SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS E. DOBBS, STATE HEALTH)
OFFICER OF THE MISSISSIPPI)
DEPARTMENT OF HEALTH, ET AL.,)
Petitioners,)
v.) No. 19-1392
JACKSON WOMEN'S HEALTH)
ORGANIZATION, ET AL.,)
Respondents.)

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10 Respondents.)

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13 Washington, D.C.

14 Wednesday, December 1, 2021

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16 The above-entitled matter came on for

17 oral argument before the Supreme Court of the

18 United States at 10:00 a.m.

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1 APPEARANCES:

2 SCOTT G. STEWART, Solicitor General, Jackson,

3 Mississippi; on behalf of the Petitioners.

4 JULIE RIKELMAN, ESQUIRE, New York, New York; on behalf

5 of the Respondents.

6 GEN. ELIZABETH B. PRELOGAR, Solicitor General,

7 Department of Justice, Washington, D.C.; for the

8 United States, as amicus curiae, supporting the

9 Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument this morning in Case 19-1392, Dobbs

5 versus Jackson Women's Health Organization.

6 General Stewart.

7 ORAL ARGUMENT OF SCOTT G. STEWART

8 ON BEHALF OF THE PETITIONERS

9 MR. STEWART: Mr. Chief Justice, and

10 may it please the Court:

11 Roe versus Wade and Planned Parenthood

12 versus Casey haunt our country. They have no

13 basis in the Constitution. They have no home in

14 our history or traditions. They've damaged the

15 democratic process. They've poisoned the law.

16 They've choked off compromise. For 50 years,

17 they've kept this Court at the center of a

18 political battle that it can never resolve. And

19 50 years on, they stand alone. Nowhere else

20 does this Court recognize a right to end a human

21 life.

22 Consider this case: The Mississippi

23 law here prohibits abortions after 15 weeks.

24 The law includes robust exceptions for a woman's

25 life and health. It leaves months to obtain an

1 abortion. Yet, the courts below struck the law
2 down. It didn't matter that the law apply --
3 that the law applies when an unborn child is
4 undeniably human, when risks to women surge, and
5 when the common abortion procedure is brutal.
6 The lower courts held that because the law
7 prohibits abortions before viability, it is
8 unconstitutional no matter what.
9 Roe and Casey's core holding,
10 according to those courts, is that the people
11 can protect an unborn girl's life when she just
12 barely can survive outside the womb but not any
13 earlier when she needs a little more help. That
14 is the world under Roe and Casey.
15 That is not the world the Constitution
16 promises. The Constitution places its trust in
17 the people. On hard issue after hard issue, the
18 people make this country work. Abortion is a
19 hard issue. It demands the best from all of us,
20 not a judgment by just a few of us. When an
21 issue affects everyone and when the Constitution
22 does not take sides on it, it belongs to the
23 people.
24 Roe and Casey have failed, but the
25 people, if given the chance, will succeed. This

1 Court should overrule Roe and Casey and uphold
2 the state's law.
3 I welcome the Court's questions.
4 JUSTICE THOMAS: General Stewart, you
5 focus on the right to abortion, but our
6 jurisprudence seems to -- seem to focus on, in
7 Casey, autonomy; in Roe, privacy. Does it make
8 a difference that we focus on privacy or
9 autonomy or more specifically on abortion?
10 MR. STEWART: I think whichever one of
11 those you're focusing on, Your Honor,
12 particularly if you're focusing on -- on the
13 right to abortion, each of those starts to
14 become a step removed for what's provided in the
15 Constitution. Yes, the Constitution does
16 provide certain -- protect certain aspects of
17 privacy, of autonomy, and the like, but, as this
18 Court said in Glucksberg, going directly from
19 general concepts of autonomy, of privacy, of
20 bodily integrity, to -- to a right is not how we
21 traditionally, this Court traditionally, does
22 due process analysis.
23 So I think it just confirms, whichever
24 one of those you look at, Your Honor, a right to
25 abortion is -- is not grounded in the text, and

1 it's grounded on abstract concepts that this
2 Court has rejected in -- in other contexts as
3 supplying a substantive right.
4 JUSTICE THOMAS: You say that this is
5 the only constitutional right that involves the
6 taking of a life. What difference does that
7 make in your analysis?
8 MR. STEWART: Sure, Your Honor. I --
9 I -- I think it -- it makes a -- a number of
10 differences. One, I -- I'd mention two in
11 particular.
12 One is it -- it really does mark out
13 the unbelievably profound ramifications of this
14 area, which, in many other areas, assisted
15 suicide, a whole host of important areas that
16 are important to dignity, autonomy, freedom, and
17 important to matters of conscience, it -- it
18 marks it out as one of the unique areas where
19 this Court has taken that important issue to the
20 people, and it's -- it's something that
21 implicates life and it just, I think, marks off,
22 Justice Thomas, how problematic and unusual and
23 how much of a break the Court's abortion
24 jurisprudence is from those other cases.
25 JUSTICE THOMAS: If we don't overrule

1 Casey or Roe, do you have a standard that you
2 propose other than the viability standard?
3 MR. STEWART: It would be, Your Honor,
4 a clarified version of the undue burden
5 standard. I -- I -- I would -- I would
6 emphasize, I -- I think, as Your Honor is
7 alluding to, that no standard other than the
8 rational basis review that applies to all laws
9 will promote an administrable, workable,
10 practicable, consistent jurisprudence that puts
11 matters back with the people. I think anything
12 heightened here is going to be problematic.
13 But I would say, if the Court were not
14 inclined to -- to overrule Casey, the -- the
15 choice would be undue burden standard,
16 untethered from any bright-line viability rule.
17 JUSTICE THOMAS: Thank you.
18 JUSTICE BREYER: Well, I'd -- I'd like
19 to go to a different topic, back to Casey.
20 MR. STEWART: Yes, Your Honor.
21 JUSTICE BREYER: I assume you've read
22 Casey pretty thoroughly.
23 MR. STEWART: Yes, Your Honor.
24 JUSTICE BREYER: And there are two
25 parts. One is they reaffirm Roe. Put that to

1 the side. The second is an opinion for the
2 Court, not for three people but for the Court,
3 and that second part is about what stare decisis
4 principles should be used to overrule a case
5 like Roe.
6 And they say Roe is special. What's
7 special about it? They say it's rare. They
8 call it a watershed. Why? Because the country
9 is divided? Because feelings run high? And yet
10 the country, for better or for worse, decided to
11 resolve their differences by this Court laying
12 down a constitutional principle, in this case,
13 women's choice. That's what makes it rare.
14 That's not what I'm asking about. I
15 want your reaction to what they said follows
16 from that. What the Court said follows from
17 that is that it should be more unwilling to
18 overrule a prior case, far more unwilling we
19 should be, whether that case is right or wrong,
20 than the ordinary case.
21 And why? Well, they have a lot of
22 words there, but I'll give you about 10 or 20.
23 There will be inevitable efforts to overturn it.
24 Of course, there will. Feelings run high. And
25 it is particularly important to show what we do

1 in overturning a case is grounded in principle
2 and not social pressure, not political pressure.
3 Only "the most convincing
4 justification can show that a later decision
5 overruling," if that's what we did, "was
6 anything but a surrender to political pressures
7 or new members." And that is an unjustified
8 repudiation of principles on which the Court
9 stakes its authority.
10 And then there are two sentences I'd
11 like to read because they say they really mean
12 this, the -- the Court, not just three: To
13 overrule under fire in the absence of the most
14 compelling reason, to reexamine a watershed
15 decision, would subvert the Court's legitimacy
16 beyond any serious question.
17 And the last sentence, after they
18 quote Potter Stewart on the same point, they say
19 overruling unnecessarily and under pressure
20 would lead to condemnation, the Court's loss of
21 confidence in the judiciary, the ability of the
22 Court to exercise the judicial power and to
23 function as the Supreme Court of a nation
24 dedicated to the rule of law.
25 Now that's the opinion of the Court,

1 all right? And it's about stare decisis and how
2 we approach it, and I hope everybody reads this.
3 It's at 505 U.S. 854 to 869.
4 All right. What do you say to that?
5 MR. STEWART: Sure, Your -- sure
6 Justice Breyer. I -- I would say a couple
7 things. I would say we have very closely gone
8 through the factors that the Casey court itself
9 went through in stare decisis. More than half
10 of our brief is devoted to stare decisis. We
11 now have 30 years in the wake of Casey to see
12 what Casey has done and what it hasn't done.
13 JUSTICE BREYER: Well, it's caused
14 some bad things and -- in the eyes of some
15 people and some good things in the eyes of some
16 people.
17 MR. STEWART: Your Honor --
18 JUSTICE BREYER: All right. All
19 right. Go ahead.
20 MR. STEWART: I'm -- I'm sorry, Your
21 Honor. What I'd emphasize, Your Honor, is that
22 to the extent that -- that the -- I would not
23 say it was the people that -- that called this
24 Court to end the controversy. The people -- you
25 know, many, many people vocally really just

1 wanted to have the matter returned to them so
2 that they could decide it -- decide it locally,
3 deal with it the way they thought best and at
4 least have a fighting chance to have their view
5 prevail, which was not given to them under Roe
6 and then, as a result, under Casey.
7 And -- and I'd also emphasize, Your
8 Honor, that on -- on stare decisis, just as I
9 said, the last 30 years, workability,
10 developments in the law, factual developments
11 that states can't account for. I think the
12 workability, the undue burden standard alone,
13 many problems.
14 On all the metrics that Casey was
15 describing or the vast bulk of them, Casey
16 fails. And I'd also emphasize this as well,
17 Justice Breyer, that Casey was not -- was -- was
18 not a -- a great example of simply letting
19 precedents stand. It -- it recast Roe's
20 reasoning, it overruled two of the Court's most
21 important abortion decisions. It jettisoned the
22 trimester framework of Roe itself and adopted a
23 new standard unknown to other parts of the law.
24 Those are not the hallmarks of
25 precedent, and they failed under this Court's

1 stare decisis factors.

2 JUSTICE BREYER: Okay. Can I take it

3 that your answer is, yes, you accept the way the

4 special rule, the rule for the rare watershed,

5 the stare decisis principles for deciding

6 whether to overturn such a case as Roe, you

7 accept that and you think it's met?

8 MR. STEWART: I would --

9 JUSTICE BREYER: Is that right?

10 MR. STEWART: -- I would say yes in

11 part, Your -- Justice Breyer, and here's what

12 I'd emphasize, is that I -- I do think,

13 particularly when Casey looked outward and

14 looked to what it see -- saw as pressure, there

15 were pressure on all sides. As -- as Your Honor

16 noted, this is a hot, difficult issue for

17 everyone. It's -- that's why it belongs to the

18 people.

19 And I think the conclusion the Court

20 drew from that, that it couldn't provide a -- a

21 good enough example, that it would look on

22 principle, those conclusions were, with respect,

23 Justice Breyer, mistaken, and the -- the last 30

24 years has -- has not seen any calming of that.

25 It's been very different than some of the

1 others -- the Court's other controversial
2 decisions that -- that have seen --
3 JUSTICE SOTOMAYOR: Counsel --
4 MR. STEWART: -- much more calm --
5 JUSTICE SOTOMAYOR: -- what hasn't
6 been at issue in the last 30 years is the line
7 that Casey drew of viability. There has been
8 some difference of opinion with respect to undue
9 burden, but the right of a woman to choose, the
10 right to control her own body, has been clearly
11 set for -- since Casey and never challenged.
12 You want us to reject that line of
13 viability and adopt something different.
14 Fifteen justices over 50 years have -- or I
15 should say 30 since Casey have reaffirmed that
16 basic viability line. Four have said no, two of
17 them members of this Court. But 15 justices
18 have said yes, of varying political backgrounds.
19 Now the sponsors of this bill, the
20 House bill, in Mississippi, said we're doing it
21 because we have new justices. The newest ban
22 that Mississippi has put in place, the six-week
23 ban, the Senate sponsor said we're doing it
24 because we have new justices on the Supreme
25 Court.

1 Will this institution survive the
2 stench that this creates in the public
3 perception that the Constitution and its reading
4 are just political acts?
5 MR. STEWART: I --
6 JUSTICE SOTOMAYOR: I -- I -- I don't
7 see how it is possible. It's what Casey talked
8 about when it talked about watershed decisions.
9 Some of them, Brown versus Board of Education it
10 mentioned, and this one have such an entrenched
11 set of expectations in our society that this is
12 what the Court decided, this is what we will
13 follow, that the -- that we won't be able to
14 survive if people believe that everything,
15 including New York versus Sullivan -- I could
16 name any other set of rights, including the
17 Second Amendment, by the way. There are many
18 political people who believe the Court erred in
19 seeing this as a personal right as -- as opposed
20 to a militia right. If people actually believe
21 that it's all political, how will we survive?
22 How will the Court survive?
23 MR. STEWART: Justice Sotomayor, I --
24 I think the concern about appearing political
25 makes it absolutely imperative that the Court

Justice Thomas has opined that stare decisis is used to provide a "veneer of credibility" for the Court by which it can have a justification for continuing to uphold wrong decisions. THAT is the point of Sotomayor''s statements

1 reach a decision well grounded in the
2 Constitution, in text, structure, history, and
3 tradition, and that carefully goes through the
4 stare decisis factors that we've laid out.
5 JUSTICE SOTOMAYOR: Casey did that.
6 MR. STEWART: No, it didn't, Your
7 Honor, respectfully.
8 JUSTICE SOTOMAYOR: Casey went through
9 every one of them. You think it did it wrong.
10 That's your belief. But Casey did that.
11 MR. STEWART: Well, Your --
12 JUSTICE SOTOMAYOR: And you haven't
13 added --
14 MR. STEWART: Sorry, Your Honor.
15 JUSTICE SOTOMAYOR: -- much to the
16 discussion in your papers as to the errors that
17 Casey made, other than "I disagree with Casey."
18 MR. STEWART: Well, Justice Sotomayor,
19 maybe I can -- I can highlight two.
20 Casey gave one paragraph to the
21 workability of Roe. It then adopted the undue
22 burden standard, which is perhaps the most
23 unworkable standard in American law. It gave
24 about three paragraphs, if memory serves, to
25 reliance, which doesn't account for the last 30

1 years and the changes that have occurred since
2 Casey. It did -- it -- it gave a brief factual
3 view to things that have changed since Roe.
4 Those, of course, are not going to take account
5 of the last 30 years of advancements in
6 medicine, science, all of those things.
7 JUSTICE SOTOMAYOR: What are the --
8 JUSTICE ALITO: What is --
9 JUSTICE SOTOMAYOR: -- advancements in
10 medicine?
11 MR. STEWART: I think it's an
12 advancement in -- in knowledge and concern about
13 such things as fetal pain, what we know the
14 child is doing and looks like and is fully
15 human from a very early --
16 JUSTICE SOTOMAYOR: You know --
17 MR. STEWART: I'm sorry.
18 JUSTICE SOTOMAYOR: -- in -- in
19 regular cases, courts decide whether science
20 fits the Daubert standard. Obviously, the --
21 under the Daubert standard, the minority of
22 people, a -- a gross minority of doctors who
23 believe fetal pain exists before 24, 25 weeks,
24 it's a huge minority and one not well founded in
25 science at all.

