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Vociferous is good word to describe the debate I enter. Capital punishment opponents should add fetuses to their list of innocents executed; and these, unlike those others they presume die innocently, do not get due process of law. They just are killed without any adjudicative process for worthiness of death. But I'm not here to discuss capital punishment. I'm here to discuss an incorrect assumption underlying Roe v. Wade: "Ancient religion did not bar abortion" (410 U.S. 113, 130). As I knock down this assumption—the assumption that ancient religion did not prohibit abortion—I knock at the foundation of what I believe strongly to be a dehumanizing and utterly unconstitutional decision, that of allowing women to take life with the help of a doctor in aborting embryos.

I The Misstatement

A The importance of historical context

- 1 The time spent on history in this case
- 2 The relevance such analysis as evidenced by Bowers v Hardwick

B Precedent

- 1 The doctrinal importance of following precedent
- 2 Casey—a case reiterating strongly and pertinently, why stare decisis and consistency are important for legitimacy and stability.
 - a. constitutional argument that no ex post facto law exist

II Why I believe it wrong

A The text of Exodus 21.22-25

- 1 Literalist reading of the text
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- III Relevance of discussion
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 - 1 my reverence for the Constitution
 - a tattered ruins
 - b using phrases not in the constitution to define constitutionality

Examine, if you will, the tommyrot called *Roe v. Wade*. In its pages you will find a discussion of the complete history of abortion. Complete, that is, inasmuch as the unelected-and-unresponsive-to-the-people-“Honorable”-Supreme-Court-Justices are able to piece it together.

Of course, one might easily, and with good reason, ask why is this panel of brethren and women examining the religious history of abortion. Good question. If it is the constitution we are adjudicating, then they sure spend a lot of time on extraneous sources. But rather than try to defend the questionable practice of calling into question history when examining the constitutionality of state-legislature-passed-anti-abortion-laws, I accept the parameters as ones I am forced to work with.

Possibly they cite ancient religious practices in the hope of gaining precedent in such law. *Casey* expounds jurisprudentially why following precedent matters. It says that consistency, even to bad precedent, leads to perceived legitimacy. Only when the court is completely wrong should it admit its fault and change. Often *Dred Scott*, in which the court upheld slavery, is brought up in comparison to *Roe*. Another argument of *Casey* is that reliance on a verdict would give greater weight to continuing with that verdict. I am sure this is wrong. Think of slavery again. Certainly the south invested more into that trade, their plantation lifestyle, than the women today who have relied on the ability to terminate pregnancy. A constitutional issue on point here is whether overturning *Roe*, which should be done, will create *ex post facto* law. And obviously it would be easy to make overturned *Roe* applicable to future pregnancies and not current ones, thus circumventing any potential problem of *ex post facto* law.

Having made, for purposes of argument, the presumption that tradition has something to

to with constitution, I will ask, Did they get it right? Is it true that No ancient religion prohibited abortion? The answer is no. Emphatically no.

Why is the statement wrong, that ancient religion allowed abortion? For starters there is a citation problem. To speak about religion the court cites a medical journal. In fact, read the text itself—the text incidentally isn't about ancient religion, it's an examination of Pythagoreans and how that relates to the fact that the ancient medical code of ethical conduct explicitly repudiates the practice of aborting incumbent life. The text itself that the court cites for their bold and incorrect statement is one, if you will merely look at it, does not have any supportive sources cited. The author merely asserts out of the blue, and irrelevant to the major thrust of his essay, that ancient religion allowed abortion (Ludwig Edelstein, *The Hippocratic Oath*, 1943, 13-14).

And even if they had given me something I could work with, some explanation for their stupidity of asserting such a claim which I could confront, I would have several other rejoinders to raise. I cite Exodus 21 as my main counterargument. But before we get to that let me reiterate again and further why this historical discussion is pertinent. It is not pertinent. But since these "Justices" have made it relevant I will further discuss their other usages of such historical, biblical examinations.

Besides being fully up for debate, and indeed it is now debated in Congress and in the media and in our homes and our hearts, this despicable thing people call constitutional law in *Roe v. Wade*, this historical basis for adjudicating constitutionality of claims is also up for debate in *Bowers v. Hardwick* (478 U.S. 186, 1986)

Bowers v. Hardwick, you will remember is about the constitutionality of state legislation banning certain sexual practices. *Bowers* is on point because it too went to great length to back itself up with historical reasoning: if the bible prohibited it, how can it be a fundamental right (as

ough fundamentality has anything to do with reading a very clear text of the Constitution—and as though fundamentality could change at all, let alone after a mere couple of decades). Bowers pointed out the very true statement that ancient religion prohibited homosexuality. Indeed it did.

To get to my point....The point is this. If Roe was right to use this type of logic to decide the Constitution, which it was not, the next question is Did it get its history correct? Again, and undeniably, it did not.

