

REHNQUIST-ELY-ALITO Entanglement

This worksheet places people and events in time relative to each other. It is a helpful reference when reading the other papers.

Month	Year	Rehnquist	Constitutinal Scholars (Ely and Tribe) and Unenumerated rights cases	Alito
JUN	1965		Griswald v Connecticut (7-2) - Contraceptives use by married couples.	
JUN	1967		Loving v. Virginia (9-0) - Antimiscegenation (prohibits marriages between races) unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment.	
	1971	Appointed by Nixon as Associate Justice. A staunch conservative who favored a conception of federalism that emphasized the Tenth Amendment's reservation of powers to the states.		
JAN	1973	Roe v. Wade (7-2) (Author: Blackmun) Rehnquist dissents: The test traditionally applied in the area of social and economic legislation is whether or not a law as that challenged has a rational relation to a valid state objective. Abortion was not so rooted in the traditions and consciences of the people as to be ranked "fundamental". Court's opinion is far more appropriate to a legislative judgement than to a judicial one.		
APR	1973		Ely publishes "The Wages of Crying Wolf", highly critical of Roe v Wade saying it was untethered to the Constitution. Nonetheless, Ely agreed with Roe's result and believed the woman should have the right to control her own body; he thought Roe was a durable opinion.	
MAY	1977	Moore v. East Cleveland (5-4) (Author: Powell) Rehnquist joined Stewart in dissent, essentially arguing the personal interests at issue do not rise to the level "of implicit in the concept of ordered liberty"; and in social and economic legislation, the power to regulate is a legislative, not a judicial function. Legislation must only be reasonable, rational, not arbitrary.		[Dobbs (2022) cites Glucksberg (1997) as precedence, and Glucksberg cites Moore (1977) as its precedence making Moore an origin story for Dobbs' argument that history and tradition - really just a history of abortion laws - are sufficient to prove abortion is not a <i>liberty interest</i> , therefore, abortion, and by association the woman, are not due strict scrutiny of state restrictions on abortion. But does Moore support exactly what Dobbs asserts? Short answer: It does not. Moore reintroduces substantive due process but does not support history and tradition as a ' <i>litmus test</i> ' to access Due Process strict scrutiny protection.
	1980		John Hart Ely publishes "Democracy and Distrust", in which he castigates " <i>liberty interest</i> " analysis a disaster in both	

		practical and theoretical terms. Liberty interest is the house of cards upon which all of Dobbs is built. If Ely is right, Alito and Dobbs are wrong in the extreme. Read "Democracy and Distrust", chapter 2.	
1986	Rehnquist sworn in as Chief Justice. Scalia sworn in as Associate Justice.		
APR 1990			Nominated by H.W. Bush to US Court of Appeals Third Circuit. Served 4/1990 - 1/2006 before elevation to Supreme Court.
1990		Lawrence H. Tribe publishes "Abortion: The Clash of Absolutes", in which he undermines most of the arguments Alito will employ in Dobbs 32 yrs later.	
OCT 1991			US Court of Appeals Third Circuit Planned Parenthood of Southeastern Pennsylvania v. Casey: Can a state require women who want an abortion to meet certain provisions, which were claimed to be unconstitutional and in violation of the <i>Roe v. Wade</i> decision. A divided bench reaffirmed <i>Roe</i> but upheld most of the provisions. Alito dissented, he would have upheld spousal notification, as well as all other provisions.
JUN 1992	Planned Parenthood of Southeastern Pennsylvania v. Casey, et al (5-4).. Rehnquist concurs in part and dissents in part. Abortion is not a "liberty interest" deemed "fundamental. Rehnquist adding, "it is our duty to overturn <i>Roe</i> ".		
1996		John Hart Ely publishes "On Constitutional Ground", wherein Casey is lauded as an excellent decision, especially its central holdings in <i>Roe</i> , as a service to the nation.	
JUN 1997	Washington v. Glucksberg (9-0) (C.J. Rehnquist author) Issue was assisted suicide. Rehnquist's principal reasoning: Only fundamental liberty interests are protected by the Due Process Clause and what is fundamental must be objectively deeply rooted in this Nation's history and traditions. Moore v. East Cleveland (1977) is cited as precedence, however, Moore majority opinion does not rely on a "liberty interest" formulation.		Dobbs cited as precedence the "established method of substantive due process analysis" set in Washington v. Glucksberg (1997). The method referenced is a liberty interest cum history of laws scheme castigated by John Hart Ely in his seminal book, "Democracy and Distrust" 1980.
JUN 2003		Lawrence v Texas (6-3) - intimate consensual sexual conduct (private, adult, consensual behavior, i.e. sodomy, homosexuality) was part of the liberty protected by the substantive due process under the Fourteenth Amendment. (Dissent by Scalia joined by Rehnquist and Thomas)	
OCT 2003		John Hart Ely dies (age 64)	
SEP 2005	Rehnquist dies (age 80) while in office.		
JAN 2006			Nominated by H.W. Bush to Supreme Court
JAN 2010		Citizens United v. Federal Elections Commission	

		(5-4). Results in unlimited dark money into elections, a catastrophic result.	
JUN 2015		Obergefell v Hodges (5-4) - Right to marry is a fundamental liberty protected by the Fourteenth Amendment. It applies to same-sex couples in the same manner as it does to opposite-sex couples. Judicial precedent has held that the right to marry is a fundamental liberty because it is inherent in the concept of individual autonomy.	Justice Alito dissented, writing the Constitution does not address the right of same-sex couples to marry, and therefore the issue is reserved to the states to decide whether to depart from the traditional definition of marriage. [Alito rejects the opinion that it is a fundamental liberty]
JUN 2022			Dobbs v. Jackson Women's Health (6-3). Roe and Casey are overturned. Women are denied due process of law when Dobbs holds abortion is not a "liberty interest". (Liberty interest schemes were castigated as practical and theoretical disasters as far back as 1980 - "Democracy and Distrust" by John Hart Ely, 1980). Dobbs sets new stare decisis doctrine when it declines to comment on reliance. Dobbs completely excised the woman in the woman - fetus duality, which is illogical and facially challenged. Dobbs denied women their liberty - freedom from oppressive restrictions on their way of life or behavior when it held states can defend against all constitutional challenges with no more than a rational reason even though states can force women to be mothers against their will. Dobbs is a travesty of justice.