Is any of this relevant to what was meant by the words of the 14th amendment when adopted in 1868? No!

1 So I don't see how that really adds
2 anything to the discussion.
3 MR. STEWART: Well --
4 JUSTICE SOTOMAYOR: That a small
5 fringe of doctors believe that pain could be
6 experienced between -- before a cortex is formed
7 --
8 MR. STEWART: Well, I --
9 JUSTICE SOTOMAYOR: -- doesn't mean that
10 there's been that much of a difference since
11 Casey.
12 MR. STEWART: We -- we pointed out as
13 an example, Your Honor, of where Roe and Casey
14 improperly preclude states from taking account
15 for these things. And they should be able to be
16 concerned about the -- about a fact of a -- a --
17 an unborn life being poked and then recoiling in
18 the way one of us would recoil.
19 JUSTICE SOTOMAYOR: Sir, I -- I don't
20 --
21 CHIEF JUSTICE ROBERTS: General, does
22 -- was -- I know what it said about viability in
23 Roe, but was viability an issue in the case? I
24 know it wasn't briefed or argued.
25 MR. STEWART: It -- it was -- it was

1 not issue -- an issue certainly the way it is an
2 issue here, Your Honor. I think it was -- to
3 the extent that the Court had to over -- had to
4 reaffirm Roe, the way to read that as something
5 other than dicta would be to under --
6 CHIEF JUSTICE ROBERTS: I'm sorry, I
7 don't know whether I said, was it an issue in
8 Roe?
9 MR. STEWART: Oh, in Roe.
10 CHIEF JUSTICE ROBERTS: Yeah.
11 MR. STEWART: I'm sorry, Your Honor.
12 My understanding is no. The law there was --
13 didn't have a viability tag. That was inserted
14 by --
15 CHIEF JUSTICE ROBERTS: In fact, if I
16 remember correctly, and I -- it's an unfortunate
17 source, but it's there -- in his papers, Justice
18 Blackmun said that the viability line was --
19 actually was dicta. And, presumably, he had
20 some insight on the question.
21 MR. STEWART: I -- I think -- and I'd
22 -- I'd add, Your Honor, Justice Blackmun in --
23 in, I think, as well his papers pointed out the
24 arbitrary nature of it and -- and the
25 line-drawing problems --

1 CHIEF JUSTICE ROBERTS: And then --
2 MR. STEWART: -- in it too.
3 CHIEF JUSTICE ROBERTS: -- and then,
4 in Casey, Casey said that that was the core
5 principle or a central principle in Roe,
6 viability. It said that after tossing out the
7 trimester formula, which many people thought was
8 the core -- core principle. But was viability
9 at issue in Casey?
10 MR. STEWART: I don't think it was
11 squarely at issue, Your Honor. Again, it's --
12 it's a little hard not to take the Court at its
13 word when it emphasized that viability -- the --
14 that viability is -- is the central part of Roe
15 -- Roe's holding and saying that it is
16 reaffirming that, so we kind of take that as it
17 -- as it stands. But the Court has not -- it
18 did not face a law like this certainly,
19 Mr. Chief Justice.
20 JUSTICE SOTOMAYOR: May I finish my
21 inquiry?
22 MR. STEWART: Of course, Justice
23 Sotomayor.
24 JUSTICE SOTOMAYOR: Virtually every
25 state defines a brain death as death. Yet, the

1 literature is filled with episodes of people who
2 are completely and utterly brain dead responding
3 to stimuli. There's about 40 percent of dead
4 people who, if you touch their feet, the foot
5 will recoil. There are spontaneous acts by dead
6 brain people. So I don't think that a response
7 to -- by a fetus necessarily proves that there's
8 a sensation of pain or that there's
9 consciousness.
10 So I go back to my question of, what
11 has changed in science to show that the
12 viability line is not a real line, that a fetus
13 cannot survive? And I think that's what both
14 courts below said, that you had no expert say
15 that there is any viability before 23 to 24
16 weeks.
17 MR. STEWART: And what I'd say -- say
18 is this, Justice Sotomayor, is that the
19 fundamental problem with viability, it's not
20 really something that rests on -- on science so
21 much. It's that viability is not tethered to
22 anything in the Constitution, in history, or
23 tradition. It's a quintessentially legislative
24 line.
25 A legislature could think that

Well said!

1 viability makes sense as -- as a place to draw
2 the line, but it's quite reasonable for a
3 legislature to draw the line elsewhere.
4 JUSTICE SOTOMAYOR: Counsel, there's
5 so much that's not in the Constitution,
6 including the fact that we have the last word.
7 Marbury versus Madison. There is not anything
8 in the Constitution that says that the Court,
9 the Supreme Court, is the last word on what the
10 Constitution means. It was totally novel at
11 that time. And yet, what the Court did was
12 reason from the structure of the Constitution
13 that that's what was intended.
14 And, here, in Casey and in Roe, the
15 Court said there is inherent in our structure
16 that there are certain personal decisions that
17 belong to individuals and the states can't
18 intrude on them. We've recognized them in terms
19 of the religion parents will teach their
20 children. We've recognized it in -- in their
21 ability to educate at home if they choose. They
22 just have to educate them. We have recognized
23 that sense of privacy in people's choices about
24 whether to use contraception or not. We've
25 recognized it in their right to choose who

No, Marbury did NOT say that. Cooper v. Aaron did in 1958, and departs from the structure of the Constitution. The structure of the constitution, even after the 14th Amendment, is the existence of dual sovereigns with different jurisdictional spheres. The whole purpose of the Bill of Rights was to leave protection of common law rights "to the states, respectively or the people" (10th Amendment)

1 they're going to marry.
2 I fear none of those things are
3 written in the Constitution. They have all,
4 like Marbury versus Madison, been discerned from
5 the structure of the Constitution.
6 Why do we now say that somehow Roe
7 versus Casey is -- Roe and Casey are so unusual
8 that they must be overturned?
9 MR. STEWART: Well, Your -- Justice
10 Sotomayor, I would -- I would emphasize two
11 things. When you're going beyond the
12 Constitution, this Court has looked closely
13 to --
14 JUSTICE SOTOMAYOR: No, what I'm
15 saying is they didn't go beyond the
16 Constitution.
17 MR. STEWART: Your Honor, they did not
18 deduce those from the structure of the
19 Constitution. They -- they pointed to the
20 Fourteenth Amendment and -- and reasoned that
21 privacy in Roe, autonomy and similar values in
22 Casey led to a right to abortion.
23 That's not how this Court
24 traditionally does things, including in the vast
25 run of cases that Your Honor ran through. The

1 Court looks to history and tradition. And,
2 here, those decisively reject the proposition
3 that states cannot legislate comprehensively on
4 abortion before, after viability, and all
5 throughout. So it's -- it's history and
6 tradition, Your Honor.
7 And I would also add, Your -- Your
8 Honor, that those -- those decisions, a great
9 many of them, draw -- you know, not just draw
10 from text -- text, history, and tradition, but
11 they draw often clear lines, very workable, have
12 not led to the many negative stare decisis
13 factors that we identify here.
14 JUSTICE KAGAN: General --
15 JUSTICE BARRETT: General, would -- go
16 ahead. Go ahead.
17 JUSTICE KAGAN: Go ahead, Justice
18 Barrett.
19 JUSTICE BARRETT: Would a decision in
20 your favor call any of the questions -- any of
21 the cases, sorry, that Justice Sotomayor is
22 identifying into question?
23 MR. STEWART: No, Your Honor, I -- I
24 think for a couple reasons. First of all, I
25 think the vast run of those cases, and some

So, as long as the "rule" to be applied, it doesn't matter if the interpretation of the Constitution is actually wrong? No. That does what Justice Thomas says "does not comport the judicial duty" of the Court because it exalts precedents (and therefore the Court) over the actual Constitution! Are we to say that SCOTUS taking away jurisdiction of the states over issues like marriage and the family is not a "negative"?

1 mentioned from time to time are Griswold,
2 Lawrence, Obergefell, these are -- these are
3 cases that draw clear rules: you can't ban
4 contraception, you can't ban intimate romantic
5 relationships between consenting adults, can't
6 ban marriage of people of the same sex. Clear
7 rules that have engendered strong reliance
8 interests and that have not produced negative
9 consequences or all the many other negative
10 stare decisis considerations we pointed out,
11 Your Honor.
12 Also, I -- I'd add none of them
13 involve the purposeful termination of a human
14 life. So those two -- those two features, stare
15 decisis and termination of a human life, Your
16 Honor, puts all of those safely out of reach if
17 the Court overrules here.
18 JUSTICE BREYER: Okay. So we -- I'm
19 sorry to interrupt again, but we really might be
20 making progress. I mean, in the part that --
21 that I read, you know, of Casey --
22 MR. STEWART: Yes, Your Honor.
23 JUSTICE BREYER: -- I think they think
24 go back 150 years, maybe now we can go back 200.
25 You think there have been only two cases which

1 were what they call the watershed and where the
2 special tough overruling rules apply.
3 You want this to be the third, or do
4 you think there were more and, if so, what were
5 they?
6 MR. STEWART: Well, Your Honor, I --
7 I -- I think there's quite a bit of difference.
8 I -- I think the question is never is it bad to
9 overrule, period. You know, surely, stare --
10 JUSTICE BREYER: This is why I'm
11 asking you to think -- think in their terms.
12 There were two they mentioned, you see.
13 MR. STEWART: But --
14 JUSTICE BREYER: And they don't want
15 Casey -- they don't want Roe to be the third.
16 MR. STEWART: And --
17 JUSTICE BREYER: Now, in your opinion,
18 you just answered Justice Barrett, hey, all
19 these are not rising to that level. Okay.
20 MR. STEWART: Right, Your Honor.
21 JUSTICE BREYER: Are there any that do
22 rise to the level in your opinion?
23 MR. STEWART: I think -- and I -- and
24 I'm not sure that I necessarily agree with the
25 watershed characterization, Your Honor. What

1 I'd say, though, I -- I can't think of another
2 that kind of hits the radar. But -- but I'd
3 emphasize that a problem here is we're -- we're
4 dealing with a right that doesn't have a basis
5 in constitutional text and, again, very much in
6 conflict with those -- with those values,
7 Justice Breyer.
8 JUSTICE SOTOMAYOR: I'm not sure how
9 your answer makes any sense. All of those other
10 cases -- Griswold, Lawrence, Obergefell -- they
11 all rely on substantive due process. You're
12 saying there's no substantive due process in the
13 Constitution, so they're just as wrong according
14 to your theory.
15 MR. STEWART: No, Your Honor, we're
16 quite comfortable with Washington versus
17 Glucksberg and how it analyzes substantive due
18 process and it looks to text, history. It looks
19 to history and tradition to discipline the
20 inquiry to make sure --
21 JUSTICE SOTOMAYOR: Well, I mean, in
22 Obergefell, there was no history of -- of -- of
23 same-sex marriage.
24 MR. STEWART: And I think the Court --
25 the -- the Court pointed out, look, when we --

Stewart accepts substantive due process that Justice Thomas concedes is made up and that was even decried by Roberts in Obergefell! SDP is judicial legislating! Which leads to answers that don't "make[ ] any sense." Sotomayor knows that to challenge SDP in a case from 1973 means all the other SDP cases are put in question (see next comment).

She gets the point—if we reverse a substantive DP case after 50 years, we will have challenges to other SDP cases. She wants to know why reversing this one doesn't open up claims to revese the others?

1 when we were facing Loving versus Virginia --
2 JUSTICE SOTOMAYOR: I -- I'm not
3 trying to argue that we should overturn those
4 cases. I just think you're dissimilating when
5 you say that any ruling here wouldn't have an
6 effect on those.
7 MR. STEWART: Respectfully, I -- I --
8 that's -- that's -- I respectfully --
9 JUSTICE SOTOMAYOR: Do you think no --
10 that no state is going to think otherwise, that
11 no people in the population aren't going to
12 challenge those cases in Court?
13 MR. STEWART: I mean, Your -- Your
14 Honor, we'll always have a diversity of views,
15 but I think -- I think --
16 JUSTICE SOTOMAYOR: That's the point.
17 MR. STEWART: -- I think -- I think
18 that's one --
19 JUSTICE SOTOMAYOR: That -- isn't that
20 the -- isn't --
21 MR. STEWART: -- of the benefits of
22 our society.
23 JUSTICE SOTOMAYOR: -- isn't that the
24 point?
25 MR. STEWART: That there's -- that

1 there's a diversity of views and people
2 can vigorously debate and make --
3 JUSTICE SOTOMAYOR: Exactly.
4 MR. STEWART: -- decisions for
5 themselves?
6 JUSTICE SOTOMAYOR: And that's what
7 we're still doing --
8 MR. STEWART: I think that's a good
9 thing, Your Honor.
10 JUSTICE SOTOMAYOR: -- and that's what
11 we're doing under undue burden, but we haven't
12 been doing it on the viability line.
13 MR. STEWART: And -- and neither one
14 has worked well. The viability line discounts
15 and disregards state interests, and the undue
16 burden standard has all -- all of the
17 problems that we've emphasized.
18 JUSTICE SOTOMAYOR: How is your
19 interest anything but a religious view? The
20 issue of when life begins has been hotly debated
21 by philosophers since the beginning of time.
22 It's still debated in religions.
23 So, when you say this is the only
24 right that takes away from the state the ability
25 to protect a life, that's a religious view,

So, Sotomayor does not realize that to disbelieve in God, disbelieve in the relation of God to issues and to life is not a religious view? How confused can one person be?

1 isn't it --

2 MR. STEWART: Respectfully --

3 JUSTICE SOTOMAYOR: -- because it

4 assumes that a fetus's life at -- when? You're

5 not drawing -- you're -- when do you suggest we

6 begin that life?

7 MR. STEWART: Your Honor, I -- aside

8 from --

9 JUSTICE SOTOMAYOR: Putting it aside

10 from religion.

