Justice Alito's Originalist Triumph
Chief Justice Rehnquist Planted the Seeds for the Abortion Opinion in a 1997 Case Involving Assisted Suicide.
By David J. Garrow *Wall Street Journal*, May 5, 2022, p. A17.

Justice Samuel Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization* represents the auspicious culmination of the conservative legal movement, which has fundamentally transformed U.S. constitutional interpretation over the past quarter-century.

Justice Alito's opinion is also a posthumous triumph for William H. Rehnquist, who dissented from *Roe v. Wade* as an associate justice in 1973 and who as chief justice in 1997 successfully undermined the constitutional foundation of *Planned Parenthood v. Casey*. In that splintered 1992 ruling, three Republican-appointed justices—Sandra Day O'Connor, Anthony M. Kennedy and David H. Souter—had surprisingly reaffirmed *Roe*'s protection of a right to abortion.

The trio's controlling *Casey* opinion asserted that the abortion right was encompassed by the 14th Amendment's Due Process Clause, which guarantees "liberty." Yet five years after *Casey,* Justices O'Connor and Kennedy both signed on to Chief Justice Rehnquist's five-vote majority opinion in *Washington v. Glucksberg,* a pioneering "right to die" case in which proponents unsuccessfully sought similar 14th Amendment protection for physician-assisted suicide.

Rejecting that claim, Rehnquist wrote that unenumerated rights are protected by the Due Process Clause only if they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." The opinion concluded that a right to hastened death wasn't "deeply rooted." Justices O'Connor and Kennedy likely believed abortion was, yet in joining Rehnquist's due-process analysis they helped place a land mine under the *Casey* holding that Justice Alito's prospective majority is on the verge of detonating.

Following from Rehnquist's *Glucksberg* formulation, Justice Alito's lengthy *Dobbs* draft opinion devotes extensive attention to detailing how almost all abortions were unlawful at the time of the 14th Amendment's ratification in 1868. It also explicates how *Roe*'s account of abortion's 19th-century legal status was largely based on two law review articles by the late Cyril Means Jr. , which even pro-choice scholars acknowledge were deeply flawed and Justice Alito calls "discredited."

Justice Harry A. Blackmun's majority opinion, Justice Alito writes, was also "remarkably loose in its treatment of the constitutional text" of the amendments (in addition to the 14th) that it referenced in passing. Justice Alito takes clear pleasure in citing by name the many liberal legal scholars who have dismissively criticized *Roe*'s reasoning, and he twice calls *Roe*'s constitutional discussion "exceptionally weak."

That's a conclusion with which even historians who fervently back abortion rights can't cavil. More important, Justice Alito's opinion highlights the fundamental revolution in constitutional analysis that has taken place since the 1970s thanks to the intellectual ascendancy of the "originalist" and "textualist" modes of interpretation. You don't have to be a Federalist Society member to see that the analytical prowess today's justices demonstrate in opinion after opinion far eclipses the quality of the Warren and Burger Courts' work product.

Justice Alito's key conclusion—that "a right to abortion is not deeply rooted in the Nation's history and traditions"—allows him to assert that *"Roe* was egregiously wrong from the start." Then his opinion takes particular aim at *Roe*'s core holding, that fetal viability—the ability to survive outside the womb, currently at about the 23rd week of pregnancy—is the decisive boundary, only after which states can proscribe abortions. Justice Alito fails to acknowledge how *Roe*'s embrace of viability—championed more by moderate Justices Potter Stewart and Lewis F. Powell Jr. than by Blackmun himself—was directly derived from a highly influential lower-court decision written by Judge Jon O. Newman.

Far more difficult than highlighting *Roe*'s multiple shortcomings is Justice Alito's similar effort to disparage and overrule the *Casey* trio's opinion. He correctly notes that "their opinion did not endorse *Roe*'s reasoning" and focused entirely on due-process "liberty" without ever citing *Roe*'s well-known invocation of a "right to privacy." Justice Alito also asserts that *"Casey* did not attempt to bolster *Roe*'s reasoning" and "made no real effort to remedy" one of Roe's "greatest weaknesses"—to wit, the trio "provided no principled defense of the viability line" and even "conspicuously failed to say that they agreed with the viability rule."

But Justice Alito's draft opinion fails to engage fairly or meaningfully with the Casey trio's fervent assertions that any narrow overruling of constitutional protection for a woman's right to choose would do profound reputational damage to the Supreme Court itself. And if the final opinion commands a majority and retains Justice Alito's first-draft language expressly mocking some of Justice Kennedy's statements in *Casey,* many observers will be surprised that Justices Neil Gorsuch and Brett Kavanaugh, both Kennedy law clerks, joined it.

The draft opinion grounds its overruling of both *Roe* and *Casey* in one clear and simple belief: that there is a "critical distinction between the abortion right and other rights." The former involves a "profound moral question" that makes it "fundamentally different" and thus "sharply distinguishes" *Roe* and *Casey* from landmark rulings on same-sex marriage, consensual sodomy and birth control. "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion," Justice Alito insists. *Dobbs* "does not undermine them in any way."

Going forward, "states may regulate abortion," and laws that do so "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests," including "respect for and preservation of prenatal life at all stages of development." Thus states that so choose will be able to outlaw all abortions.

Near its close, the Alito opinion strikingly asserts that "we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work." This will be perhaps the most momentous Supreme Court ruling since the unanimous *Brown v. Board of Education* (1954), yet it will likely be propounded by the slimmest possible five-justice majority.

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