

# The Problem with Jon Stewart

## Episode 203 Final Transcript

Jon: What are we gonna f\*\*king do?

Kris: I don't know. I mean, we've been sort of looking for answers ever since the decision came down.

Jon: Right.

Kris: Maybe somebody has a good response. That'll help us give us some sort of clarity.

Jon: Right, right, right.

Kris: Or make us feel better. And we found that, um, there was none of that [LAUGHTER] when we did our own —

Jon: Wait, you were, you were looking for crumbs and there's nothing on the floor.

Kris: Yeah. There's nothing on the floor.

Jon: It's sterile. It's cleaned out. It's nothing

[INTRO MUSIC]

Jon: Welcome. My name is Jon Stewart. First time, long time. We got our writers, Kris Acimovic and Tocarra Mallard, are gonna be joining us today. And then later on Kate Shaw, Leah Litman, Melissa Murray, the constitutional law professors from the podcast "Strict Scrutiny." And of course there is our AppleTV+ show "The Problem" and you can check that out as well. We got new episodes coming. I'm not exactly sure when probably like, I dunno, what do you want from me? Working as hard as I can. Not really, so let me ask you Tocarra and Kris, how was ya week?

Tocarra: Devastating, devastating.

Jon: Uh-huh.

Tocarra: Jon, you know, I've had a lot of odd jobs.

Jon: Yes.

Tocarra: And when I was in college, I used to work at a senior care facility in Pasadena, Florida.

Jon: Okay.

Tocarra: And I — stay with me, stay with me.

Jon: Okay.

Tocarra: Um, and I used to work in the dining room and I'd meet all these, you know, fantastic people who lived all these great lives. And I was talking to one person in particular who asked me what I was doing. And I was like, "You know, I'm in college and I'm doing this job and I'm doing that job, but I'm just, you know, I'm traveling." And she was like, "Oh, I'm so proud of you. When I was your age, I had a lot of kids and I loved my kids, but I hated my life."

Kris: Boo.

Tocarra: And —

Jon: Woah.

Tocarra: — she's like, "I'm, I'm so glad you have so many opportunities and do everything, do all the things." And so this weekend, you know, I was really thinking about her and a lot of other people who like left this earth thinking that it was gonna be better. So I'm thinking about her and I'm thinking about all these, you know, young people who are going to have to undo a lot of knots.

Kris: Mm-hmm.

Jon: Now, when you were in the nursing facility, the assisted living facility,  
Tocarra —

Tocarra: Mm-hmm

Jon: — were any of those patients Supreme Court Justices because —

[LAUGHTER]

Tocarra: Muses to Andy Warhol, you know, we had all kinds of cool kids [LAUGHTER] in the senior care facility. Yes. Everyone deserved a documentary.

Jon: Yeah. Kris, you feeling the same?

Kris: Yeah, I, yeah, I feel all the different things. The more I thought about it and the more I read about the stuff I got angry about how this is just to these people, the Supreme Court people, um, it's just a thought experiment. It's like, this is, this is a bunch of debate kids who do these sort of like debate exercises.

Kris: Mm-hmm and I don't know if any of you were a high school debater. I did it.

Jon: Kris, I, I think you could have just signed out actually.

[KRIS LAUGHS]

Jon: I think, I think what I did is I signed out and I went to work at a mall.

Tocarra: Hell yeah.

Jon: You don't have to have the best case. You don't have to make the best point. You just have to like do it on this little technicality.

Tocarra: That's right.

Kris: I feel like we should make it so being on a debate team should make you not get into college [JON LAUGHS] because it's a problem

Jon: Kris, let me, let me, let me tell you something. I think you're giving the Supreme Court far too much credit.

Kris: You do?

Jon: Yes. Because in my mind, the idea that this was based in any kind of reason, debate or philosophical education — the Supreme Court is now the Fox News of justice in my mind.

Tocarra: Damn.

Kris: Yeah.

Jon: They are a, it is a cynical pursuit. In the same way that Fox News would come out with "We're fair and balanced" under the patina of what would be a high status pursuit to the betterment of society, journalism. They are a cynical political arm. And when you look at the ridiculous Kabuki theater now of Justice confirmation, where they can just go out there and just f\*\*king lie.

Jon: Yes.

Jon: Like if this were about debate, then they would've understood what perjury meant.

Jon: Hell yeah. But they are now the Fox News of justice. I mean, there is no consistency. States can't regulate —

Kris: Guns.

Jon: —guns, but they can regulate uteruses, you know?

Kris: Yeah. It makes no sense. There's no coherence.

Jon: I think the thing that struck me was, you know, the arc of the moral universe is long, but it bends towards justice. Right?

Tocarra: Yeah.

Jon: And I think we're all sort of steeped in that ethos. What you don't realize is there is a goodly amount of individuals who are trying to bend it back.

Tocarra: The old guard is always chasing us.

Kris: Mm-hmm

Jon: Did you see any reactions that — 'cause I justifiably, I just saw just disbelief and anger.

Kris: That was really the gist of a lot of the stuff I saw.

Jon: Was there anybody, anything that you caught a whiff of and you're like, I'm gonna hold onto that. I'm gonna embroider that on a pillow or what's wrong with that person?

Kris: Here's a, what's wrong with that person that I would like to share.

[JON LAUGHS]

Jon: Okay.

Kris: This is from the other side, there was a little bit of gloating going on from the people who were happy about this decision. And it was a woman who tweeted, "If you're scared for your daughter's future, maybe focus on raising her to not be a slut."

Jon: Wow. Wow.

Kris: If I could point out Jon, nobody knows how to raise your daughter to not be a slut.

[TOCARRA LAUGHS]

Kris: Nobody knows. Nobody knows nobody's ever had a good idea about this. As far as I know, it might be a —

Tocarra: It's not a nature versus nurture thing?

Kris: It's just gonna, it's just gonna happen.

Jon: It's like they're not even intellectually coherent. Like Laura Trump, I don't know if you saw her quote. She was like you know, "The left they want you to have abortions, but we want women to be able to choose." And you're like, that's I think you have it —

Kris: Yeah. It's mixed up. Babe. You're on the wrong side, babe.

Tocarra: Yeah.

Kris: Babe, you're on the wrong side,

Jon: Like 'cause at a point, do you really believe like the Trumps are anti-abortion like for Donald Trump he's like, "I'm pro-life unless obviously you know, I get somebody and then —"

Tocarra: Oh my God.