11 MR. STEWART: I -- I'll -- I'll try to

12 -- I think there might be more than one

13 question. I'll do my very best, Justice

14 Sotomayor.

15 I -- I think this Court in Gonzales

16 pretty clearly recognized that before viability,

17 we are talking with unborn life with a human

18 organism. And I think the philosophical

19 questions Your Honor mentioned, all those

20 reasons, that they're hard, they've been

21 debated, they're -- they're -- they're

22 important, those are all reasons to return this

23 to the people because the people should get to

24 debate these hard issues, and this Court does

25 not in that kind of a circumstance --

1 JUSTICE SOTOMAYOR: So when does the
2 life of a woman and putting her at risk enter
3 the calculus? Meaning, right now, forcing women
4 who are poor -- and that's 75 percent of the
5 population and much higher percentage of those
6 women in Mississippi who elect abortions before
7 viability -- they are put at a tremendously
8 greater risk of medical complications and ending
9 their life, 14 times greater to give birth to a
10 child full term, than it is to have an abortion
11 before viability.
12 And now the state is saying to these
13 women, we can choose not only to physically
14 complicate your existence, put you at medical
15 risk, make you poorer by the choice because we
16 believe what? That --
17 MR. STEWART: Sure, Your Honor. I --
18 I think, to -- to answer, I think, the -- the
19 question I think you -- you led with and -- and
20 then I think expanded on but is still on the
21 same issue is as to when does a woman's interest
22 enter, as far as we're concerned, it's there the
23 entire time. Our point is that all of the
24 interests are there the entire time, and Roe and
25 Casey improperly prevent states from taking

This is a great discussion if one is trying to make policy, but legislative bodies are constitutionally charged to do that! This kind of analysis wholly belongs to the "living Constitution" camp of constitutional interpretation

1 account and weighing those interests however
2 they think best.
3 We're not saying --
4 JUSTICE KAGAN: General --
5 JUSTICE ALITO: General, are there --
6 are there secular philosophers and bioethicists
7 who take the position that the rights of
8 personhood begin at conception or at some point
9 other than viability?
10 MR. STEWART: I -- I believe so. I
11 mean, I think there's a wide array, I mean,
12 of -- of -- of people of kind of all different
13 views and -- and of no faith views who -- who
14 would reasonably have that view, Your Honor.
15 It's -- it's -- it's not tied to a
16 religious view and I don't think, were it
17 otherwise, this Court's jurisprudence would --
18 on this issue would run right into some of its
19 religious exercise jurisprudence.
20 JUSTICE KAGAN: General, Justice
21 Breyer started with stare decisis, an important
22 principle in any case, and, here, for the
23 reasons that Casey mentioned, especially so, to
24 prevent people from thinking that this Court is
25 a political institution that will go back and

Stewart realizes that if a view is religious it creates a number of issues, which, I suspect, is why he was unwilling to point out the fallacy noted above in Sotomayor's comment about Stewart's view being "religious."

Stare decisis is used to create the "veneer of credibility"

1 forth depending on what part of the public yells
2 loudest and -- and -- and preventing people from
3 thinking that the Court will go back and forth
4 depending on changes to the Court's membership.
5 And what strikes me about this case --
6 and -- and -- and you come here very honestly
7 saying, you know, we want you to discard the
8 entire setup and then, even if you don't do
9 that, we want you to discard the viability line,
10 which you've acknowledged again today Casey says
11 is the -- the heart, the central principle of
12 Roe.
13 And so usually there has to be a
14 justification, a strong justification in a case
15 like this beyond the fact that you think the
16 case is wrong. And I guess what strikes me when
17 I look at this case is that, you know, not much
18 has changed since Roe and Casey, that people
19 think it's right or wrong based on the things
20 that they have always thought it was right and
21 wrong for.
22 So the -- the -- the -- the -- the
23 rationale behind those cases has something to do
24 with the autonomy and the freedom and the
25 dignity of women to pursue their lives as they

Justice Thomas in Gamble- exalts precedent over the Constitution, which makes SCOTUS supreme over the Constitution!

1 wish, to protect their bodily integrity, to make
2 the decisions that are most fundamental to the
3 course of their lives.
4 And -- and always, in those cases,
5 there was an understanding that there were
6 important interests on the other side in
7 protecting life or protecting the potential for
8 life, whether people saw it one way or the other
9 way, and that there was a difficult question
10 here and a balance to be made.
11 And, I mean, it strikes me that
12 people -- some people think those decisions made
13 the right balance and some people thought they
14 made the wrong balance, but, in the end, we are
15 in the same exact place as we were then, except
16 that we're not because there's been 50 years of
17 water under the bridge, 50 years of decisions
18 saying that this is part of our law, that this
19 is part of the fabric of women's existence in
20 this country, and that that places us in an
21 entirely different situation than if you had
22 come in 50 years ago and made the same
23 arguments.
24 So I guess I just wanted to hear you
25 react to that.

Why waiting to challenge Obergefell is a bad idea—exposes us to this argument that could be avoided if we would challenge wrong decisions sooner. NOTE, no one wanted to say Plessy should not have been reversed the day after it was decided! If true, and a decision is wrong, why create this “long-standing” precedent problem!

1 MR. STEWART: Of course, Justice
2 Kagan. Thank you. I -- I would emphasize a
3 couple things, Your Honor. The fact that so
4 much time has passed, let's say nothing had
5 changed, that's not a point in Roe and Casey's
6 favor. They have no basis in the Constitution.
7 They -- they adopt a right that purposefully
8 leads to the termination of now millions of
9 human lives. The -- if nothing had changed,
10 they'd be just as bad as they were 30 years ago,
11 50 years ago. And now we just have decades of
12 damage, and we have a situation where nearly 30
13 years after Casey, the Court unfortunately
14 divides over what Casey, the lead case on -- on
15 -- in the abortion area, even means.
16 The lower courts are left not knowing
17 what to do, as I think -- and I think kind of a
18 fundamental problem here is, I think, as Justice
19 Gorsuch mentioned, emphasized in his -- his
20 opinion in -- in June Medical, that the problem
21 for lower court judges is the Constitution
22 doesn't give them an answer to this. There's no
23 neutral rule of law, so judges unfortunately
24 have to look within themselves. And that's just
25 never going to solve this issue.

1 But, if the matter is returned to the
2 people, the people can deal with it, they can
3 work, they can compromise and reach different
4 solutions. But, if we don't do that, we're just
5 going to have all this sort of damage, and at
6 some point, it's appropriate for the Court to
7 say enough, as it has in some of its -- the
8 great overrulings in -- in Brown and in other
9 cases, where it said this is just enough.
10 Justice Harlan had it right in dissent
11 in Plessy when he recognized that -- that --
12 that, you know, all are -- all are equal. And,
13 here -- similarly here, the state should be able
14 to recognize, hey, there are real values on both
15 sides here. We -- we -- we think that this one
16 slightly outweighs, we think that this one
17 slightly outweighs, or we think that there's
18 some balance to be drawn here.
19 But, if the Court doesn't do that,
20 Justice Kagan, it's just going to be continued
21 damage, and the Court will continue to plunge in
22 this political issue.
23 I apologize, Mr. Chief Justice. I've
24 gone over.
25 CHIEF JUSTICE ROBERTS: No, no, that's

1 all right. I have just a few little -- well,
2 not little, I hope, questions, and the first
3 gets back to the issue of viability.
4 You know, in your petition for cert,
5 your first question and the only one on which we
6 granted review was whether all pre-viability
7 prohibitions on elective abortions are
8 unconstitutional. And then I think it's fair to
9 say that when you got to the brief on the
10 merits, you kind of shifted gears and talked a
11 lot more about whether or not Roe and Casey
12 should be overruled, and I wanted to give you a
13 chance to explain that.
14 MR. STEWART: Sure, Your Honor. So a
15 couple points. You know, at the petition stage,
16 we were, of course, identifying -- we identified
17 for the Court three questions. We emphasized,
18 as you do at the cert stage, hey, this is
19 important; only this Court can resolve it. We
20 emphasized, I believe it was five times, that
21 the Court was at the least going need -- going
22 to need to reconsider, revisit, or reevaluate
23 its precedents. And we asked the Court to at
24 least get rid of a viability line or any
25 suggestion of a viability line.

1 So we added, however -- and we had to
2 take account of the reality that this argument
3 has not fared well in the lower courts. It --
4 it -- it's lost in every court of appeals. So,
5 you know, we -- we raised the issue in addition,
6 but, once the Court granted only the first
7 question, we presented every argument as we, you
8 know, signaled we -- we would present the -- the
9 -- the full-blown constitutional merits argument
10 with that fundamental question.
11 So I -- I'd emphasize that, Your
12 Honor. It was kind of the shift you go from
13 cert state to merits stage. The Court granted
14 one question. That question fairly includes
15 what is the correct standard.
16 CHIEF JUSTICE ROBERTS: Well, it
17 fairly includes the broader arguments you
18 raised. I'm not suggesting that. But, on the
19 other hand, it presumably included the viability
20 question as well, because that's what you talked
21 about in that one sentence.
22 MR. STEWART: And -- and -- and we --
23 we've addressed that as well, Your Honor. What
24 I -- what I'd emphasize here is that the merits
25 arguments of, you know, the validity of Roe and

Why all other cases did not lead to reconsideration of Casey—they did not necessarily implicate viability! Don't present the right question you will not get the question answered!!

1 Casey as an original matter, is there a
2 viability rule based on the Constitution, those
3 are not that complicated or -- or -- or lengthy.
4 The harder questions are, you know, should the
5 Court overrule and -- and take that momentous
6 step? And that's why we devote a lot of space
7 to that very important issue. We respect stare
8 decisis and have walked through all those
9 points. But, again, focusing on the question
10 presented and arguing -- presenting our best
11 arguments for that, that's -- that's what we've
12 done, Mr. Chief Justice.
13 CHIEF JUSTICE ROBERTS: On stare
14 decisis, I think the first issue you look at is
15 whether or not the decision at issue was wrongly
16 decided. I've actually never quite understood
17 how you evaluate that. Is it wrongly decided
18 based on legal principles and doctrine when it
19 was decided or -- or in retrospect?
20 Because Roe -- I mean, there are a lot
21 of cases around the time of Roe, not of that
22 magnitude but the same type of analysis, that --
23 that went through exactly the sorts of things we
24 today would say were erroneous, but do we look
25 at it from today's -- if we look at it from

This time unmasks argument is more consistent with a living constitution than with did-we-interpret-the-words wrong principle of interpretation

1 today's perspective, it's going to be a long
2 list of cases that we're going to say were
3 wrongly decided.
4 MR. STEWART: Well, I'd say -- I'd
5 say, Mr. Chief Justice, that you -- you look --
6 you can look both was it wrong at the time, has
7 it been unmasked as wrong by -- by new
8 understandings, new knowledge, any developments.
9 But I -- I don't think -- as I -- I
10 think the colloquy -- my colloquy with Justice
11 Barrett indicated, the Court won't have -- have
12 to be looking at -- at -- at much other -- many
13 other areas because this is an area that has a
14 uniquely problematic set of stare decisis
15 considerations. A lot of other controversial
16 areas or once controversial areas are -- are
17 quite settled clear rules and don't have those
18 considerations against them.
19 So, really, by -- by overruling Roe
20 and Casey, the Court won't have to go down that
21 road, and a lot of those decisions are quite
22 readily groundable in history, tradition, and
23 the Court's traditional factors, Your Honor.
24 CHIEF JUSTICE ROBERTS: Thank you.
25 Justice Thomas?

So, as long as the "rule" in those other cases is "clear" then it doesn't matter if they were wrong. Well that's sure great. The more "clearly" wrong, the better (see Robert's statement on p. 67)? Under this analysis Roe would NOT be reversed nor would it have been modified by Casey because its trimester framework rule was very clear. What a hogwash, superficial answer and Sotomayor knows it

1 JUSTICE THOMAS: No questions.
2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer?
4 Justice Alito?
5 Justice Sotomayor?
6 Justice Kagan?
7 JUSTICE KAGAN: General, I -- I just
8 wanted to get your quick sense of how your
9 intermediate positions would work, you know, if
10 basically the viability line was discarded and
11 undue burden became the standard overall, a
12 standard that according to you is an unclear
13 one, what that would leave the Court with going
14 forward.
15 You know, I'm just sort of thinking
16 about the great variety of different -- of
17 regulations that states could pass, so whether
18 one is 15 weeks and one is 12 weeks and one is 9
19 weeks or variation across a wide variety of
20 other dimensions. What would that look like
21 coming to the Court? How would we -- how -- how
22 do you think we should -- we would be able to
23 deal with that or -- or how would you counsel us
24 to deal with that if the Court were to go down
25 that road?

An "undue burden" standard won't work—what's "undue" is purely subjective

1 MR. STEWART: Well, I think I -- that
2 this is -- not to push back against the end --
3 and I will -- will answer your question, Justice
4 Kagan, but part of why we've counseled to
5 overrule full scale is that that's the only way
6 to get rid of a number of the problems that I
7 think Your Honor's alluding to.
8 And that's that when you have the
9 undue burden standard, it's -- it's a very hard
10 standard to apply. It's not objective. The
11 Court looks to the record in each case and
12 what's going on. I mean, the Court in Casey
13 itself said, under this record, this is not an
14 undue burden. You -- you couldn't say
15 necessarily for certain that a certain number of
16 weeks one place would be an undue burden but
17 would be okay another place.
18 But, again, that is the world we have
19 under Casey. So, if the Court upholds this law
20 under the undue burden standard, it would be
21 carrying forward with those features, which I --
22 and I hope I've answered your question, but I
23 think that's one of the very strong reasons to
24 just go all the way and overrule Roe and Casey,
25 Your Honor. I -- anyway.

Correct: there is no non-arbitrary standard between conception and birth other than possibly viability outside the womb

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?
3 Justice Kavanaugh?
4 JUSTICE KAVANAUGH: I want to be clear
5 about what you're arguing and not arguing.
6 MR. STEWART: Yes, Your Honor.
7 JUSTICE KAVANAUGH: And to be clear,
8 you're not arguing that the Court somehow has
9 the authority to itself prohibit abortion or
10 that this Court has the authority to order the
11 states to prohibit abortion as I understand it,
12 correct?
13 MR. STEWART: Correct, Your Honor.
14 JUSTICE KAVANAUGH: And as I
15 understand it, you're arguing that the
16 Constitution is silent and, therefore, neutral
17 on the question of abortion? In other words,
18 that the Constitution is neither pro-life nor
19 pro-choice on the question of abortion but
20 leaves the issue for the people of the states or
21 perhaps Congress to resolve in the democratic
22 process? Is that accurate?
23 MR. STEWART: Right. We're -- we're
24 saying it's left to the people, Your Honor.
25 JUSTICE KAVANAUGH: And so, for the --

Correct: If the unborn is a person under the 14th amendment, then section 5 of the 14th gives Congress the power to prohibit all abortion laws

1 if you were to prevail, the states, a majority
2 of states or states still could or -- and
3 presumably would continue to freely allow
4 abortion, many states; some states would be able
5 to do that even if you prevail under your view,
6 is that correct?
7 MR. STEWART: That's consistent with
8 our view, Your Honor. It's -- it's one that
9 allows all interests to have full voice and --
10 and many of the abortions we see in certain
11 states that I don't think anybody would think
12 would be moving to change their laws in a more
13 restrictive direction.
14 JUSTICE KAVANAUGH: Thank you.
15 MR. STEWART: Thank you, Your Honor.
16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett.
18 JUSTICE BARRETT: General, I have a
19 question that is a little bit of a follow-up to
20 that Justice Breyer was asking you. That's
21 about stare decisis. And I think a lot of the
22 colloquy you've had with all of us has been
23 about the benefits of stare decisis, which I
24 don't think anyone disputes, and, of course, no
25 one can dispute because it's part of our stare

1 decisis doctrine that it's not an inexorable
2 command and that there are some circumstances in
3 which overruling is possible. You know, we have
4 Plessy, Brown. We have Bowers versus Hardwick,
5 to Lawrence.
6 But, in thinking about stare decisis,
7 which is obviously the core of this case, how
8 should we be thinking about it -- I mean,
9 Justice Breyer pointed out that in Casey and in
10 some respects, well, it was a different
11 conception of stare decisis insofar as it very
12 explicitly took into account public reaction.
13 Is that a factor that you accept, or are you
14 arguing that we should minimize that factor?
15 And is there a different set of rules
16 -- it is true that Casey identified Brown and
17 West Coast Hotel as watershed decisions. But is
18 there a distinct set of stare decisis
19 considerations applicable to what the Court
20 might decide is a watershed distinction.
21 MR. STEWART: I don't think there
22 should be a distinct set of -- of -- of
23 considerations there, Your Honor. I think what
24 I -- what I emphasize, and just to make sure, on
25 -- on the kind of legitimacy, the Court looking

Bingo! The case is NOT about the Constitution or even abortion!

