POLITICO

EXCLUSIVE

Supreme Court has voted to overturn abortion rights, draft opinion shows

"We hold that Roe and Casey must be overruled," Justice Alito writes in an initial majority draft circulated inside the court.

Abortion rights supporters and anti-abortion demonstrators rally outside the U.S. Supreme Court on Nov. 1, 2021. | Drew Angerer/Getty Images

By **JOSH GERSTEIN** and **ALEXANDER WARD**
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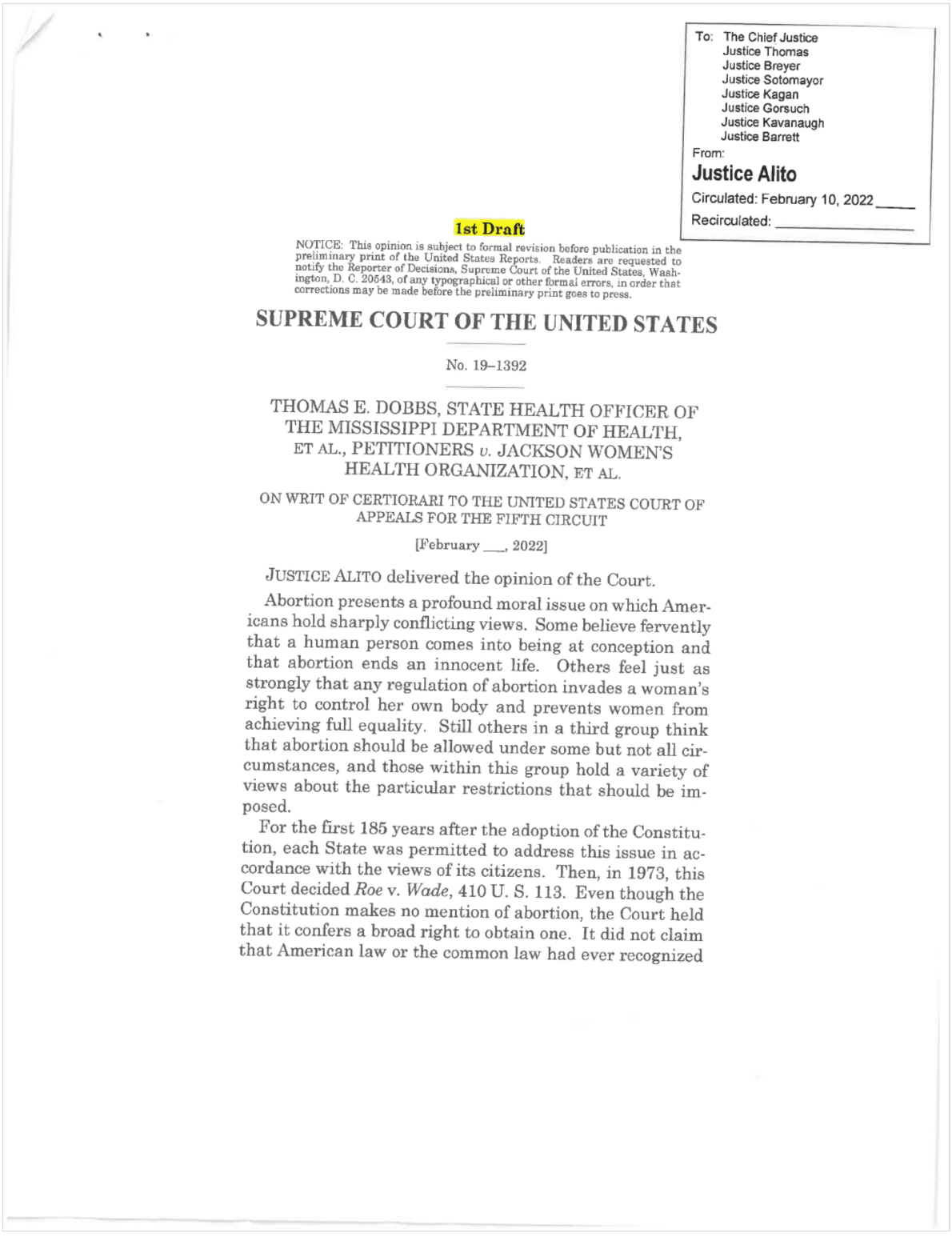
The Supreme Court has voted to strike down the landmark *Roe v. Wade* decision, according to an initial draft majority opinion written by Justice Samuel Alito circulated inside the court and obtained by POLITICO.

