

Twitter Thread by Amy Kapczynski



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I clerked at the Supreme Court. Last night, I assumed a liberal clerk leaked the draft opinion overturning Roe. Now I think MUCH more likely it was leaked by a conservative fanatically committed to every word of Alito's monstrous opinion.

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Timing: This draft was circulated in Feb. If a liberal was mad about it, why wait until April to send it to Politico? The op will be out in June. What are the benefits of releasing it early? And a BIG downside – the focus on the leak itself instead of the opinion.

If you work inside the Court, you know that the most concrete impact of the leak is to lock in this opinion essentially as is. Any edits at this point reveal jockeying between Justices, undermine the majority, and Court itself. Embarrassing to the majority.

Liberals have lived for years trying to eke out a sentence here or there in SCOTUS opinions to make these conservative decisions less terrible. Why leak something and undermine that whole strategy?

Far and away most likely impact of the leaked draft is that it locks in 5 votes for this opinion, essentially without edits. Who would want that? So: This is about as extreme an opinion as you can have overturning Roe.

It talks about fetuses being people as a matter of ancient law (teeing up idea that fetuses are constitutionally PROTECTED – no abortion anywhere as matter of conlaw.) And its arguments undermine all of SCOTUS's gay rights and contraception decisions.

...are motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. See, e.g., *Nash v. Meyer*, 54 Idaho 283, 301 (1934); *State v. Aupsplund*, 86 Ore. 121, 131-132 (1917); *Trent v. State*, 15 Ala. App. 485, 488 (1916); *State v. Miller*, 90 Kan. 230, 233 (1913); *State v. Tippie*, 89 Ohio St. 35, 39-40 (1913); *State v. Gedicke*, 43 N. J. L. 86, 90 (N. J. Sup. Ct. 1881); *Dougherty v. People*, 1 Colo. 514, 522-523 (1873); *State v. Moore*, 25 Iowa 128, 131-132 (1868); *Smith v. State*, 33 Me. 48, 57 (1851); see also *Memphis Center for Reproductive Health*, 14 F.4th, at 446 & n. 11 (Thapar, J., concurring in the judgment in part and dissenting in part) (citing cases).

One may disagree with this belief (and our decision is not based on any view about when a State should regard pre-natal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of

Back to timing. Draft majorities circulate first, and then concurrences and dissents. So this is about the right timing for concurrences to come out. I think best bet is that Chief Justice Roberts circulated one recently, adopting a more moderate position.

Maybe Roberts says abortions ok in some time frame, preserving exceptions for the life of the woman, etc. And Kavanaugh is tempted by it – maybe not enough to vote for it, but enough to demand some changes to the Alito opinion.

Now let's talk psychology of SCt clerks. The kinds of liberal students who end up at the Court are not an activist bunch. They are enormously risk averse and rule-abiding. Hard to see how one of them blows their career out of the water in this way (for what benefit?).

Leaking is much more of the style of conservatives right now. Think about what Justice Thomas is doing as a model for a clerk here – making a mockery of the Court's recusal rules re. his wife's role in the Jan 6 coup attempts.

<https://t.co/L5eyKkW1t8>

Conservatives have shown that they are willing to break the public trust in the Court to get their way.

If you want the liberal view, read Justice Breyer's recent book - LITERALLY CALLED "the peril of politics."

<https://t.co/tBiWqAiOg9>

Conservatives also know that the leak will be blamed on the left, distracting from how devastating the reversal of *Roe* will be to the credibility of the Court. The career consequences of someone found out are far smaller on right than left, too, I'd

wager.

This is in NO WAY the most important story here. Alito's opinion is horrific, and we have failed the young people of this country yet again. It's a devastating moment. Much more to say about that, soon.

But I'm with [@steve_vladeck](#) and [@joeyfishkin](#) about what likely happened here. (Though I think done by a clerk, not a Justice). Occam's razor. It just makes sense.

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