Again, the issue is not whether a decison correctly interpretted the Constitution, but, per below, what will provide a "veneer of credbility

1 outward, I -- I think Casey was unusual in that
2 regard. I think it was a mistake. And I think
3 it's something that is kind of in conflict with
4 this Court's structure and approach as an
5 independent branch looking to the Constitution
6 rather than looking without.
7 And I -- I think that's one reason why
8 traditionally the Court is -- is -- is -- in
9 some of its greatest overrulings, it's -- it's
10 not looking without. It's saying this was
11 wrong. It was wrong the day it was decided. We
12 know it's wrong today. And it's led to all
13 these terrible consequences. We should get --
14 we should get rid of it.
15 I -- so I -- I think that that was an
16 unfortunate break, and I think the Court -- even
17 if the Court were to -- were to still look at
18 legitimacy, though, Justice Barrett, I think the
19 Court could very, very powerfully say, look,
20 our -- our legitimacy really derives from our
21 willingness to stand strong and stand firm in
22 the face of whatever is going on and stand for
23 constitutional principle and follow our
24 traditional stare decisis factors to overrule
25 when it's appropriate.

Thomas in Gamble—"factors" is a policy-weighing analysis, which is a legislative function, not judicial

1 Thank you, Your Honor.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.
4 MR. STEWART: Thank you, Mr. Chief
5 Justice.
6 CHIEF JUSTICE ROBERTS: Ms. Rikelman.
7 ORAL ARGUMENT OF JULIE RIKELMAN
8 ON BEHALF OF THE RESPONDENTS
9 MS. RIKELMAN: Mr. Chief Justice, and
10 may it please the Court:
11 Mississippi's ban on abortion two
12 months before viability is flatly
13 unconstitutional under decades of precedent.
14 Mississippi asks the Court to dismantle this
15 precedent and allow states to force women to
16 remain pregnant and give birth against their
17 will.
18 The Court should refuse to do so for
19 at least three reasons.
20 First, stare decisis presents an
21 especially high bar here. In Casey, this Court
22 carefully examined and rejected every possible
23 reason for overruling Roe, holding that a
24 woman's right to end a pregnancy before
25 viability was a rule of law and a component of

1 liberty it could not renounce. The question
2 then is not whether Roe should be overturned but
3 whether Casey was egregiously wrong to adhere to
4 Roe's central holding.
5 Second, Casey and Roe were correct.
6 For a state to take control of a woman's body
7 and demand that she go through pregnancy and
8 childbirth with all the physical risks and
9 life-altering consequences that brings is a
10 fundamental deprivation of her liberty.
11 Preserving a woman's right to make this decision
12 until viability preserve -- protects her liberty
13 while logically balancing the other interests at
14 stake.
15 Third, eliminating or reducing the
16 right to abortion will propel women backwards.
17 Two generations have now relied on this right,
18 and one out of every four women makes the
19 decision to end a pregnancy.
20 Mississippi's ban would particularly
21 hurt women with a major health or life change
22 during the course of a pregnancy, poor women,
23 who are twice as likely to be delayed in
24 accessing care, and young people or those in
25 contraception, who take longer to recognize a

Note: This liberty is not "liberty" as undestood in the common law and the Court has said, POST-14th Amendment, that the constitution was framed in the language of the language of the common law and "must be interpreted in light of its history"

1 pregnancy.

2 To avoid profound damage to women's

3 liberty, equality, and the rule of law, the

4 Court should affirm.

5 JUSTICE THOMAS: Counsel, I just have

6 one question. I assume you -- from your brief,

7 you're relying on an autonomy theory?

8 MS. RIKELMAN: Both bodily integrity

9 and the ability to make decisions related to

10 family, marriage, and childbearing, Your Honor.

11 JUSTICE THOMAS: Shortly, some years

12 after we decided Casey, we had a case out of

13 South Carolina, I believe, and it involved a

14 woman who had been convicted of criminal child

15 neglect because she ingested cocaine during

16 pregnancy, and her case was post-viability, so

17 it doesn't fit in the facts of this case.

18 If she had ingested cocaine

19 pre-viability and had the same negative

20 consequences to her child, do you think the

21 state had an interest in enforcing that law

22 against her?

23 MS. RIKELMAN: The state may have,

24 Your Honor. The state can certainly regulate to

25 serve its interests in fetal life and in women's

Hmm. These are among the common law rights not enumerated in the constitution—personal security, husband-wife, parent-child and per the Ninth Amendment, were retained by the people and jurisdiction over them was LEFT by the Tenth, “to the states, respectively, or the people” 9th and 10th were limitations on FEDERAL jurisdiction! But if pro-aborts want to resort to common law, then the unborn were persons at common law!

1 health. Those particular laws tend to undermine
2 both of those interests because they deter women
3 from seeking prenatal care, which is
4 counterproductive to both their health.
5 JUSTICE THOMAS: But pre-viability as
6 well as post-viability?
7 MS. RIKELMAN: No, Your Honor. The --
8 the Court has been clear that after
9 viability states can prohibit abortion, except
10 to save a woman's life.
11 JUSTICE THOMAS: No, I mean the -- in
12 my example of criminal child neglect. I
13 understand you -- your argument is about
14 abortion. I am trying to look at the issue of
15 bodily autonomy and whether or not she has a
16 right also to bodily autonomy in the case of
17 ingesting an illegal substance and causing harm
18 to a pre-viability fetus.
19 MS. RIKELMAN: Your Honor, of course,
20 those issues aren't posed in this case, and,
21 again, I would say that the states can certainly
22 regulate throughout pregnancy, both before and
23 after viability, to preserve fetal life and to
24 preserve the woman's health.
25 The Court has said, however, there

Where does a "right to bodily autonomy" begin and end and what bounds it, especially during a pregnancy? But, more to the point, in society, in which each person is interfacing with other persons, who should decide where to draw those lines—court or legislature? The "structure" of our Constitution says legislative bodies.

From a Christian perspective, human beings are never autonomous, but always subject to the law of God and the providence of God and I suspect Thomas, being Catholic, knows that. He also knows autonomy is no where in the text or structure of the Constitution so he probably hopes to pin her down on this.

1 is -- there are other constitutional issues at
2 stake, for instance, in the Ferguson case, that
3 states still can't violate women's Fourth
4 Amendment rights. But, again, that's not what
5 this case is about.
6 This case is about a ban on abortion
7 that the state concedes is weeks before
8 viability, and the Court has been clear for 50
9 years that the one thing that states cannot do
10 is to take the decision completely away from the
11 woman until viability, that, until that point,
12 it is her decision to make given the unique
13 physical demands of pregnancy and the,
14 life-altering consequences of pregnancy and
15 having a child.
16 JUSTICE THOMAS: Thank you.
17 CHIEF JUSTICE ROBERTS: You -- the
18 point you made about the impact on -- on women
19 and their place in society, those -- those words
20 are certainly made in Roe as well. What we have
21 before us, though, is a 15-week standard.
22 Are -- are you suggesting that the
23 difference between 15 weeks and viability are
24 going to have the same sort of impacts as you
25 were talking about -- or as we were talking

1 about in Roe?

2 MS. RIKELMAN: Yes, Your Honor, I

3 believe they would because people who need

4 abortion after 15 weeks are often in the most

5 challenging circumstances. As I mentioned,

6 they're people who have made -- perhaps had a

7 major health or life change, a family illness, a

8 job loss, a separation, young people or people

9 who are on contraception or pregnant for the

10 first time and who are delayed in recognizing

11 the signs of pregnancy, or poor women, who often

12 have much more trouble navigating access to

13 care, and if they're denied the ability to make

14 this decision because there's a ban after 15

15 weeks, they will suffer all of the consequences

16 that the Court has talked about in the past.

17 And, in fact, the data has been very

18 clear over the last 50 years that abortion has

19 been critical to women's equal participation in

20 society. It's been critical to their health, to

21 their lives, their ability to pursue --

22 CHIEF JUSTICE ROBERTS: I'm sorry,

23 what -- what kind of data is that?

24 MS. RIKELMAN: I would refer the Court

25 to the brief of the economists in this case,

1 Your Honor, and it compiles data showing studies
2 based actually on causal inference, showing that
3 it's the legalization of abortion and not other
4 changes that have had these benefits for women
5 in society, and, again, those benefits are clear
6 for education, for the ability to pursue a
7 profession, for the ability to have --
8 CHIEF JUSTICE ROBERTS: Well, putting
9 that data aside, if you think that the issue is
10 one of choice, that women should have a choice
11 to terminate their pregnancy, that supposes that
12 there is a point at which they've had the fair
13 choice, opportunity to choice, and why would 15
14 weeks be an inappropriate line?
15 Because viability, it seems to me,
16 doesn't have anything to do with choice. But,
17 if it really is an issue about choice, why is 15
18 weeks not enough time?
19 MS. RIKELMAN: For -- for a few
20 reasons, Your Honor. First, the state has
21 conceded that some women will not be able to
22 obtain an abortion before 15 weeks and this law
23 will bar them from doing so. And a reasonable
24 possibility standard would be completely
25 unworkable for the courts. It would be both

What “choice” necessarily entails? if choice is the issue, then why is it anything another than autonomous? If not autonomous, how long must the choice be given? How can there be a “rule of law” that “fits” all different individuals? Think back to Steve Cohen-woman has a right, period, no exceptions. What is Roberts fishing for?

1 less principled and less workable than
2 viability, and some of the reasons for that are,
3 without viability, there will be no stopping
4 point.
5 States will rush to ban abortion at
6 virtually any point in pregnancy. Mississippi
7 itself has a six-week ban that it's defending
8 with very similar arguments as it's using to
9 defend the 15-week ban. And there are states
10 that have bans --
11 CHIEF JUSTICE ROBERTS: Well, I know,
12 but I'd like to focus on the 15-week ban because
13 that's not a dramatic departure from viability.
14 It is the standard that the vast majority of
15 other countries have.
16 When you get to the viability
17 standard, we share that standard with the
18 People's Republic of China and North Korea. And
19 I don't think you have to be in favor of looking
20 to international law to set our constitutional
21 standards to be concerned if those are your --
22 share that particular time period.
23 MS. RIKELMAN: I think there's two
24 questions there, Your Honor, if I may. First,
25 that is not correct about international law. In

1 fact, the majority of countries that permit
2 legal access to abortion allow access right up
3 until viability, even if they have nominal lines
4 earlier.
5 So, for example, Canada, Great Britain
6 and most of Europe allows access to abortion
7 right up until viability, and it also doesn't
8 have the same barriers in place.
9 CHIEF JUSTICE ROBERTS: What do you
10 mean, even if they have nominal lines earlier?
11 MS. RIKELMAN: Some countries, Your
12 Honor, have a nominal line of 12 weeks or 18
13 weeks, but they permit legal access to abortion
14 after that point for broad social reasons,
15 health reasons, socioeconomic reasons, so their
16 regimes really aren't comparable, and they also
17 don't have the same type -- types of barriers
18 that we have here. So, if the Court were to
19 move the line substantial -- substantially
20 backwards -- and 15 weeks is 9 weeks before
21 viability, Your Honor, it's quite a bit
22 backwards -- it may need to reconsider the rules
23 around regulations because, if it's cutting the
24 time period to obtain an abortion roughly in
25 half, then those barriers are going to be much

1 more important.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 JUSTICE BARRETT: Ms. Rikelman, I have

4 a question about the safe haven laws. So

5 Petitioner points out that in all 50 states, you

6 can terminate parental rights by relinquishing a

7 child after abortion, and I think the shortest

8 period might have been 48 hours if I'm

9 remembering the data correctly.

10 So it seems to me, seen in that light,

11 both Roe and Casey emphasize the burdens of

12 parenting, and insofar as you and many of your

13 amici focus on the ways in which forced

14 parenting, forced motherhood, would hinder

15 women's access to the workplace and to equal

16 opportunities, it's also focused on the

17 consequences of parenting and the obligations of

18 motherhood that flow from pregnancy.

