The End of Roe v. Wade

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Editors' note: This article was originally titled "The Leaked Dobbs *Draft: Trial Run for the End of* Roe v. Wade*" and was written before the Supreme Court decision in* Dobbs v. Jackson Women's Health Organization *was issued on June 24, 2022. We publish that original piece here followed by a postscript written by the author updating the analysis after the final opinion was handed down.*

In constitutional law parlance, a decision is said to be "infirm" if it is inconsistent with the views of the current majority on the Supreme Court. *Roe v. Wade*, the 1973 decision legalizing abortion, is today not just infirm, but on life support. The Court is expected to hand down a decision in *Dobbs v. Jackson Women's Health Organization* this summer that will at best leave the constitutional right to abortion diminished and may well overturn *Roe* altogether. That much is apparent to anyone who can count. We now have six conservative Catholic justices on the Supreme Court who think *Roe* was wrongly decided.[1] Of these only Chief Justice Roberts can be counted on to give great weight to the damage that the Court could sustain to its institutional health by reversing *Roe*. Overturning *Roe* will not be well received by a sizeable majority of Americans.[2]

Thanks to leaks emanating from the Supreme Court, we have some information about the progress of the *Dobbs* case. These leaks are rare breaches of the Court's normally opaque deliberative processes. We know that five justices voted to overturn *Roe* this winter after oral argument in December 2021; that Justice Alito was tasked with drafting an opinion for the majority; and that his initial draft was circulated in February. As of the most recent leak on May 11, we know that Alito has not revised his draft, that no other justice had as yet circulated a draft, and that the five votes to overturn hold steady. We also have the full text of the Alito draft, confirmed as genuine by the Supreme Court. Barring further leaks, we will not know more until the decision is handed down.

Developments may yet alter the apparent trajectory of *Dobbs*. Chief Justice Roberts could write a more moderate opinion, peel off a vote, and set constitutional abortion rights on a more gradual path to oblivion. The most obvious tack such an opinion could take would be to bless the Mississippi fifteen-week ban law challenged by the Jackson clinic in the *Dobbs* case. The Court could then leave

the question of how much more destruction it will allow to *Roe* for another day. However, the justices have largely vaulted past consideration of the law that bans abortion after fifteen weeks of gestation in favor of debating the demise of *Roe* altogether. Alito could moderate his maximalist opinion to hold a majority if any of the other four votes to overturn prove restive. Or the leaked draft could become the majority opinion substantially unchanged.

Justice Alito excoriates *Roe v. Wade* for purporting to find a right to abortion in the Constitution in flagrant violation of what he deems proper methods of constitutional interpretation. We can all agree that the word "abortion" is not in the text of the Constitution. Alito recognizes, as he must, that there are so-called unenumerated constitutional rights—that is, rights not mentioned expressly in the Constitution.[3] He then elevates the approach preferred by some conservatives to the status of the established methodology for determining whether an unenumerated right is protected by the Constitution. Viewed through his methodological lens, *Roe* is "egregiously wrong." Alarmingly, Alito's approach sweeps away not only the constitutional foundation for the right to abortion but also for the entire edifice of sexual autonomy and family life rights that the Supreme Court built out since the 1960s. These include the right to conduct a sex life free from government intrusion, the right to use contraceptives, whether married or single, straight or gay. They include the rights to marry and form families, straight or gay. These rights were understood in prior Supreme Court cases as essential to full membership in a secular and liberal society. If the Alito draft becomes law these rights will all be "infirm." We will see below that Alito insists his opinion does not implicate these precedents; but people who are attached to these rights will not be consoled by his insistence.

Roe v. Wade held that the right to abortion is part and parcel of the "liberty" protected by the Fourteenth Amendment's due-process clause. That clause states that no state shall "deprive any person of life, liberty or property without due process of law." If we examine Alito's approach to decommissioning abortion as a constitutional right, it will be readily apparent that a whole suite of sex, gender, and family rights is left without a home in the Constitution. Those rights, like the right to abortion, are justified as constitutional rights primarily because they are necessary to enjoy the liberty integral to self-realization and participation in civil society and the polity.

