SLATE

What Alito Gets Wrong by Comparing His Opinion in *Dobbs* to *Brown v. Board of Education*

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Justice Samuel Alito's majority opinion in *Dobbs v. Jackson's Women's Health* revokes a constitutional right to abortion by calling *Roe v. Wade* an abuse of judicial authority. Because there is no right to an abortion in the nation's past, Alito argues, *Roe* was wrong the day it was decided, and *Casey v. Planned Parenthood* was wrong for honoring its precedent. But by overturning these two decisions, Justice Alito has committed his own abuse of judicial authority. Claiming reverence for the past, he justifies his failure to respect tradition with a tactic conservatives frequently attribute to liberals: distorting history to promote a present-day political agenda.

As precedent for not following precedent, Alito cites three cases applauded by liberals that allegedly disregard *stare decisis.* The first corrected the abuse of judicial authority in the notorious Lochner era when a conservative court ruled progressive state legislation limiting work hours unconstitutional. The second reversed a ruling allowing states to require children in public schools to salute and pledge allegiance to the U.S. flag. The third is *Brown v. Board of Education,* which ended school segregation by overturning *Plessy v. Ferguson'*s doctrine of "separate but equal."

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Education, which ended school segregation by overturning *Plessy v. Ferguson's* doctrine of "separate but equal."

These examples should not fool anyone. In fact, read carefully, they expose Justice Alito's political hypocrisy masquerading as a non-partisan account of legal history. For instance, the work-hours ruling relied on precedents protecting women's health. But it is Justice Alito's desire to associate his draft opinion with the moral authority of *Brown* that most poignantly betrays his contradictory appeals to history.

Alito fails to mention that *Plessy* did precisely what he insists be done with abortion: grant authority "to the people and their elected representatives" to regulate politically divisive issues. *Plessy* allowed state legislatures to determine the contentious issue of racial segregation despite Homer Plessy's claim that requiring "separate but equal" cars on intrastate railroad travel violated, among other things, his due process rights. In contrast, Brown denied state legislatures that political authority.

But contrary to popular myth, *Brown* did not expressly breach the issue of *stare decisis*. The court has explicitly called only one of its previous rulings unconstitutional: the 1938 decision *Erie Canal v. Tompkins*. *Brown*, like the other two examples, honored legal precedent while changing the effect of an earlier decision. *Plessy* rested on the legal ruling that a state could consider race when exerting its police powers for the public welfare as long as doing so was "reasonable." Nothing in *Brown* contradicted that ruling.

Instead, *Brown* unanimously claimed to be honoring *stare decisis* while overturning the effects of *Plessy* by introducing evidence that would have been unavailable in 1896. The question of new evidence is crucial because *Dobbs* overturns both *Roe* and *Casey* without taking acount of any new evidence (including copious evidence to economic and medical harms to women that were unavailable to the Justices in *Roe*), noting only that abortion still divides the nation. When *Plessy* was decided, the court argued, the justices did not have evidence showing that attending segregated schools generated a feeling of inferiority in Black children. That new evidence showed that state laws requiring segregated schools were not, in fact, reasonable.

"Any language in *Plessy v. Ferguson* contrary to this finding is rejected," the court decided. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."

Alito's appeal to *Brown* as precedent rings hollow for another reason. *Brown* relied on the doctrine of a "living Constitution," anathema to the five justices agreeing to *Dobbs'* majority opinion. According to their method of constitutional interpretation, the *Brown* court would have had to interpret the 14th Amendment according to traditions and practices from 1868 when it was ratified. But, just as numerous states in 1868 banned abortion, many at the time also mandated segregated schools. Rather than turn the clock back, however, *Brown's* justices looked at the changed role of public education in 1954.

A longer look at the past would have been more devastating. Because public education was not widespread at the time, the Constitution does not mention it any more than it mentions abortion. Under the 10th Amendment public schooling became the responsibility of each state. One state

with a long tradition of public schools was Massachusetts, whose constitution had a provision similar to the 14th Amendment's equal protection clause. Yet in an 1849 case, cited in *Plessy*, the Massachusetts Supreme Court upheld Boston's separate but equal schools.

One of *Plessy's* attorneys had been the U.S. Solicitor General, who had argued numerous civil rights cases before the Supreme Court. In his brief in *Plessy* he claimed that states could segregate schools but not railroad cars. He did so by following a method similar to Justice Alito's. Turning to *Blackstone's Commentaries*, an eighteenth-century source widely known in 1787, he cited the right of "freedom of locomotion." But Blackstone has no reference to public schools as we know them. If *Brown* had followed Justice Alito's standard, tax-supported public education would be what the majority's allies at the Cato Institute call it: a privilege, not a right.

The 14th Amendment exists because of a decision worse than *Plessy*. In 1857, in *Dred Scott v. Sandford*, Chief Justice Roger Taney denied U.S. citizenship to anyone of African descent, even those who were free. He did so with a story of the past as flawed as Justice Alito's is today. When the Constitution was ratified, he argued, discriminatory legislation by states against free people of color "stigmatized" them with "deep and enduring marks of inferiority and degradation." Because a republic can have only one class of citizens, those stigmatized were not part of "We, the People," who ratified the Constitution and "had no rights which the white man was bound to respect."

In 1928 Charles Evans Hughes, who had two terms on the Supreme Court, once as Chief Justice, called *Dred Scott's* use of history one of the court's "self-inflicted wounds." Yet the court never overturned that dreadful decision. Instead, it allowed a political process outlined by the Constitution to take its course: ratification of the 13th and the 14th Amendments. Wrongly decided cases denying women's suffrage, upholding poll taxes, and invalidating the income tax have also been corrected by way of constitutional amendments.

If the *Dobbs* majority was really intent on stopping "judicial legislation" and allowing the people to express their will through the political process, it should have honored its judicial duty of respecting *stare decisis* and let constitutional remedies other than judicial ones take their course. Granted, *Brown* reversed *Plessy* rather than rely on a new amendment. But *Brown*, unlike *Dobbs*, did not take away a right.

We tend to forget that the 13th Amendment took away a right by abolishing slavery. *Dred Scott* was the first Supreme Court case to declare congressional legislation unconstitutional because of the Bill of Rights. The Missouri Compromise that outlawed slavery in some territories, Chief Justice Taney argued, violated the due process clause of the Fifth Amendment by denying someone of "his liberty or property" to maintain ownership of a slave. The right to own slaves is morally reprehensible. But taking away even that "right" called for the authority of a constitutional amendment, not a judicial opinion.

Knowing that states had authorized slavery, framers of the 14th Amendment addressed *Dred Scott* by implicitly granting African Americans citizenship and putting limits on state action. Yet in another horrendous decision, in 1876 the court ruled that the Bill of Rights continued to limit actions only of the federal government. Without mentioning that abuse of judicial authority,

Justice Alito does, however, acknowledge that 50 years later the court slowly began to incorporate parts of the Bill of Rights under the 14th Amendment. But the case he cites is a recent one in which the Roberts' court incorporated the Second Amendment.

Today's Supreme Court has power inconceivable to most founders. Imagined as being above politics, the court soon became partisan with John Marshall's assumption of judicial review condemned by Thomas Jefferson as a Federalist's abuse of judicial authority over the states. The court's unchecked power means that, even if an opinion, like *Dred Scott*, gets history wrong, inaccurate history becomes part of the nation's legal history.

With *Dobbs*, the court again stigmatized itself with yet another "self-inflicted wound." Unfortunately, the people most likely to be wounded are pregnant people who will now be denied the right to protect their health.