19 Why don't the safe haven laws take

20 care of that problem? It seems to me that it

21 focuses the burden much more narrowly. There

22 is, without question, an infringement on bodily

23 autonomy, you know, which we have in other

24 contexts, like vaccines. However, it doesn't

25 seem to me to follow that pregnancy and then

Looking for a way to justify departure for stare decisis? But, if that's it, then this is a policy consideration - Again, consider Justice Thomas in Gamble

1 parenthood are all part of the same burden.
2 And so it seems to me that the choice
3 more focused would be between, say, the ability
4 to get an abortion at 23 weeks or the state
5 requiring the woman to go 15, 16 weeks more and
6 then terminate parental rights at the
7 conclusion. Why -- why didn't you address the
8 safe haven laws and why don't they matter?
9 MS. RIKELMAN: I think they don't
10 matter for a couple of reasons, Your Honor.
11 First, even if some of those laws are new since
12 Casey, the idea that a woman could place a child
13 up for adoption has, of course, been true since
14 Roe, so it's a consideration that the Court
15 already had before it when it decided those
16 cases and adhered to the viability line.
17 But, in addition, we don't just focus
18 on the burdens of parenting, and neither did Roe
19 and Casey. Instead, pregnancy itself is unique.
20 It imposes unique physical demands and risks on
21 women and, in fact, has impact on all of their
22 lives, on their ability to care for other
23 children, other family members, on their ability
24 to work. And, in particular, in Mississippi,
25 those risks are alarmingly high. It's 75 times

1 more dangerous to give birth in Mississippi than
2 it -- than it is to have a pre-viability
3 abortion, and those risks are disproportionately
4 threatening the lives of women of color.
5 JUSTICE BARRETT: So are you saying --
6 I mean, actually, as I read Roe and Casey, they
7 don't talk very much about adoption. It's a
8 passing reference that that means out of the
9 obligations of parenthood. But, as I hear this
10 answer then, are you saying that the right as
11 you conceive of it is grounded primarily in the
12 bearing of the child, in the carrying of a
13 pregnancy, and not so much looking forward into
14 the consequences on professional opportunities
15 and work life and economic burdens?
16 MS. RIKELMAN: No, Your Honor, I
17 believe it's both, and -- and that is exactly
18 how Casey talked about it. It talked about the
19 two strands of cases that supported the right.
20 One was the strand of cases supporting bodily
21 integrity, and it cited to cases like Curzan and
22 Riggins versus Nevada. And the second was the
23 strand of cases supporting decisional autonomy
24 and specifically decisions related to
25 childbearing, marriage, and procreation,

1 decisions like Griswold, Loving.
2 And so it's really both strands that
3 we're relying on here.
4 JUSTICE GORSUCH: May I ask you a
5 question about stare decisis, counsel? Your --
6 your colleagues on the other side have
7 emphasized that Casey rejected Roe's trimester
8 framework and replaced it with an undue burden
9 standard. They argue that the undue burden
10 standard was not well known to the law before
11 that, and then they argue that the undue burden
12 standard has evolved over time too in ways the
13 Court has found difficult to agree upon.
14 In Hellerstedt, for example, they --
15 they point out in their briefs that the Court
16 seemed to suggest that a court should consider
17 both the benefits and the burdens associated
18 with the proposed restriction. In June Medical
19 more recently, the Court splintered on -- on --
20 on that same question, whether benefits could be
21 considered or only burdens.
22 And so the argument goes that this has
23 proved to be, putting aside all the other
24 obviously difficult questions in the case, that
25 -- that the standard itself has proved difficult

1 to administer and that that is relevant to the
2 stare decisis analysis, and I just wanted to
3 give you an opportunity to respond.
4 MS. RIKELMAN: Yes, Your Honor. The
5 first point I'd like to make is the undue burden
6 test is not at issue in this case. That is the
7 test that applies to regulations, not
8 prohibitions. And the state has conceded that
9 this is a prohibition. In fact, that's the
10 title of this law, is an Act to prohibit
11 abortion after 15 weeks.
12 And the only thing that's at issue in
13 this case is the viability line, and the
14 viability line has been enduringly workable.
15 The lower federal courts have applied it
16 consistently and uniformly for 50 years. And
17 the Fifth Circuit here below had no difficulty
18 striking down this law unanimously, 3-0. So
19 it's been an exceedingly workable standard.
20 And if I may return to your question,
21 Mr. Chief Justice, a reasonable possibility
22 standard would not be workable. It would
23 ultimately boil down to an argument that states
24 can prohibit a category of women from exercising
25 a constitutional right merely because of the

1 number of people in the category. And that's
2 just not how constitutional rights work. A
3 state would never say that it could ban
4 religious services on a Wednesday evening, for
5 example, simply because most people could attend
6 religious services on another night of the week.
7 JUSTICE GORSUCH: So -- so I actually
8 just wanted to -- that's helpful, I think. I
9 just want to make sure I understand what you're
10 telling me, counsel, that -- that if the Court
11 were to, in this case, step past viability and
12 apply undue burden, the undue burden test, to
13 regulations prior to viability, you would agree
14 with the other side, I think, that that's not a
15 workable standard. Is -- is that -- is that a
16 fair understanding of what you're -- you're
17 telling the Court?
18 MS. RIKELMAN: No, Your Honor. I -- I
19 believe --
20 JUSTICE GORSUCH: Do you think that
21 would be workable?
22 MS. RIKELMAN: -- I believe -- if I
23 may clarify, I believe the undue burden test has
24 been workable for regulations that it is --
25 JUSTICE GORSUCH: I -- I -- I

1 understand that. I'm -- if it were to apply --
2 if the Court were to -- and I thought this was
3 what you were saying in response to the Chief
4 Justice, but maybe I'm mistaken, and please
5 correct me if I am -- but what -- what is your
6 argument against applying the undue burden
7 standard prior to viability?
8 MS. RIKELMAN: If the undue burden
9 standard, as this Court laid out in Casey, which
10 includes the viability line, is applied --
11 JUSTICE GORSUCH: No, no, I'm asking
12 -- I know -- we're fighting the hypothetical
13 here, counsel, all right? Accept the
14 hypothetical. If, hypothetically, the Court
15 were to extend the undue burden standard to
16 regulations prior to viability, would that be
17 workable or would that not be workable in your
18 view?
19 MS. RIKELMAN: Without viability, it
20 would not be workable, Your Honor, because it
21 would ultimately, again, always come down to a
22 claim that states can bar a certain category of
23 people from exercising this right simply because
24 of the number of people in the category, and
25 that's not a workable standard and it's not a

An honest answer! Helps a prolife majority say the "other side" conceded there was no alternative middle ground.

1 constitutional standard.

2 JUSTICE GORSUCH: I appreciate that

3 clarification. Thank you.

4 JUSTICE ALITO: Just to follow up on

5 that, I read your briefs -- your brief to say

6 that the only real options we have are to

7 reaffirm Roe and Casey as they stand or to

8 overrule them in their entirety. You say that

9 "there are no half-measures here." Is that a

10 correct understanding of your brief?

11 MS. RIKELMAN: Your Honor, it --

12 certainly, the arguments that the state has

13 presented is what we're responding to there,

14 which is that all of the state's arguments,

15 including their alternatives, which are undue

16 burden without viability, would be the

17 equivalent of overruling Casey and Roe because

18 the viability line is the central holding of

19 those cases. Casey mentioned it no fewer than

20 19 times. And the Court in June Medical just a

21 year ago affirmed that the viability line is the

22 central holding of both Casey and Roe.

23 JUSTICE ALITO: Well, you -- you do

24 emphasize that the Court drew the line at

25 viability in Roe and reaffirmed that in Casey,

An honest answer, which means the ‘conservatives” can say that the pro-aborts conceded there was no other middle ground unless viability is retained as the middle ground

1 and that is certainly something that we have to
2 take very seriously into consideration.
3 But suppose we were considering that
4 question now for the first time. I'm sure you
5 know the arguments about the viability line as
6 well as I do, probably better than I do. What
7 would you say in defense of that line? What
8 would you say to the argument that has been made
9 many times by people who are pro-choice and
10 pro-life that the line really doesn't make any
11 sense, that it is, as Justice Blackmun himself
12 described it, arbitrary?
13 The -- the woman's -- if a woman wants
14 to be free of the burdens of pregnancy, that
15 interest does not disappear the moment the
16 viability line is crossed. Isn't that right?
17 MS. RIKELMAN: No, Your Honor, and if
18 I may make a few points to answer your question.
19 First, I think the state views
20 viability as arbitrary because it completely
21 discounts the woman's interests. But
22 viability --
23 JUSTICE ALITO: No, no. But does a
24 woman have -- does -- upon reaching the point of
25 viability, does not the woman have the same

1 interests that she had before viability in being
2 free of this pregnancy that she no longer wants
3 to continue?
4 MS. RIKELMAN: Viability is a
5 principled line, Your Honor, because, in
6 ordering the interests --
7 JUSTICE ALITO: Well, I'm trying to
8 see whether it is a principled line.
9 MS. RIKELMAN: Yeah. The --
10 JUSTICE ALITO: Will you agree with me
11 at least on that point, that a woman still has
12 the same interest in terminating her pregnancy
13 after the viability line has been crossed?
14 MS. RIKELMAN: Yes, Your Honor, but
15 the Court balanced the interests -- This is a legislative evaluation
16 JUSTICE ALITO: Okay. And then --
17 MS. RIKELMAN: -- and in ordering the
18 interests at stake --
19 JUSTICE ALITO: -- look at the
20 interests on -- on the other side. The -- the
21 fetus has an interest in having a life, and that
22 doesn't change, does it, from the point before
23 viability to the point after viability?
24 MS. RIKELMAN: In -- in some people's
25 view, it doesn't, Your Honor, but what the Court

So, tearing apart babies is a neutral position that does not resolve any philosophical or theological issues or differences? How confused and sophomoric!

1 said is that those philosophical differences
2 couldn't be resolved --
3 JUSTICE ALITO: Well, what is the --
4 MS. RIKELMAN: -- in the way --
5 JUSTICE ALITO: That -- that's what
6 I'm getting at. What is the philosophical
7 argument, the secular philosophical argument for
8 saying this is the appropriate line?
9 There are those who say that the
10 rights of personhood should be considered to
11 have taken hold at a point when the fetus
12 acquires certain independent characteristics.
13 But viability is dependent on medical technology
14 and medical practice. It has changed. It may
15 continue to change.
16 MS. RIKELMAN: No, Your Honor, it is
17 principled because, in ordering the interests at
18 stake, the Court had to set a line between
19 conception and birth, and it logically looked at
20 the fetus's ability to survive separately as a
21 legal line because it's objectively verifiable
22 and doesn't require the Court to resolve the
23 philosophical issues at stake.
24 CHIEF JUSTICE ROBERTS: I just want to
25 focus on stare decisis for a little bit. I

It is 'objective' more or less, laying aside changes based on scientific advances, but it DOES resolve philosophical questions in a particular way!!

See reference to "reason" in green on p. 69.

1 found my colleague, Justice Breyer's, comments
2 quite compelling. I'm not quite sure how
3 they're -- they play out in -- in Casey.
4 It is certainly true that we cannot
5 base our decisions on whether they're popular or
6 not with the people. Casey seemed to say we
7 shouldn't base our decisions not only on that
8 but whether they're going to -- whether they're
9 going to seem popular, and it seemed to me to
10 have a paradoxical conclusion that the more
11 unpopular the decisions are, the firmer the
12 Court should be in not departing from prior
13 precedent, sort of a super stare decisis, but
14 it's super stare decisis for what are regarded
15 as -- by many, as the most erroneous decisions.
16 Do you think there is that category?
17 Is there -- or is it just normal stare decisis?
18 MS. RIKELMAN: I think it is precedent
19 on precedent, Your Honor, because Casey did the
20 stare decisis analysis for Roe, so the question
21 before this Court is whether that stare decisis
22 analysis was egregiously wrong.
23 And if I may answer your earlier
24 question about whether viability was squarely at
25 issue in Casey, it clearly was, Your Honor. At

Like what Thomas said in Gamble and I said above on p. 40, the more wrong the better!

1 pages 869 to 871, the Court squarely discussed
2 viability because the government had made the
3 argument that viability was arbitrary --
4 CHIEF JUSTICE ROBERTS: Well, no, I
5 appreciate that Casey addressed it, but that's
6 different than saying it was at issue. It said
7 it was the central principle of Roe because it
8 was pretty much all that was left after they
9 were done dealing with the rest of it.

That's an honest assessment—Casey was essentially overruling Roe by discarding the "framework" and shifting from privacy to liberty!

10 And the regulations in Casey had --
11 had no applicability or not depending upon where
12 viability was. They applied throughout the
13 whole range, period. So, if they didn't say
14 anything about viability, it's like what Justice
15 Blackmun said in -- when discussing among his
16 colleagues, which is a good reason not to have
17 papers out that -- that early, is that they
18 don't have to address the line-drawing at all in
19 Roe, and they didn't have to address the
20 line-drawing at all in Casey.
21 MS. RIKELMAN: I disagree with that,
22 Your Honor, because the undue burden test
23 incorporates the viability line. That was what
24 the Court was assessing the regulations against,
25 whether they imposed a substantial obstacle in

**** An honest answer!**

1 the path of a woman before viability.

2 And if a prohibition like this law

3 isn't a substantial obstacle, then nothing would

4 be, so the issue was squarely before the Court,

5 and, in fact, the Court said at page 879 that in

6 adopting the undue burden test, it was not

7 disturbing the viability line.

8 JUSTICE BREYER: It's a very

9 interesting question that I think Justice

10 Barrett raised too. It's usually just

11 philosophical, but I think it has bite here.

12 When I read Casey, it's not just one

13 on one, you know, two is greater than one.

14 Casey plus Roe is greater than -- it -- it's --

15 they're making a point that -- that -- that

16 we're an institution, perhaps more, than a court

17 of appeals or a district court. It's Hamilton's

18 point, no purse, no sword, and yet we have to

19 have public support, and that comes primarily,

20 says Casey -- I wonder if it was O'Connor who

21 wrote that? I don't know.

22 But it comes primarily from people

23 believing that we do our job. We use reason.

24 We don't look to just what's popular. And

25 that's where you're seeing the paradox. But the

How funny! We don't use our views about religion and God? We didn't decide any moral or theological or philosopical question by letting babies be killed in the womb. Yeah, right.

So not worrying about the public''s perception of the Court (the purpose of stare decisis the way its used) has nothing to do with what the majority of the people think about youo? Yeah, right.

1 problem with the super case of which we've heard
2 three mentioned, the problem with a super case
3 like this, the rare case, the watershed case,
4 where people are really opposed on both sides
5 and they really fight each other, is they're
6 going to be ready to say, no, you're just
7 political, you're just politicians.
8 And that's what kills us as an
9 American institution. That's what they're
10 saying. So we're looking at it for that. But
11 we are looking to, and that they say is a reason
12 why -- a reason why, when you get a case like
13 that, you better be damn sure that the normal
14 stare considerations, stare decisis overrulings
15 are really there in spades, double, triple,
16 quadruple, and then they go through and show
17 they're not. Okay?
18 What's the paradox? Now maybe you
19 think I've just made an argument that there
20 isn't one, but, really, in my head, I'm thinking
21 I'm not sure. There may be one. And I don't
22 know if you've ever thought about this. I don't
23 know if you've ever -- if -- when -- when --
24 when that occurred to you, I don't want to
25 overrule the stare -- I wouldn't want the Court

CF to Thomas who says the way it is used by folks like Breyer "does not comport with the court's judicial duty" under the Constitution

1 to overrule the stare decisis section of Casey,
2 you see. And that -- that's -- that's what I
3 think is being brought up, and maybe I haven't
4 made it clearer, but I've tried to.
5 MS. RIKELMAN: Yes, Your Honor. I
6 think the point that the Court was making was
7 that the fact that some states may continue to
8 enact laws in the teeth of the Court's precedent
9 has never been enough of a reason to overrule.
10 And that's true for a number of decisions that
11 the Court has issued. The fact that some people
12 continue to disagree with them is not a basis to
13 discard that precedent.
14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas, anything further?
16 JUSTICE THOMAS: Back to my original
17 question. If I were -- I know your interest
18 here is in abortion, I understand that, but, if
19 I were to ask you what constitutional right
20 protects the right to abortion, is it privacy?
21 Is it autonomy? What would it be?
22 MS. RIKELMAN: It's liberty, Your
23 Honor. It's the textual protection in the
24 Fourteenth Amendment that a state can't deprive
25 a person of liberty without due process of law,

See the attempt to legitimize Casey because "liberty" is in the 14th Amendment's Due Process Clause, but what did that word mean at common law at the time it was used? Our side refuses to refute this living constitution, made up view of liberty that was never intended when the Constitution or 14th amendment were adopted! The other side won't go there because the unborn were persons at common law. Why won't our side make them go there? Make the court think about that? Use the Ninth Amendment! Use prior precedents about interpreting according to the common law.

