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Three Observations about Justice Alito's draft opinion in Dobbs - commentary

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Comments

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COMMENTARY

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JOHN GREABE

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"Since 1971, the Supreme Court has recognized that the equal protection clause is presumptively violated by state laws that discriminate on grounds of sex or gender." (Al Drago | Getty Images)

There is much to say about Justice Samuel Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization*, which was leaked from the United States Supreme Court on May 2.

Obviously, the most significant direct consequence of the proposed decision, which overrules *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) while upholding the constitutionality of a Mississippi law that outlaws most abortions after 15 weeks of pregnancy, would be the restriction or elimination of abortion services throughout much of the nation. This will have all sorts of attendant consequences, large and smaller, many of which will be unforeseen.

Much has been written and said about this development, and there will be no shortage of additional commentary once the court's formalist, textualist/originalist majority, on whose behalf Justice Alito reportedly is writing, issues its ruling. (More on the constitutional views of the court's formalist, textualist/originalist majority here, where I contrast its approach with the pragmatic consequentialism of retiring Justice Stephen Breyer.)

I claim no great expertise on abortion but would like to share three observations, informed by my years working in the federal courts and teaching constitutional law, about aspects of the draft opinion that have made a strong impression on me.

1) The abrupt dismissal of equal protection concerns. *Roe* and *Casey* identified a qualified right to abortion as a "liberty" specially protected by the 14th Amendment's due process clause, which prohibits states from depriving any person of "life, liberty, or property, without due process of law." The draft opinion holds that *Roe* and *Casey* were egregiously wrong in so identifying the abortion right because it is not mentioned anywhere in the text of the Constitution, is not "deeply rooted in in this Nation's history and tradition," and is not "implicit in the concept of ordered liberty."

Even if one accepts this rationale for overruling *Roe* and *Casey*, one would like to think that the Supreme Court would not allow states to outlaw abortion without carefully considering whether the right might be specially protected by some other constitutional provision. And indeed, many constitutional law experts have for years argued that the abortion right is better understood as being protected by a different provision of the 14th Amendment – its equal protection clause, which prohibits the states from denying to any person within their jurisdiction "the equal protection of the laws."

Since 1971, the Supreme Court has recognized that the equal protection clause is presumptively violated by state laws that discriminate on grounds of sex or gender. Those who regard the abortion right as specially protected by the equal protection clause say that state laws prohibiting or significantly curtailing abortion violate the clause because, among other things, they are at least partially rooted in antiquated sex-role stereotypes, and because a woman's reproductive autonomy is central to her ability to participate equally in in the economic and social life of the nation. Case law supports these arguments, which have been presented in *Dobbs* through amici curiae ("friends of the court") briefs submitted by the United States Solicitor General's Office and distinguished equal protection constitutional law scholars.

And yet, the leaked *Dobbs* draft devotes less than a paragraph to its discussion of equal protection concerns. After noting that amici have raised the 14th Amendment's equal protection clause as "yet another potential home for the abortion right," the draft dismissively states:

"Neither *Roe* nor *Casey* saw fit to invoke [the equal protection] theory, and it is squarely foreclosed by our precedents, which establish that a State's regulation of abortion is not a sex-based classification and thus is not subject to the heightened scrutiny that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other. And, as the Court has stated, the goal of preventing abortion does not constitute invidious discriminatory animus against women. Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures." (Citations and internal quotation marks omitted.)

Of course, the draft's holding that Mississippi's highly restrictive abortion law does not violate the due process clause also is "squarely foreclosed" by the court's precedents – namely, *Roe*, *Casey*, and the many other decisions which have applied them. So, should we not at least receive an explanation why the equal protection precedents that the court cites should stand while its due process precedents must fall? Is not such an explanation particularly necessary if the court is going to take the unprecedented step of withdrawing constitutional protection for a right deemed critical by many millions of Americans? Let us hope that, as the court finalizes its opinion, it at the very least provides the American people with a better reasoned explanation of why a state's banning of abortion would not deprive women of equal protection under law.