And this brings us to our next point of why it did not. It is logical fallacy. The absurdity of the claim that no ancient religion prohibited abortion is as dumb as saying that no ancient American Indian tribes drank root beer. How do you know they didn't? Did you happen to come across a library of Indian documents in which one would expect that the rare practice of aborigine-root-beer-binges to be recorded? (Incidentally they did drink root beer, see Cardozo Journal of Ancient American Indian Law and Customs, Vol. 4, 1976, p. 3-7.) And if it was not recorded—forgive me for questioning your omniscience—is it at all possible that they drank it on occasion without putting it in their annals of official dietary history? Or maybe you think that you were able to scour the full North and South American continents in search of the remains of the root extract from which the renowned beverage is derived. And let us say you were able to scour the full continents and let us say you were able to dig down deep enough and in all the places that land movement due to earthquakes, etc. would have buried them. Let us say you did all that. How then do you suppose you would react if I told you that I think that the extract might have biodegraded during the 3,000 years it would take to become ancient? And that is what we're questioning, right? The ancient practice of root beer drinking as it relates to the text of the Constitution and what has been put into the Constitution (wrongly) by the test of whether to currently drink root beer is a fundamental right.

Exodus 21 has long been looked at in relation to this question of abortion. Both proponents and opponents for the practice of feticide use the passage in their defense. I can easily see why one might get it wrong. For one, many don't read the Good Book. For two, many of the bibles today merely cop out of quandary by mistranslating the pertinent clauses. Most bibles read something like this, If two men fight and a woman is hit while they are fighting, and if she is pregnant and as a result of the blow she *miscarries*, then the offender(s) will pay as much as the husband of the pregnant woman will demand and as much as the judges will allow. But if further harm befalls the actual person of the woman in question, then we get mad. Then we take life for life. Eye for eye. Tooth for tooth. Burning for burning. Etc. (The New English Bible, 1970, 84. The Complete Parallel Bible: New Revised Standard Version, Revised English Bible, New American Bible, New Jerusalem Bible, 1993, 156-157. The Holy Bible, Revised Version, 1962, 94-95. Good News Bible, 1976, 89: "loses her child, but she is not injured in any other way....But if the woman herself is injured....")

Notice the operative word *miscarriage*. In Hebrew there is a word for miscarriage. But it ain't the word used here. The correct rendering is the King James, that the child leaves the woman. In other words, premature birth. The Septuagint reads, "And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty....But if it be perfectly formed, he shall give life for life" (Lancelot Brenton, 2001). The Holy Bible, New International Version is even clearer: "If men who are fighting hit a pregnant woman and she gives birth prematurely but there is no serious injury [then he is fined]....But if there is serious injury [then life for life]..." (1996, 66). The Hexaglot Bible reads as does the King James, "fruit departs but no mischief" follows, but when mischief follows life for life (editor Edward Levante, 1874, vol I, 219). (See also The Cross-Reference Bible, American

Standard Version, 1959, 145-6: "fruit depart, no harm follow.")

It is very clear to me, at least reading the original words, not the inserted incorrect words of miscarriage, etc, that the passage fully flounders Roe's incorrect statement in question (whether ancient religion prohibited feticide). What else could it mean? The woman is hit. The fruit departs from her. She gets paid. But if there is further *mischief* then life will be required.

Capital punishment is involved in the subject at hand. (See Edward Gaffney, The Religion Clause, 1993 B.Y.U.L. Rev. 189, n1, for views that "life for life" does not deal with capital punishment.) Capital punishment is required for the breach of whatever is here prohibited by Exodus 21.22-23. And I repeat my assertion, that the prohibited activity is not the accidental killing of the unborn for which penalty a fine is levied. The prohibited activity is accidental causation of a premature birth for which a fine is paid or the accidental killing of an unborn child for which penalty an execution is required.

That is the only way to read the text. If the phraseology in anyway evidences more than a removal from the womb of the child, show me. The text does not say anything but that the child leaves the woman. Period. So why do people think that in addition to leaving the mother prematurely, the child also passes on to the hereafter? My earlier response herein was that many simply read their mistranslated bible and assume it correct. A further understanding of the difficulty lies in the fact that rabbis have long misconstrued the clause about the baby leaving the body of the mother and whether further mischief befalls. Why they did this is theorized very interestingly. Authors have shown how the text was interpolated by rabbis (Bernard Jackson, Essays in Jewish and Comparative Legal History, 1975, at 75-107. Samuel Loewenstamm, Exodus XXI 22-25, Vetus Testamentum 352, 1977, at 352-360). Rebuttals to that article have such dubious arguments as to remove themselves from the text and rely wholly on comparative

ancient Asian law. For instance, they argue that because other civilizations had laws where miscarriage was the word used in a comparable setting, that must have been what was meant here (Loewenstamm at 353-360. Roy Ward, *The Use of the Bible in the Abortion Debate*, 13 St. Louis U. Pub. L. Rev. 391-408, 396). As though the Torah were derivative of some other civilization's precedent and not of God! In any case, ask your local rabbi, and I have, what the passage means, and they will default to their footnote which says that the meaning is miscarriage, not premature birth. What a shame. Read your own Hebrew and come to your own conclusion. The bible is open for debate. The local pastor or rabbi does not know it all.

