

John McGinnis
What Happens Next – 05.29.2022

Larry Bernstein:

John, what are the implications that someone leaked a draft of Justice Alito's opinion. This is the most important Supreme Court case in a generation, are you surprised that a clerk leaked it to Politico?

John McGinnis:

The leak is really very dangerous to the court. It's the coin of the realm in the Supreme Court is after an opinion is drafted to deliberate them. It's not only about the Supreme Court, but it really should make us reflect on the danger to a Republic of the loss of these institutional norms.

Larry Bernstein:

Leaks are new to the Supreme Court but not to the other branches of government. Let's use the Pentagon Papers as an example. Daniel Ellsberg revealed military secrets that were published by the New York Times. These confidential reports were published despite Secretary of State Henry Kissinger's request not to do so because they were state secrets. There were concerns about precedent and violations of institutional norms, especially in wartime, yet the republic survived.

Every modern president complains about leaks at the executive branch; however, leaks continue every day and it is the bread and butter of the DC press. The public seems to want the fifth estate to get access to government secrets as a way to keep the government honest and prevent abuse.

John McGinnis:

One difference between the court and these other leaks. The court isn't trying to follow what the public wants but what the constitution says. The entire work product of the Supreme Court depends on candid back and forth between the justices.

I think leaks are, while perhaps regrettable in certain national security situations, really cannot be analogized to those at the Supreme Court. And one evidence of that is we've never seen an opinion leaked before in the history of the Supreme Court.

Larry Bernstein:

When norms are broken, new norms of behavior are adopted. If clerks are not to be trusted on big constitutional cases, then the justices will have to write their own opinions on these matters and use the clerks exclusively for the more mundane cases.

John McGinnis:

That still would be harmful. There's some reason that we have clerks. Judges will make more mistakes unless there are more eyes on the opinion. So, there are costs of that, but you're right. The tradeoff will be that we'll at least do these things more secretly.

Clerks don't have all that much influence on the decisions but have input into the drafting. The Supreme Court decision has a lot of effect on the law because it's at the top of a huge judicial hierarchy.

I think the loss of trust in clerks is a real cost. You might see a bifurcated reaction, which I also don't think would be good, which is, you might think even today there's really are two Supreme Courts. There's the Supreme Court that does the ordinary work through the ERISA cases, the bankruptcy cases, the cases that never get to the front page, they'll let clerks work on that. And the other cases that are on the front page, the justice are going to keep it to themselves. Nevertheless, that's still costly because the work-product is improved by clerks.

Justice Kagan said that at conferences the cases that they discussed most were these technical bankruptcy and jurisdictional cases.

That's not surprising. That's actually where they might change other people's minds. They're all these technical matters that they just want to get right, whereas she said there was very little discussion in the cases that make the front page. There are these two courts, there's a technical legal court, and there's another court operating like a House of Lords, there just giving its views.

Larry Bernstein:

A number of our listeners are aware that the Dobbs opinion overrules Roe vs. Wade but they have not read the opinion in close detail. What is your evaluation of the leaked Alito opinion as a legal matter?

John McGinnis:

I think it's a sound opinion for a judge. It's not academic. He doesn't write a treatise on the original meaning of the constitution. Roe versus Wade, even liberal law professors at the time said it was a weak opinion, according to John Hart Ely that it didn't resemble constitutional law. It's been defended on almost every amendment. From the First, the Fourth to the 14th Amendment's substantive due process, privileges and immunities. Justice Alito goes through each of these arguments, not at the law review lengths, but I think very cogently and shows why a right to abortion cannot be contained in any of these provisions of the constitution.

I think it's sort of obvious why it's not a First and Fourth Amendment, but he takes on seriously this substantive due process argument. Now some originalists would say substantive due process itself is a mistake. He doesn't attack that because there's a lot of precedent on substantive due process. And no Supreme Court justice is going to throw out all sorts of precedent, but he actually does suggest, even if you look at this in with the provision that probably does speak to fundamental rights, which is the privilege and immunities clause of the

14th Amendment. That clause has been best understood protecting rights that are deeply rooted in the American tradition.

