

“Getting ‘Roe’ Wrong”

REVIEW: ‘The Fall of Roe: The Rise of a New America’ by Elizabeth Dias and Lisa Lerer
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BY David J. Garrow

Reviewing really excellent books is great fun: You learn [important new facts](#), are hugely impressed by an author’s [analytical ability](#) or [archival research](#), or come away with a far deeper understanding of [someone you knew only passingly](#). In stark contrast, having to review a really bad book is deeply unpleasant and sticks in your memory even [many years later](#).

Almost always the latter scenario occurs only when you know a topic so well that you feel professionally obligated to call a turd a turd. So it is with *The Fall of Roe*. Thirty years ago I wrote the standard history of *Roe v. Wade, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, the [updated paperback edition](#) of which clocks in at a door-stopping 1,047 pages. Ten years ago, with additional Supreme Court justices’ private case files now available, I expanded that account with a law review article entitled simply [“How Roe v. Wade Was Written.”](#) Since then I’ve continued to write about abortion litigation for [law professor blogs](#) and to endorse first-rate books that [add significantly to our understanding of Roe](#) or to [abortion rights history more broadly](#).

To call *The Fall of Roe* hugely disappointing is an understatement. Coauthors Elisabeth Dias and Lisa Lerer, both national correspondents for the *New York Times*, state that they interviewed some 350 people while writing this book, but oddly not a single one of those sources is explicitly identified. A disciplined reader can easily make out that a host of pro-choice organizational leaders are clearly among the authors’ top sources, and with painstaking quote checking one can surprisingly confirm that leading anti-abortion figures like Marjorie Dannenfelser and Leonard Leo also spoke extensively to Dias and Lerer.

Thus *The Fall of Roe* is rich with detailed accounts of interest group media strategies and organizing efforts, but anyone expecting to learn *anything* new about how the Supreme Court in 2021-22 actually came to its decision to strike down *Roe* in its sweeping 5-to-4 ruling in *Dobbs v. Jackson Women’s Health Organization* will be sorely and totally disappointed. That absence is especially striking given how just eight months ago two of the *Times*’s best remaining journalists, Jodi Kantor and Adam Liptak, published a very lengthy news story—[“Behind the Scenes at the Dismantling of Roe v. Wade”](#)—that energetically tried to discover how that slim five-justice majority—Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—had decided to issue such a landmark decision by the narrowest possible margin.

Scores of challenges to state enactments seeking to undermine *Roe*—and its equally if not more important 1992 progeny, *Planned Parenthood of Southeastern Pennsylvania v.*

Casey—were being litigated year after year in the federal courts, and when Mississippi’s imposition of a 15-week ceiling on abortions was blocked by lower courts, nothing out of the ordinary was anticipated. The state’s Supreme Court petition seeking review sat on the justices’ docket for months before it was finally granted—an opaque process Kantor and Liptak partially but not fully succeed at illuminating—and only when Mississippi’s merits brief was filed in July 2021 did careful observers realize that an all-or-nothing challenge to constitutional protection for a woman’s right to choose was now suddenly at hand.

The quality of Mississippi’s submission, written by former Thomas clerk Scott G. Stewart, was immediately obvious. I wrote then, in an op-ed that the *Wall Street Journal* presciently titled [“Has *Roe v. Wade* Met Its Match?”](#)—that “no finer or more important brief has been submitted to the U. S. Supreme Court in many decades.” That fact, plus the presence of Donald Trump’s three new first-rate justices—Gorsuch, Kavanaugh, and Barrett—made clear to anyone who could skim newspaper headlines that *Roe*’s fate was seriously in doubt. Indeed, the Court’s very acceptance of Mississippi’s petition signified that at least four justices—the minimum needed to take a case—doubted whether *Roe* and *Casey*’s holdings should stand.

Not only did Stewart’s powerful argument call for that duo to be overruled, the Center for Reproductive Rights attorneys representing Mississippi’s sole abortion clinic likewise insisted on an all-or-nothing framing of the issue, rather than acknowledge the existence of an obvious middle ground. As Dias and Lerer critically observe, “if they gave the Court an option to uphold the law and avoid fully striking down *Roe*, they could potentially save the right to an abortion before fifteen weeks—when more than 90 percent of abortions occurred.” Yet they declined to do so.

At oral argument in late 2021, Chief Justice John Roberts almost plaintively sought to focus on that compromise—“The thing that is at issue before us today is fifteen weeks”—rather than all the parties’ absolutist stances. Then, for several months, the Court went silent, only for that silence to be astonishingly broken on the evening of May 2, 2022, when *Politico* published a 98-page draft opinion striking down *Roe* and *Casey* that Justice Alito had circulated to his colleagues on February 10. Such a leak was unprecedented in Supreme Court history, and Kantor and Liptak’s reporting persuasively suggests that within the Court the effect was to freeze in place the tentative but not yet final votes of Justices Kavanaugh and Barrett. Seven weeks later Alito’s almost unchanged draft was officially promulgated as the new law of the land.

Dias and Lerer exaggeratedly contend that *Dobbs* “transformed America” and “created a new country,” much like how they claim to reveal an “explosive” and “previously unseen history.” Hardly. Abortion access today remains just as profoundly *class-based* as it has been since even *before Roe*, with poverty-class women facing profound hurdles that extend beyond the now significantly increased need for interstate travel to locales where clinics can operate freely. As *The Fall of Roe* rightly notes, but as pro-choice advocates

rarely acknowledge, a phenomenally disproportionate percentage of abortions are sought by black women—80 percent in pre-*Dobbs* Mississippi and 42 percent nationally, while constituting only 42 and 14 percent of the respective populations.

A better book than *The Fall of Roe* would highlight the extreme importance of Justice Kavanaugh's additional concurring opinion, in which he concluded that decades of unending abortion litigation had "damaged the Court as an institution," with 26 states rejecting *Casey* and calling for *Roe*'s overruling. Likewise, a more in-depth book would have acknowledged, and drawn upon, a sizeable shelf of essential histories—e.g., Steven Teles's *The Rise of the Conservative Legal Movement* (2008) and well-known abortion law expert Mary Ziegler's five relevant titles, including *Dollars For Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* (2022)—none of which *The Fall of Roe* ever mentions.

In retrospect, had Hillary Clinton run a competent 2016 general election campaign, or had elderly justice Ruth Bader Ginsburg retired well prior to her 2020 death, Donald Trump and friends would not have been able to transform the Supreme Court. But in what's perhaps *The Fall of Roe*'s most memorable gem, Dias and Lerer recount how in 2018 then-North Dakota Democratic senator Heidi Heitkamp had uttered a prophetic warning to the president: "If your Court reverses *Roe v. Wade*, the Republicans might be a minority party for a generation."

The Fall of Roe: The Rise of a New America
by Elizabeth Dias and Lisa Lerer
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