1 and the Court has interpreted liberty to include
2 the right to make family decisions and the right
3 to physical autonomy, including the right to end
4 a pre-viability pregnancy.
5 JUSTICE THOMAS: So it's all of the
6 above?
7 MS. RIKELMAN: Well, the Court --
8 that's how the Court has interpreted the liberty
9 clause for over a hundred years in cases going
10 back to Meyer, Griswold, Carey, Loving,
11 Lawrence.
12 JUSTICE THOMAS: Yeah, but I -- I
13 mean, all of those sort of just come out of
14 Lochner, the -- so it's that we've -- we've
15 dropped part of it. So I understand what you're
16 saying, but what I'm trying to focus on is, if
17 we -- is to lower the level of generality or at
18 least be a little bit more specific.
19 In the old days, we used to say it was
20 a right to privacy that the Court found in the
21 due process, substantive due process clause,
22 okay? So -- or in substantive due process, and
23 I'm trying to get you to tell me, what are we
24 relying on now? Is it privacy? Is it autonomy?
25 What is it?

Is Thomas setting up a concurring opinion diatribe on substantive due process, which is what Lochner was?? Repeats question to DOJ on p. 85.

I think Thomas is trying to get her to say what that constitutional "thing" is that we are substantively injecting into the word "liberty." What is the "thing" were going to continue to interpret—privacy? autonomy?

1 MS. RIKELMAN: I think it continues to
2 be liberty, and the right exists whatever level
3 of generality the Court applies. There was a
4 tradition under the common law for centuries of
5 women being able to end their pregnancies.
6 But, in addition, when it comes to
7 decisions related to family, marriage, and
8 childbearing, the Court has done the analysis at
9 a higher level of generality, and that makes
10 sense because, otherwise, the Constitution would
11 reinforce the historical discrimination against
12 women.
13 JUSTICE THOMAS: Thank you.
14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer?
16 Justice Alito?
17 JUSTICE ALITO: Well, you just
18 mentioned the common law, so let me ask you a
19 couple questions about history.
20 Did any state constitutional provision
21 recognize that abortion was a right, liberty, or
22 immunity in 1868, when the Fourteenth Amendment
23 was adopted?
24 MS. RIKELMAN: No, Your Honor, but it
25 had been allowed under the common law for many

There was a "tradition under the common law for centuries" that the unborn was a person, a natural persons! Why does our side never press this point!!

What is this "historical discrimination"? That only women can get pregnant? Is pregnancy a badge of discrimination imposed upon women BY SOCIETY? Did society make it such that a man could physically leave a woman and the child but a woman could not leave the child or is that in the nature of things?

Not true. The common law did not always prosecute the woman, though at one time it did. But prosecutorial discretion prior to quickening is far different from a 'right."

1 years.

2 JUSTICE ALITO: Does any judicial

3 decision at that time or shortly or immediately

4 after 1868 recognize that abortion was a right,

5 liberty, or immunity?

6 MS. RIKELMAN: There were state high

7 court decisions shortly before then, Your Honor,

8 talking about the ability of women to end a

9 pregnancy before quickening.

10 JUSTICE ALITO: What's your best case?

This question was NEVER answered!

11 MS. RIKELMAN: For the right to end a

12 pregnancy, Your Honor?

13 JUSTICE ALITO: Uh-huh.

14 MS. RIKELMAN: Allowing a state to

15 take control of a woman's body and force her to

16 undergo the physical demands, risks, and

17 life-altering consequences of pregnancy is a

18 fundamental deprivation of her liberty. And,

19 once the Court recognizes that that liberty

20 interest deserves heightened protection, it does

21 need to draw a workable line, and viability is a

22 line that logically balances the interests at

23 stake.

24 JUSTICE ALITO: The brief for the

25 American Historical Association says that

1 abortion was not legal before quickening in 26
2 out of 37 states at the time when the Fourteenth
3 Amendment was adopted. Is that correct?
4 MS. RIKELMAN: That is correct because
5 some of the states had started to discard the
6 common law at that point because of a
7 discriminatory view that a woman's proper role
8 was as a wife and mother, a view that the
9 Constitution now rejects, and that's why it's
10 appropriate to do the historical analysis at a
11 higher level of generality.
12 JUSTICE ALITO: In the face of that,
13 can it said that the right to -- to abortion is
14 deeply rooted in the history and traditions of
15 the American people?
16 MS. RIKELMAN: Yes, it can, Your
17 Honor. Again, at the founding, women were able
18 to end their pregnancy under the common law.
19 And, in fact, this Court in Glucksberg
20 specifically decided -- discussed Casey as a
21 decision based on history and tradition and, at
22 Note 19, specifically called out and relied on
23 Roe's conclusion that at the time of the
24 founding and well into the 1800s, women had the
25 ability to end a pregnancy.

A living constitution?

There is a difference between a “right” which is the question vis-a-vis whether the common law chose to criminalize an abortion prior to quickening

1 JUSTICE ALITO: What was the -- the
2 principal source that the Court relied on in Roe
3 for its historical analysis? Who was the author
4 of that -- of that article?
5 MS. RIKELMAN: I apologize, Your
6 Honor, I don't remember the author. I know that
7 the Court spent many pages of the opinion doing
8 a historical analysis. There's also a brief on
9 behalf of several key American historian
10 associations that go through that history in
11 detail because there's even more information now
12 that supports Roe's legal conclusions.
13 JUSTICE ALITO: All right. Thank you.
14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?
16 Justice Kagan?
17 Justice Gorsuch?
18 Justice Kavanaugh?
19 JUSTICE KAVANAUGH: I think the other
20 side would say that the core problem here is
21 that the Court has been forced by the position
22 you're taking and by the -- the cases to pick
23 sides on the most contentious social debate in
24 American life and to do so in a situation where
25 they say that the Constitution is neutral on the

1 question of abortion, the text and history, that
2 the Constitution's neither pro-life nor
3 pro-choice on the question of abortion, and they
4 would say, therefore, it should be left to the
5 people, to the states, or to Congress.
6 And I think they also then continue,
7 because the Constitution is neutral, that this
8 Court should be scrupulously neutral on the
9 question of abortion, neither pro-choice nor
10 pro-life, but, because, they say, the
11 Constitution doesn't give us the authority, we
12 should leave it to the states and we should be
13 scrupulously neutral on the question and that
14 they are saying here, I think, that we should
15 return to a position of neutrality on that
16 contentious social issue rather than continuing
17 to pick sides on that issue. So I think that's,
18 at a big-picture level, their argument. I want
19 to give you a chance to respond to that.
20 MS. RIKELMAN: Yes. A few points if I
21 may, Your Honor.
22 First, of course, those very same
23 arguments were made in Casey, and the Court
24 rejected them, saying that this philosophical
25 disagreement can't be resolved in a way that a

Correct: Ex parte Virginia says the 14th Amendment did not expand the federal judicial power, SDP is wrong, and U.S.C. Sec. 1983 that did give the judiciary power to decide if a person's constitutional rights were violated doesn't authorize the court to CREATE rights and then rule on them!

Is a man denied equal protection by being forced by the woman decision to have a child to prpovide for the child for 18 years? Why does a woman have a right to force this "burden" on a man?

1 woman has no choice in the matter.
2 And, second, I don't think it would be
3 a neutral position. The Constitution provides a
4 guarantee of liberty. The Court has interpreted
5 that liberty to include the ability to make
6 decisions related to child -- childbearing,
7 marriage, and family. Women have an equal right
8 to liberty under the Constitution, Your Honor,
9 and if they're not able to make this decision,
10 if states can take control of women's bodies and
11 force them to endure months of pregnancy and
12 childbirth, then they will never have equal
13 status under the Constitution.
14 JUSTICE KAVANAUGH: And I want to ask
15 a question about stare decisis and to think
16 about how to approach that here because there
17 have been lots of questions picking up on
18 Justice Barrett's questions and others. And
19 history helps think about stare decisis, as I've
20 looked at it, and the history of how the Court's
21 applied stare decisis, and when you really dig
22 into it, the history tells a somewhat different
23 story, I think, than is sometimes assumed.
24 If you think about some of the most
25 important cases, the most consequential cases in

1 this Court's history, there's a string of them
2 where the cases overruled precedent. Brown v.
3 Board outlawed separate but equal. Baker versus
4 Carr, which set the stage for one person/one
5 vote. West Coast Hotel, which recognized the
6 states' authority to regulate business. Miranda
7 versus Arizona, which required police to give
8 warnings when the right to -- about the right to
9 remain silent and to have an attorney present to
10 suspects in criminal custody. Lawrence v.
11 Texas, which said that the state may not
12 prohibit same-sex conduct. Mapp versus Ohio,
13 which held that the exclusionary rule applies to
14 state criminal prosecutions to exclude evidence
15 obtained in violation of the Fourth Amendment.
16 Giddeon versus Wainwright, which guaranteed the
17 right to counsel in criminal cases. Obergefell,
18 which recognized a constitutional right to
19 same-sex marriage.
20 In each of those cases -- and that's a
21 list, and I could go on, and those are some of
22 the most consequential and important in the
23 Court's history -- the Court overruled
24 precedent. And it turns out, if the Court in
25 those cases had -- had listened, and they were

1 presented in -- with arguments in those cases,
2 adhere to precedent in Brown v. Board, adhere to
3 Plessy, on West Coast Hotel, adhere to Atkins
4 and adhere to Lochner, and if the court had done
5 that in those cases, you know, this -- the
6 country would be a much different place.
7 So I assume you agree with most, if
8 not all, the cases I listed there, where the
9 Court overruled the precedent. So the question
10 on stare decisis is why, if -- and I know you
11 disagree with what about I'm about to say in the
12 "if" -- if we think that the prior precedents
13 are seriously wrong, if that, why then doesn't
14 the history of this Court's practice with
15 respect to those cases tell us that the right
16 answer is actually a return to the position of
17 neutrality and -- and not stick with those
18 precedents in the same way that all those other
19 cases didn't?

CF to Thomas in Gamble about exalting precedent over the constitution!

20 MS. RIKELMAN: Because the view that a
21 previous precedent is wrong, Your Honor, has
22 never been enough for this Court to overrule,
23 and it certainly shouldn't be enough here when
24 there's 50 years of precedent. Instead, the
25 Court has required something else, a special

1 justification. And the state doesn't come
2 forward with any special justification. It
3 makes the same exact arguments the Court already
4 considered and rejected in its stare decisis
5 analysis in Casey.
6 And, in fact, there is nothing
7 different. There is no less need today than 30
8 years ago or 50 years ago for women to be able
9 to make this fundamental decision for themselves
10 about their bodies, lives, and health.
11 JUSTICE KAVANAUGH: Thank you.
12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?
14 JUSTICE BARRETT: I want to ask you a
15 follow-up question. You know, the Chief was
16 asking you about the viability line and if that
17 was the right place, if that's the right line to
18 draw. So let's take it out of the question of
19 stare decisis and imagine that there is a state
20 constitution that's identical to the Fourteenth
21 Amendment's Due Process Clause, and a state
22 supreme court has to decide as a matter of state
23 constitutional law what the scope of an abortion
24 right is. And the second trimester ends at 27
25 weeks. And so that state supreme court says, we

1 think that the right exists, you know, in a --
2 in a -- in an absolute sense, that the state
3 cannot take away the right up to 27 weeks and
4 then after that adopts an undue burden standard.
5 As a matter of first principles, is
6 that line acceptable as a matter of
7 constitutional law?
8 MS. RIKELMAN: Your Honor, it may be,
9 but I think that the question in this case is
10 whether a line is obviously more principled or
11 obviously more workable than viability because
12 of the stare decisis context.
13 JUSTICE BARRETT: Why -- I mean,
14 that's the Roe framework basically, the
15 trimester. Why wouldn't that be workable if you
16 pick a line and say the end of the second
17 trimester, 27 weeks; the third trimester,
18 state's interests increase? I don't understand
19 why 27 weeks is less workable than 24.
20 MS. RIKELMAN: I'm not trying to
21 suggest it is, Your Honor. What I was trying to
22 suggest is that the viability line is a
23 principled and workable line, so to change it,
24 there would have to be a new line that's
25 obviously more principled and more workable.

She's rightly pointing out that "workability" is not a test of correct interpretation. Sadly, Stewart earlier said if the rule was "clear," i.e., workable, then the prior case could be left alone

1 And -- and the line that the Court has
2 drawn actually --
3 JUSTICE BARRETT: But that's stare
4 decisis. I'm asking as a matter of first
5 principles.
6 MS. RIKELMAN: As a matter of first
7 principle, the viability line makes sense
8 because if the -- the state constitution was the
9 same --
10 JUSTICE BARRETT: As a matter of
11 prudential judgment. It's not constitutionally
12 required as a matter of first principles
13 because, in fact, we could decide to be more
14 protective and say 27 weeks, end of the second
15 trimester.
16 MS. RIKELMAN: You could, Your Honor,
17 but the -- the viability line makes sense given
18 the protection for liberty because it comes from
19 the woman's liberty interests in resisting state
20 control of her body. And, once the Court
21 recognizes that interest, it does need to draw a
22 line, as it does in many other constitutional
23 contexts, like the Fourth and Fifth Amendment.
24 And the viability line, as I
25 mentioned, makes sense because it focuses on the

Making the point that this is a legislative judgment, not a constitutionally required one

Another honest answer, followed by a well-done quick pivot back to her legal "soundbite"

Actually, it does assume it does not begin prior to viability or it would be a separate "person" and would be murder. Any decision is based on some philosophical or theological or metaphysical position about life!

1 fetus's ability to survive separately, which is
2 an appropriate legal line because it's
3 objectively verifiable and doesn't delve into
4 philosophical questions about when life begins.
5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.
7 General Prelogar?
8 ORAL ARGUMENT OF GENERAL ELIZABETH B. PRELOGAR
9 FOR THE UNITED STATES, AS AMICUS CURIAE,
10 SUPPORTING THE RESPONDENTS
11 GENERAL PRELOGAR: Mr. Chief Justice,
12 and may it please the court:
13 For a half century, this Court has
14 correctly recognized that the Constitution
15 protects a woman's fundamental right to decide
16 whether to end a pregnancy before viability.
17 That guarantee that the state cannot force a
18 woman to carry a pregnancy to term and give
19 birth has engendered substantial individual and
20 societal reliance.
21 The real-world effects of overruling
22 Roe and Casey would be severe and swift. Nearly
23 half of the states already have or are expected
24 to enact bans on abortion at all stages of
25 pregnancy, many without exceptions for rape or

Can the state force a man to pay for the child because of the woman's choice?

1 incest.

2 Women who are unable to travel

3 hundreds of miles to gain access to legal

4 abortion will be required to continue with their

5 pregnancies and give birth, with profound

6 effects on their bodies, their health, and the

7 course of their lives.

8 If this Court renounces the liberty

9 interests recognized in Roe and reaffirmed in

10 Casey, it would be an unprecedented contraction

11 of individual rights and a stark departure from

12 principles of stare decisis.

13 The Court has never revoked a right

14 that is so fundamental to so many Americans and

15 so central to their ability to participate fully

16 and equally in society. The Court should not

17 overrule this central component of women's

18 liberty.

19 JUSTICE THOMAS: General, would you

20 specifically tell me -- specifically state what

21 the right is? Is it specifically abortion? Is

22 it liberty? Is it autonomy? Is it privacy?