Abortion has not been deeply rooted in the American tradition. It is not a deeply rooted right from the time of the 14th Amendment or even right up to *Roe versus Wade* declared that it was a fundamental right. So, I think it's a very sensible opinion. It's a lawyer like opinion that still reflects the idea that we need to locate any right in the text of the constitution, or at least in a very longstanding structure of precedence. His arguments are very straightforward, they're arguments that have been made against *Roe* for a very long time, and they're very cogently made.

Larry Bernstein:

Alito spends a lot of time in his *Dobbs* opinion on the issue of *stare decisis*. *Stare decisis* is when the Supreme Court accepts a previous court decision in future cases even if the court thinks the previous case was made in error. Can you explain Alito's decision-making process for overturning *Roe*?

John McGinnis:

The most important factor in *stare decisis* is the quality of the reasoning of the case that's to be overruled. If the case is pretty close to being right, even if we would critique it in some ways, it's good enough for government work. (laughs).

But we cannot have cases that are completely contrary to the meaning and methodology of the constitution. And I think he's absolutely right about that. Otherwise, the court is going to be building on erroneous reasoning and creating an edifice that's completely different from the constitution. So given that the constitution is difficult to amend, there's always a danger that one precedent is going to build on another. And if one precedent is built on completely faulty reasoning, a precedent that is as important as *Roe versus Wade*, it's a danger because it set the court off on a totally wrong direction.

Justice Alito points out, that's been true of other cases, in *Plessy versus Ferguson*, a case that permitted, separate but equal, got the court on a completely false direction that was overruled. *Lochner*, a case that found a fundamental right to contracts. I think an argument that's stronger than *Roe*, an argument I think is still wrong. The court overruled that. They overruled those cases because the quality of the reasoning was weak and moved the court in a direction that was contrary to basic tenants of the constitution. The basic tenant being that people in the states have the right to make the law unless there is a provision of the constitution that clearly deprives them of that.

One other point is that people are saying overruling *Roe* was the first time the court has taken a right away. This is false. In *Lochner*, they gave the right to people which is a right to work however long unless the government could come up with a very persuasive justification. That's an important individual right and the court overruled that. And the court in a case called *Smith*

overruled free exercise saying that even neutral laws that the government passed, you have a free exercise right against them.

So, if you were fired because you wouldn't work on Saturday, you could add a free exercise right to say, I should get employment insurance, even though the neutral rules said for personal reasons you wouldn't get it. They overruled that in Smith. Cases that grant individual rights can be overruled.

Larry Bernstein:

Alito quotes Archibald Cox who was formerly JFK's US Solicitor General. Cox complains that Roe reads like a congressional statute and not like a court opinion.

John McGinnis:

Absolutely. Cox puts his finger on one of the problems. It's very odd to think that the constitution has this detailed trimester regulation scheme in it. It's quite bizarre. This is very hard for people to understand is not about abortion, it's about policing the judiciary and the difference between law and policy. Maybe the trimester scheme is great as a matter of policy. Maybe it's the scheme we should have, but there's nothing in the constitution that suggests that is the competence in the court.

And that's the concern about Roe, to demarcate the area between law and policy. And that's the reason that it's so important for Roe to be overruled. Just as it was important for *Lochner* to be overruled. This case that said bakers couldn't work for more than 10 hours. So long as you agree that legislatures can make health and safety regulations. That's not a decision that judges have a kind of comparative advantage in making.

And one way of thinking about our constitution is we try to get decisions where judges have a comparative advantage, which are dictated by the rules and meaning of the constitution. And then we have discretionary decisions, we leave those to the legislature. And Roe violated that basic premise. And that's the reason it needs to be overruled.