Alito's argument against *Roe* starts with the declaration that an unenumerated right deserving of constitutional protection must be "deeply rooted in this Nation's history and tradition." He proceeds to imbue the inquiry with the jurisprudential theory of originalism, an attractive approach to his fellow conservative justices and a doctrinal commitment for some of them. The originalist inquiry that will settle the question then is whether abortion was lawful in the states in 1868 when the Fourteenth Amendment was ratified. Alito devotes a great swath of his opinion to answering this question in the negative. The draft includes a thirty-page appendix cataloging the abortions laws of the states in the union in 1868 arrayed to support his conclusion that the majority of states did not allow abortion at any stage of a pregnancy.

The eccentric legal history on display in the draft is certain to come under heavy fire from legal historians. Against standard legal history, Alito insists that common law criminalized abortion at every stage of pregnancy. Alito disputes that the common law distinguished between pregnancies that have and have not reached the stage of "quickening"—that is, when the fetus can be felt to move. Quickening occurs in the second trimester of pregnancy. Common law did not criminalize pre-quickening abortion.

By 1868 most but not all states had statutes governing abortion, although some still relied on common law. Contrary to the novel history promoted in the draft, many states that had statutes simply codified the common law rule that allowed abortion until quickening. A majority of states did not criminalize pre-quickening abortions.[4] Those that did were testimony to the growing power of the medical profession to wrest the terrain of obstetrics from midwives, who had earlier presided

over both childbirth and abortion. Alito does not comment on the fact that in the nineteenth century women could neither vote nor prevent the ascendency of a medical profession with scant respect for women's autonomy.

Legal historians may quibble about how many state abortion statutes preserved the common law quickening distinction in 1868. We can, however, be confident that sexual privacy for married and single people, straight and gay, is not "deeply rooted in this Nation's history and tradition." If this is really the accepted touchstone for determining whether a right is protected by the Constitution, then repudiating the reasoning in these precedents would be the constitutional law equivalent of shooting fish in a barrel. There may be five or even six votes on the Supreme Court for ancestor worship today. But from the first case to the last in the line of cases constitutionalizing a secular sexual regime, from *Griswold v. Connecticut* in 1965 (right of married people to use contraceptives) to *Obergefell v. Hodges* (gay marriage) in 2015, the majorities in Supreme Court cases did not employ this historical methodology to determine whether these *un*enumerated rights deserved constitutional protection. From *Griswold* to *Obergefell* the method Alito treats as accepted by the Court was used by dissenters unsuccessfully resisting the constitutional protection of sexual freedom and equality.

This historical pedigree method was used by the Supreme Court majorities to decide whether the *enumerated* rights spelled out in the first eight amendments to the federal Constitution applied only in federal cases or must also be "incorporated" into state law. The method, in variations debated by the justices, was used in the mid-twentieth century to incorporate *enumerated* provisions of the Bill of Rights "against the states" and "through" the Fourteenth Amendment's due-process clause. Incorporation meant states are required to accord rights such as freedom of speech or the right to a speedy and public trial at least the same scope and level of protection in their courts as was provided by the corresponding federal right. Gradually, over decades, almost all the provisions of the federal Bill of Rights were incorporated against the states. Unsurprisingly, there was a wealth of evidence to be found of shared practices with respect to the subject matter of the Bill of Rights—protection of religious and political dissent, protection from intrusive government surveillance, and protection from being railroaded in the courts. This evidence was supplied by state laws, state constitutions, and the less ancient reaches of the common law tradition.

Consulting tradition, much less the freezing of tradition in 1868 when the Fourteenth Amendment was ratified, was not, nor could it be, a method for modernizing our antique Constitution on matters of sex and gender. There the inquiry took the form of conceptual analysis of liberty and commonsensical acknowledgment of social change. For example, when the question is posed, "Can women participate fully in society without the ability to control their reproductive capacities?" the twentieth- or twenty-first-century answer must be no. Or when the question is, "Can gay people be denied the right to marry because of common law traditions or biblical anathema?" the answer must again be no in a secular society. This is the route taken by several generations of Court majorities, including by some conservative justices of a less doctrinaire stripe, to remove the legal disabilities labored under by women and gay people.[5]

Supporters and opponents of *Roe* should concede that distinguishing between the proper use of judicial power and judicial overreach is as difficult as any question in constitutional law. In his draft Alito does not engage this question so much as declare victory for his team. If he holds five votes, he has indeed won the victory.