The text as is is clear enough. Fruit of the womb departs from the woman. Is there some reason to think that the fruit dies? No. Nothing in the text suggests anything more than a departure from the body of the woman. Nothing suggests a deceased fetus. Only a displaced fetus. A premature birth.

Now set the bible aside. Look up the word "Talmud" on dictionary.com. See that the definition is a "collection of *ancient* Rabbinic writings" (italics added). Now pick up your Encyclopedia Judaica (1971). Look up abortion. See if Roe's statement that "ancient religion did not bar abortion" jives with the following quotations. "In Talmudic times, as in ancient halakhah, abortion was considered a transgression [if] the foetus was viable." "Abortion [was] prohibited." "The prohibition against abortion." "The existence of an *ancient* law according to which...the penalty for aborting a foetus of completed shape was death (Ha-Mikra ve-Targumav, 280-1, 343-4)" (italics added). "Philo (Spec. 3:108) specifically prescribes the imposition of the death penalty for causing an abortion, and the text is likewise construed in the Samaritan Targum and by an substantial number of Karaite commentators." All of this is on page 100 of the aforementioned encyclopedia in volume 2. Don't tell me the Supreme Court is legitimate. Don't

ell me they're even smart.

Enough of that. Now let us say, in conclusion, that the Constitution is in tatters. People get this document. And they say, ok, let us take a phrase like, say, the amendment which proscribes the specific acts of soldiers entering and quartering themselves in our homes or unreasonable searches. Then they say, let us ignore the ancient doctrine of law that when a specific activity is listed then it is logical to believe that when it goes into great detail and lists the several behaviors not allowed then it means those to be the end of story. No reading in more than is there when the specifics are seen to have been foreseen and dealt with by the drafters. People take this penumbra balderdash of not what the Constitutional Framers actually said but what they meant to say. What they would have said had they had the chance. Baloney.

People take this sacred document and shred it. They say that because one issue implicating privacy issues is listed then we must say other issues of private nature are also protected. It is sick. It is wrong. And it is not constitutional law. It is near-murder done in the name of constitutional law. And what's worse, the constitution very clearly leaves to the people or the states such matters.

The truth is that Roe was wrong. It was wrong in its holding. It was wrong in its reasoning. And it was wrong to ever enter the arena of what is *clearly* to be left to the people or in other words the local governments and states to decide. In fact, the states *had* exercised their Tenth Amendment right: "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." And the court was wrong to base part of its wrongful decision on the erroneous statement that anciently, religion was not opposed to this base and opprobrious behavior, which it was.

Americans still oppose abortion (Michael J. Perry, Religion Politics and Abortion, 79 U.

et. Mercy L. Rev. 1, 37 (2001), the majority of Americans feel that abortion is murder). To be sure, the Judicial Power extends to all Cases arising under our Constitution. The Court can and should deal with such matters. But today's court has thwarted the clear and good division of powers. It has replaced majoritarian review with their own nearly unimpeachable judicial review. Note the incredible logic of Scalia, lover of tradition, as he dissents in Casey: "How upsetting it is that so many of our citizens...think that we Justices should properly take into account their views" (505 U.S. 833, 999-1000). So instead, they look to the views of ancients!

People somehow think that only the Supreme Court is entrusted with safeguarding the Constitution. But the Constitution itself holds the President and Congress and Court equally yoked to the same burden to "defend the Constitution of the United States." (Article II, Section I [8]. Article VI [3]).

Before he [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.

Likewise the judges and congresspersons swear "by Oath or Affirmation, to support this Constitution." So where does the Court come off proclaiming itself the "ultimate expositor" of the Constitution or "supreme in the exposition of the Constitution"? (United States v. Morrison, 529 U.S. 598, 616 (2000). Cooper v. Aaron, 358 U.S. 1,18 (1958). People are becoming less happy with the Court and less happy with Roe (Elizabeth Hayt, Surprise , Mom: I'm Against Abortion, 30 March 2003, sec 9, 1).

The current political tide is turning against Roe. Abortionists feel the pull towards prohibition and don't like it. Americans are fed up. Partial birth abortion is on Congress's agenda

to be criminalized (Carl Hulse, Senate GOP Holds Firm as Vote on Abortion Nears, NYT, 13 March 2003, A24, “‘I don’t understand,’ said Senator Peter G. Fitzgerald, Republican of Illinois, ‘how those who can hear the howl of a wolf or the squeal of a dolphin can be death to the cry of an unborn child.’”). Too bad it was taken from the states to decide, and given to the federal legislature. But if the papers are right, Roe is every bit the volatile issue as it was 20 years ago (Walter Shapiro, ‘Roe vs. Wade’ dissent was prescient, USA Today, 17 April 2002, 6A. Tony Mauro, Will new face soon join justices?, USA Today, 26 June 2002, 13A, Justice Kennedy “shows signs of moving to the anti-abortion side.”) I want Roe demolished. Abortion is nowhere near part of the constitution for the court to decide. And to think the court used faulty history of what was prohibited by religion is absurd. If only the wonderful constitution could be resurrected as a phoenix from its ashes.