Larry Bernstein:

I was confused by one of Alito's arguments. He mentions that after most of the major constitutional cases there is often a swift change in public opinion that supports the court's decision. I assume Alito was referencing the *Brown* decision overturning *Plessey vs. Ferguson*, or establishing the right for gays to marry. Public opinion for the right to abortion was evenly split in 1973 when Roe was written and is about the same today. Why is it relevant whether a Supreme Court decision changes public opinion?

John McGinnis:

This goes to the question of *stare decisis*. Because if indeed Roe had captured a change in society, now everyone thought abortion should be free, easy, accessible, and everyone thought that even if Roe is as bad a decision on its reasoning, it still perhaps should not be overruled.

Larry Bernstein:

Laurence Tribe and Mark Tushnet who are both liberal Harvard constitutional law professors condemned Roe as poorly reasoned years ago. And very recently Akhil Amar who is a liberal Yale constitutional law professor wrote an Op-Ed in the Wall Street Journal agreeing with Alito. Why isn't the liberal academy screaming bloody murder.

John McGinnis:

Oh, you're not in the legal academy, you don't see the hundreds who come out arguing that's a terrible decision. Indeed, Laurence Tribe thinks it's a terrible decision now. The left didn't defend Roe, they just argued it should be accepted as stare decisis. Stare decisis is a weak argument, we should accept it because it exists.

Larry Bernstein:

What are the best arguments made by the academy that oppose Alito's Dobbs decision? And will these attacks influence Alito's final decision, the dissents, or the concurring opinions?

John McGinnis:

You made an interesting point; I don't think it will change Alito's opinion much. It may change if they make their way into the dissent, he'll respond to those.

The most interesting argument is that this violates the equal protection clause, because it treats women particularly badly. There's an obvious problem with that argument, which is men can't have an abortion. And there's some Supreme Court president that says, "you can apply equal protection in those cases." And that's what Alito says.

Somehow people have tried to build on this, "Well, but the motivations here are clearly anti-women. And, that's the reason that we have these abortions. That they're trying to keep women in the home." I don't think they're very good arguments because women and men feel the same about abortion. There's a question of the life of the fetus and that's an important consideration.

We had laws of conscription that forced men to fight. And that was a real cost to men because you could get killed if you were a man.

My prediction is we'll see more discussion of equal protection, equality arguments. The basic difference in the public's mind and why the public has changed about same-sex marriage and abortion is people can debate about whether there's a harm. When is this fetus alive? It's much harder to make the harm argument about same-sex marriage. And that's why I think these arguments about fundamental rights are very difficult to make for abortion, because you don't have fundamental rights to do things that may be harmful. That seems open to discussion and maybe should be a legislative decision.

Larry Bernstein:

Ruth Bader Ginsburg said that her opinions were improved by the quality of the drafts of Scalia's dissents. Do you think that in this process, the liberal dissent on Dobbs will influence Alito's redraft that will improve the quality of his final opinion?

John McGinnis:

To some extent. I think it's already a pretty good opinion as I've suggested. I think we'll see some equality arguments from the dissents that will force him to take those arguments seriously.

The opinion will be improved by some of the other members of the majority who will refine some arguments he's made.

Larry Bernstein:

In Brown, Earl Warren recognized that this was going to be an enormous decision and he went to the justices and really insisted that it be a 9-0 and justices who were on the fence caved as Warren appealed to their loyalty to the institution and the expectation of attacks on the court. Do you think in this case that you may see something similar?

Do you think Roberts who is offended by the leak will change his decision and is it possible that one of the liberal justices might change their decision?

John McGinnis:

Roberts may think of that as part of his calculus. On the other hand, in the oral argument he publicly staked out a position which was let's uphold this law without overruling Roe and he may fear that he doesn't want to seem to change it under pressure.

There's a possibility that he will join in at least a good deal of Alito's opinion. That's my suspicion, but I've got a low degree of confidence. I have a high degree of confidence that none of the other justices are going to join Alito's opinion. It's not their way of doing constitutional law.