23 GENERAL PRELOGAR: The right is

24 grounded in the liberty component of the

25 Fourteenth Amendment, Justice Thomas, but I

Thomas is going back to the queastion asked of Dobbs' counsel. What is the "thing" we're injecting into "liberty" by our substantive due process argument/

1 think that it promotes interest in autonomy,
2 bodily integrity, liberty, and equality. And I
3 do think that it is specifically the right to
4 abortion here, the right of a woman to be able
5 to control, without the state forcing her to
6 continue a pregnancy, whether to carry that baby
7 to term.
8 JUSTICE THOMAS: I understand we're
9 talking about abortion here, but what is
10 confusing is that we -- if we were talking about
11 the Second Amendment, I know exactly what we're
12 talking about. If we're talking about the
13 Fourth Amendment, I know what we're talking
14 about because it's written. It's there.
15 What specifically is the right here
16 that we're talking about?
17 GENERAL PRELOGAR: Well, Justice
18 Thomas, I think that the Court in those other
19 contexts with respect to those other amendments
20 has had to articulate what the text means in the
21 bounds of the constitutional guarantees, and
22 it's done so through a variety of different
23 tests that implement First Amendment rights,
24 Second Amendment rights, Fourth Amendment
25 rights.

Correct, but based on what? What 5 justices NOW think it should mean? Or what it meant under the common law at the time the words in the text were written? Obviously, the latter, according to prior precedents.

1 So I don't think that there is
2 anything unprecedented or anomalous about the
3 right that the Court articulated in Roe and
4 Casey and the way that it implemented that right
5 by defining the scope of the liberty interest by
6 reference to viability and providing that that
7 is the moment when the balance of interests tips
8 and when the state can act to prohibit a woman
9 from -- from getting an abortion based on its
10 interests in protecting the fetal life at that
11 point.

Thomas is still trying to get at precisely what "right" is involved

12 JUSTICE THOMAS: So the right
13 specifically is abortion?
14 GENERAL PRELOGAR: It's the right of a
15 woman prior to viability to control whether to
16 continue with the pregnancy, yes.
17 JUSTICE THOMAS: Thank you.
18 JUSTICE SOTOMAYOR: General, I am
19 interested in Justice Kavanaugh's long litany of
20 cases in which we've overruled precedent, and we
21 have. Yet, you did call this unprecedented. As
22 I see the structure of the Constitution, the
23 body of it is the relationship of the three
24 branches of government, and then there is the
25 relationship of the federal government to the

1 state, and, through our incorporation of the
2 Fourteenth Amendment, of the state vis-α-vis the
3 individual, it's the federal government and the
4 states' relationship to individuals.
5 And I see the Bill of Rights,
6 including the Fourteenth Amendment, as basically
7 setting the limits, giving individual freedom to
8 do certain things and stopping the government
9 from intruding in those liberties, in those Bill
10 of Rights, correct?
11 Of all of the decisions that Justice
12 Kavanaugh listed, all of them invite --
13 virtually, except for maybe one, involved us
14 recognizing and overturning state control over
15 issues that we said belong to individuals, the
16 right in Miranda to be warned was an individual
17 right, correct?
18 GENERAL PRELOGAR: That's right,
19 Justice Sotomayor, and I think that that is a
20 key distinction with the list of precedents that
21 Justice Kavanaugh was relying on.
22 I think that there are really two key
23 distinctions, and the first is that in the vast
24 majority of those cases, the Court was actually
25 taking the issue away from the people and saying

1 that it had been wrong before not to recognize a
2 right. And I think that matters because it goes
3 straight to reliance interests.
4 Here, the Court would be doing the
5 opposite. It would be telling the women of
6 America that it was wrong, that, actually, the
7 ability to control their bodies and perhaps the
8 most important decision they can make about
9 whether to bring a child into this world is not
10 part of their protected liberty, and I think
11 that that would come at tremendous cost to the
12 reliance that women have placed on this right
13 and on societal reliance and what this right has
14 meant for further ensuring equality.
15 JUSTICE BREYER: The reliance point is
16 a -- is a good point, and this may be my fault.
17 I'm talking about pages 854 to 863 in the Casey
18 case. And I've already used up too much time.
19 I can't read those pages out loud. But they do
20 not include the list that Justice Kavanaugh had.
21 They do include two. One is Brown, and the
22 second one is West Coast Hotel versus Parrish.
23 And you could add the gay rights cases as a
24 third which would fit the criteria.
25 But there are complex criteria that

1 she's talking about that link to the position in
2 the rule of law of this Court, so all I would
3 say is you have to read them before beginning to
4 say whether they are overruling or not
5 overruling in the sense meant there calling for
6 special concern.
7 Now they say in those, maybe I'd
8 mention two, wait a minute, of course, Plessy
9 was wrong when decided, but, just a minute, also
10 remember Plessy said that separate but equal was
11 a badge of inferiority. No, they said, it
12 isn't. Well, all you have to do is open your
13 eyes and look at the south, my friend, and you
14 will see whether it was or it wasn't in 1954.
15 And they made a similar point. They
16 said, are you going to sit here in the middle of
17 the Depression and tell me that -- that Lochner,
18 with its other cases, and pure, just about pure
19 laissez faire, we can run the country that way.
20 I mention that because I want people
21 to read those 15 pages with care, and that's why
22 I said that. If you have anything to add to my
23 plea to read it, please do.
24 GENERAL PRELOGAR: Well, Justice
25 Breyer, I agree completely. I have read those

1 pages and re-read them many times, and I think
2 that this is actually another key distinction
3 from the cases that Justice Kavanaugh was
4 referring to, and that is, as I understand those
5 passages in Casey, the Court carefully walked
6 through each and every stare decisis factor that
7 this court focuses on. It looked at workability
8 of the viability rule, doctrinal underpinnings,
9 legal and factual developments, and critically
10 reliance interests.
11 And down the line, it found that the
12 case for reaffirming Roe was overwhelming. And
13 in that situation, when every factor that the
14 Court consults to determine whether to retain
15 precedent counsels in favor of retaining it, I
16 think Casey properly perceived that a decision
17 to overrule nevertheless, perhaps based on a
18 conclusion that the justices thought the case
19 was wrongly decided in the first instance, would
20 run counter to the ability of stare decisis to
21 function as a cornerstone of the rule of law in
22 this context.
23 JUSTICE ALITO: Is it your argument
24 that a case can never be overruled simply
25 because it was egregiously wrong?

Yay! Now let's use the position of the General and DOJ against them by bringing forward the Ninth Amendment as a basis for legislation. that is a wholly "new argument!"

1 GENERAL PRELOGAR: I think that at the
2 very least, the state would have to come forward
3 with some kind of materially changed
4 circumstance or some kind of materially new
5 argument, and Mississippi hasn't done so in this
6 case. It is --
7 JUSTICE ALITO: Really? So suppose
8 Plessy versus Ferguson was re-argued in 1897, so
9 nothing had changed. Would it not be sufficient
10 to say that was an egregiously wrong decision on
11 the day it was handed down and now it should be
12 overruled?
13 GENERAL PRELOGAR: It certainly
14 was egregiously wrong on the day that it was
15 handed down, Plessy, but what the Court said in
16 analyzing Plessy to Brown and Casey was that
17 what had become clear is that the factual
18 premise that underlay the decision, this idea
19 that segregation didn't create a badge of
20 inferiority, had been entirely mistaken.
21 JUSTICE ALITO: So is your -- is it
22 really --
23 GENERAL PRELOGAR: And, here, the
24 state is not --
25 JUSTICE ALITO: -- is it your answer

1 that we needed all the experience from 1896 to
2 1954 to realize that Plessy was -- was wrongly
3 decided? Would you answer my question? Had it
4 come before the Court in 1897, should it have
5 been overruled or not?
6 GENERAL PRELOGAR: I think it should
7 have been overruled, but I think that the
8 factual premise was wrong in the moment it was
9 decided, and the Court realized that and
10 clarified that when it overruled in Brown.
11 JUSTICE ALITO: So there are --
12 GENERAL PRELOGAR: And, here --
13 JUSTICE ALITO: -- circumstances in
14 which a decision may be overruled, properly
15 overruled, when it must be overruled simply
16 because it was egregiously wrong at the moment
17 it was decided?
18 GENERAL PRELOGAR: Well, I think --
19 JUSTICE ALITO: Correct?
20 GENERAL PRELOGAR: -- every other --
21 JUSTICE ALITO: Is that correct?
22 GENERAL PRELOGAR: -- stare decisis
23 factor likewise would have justified overruling
24 in that interest, that actually it would run
25 counter to any notion of reasonable reliance,

Hmm. Was this a factual premise or was it a moral premise—that we are not “all of one blood” (Acts 17:26) and so there is value to keeping them apart and reducing interaction between them. As Cornelius Van Til has written, because God created the world, there are no non-neutral facts, period, and all things must be understood in relation to Him (Romans 11:36).

Great response, actually. He retreats to the “’factor” there would have been no reliance interest and FOR THAT REASON it would have been okay to reverse Plessy. What an insult to blacks!

How is that? If two identical schools are built side by side, what is unworkable about saying one color goes in one school and one color in antoher? What if the teacher who taught a class in the morning in one school taught the same class in the afternoon in the other school. Not saying that is good thing to do, but is what seems "equal" any less subjective than what is "undue" or what line between conception and birth objectively balances rightly all competing interests?

1 that it was not a workable rule, that it had
2 become an outlier in our understanding of
3 fundamental freedoms.
4 JUSTICE ALITO: Well, there was a lot
5 of reliance on --
6 GENERAL PRELOGAR: And so I think,
7 looking at all of the facts --
8 JUSTICE ALITO: -- there was a lot of
9 reliance on Plessy. The -- the south built up a
10 whole society based on the idea of white
11 supremacy. So there was a lot of reliance. It
12 was -- it was improper reliance. It was
13 reliance on an egregiously wrong understanding
14 of what equal protection means.
15 But your answer is -- I don't -- I
16 still don't understand -- I still don't have
17 your answer clearly. Can a decision be
18 overruled simply because it was erroneously
19 wrong, even if nothing has changed between the
20 time of that decision and the time when the
21 Court is called upon to consider whether it
22 should be overruled? Yes or no? Can you give
23 me a yes or no answer on that?
24 GENERAL PRELOGAR: This Court, no, has
25 never overruled in that situation just based on

Hopefully this answer will help kill this "balancing" concept of stare decisis, because it elevates precedent over the correct meaning of the Constitution, which exalts the Court itself over the Constitution. Thomas has already said, in Gamble, it needs to be killed. Maybe this will do it for Alito and Gorsuch as well, maybe Kavanaugh.

1 a conclusion that the decision was wrong. It
2 has always applied the stare decisis factors and
3 likewise found that they warrant overruling in
4 that instance. And -- and Casey did that. It
5 applied the stare decisis factors.
6 If stare decisis is to mean anything,
7 it has to mean that that kind of extensive
8 consideration of all of the same arguments for
9 whether to retain or discard a precedent itself
10 is an additional layer of precedent that needs
11 to be relied on and can form a stable foundation
12 of the rule of law.
13 JUSTICE KAGAN: General, you've talked
14 a number of times about the reliance interests
15 here, and I think I'd like you to say a little
16 bit more about that because, you know,
17 sometimes, when we talk about reliance
18 interests, it's like there's a rule of law and
19 you look at it and you say, oh, somebody will
20 enforce my contract because of this rule, and it
21 has a very kind of grounded quality to it.
22 And, as Casey talked about the
23 reliance interests here, they're a little bit
24 more airy. And I just wanted to get your sense
25 of what are the reliance interests here and how

1 does -- how do they cash out on the ground?
2 GENERAL PRELOGAR: Well, there are
3 multiple reliance interests here, as I think
4 Casey correctly recognized. Casey pointed to
5 the individual reliance of women and their
6 partners who had been able to organize their
7 lives and make important life decisions against
8 the backdrop of having control over this
9 incredibly consequential decision whether to
10 have a child. And people make decisions in
11 reliance on having that kind of reproductive
12 control, decisions about where to live, what
13 relationships to enter into, what investments to
14 make in their jobs and careers.
15 And so I think, on a very individual
16 level, there has been profound reliance. And
17 it's certainly the case that not every woman in
18 America has needed to exercise this right or has
19 wanted to, but one in four American women have
20 had an abortion, and for those women, the right
21 secured by Roe and Casey has been critical in
22 ensuring that they can control their bodies and
23 control their lives.
24 And then I think there's a second
25 dimension to it that Casey also properly

1 recognized, and that's the societal dimension.
2 That's the -- the understanding of our society,
3 even though this has been a controversial
4 decision, that this is a liberty interest of
5 women. It's the case that not everyone agrees
6 with Roe versus Wade, but just about every
7 person in America knows what this Court held,
8 they know how the Court has defined this concept
9 of liberty for women and what control they will
10 have in the situation of an unplanned pregnancy.
11 And for the Court to reverse course
12 now, I think, would run counter to that societal
13 reliance and the very concept we have of what
14 equality is guaranteed to women in this country.
15 JUSTICE SOTOMAYOR: It is certainly
16 true that there can be some planning by some
17 people about pregnancy. People who are raped
18 don't have a choice, whether it's by an outsider
19 or their own husband. And not everybody can
20 afford contraceptives, contrary to the -- the --
21 your adversary's brief. In fact, 19 percent of
22 the women in Mississippi are uninsured, so they
23 don't have money to pay for contraceptives.
24 So -- but why -- their point in their
25 brief was, you know, contraceptives, if you use

1 them, the failure rate is very small, et cetera,
2 et cetera, how can there be real reliance. So
3 could you address that issue?
4 GENERAL PRELOGAR: Of course. So,
5 first, this is not a new circumstance since Roe
6 and Casey. Contraceptives existed in 1973 and
7 in 1992, and still the Court recognized that
8 unplanned pregnancies would persist and deeply
9 implicate the liberty interests of women.
10 But I think even on the facts, the
11 state is mistaken here. Contraceptive failure
12 rate in this country is at about 10 percent,
13 using the most common methods. That means that
14 women using contraceptives, approximately one in
15 10 will experience an unplanned pregnancy in the
16 first year of use alone. About half the women
17 who have unplanned pregnancies were on
18 contraceptives in the month that that occurred.
19 And so I think the idea that contraceptives
20 could make the need for abortion dissipate is
21 just contrary to the factual reality.
22 JUSTICE SOTOMAYOR: You also
23 mentioned, or maybe it was your co-counsel, that
24 life changes for women after 15 weeks.
25 GENERAL PRELOGAR: That's exactly