Kris: Right.

Jon: — you know, I'm pro my life."

Tocarra: That's like Sarah Huckabee saying at her, you know, gubernatorial speech, "I want babies in the womb to be as safe as children in the classroom." And you're like, gehguh.

Kris: Yeah.

Tocarra: Okay. Goofy b\*\*\*\*.

Jon: What a weird f\*\*king way to frame that. Right?

Kris: Yeah.

Tocarra: So dumb

Jon: I want babies in the womb to start doing duck and cover drills.

Tocarra: Yes.

Jon: That's what I want. And we gotta start talking about putting a little Bulletproof Uteri when you bulletproof —

Tocarra: Is there any desk they can hide under there?

Jon: Right. They, you know what we need armed vagina guards.

[TOCARRA LAUGHS]

Tocarra: How much is that pay? Times are hard.

Jon: Yeah. That's —

Tocarra: Are we creating jobs in this new economy?

Jon: "Alright you know what? Tocarra left, she left a show." "Oh really? Where'd she go?" "She's with a vagina guard company."

[TOCARRA LAUGHS]

Tocarra: The commercial was really good. You know, they got me.  
[LAUGHTER] Vagina guard.

Jon: Be all you can be.

Kris: Yeah.

Tocarra: But you know, on, I don't wanna say it's the flip side, but we had people who were angry about it, but then said things that were absolutely not helpful.

Kris: Oh yeah.

Tocarra: Like, I don't know if you saw this, Jon, there was a democratic politician, I think out of Michigan who shared a tweet that was basically like, oh, he's feeling wildly conflicted emotions, anger about Roe, gratitude about passing, you know, gun reform in his state. So he needed to turn inward and do some yoga. And then he shared a picture of himself head down, a\*\* up —

Jon: What

Tocarra: — doing yoga. And I just wanna say, I have never found comfort in a white man doing yoga.

[KRIS LAUGHS]

Jon: What?

Tocarra: And as a — if you're a politician, I am not concerned about your peace. I'm concerned about your policy. I was like, what the heck.

Kris: That's the whole deal. Turn outward. Act.

Jon: Was that in relation to perhaps the other tweet, his way of creating, let's say contraception? [LAUGHTER] Let's say, he's saying, "Let me put this picture out there to prevent sexual activity from occurring in the first place." How are you gonna battle this nonsense? Even with the idea, like, I still don't understand why it's not called forced pregnancy.

Tocarra: Right?

Jon: Why isn't that just the term I saw Alexandria Ocasio-Cortez wrote forced pregnancy. Like why is that not the term —

Tocarra: Right?

Jon: — because that's, that's what it is.

Tocarra: That's what it is.

Kris: Yeah.

Tocarra: Forced pregnancy, forced birth. Exactly.

Jon: Right.

Kris: I will say that I got a fundraising thing from Nancy Pelosi. If you're looking for hope, if you're looking for leadership and it said the subject was Supreme Court backfires. And then she wrote, "I watched Republicans steal a Supreme Court seat from President Obama. I watched them pack the Supreme Court with three of Trump's radical justices. I watched those Justices take an apocalyptic vote to decimate vs Wade.

Jon: What?

Kris: Yeah. She's just like saying it's like her kink to watch all of her rights go away. like —

[LAUGHTER]

Jon: I watched.

Kris: Yeah.

Jon: I had a camera in the whole thing.

Tocarra: a lot of deep breathing from Nancy Pelosi.

Kris: And then a little bit later, she said, "I cannot stress how badly I need your \$15 in this moment." [JON LAUGHS] Nancy Pelosi needs \$15 right now.

Tocarra: For, okay — Kris, I got —

Jon: Is that to pay for a subscription for her democracy stealing kink?

Kris: I don't know. I don't know. It feels like a little bit of a scam.

Jon: It does feel a little bit like a scam. I'm gonna bring on our constitutional scholars guys, always a pleasure.

Kris: See you soon.

[TRANSITIONAL MUSIC]

### **Interview with the hosts of Strict Scrutiny:**

Jon: Okay. We got Melissa, Strict Scrutiny is back. Kate Shaw, Melissa Murray, Leah Litman guys. What the f\*\*k?

Melissa: We tried to tell you.

Jon: So guys tell me, how did this hit you? Did you immediately go into, how do we salvage this solution mode? Was it too still just disbelief? Talk to me and walk me through a little bit of how this hit you. This decision.

Melissa: I don't know that we were necessarily surprised. We've been saying that this was going to happen. We've been saying it since we started our podcast in 2019. I said it —

Jon: Oh wow.

Melissa: —when I testified against Brett Kavanaugh in 2018. I said he would be a reliable vote, but you know, we take no pleasure in being right, because this is absolutely devastating for so many people across the country. And so I think for

me, at least, it was just sort of sitting there with this really odd sensation of being completely and utterly right but wanting to be totally, totally. Wrong

Leah: So for me, it wasn't a feeling of surprise. It was more a feeling of disappointment and rage at the people who suggested we were somehow hysterical women for suggesting that this might happen. And that Roe would be overruled. I mean, I remember Senator Ben Sasse saying that some of the confirmation hearings, you know, there are always these crazy ladies in their pink pussy hats saying Roe versus Wade is going to be overruled, but it never is. And it's like, well, the point is you needed enough votes to get there. You were always trying to get there. And once you had the votes, you would do that. And yet, somehow it was not just the Senator, Ben Sasse. It was also, as Melissa was saying legal academics on the left legal commentariat on the left, you know, who went to bat for some of these nominees and assured us well, these judges and justices, they are products of the meritocracy. I know them, they would never do these completely insane things. Even though all of their prior work to date, it was totally clear that they were going to do these insane, terrible things.

Jon: You know, it would've been one thing if they sat in the confirmation hearings and said, "My entire ideological bearing is that life begins a conception and that abortion should be made illegal." And at the very least you would respect their honesty and integrity, but this makes the court a cynical pursuit. It feels like the Fox News of justice, that this is a political — having nothing to do with scholarship or anything else. This was a desire in search of a rationale.