The draft opinion is a full-throated, unflinching repudiation of the 1973 decision which guaranteed federal constitutional protections of abortion rights and a subsequent 1992 decision — *Planned Parenthood v. Casey* — that largely maintained the right. "*Roe* was egregiously wrong from the start," Alito writes.

"We hold that *Roe* and *Casey* must be overruled," he writes in the document, labeled as the "Opinion of the Court." "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."



To: The Chief Justice
Justice Thomas
Justice Breyer
Justice Sotomayor
Justice Kagan
Justice Gorsuch
Justice Kavanaugh
Justice Barrett
From:
Justice Alito
Circulated: February 10, 2022
Recirculated: _____

1st Draft

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 19–1392

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS *v.* JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February ___, 2022]

JUSTICE ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe* v. *Wade*, 410 U. S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized

Deliberations on controversial cases have in the past been fluid. Justices can and sometimes do change their votes as draft opinions circulate and major

decisions can be subject to multiple drafts and vote-trading, sometimes until just days before a decision is unveiled. The court's holding will not be final until it is published, likely in the next two months.

The immediate impact of the ruling as drafted in February would be to end a half-century guarantee of federal constitutional protection of abortion rights and allow each state to decide whether to restrict or ban abortion. It's unclear if there have been subsequent changes to the draft.

No draft decision in the modern history of the court has been disclosed publicly while a case was still pending. The unprecedented revelation is bound to intensify the debate over what was already the most controversial case on the docket this term.

"*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division."

—Justice Samuel Alito in an initial draft majority opinion

A person familiar with the court's deliberations said that four of the other Republican-appointed justices — Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett — had voted with Alito in the conference held among the justices after hearing oral arguments in December, and that line-up remains unchanged as of this week.

The three Democratic-appointed justices — Stephen Breyer, Sonia Sotomayor and Elena Kagan — are working on one or more dissents, according to the person. How Chief Justice John Roberts will ultimately vote, and whether he will join an already written opinion or draft his own, is unclear.

The document, labeled as a first draft of the majority opinion, includes a notation that it was circulated among the justices on Feb. 10. If the Alito draft is adopted, it would rule in favor of Mississippi in the closely watched case over that state's attempt to ban most abortions after 15 weeks of pregnancy.

On Tuesday, after this article was published, Roberts confirmed the authenticity of the draft opinion and said he was ordering an investigation into the disclosure.

"To the extent this betrayal of the confidences of the Court was intended to undermine the integrity of our operations, it will not succeed. The work of the Court will not be affected in any way," Roberts pledged in a written statement. "This was a singular and egregious breach of that trust that is an affront to the Court and the community of public servants who work here."

Roberts also stressed that the draft opinion "does not represent a decision by the Court or the final position of any member on the issues in the case." The court spokesperson had declined comment pre-publication.

SUPREME COURT

10 key passages from Alito's draft opinion, which would overturn Roe v. Wade

BY JOSH GERSTEIN

POLITICO received a copy of the draft opinion from a person familiar with the court's proceedings in the Mississippi case along with other details supporting the authenticity of the document. The draft opinion runs 98 pages, including a 31-page appendix of historical state abortion laws. The document is replete with citations to previous court decisions, books and other authorities, and

includes 118 footnotes. The appearances and timing of this draft are consistent

The disclosure of Alito's draft majority opinion — a rare breach of Supreme Court secrecy and tradition around its deliberations — comes as all sides in the abortion debate are girding for the ruling. Speculation about the looming decision has been intense since the December oral arguments indicated a majority was inclined to support the Mississippi law.