Justice Alito has an answer to the objection that he yanks the Constitution out from under the sexual autonomy and marital freedom cases grounded in liberty. His answer is that only abortion is sui generis—unique—in that "many" believe the rights of unborn children hang in the balance. His implication is that *stare decisis*—precedent—is a more potent protection absent this clash between the lives of the unborn and women's autonomy. We shall see. Red state legislatures will be lobbing

laws derogating from these rights at the Supreme Court. They will be asking the justices to cut back these precedents in deference to religious sensibilities. A Republican Congress cowed by demagogues may also tempt the Supreme Court to revise constitutional protections in the direction of their members' conservative proclivities and beliefs.

Perhaps the most remarkable feature of the draft opinion is the short shrift Alito gives to the objection that women have relied upon *Roe* for several generations. In *Planned Parenthood of Southeastern Pa. v. Casey*, decided only twenty years after *Roe*, the Republican-appointed authors of the controlling opinion held this reliance to be the chief reason to preserve the right to abortion. Justices O'Connor, Kennedy, and Souter wrote, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[6] Alito crosses the line into dark comedy or fatuousness when he blandly cites the views of abortion foes that women have made so much progress in the past half century that they don't need the right to abortion to sustain or make more gains as on a par with opposing views that the right to abortion is critical for "modern" women. Legislators will have the difficult task of evaluating the evidence pro and con. Of course legislators may also determine that protecting fetal life at every stage is more weighty than any interests of women.

Justice Alito issues a clarion call for democracy and against an overweening Supreme Court:

> It is time to heed the Constitution and return the issue of abortion to the people's representatives. "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy by citizens trying to persuade one another and then voting." … That is what the Constitution and the rule of law demand.[7]

Many supporters of *Roe* share Justice Alito's enthusiasm for democracy. But "democracy" is at a low ebb in the United States, and indications are that the tide is still receding. The litany of anti-democratic forces and practices at the state and federal levels is well known to this readership. The Supreme Court has exacerbated this decline during its now decades-long rightward course, including approval of corporate money sloshing through our political institutions and its tolerance for voter suppression and gerrymandering. Democrats (small "d") face a Hobson's choice between rule by five or six conservative justices and rule by undemocratic state and federal governments. Whether *Roe* is hobbled or overturned, we can anticipate more oppressive legislation in Red states, abetted by anti-reproductive freedom measures enacted by a rightward-moving Congress. Women will suffer harm and endure hardship. There will be popular resistance to the abrupt rollback of reproductive rights and anticipated assaults on constitutional protections for the secular family. Popular resistance may birth some democracy.

POSTSCRIPT

After this article was written, on June 24, the Supreme Court handed down its decision in *Dobbs*, overturning *Roe v. Wade*. There were no significant changes to the majority opinion leaked in May. Justice Alito held four votes, and so *Roe* fell 5-4. The hard right is ascendant; the liberal eclipse is complete.

Chief Justice Roberts proposed "a more measured course," preserving an anemic version of *Roe*. He cast a concurring sixth vote only in upholding Mississippi's fifteen-week ban, but did not vote with the majority to overturn *Roe*. The only possible way for *Roe* to have survived the lineup on this Court would have been to attract another conservative to his position. No justice joined him. Roberts offered a clear and elegant solution to the problem presented in *Dobbs* as he saw it. That problem was to hold his conservative brothers and sister in check so that their zeal to use the power of the majority to put their imprint on the Constitution did not discredit the Court. Roberts sought to avoid

rendering an inflammatory decision in this supremely controversial case. Zeal could damage the legitimacy of the institution of which he is the chief steward and eventually its ability to service capital in cases unlikely to command attention of the kind that influences popular politics. His solution was to dispense with the viability rule in *Roe* and *Casey* but retain a constitutional right to abortion. States would be allowed to ban abortion prior to viability. *Dobbs* would set that cutoff at fifteen weeks, a few weeks into the second trimester but before viability. This would give women a "reasonable opportunity to choose." Abortion opponents would be handed a win. But since the "vast majority" of abortions occur in the first trimester, public anxiety about the issue of abortion and its political salience would be allayed. Roberts counseled that the Court refuse to take any further cases seeking deeper cutbacks to *Roe* for several years to further settle the country down and take pressure off the Court. The other five conservative justices rejected this politically astute compromise in favor of exerting the fullness of their power.