Kate: Yeah. And I mean in terms of initial reactions, you know these are the three appointees of Donald Trump who, you know, pledged to put justices on the Supreme Court who would overturn Roe. And he was as explicit about it as he could possibly have been. And then of course, the nominees got before the Senate judiciary committee once nominated and declined to say anything definitive, but it wasn't necessary because Trump knew and the senators knew that they were, these three justices, were the product of a conservative legal movement who had been trained and groomed to adhere to and espouse a set of legal theories and putting in quotation marks because they're pretty outcome driven, right? There's a set of justifications we could talk about in the opinion, basically retrofit around a set of just conservative pet project outcomes. And so that's what's so frustrating about the kind of veneer of law and like armchair history that the opinion reflects, but really it's just raw power. It's an exercise of power. They have the votes. And so they did it.

Jon: Kate that's dead on.

Melissa: But this is the one time Donald Trump may actually have told the truth. I mean —

Jon: RIght.

Melissa: — it's the only time he's probably told the truth.

Jon: But by the way, he only said it to his base. None of them would ever say — they don't necessarily realize that that's all being recorded and everyone else can watch it.

[LAUGHTER]

Jon: But I think what Kate said is something that I want to ask you guys about, because what's clear is there are pet conservative projects, abortion gay marriage, now it's trans issues, and CRT. I can only imagine that there will now be legal cases that will be brought up to reinforce their ability to censor certain teachings in schools to censor — they have an ideology and they are retrofitting. With legal scholarship.

Leah: I think the opinion in Justice Alito's majority makes that clear. You know, the idea that this represents the triumph of some conservative judicial coherent methodology is just insane, right? Like the opinion itself is —

Jon: The originalist it's 1860. Anything else after 1868 —

Leah: It's a punchline. It's a punchline, right? Like on one hand they looked to sources dating back to the 13th century, even though the day before in the New York gun case, they insisted that sources long predating ratification had only limited relevance in telling us what the constitution meant in the opinion in Dobbs they said, well, look at all of these statutes states were enacting in the 1900s, even though again, the day before in Dobbs, they were saying all of this stuff that happens after the 14th Amendment is ratified isn't relevant. You know, it's just picking and choosing all over the place with history. It's totally clear this is, as Kate was saying, designed to reach a particular. Result. And you know, this is totally apparent to anyone who has watched this because the idea that overruling Roe and Casey is the product of, you know, judging, faithful to the Constitution is totally belied by the fact that the Republican party has spent decades putting people on the court to get the results that they want. Like those two things cannot really coexist with one another right in the universe.

Melissa: The other thing too, that I think is worth mentioning about originalism is sort of its roots and origins. No, no pun intended, but —

Jon: Mm-hmm,

Melissa: — originalism arises in the 1980s as a response to what conservatives view as the overreach of the Warren court, particularly on issues of criminal justice, but also on questions around, um, racial integration, principally and it's later the Burger court that gives us Roe. But this idea that there are activists judges who are interpreting the constitution, according to their own proclivities is what sparks originalism. And the idea is that we should be interpreting the Constitution in line with how the drafters or the ratifiers of that document would have understood that document in its terms at the time they were writing and ratifying it. But the thing about it is this whole method that emerges ostensibly to constrain judicial discretion. In this new court actually authorizes that kind of discretion —

Jon: Of

Melissa: course

Melissa: — because they can be selective and itinerant about the kind of history that they use. And, you know, Leah just said it, but you know, Justice Alito was talking about, you know, these laws that were in place at the turn of the century or at the Civil War, never mentions the ratifiers of the 14th Amendment who understood the term Liberty in that amendment to encompass a repudiation of all of the conditions of slavery that enslaved people experience, including the absence of bodily autonomy in labor, as well as the absence of bodily autonomy against sexual coercion. The fact that they couldn't keep their children, the fact that their marriages weren't recognized. And so, if you proceed from that originalist understanding of the 14th Amendment, it makes total sense that there is a right to terminate a pregnancy, total sense that there is a right to procreate or not a right to marry or not.

Jon: Liberty means that an overseer can't come in and take your children. Liberty means they can't come in. It's a form in some ways of rape force pregnancy. It's a form of control.

Melissa: Everyone knew this when they were passing the 14th Amendment. "Uncle Tom's Cabin" is the most widely read book of the age and it explicitly talks about the sexual coercion of enslaved women. And like, this is something

that falls out. it's like Justice Alito didn't get to that part of history. It may be because he went to school in one of those C RT prohibited jurisdictions.

Jon: You guys are naturally falling back on your education and your experience in law school and in litigating and throughout your law careers, I don't think that's what this is. This is an ideology in search of a justification. And the reason they call themselves originalist is the same reason they quote the Bible. It's dogma; it's dead people. It's people that you cannot argue with. This text is its fundamentalism. It's saying this text is sacrosanct. Even that gun s\*\*t for God's sakes. Like Madison, I think only put in there state militias because the slave states were like, "If you have a federal militia and you call up your militia, like, are we stuck here with slaves? Like with no guns?" You know, none of this is deigned by God or a burning bush or any of that. And let me ask you, how is this not a religious decision? They're suggesting that life is beginning at conception with no evidence other than that's what the creator said, but even that is not the case. In certain biblical texts and certainly in Judaism, it's not.

Kate: I mean, I would say they keep a little bit of sort of critical distance from actually fully invading the Alito majority opinion.

Kate: Doesn't say we are decreeing that life begins at conception. We're just saying a state could reasonably so conclude and thereby prohibit abortion or severely restrict it. But you're right the deep undercurrent in the cases we subscribe to that view.

Jon: Right.

Kate: But there's plausible deniability, right? All we're doing is stepping out of the fray. Then if states happen to take the position, which you know, will reference a number of times, life begins at conception and no abortion can be permitted. All a state has to do is basically pass the laugh test, the rational basis test and believing that life begins a conception clearly that's rational. And, and so a state basically will get to regulate to the point of prohibition if it wants to. But the court is careful enough not to endorse that as a matter of, you know, faith or kind of religious belief. Um, so I think it's plausibly speaking, not, you know, a, an explicitly theocratic kind of an edict, but you're right it's sort of woven throughout.

Jon: I wanna ask you guys about the ramifications as it stands today. What states will be allowed to do. And I say this, and if you'll forgive me for personalizing it, but we did IVF and I don't see how that would be legal. And, and I don't see how the court could say that you are protected when you do that. And there are

a lot of people who dearly want children who won't be able to have them because of this decision, because IVF is by its nature, embryonic roulette. And I'll give you the second part of this. If the state is saying, life begins a conception and, and you are just an Uber driver for a fetus. What if that woman dies, who goes to jail for that?

