Alito explained why Roe must go

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Terry A. Hurlbut May 14, 2022

On Monday, May 16, the Supreme Court will release “one or more decisions” from among its current cases. Does that include *Dobbs v. Jackson Women’s Health Organization?* The Court won’t say, and indeed never does. But with the illegal protests happening in front of five Justices’ houses, the Court might want to release their opinion in *Dobbs* just to get it over with. In anticipation of that, *CNAV* offers this analysis of the Alito Draft. It might show that apologists for abortion ruined their own case.

Will the Court release its opinion?

We know only, from SCOTUSblog, that May 16 will be an “opinion day.”

> NEW: Next Monday will be a Supreme Court opinion day. Starting at 10 a.m. EDT, the court expects to issue one or more decisions in argued cases from the current term.
>
> — SCOTUSblog (@SCOTUSblog) May 12, 2022

As history shows, the Court never says in advance what opinions in what cases it will release.

> We can announce, however, that we'll be liveblogging the release of orders from today's conference AND opinions, starting at around 9:25 @SCOTUSblog. Please join us to discuss the leak, pending opinions, and whatever other SCOTUS-related issues are on your mind. https://t.co/6xx8khvACh
>
> — Amy Howe (@AHoweBlogger) May 12, 2022

But we do know that demonstrations continue in front of the houses of five Justices, including Samuel A. Alito. He drew the assignment to write for the majority in *Dobbs*. And in his opinion, *Roe v. Wade* must go. Here again is the Alito Draft, so that readers may follow along.

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Alito gives a timeline

Justice Alito begins with a simple timeline. Contrary to modern belief, individual States and territories wrote their own laws on abortion for 185 years. Alito includes, in two Appendices, *thirty-seven citations* of State laws forbidding abortions, thirteen citations of territorial laws, and one citation that made abortion unlawful in the District of Columbia.

Then came *Roe v. Wade* (410 U.S. 113, 1973), which upset thirty abortion prohibitions still on the books. Alito scolds the *Roe* court for:

- Bringing up the practice of abortion in ancient history ("constitutionally irrelevant"),
- *Incorrectly* asserting that abortion was never a crime in common law, and
- Handing down "a numbered set of rules" that read like an act by a legislature.

The Court actually weakened *Roe* in 1992 (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833). Alito tells us that the *Casey* court discarded the trimester system of *Roe*. Instead they said no State may impose an "undue burden" on a woman seeking an abortion. In the case at hand: wait twenty-four hours? Check. Minor girls getting parental or guardian consent? Check. But adult married woman getting the consent of the husband? No. And the Court gave *no further guidance*.

The ugliness of *stare decisis*

By far the ugliest part of the *Casey* opinion was the introduction of the phrase *stare decisis* into public discourse. *Stare decisis* is Latin for "to stand as decided." As Alito scolded, it meant they had to leave the "central holding" of *Roe* intact, "*even if that holding was wrong.*" (Emphasis added.) To do less would be to undermine respect for the Court and for the rule of law.

And then the Court said one thing that, more than any other single thing the Court has ever said or done, that provoked people to call it a group of "unelected bureaucrats in black robes." They said:

> We call the contending sides of a national controversy to end their national division

and treat their holding as final. That also is where the phrase "settled law" came from.

That case did like hell settle the controversy. Different States passed different laws. Advocates for abortion continued to sue away law after law – though occasionally the Court would chip away at *Roe*, bit by bit, though not as thoroughly as *Casey* did.

As *CNAV* covered, Texas passed its Heartbeat Act, that left enforcement to private citizens and granted them standing. So the angry abortion lobby sued immediately, asking in effect:

> Are you going to let those Texas rubes do an end run around your law?

The Court effectively replied,

> Call us when you have an actual controversy.

The Mississippi case – and Alito answers an ultimatum

And so we come to the case now at hand: *Dobbs v. Jackson Women's Health Organization*. In 2018, Mississippi passed its Gestational Age Act, forbidding abortion after fifteen weeks. Immediately the managers, and one of the doctors, at the abortion mill sued. The U.S. District Court for the (presumably) Southern District of Mississippi enjoined the State through summary judgment. "Pre-viability" was their reason. The Court of Appeals for the Fifth Judicial Circuit affirmed.

Thomas Dobbs, as Chief Health Officer in Mississippi, petitioned for *certiorari*. Twenty-six States supported his petition. Furthermore, the petitioners directly attacked the *Roe* and *Casey* decisions, saying the Court made two bad decisions. The respondents said two things:

1. If the Court lets Mississippi ban "pre-viability" abortions, they might as well overrule *Roe* and *Casey* entirely.
2. "No half measures!" Either strike down this Mississippi law, or overrule *Roe* and *Casey*.