Justice Thomas wrote a concurrence certain to roil the waters that Roberts wished to calm. He calls for the Court to follow *Dobbs* "at the earliest opportunity" with cases overturning precedents recognizing rights to sexual and marital freedom. Thomas like the dissenters does not abide Alito's fulsome assurances that *Griswold* or *Obergefell* are left secure in the wake of *Dobbs*. Thomas explained that, yes, the issues of the constitutional protection of the right to use contraceptives or gay marriage are not before the Court in *Dobbs;* but the grounds for that protection are blown away in *Dobb*s: Like abortion they were not "deeply rooted in this Nation's history and tradition" in 1868 and therefore cannot be imported into the Constitution via the Fourteenth Amendment's liberty clause. The dissent is in full agreement as to the logic and implications of *Dobbs*:

> Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

Justice Kavanaugh also wrote a concurrence. He seems to want to claim his role as the "median justice," the essential fifth vote in close cases, and to tip his hand that as the median justice he will keep the Court from the path that Justice Thomas would like to take. He affirms that *Dobbs* does not mean that sexual and marital freedom are "threatened." He likewise gestures toward his likely stance on some of the issues involving interstate travel to obtain abortion care by affirming his support for the constitutional right to travel across state lines. We shall see. Kavanaugh's concurrence is an exercise in happy talk. He envisions a future in which no abortion cases he will deem "difficult" will come before the Court now that *Dobbs* has made the Constitution "neutral" on the issue of abortion. This in a country, half free, with fifty state jurisdictions with incommensurate law.

The dissenters in *Dobbs* tells us what we already know but is never mentioned by the majority: People will continue to have and to seek abortions, 20–25 percent of women have abortions, and poor women will bear the brunt under *Dobbs* just as they have done under the *Roe* regime. The dissent's takedown of the majority opinion is cogent as jurisprudence, but they lost. *Roe* and then *Casey* were compromised in half the country by dozens of state laws enacted over decades and an acquiescent Supreme Court. The federal courts were never going to deliver as manna a comprehensive, funded reproductive health system. The recourse is to organize at the local and state level, building a mass movement capable of protecting sexual and reproductive freedom and demanding universal reproductive health care that this wealthy society now withholds. The victors may regret the end of *Roe v. Wade*.

Notes

1. Justice Sotomayor was also raised and educated a Catholic, but like many other Catholic jurists, notably Justices Brennan and Kennedy, her views on constitutional law are not bound to either Catholicism or those of the Federalist Society. Justice Gorsuch was raised a Catholic but attends an Episcopal church.

2. An NBC poll conducted after the draft opinion leaked found that 63 percent of Americans believe abortion should always be legal or legal in most cases. See Mark Murray, "Support for Abortion Rights Hits New High as Midterm Outlook Is Grim for Democrats," NBC News, May 15, 2022. A PBS/NPR/Marist poll conducted after the *Dobbs* case leaked found 64 percent of Americans are opposed to overruling *Roe v. Wade*. See Laura Santhanam, "Majority of Americans Don't Want Roe Overturned," PBS NewsHour, May 19, 2022.

3. The Ninth Amendment explicitly states that there are unenumerated rights: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. For a recent review of the discussion among historians about nineteenth-century abortion law, see Aaron Tang, "The Originalist Case for an Abortion Middle Ground," SSRN (September 13, 2021).

5. Miscegenation laws were also struck down in this era, on grounds that they violated equal protection but in part also because they infringed the liberty of the races to intermarry.

6. The passage in *Casey* continues:

> For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. (Citation omitted) The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. (*Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833 at 857.)

7. The internal quotation is from Justice Scalia's dissent in *Casey*.