Leah: I mean, these are some of the open questions that the court has basically just invited. You know, one question is whether these statutes even have to make an exception for cases where abortion might be necessary to save the life or health of the mother. I mean, Kate mentioned the standard of review that Justice Alito said abortion restriction should be judged by it's called rational basis review. Kate called it the laugh test. It literally just means, is there some hypothetical rational basis we can imagine for this law. States don't actually have to prove that their law advances a valid purpose. So under that test, could states say, well, we think it's rational or reasonable to prioritize the potential life of the fetus over the actual life of the woman. I honestly, I don't know what this court would say, and that is so horrifying to imagine. And that's not even acknowledging that even in laws where there are exceptions for cases where abortion is necessary, we don't know what exactly that would encompass. And these are just some of the horrifying questions that the court will have to confront. Despite saying, you know, we court are getting out of the business of abortion and returning it to the political process. No, they're not, you know, there are going to be other questions they or other courts will have to answer again, given the immense human suffering that these laws could inflict.

Melissa: The states where they have the most restrictive abortion laws are also the states that have refused to expand Medicaid that do not have paid parental leave. No subsidy —

Jon: No, Kristi Noem has a website out now, for women. It supports them in pregnancy. It's, I believe it's a robust website, one pager. A lotta likes.

Melissa: Well, [www.Governorgirls.com](http://www.Governorgirls.com) is gonna be great for this . But, um, leaving that aside, um, you know, Leah's point about returning this to the states and democratic deliberation, like, you know, that's pure gas lighting on the part of the court because,

Jon: Yes.

Melissa: No institution has done a better job of dismantling the structure of democratic deliberation than this court. So, I mean, there's just trolling all the way around from those who argue, like,

Jon: Yes.

Melissa: You know, that they're, you know, we're about life, well, be pro-life for the whole life. And then from this court, it's like, you know, we're getting out of this and the people can decide. The people can't decide because you've made it really hard for them to decide.

Jon: That I think is, is a, a point that can never be stressed enough. This court and, and the, the Republican majorities have found their way to minority rule. Look. And again, like not to bring everything back to slavery, but the truth of the matter is that the Senate is affirmative action for rural white Christians, because to get them to join the union, they had to make those compromises. There was no idealistic like, the checks and balances of the electoral college it's nonsense. It was all done to convince Virginia that even though you've only got like 10 white people for every 500 black people, you'll be good. We won't let Massachusetts run your life.

Leah: And that's the stuff that's baked into the constitutional system.

Jon: Baked in.

Leah: I think, I think Melissa was alluding to the stuff that the Supreme Court has unleashed on the federal system.

Jon: They've added more.

Leah: Right.

Leah: Oh, I didn't know. Talk to me. Talk to me.

Melissa: The constitution made a cake and they're like, let's ice it .

Leah: Yeah, like

Jon: [LAUGHS] What, what, what have these bastards done?

Leah: Where to start. I mean, just, you know, less than 10 years ago, they dismantled the pre-clearance regime of the voting rights act that required certain states with histories of racial discrimination,

Jon: right?

Leah: To pre-clear changes to their voting laws three years ago, they said federal courts, can't remedy instances of partisan gerrymandering, where politicians can lock in their power.

Jon: Wow.

Leah: And ensure voters can't vote them out. Just last term, Justice Alito wrote an opinion for the court watering down the remaining provision of the voting rights act, section two, that was supposed to guard against voter discrimination against racial minorities. So this court has amped up the anti-democratic aspects of our system and made it harder for voters to register their preferences in the political process.

Jon: It's a rigged game. What they're saying is what we did first was we fixed the states. So we made the states have super majorities, even though there's a pretty reasonable split of Democrats and Republicans. And that super majority can do our legislative bidding without any kind of a check on it. So we're just gonna send it back to them and let the magic happen.

Leah: Yep.

Jon: Wow.

Melissa: Like asking a burglar to take care of the burglary.

Jon: Diabolical and, and why have they been so successful in creating this bait and switch hokey pokey, all the different things.

Kate: You know, once upon a time in really the Warren Court was maybe the only time when this really worked. The court actually did some work in kind of unsticking blockages in the democratic process. Like the one person, one vote cases, right? Making sure that states couldn't give all the political power to like the white, rural areas and deprive urban diverse centers of political power, which they were absolutely doing before the one person won vote cases. So the court actually kind of —

Jon: Right. The Warren Court by the way, was, uh, that was, was sixties.

Kate: Yeah.

Jon: Or is that, yeah.

Kate: It turns out to have been like maybe just an anomaly of in 230 years of, of mostly doing really terrible damaging stuff. The court had a decent decade and that was that decade. And, and so they actually made democracy work to a degree and they, and they would explain they're intervening in some of these cases, by saying, if democracy's not working, the democratic process by definition is not gonna fix it. We, because we stand outside of the ordinary political process.

Jon: Yes.

Kate: Have a unique vantage point and a unique responsibility.

Jon: Mm-hmm

Kate: To actually make democracy work. And then maybe you guys can figure out what you want, but you have to be able to register your preferences and make them policy, or none of this makes any sense, the checks and balances, the distribution of power. So that was a minute in which the court actually took that responsibility seriously. And it has basically relinquished any concern within, in some ways taken the opposite tack in recent years.

Jon: Well, now they're just a thumb on they're on the thumb, on the scale. That's all they are now is for, for one particular side. And I'll tell you, you may say that I'm being crazy, but if in this case, if a state decides like, the woman who's having a baby is not as important as the potential of that life, that what they're really saying is to save a life, autonomy means nothing. So let's play that out. We have an organ shortage in this country. Organ donation saves lives. Under this, how could they not go to a person and say, give me one of your kidneys, because it's gonna save this person's life. It's it would be consistent.

Leah: Is that person a woman or a man? Like women don't have bodily autonomy. I'm not sure about the men's though.

Jon: Right? The men still do, but so that's, that's the thing. Let's play this out. How can we make the case that men don't have it either, now? Well let's bring some peril to men, whether it be, you know, financial or bodily harm,. Let's say, uh, uh, then I have to be a blood donor. I have to be an organ donor, or I have to be. Why can't the state, under this provision, say to me, and by the way, the fact that this is the don't tread on me party and the Liberty party. F\*\*k you. That's insane. So, so how is it though that, uh, uh, why couldn't they just take a kidney and say it saves a life.