Under long-standing court procedures, justices hold preliminary votes on cases shortly after argument and assign a member of the majority to write a draft of the court's opinion. The draft is often amended in consultation with other justices, and in some cases the justices change their votes altogether, creating the possibility that the current alignment on *Dobbs v. Jackson Women's Health Organization* could change.

The chief justice typically assigns majority opinions when he is in the majority. When he is not, that decision is typically made by the most senior justice in the majority.

'Exceptionally weak'

A George W. Bush appointee who joined the court in 2006, Alito argues that the 1973 abortion rights ruling was an ill-conceived and deeply flawed decision that invented a right mentioned nowhere in the Constitution and unwisely

sought to wrench the contentious issue away from the political branches of government.

Alito's draft ruling would overturn a decision by the New Orleans-based 5th Circuit Court of Appeals that found the Mississippi law ran afoul of Supreme Court precedent by seeking to effectively ban abortions before viability.

Roe's "survey of history ranged from the constitutionally irrelevant to the plainly incorrect," Alito continues, adding that its reasoning was "exceptionally

"The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions," Alito writes.

Alito approvingly quotes a broad range of critics of the *Roe* decision. He also points to liberal icons such as the late Justice Ruth Bader Ginsburg and Harvard Law Professor Laurence Tribe, who at certain points in their careers took issue with the reasoning in *Roe* or its impact on the political process.

Alito's skewering of *Roe* and the endorsement of at least four other justices for that unsparing critique is also a measure of the court's rightward turn in recent decades. *Roe* was decided 7-2 in 1973, with five Republican appointees joining two justices nominated by Democratic presidents.

The overturning of *Roe* would almost immediately lead to stricter limits on abortion access in large swaths of the South and Midwest, with about half of

the states set to immediately impose broad abortion bans. Any state could still legally allow the procedure.

SUPREME COURT

Read Justice Alito's initial draft abortion opinion which would overturn Roe v. Wade

BY POLITICO STAFF

"The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion," the draft concludes. "*Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."

The draft contains the type of caustic rhetorical flourishes Alito is known for and that has caused Roberts, his fellow Bush appointee, some discomfort in the

At times, Alito's draft opinion takes an almost mocking tone as it skewers the majority opinion in *Roe,* written by Justice Harry Blackmun, a Richard Nixon appointee who died in 1999.

"*Roe* expressed the 'feel[ing]' that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance," Alito writes.

Alito declares that one of the central tenets of *Roe*, the "viability" distinction between fetuses not capable of living outside the womb and those which can, "makes no sense."

SUPREME COURT

How rare is a Supreme Court breach? Very rare

BY JOSH GERSTEIN

In several passages, he describes doctors and nurses who terminate pregnancies as "abortionists."

When Roberts voted with liberal jurists in 2020 to block a Louisiana law imposing heavier regulations on abortion clinics, his solo concurrence used the more neutral term "abortion providers." In contrast, Justice Clarence Thomas used the word "abortionist" 25 times in a solo dissent in the same case.

Alito's use of the phrase "egregiously wrong" to describe *Roe* echoes language Mississippi Solicitor General Scott Stewart used in December in defending his state's ban on abortions after 15 weeks of pregnancy. The phrase was also contained in an opinion Kavanaugh wrote as part of a 2020 ruling that jury convictions in criminal cases must be unanimous.

In that opinion, Kavanaugh labeled two well-known Supreme Court decisions "egregiously wrong when decided": the 1944 ruling upholding the detention of Japanese Americans during World War II, *Korematsu v. United States*, and the 1896 decision that blessed racial segregation under the rubric of "separate but equal," *Plessy v. Ferguson*.

The high court has never formally overturned *Korematsu*, but did repudiate the decision in a 2018 ruling by Roberts that upheld then-President Donald Trump's travel ban policy.

The legacy of Plessy v. Ferguson

Plessy remained the law of the land for nearly six decades until the court overturned it with the *Brown v. Board of Education* school desegregation ruling in 1954.

Alito's draft opinion includes, in small type, a list of about two pages' worth of decisions in which the justices overruled prior precedents — in many instances reaching results praised by liberals.