1 right, Justice Sotomayor, and I think that this
2 is responsive as well to the questions that the
3 Chief Justice was asking about, in particular,
4 the impact of enforcing a 15-week bar in this
5 case. The Court has always looked at that issue
6 by looking at the people for whom the law is a
7 restriction, not those for whom it's irrelevant.
8 So the question is, why would women
9 need access to abortion after 15 weeks, and what
10 is the effect on them? And there are any number
11 of women who cannot get an abortion earlier.
12 They don't realize that they're pregnant.
13 That's especially true of women who are young or
14 don't have -- haven't experienced a pregnancy
15 before, or their life circumstances change, as
16 you referred to, Justice Sotomayor. They lose
17 their job or their relationship breaks apart or
18 they have medical complications. Or, for many
19 women, they don't have the resources to pay for
20 it earlier. It takes time for them to raise the
21 money or make the appropriate logistical
22 arrangements to be able to take time off work
23 and travel and have childcare. And for all
24 those women in this category who need access
25 to abortion after 15 weeks, the fact that other

1 women were able to exercise their constitutional
2 rights does nothing to diminish the impact on
3 their liberty interests in forcing them to
4 continue with that pregnancy.
5 JUSTICE SOTOMAYOR: Thank you.
6 CHIEF JUSTICE ROBERTS: General,
7 following up on that, would that argument be
8 true in terms of viability as well? In other
9 words, what -- your discussion of the reliance
10 interests and the ability of women and men to
11 control their lives in reliance on the right to
12 -- to an abortion, the argument would not be as
13 strong, I think you'll have to concede, given
14 what we're talking about, which is not a
15 prohibition; it's a 15-week line. Is that
16 right?
17 GENERAL PRELOGAR: Yes. So this --
18 CHIEF JUSTICE ROBERTS: There -- you
19 have to hypothesize people who have planned
20 their lives according to a 24 or whatever week
21 limit it is but not a 15-week limit on abortion,
22 right?
23 GENERAL PRELOGAR: Well, I don't think
24 the Court has ever analyzed reliance with that
25 kind of parsing. I think, here, the -- I -- the

1 -- the force of the viability line is that it's
2 clearly demarcated to the scope of a
3 woman's protected liberty interests in this
4 context. And the state is not actually asking
5 this Court to replace it with a clear 15-week
6 line that would provide some measure of
7 continued protection for this right. They're
8 asking the Court to reverse the liberty interest
9 altogether or leave it up in the air.
10 And if that were to happen, then
11 immediately states with six-week bans,
12 eight-week bans, ten-week bans, and so on, would
13 seek to enforce those with no continued guidance
14 of what the scope of the liberty interest is
15 going forward.
16 CHIEF JUSTICE ROBERTS: Well, that may
17 be what they're asking for, but the thing that
18 is at issue before us today is 15 weeks. And I
19 just wonder what the strength of your reliance
20 arguments, which sounded to me like being based
21 on a total prohibition, would be if there isn't
22 a total prohibition, and as far as viability
23 goes, I don't see what that has to do with the
24 question of choice at all.
25 GENERAL PRELOGAR: Well, I think, as

Is Roberts trying to sett up a concurring opinion for himself, if not also an argument to make to the others to keep from reversing Roe? Is he saying all we have to decide NOW is if the law at 15 weeks is good and that will allow us to get around stare decisis and leave its propriety to another day by simply saying in THIS case, with THIS particular law, there is no real material harm to reliance interests so below viability is okay. This would help him eliminate one of the factors for continuing with the strict viability line in Casey. If he can use this to pull off either Barrett or Kavanaugh, then only 4 might be for outright reversal. See Barrett comment on p. 109. That would leave outright reversal for the next case. BUT, Roberts would have to explain for lower courts why 15 weeks is okay, so they might have some guidance as to whether 6 weeks (confirmed heart rate) is also good. Both sides say they can think of what “rule” could be given to provide that guidance.

1 Casey emphasized in reaffirming the viability
2 line, the Court justified that as having both a
3 logical and a biological justification that it
4 marks the point in pregnancy when the fetus is
5 capable of meaningful life --
6 CHIEF JUSTICE ROBERTS: No, that's
7 what John Hart Ely explained was a complete
8 syllogism. That's the definition of viability.
9 It's not a reason that viability is a good line.
10 GENERAL PRELOGAR: Well, it's focused
11 on the idea of fetal separateness, and I think
12 that that is a line that also accords with the
13 history and tradition in this country of
14 abortion regulation. Contrary to the state's
15 arguments here, at the time of the founding and
16 for most of early American history, women had an
17 -- an ability to access abortion in the early
18 stages of pregnancy, and it was only when the
19 fetus was deemed sufficiently separate that
20 states could act to bar that.
21 So I think that the viability line
22 also aligns with history and tradition in that
23 respect.
24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

Biolgoically, from conception there are two different living beings with their own genetic makeup. So, there's a good line, General :)

1 JUSTICE THOMAS: You heard my question
2 to counsel earlier about the woman who was
3 convicted of criminal child neglect. What would
4 be your reaction to that as far as her liberty
5 and whether or not the liberty interest that
6 we're talking about extends to her?
7 GENERAL PRELOGAR: Well, Justice
8 Thomas, I have to confess that I haven't read
9 the specific case you're referring to, but, if I
10 understand the question you were posing, it
11 sounds as though the state is seeking to
12 regulate for a child that's been born that was
13 injured while it was inside the womb.
14 And I think that we are not denying
15 that a state has an interest there. We're not
16 denying that a state has an interest here
17 either. Roe recognized that states have
18 interests that exist from the outset of
19 pregnancy.
20 But, with respect to this specific
21 right to abortion, there are also profound
22 liberty interests of the woman on the other side
23 of the scale in not being forced to continue
24 with a pregnancy, not being forced to endure
25 childbirth and to have a child out in the world.

1 And the state's arguments here seem to
2 ask this Court to look only at its interests and
3 to ignore entirely those incredibly weighty
4 interests of the women on the other side.
5 JUSTICE THOMAS: Thank you.
6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer?
8 Justice Alito? No?
9 Justice Gorsuch, anything further?
10 JUSTICE GORSUCH: I just want to make
11 sure I understand your response to the Chief
12 Justice. If this Court will reject the
13 viability line, do you see any other
14 intelligible principle that the Court could
15 choose?
16 GENERAL PRELOGAR: Well, I think that
17 it would be critically important, even if this
18 Court were to reject the viability line, to
19 reinforce and reaffirm the fundamental and
20 profound liberty interests --
21 JUSTICE GORSUCH: That -- that --
22 GENERAL PRELOGAR: -- at stake here,
23 and I --
24 JUSTICE GORSUCH: Counsel, I'm sorry
25 for interrupting, but that wasn't my question.

1 I understand -- I understand you -- I understand
2 that point fully by the end of this argument.
3 That is deeply clear to me. I understand your
4 position.
5 I -- I'm just asking a question about
6 whether you think there would be another
7 alternative line that the government would
8 propose or not. You emphasized that if -- if 15
9 weeks were approved, then we'd have cases about
10 12 and 10 and 8 and 6, and so my question is, is
11 there a line in there that the government
12 believes would be principled or not.
13 GENERAL PRELOGAR: I don't think
14 there's any line that could be more principled
15 than viability. You know, I think the factors
16 the Court would have to think about are what is
17 most consistent with precedent, what would be
18 clear and workable and what would preserve
19 the -- the essential components of the liberty
20 interests, and viability checks all of those
21 boxes and has the advantage as well as being a
22 rule of law for 50 years.
23 JUSTICE GORSUCH: Thank you. That's
24 helpful, counsel. Appreciate it.
25 CHIEF JUSTICE ROBERTS: Justice

An honest answer! Helps the conservatives say to the public—your own side said there was not aonther "line" we could draw.

1 Kavanaugh?

2 JUSTICE KAVANAUGH: You -- you make a

3 very forceful argument and identify critically

4 important interests that are at stake in this

5 issue, no doubt about that.

6 The other side says, though, that

7 there are two interests at stake, that there's

8 also the interest in -- in fetal life at stake

9 as well. And in your brief, you say that the

10 existing framework accommodates -- that's your

11 word -- both the interests of the pregnant woman

12 and the interests of the fetus.

He is correct—the baby's interest is never accommodated prior to viability! Moreover, unless birth is chosen as the "line", the baby's interest in life always ends; the baby has no alternative like the mother with, for example, adoption

13 And the -- and the problem, I think

14 the other side would say and the reason this

15 issue is hard, is that you can't accommodate

16 both interests. You have to pick. That's the

17 fundamental problem. And one interest has to

18 prevail over the other at any given point in

19 time, and that's why this is so challenging, I

20 think.

21 And the question then becomes, what

22 does the Constitution say about that? And I

23 just want to get your reaction to what the other

24 side's theme is, and I've mentioned it in my

25 prior questions.

Correct. Where did the Constitution give the court the authority to decide this kind of question?

1 When you have those two interests at
2 stake and both are important, as you
3 acknowledge, why not -- why should this Court be
4 the arbiter rather than Congress, the state
5 legislatures, state supreme courts, the people
6 being able to resolve this? And there will be
7 different answers in Mississippi and New York,
8 different answers in Alabama than California
9 because they're two different interests at stake
10 and the people in those states might value those
11 interests somewhat differently.
12 Why is that not the right answer?
13 GENERAL PRELOGAR: Justice Kavanaugh,
14 it's not the right answer because the Court
15 correctly recognized that this is a fundamental
16 right of women, and the nature of fundamental
17 rights is that it's not left up to state
18 legislatures to decide whether to honor them or
19 not.
20 And it's true, different rules would
21 prevail throughout the country if this Court
22 were to overrule Roe and Wade -- Roe and Casey,
23 but what that would mean is that women in those
24 states who are refusing to honor their rights
25 and who are forcing them to continue to use

1 their bodies to sustain a pregnancy and then to
2 bring a child into the world will have no
3 recourse other than to travel if they're able to
4 afford it or to attempt abortion outside the
5 confines of the medical system or to have a
6 child even though that was not the best choice
7 for them and their family.
8 JUSTICE KAVANAUGH: Thank you.
9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett.
11 JUSTICE BARRETT: I have a follow-up
12 to Justice Kagan's question about reliance. I'm
13 just trying to nail down, and I -- and I asked
14 Ms. Rikelman this question too, but I'm not sure
15 that I fully understand the government's
16 position or Ms. Rikelman's position.
17 So, on pages 18 and 19 of your brief,
18 you talk about reliance interests and you quote
19 some of the language from Casey about a woman's
20 ability to participate in the social and
21 economic life of the nation.
22 And I mentioned the safe haven laws to
23 Ms. Rikelman, and it -- it seems to me I fully
24 understand the reliance interests. There are
25 the airy ones Justice Kagan was referring to and

1 then there are the more specific ones about a
2 woman's access to abortion as a backup form of
3 birth control in the event that contraception
4 fails so that she need not bear the burdens of
5 pregnancy.
6 But what do you have to say to
7 Petitioners' argument that those reliance
8 interests do not include the reliance interests
9 of parenting and bringing a child into the world
10 when maybe that's not the best thing for her
11 family or her career?
12 GENERAL PRELOGAR: I think the state
13 is wrong about that. And I -- I think where the
14 analysis goes wrong in reliance on those safe
15 haven laws is overlooking the consequences of
16 forcing a woman upon her the choice of having to
17 decide whether to give a child up for adoption.
18 That itself is its own monumental decision for
19 her.
20 And so I think that there's nothing
21 new about the safe haven laws, the -- or -- or
22 at least nothing new about the availability of
23 adoption as an alternative. Roe and Casey
24 already took account of that fact. And I think
25 that there are certainly, of course, all of

Will Barrett's apparent concern about reliance interest and previously about safe haven laws allowing women not to have to care for the child make here susceptible to the possible argument of Roberts I mention on p. 101

1 the -- the bodily integrity interests that we've
2 referred to, but, also, the autonomy interests
3 retain in force as well.
4 JUSTICE BARRETT: Okay. So it's
5 the -- the reliance interests and the right to
6 be able to choose to terminate the pregnancy
7 rather than having to terminate the parental
8 rights?
9 GENERAL PRELOGAR: I think that that
10 is part of it, yes. And I think, for many
11 women, that is an incredibly difficult choice,
12 but it's one that this Court for 50 years has
13 recognized must be left up to them based on
14 their beliefs and their conscience and their
15 determination about what is best for the course
16 of their lives.
17 JUSTICE BARRETT: Thank you, General.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 General.
20 Rebuttal, General Stewart.
21 REBUTTAL ARGUMENT OF SCOTT G. STEWART.
22 ON BEHALF OF THE PETITIONERS
23 MR. STEWART: Thank you, Mr. Chief
24 Justice. I'd like to do my best to make three
25 points.

1 First, picking up where -- where you
2 just left off, Justice Barrett, on safe haven
3 laws, the Respondents in this case, I -- I
4 believe, as Your Honor pointed out, have
5 emphasized parenting burdens being a lead or the
6 lead reason that women seek abortions.
7 I would emphasize safe haven laws, as
8 best I've been able to find, first came into
9 existence in 1999 in Texas. They're now
10 ubiquitous, and you're correct, Justice Barrett,
11 that they relieve that huge burden.
12 I would also add that as to -- as to
13 burdens during pregnancy, I would emphasize that
14 contraception is more accessible and affordable
15 and available than it was at the time of Roe or
16 Casey. It serves the same goal of allowing
17 women to decide if, when, and how many children
18 to have.
19 And I would also note, just frankly,
20 the lowest cost abortion at Jackson Women's
21 Health is $600 for the abortion, additional
22 costs and further fees. According to -- to my
23 friends, the Respondents, and their amici, there
24 are also additional costs related to travel,
25 taking off time -- time off of work,

1 accommodations, all of those sorts of things.
2 Whether somebody is uninsured or not, the costs
3 of contraception are consistently significantly
4 less than those.
5 Number two, I -- I think you --
6 Justice Kavanaugh, you had it exactly right when
7 you -- when you used the term scrupulously
8 neutral. I think that's a very good description
9 of what we're asking for here. I think it's the
10 problem and the value that has evaded the Court
11 and will continue to evade this Court under Roe
12 and Casey, but that is exact -- exactly right.
13 This is a hard issue. It involves --
14 and -- and I would emphasize, Your Honor, that,
15 as you said, there are interests here on -- on
16 both sides. There are interests for everyone
17 involved. This is unique for the woman. It's
18 unique for the unborn child too whose life is at
19 stake in all of these decisions. It's unique
20 for us as a society in how we decide if the
21 states get to -- get -- get to legislate on this
22 issue, how to decide and how to weigh these
23 tremendously momentous issues.
24 In closing, I would say that in its
25 dissent in Plessy versus Ferguson, Justice

1 Harlan emphasized that there is no caste system
2 here. The humblest in our country is the pure,
3 the most powerful. Our Constitution neither
4 knows nor tolerates distinctions on the basis of
5 race.
6 It took 58 years for this Court to
7 recognize the truth of those realities in a
8 decision, and that was the greatest decision
9 that this Court ever reached. We're -- we're
10 running on 50 years of Roe. It is an
11 egregiously wrong decision that has inflicted
12 tremendous damage on our country and will
13 continue to do so and take enumerable human
14 lives unless and until this Court overrules it.
15 We ask the Court to do so in this case
16 and uphold the state's law. Thank you, Your
17 Honor.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 General, counsel. The case is submitted.
20 (Whereupon, at 11:54 a.m., the case
21 was submitted.)
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