Melissa: Or alternatively prohibit masturbation because —

Jon: Now Melissa, please. Let's okay. [MELISSA LAUGHS] Now I have to draw the line.

Melissa: I think that's where they're drawing the line too. I mean, if you wanna talk about bodily autonomy for everyone.

Jon: Right.

Melissa: If you're gonna start with this idea that abortion extinguishes a potential life. The IVF does, as you've said.

Jon: Right.

Melissa: Masturbation could a vasectomy could, I mean, where, where does it end or is this really just for women? And if it is really just for women, it'd be terrific. If the majority actually grappled with the equal protection dimensions of that question.

Jon: Did they grapple with it?

Melissa: Well, this is really sort of, I mean,

Kate: It's every subject from Melissa.

Melissa: It's a very touchy subject.

Jon: Okay.

Melissa: It's every scholar's wish to see their work taken seriously by someone who has authority to do something. And so me and a couple of other law professors, Reva Siegel at Yale and Serena Mayeri at Penn, filed a brief making this argument that restrictions on abortion violate the equal protection clause. And —

Jon: You filed it for this particular case.

Melissa: For this case. Yeah. Um,

Jon: Oh, wow.

Melissa: And it was cited.

Jon: Okay.

Melissa: Unfortunately, by the majority [MELISSA LAUGHS] so Alito noted that some scholars said that there were perhaps equality issues here and also noted that the US government also made the same argument. Um, but then dismissed them out of hand because the court's precedent clearly forecloses that as though he had not completely laid waste to precedent anyway, but apparently one of the court's precedents, forecloses, even considering the equality of women in a case, like this.

Jon: Oh, so he was, he was stare decisis when it comes to

Melissa: Yes, stare decisis

Jon: — equal protection.

Melissa: For equality. Yeah.

Jon: Uhhuh that's —

Melissa: Otherwise stare decisis is for suckers and precedents are for punks, so, hmmm.

Jon: So they are, would you guys say, forget about personal preferences? Is this court and are at this point now the majority of our political system, an entirely cynical undertaking

Kate: This court? Yes. Ah? I mean most, I'm not sure if all of the political system, I'm not quite sure I'm ready to go there?

Melissa: Kate's an optimist.

Jon: [ALL LAUGH] Well, come with me, Kate. It's corruption of the highest order, Kate. It just, it just is. It's ideologues, and the idea that they pay homage to the founders and the greatness of their intellect is such an insult. There's such cynical purveyors.

Kate: And it's not even just like the founders. So basically what the case says is if we're trying to decide what the constitution means, when it uses terms like

Liberty, right? It doesn't list what's part of Liberty. It just says Liberty. So we have to have some way to figure out what Liberty means. And what Alito says is we have to look to history and tradition. And if a right is deeply rooted in history and tradition, then that right is encompassed within the Liberty protected by the constitution, and canvases history. Low and behold, there hasn't been a whole lot of recognition of women's rights in general, and women's rights to bodily autonomy in particular. Although the history is much more complex than Alito lets on, but it's not just the founding era. I mean, the opinion literally starts, with a 13th century treatise about like, if a woman, you know, if somebody poisons a woman who is, who has, and the fetus dies, then she shall have committed a, the person at shall have committed a homicide. That's literally where the historical section begins. There's a discussion of eminent, common law authorities from the 17th, 16th, and 15th centuries.

Jon: He's citing punishments against women in the 12 hundreds.

Kate: When people literally just opened veins and bled out because they had stomach aches. I mean, when you think about the state of medical

Jon: Women were property.

Kate: Oh yeah. So there's one authority that he cites one of the eminent common law authorities, sir, Matthew Hale, who was —

Leah: [LEAH LAUGHS] A witch burner.

Kate: Literally presided over a famous trial that resulted in the conviction of two witches who were both widows, independent women, clearly deeply threatening, [LEAH LAUGHS] presided over their trial and sentence them to death. This is one of the three preeminent common law authorities.

Melissa: Kate, they were probably sending text messages to Mark Meadows. [ALL LAUGH] So they had to be stopped.

Jon: In, in his defense, I believe those women did float. If I'm , [ALL LAUGH] if I'm remembering the case correctly.

Kate: And that's the early stuff. And then he sort of skips ahead and, and really focuses on the 19th century. There's this wave of anti-abortion legislation, but all of this is passed when women don't have a voice in the political process, they don't vote.

Jon: If it's all before 1920, it's meaningless.

Kate: Completely. And yet that is the history that Alito says, determines the meaning in 2022 of Liberty in the constitution. The method is so deranged and the implications for other liberties, the court has previously in more sane eras recognized, terrifying.

Jon: But wouldn't that be like quoting there's a, a plantation trial that took place in 1821, where, uh, it was very clear that, uh, the, the common law was that black people did not have bodily autonomy. I mean, you could just quote that.

Leah: So Jon it's interesting. You raised that as a possibility because just the day before the Supreme Court decided Dobbs in the New York guns case, right? That what case Justice Thomas cited as authority for his interpretation of the second amendment, Dred Scott versus Stanford —

Jon: Get the f\*\*k outta here, come on!

Leah: Which held that black people could not be citizens. He's like, see what the Supreme Court did in that case, that's what I'm relying on.

Melissa: No, to be he, this Lee's exactly right. He basically Justice Thomas essentially says that because Roger Taney, who is the chief justice and the author of the Dred Scott opinion, um, feared the prospect of blacks having guns and recognized that gun ownership was a crucial indisia of citizenship. That was part of the logic and indeed the calculus and the consideration when the court and Dr. Scott determined that individuals of African descent could not be citizens under the constitution. Something the 14th amendment was written and ratified to repudiate.

Jon: It's it, he used, they used the 14th amendment to play both sides of the ideological coin. The basically just —

Melissa: Oh, he does that all the time. He does that —

Jon: All the time. Melissa. I could tell you're so mad at him. Like it just like it's, it's so vexing, like, because there's no recourse because you clearly had an argument of great import. It must feel like just banging your head against the wall.

Melissa: Here's the thing. I mean, Kate's talked about how Justice Alito goes back to this 19th century and all of these, the criminalization of abortion after

the civil war. What Justice Alito doesn't tell you is one of the reasons why they're so exercised to criminalize abortion is because white women, as part of this effort toward voluntary motherhood are actually trying to exercise some control, so they don't have families of disproportionate sizes. That they have families that are manageable and they're not literally tired all the time.