Well! If that sounds like an ultimatum, that's because that's exactly what it is. And from the preliminary vote, that seems to have been enough for Alito, Thomas, Barrett, Gorsuch, and Kavanaugh to say:

> All right, you're gonna get. Your. Wish.

If any one thing frosts a judge, it's a party to a case daring to give that judge an ultimatum. So when Chief Justice Roberts assigned Samuel A. Alito to draft the majority opinion, anyone could predict the outcome.

Alito tears the Roe case apart

So Alito proceeded to tear the *Roe* case apart. As he notes, the Constitution and its Amendments *never* say a woman may have an abortion. The *Roe* court tried to find a right to abortion in the:

1. Ninth Amendment (abortion as a right the people retain),
2. First, Fourth and Fifth Amendments (security of the person, and so forth), or
3. Fourteenth Amendment (the Due Process Clause, that protects "life, liberty and property").

An *amicus* brief tried to find that the Equal Protection Clause protects abortion as something only a woman would seek. But Alito points out that the Court has already ruled *against* that construction of that clause.

So – back to the arguments the *Roe* court made. The Fourteenth Amendment protects two kinds of rights, those being rights that:

1. One can find in the First Eight Amendments, and/or
2. Have deep roots in American history and tradition, and are necessary to the American system of ordered liberty.

The right to keep and bear arms satisfies both counts, and so does the prohibition of excessive fines. But abortion appears *nowhere* in those eight Amendments. And as for rooting in history and tradition, Alito cites traditions of common law, and American State statute, *forbidding* abortion. Lawyers will recognize the names of the great common-law scholars: Blackstone, Coke, Hale. All say that abortion, especially after the baby starts moving, is a crime.

Zero! None!

Most tellingly, he says this:

> Until the latter part of the twentieth century, there was no support in American law for a constitutional right to obtain an abortion. Zero. None.

Furthermore the only reason to use "quickening" as a threshold was that doctors originally couldn't even *tell* that a woman was pregnant. Now that we *can* easily tell, "quickening" must fall by the wayside. Which it did in the nineteenth century. By 1868 all States made abortion criminal. Alito scolds respondents and their friends of the court for:

1. Ignoring this history, and then
2. Saying the history doesn't matter.

One friend of the court tries to say the legislatures, in criminalizing abortion, did not want Catholic immigrants to out-breed Protestant natives. Catholics wouldn't get abortions, this theory ran, so the law mustn't let Protestants do it either. To that, Alito effectively says:

> If that's the best you've got, that shows that the **Roe** and **Casey** courts had **nothing** to support their decisions.

Besides, that friend of the court has statements from supporters of those laws but *not* from actual lawmakers.

Central to the concept of ordered liberty? Not so much

But is abortion central to the very notion of liberty? The *Casey* court did hold:

> At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Alito rightly points out that you can think and say what you wish about these things, but you may not always *act* on your thoughts or feelings. That's why, incidentally, the law *has* treated harshly those who, from time to time, have bombed abortion mills, killed their doctors or other staff (in or out of the places of practice), or both. That is *also* why we do not (so far) recognize the radical Muslim concept *jihad* as justifying murder or treason.

Ordered liberty sets bounds between competing interests. In simpler terms, your right to swing your fist ends at the tip of my nose.

Finally, Alito addresses squarely those who tried to find support for *Roe* and *Casey* in other cases recognizing rights to personal decisions. The Solicitor General cited cases like *Loving v. Virginia*, *Griswold v. Connecticut,* and so on. (That officer also cited cases decided *after* the *Casey* decision. But we know that no case can rely on cases decided *in its future.* Justices of the Supreme Court are not time travelers.)

Alito points out this important difference. *Abortion destroys life.* "Miscegenation" does not destroy life. Contraception might stop life from starting, but does not destroy life. Abortion does.

Alito sets limits on *stare decisis*

At last Alito comes to the *stare decisis* doctrine. He doesn't throw it out the window. But he *does* point out that the Court has *already set limits* on it.

Time *does not* sanction an error of the Court in interpreting the Constitution. The history of the Court is *replete* with such errors – which the Court has corrected. Sadly, the one exception to this was *Scott v. Sandford*, that took a War Between the States to correct. But as to the rest: the Court made a clear mistake in *Plessy v. Ferguson* (1896), and would not correct that until 1954 (*Brown v. Topeka Board of Education*)! In so correcting, the Court set a record for how long it let a bad precedent stand before overruling it. For *fifty-eight years* that precedent stood. Against that, the Court would act more timely by reversing a forty-nine-year-old error.

Again, that's the record. Most reversals happen far more quickly, say in twelve or nine or even three years.

