges from 50-69 % with much smaller numbers, often in the 20s, in favor of overturning it. Only around 19% want it banned in all circumstances. For the First Trimester, support for saving Roe averages 60%. Predictably, it is always low in Republican states.

In terms of who gets abortions, the demographics have shifted dramatically. Back in 1995 Black and Asian-Pacific were 31% of the total. By 2015 their share was up to 49%. By income, from 1995-2015, the percent who were poor increased from 28% to 44%. Higher income cases have dropped from 52% to 25%.

In terms of whether there are party differences in whether this is a “very important” issue, something amazing has happened. Before September 2, 2021, there was a 5% difference between the parties, with Democrats slightly more likely to think this was a very important issue. Today the ratio is 37% to 51%, a 15 percent difference. The Court’s escalation of this issue has caused an escalation of tensions and polarization. We might have predicted that it would be Republicans dancing in the streets, but they are quiet. It is Democrats out marching.

Alito has a dramatic summary of the issues:



Roe “halted a political process, prolonged divisiveness, and deferred stable settlement of the issue. . . . This Court’s inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise “raw judicial power.” We do not pretend to know how our political system or society will respond to today’s decision overruling Roe and Casey. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly. We therefore hold that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”

Alito turns to the obvious next question: What happens when we get a wave of new cases based upon challenges to whatever laws the various states approve. “Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history. It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot “substitute their social and economic beliefs for the judgment of legislative bodies.” Respect for a legislature’s judgment applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” It must be sustained if there is a rational basis on which the legislature would have thought it would serve legitimate state interests. These legitimate interest include respect for a preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures, the preservation of the medical profession; the mitigation of fetal pain,; and the prevention of discrimination on the basis of race, sex, or disability. . . . The Mississippi legislature found that abortions performed after fifteen weeks typically use the dilation and evacuation procedure and the legislature found the use of this procedure “for non-therapeutic or elective reasons to be a barbaric practice dangerous for the maternal patient, and demeaning to the medical profession.”

So what’s next? Many people have said that if Roe can be overturned, what comes next? Same-sex marriage? The right to contraception? The Loving decision, which allowed Black and white people to get married? Alito seems to hint that these are not on the chopping block. After all, they don’t cause harm. But Alito was one of those who voted against the Obergefell decision that legalized same-sex marriage. I have no way of knowing how this will work itself out, but if I were hoping someday to join a same-sex marriage I would be nervous. And we know that the Republican Party fought tooth and nail to keep birth control out of the required health coverage of Obamacare.

But perhaps there are some less dramatic restrictions that we can anticipate. Will women be prohibited from going to a neighboring state to get an abortion? This is in the draft of one state

law. Will Plan B pills (the so-called “morning after pill”) be banned or restricted, for example by requiring a prescription or permission of the father or parents, for a minor? Some people consider this pill to be a form of abortion. Anyone who thinks this will be the end of this strident debate is delusional. The passions around this issue are escalating, not deescalating.

**Appendix:** At the end of the ruling there is a curious, lengthy, but interesting appendix. It includes quotes from actual laws in the 1800s. There are 32 of these listed, plus laws in 13 territories, most soon to be states. Twenty of these laws were passed in the two decades before the Civil War, and before the Fourteenth Amendment, a time of harsh governance. In each of these cases, abortion is considered a crime. In some cases it is a felony, in others a misdemeanor. Conviction results in a fine and jail time ranging from six months (in Alabama) to twenty years in South Carolina. Eight specify ten years. Michigan is on the harsh side, “not more than ten years.”

My initial assumption was that the South would have the harshest laws. This turned out not to be true. Vermont, New Hampshire, New Jersey all specified the ten year maximum. But some in the South also specified that penalty. I think we can say that there is no regional pattern. Curiously, the South (Alabama and South Carolina) had both the lightest and the harshest penalties. Virginia’s law was the most curious, at least to me. It applied only to a “free persons” and drew a distinction between a “quick child” (i.e., one that was moving) and a “not-quick child.” The penalties were five years and six months respectively. 11 of these laws were passed after the Civil War, including South Carolina.

In most of these laws, there is a provision for abortion to save the life of the mother. Two physicians typically had to agree to this procedure. The purpose of this appendix appears to be to argue with a point in Roe that there was a time when abortion was covered by common law rather than by statutory law. But to me, a disturbing point is the mindset of those who want to overturn Roe. They are going back to one of the most oppressive times in American history to justify their action. The 1830s and 1840s were a time of oppressive injustice, when Americans were enslaved, when women could not vote, when women could not divorce an abusive husband, when children were assumed to be the property of the father, when women often did not have property rights.

Let me offer a final thought of my own. There is much more in this ruling but I don’t have the time or the tolerance to work through it. This is the most frustrating case I have ever read. It throws the proverbial kitchen sink at Roe and Casey. It seems to grasp at any argument that will bolster its case (including arguments about fetal pain which the internationally-acclaimed scientist cited says distorts and fabricates his findings). As someone who spent his career having great respect for the Supreme Court, this ruling alters that position. The Supreme Court is no longer a Court. It is five Originalist ideologues with the bit in their mouth.