Jon: Right?

Melissa: And so they're using contraceptives. Some of them are terminating pregnancies and it means that these native born white women are not having children in as great numbers as they're immigrant and darker hued sisters and people are literally scared in like a Tucker Carlson way that the country is changing its demographic character. And it's going to be largely led —

Jon: Wow.

Melissa: By the children of these immigrant women or, or these black women, and —

Jon: So, it's replacement theory,

Melissa: It's replacement theory.

Jon: Oh my God.

Melissa: I mean, so he's literally citing eight 19th century replacement theory ideas to justify limiting reproductive rights today. I mean, it's straight out of the Tucker Carlson playbook.

Jon: But here's the thing. So I'm, I'm angry on like an emotional level, but I would imagine my anger would be amplified exponentially if I knew what you guys knew. If I knew just how corrupt this was and just how much foundation there is for allowing Liberty to, to win a couple of these cases. Like knowing the backing of that, what's the recourse. Is there a, like now, do you take the right wing playbook and say, all right, we're just gonna start introducing counter claims into the lower courts and try and reverse engineer this thing. And now it's a decades-long project.

Leah: I mean, I think it is a decades long project. You know, there is this idea kind of floating around that this just magically happened because Mitch McConnell blockaded President Obama's nomination of Merrick Garland, and Justice Ginsburg just happened to die. But what that overlooks is the

conservative legal movement working over the last 40 years to build a network of power, to build a network of ideas, to exercise the maximum extent of political power they could to obtain all of the political power that they could and work for the long game to be ready for a world in which they could control the Supreme Court. That took four decades. That might be the time horizon that progressives are working with and I think they need to get ready to be involved and stay involved in state, local, federal elections, as well as organizing for that time period, if not longer.

Jon: But who leads, who leads that movement? Why doesn't the left have- left has think tanks, but they don't work like enterprise and heritage and the Federalist. They don't, you know, it's almost as though the right built a parallel universe to the— they didn't care for what the institutions of society in the 60's, the war in court, the higher education, uh, you know, any of those things. So they built a parallel universe. Now they have their own scholars and their own judges. And for you guys who have studied in this, when you see the foundations that they're building, is it like being a climate scientist and like looking at a conservative tank that says that actually global warming is good? Like, is it, is it the upside down when you look at that scholarship?

Melissa: I mean it is daunting. I think because the one thing I think it really underscores is there is tremendous discipline on the other side. And, you know, I don't know that the left has always been, especially discipline. Like there's so many different causes that progressives embrace and sometimes they conflict with each other. And, you know, there is this battle, I think, for a kind of political purity. I mean, I don't think the Republicans ever allowed that kind of intering warfare amongst their ranks. Like this is the goal. Roe is the great white whale. We're all Captain Ahab get on the boat, let's go. And I just don't know that progressives are disciplined in the way that that requires. I think they have to be. And I think Leah's rice, this is gonna be a 40 year ordeal. So, you know, limber up and pack a lunch. If you wanna do this.

Jon: Do you think it's because you know, the right is still considered like white Christian is still considered the default setting? It's the factory setting of the country. The left is coalitions of interests of a wide variety of people that have been left out of disenfranchised removed from the political process, but can have very different foundational principles that they're defending. Whereas the right only has to defend this 40% of the factory setting. And everybody's pretty homogenous and on point.

Leah: So I mean, maybe I guess I'd kind of add to that two small things.

Jon: Yeah.

Leah: I'm not sure I would say default setting, but there is this feeling on the right of this intense feeling of victimization and grievance, where they feel persecuted by a society, you know, a general public that no longer accepts or shares their views. And that has become something like, uh, organizing principle or something that they can all gather around in a way that the left hasn't seized upon even though right. The reverse is true. Right? All of the democratic party and progressives should look at the Supreme Court and be like, wow, there is an institution that is personally attacking us. We should all be able to get together and recognize that. And then second is the other thing, for whatever reason, like the left and progressives, I think for actually good reasons are less comfortable with the kind of authoritarian top down approach.

Jon: Okay.

Leah: That the right uses where you have, you know, the right being okay. Outsourcing judicial selection to the Federalist society and the Federalist society, just picking like the craziest white guys to nominate to the federal bench. And that would never fly on, you know, the left for again, totally understandable reasons. But I think a desire to accomplish multiple goals and not be autocratic, right? Will undermine the efficiency with which the left can just do, uh, burn everything to the ground approach.

Kate: Right. If your political coalition is mono-maniacally focused on one thing. And honestly, Roe has been that one thing for 30 years, probably for that political and legal coalition.

Jon: And guns as well.

Kate: Guns too. But if I have to choose one, I think the white whale is Roe. And I think there's an enormous question of what having caught the bus or the whale or whatever your metaphor, what happens next for that political coalition. But I guess at least in the immediate, they're just gonna keep pushing cause overturning Roe just —

Jon: I'll tell you what happens next, they start invoking the Rico act on data. Of pregnant women.

Kate: Yeah.

Jon: And doctors that are gonna do abortions and abortion pills. And they treat this like a criminal conspiracy.

Melissa: That's just a sideline though, Jon. I mean the real, next thing is gonna be contraception and same sex marriage. I mean it's in their platform like their, like, yes, there are many whales to spear here and now that the dogma has caught the car, there's time to go after some of these other ones.

Jon: Oh my God, did you just think of that?

Melissa: I did it. I did. I did.

Jon: That's top not to work right there. The dogma caught the car. Come on.

Melissa: I'm coming for your job, Jon, coming for your job.

[LAUGHS]

Jon: So your feeling is like, they really are. Now they're gonna try and catch as many whales as they can in this, but at a certain point doesn't popular opinion catch up at some point? I mean, you're talking about policies that are almost. For, for a divided country at ridiculously high approval ratings, like, you know, contraception and same sex marriage and interracial marriage. Like if that's what they're going for —

Melissa: Not that one because that one's personal, Jon. That's personal. Clarence has to go home to Ginny.