Five standards for overruling a precedent

Alito sets five grounds for overruling a bad precedent:

- Nature of the error,
- Quality (or lack of quality) of the reasoning behind it,
- Workability of the original rule,
- Effect on other areas of law, and
- Interests of various parties that rely on continuing the error.

By all such standards, *Roe* and *Casey* must fall. Alito's quarrel with *Roe* and *Casey* was that it took a question no Court could settle, out of the hands of legislatures and the people. Alito doesn't actually say that abortion kills a baby. Rather, he says the people cannot agree and the Court shouldn't try to settle that one way or another. The Court tried in *Roe* and *Casey*, and shouldn't have.

He also found the reasoning very weak, especially given the "viability" standard. *Viability* depends on best medical practice and research. It's gotten better all the time—in the hands of doctors having patients who desperately want to save young lives.

Which leads to his next objection. "Viability" and "undue burden" don't work. They don't work because *who's to say* whether an unborn child is viable or not, or whether a burden is due or undue?

He shows bad effects on other areas of law by citing case after case in which the Court has carved out exceptions to long-standing principles of jurisprudence.

About that reliance interest

A court creates a reliance interest when people must plan an act and know far in advance whether that act will still be legal. In nearly *every single case* involving abortion, people do *not* plan for it ahead of time. Furthermore, even the *Casey* opinion conceded that

> Reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

When might the Court upend someone's plans? Some women have said on social media that if *Roe* goes, "hookup culture" goes with it. Several have already said they will *no longer* have sex casually. When they express a fear of pregnancy, they concede that *no contraceptive method is foolproof.*

One woman said:

> Since about 75% of men only care about sex and money I hope they know that this roe v wade decision could destroy hook-up culture and leave them paying 18 years of child support.

Lay aside whether that statistic is accurate or not. *CNAV* holds that forcing *any* man to accept responsibility for the children he sires, in or out of wedlock, can only do good for civilization.

Must our society permit abortion to let women take equal part in American economic and social life? Alito defies any Court to answer that. *CNAV* answers: no. The question assumes that motherhood gives no value to society – obviously false. It also denies that men have any similar obligation to balance work and family life. And that is also false, for reasons beyond scope here.

Alito addresses the shaking of the faith in the Court

The *Casey* court said one other thing directly relevant to current events. They said that overruling *Roe* entirely would shake the public's faith in the Court. The Court, by this theory, must stick to what it has decided or leave people wondering whether it caved to public pressure.

Public pressure works both ways. *CNAV* will not deny the history of Marches for Life, because your editor took part in four of them. (See here, here, here, and here.) Never at any time did March organizers even *think* of demonstrating in front of the homes of Justices most likely to decide to uphold *Roe* and *Casey.* That's probably because everyone knew that's against federal law.

Justice Alito says the obvious: you do not let error stand permanently. The Court didn't let *Plessy v. Ferguson* stand, and no more than one or two people would have wanted *that*. So if anything, overruling *Roe* and *Casey*, far from *shaking* public faith in the Court, would *restore* it.

Last, Alito applies *rational-basis review* to the matter at hand: the Gestational Age Act in Mississippi. He identifies several bases for upholding this law:

1. Respect for and preservation of prenatal life,
2. Protecting the health and safety of the mother,
3. Eliminating a gruesome medical procedure (and preserving the integrity of the medical profession),
4. Relieving pain and suffering of the unborn child, and
5. Preventing discrimination.

The first four, by themselves, justify stopping abortion after fifteen weeks.

Conclusion

The draft opinion orders remanding the case to the Fifth Circuit, telling them to decide the case knowing that *Roe* and *Casey* no longer apply. Even Chief Justice Roberts would agree with that, though for reasons he has not yet made clear.

Sadly, someone has already tried to influence the Court. This case has paralyzed the Court as no other case has before this. As Alito points out, the Court tried to protect, and stand, on its prestige, and lost. Events have also vindicated Thomas Jefferson, who decried the idea that

> the Constitution is a mere thing of wax in the hands of the judiciary, which they may twist and shape in any form they please.

To which Alito now cries, "Enough!" Or in the language of his ancestors, "*Basta!*"

Then someone leaked his draft, after no other member of the Court wrote anything in reply for nearly three months. Now he and his family have had to leave their house and hide. Someone has poured contempt on the Court, and it's not Justice Alito, and it's not anyone on the pro-life side.

Again, the Supreme Court has an Opinion Day next Monday. We'll see whether they release an opinion in *Dobbs*. If the Court wants to preserve its dignity and integrity, it will stand on Alito's opinion. Furthermore, Alito will acknowledge and rebut Roberts' concurrence and three likely dissents, and the Court can move on.

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