Justice Sotomayor has been drifting very sharply to the left and her comments at oral argument suggest that she wants to write a barn burning dissent. The interesting question is whether Kagan and Breyer will join any dissent of Sotomayor. My suspicion here, with a low degree of confidence is they will not do so that she will go off on some equal protection argument and denounce the patriarchy.

Breyer and Kagan will be much more measured. Kagan is trying to stake out a position that she's the stare decisis judge, stay with Supreme Court decisions that have been decided.

Larry Bernstein:

Do you think that Roe has politicized the Supreme Court confirmation process? And now that the issue is off the table that will that reduce the importance of judge selection as the court returns to deciding boring ERISA and bankruptcy cases.

John McGinnis:

It will help insofar as people think that overruling Roe is entrenched and it's not coming back again. I think more of the movement is going to be political which will help the court. It's going to be in state legislatures and in the congress to enshrine certain abortion rights. I do think that that will help. It obviously is not going to change things completely because there are other hot button issues for the court.

Next term we'll see the affirmative action cases. If originalism were accepted by both parties as this methodology like the ERISA cases, we will we get tempering of the divisions on the Supreme Court. And I don't expect that anytime soon because we've noticed at least in Congress for the first time in Justice Barrett's confirmation hearing, Senators coming out against originalism, against interpreting the constitution according to its original meaning, saying things like, "That's racist. That's homophobic." I'm quoting Senator Markey of Massachusetts.

We're getting a division over judicial methodology. It may depend on political events that we cannot foretell. It depends on who's going to be doing the appointing of the judges. I don't think there's any particular decision that's likely to rouse as many passions as Roe vs. Wade on the horizon.

Larry Bernstein:

Do you think the opposition to originalism was related to the fear of overturning Roe and now that is off the table, will originalism be less attacked?

John McGinnis:

Originalism is never going to be embraced by progressives. There is a conservative valence to it, slowing down the pace of change by forcing congress to legislate and not allowing discretion of presidents through bureaucracies to make dramatic social change. That's not the constitution of 1789, even as amended in 1868. And that will become the nub of the progressives' objections, even after abortion is taken off the table.

Larry Bernstein:

Do you think that the Supreme Court will ever consider overturning Dobbs?

John McGinnis:

To change the abortion decision, they really need to change the personnel in the court quite dramatically and to have a political movement that's able to do that, they'll broaden it through congress, even before the court gets to it. I think we're going to see the state legislatures and ultimately the federal legislatures when there's the next Democratic wave.

When the Democrats had 60 votes in the senate with Obama, they could have codified Roe versus Wade, and they didn't. Next time, if they get 60 votes in the senate, I'm pretty confident they'll be doing that.

Larry Bernstein:

Red, blue and purple state legislatures will pass very different abortion bills. How will these laws affect people residing in different states?

John McGinnis:

The red states and the blue states will figure out ways of coming into conflict with one another. My prediction is the blue states are going to say, "Not only can people have an abortion whenever they want, but we'll pay for other people's abortions. Come to our state." And some of the red states will say, "Well, if you're a citizen of our state, you can't go to another state to get an abortion." Can a red state forbid its citizens from going getting an abortion in another state? There's some Supreme Court precedence that suggests there are some authorities the states have over their citizens when they go to other states.

The legislation is political messaging, particularly on the right because for a while, their legislation wouldn't actually take effect because of Roe. Now, they'll have to be accountable for the legislation and we'll see some moderation that would be my prediction.

Larry Bernstein:

I end each episode on a note of optimism. John, what are you optimistic about as it relates to Dobbs?

John McGinnis:

I am optimistic that this will temper the Supreme Court confirmation wars because it will get the court out of the abortion regulation business and deflect that attention into state legislatures where these difficult policy issues should be decided. It's healthy for the court and it creates a demarcation between the business of making policy and the business of making law. And that that goes far beyond the question of abortion.