

Conflict over dismantling US abortion rights poses a political challenge

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it, Justice Samuel Alito stresses that abortion rights appear nowhere in the text of the Constitution – and that at the time the 14th Amendment was being drafted, abortion was being criminalised. The authors of the Constitution, he reasons, could hardly have believed that abortion was a fundamental right.

This draft opinion attracted criticism both because of contested historical narrative – and because of its far-reaching implications. This method of identifying constitutional rights – based only on history and tradition – has sometimes given way to other interpretive approaches by the court. And despite Alito's halfhearted attempt to say otherwise, a court that looks only at what rights meant in the mid-19th century would have no reason to stop with abortion. At the time, lawmakers were criminalising contraception, same-sex intimacy and much more.

Even if the court does stress that abortion is different because of its effect on foetal life, its approach could mean that the issue doesn't stay with the states for long. Anti-abortion groups are ready to ask the court's conservative majority to

declare that abortion is unconstitutional everywhere because of its effects on life in the womb.

Perhaps most strikingly, the draft echoes arguments long made by the US pro-life movement. Alito attacks *Roe vs Wade* for deepening the national divide on abortion and distorting much of US abortion jurisprudence. He dismisses the argument, favoured by the late Ruth

A clear majority in polls favour keeping *Roe*. Progressives have to turn this into a voting majority

Bader Ginsburg and others, that abortion bans constitute discrimination on the basis of sex on the grounds that the court, in past precedent, has already rejected that claim. That the court has rejected the very arguments against *Roe* more than once does not matter to Alito, nor does the likely public outcry that a decision like this would produce. This is the work of a judge who does not care

about the consequences of his decision, for the country or the institution he serves – a decision tailor-made for talking points in conservative media.

Supporters of abortion rights may feel helpless given the now near certainty that the court will reverse *Roe* in less than two months' time. And yet such a decision will hardly end conflict over abortion in the United States. After years of being outcompeted, abortion-rights groups have changed focus. State constitutional litigation in places like Michigan may prevent some criminal abortion laws from going into effect. And shutting down access to abortion in the post-*Roe* United States will not be easy. People will order pills on the internet or simply drive out of state. Some progressive states such as Oregon, Connecticut and California have begun to take steps to make these journeys easier – creating funding for those without resources to pay for travel or shielding medical professionals from civil and criminal liability in conservative states. More blue states will probably adopt this model in the months to come.

Progressives have a political opportu-

nity to use the undoing of *Roe* to galvanise Americans who do not want to see abortion criminalised. Public opinion on abortion in the United States is messy, with many endorsing some restrictions, but a clear majority favour keeping *Roe* and swearing off criminalisation. The task for progressives is to turn this polling majority into a voting majority – and to convince people that abortion should be one of the key issues to consider when they go to the polls in the upcoming midterms and beyond.

This means stressing to voters that the conflict could go in unexpected directions – by opening the door to national legislation banning abortion, reopening debate about whether common contraceptives are abortifacients and sparking a costly interstate battle about when one jurisdiction can tell another what to do. The question remains whether Democrats are up to the job.

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The leak of a draft opinion reversing *Roe vs Wade*, the landmark United States Supreme Court ruling recognising a right to choose abortion, produced shockwaves last week. A final decision in the case, *Dobbs vs Jackson Women's Health Organization*, is not expected until the end of June, and key details might still change – Supreme Court opinions often go through dozens of rounds of editing before publication. All the same, there is every reason to believe that the court will dismantle abortion rights in short order – and for reasons similar to those laid out in the draft.

The leaked document takes the approach long promoted by the conservative legal movement, which insists that judges interpret the Constitution by looking at its original public meaning. In