2) The decommissioning of constitutional stare decisis. In *Casey*, the court famously relied on the doctrine of constitutional stare decisis – which establishes a presumption in favor of standing by prior constitutional decisions – to uphold the core ruling of *Roe*. Justices who hold a robust view of constitutional stare decisis argue that, if the court too frequently overrules controversial constitutional precedents, it will inevitably come to be seen less as a law court and more as just another forum where partisan politics play out. The *Casey* majority applied the four factors that typically inform stare decisis analysis and decided not to overrule *Roe* because (1) Roe's central rule remained workable, (2) women had come to rely on constitutional protection for reproductive and bodily autonomy in order to participate equally in the economic and social life of the nation, (3) the law's growth in the years since *Roe* was decided had not rendered its central rule a doctrinal anachronism, and (4) *Roe*'s underlying premises of fact had not been substantially undermined by passage of time.

The draft opinion rejects this approach to constitutional stare decisis in favor of a version that makes the overruling of constitutional precedent far more likely.

First, the draft opinion states that, in constitutional cases, stare decisis considerations are at their weakest because it is more important to interpret the Constitution correctly than to

prioritize the societal and institutional interests that stare decisis protects.

Second, the draft opinion says that the principal factors to consider in deciding whether to overrule a precedent are the strength and quality of its reasoning. And then, it judges the strength and quality of the precedent's reasoning against its own abstract, textualist/originalist formalism – an extreme approach to constitutional interpretation that is not deeply rooted in the court's historical practice. In other words, the more a precedent's reasoning departs from the formalist, textualist/originalist method that the majority says is the only legitimate way to interpret the Constitution, the weaker the argument is in favor of following the precedent on grounds of stare decisis.

Third, the draft opinion rejects as inappropriate to a constitutional stare decisis analysis the societal reliance interest – that is, women's general reliance on constitutional protection for reproductive and bodily autonomy so that they may participate equally in the economic and social life of the nation – that *Casey* relied heavily upon in reaffirming the core holding of *Roe*.

If the stare decisis analysis of the draft opinion accurately describes how the court is going to go about deciding whether to overrule constitutional precedents, there is reason for concern that the court also will withdraw constitutional protections for other rights – for example, the rights to same-sex marriage and to be free from criminal liability for private consensual homosexual activity – that were adopted in decisions that did not use the draft opinion's formalistic, textualist/originalist reasoning.

It therefore does not overstate things to say that Justice Alito's treatment of constitutional stare decisis, if agreed to by a court majority, could set the stage for a fundamental remaking of American constitutional law.

3) Statesmanship. Abraham Lincoln's second inaugural address, delivered shortly before the end of the Civil War, is celebrated as a masterpiece of leadership. Many who attended Lincoln's second inaugural anticipated that the speech, which was delivered at a time when Union forces were successfully wrapping up their southern campaigns, would provide occasion for celebration, and perhaps even a rhetorical victory lap by the nation's beleaguered commander in chief. Instead, Lincoln delivered a somber speech that laid the sin of slavery at the feet of all Americans, and called on all Americans to begin the difficult work of reunification and nation-building:

"With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan – to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations."

Our nation is once again deeply divided. And there are few issues on which we are more bitterly divided than abortion rights. One therefore might hope that a court majority, which apparently stands ready to deliver an unprecedented, right-withdrawing ruling, would make

some effort to signal to those who will be shattered by the ruling that it understands and acknowledges their very deep and serious concerns.

Justice Alito's draft opinion does not do this. It repeatedly uses extreme language – for example, "egregiously wrong" and "exceptionally weak" – to belittle the reasoning of the many justices who authored and joined the court's decisions in *Roe* and *Casey*. It does not even describe, let alone engage, the arguments of those who say that withdrawing from women constitutional protection for reproductive and bodily autonomy will inevitably lead to their renewed subjugation. It mocks the justices who authored the constitutional stare decisis section of the *Casey* opinion for being hubristic in thinking that they could call the nation together to forge a reasonable compromise. It borders on exuding malice toward those with whom it disagrees.

Let us hope that, when the opinion finally issues, the majority opinion makes some effort to demonstrate an awareness that the Supreme Court is the Supreme Court of the entire nation. Such a showing is especially urgent when the court addresses issues, like abortion, that bitterly divide us, and when it takes the unprecedented step of withdrawing recognition of a fundamental right.

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