[JON LAUGHS]

Leah: You know, on this point about whether they're gonna come for contraception and marriage equality in light of popular support for them. I think this gets back to the concerns about minority rule in this country, given that the constitution has skewed our political systems to allow minorities to take control, given that the court has allowed states. To continue to have politicians who stay in power while suppressing votes and gerrymandering districts that does limit the extent to which politicians and the court would face pushback for enacting these policies. And I mean, we're already kind of seeing this. Melissa mentioned, you know, the 2016 Republican platform promise to appoint justices, not just who would overrule Roe, but also who would overrule Obergefell. We're already seeing some politicians express an interest in pursuing that goal. We're already seeing states vow or criminalize certain forms of

contraception, whether it's IUDs or the morning after pill. And so all of the promises and the majority about don't worry about these other rights ring, super hollow, given that the court just undermined the basis for those rights too.

Jon: How is this not then separation of church and state? Because none of this has any reality to it other than in some sort of perverse religious thought. None of it.

Kate: Who's going to tell him? Who's gonna tell him Leah?

Jon: Oh, boy.

Leah: It's so funny. You mentioned the separation of church and state. Jon.

Jon: Should I just leave? Should I just go?

[LAUGHTER]

Leah: Over the last two weeks, the court has basically read that out of the constitution too. So it overruled establishment clause cases that said, you know, government can't endorse religion. It overruled the cases that said governments must have a secular purpose in adopting legislation. It ruled that attempting to maintain some separation between church and state did not allow a state to refuse to fund religious education in public schools. It turns out that the original meaning of the constitution is there's no establishment clause at all.

Kate: Right. The basis of the separation of church and state is right. The part of the first amendment we know is the establishment clause. That clause, it turns out is actually unconstitutional, even though it's in the constitution. Didn't know that was possible. The court has just told us. [KATE LAUGHS]

Jon: Guys, and I'm not gonna ask for like, give me some hope here. Come on guys because I know Kate's an optimist, but we're all going on the thing.

Kate: Yeah.

Jon: Give me a strategy. What's the beginnings of a recapturing of a plan of action?

Kate: State courts actually are an important next frontier. The U.S. Constitution right now, as construed by this Supreme Court is not gonna be a font of a lot of

rights and protections, but every state has its own constitution and every state's courts construes that state's constitution —

Jon: We're gonna be the EU. We're gonna be the EU.

Kate: It's possible.

Jon: What groups would you say to go like top line is probably what planned parenthood in terms of just protecting women who are in this situation right now.

Leah: I would also say abortion funds as well as. Smaller local clinics that might be opening in some places that will cater to women who are now in reproductive deserts. So abortion funds are super important as are smaller clinics and areas. And the other thing I would just add is if you think about all the things you do in your life, they're basically all opportunities for organization, right? Like I'm on a swim team. I have a book club, right? These are all opportunities to build networks with people, to get them involved in politics, to get them to care, to get them to stay active, you know, like we need to focus on that kind of organization and getting everyone we know, you know, and those we don't, um, involved in this long term fight.

Jon: Who's got the macro view because my experience in these types of fights is that there are a lot of really good, really dedicated people. Oftentimes though fighting in fiefdoms that are not necessarily coordinated or working together. And that apart they're very easily paired, but when they begin to organize in a more global way, in a more macro way, it becomes a lot harder. To walk away from?

Melissa: I think that's definitely right. I think for the conservatives, you know, the Republican party and some of these sort of major institutions behind the Republican party served that purpose in getting them organized and on the same page about what their goals were and how they would achieve them. And, you know, it would be nice to see the Democrats sort of take the lead in doing that. I don't know whether that's going to be possible given, you know, the sort of big tent composition and the divisions within, but, you know, I will say this and it sounds small bore and it completely is undermined by everything we just talked about. But I do think it's really important for people to vote and to understand that voting isn't like waving a magic wand and you know, you go to the polls and you cast your vote and suddenly student loan forgiveness happens. Like you may have to vote in successive elections over and over again, taking your hits for years. The way the Republicans did before you actually realized the kinds of

gains that they did. They didn't really begin to get real purchase on this until the tea party. I mean, and, you know, they had some small wins, but like, it really was in sort of the response to Barack Obama that they kind of came together.

Leah: I just wanna underscore, like the Republicans went to the polls to get justices who had overrule Roe. And you know, a first time they got Justice David Souter another time they got Justice Anthony Kennedy, neither of those justices overruled Roe. Their response wasn't I'm never gonna vote again. F\*\*k the Republican party, right? You guys are a bunch of pro-choice losers. It was to keep voting and to keep pressuring the party, to be more hard line on the appointment of federal judges and the issue of abortion. That is the model that progressives need to understand. Not to throw up your hands because you didn't get what you want out of the Democratic Party this go round.

Jon: Right.

Leah: Not to be selfish, but I do worry that, you know, the progressive benefactors are giving to organizations that are meant to be a substitute for exercising political power, rather than giving to organizations that are designed to get progressives and Democrats political power. Like that is where we need this money to go now to the organizations designed to elect progressive candidates. To the organizations that are promoting progressive thought in different media, on different channels. That's where we need the support

Jon: I'm gonna bring Kris and Tocarra back in and make sure that they are able to ask— if you guys got time. I know you guys are busy saving us from what appears to be the most ridiculous. Supreme Court session since you know.

Melissa: Wait until next year, Jon. Wait till next year.

Jon: Melissa stop. You're killing me.

Melissa: Jon.

Jon: Oh my God.

Melissa: Believe Black women. [JON LAUGHS] I'm telling you. I just want you to know like believe Black women.

Jon: Tocarra and Kris, you got any, I mean, you were listening. I'm sure you were flipping out. Tocarra —

Tocarra: No, I'm okay with Loving versus Virginia being case by case and that's coming from someone who's in an interracial relationship. So it's okay for me to judge. [LAUGHTER] We all know that one couple that is incredibly annoying. [LAUGHTER] This is not the black and white Michael Jackson video. You can calm down. [LAUGHTER]

Kris: Can I ask you just one last question because I'm— I can't let it go. I don't understand these originalists and how they emerge. And I wanna know in law school, do they- are they fully formed there? Are they like, “Yeah, I'm an originalist f\*\*k off.” And then they like are in the same corner? Or —

Jon: Or is it cynicism? Is it a cynical thing?

Kris: Yeah.

Melissa: The question of like, you know, how does this get started? I mean, it, it, there is sort of a, a kind of grievance origin story. So in the 1980s at Yale law school, there's a group of very conservative students who feel like the entire law school is organized to be a conduit and a font of progressive or liberal dogma. And so they form the Federalist society.

