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Constitution expert: 'Alito's wrath' may strip away your right to sex, kids

5–6 minutes

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The Supreme Court overturned the right to choose abortion on Friday, June 24.

The majority opinion by Justice Samuel Alito repeated, practically verbatim, what was said in the previous leaked draft opinion, with its twin foci being text and original intent. In the absence of plain textual support in the Constitution, Alito claimed constitutional rights must be "deeply rooted" in American history.

Abortion, he asserts, could not pass this test.

It it not mentioned in the Constitution, never originally understood, and in fact, generally illegal from the founding fathers. It could hardly, Alito claimed, be implicit in the "liberty" that is expressly protected by the Fourteenth Amendment.

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Justice Alito's opinion's flaws are many, but his premier mistake is

his insistence on using text and history as exclusive markers for constitutional rights.

A number of fundamental rights, after all, lack not only textual support but also historical background.

Called "substantive due process," the analysis used to recognize these fundamental rights looks beyond text and history to include logic, consistency, costs and benefits.

Rights to contraception (Griswold v. Connecticut), same-sex marriage (Obergefell v. Hodges), and sexual intimacy (Lawrence v. Texas), were all developed in this fashion.

So was a parent's fundamental right to keep and care for her children. This bedrock right finds it genesis not in constitutional text (none exists) or history (ditto), but in two Supreme Court cases, Pierce v. Society of Sisters and Meyer v. Nebraska, handed down during the socially conservative Lochner era.

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If Alito's analysis is correct, not only are contraception, same-sex marriage, and sexual intimacy at risk (as Justice Clarence Thomas claims), so is the fundamental right to children.

Nothing in the Constitution speaks to it, and history does not protect it.

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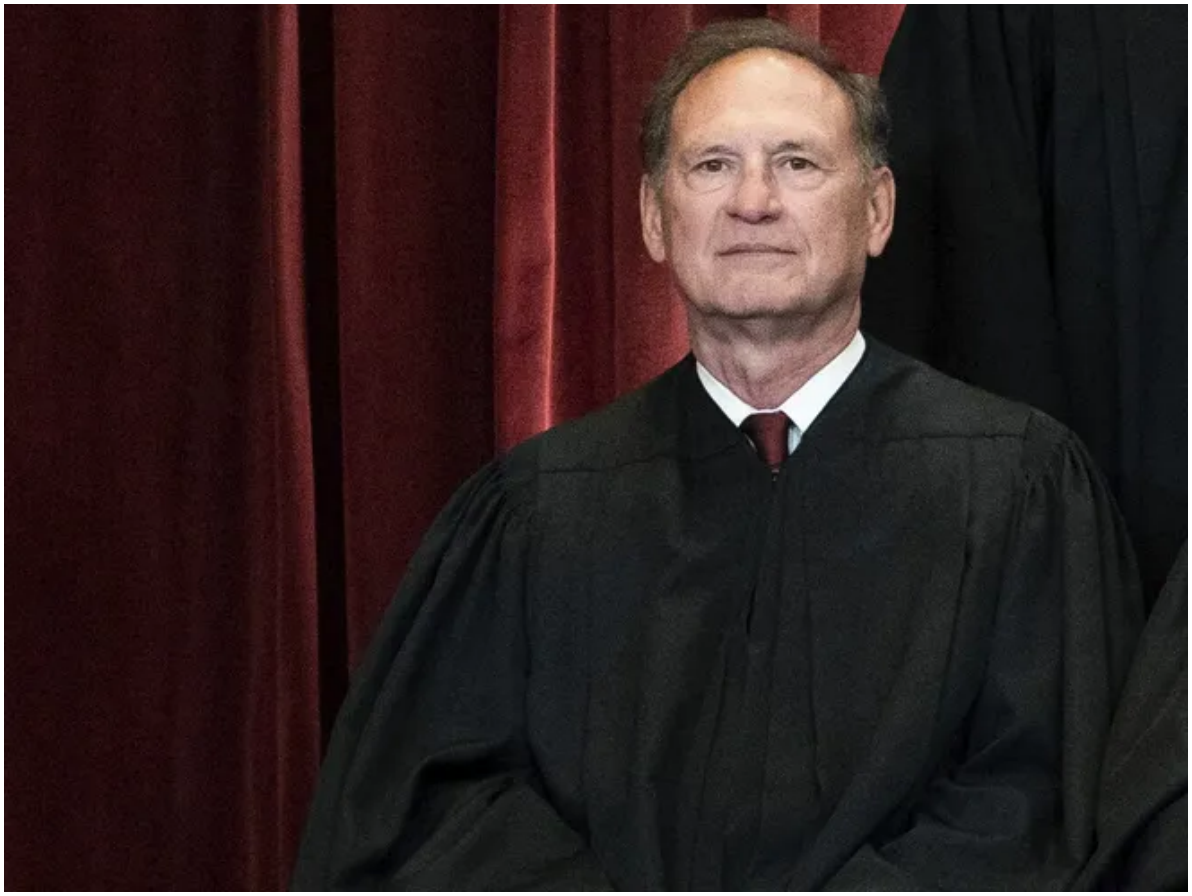
Parents in the late 18th century, after all, were subject to the Elizabethan “Poor Laws” received from Britain, which allowed church wardens and local overseers in the colonies/states to seize poor children from their homes and impress them into the service of others.



