Alito’s Challenge to Libertarians

In his recently leaked first draft of an opinion that would reverse the abortion-rights cases *Roe v. Wade* and *Casey v. Planned Parenthood*, Supreme Court Justice Samuel Alito gives Americans a choice between judges who read their personal preferences into the Constitution and judges who recognize *only* rights that they find “rooted in [our] history and tradition” and deem “essential to our Nation’s ‘scheme of ordered Liberty.’”

Is that it? Neither choice seems an adequate safeguard for individual freedom.

Whether one likes the result or not, Alito’s draft in *Dobbs v. Jackson Women’s Health Organization* raises important issues apart from abortion. Indeed, he unintendedly draws attention to whether the Constitution can be relied on to protect liberty. Unsurprisingly, Alito is not concerned with rights as a philosophical matter. That’s not his job. Rather, he’s concerned only with *constitutional rights* — liberties that satisfy criteria making them worthy of protection by the government. By that standard, an otherwise perfectly defensible right might not qualify. That would be left to the legislative process. That’s the constitutional game. The framers understood this, though some libertarians do not.

The Constitution may seem to clearly endorse a general notion of liberty in the 14th Amendment’s due process clause, but does it really? Alito, like other conservatives, thinks not:

> Historical inquiries … are essential whenever we are asked to recognize a new component of the “liberty” protected by the Due Process Clause because the term “liberty” alone provides little guidance. “Liberty” is a capacious term. As Lincoln once said: “We all declare for Liberty; but in using the same word we do not all mean the same thing” In a well-known essay, Isaiah Berlin reported that “[h]istorians of ideas” had catalogued more than 200 different senses in which the terms had been used.
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> In interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution.

So, Alito writes elsewhere in his opinion, “[G]uided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term ‘liberty’ when the issue involves putative rights not named in the Constitution” — such as a woman’s putative right terminate a pregnancy.

Note that Alito uses the term *ordered liberty*. That’s a concept in the case law, apparently

first enunciated in 1937, that "sets limits and defines the boundary between competing interests." Why must the term *liberty* be so qualified? Because, he writes, "attempts to justify abortion [and other things –SR] through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history."

If that counts as "proving too much," libertarians would say let's do it.

Alito hastens to add that other court-protected rights that are *not* deeply rooted in history — such as the rights to contraception, interracial marriage, and same-sex marriage — are not jeopardized by his opinion because abortion is unique. How confident can others be about that?

Putting on his historian's hat, Alito accuses the majority in *Roe* of misstating history and writes that abortion even at an early stage was never regarded as a right in Anglo-American common or statutory law and was generally illegal throughout the United States. Not everyone agrees with Alito's historical account.

Alito asserts that when justices ignored history, they engaged in "the freewheeling judicial policymaking that characterized discredited decisions such as Lochner v. New York." That was the highly influential 1905 case in which the Court struck down a state law limiting the hours that bakers could work per day and per week because the law violated freedom of contract under the 14th Amendment. Progressives hated the ruling from the start, but some conservatives later came to hate it too because it relied on the concept of *substantive due process*, by which judges could invent rights that conservatives abhorred. Libertarians also ought to have apprehensions about substantive due process. Such seemingly benign legal notions, including "unenumerated rights," are double-edged swords.

The juridical problem in distinguishing putative rights that are constitutionally protected from those that are not is that no constitution could name more than a few rights. Where does that leave all the rights left out? (We could say there is only one right, namely, the right not to be subjected to aggression, and that anything more specific rights are examples of the principle. But that would incite a never-ending controversy over what constitutes aggression.)

The Ninth Amendment, which says that rights not mentioned were still retained by the people, seemed to be the solution to the problem. That amendment has not played an important role in constitutional law to the frustration of libertarians, but danger lies in that amendment if it were to be taken seriously. The danger is that pseudo-rights could be embraced by Supreme Court justices. Rights theory is like a butterfly. You may lovingly

nurture the egg, larva, and pupa, but once the butterfly emerges from the cocoon, it will fly where it likes or be blown about by the wind, logic or no logic. (It's been pointed out that the Bill of Rights has turned out to be a tragic distraction. Instead of the government having the burden of justifying any power it wishes to exercise, the people have had to justify any claimed right by finding supporting text in the Bill of Rights. Maybe we'd have been better off without it.)

It's tempting for each of us to think that our own theory of rights or liberty just happens to be the one that perfectly aligns with the intent of the framers or with the common understanding of the constitutional text in 1789. But how likely is that? The framers didn't agree philosophically on everything and people often understand words and sentences differently among themselves. In other words, originalism isn't a neat solution.

As noted, Alito's alternative to judges who impose their personal views about liberty is judges who stick exclusively to rights deeply rooted in the country's history and tradition. But this is also unsatisfying because it imprisons us in the thinking of long-dead individuals whose understanding of liberty might have been incomplete. Why assume that the framers understood every implication of the nature of freedom? As Thomas Paine wrote in *The Rights of Man*:

> There never did, there never will, and there never can, exist a Parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the "end of time," or of commanding for ever how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do, nor the power to execute, are in themselves null and void…. It is the living, and not the dead, that are to be accommodated.

It's true that constitutions can be amended and the framers' shortcomings addressed, but that process is always costly and difficult. In the meantime, people suffer from the deprivation of their liberty.

Alito's choice between the alternatives is clear, but the Constitution contains no guide to interpretation. Even if it did, how would that help? Any guide to interpretation would itself be open to interpretation. We'd end up with an infinite series of guides.

So where does that leave us? Apparently with two choices: an un-elected national super-legislature free to invent rights or a federal court guided by an emaciated, tradition-bound notion of liberty and unchained state legislatures free to grant (revocable) "rights" by majority vote. Neither seems ideal, but the ideal seems not to be on the menu today. I recorded my thoughts on perhaps the short-term second-best solution in "Disagreement

without Conflict.”

(See my book *America’s Counter-Revolution: The Constitution Revisited*.)