Leah: What they have done is they have so much money and so much presence on law school campuses that when you walk into law schools, they are already running all of these events, all of these programs. You can apply to them, go to summer institutes and they will teach you all about originalism, all about textualism. They will connect you —

Kris: OK.

Leah: — with federal judges and Supreme Court justices and promise you, right? Like if you are one of our people, right, we're gonna get you these great jobs and we're gonna help you. And there is no similarly active network of grooming people and supporting them on the left. Like if you are, I know I used the grooming. I'm sorry.

Jon: No, no, no.

Tocarra: A little bit. Continue.

[KRIS LAUGHS]

Jon: It's just came to mind like saying it's the thing that they complain that CRT actually isn't doing —

Kris: Yeah.

Jon: — is the thing they're doing.

Kris: Right.

Leah: Yes.

Kate: Right.

Jon: But I bet you have groups that are coalitions like LGBT or you know, lawyers of color like there, that's what I mean by the left has these fiefdoms, but nobody's looking at that macro view of how do we give this a dogmatic foundation in the same way that they have?

Kris: Yeah.

Melissa: I mean, because there's something kind of ill about dogma.

Kris: Yeah.

Jon: Yeah.

Melissa: Right.

Kris: Yes.

Jon: You got no more dog puns for me? Melissa? On this? Because I'm looking for entertainment right now.

Melissa: I mean the dogma that licked —

Jon: Alright. [LAUGHTER] Get outta here! Guys, I can't thank you enough for spending the time with us. I so wish it was under better circumstances and that we didn't have to reconvene as quickly as we did, but thank you for the history lesson and we should create like a, I don't know what they would be called. Like people that ask questions of people in power. They could have their own networks [KRIS LAUGHS] and they would follow these things. Because I think

the country might be interested in that and we could call it something. I don't know.

Kris: Yeah. I don't know. Let's keep thinking on what we should call that.

Jon: Guys, thank you so much for joining us, but Strict Scrutiny is the podcast. Kate Shaw, Leah Litman, Melissa Murray. Thanks again. And I hope we get to chat again soon, under much better circumstances.

Kris: In 40 years.

Kate: Thanks —

Jon: In 40 years. [LAUGHTER] Kris!

Leah: Thanks for having us.

Melissa: Thank you.

Kate: Thank you so much.

Jon: Alright. Take care guys.

### **Interview with Strict Scrutiny ends**

[TRANSITION MUSIC]

Jon: What the f\*\*k?

Kris: Yeah. What the f\*\*k is true?

Tocarra: We're screwed. Screwed.

Jon: I was expecting like a little sliver, a little bit of the, “The sun’ll come out tomorrow.” [JON SINGS “TOMORROW” BY CHARLES STROUSE AND MARTIN CHARNIN] Instead. It was Megadeath.

Kris: What struck me is that it's very clear that the Supreme Court is bulls\*\*t. Like it's a real —

Jon: I — that's what was the thing.

Kris: — bulls\*\*t institution. This 13th century, the making these cases, it's just, it's bulls\*\*t.

Jon: It's just another cog in an ideological machine. And the crazy part is we imbue such high status —

Tocarra: Absolutely.

Jon: — in it and such elevated motivation. And it's really just it's like I was saying, like it's Fox news for justice.

Kris: Yeah. We call them justice. We're like Justice Kavanaugh. That is not apt.

Tocarra: Yes.

Jon: It's just us partisans.

Tocarra: You think people who love the law, but it's not it's people who have been bought and paid for on the back end who are moving forward with, you know, pathetic plans to honor this replacement theory.

Jon: Well, I think what it's almost like a chess move. It's like everything else that, that happens in the country, that there's an advance in Liberty for one group and the in group then has to make their chess move to try and devalue and de-legitimize the power that, that other group might wield.

Kris: Right.

Jon: And I, you know, the thing I it keeps haunting me a little bit is what's the brunch where Gorsuch and Kavanaugh and Barrett and Alito, like who's at that brunch where they're like, “Great f\*\*king job guys. Way to go.” I always wonder, like, who are their patrons? Who are the ones that put this plan together and greet them at the celebration?

Kris: As liberators of fetuses.

Jon: Right.

Kris: It's weird. It's weird.

Jon: And listen, I have children. I love my children, but like, I mean, we did IVF, like as far as I'm concerned, that's illegal now because IVF is nothing if not in embryonic roulette wheel, like they go in, you get, let's say you get lucky enough to get eight or 10 that Ize they'll grade them. They'll just, the doctor will be like, that's a C that's a B plus. That's an A, and according to this now, like the BS and CS just got murdered. Do you remember the show, "The Good Place?"

Tocarra: Oh yeah.

Kris: Yeah. Yeah, yeah, yeah.

Tocarra: Oh my gosh.

Jon: So I love that show. Michael Schur, is such a great writer and such an interesting guy, but he did on the show, the trolley problem it's in. So if you're driving down and the train is going and if there's three people on the tracks and you can pull a lever and turn it, but you'll hit 10 people. And what do you do? And now, okay. Out of the three people, you know, one of them. What do you do? Like if I'm on the trolley and there's a baby on the track, and if I pull the lever, I hit my fertilized embryo.

Tocarra: Yeah.

Jon: In a ditch. Like a pull in that f\*\*king lever.

Kris: Yeah.

Tocarra: Yeah.

Jon: And I, I don't think anyone wouldn't.

Kris: No, you're right. That makes it easy. That makes the trolley problem extremely easy. It's not even a problem anymore. [LAUGHTER]

Jon: Now you're just-

Tocarra: What a weird thought exercise, Jon.

Kris: Yeah.

Kris: Let's just take out those embryos. [LAUGHTER]

Jon: Alright, that's gonna be the show. Guys, thanks for sharing your time and wisdom. Tocarra Mallard, Kris Acimovic. Kate Shaw, Leah Litman, Melissa Murray. Strict Scrutiny! Check out their podcast. Apparently we're talking to 'em every f\*\*king week because-

Tocarra: Hell yeah.

Kris: Yeah.

Jon: -this demise of the country is now on a much steeper slope than anybody had realized. You can check out our show. Of course, The Problem. Apple TV Plus. And man just hit us up. Let us know what you're thinking. We'll be back soon.

Tocarra: Peace.

Kris: Bye.

Jon: Good bye.

[OUTRO MUSIC]

Jon: The Problem with Jon Stewart Podcast is an Apple TV+ podcast and a joint Busboy Production.