This practice continued in antebellum America during the “House of Refuge Movement,” and remained in place in 1868, when the Fourteenth Amendment was ratified.

Across the country and with government support, ostensibly philanthropic societies during the late 19th century "scrutinz[ed] parental behavior, arrest[ed] parents, and remov[ed] thousands of children.” No court in the late 19th century ever put a stop to it. No law was passed to protect these families. No right to family, as we now understand it, existed at the time.

Judged by text and history, the Supreme Court's recognition of fundamental parental rights is just as "egregiously wrong" as its recognition of a right to choose abortion.

Along with contraception, same-sex marriage, and sexual intimacy, it too is a candidate for Justice Alito's wrath.

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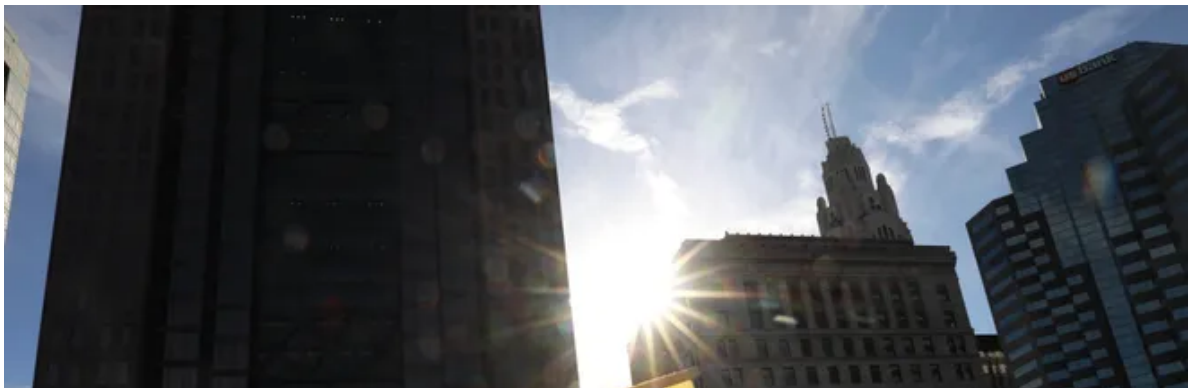
Mothers might then be forced to give up their newborns and use the safe havens trumpeted by Justice Barrett whether they want to or not. That is not all. If parents can be forced to turn over their kids to government, they can be forced to send them to public school. Children could even be vaccinated by government.

All that stands in the way is an "egregiously wrong" (by Justice Alito's definition) court-created right to keep and care for children. Justice Stephen Breyer wrote in his dissent in Dobbs that Justice Alito's opinion is a "loaded weapon."



Few liberals will take solace in Justice Alito's assurance that "contraception and same-sex relationships are inherently different from the right to abortion." But neither should conservatives who cherish their families rest comfortably.

Constitutional rights on both sides of the aisle are creatures of the court. The right to family is one. There are others. Be careful what you wish for.

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