The implication that allowing states to outlaw abortion is on par with ending legal racial segregation has been hotly disputed. But the comparison underscores the conservative justices' belief that *Roe* is so flawed that the justices should disregard their usual hesitations about overturning precedent and wholeheartedly renounce it.

Alito's draft opinion ventures even further into this racially sensitive territory by observing in a footnote that some early proponents of abortion rights also had unsavory views in favor of eugenics.

"Some such supporters have been motivated by a desire to suppress the size of the African American population," Alito writes. "It is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are black."

Alito writes that by raising the point he isn't casting aspersions on anyone. "For our part, we do not question the motives of either those who have supported

and those who have opposed laws restricting abortion," he writes.

Alito also addresses concern about the impact the decision could have on public discourse. "We cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work," Alito writes. "We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision."

In the main opinion in the 1992 *Casey* decision, Justices Sandra Day O'Connor, Anthony Kennedy and David Souter warned that the court would pay a "terrible price" for overruling *Roe*, despite criticism of the decision from some in the public and the legal community.

"While it has engendered disapproval, it has not been unworkable," the three justices wrote then. "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant."

When *Dobbs* was argued in December, Roberts seemed out of sync with the other conservative justices, as he has been in a number of cases including one challenging the Affordable Care Act.

At the argument session last fall, Roberts seemed to be searching for a way to uphold Mississippi's 15-week ban without completely abandoning the *Roe* framework.

"Viability, it seems to me, doesn't have anything to do with choice. But, if it really is an issue about choice, why is 15 weeks not enough time?" Roberts asked during the arguments. "The thing that is at issue before us today is 15 weeks."

Nods to conservative colleagues

While Alito's draft opinion doesn't cater much to Roberts' views, portions of it seem intended to address the specific interests of other justices. One passage argues that social attitudes toward out-of-wedlock pregnancies "have changed drastically" since the 1970s and that increased demand for adoption makes abortion less necessary.

Those points dovetail with issues that Barrett — a Trump appointee and the court's newest member — raised at the December arguments. She suggested laws allowing people to surrender newborn babies on a no-questions-asked basis mean carrying a pregnancy to term doesn't oblige one to engage in child rearing.

"Why don't the safe haven laws take care of that problem?" asked Barrett, who adopted two of her seven children.

Much of Alito's draft is devoted to arguing that widespread criminalization of abortion during the 19th and early 20th century belies the notion that a right to abortion is implied in the Constitution.

The conservative justice attached to his draft a 31-page appendix listing laws passed to criminalize abortion during that period. Alito claims "an unbroken tradition of prohibiting abortion on pain of criminal punishment…from the earliest days of the common law until 1973."

"Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. Zero. None. No state constitutional provision had recognized such a right," Alito adds.

Alito's draft argues that rights protected by the Constitution but not explicitly mentioned in it — so-called unenumerated rights — must be strongly rooted in U.S. history and tradition. That form of analysis seems at odds with several of the court's recent decisions, including many of its rulings backing gay rights.

"We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision…."

—Justice Samuel Alito in an initial draft majority opinion

Liberal justices seem likely to take issue with Alito's assertion in the draft opinion that overturning *Roe* would not jeopardize other rights the courts have grounded in privacy, such as the right to contraception, to engage in private consensual sexual activity and to marry someone of the same sex.

"We emphasize that our decision concerns the constitutional right to abortion and no other right," Alito writes. "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

Alito's draft opinion rejects the idea that abortion bans reflect the subjugation of women in American society. "Women are not without electoral or political power," he writes. "The percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so."

The Supreme Court remains one of Washington's most secretive institutions, priding itself on protecting the confidentiality of its internal deliberations.

"At the Supreme Court, those who know don't talk, and those who talk don't know," Ginsburg was fond of saying.

That tight-lipped reputation has eroded somewhat in recent decades due to a series of books by law clerks, law professors and investigative journalists. Some of these authors clearly had access to draft opinions such as the one obtained by POLITICO, but their books emerged well after the cases in question were resolved.

The justices held their final arguments of the current term on Wednesday. The court has set a series of sessions over the next two months to release rulings in its still-unresolved cases, including the Mississippi abortion case.

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